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Disinformation and the Defamation Renaissance: A Misleading Promise of “Truth”

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DISINFORMATION AND THE DEFAMATION RENAISSANCE: A MISLEADING PROMISE OF “TRUTH”

Lili Levi *

ABSTRACT

Today, defamation litigation is experiencing a renaissance, with progressives and conservatives, public officials and celebrities, corporations and high school students all heading to the courthouse to use libel lawsuits as a social and political fix. Many of these suits reflect a powerful new rhetoric—reframing the goal of defamation law as fighting disinformation. Appeals to the need to combat falsity in public discourse have fueled efforts to reverse the Supreme Court’s press-protective constitutional limits on defamation law under the New York Times v. Sullivan framework. The anti-disinformation frame could tip the scales and generate a majority on the Court to dismantle almost sixty years of constitutionalized defamation law. The new anti-disinformation frame brings with it serious democratic costs without clear corresponding benefits. Defamation lawsuits cannot credibly stem the systemic tide of disinformation or predictably correct reputational harm, but they do threaten powerful chilling effects for the press, super-sized by our current socio-historical context. Especially as claims of disinformation drift away from political speech to economic and social matters, this as a distinct justification increasingly evaporates. Lest progressives too quickly rejoice over the apparent success of their disinformation claims against right-wing media, anti-disinformation defamation litigation presents an equal opportunity invitation—and conservative cases are already on track. The new disinformation frame for defamation suits offers an illusory distraction and further

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politicizes defamation. Instead, the Article suggests a shift of focus to the audience in order to advance the anti-disinformation project while returning defamation law to its traditional concern with individual reputation.

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INTRODUCTION

After almost thirty years of subsidence, big-ticket defamation litigation is staging a roaring comeback. Political defamation claims—such as those by Sarah Palin, Devin Nunes and Donald Trump against the “liberal” media and those by election system manufacturers Dominion and Smartmatic against Fox and the “conservative” media¹—have attracted a polarized public. Libel trials featuring Hollywood celebrities like Johnny Depp and Amber Heard have grabbed the headlines, energized billions of people on social media, and recast YouTube and TikTok as “news” fora.² This revival of defamation litigation is happening against a background of unprecedentedly large damage claims (now in the billions)³ sought by a rising plaintiff’s defamation bar,⁴ eye-popping settlements,⁵ and more plaintiff-friendly judicial interpretations during the life-cycle of defamation litigation.⁶

What is most notable about these developments is that both progressives and conservatives are now looking to defamation law as a social fix for systemic problems rather than a remedy for harm to individual reputation. Distrust of the press and concern about distortions in political discourse have led to a fresh argument for defamation reform—namely, recasting defamation litigation as a tool to fight disinformation.⁷ This new rationale has fueled efforts to reverse or significantly erode the Supreme Court’s press-protective First Amendment limitations on defamation law under *New*

1. See *infra* Section I.B.1.

2. See *infra* Section IV.B.1.a; Katerina Eva Matsa, *More Americans Are Getting News on TikTok, Bucking the Trend on Other Social Media Sites*, PEW RSCH. CTR. (Oct. 21, 2022), <https://www.pewresearch.org/fact-tank/2022/10/21/more-americans-are-getting-news-on-tiktok-bucking-the-trend-on-other-social-media-sites/> [<https://perma.cc/A3ZY-R4B2>].

3. See, e.g., Adam Gabatt, *Fox and Friends Confront Billion-Dollar US Lawsuits Over Election Fraud Claims*, THE GUARDIAN (July 4, 2022), <https://www.theguardian.com/media/2022/jul/04/fox-oan-newsmat-lawsuits-election-fraud-claims> [<https://perma.cc/XFL3-U9W8>] (describing \$1.7 billion lawsuit by Dominion and \$2.7 billion suit by Smartmatic against Fox); Jeremy W. Peters, *Defamation Suit About Election Falsehoods Puts Fox on Its Heels*, N.Y. TIMES (Aug. 13, 2022), <https://www.nytimes.com/2022/08/13/business/media/fox-dominion-lawsuit-first-amendment.html> [<https://perma.cc/M9S9-SFAE>]. See generally *Complaint, U.S. Dominion Inc. v. Fox Network LLC*, No. N21C-03-257 (Del. Super. Ct. Mar. 26, 2021); *Complaint, Smartmatic U.S. Corp. v. Fox Corp.*, No. 151136/2021 (N.Y. Sup. Ct. Feb. 4, 2021).

4. See *infra* Section III.D.

5. See *infra* Section III.C.1.b.

6. See *infra* Section III.C.1.

7. See *infra* Part I & Section II.A; see also David A. Logan, *Rescuing Our Democracy by Rethinking* *New York Times Co. v. Sullivan*, 81 OHIO ST. L. J. 759, 777–78 (2020).

York Times v. Sullivan and its progeny.⁸ It may well succeed, by instigating an alliance between the liberal and conservative wings of an already press-skeptical Supreme Court.⁹

Defamation law inevitably confronts conflicting commitments—to freedom of speech and press on the one hand, and to the interest in reputation on the other. The siren’s call of the new anti-disinformation argument is that it recasts the interest in reputation from a personal or even social interest in the dignity and status of the defamed individual to an interest in full, free and truthful public discourse. In the anti-disinformation frame, defamation liability for disinformation advances the very same public goals as the interest in a free and independent press. This value-equivalence implicitly undermines the *Sullivan* Court’s argument that the need for “breathing space”¹⁰ for error in public discourse justifies tilting the balance toward the interests of the press as drivers of public discussion and self-government. By implicitly defining the press almost solely through the dangers its errors pose to the public, the disinformation argument tips the balance completely against the press.

Despite the surface appeal of this new way to fight viral falsity, using disinformation as the rationale for wholesale revision of defamation law brings significant risks for an already-imperiled press without material and realistic public benefits in exchange.¹¹ Some new analyses question the binary vision of the standard account of the defamation and speech trade-off, arguing that the incentives are more complex and that, taking audience reactions into account, more stringent defamation laws may actually end up harming reputation.¹² This is certainly a good reason for caution in upending defamation law today.

Further, though, there are two reasons to be wary of the turn to anti-disinformation to justify defamation law reform. One is that the search for authoritative truth to fight disinformation through

8. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); see also *infra* Section I.A.

9. See *infra* Section II.A; see also RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court’s Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 423–28 (2022).

10. *Sullivan*, 376 U.S. at 272.

11. See *infra* Part IV.

12. See Yonathan A. Arbel & Murat Mungan, *The Case Against Expanding Defamation Law*, 71 ALA. L. REV. 453 (2019); Daniel Hemel & Ariel Porat, *Free Speech and Cheap Talk*, 11 J. LEGAL ANALYSIS 46 (2019); see also *infra* Part IV.

defamation litigation is likely to be ineffective and could even amplify the spread of disinformation.¹³ At a minimum, it is far from clear what audiences will take away from such actions. The other reason is that, at this moment, there is reason to be particularly concerned that the attack on constitutionalized defamation law can all-too-easily be used to muzzle the press for censorious reasons unrelated to defamation.¹⁴ The chilling effect of a reversal of *Sullivan* is likely to be particularly extensive and coverage-skewing in today's political and legal environments. The anti-disinformation reformers' assumption—that reversal of the *Sullivan* protections will likely improve both the press and the processes of democratic self-government—rest on empirically untested and overly optimistic intuitions. To the contrary, weaponizing defamation law would likely have perverse results—deterring coverage by news organizations that aspire to accuracy while simultaneously allowing the social problem of online falsity to worsen through the carelessness of TikTokers unlikely to be sued.

That the voting machine cases in which the anti-disinformation arguments are strongest have been brought against Fox News and other right-wing media outlets peddling lies about election fraud should not blind us—particularly progressives and the liberal wing of the Court—to the risks involved in a fundamental retrenchment from almost sixty years of comparatively press-protective constitutionalized tort doctrine. The Trump era has shown that for every suit attracting liberal kudos, far more seem to be brought to advance partisan conservative objectives. Indeed, parroting the disinformation arguments in Dominion's action against Fox News, Trump has recently sued CNN for \$475 million in damages for alleged defamation in its reporting and programming critical of him.¹⁵ Furthermore, there are hints, particularly from recent cor-

13. See *infra* Section IV.B.1. The recent *Depp v. Heard* trial is an object lesson.

14. See *infra* Section IV.B.

15. Complaint & Jury Demand, *Trump v. CNN, Inc.*, No. 0:22-cv-61842-AHS (S.D. Fla. Oct. 3, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.621239/gov.uscourts.flsd.621239.1.0.pdf> [<https://perma.cc/5FTP-UM7M>]. Trump's CNN complaints asserts that CNN "[a]s a part of its concerted effort to tilt the political balance to the Left, . . . has tried to taint [Trump] with a series of ever-more scandalous, false, and defamatory labels of 'racist,' 'Russian lackey,' 'insurrectionist,' and ultimately 'Hitler.'" *Id.* at 1. Claiming both that the actual malice standard is met and that it should not apply because of the "ideological homogeneity" of the media, the complaint explicitly explains that "[s]uits like these do not throttle the First Amendment, they vindicate the First Amendment's marketplace of ideas." *Id.* at 2. The suit asserts that CNN offers propaganda and "propagate[es] its political views" rather than reporting the news. See, e.g., *id.* at 19. See also Kelly Kasulis Cho, *Trump Sues CNN for Defamation, Seeks \$475 Million in Damages*,

porate defamation suits and the *Depp v. Heard* trial, that the anti-disinformation argument is spreading from the political to the economic and social context.¹⁶ If we zoom out enough, we can characterize virtually any defamation action as implicating socially harmful disinformation. Soon enough, disinformation as a distinguishing justification for eroding First Amendment protections begins to disappear.

All this is not to sing the praises of the *Sullivan* regime or to reify American defamation law precisely as it is now.¹⁷ Rather, the goal is simply to warn that using the new anti-disinformation frame to justify reducing barriers to defamation liability brings with it serious democratic costs without clear corresponding benefits. The overall protections granted to the press under U.S. law are already thin, particularly in connection with newsgathering.¹⁸ Further constrictions may well trigger outsized impacts. Instead of using defamation law to try to reduce disinformation by stopping propagators, a more fruitful goal would be to focus on methods to neutralize the impact of democracy-harming disinformation and to combat public and judicial distrust of the press. Effectively helping polarized audiences consume information critically and thinking of

WASH. POST (Oct. 4, 2022, 3:38 AM), <https://www.washingtonpost.com/media/2022/10/04/donald-trump-sues-cnn-defamation-lawsuit/> [https://perma.cc/M6BE-LY6T] (also mentioning Trump's 2020 suits against CNN, *The New York Times*, and the *Washington Post* over opinion pieces linking him to Russian electoral interference and noting that the Post action is still pending); Michael M. Grynbaum, *Trump Sues CNN for Defamation, Seeking \$475 Million*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/business/media/trump-cnn-lawsuit.html> [https://perma.cc/GABS-SWH4]. To be sure, former President Trump's recent indictment in New York and other pending legal troubles may distract his focus from this case. See, e.g., Michael Rothfeld, *The Donald Trump Indictment, Annotated*, N.Y. TIMES (Apr. 4, 2023), <https://www.nytimes.com/interactive/2023/03/16/ny-region/trump-indictment-annotated.html?searchResultPosition=3> [https://perma.cc/RV3X-5SB7]; Dan Berman, *Notable Legal Clouds That Continue to Hang over Donald Trump in 2023*, CNN POLITICS (Apr. 4, 2023), <https://www.cnn.com/2023/03/20/politics/donald-trump-legal-clouds/index.html> [https://perma.cc/BK9X-B2JU]. Still, similar defamation lawsuits by political personalities against the press are likely. See, e.g., Eugene Volokh, *Devin Nunes Sues for Libel Over "Investigators Examined Trump Media for Possible Money Laundering" Article*, REASON (Apr. 4, 2023), <https://reason.com/volokh/2023/04/04/devin-nunes-sues-for-libel-over-investigators-examined-trump-media-for-possible-money-laundering-article/> [https://perma.cc/3ZKR-7F5U].

16. Lindsay Crouse, *Fandom is Out of Control*, N.Y. TIMES (June 4, 2022), <https://www.nytimes.com/2022/06/04/opinion/amber-heard-johnny-depp-trial-celebrity.html> [https://perma.cc/76HA-48KZ] (discussing fandom and associated with "celebrity worship syndrome").

17. Important scholarship has powerfully challenged the *Sullivan* regime as sub-optimal for both plaintiffs and defendants. See, e.g., David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).

18. See, e.g., Mary-Rose Papandrea, *Protecting the Role of the Press During Times of Crisis*, 61 WM. & MARY L. REV. 1159 (2020).

structural ways to improve today's complicated informational ecosystem could advance the anti-disinformation project while returning defamation law to its traditional concern with individual reputation.

This Article proceeds in four Parts. Part I identifies anti-disinformation as a new umbrella rationale being touted to justify reversing or fundamentally revising *New York Times v. Sullivan* and its progeny. Part II addresses the potentially catastrophic impact of the anti-disinformation argument on the stability of constitutionalized defamation law at the Supreme Court. Part III describes today's "defamation renaissance," the pro-plaintiff doctrinal shifts that enhance the contradictions of current defamation law, and the critical impact of a rising sophisticated plaintiff's defamation bar. Starting from the assumption that radical doctrinal changes should only be made if the benefits predictably and significantly outweigh the costs when speech and press are involved, Part IV details the argument that the turn to the disinformation rationale for overhauling defamation law presents dangers to the press and, ironically, to the democratic discourse that the argument seeks to protect. It suggests that existing constitutionalized defamation law, properly applied, can adequately address the reputational harms for which the anti-disinformation rationale has been recruited. Part IV ends with a call to shift attention from the producer-focused anti-disinformation frame to a consumer-focused research inquiry into ways to diminish the reception and neutralize the impact of democracy-threatening disinformation.

I. A NEW RATIONALE FOR LIBEL REFORM—ANTI-DISINFORMATION

The political targeting of defamation law since the 2016 Trump candidacy, social and technological developments, shifts in judicial philosophy on the Court, and the rise of a sophisticated plaintiff's defamation bar have all joined to produce a powerful reframing of the goals of defamation actions. The attack on the *Sullivan* regime found rich new ground in a line of influential scholarship focusing on the democratic harms of political distortion and disinformation.¹⁹

19. Beyond scholarly arguments, public discourse reflected this move as well. See, e.g., Michael M. Grynbaum, *Lawsuits Take the Lead in Fight Against Disinformation*, N.Y. TIMES, <https://www.nytimes.com/2021/02/06/business/media/conservative-media-defamation-lawsuits.html> [https://perma.cc/S5M6-46UT] (Nov. 3, 2021); Ben Smith, *The 'Red Slime'*

When it was decided, Alexander Meiklejohn famously called the decision in *New York Times v. Sullivan* an occasion for “dancing in the streets.”²⁰ Yet today, more people from different political vantage points have begun to complain about the results of constitutionalized defamation doctrine.²¹ Progressives complain that the press’s amplification of unsupported lies, such as those about the 2020 presidential election, have harmed democratic discourse, and they worry that the plaintiff’s high burden in public figure defamation cases undermines women and the #MeToo movement.²² On the other side, conservatives who accepted the Trumpian narrative claim that the current libel rules enable the institutional press to lie with legal impunity in order to advance liberally-biased ideological interests.²³

A. *Sullivan and the Changed Information Environment*

Justices Thomas and Gorsuch, as well as lower federal and state court judges,²⁴ have used history and changes in the information environment to justify express calls for the reversal or fundamental revision of the *Sullivan* precedent. Characterizing *Sullivan* and “the Court’s decisions extending it [as] policy-driven decisions masquerading as constitutional law”²⁵ in *McKee v. Cosby*, Justice

Lawsuit That Could Sink Right-Wing Media, N.Y. TIMES, <https://www.nytimes.com/2020/12/20/business/media/smartmatic-lawsuit-fox-news-newsmax-oan.html> [<https://perma.cc/9USB-CXSQ>] (May 18, 2021).

20. Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 221 n.125 (1964) (quoting Alexander Meiklejohn).

21. See Yonathan A. Arbel, *A Status Theory of Defamation Law*, at 5–6, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4021605 [<https://perma.cc/ZNM6-8AFF>]; David McGowan, *A Bipartisan Case Against New York Times v. Sullivan*, 1 J. FREE SPEECH L. 509, 510, 526 (2022); Glenn Reynolds, *Rethinking Libel for the Twenty-First Century*, 87 TENN. L. REV. 465 (2020).

22. See, e.g., Julia Jacobs, *#MeToo Cases’ New Legal Battleground: Defamation Lawsuits*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/arts/defamation-metoo.html> [<https://perma.cc/8XHE-CNSW>]; Michelle Goldberg, *The Amber Heard Verdict Was a Tragedy. Others Will Follow.*, N.Y. TIMES (June 2, 2022), <https://www.nytimes.com/2022/06/02/opinion/amber-heard-johnny-depp-verdict.html?searchResultPosition=20> [<https://perma.cc/4H3A-DYEE>].

23. See, e.g., *Tah v. Global Witness Publ’g, Inc.*, 991 F.3d 231, 251–56 (D.C. Cir. 2021) (Silberman, J., dissenting).

24. See, e.g., *id.* (quoted by Justice Thomas in his dissent in *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021)); *Mastandrea v. Snow*, 333 So. 3d 326, (Fla. Dist. Ct. App. 2022) (Thomas, J., concurring); *Reighard v. ESPN Inc.*, No. 355053, 2022 Mich. App. LEXIS 2720, at *28–30 (May 12, 2022) (Boonstra, J., concurring).

25. *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring). See *id.* at 676–78 (developing Justice Thomas’s historical account). Justice Thomas continued his call in

Thomas launched an originalist attack on *Sullivan* and suggested reconsideration of status-based defamation protections “in an appropriate case.”²⁶

Justice Gorsuch arrived at the same destination in *Berisha v. Lawson*,²⁷ but via a path purportedly focused on the current information environment. He asserted that even if *Sullivan* was the right response to the systematic attempt by Southern states to use defamation law to deter Northern press coverage of the civil rights movement in 1964,²⁸ changed circumstances in the media landscape and the impacts of viral disinformation make the *Sullivan* jurisprudence a bad policy today.²⁹ Starting with the view that “over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability,”³⁰ Justice Gorsuch blamed *Sullivan*’s protections for leading to a media legal strategy of “ignorance is bliss” reflected by “publishing without in-

Berisha, 141 S. Ct. at 2424–25 (2021) (Thomas, J., dissenting) and *Coral Ridge Ministries Media Inc. v. Southern Poverty Law Center*, 142 S. Ct. 2453, 2454–55 (2022) (Thomas, J., dissenting from denial of certiorari).

26. *McKee*, 139 S. Ct. at 676. *See also id.* at 682 (recommending leaving it to the states to it to the states to “strick[e] an acceptable balance” between reputation and public discourse). Instead of limiting the constitutional inquiry to the interpretation of limited purpose public figures—the matter at issue in *McKee*—Justice Thomas’s dissent chose a full-bore attack on *Sullivan* as a whole. *McKee* was a defamation suit brought against Bill Cosby by one of his alleged rape victims who had been attacked as an “admitted liar, not credible, unchaste, and a criminal[]” in a letter by Cosby’s lawyer to news organizations. Petition for Writ of Certiorari, *McKee v. Cosby*, 139 S. Ct. 675 (No. 17-1542). The district court dismissed *McKee*’s lawsuit and the First Circuit affirmed, finding *McKee* to be a limited purpose public figure who had not succeeded in adequately pleading actual malice. *McKee v. Cosby*, 874 F.3d 54, 61–65 (1st Cir. 2017). *McKee*’s cert petition claimed a circuit split on “whether a victim of sexual misconduct to merely publicly states that she was victimized . . . has stressed herself to the forefront of a public debate . . . thereby becoming a limited purpose public figure who loses her right to recover for defamation absent a showing of actual malice.” Petition for Writ of Certiorari at i, 2, *McKee v. Cosby*, 139 S. Ct. 675 (No. 17-1542). The Court denied *McKee*’s writ. Justice Thomas concurred in that denial rather than addressing the “factbound question” of *McKee*’s public figure status. *McKee v. Cosby*, 139 S. Ct. at 675–76 (Thomas, concurring).

27. *Berisha v. Lawson*, 141 S. Ct. 2424, 2425–30 (2021) (Gorsuch, J., dissenting).

28. *See id.* at 2427.

29. *Id.* at 2427–30 (citations omitted); *see also id.* at 2427 (citations omitted) (“Since 1964, . . . our Nation’s media landscape has shifted in ways few could have foreseen. . . . All of which means that “the distribution of disinformation”—which “costs almost nothing to generate”—has become a “profitable” business while “the economic model that supported reporters, fact-checking, and editorial oversight” has “deeply erod[ed].”) Justice Gorsuch’s argument owed much to Logan, *supra* note 7, which was cited seventeen times in the Justice’s dissent. *Id.* at 2427–28.

30. *Id.* at 2428; *see also* Logan, *supra* note 7, at 778 (arguing that constitutionalized defamation doctrine has provided a “license to publish falsehoods”); *infra* Section I.B.2.

vestigation, fact-checking, or editing.”³¹ Implicitly, on this view, reversing *Sullivan* and using defamation law as a tool in the anti-disinformation arsenal would both increase the reported truth and improve the press’s own norms and practices in the interests of the public and democracy.

B. Cases Centering Anti-Disinformation and Authoritative Truth as the Rationales for Defamation Litigation

Echoes of this anti-disinformation approach appear both in recent cases and public rhetoric³²—particularly in the context of political disinformation, but beyond that as well, in the corporate and celebrity contexts. These cases focus not only on the falsity of the specific defamatory statements at issue, but also on the broader climate of political lies, conspiracies, and contested issues of social policy.

1. Defamation Actions Striking Back at the “Big Lie” and Political Conspiracy Theories

The explicit characterization of defamation actions as weapons to strike back at political disinformation has until now been clearest in the election context, in connection with the “Big Lie” about the 2020 presidential election. Dominion and Smartmatic, the two principal voting systems companies, have each filed suits against Fox News, OANN and Newsmax as well as numerous individuals who accused their voting machines and software of assisting election fraud.³³ All the cases explicitly connect defamation suits and

31. *Berisha*, 141 S. Ct. at 2428; see also Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J. LAW & TECH. 387, 389, 394–96, 406–07, 413–14 (2020) (arguing, from the progressive side, that *Sullivan* is ill-suited to the present and that online falsehoods threaten democracy because falsehoods spread more quickly than truth, people engage in motivated reasoning and rely on those they trust regardless of reliability, and correcting falsehoods may be difficult).

32. See, e.g., Jeremy W. Peters, *First Amendment Scholars Want to See the Media Lose These Cases*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/13/business/media/fox-news-first-amendment-sullivan.html> [<https://perma.cc/9PUJ-GVFX>].

33. See *U.S. Dominion, Inc. v. Fox News Network, LLC*, C.A. No. N21C-03-257, at *1–*3, 2021 Del. Super. LEXIS 706, (Dec. 16, 2021); *U.S. Dominion, Inc. v. Newsmax Media, Inc.*, C.A. No. N21C-08-063, at *1–2, 2022 Del. Super. LEXIS 256, (June 16, 2022); Complaint & Demand for Jury Trial at 3, *U.S. Dominion, Inc. v. Herring Networks, No. 1:21-cv-02130* (D.D.C. Aug. 10, 2021). In addition to Fox News, OAN and Newsmax, Dominion sued Rudy Giuliani, Sidney Powell, My Pillow CEO Mike Lindell, and former Overstock CEO Patrick Byrne. Smartmatic commenced lawsuits, which are also proceeding to discovery, against Mike Lindell, Newsmax, OAN, and Fox News with co-defendants Rudy

the correction of political disinformation and are proceeding to discovery.³⁴ There are also a number of pending defamation actions brought by election workers and officials over statements made in connection with their activities during the election.³⁵ Their complaints as well specify their goal of correcting disinformation.³⁶

Giuliani, Maria Bartiromo, and Lou Dobbs. See *Smartmatic U.S. Corp. v. Herring Networks, Inc.*, 2022 U.S. Dist. LEXIS 109645, at *1–2, *4. (D.D.C. 2022); *Smartmatic U.S. Corp. v. Fox Corp.*, 2022 NYNJ LEXIS 211, at *1 (N.Y. Sup. Ct. 2021); *Smartmatic U.S. Corp. et al v. Newsmax Media, Inc.*, No. N21C-11-028, (Del. Super. Ct. 2021); see also Jen Wieczner, *Dominion Voting: Big Lies vs. Big Lawsuits*, FORTUNE, at 81, 88 (Apr./May 2021) <https://resources.newhouse.syr.edu/awards/wp-content/uploads/sites/7/2022/02/Fortune-Dominion-Voting.pdf> [<https://perma.cc/F587-7N8T>]; As Tom Clare of Clare Locke, which represents Dominion, has said, the suits are designed not only to vindicate the companies' reputations, but to discredit the disinformation that weaponized the "big lie." Wieczner, *supra*.

Still pending is a small-scale case of this type. In *Konnech v. True the Vote*, a small elections logistics company in Michigan sued True the Vote, a nonprofit organization specializing in claiming voter fraud, *inter alia* for defamation in connection with statements about Konnech's supposed connections with the Chinese Communist Party and involvement in election fraud and espionage. See Stuart A. Thompson, *How a Tiny Elections Company Became a Conspiracy Theory Target*, N.Y. TIMES (Nov. 12, 2022), <https://www.nytimes.com/2022/10/03/technology/konnech-election-conspiracy-theories.html> [<https://perma.cc/KYA8-YKJK>] (describing the case as part of a viral conspiracy theory spawned at a conference of election deniers about Chinese control of American elections). In addition to the plaintiff's goal of stopping harassment against him and his family, experts see the action as a way of helping stop the damaging effects of election fraud conspiracy theories on the ability of election officials to staff elections. See Rick Hasen, "*Lawsuit Alleges True the Vote Hacked Data and Targeted Small Election Vendor with Racist, Defamatory Campaign*," ELECTION L. BLOG (Sept. 14, 2022, 5:45 PM) <https://electionlawblog.org/?p=131957> [<https://perma.cc/U92M-A9VJ>]. The case also implicates the influence of conspiracy theories on prosecution decisions, as Los Angeles County first charged and then dropped the prosecution of Konnech's CEO for illegally storing personal information of poll workers on Chinese servers. Rick Hasen, "*LA County Drops Charges Against Election Software Executive, Citing Potential Bias*," ELECTION L. BLOG (Nov. 10, 2022, 7:28 PM), <https://electionlawblog.org/?p=133042> [<https://perma.cc/G3XH-J534>].

34. See, e.g., Jeremy Barr & Rachel Weiner, *Rupert Murdoch to be Deposed in \$1.6 Billion Defamation Case Against Fox*, WASH. POST (Dec. 5, 2022, 4:46PM), <https://www.washingtonpost.com/media/2022/12/05/rupert-murdoch-deposed-dominion/> [<https://perma.cc/8NRX-9HNM>] (describing extensive discovery by Dominion).

35. In *Weisenbach v. Project Veritas*, a Pennsylvania trial court allowed discovery to proceed in Erie Postmaster Robert Weisenbach's defamation action against Project Veritas over claims that he had backdated mail-in ballots during the 2020 election. The complaint in the case demonstrates the broad public goals it is designed to achieve. See First Amended Complaint at 1, *Weisenbach v. Project Veritas*, No. 10819-21 (Ct. Com. Pl. Pa. Aug. 12, 2021); see also Complaint at 2, *Freeman v. Herring Networks, Inc.*, No. 1:21-cv-03354 (D.D.C. Dec. 23, 2021); Amended Complaint at 1–2, *Freeman v. Giuliani*, No. 21-3354 (D.D.C. May 10, 2022); Second Amended Petition at 1, *Freeman & Moss v. Gateway Pundit*, No. 2122-CC09815-01 (Cir. Ct. Mo. Jan. 10, 2023); Peters, *supra* note 32; Lyrissa Lidsky, *Disinformation & Defamation: A Loss for Veritas, A Strike for Truth?*, PRAWFSBLAWG (July 18, 2022, 12:28 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2022/07/disinformation-defamation-a-loss-for-veritas-a-strike-for-truth.html> [<https://perma.cc/6RDA-V3SZ>].

36. First Amended Complaint at 1–3, *Weisenbach v. Project Veritas*, No. 10819-21, (Ct. Com. Pl. Pa. Aug. 12, 2021).

Similarly, the defamation actions against Infowars’s conspiracy theorist-in-chief Alex Jones—filed by the parents of children killed in the 2012 Sandy Hook Elementary School shooting over his claims that the shooting was a hoax staged to justify unnecessary gun regulation—are designed principally to strike a blow against conspiracy theories and the outlets that propagate them: “More important than money, the parents said, is society’s verdict on a culture in which viral misinformation damages lives and destroys reputations, yet those who spread it are seldom held accountable.”³⁷

During closing argument, the plaintiffs’ lawyer made this clear, saying to the jury “I am asking you to take the bullhorn away from Alex Jones and all others who believe they can profit off fear and misinformation.”³⁸

The argument that disinformation and the challenges of “internet speech” call for a reversal of *Sullivan* also figured explicitly in *Pace v. Baker-White*, a defamation case brought by a lawyer and

37. Elizabeth Williamson, *Lies for Profit: Can Sandy Hook Parents Shut Alex Jones Down?*, N.Y. TIMES, <https://www.nytimes.com/2022/07/31/us/politics/sandy-hook-alex-jones.html> [https://perma.cc/SUS2-6G9L] (Sept. 23, 2022). In another case involving conspiracy theories, Fox News settled a case brought by the parents of murdered Democratic Party aide Seth Rich over the network’s circulation of false rumors implicating him in a document leak and attributing election interference in 2016 to him rather than Russia. See Tiffany Hsu, *Ties Between Alex Jones and Radio Network Show Economics of Misinformation*, N.Y. TIMES, <https://www.nytimes.com/2022/07/24/business/media/alex-jones-misinformation-ge-nesis.html> [https://perma.cc/KJS2-KLUV] (July 26, 2022); see also Complaint at 1, Rich v. Fox News Network, LLC, No. 18-cv-02223 (S.D.N.Y. 2020); Rich v. Fox News Network, LLC, 939 F.3d 112 (2d Cir. 2019); David Folkenflik, *Behind Fox News’ Baseless Seth Rich Story: The Untold Tale*, NPR (Aug. 1, 2017, 7:23 AM), <https://www.npr.org/2017/08/01/540783715/lawsuit-alleges-fox-news-and-trump-supporter-created-fake-news-story> [https://perma.cc/WR3C-CTPS]; Katie Robertson, *Fox News Reaches Settlement With Parents of Seth Rich*, N.Y. TIMES (Nov. 24, 2020), <https://www.nytimes.com/2020/11/24/business/media/fox-news-seth-rich.html> [https://perma.cc/BE99-PC8K].

38. Janet Miranda, *Alex Jones Ordered to Pay \$45 Million in Punitive Damages (2)*, BLOOMBERG L., <https://news.bloomberglaw.com/litigation/alex-jones-ordered-to-pay-extra-45-million-in-punitive-damages> [https://perma.cc/7Y9N-R9AJ] (Aug. 5, 2022 7:02 PM); Annabelle Timsit, Leo Sands & Joanna Slater, *Will Alex Jones Pay Sandy Hook Families \$1B? What to Know About the Huge Award.*, WASH. POST (Oct. 13, 2022, 9:36 AM), <https://www.washingtonpost.com/nation/2022/10/13/alex-jones-1-billion-sandy-hook-damages/> [https://perma.cc/42SG-VDPC] (describing the approximately \$1.5 billion in damages against Jones). Jones recently filed for personal bankruptcy and InfoWars’ parent company had filed for bankruptcy as well, raising questions as to the plaintiffs’ ability to collect the damages awarded in the Sandy Hook defamation cases against him. See Wilfred Chan, *Alex Jones Owes \$1.5bn and Declared Bankruptcy. So How is InfoWars Still Running?*, THE GUARDIAN (Dec. 8, 2022, 1:00 AM), <https://www.theguardian.com/us-news/2022/dec/07/alex-jones-info-wars-bankruptcy> [https://perma.cc/W485-VJSF]; see also Jonathan O’Connell, *Sandy Hook Families Sued Alex Jones. Then He Started Moving Money Around.*, WASH. POST (Nov. 21, 2022, 7:00 AM), <https://www.washingtonpost.com/investigations/2022/11/21/alex-jones-sandy-hook-lawsuit/> [https://perma.cc/8285-26ZD].

inspector in a police department against the founders of the Plain View Project, a database created by Injustice Watch, an investigative journalism nonprofit, to expose a “nationwide policing problem” by identifying local police officers whose social media contributions appeared to endorse racism, bigotry and violence.³⁹ After the Third Circuit affirmed the dismissal of plaintiff’s action because he had failed to meet his burden to show actual malice, the plaintiff petitioned for certiorari to “reconsider and revise” the actual malice standard “given the proliferation of ‘fake’ and ‘polluted’ news that spreads like wild fire [sic] over the internet causing harm to our democracy.”⁴⁰

2. Corporate Defamation Plaintiffs and the Effects of Economic Disinformation

The use of defamation litigation to fight anti-democratic disinformation can also provide a playbook for corporate suits over business falsity that does not directly implicate politics. Implicitly, the corporate defamation plaintiff complaining about a defamatory statement regarding its business can style its lawsuit as a way to fight the effects of economic disinformation. Corporate defamation plaintiffs can argue that, by misleading markets, regulators and consumers and therefore harming the companies economically, intentional falsehoods about them or their products can distort the economy and lead to consumer and market harm. Moreover, in at least some instances, the economic disinformation over which corporations might bring defamation actions could also contain echoes of political controversies.

Arguably, there is already a hint of the disinformation turn in some recent defamation actions by corporations alleging extensive

39. 432 F. Supp. 3d 495, 499–500 (E.D. Pa. 2020), *aff’d*, 850 Fed. App’x. 827 (3d Cir. 2021), *cert. denied*, 142 S. Ct. 433 (Nov. 1, 2021).

40. Petition for Writ of Certiorari at 6, 10–11, *Pace v. Baker-White*, *cert. denied*, 142 S. Ct. 433 (Nov. 1, 2021) (relying on Gorsuch and Logan critiques of *Sullivan* and the “rise of the reckless internet troll masquerading as a credible and authoritative news source”), https://www.supremecourt.gov/DocketPDF/21/21-394/191892/20210909132518131_21-%20Petition.pdf [<https://perma.cc/5H9T-CHCH>]. Using a more indirect reference to disinformation, the petition for certiorari in *Tah v. Global Witness Publ’g, Inc.* argued that failing to make some pro-plaintiff adjustments to defamation law would damage public discourse. Petition for Certiorari at 32–33, *Tah v. Global Witness Publ’g, Inc.*, 991 F.3d 231 (D.D.C. 2021) (“society is awash in the quantity of discourse. But the level of discourse ‘also depends on the quality of the speech. . . . To the extent that no realistic roadblocks exists to the correction of error, the public is a loser.”)

business harm.⁴¹ In the “pink slime” lawsuit against ABC, for example, the plaintiff beef product producer accused the network of waging a “disinformation campaign” against the company’s product, which led to a consumer backlash.⁴² The plaintiff’s point was that consumers were misled by the defendant’s reporting into believing the company’s commonly used products and processes were unsafe.

In *BYD v. Vice*, the corporate plaintiff—a Chinese company that is “one of the world’s largest producers and suppliers of electric vehicles, solar panels, lithium batteries, and protective masks and equipment, among other products”—sued Vice Media over a story indicating that BYD had used forced Uyghur labor in its supply chain.⁴³ By accusing Vice of relying on a biased, anti-Chinese source and falsely associating the company with the Chinese government’s human rights abuses against the Uyghurs, the company implicitly argued that American consumers would be deprived of critical products (including personal protective equipment in a pandemic) on the basis of economic disinformation grounded on political bias.

In *Binance Holdings v. Forbes Media*, the corporate plaintiff sued for defamation over an article in *Forbes* accusing it of “an elaborate scheme to avoid bitcoin regulators.”⁴⁴ As the largest

41. The following discussion does not purport to address all such actions.

42. Beef Prods., Inc. v. Am. Broadcasting Cos., Inc., No. Civ. 12-292, 2014 S.D. Cir. LEXIS 2, 36 (2014); Curtis Brainard, *BPI’s Beef with ABC News*, COLUM. JOURNALISM REV. (Oct. 3, 2012), https://archives.cjr.org/the_observatory/bpi_abc_lawsuit_pink_slime_lft.php [<https://perma.cc/6FCS-3STZ>]; see Complaint for Plaintiff at 141, 154, Beef Prods., Inc. v. Am. Broadcasting Cos., 2014 S.D. Cir. LEXIS 2 (2014) (No. Civ. 12-00292).

43. BYD Co. Ltd. v. Vice Media LLC, 531 F. Supp. 3d 810, 815–16 (S.D.N.Y. 2021), *aff’d* 2022 U.S. App. LEXIS 5351 (2d Cir. 2022), *cert. denied*, 143 S. Ct. 103 (2022). At the start of the pandemic, BYD won a \$1 billion contract to supply masks to California. *Id.* at 815–16. On April 11, 2020, Vice published an article on its website with the headline *Trump Blacklisted This Chinese Company. Now It’s Making Coronavirus Masks for U.S. Hospitals*. *Id.* at 816. The article also discussed a report by the Australian Strategic Policy Institute which included BYD in its list of companies associated with factories using forced Uyghur labor and which mentioned its relationship with a subsidiary that allegedly used forced labor. *Id.* BYD claimed that both the allegation of use of forced labor in its supply chain and the article headline’s reference to a “blacklist” were defamatory. *Id.* BYD claimed both that the Australian Strategic Policy Institute was “biased and . . . has been repeatedly criticized publicly for making false statements of fact, with an anti-Chinese bias,” and that “contrary to the representations made in the article, the report did not state that BYD used forced Uyghur labor in its supply chain.” *Id.*

44. Complaint by Plaintiff at 2, *Binance Holdings Ltd. v. Forbes Media LLC*, No. 2:20-cv-16398 (D.N.J. 2020). *Binance* thereafter voluntarily dropped the suit against *Forbes*. Greg Thomson, *Binance Quietly Drops ‘Multi-Million’ Forbes Defamation Lawsuit*, COIN-

cryptocurrency exchange in the world in terms of trading volume, the company could implicitly argue that such false information would have negative effects on a significant segment of today's financial marketplace.

The plaintiff in *ShotSpotter Inc. v. Vice Media LLC*—a controversial technology surveillance company which uses “acoustic sensors to monitor and notify police of purported gunshots and enable faster responses”⁴⁵—asserted that it had brought its defamation suit “to set the record straight, and to stand up for its dedicated employees, law enforcement officers, and the communities they serve that are disproportionately impacted by gun violence.”⁴⁶ The action specified, as a factor of damage, “expenses incurred for combatting a disinformation campaign.”⁴⁷ Implicitly connecting the economic harm to ShotSpotter with Vice's financial and assertedly politicized liberal concerns, the company specifically sought to characterize Vice as pursuing a “subversive’ brand” looking to make money from “virtue-signaling corporations”⁴⁸ by publishing articles, regardless of truth, about the use of new technologies

TELEGRAPH (Feb. 9, 2021), <https://cointelegraph.com/news/binance-quietly-drops-multi-million-forbes-defamation-lawsuit> [<https://perma.cc/9CMZ-EPJJ>].

45. *ShotSpotter Inc. v. Vice Media, LLC*, C.A. No. N21C-10-082 SKR, 2022 Del. Super. LEXIS 268, at *1 (June 30, 2022) (granting Vice Media's motion to dismiss). ShotSpotter was represented by Clare Locke. *ShotSpotter Files Defamation Lawsuit Against Vice Media*, SHOTSPOTTER (Oct. 12, 2021), <https://www.shotspotter.com/press-releases/shotspotter-files-defamation-lawsuit-against-vice-media/> [<https://perma.cc/2NWF-S7B4>] [hereinafter *ShotSpotter Files Defamation Lawsuit*]. After the dismissal, Vice Media appended an Editor's Note correcting some information in the original article. *VICE Media and ShotSpotter Resolve Dispute*, SHOTSPOTTER (Aug. 4, 2022), <https://www.shotspotter.com/blog/vice-media-and-shotspotter-resolve-dispute/> [<https://perma.cc/T4NV-F224>]. ShotSpotter claimed that a Vice article titled *Police Are Telling ShotSpotter to Alter Evidence from Gunshot-Detecting AI* defamed the company and sought \$300 million in damages by asserting a “pattern’ of ‘altering’ gunshot alerts at the request of police departments,” and “conspiring with police to fabricate and alter evidence to frame Black men for crimes they did not commit.” *ShotSpotter*, at *2, *4 (Del. Super. Ct. June 30, 2022). In its news release about the case, ShotSpotter's legal counsel Tom Clare, Partner at Clare Locke LLP, claimed that:

To spin its yarn, [Vice] knowingly misrepresented court records and concealed facts that rebutted its claims. They propagated these lies through social media, spreading harmful disinformation that undermined trust in ShotSpotter that has been built over the past 25 years with the criminal justice system and communities at large. We will hold them accountable.

ShotSpotter Files Defamation Lawsuit, supra.

46. Complaint for Plaintiff at 3, *ShotSpotter Inc. v. Vice Media, LLC*, C.A. No. N21C-10-082 SKR, 2022 Del. Super. LEXIS 268 (June 30, 2022).

47. *ShotSpotter Inc. v. Vice Media, LLC*, C.A. No. N21C-10-082 SKR, 2022 Del. Super. LEXIS 268 at *2.

48. Complaint for Plaintiff at 24, *ShotSpotter Inc. v. Vice Media, LLC*, C.A. No. N21C-10-082 SKR, 2022 Del. Super. LEXIS 268 (June 30, 2022).

against marginalized people.⁴⁹ By contrast, SpotShoter sought to emphasize the benefits of its technology for communities of color.

3. Seeking to Establish Authoritative Social Truths via Audience Engagement

Celebrity defamation trials have enthralled the public and created an engrossing new form of entertainment, as evidenced by the nation's fascination with the *Depp v. Heard* libel action, tried in spring 2022 in state court in Virginia. An internet obsession, the trial was watched and commented on by millions, if not billions.⁵⁰ The origin of the suit was an op-ed piece by Amber Heard, originally drafted by the ACLU and subsequently published in the *Washington Post*, in which she described herself as “a public figure representing domestic abuse.”⁵¹ Johnny Depp, Heard's former husband, who had previously lost a defamation suit against a tabloid in the United Kingdom on substantial truth grounds over a headline describing him as “wifebeater,”⁵² brought a \$50 million defamation action against Heard over her op-ed, although he had not been specifically identified in the essay.⁵³ Heard counterclaimed for \$100 million for defamation.⁵⁴ Ultimately, the jury found that

49. *Id.* at 1.

50. See, e.g., Tatiana Siegel, *Are Johnny and Amber's Stans for Real?*, ROLLING STONE (May 3, 2022), <https://www.rollingstone.com/tv-movies/tv-movie-features/johnny-depp-amber-heard-fan-war-online-social-bots-1345208/> [<https://perma.cc/6C4C-E2PD>].

51. Amber Heard, Opinion, *I Spoke up Against Sexual Violence—and Faced Our Culture's Wrath. That Has to Change.*, WASH. POST (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/live-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html [<https://perma.cc/3PBX-YGL8>]; see also A.O. Scott, *The Actual Malice of the Johnny Depp Trial*, N.Y. TIMES (June 2, 2022), <https://www.nytimes.com/2022/06/02/arts/depp-heard-trial-malice.html?searchResultPosition=3> [<https://perma.cc/HB9G-3AN9>]. In 2016, after filing for divorce from Johnny Depp, Amber Heard was granted a temporary restraining order after she accused Depp of domestic violence. Emily Yahr, *Amber Heard Files Restraining Order Against Johnny Depp After Alleged Domestic Violence*, WASH. POST (May 27, 2016, 5:06 PM), <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2016/05/27/amber-heard-files-restraining-order-against-johnny-depp-after-alleged-domestic-violence/> [<https://perma.cc/5ZVA-GHBM>].

52. See, e.g., *Johnny Depp Loses Libel Case Over Sun 'Wife Beater' Claim*, BBC NEWS (Nov. 2, 2020), <https://www.bbc.com/news/uk-54779430> [<https://perma.cc/QLK4-M3ED>].

53. Complaint at 1, 24, *Depp v. Heard*, __ Va. Cir. __ (2022) (No. CL-2019-2911), https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/high-profile/depp%20v%20heard/cl-2019-0002911_complaint_8766635_03_01_2019.pdf [<https://perma.cc/TCR5-5LPS>].

54. Counterclaims at 19, *Depp v. Heard*, __ Va. Cir. __ (2022) (No. CL-2019-2911) <https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/high-profile/d>

Depp had been defamed by Heard's op-ed statement and awarded him a judgment of \$15 million (capped at over \$10 million).⁵⁵ The jury also found that Heard had been defamed by Depp's attorney's statements to a British tabloid that she damaged the couple's penthouse and called 911, staging a hoax, "to set Mr. Depp up."⁵⁶ She was awarded \$2 million in damages.⁵⁷ Although both Heard and Depp appealed the decision below, the matter was settled in December 2022 for a \$1 million payment from Heard to Depp.⁵⁸

The story of this celebrity trial reveals a different but related angle on the turn to disinformation in defamation litigation—the focus on the courtroom as the locus for truth-determinations. The social media activity about this case suggested that partisan audiences are interpreting defamation trials as occasions for audience involvement in the establishment of authoritative (albeit passionately contested) truths both about the facts and statements at issue in the case and about some broader socio-political and cultural issues (such as the #MeToo movement and domestic abuse).⁵⁹

epp%20v%20heard/cl-2019-2911-def-counterclaims-8-10-2020.pdf [https://perma.cc/4ASC-SDP5].

55. Julia Jacobs, *Jury Reaches Verdict in Johnny Depp-Amber Heard Trial: What to Know*, N.Y. TIMES, <https://www.nytimes.com/2022/04/21/arts/johnny-depp-amber-4/20/23-trial.html> [https://perma.cc/8VGY-A3AD] (Aug. 9, 2022).

56. Julia Jacobs & Adam Bednar, *Johnny Depp Jury Finds That Amber Heard Defamed Him in Op-Ed*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/arts/depp-heard-trial.html?searchResultPosition=6> [https://perma.cc/T7FU-CDN3]; Julia Jacobs, *Johnny Depp's Win in Court Could Embolden Others, Lawyers Say*, N.Y. TIMES (June 2, 2022), <https://www.nytimes.com/2022/06/02/arts/depp-metoo-defamation.html?searchResultPosition=5> [https://perma.cc/2CL7-MDJS]; see also Amanda Marcotte, *The Johnny Depp and Amber Heard Verdict: A Victory for the War on Free Speech*, SALON (June 2, 2022, 1:25 PM), <https://www.salon.com/2022/06/02/the-johnny-depp-and-amber-heard-verdict-a-victory-for-the-on-free-speech/> [https://perma.cc/ULF3-JJLQ].

57. Jacobs & Bednar, *supra* note 56.

58. On the settlement, see Julia Jacobs, *Amber Heard Says She Has Decided to 'Settle' Johnny Depp Defamation Case*, N.Y. TIMES (Dec. 19, 2022), <https://www.nytimes.com/2022/12/19/arts/amber-heard-johnny-depp-settlement.html> [https://perma.cc/L7FD-GHC2] ("citing a financial and psychological toll"). For the appeals, see Brief of Appellant at 3–5, *Heard v. Depp*, No. 1062-22-4 (Va. Ct. App. Nov. 23, 2022), <https://deadline.com/wp-content/uploads/2022/12/Heard-Brief-of-Appellant-VCA.pdf> [https://perma.cc/378V-997U] (Heard appellate brief, raising 16 points of error below); Brief of Appellant at 2–3, *Depp v. Heard*, No. 1072-22-4, (Va. Ct. App. Nov. 2, 2022), <https://deadline.com/wp-content/uploads/2022/11/Depp-Heard-Virginia-Court-Of-Appeals.pdf> [https://perma.cc/SU75-GVTY] (Depp appellate brief arguing that the judgment in Heard's favor at trial was erroneous).

59. This has been noted with respect to other defamation actions in the #MeToo context. See, e.g., Jacobs, *supra* note 22.

4. Calls for Accountability for the “Liberal Press”

Some lower court judges have unambiguously joined in the new critique of constitutionalized defamation law as promoting disinformation. One such judge has explicitly identified the press with liberal “ideological homogeneity”⁶⁰ and adopted the kind of conservative “fake news” critique of the mainstream institutional press that was common during the Trump presidency. In a dissent in *Tah v. Global Witness Publishing* that raised much consternation in the press and the media defense bar, Judge Laurence Silberman of the D.C. Circuit Court of Appeals, in the course of attacking *Sullivan*, strikingly articulated a skeptical and politicized characterization of virtually all the mainstream press as “Democratic Party broadsheets” or “Democratic Party trumpet[s]” with a “bias against the Republican Party” and cast the press as “a threat to a viable democracy.”⁶¹ According to Judge Silberman, *Sullivan* “no doubt . . . increased the power of the media” and “that power is now abused.”⁶²

On this reading (radical for an appellate court opinion), the monolithic liberal press, rather than performing its constitutional

60. See, e.g., *Tah v. Global Witness Publ'g, Inc.*, 991 F.3d 231, 255 (D.C. Cir. 2021) (Silberman, J., dissenting); see also *id.* at 253–54 (majority opinion). *Tah* involved a claim by two Liberian government officials that they had been defamed in *Catch Me if You Can*, a report by the NGO Global Witness chronicling the acquisition of an offshore oil license in the waters off the coast of Liberia by ExxonMobil for \$120 million. Complaint at 1–2, *Tah*, 991 F.3d 231 (No. 1:18-cv-02109), <https://storage.courtlistener.com/recap/gov.uscourts.dcd.199984/gov.uscourts.dcd.199984.1.0.pdf>. [https://perma.cc/KFT2-HVDP]. The plaintiffs charged that they had been falsely accused of taking bribes and being complicit in corruption associated with the purchase. Although the D.C. Circuit Court of Appeals affirmed the district court’s denial of Global Witness’s special motion to dismiss under the D.C. anti-SLAPP statute, it dismissed the case on the ground that the plaintiffs had failed to plausibly allege actual malice. *Tah*, 991 F.3d at 243. Although Judge Silberman recognized “a few notable exceptions to Democratic Party ideological control: Fox News, the *New York Post*, and *The Wall Street Journal*’s editorial page,” he expressed concern that

[T]hese institutions are controlled by a single man and his son. Will a lone holdout remain in what is otherwise a frighteningly orthodox media culture? After all, there are serious efforts to muzzle Fox News. And although upstart (mainly online) conservative networks have emerged in recent years, their visibility has been decidedly curtailed by Social Media, either by direct bans or content-based censorship.

Id. at 255. Justice Thomas quoted Judge Silberman’s attack on *The New York Times* actual malice standard in his dissent from the denial of certiorari in *Berisha*. *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021); see also *supra* note 24 (citing state court judges in agreement).

61. *Tah*, 991 F.3d at 254–56 (Silberman, J., dissenting) (characterizing virtually all the institutional press as “dangerous” because “we are very close to one-party control of these institutions”).

62. *Id.* at 254.

function and having to be protected in playing its democratic role, instead poses a threat to a viable democracy that must be resisted. If Judge Silberman is not alone,⁶³ various interpretive consequences are likely to flow from this attitude—and none particularly hospitable to press claims. Even if the *Sullivan* rule survives this new round of attacks, we can expect various ways in which lower courts could limit the application of the defense-protective rules of the *Sullivan* progeny.

II. UNSTABLE PRESS FREEDOMS AT THE SUPREME COURT

For the first time in decades, doubts about the Court's continuing commitment to foundational cases of constitutionalized defamation have become evident.⁶⁴ Virtually no observers at the time interpreted Justice Thomas's call in 2019 to reverse *Sullivan* as evidencing the Supreme Court's willingness to jettison one of the most important First Amendment decisions of the twentieth century. The thin historicism of the Thomas analysis,⁶⁵ the Court's limited acceptance of originalism as a fundamental analytic approach in First Amendment cases, and the enormity of his recommended changes suggested that Justice Thomas would likely stand alone or with limited company in his attack on *Sullivan*. However, when Justice Gorsuch cast his critique of the *Sullivan* framework in 2021 on grounds based on today's disinformation-ridden information marketplace, the possibility of fundamental revision to the First Amendment gloss on defamation law gained traction.

63. See, e.g., Josh Gerstein, *Media's Legal Defeats Trouble First Amendment Advocates*, POLITICO (Sept. 23, 2019, 8:21 PM), <https://www.politico.com/story/2019/09/23/legal-defeat-s-media-first-amendment-1508565> [<https://perma.cc/C7V8-CY8U>] (quoting Professor Jane Kirtley's view that "there is a seismic shift," with increased judicial skepticism, especially among newer judges, about media motives).

64. Admittedly, the development of the *Sullivan* framework has not been free of conflicts at the Court. See Lee Levine & Stephen Wermiel, *The Making of Modern Libel Law: A Glimpse Behind the Scenes*, 29 COMM. LAW. 1, 1 (2012); Amy Kristin Sanders & Kirk Von Kreisler, *Is Defamation Law Outdated? How Justice Powell Predicted the Current Criticism*, 20 FIRST AMEND. L. REV. 1, 2–3 (2022). Still, the majority has held for almost sixty years.

65. See *infra* Section IV.A.

A. “Counting to Five”⁶⁶—*The Possible Pincer Effects of the Thomas and Gorsuch Attacks on Sullivan*

Justice Brennan famously asserted the importance of “counting to five.”⁶⁷ If Justice Gorsuch’s disinformation-based rationale for revisiting the *Sullivan* framework attracts liberal members of the Court (or the Chief Justice, who has signaled a commitment to broad readings of the free speech guarantee),⁶⁸ we should prepare for the very real possibility of epochal change. The development of Justice Gorsuch’s new, disinformation rationale awakens the possibility of unexpected alliances on the Court. Especially in light of a newly reconstituted bench with an appetite for making vertiginous doctrinal changes, the rise of multiple rationales justifying defamation reform should sound a warning bell. To be sure, thus far only Justices Gorsuch and Thomas have called for the Court to consider reversing the *Sullivan* line. But Justice Gorsuch’s stance in his dissent in *Berisha* provided a far more modern alternative to get to a similar place. In the past, Justice Kagan has recognized deficiencies in the *Sullivan* line of cases⁶⁹ and questioned the “dark side of . . . *Sullivan*,”⁷⁰ asking whether it has increased “press arrogance”⁷¹ and whether the actual malice standard “imposes serious costs . . . at least potentially, to the nature and quality of public discourse.”⁷² Justice Sotomayor has expressed criticisms of the press, suggesting that the press “lacks trustworthiness, accuracy and ethics.”⁷³ This speculation means that a narrow coalition could form among the Justices—some of whom might accept the Thomas

66. This is a reference to Justice Brennan’s quip. Lee Levine & Stephen Wermiel, *What Would Justice Brennan Say to Justice Thomas?*, 34 COMM. LAW. 1, 24 (2019) (citing LEE LEVINE & STEPHEN WERMIEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN’S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN* 196 (2014)).

67. See Levine & Wermiel, *supra* note 64, at 24 (quoting Justice Brennan).

68. See, e.g., Ronald K.L. Collins & David L. Hudson Jr., *The Roberts Court—Its First Amendment Free Expression Jurisprudence: 2005–2021*, 87 BROOK. L. REV. 5 (2021). As Professors Jones and West’s empirical study of Supreme Court attitudes toward the press indicates, however, Justice Roberts’ language about the press has “strong positivity mentions in the Regulation and Democracy Frames . . .” Jones & West, *supra* note 9, at 427.

69. Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW & SOC. INQUIRY 197, 205 (1993). Justice Gorsuch adverted to these statements (as well as former Justices skeptical of *Sullivan*) in his dissent in *Berisha*. *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting).

70. Kagan, *supra* note 69, at 205.

71. *Id.* at 208.

72. *Id.* at 204–05. Still, Justice Kagan concluded at that time that the concerns she voiced did not compel its reconsideration or reversal. *Id.* at 208.

73. Jones & West, *supra* note 9, at 427–28.

“originalism and judicial restraint” model and others who might be persuaded by the Gorsuch approach of concern about the harms of the modern press. One can imagine a decision reversing *Sullivan* or significantly limiting⁷⁴ the public figure cases and/or the defendants’ procedural protections in defamation cases.

Skepticism about the *Sullivan* framework is not the only reason to suspect that the anti-disinformation frame might attract adherents on the Court. What makes the disinformation-based argument so powerful is its recalibrated description of the trade-off at stake. It readjusts the relationship between individual and collective interests. Even though earlier critics recognized reputation as a social as well as a personal interest, defamation litigation was

74. The Supreme Court could recalibrate the balance in a variety of specific doctrinal ways. Balancing theorists have suggested different areas of focus for reform short of reversing *Sullivan* and its progeny. See, e.g., Jeffrey Abramson, *Full Court Press: Drawing in Media Defenses for Libel and Privacy Cases*, 96 OR. L. REV. 19 (2017) (noting that post-*Sullivan* cases weakened its democratic foundation and arguing for cabining rather than reversal); Clay Calvert, *Privileging Opinion, Denigrating Discourse: How the Law of Defamation Incentivizes Talk-Show Hyperbole*, 2020 PEPP. L. REV. 51 (2020) (arguing that interpreting the context of talk shows as hyperbolic opinion harms democratic discourse); David Elder, *The Law of Defamation, the First Amendment, and Justice William H. Rehnquist’s Attempts to “Hold[] the Balance True”: A Framework for Assessing the Continuing Viability of New York Times v. Sullivan*, 83 LA. L. REV. 129 (2022); Randall D. Nice, Note, *Reviving the Lost Tort of Defamation: A Proposal to Stem the Flow of Fake News*, 61 ARIZ. L. REV. 205, 226 (2019) (recommending a “reasonable publisher” baseline); Martin H. Redish & Julio Pereyra, *Resolving the First Amendment’s Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451 (2020) (suggesting procedural changes); Reynolds, *supra* note 21, at 479–82 (mentioning elimination of the public figure concept, overturning *St. Amant* or applying a “reasonable person” standard, or precluding the application of the *Twombly/Iqbal* pleading doctrine to defamation cases); Sunstein, *supra* note 31, at 413–14 (suggesting consideration of damage caps, a “general right to demand correction or retraction after a clear demonstration that a statement is both false and damaging,” and a right to “notice and takedown” online in particular); R. George Wright, *How to Do Surgery on the Constitutional Law of Libel*, 74 SMU L. REV. FORUM 145 (2021). For older analyses and recommendations, see, e.g., RANDALL BEZANSON ET AL., *LIBEL LAW AND THE PRESS: MYTH AND REALITY* (1987); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986); Charles Rothfeld, *The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures*, 19 YALE L. & POL’Y REV. 165 (2000) (arguing that punitive damages should be deemed unconstitutional in public figure cases); John Soloski, *The Study and the Libel Plaintiff: Who Sues for Libel*, 71 IOWA L. REV. 217 (1985) (reporting results of early study finding that improvements in media retraction, correction or apology practices would reduce many libel suits). For a recent suggestion that strict liability be reconsidered for the defamation tort, see Cristina Carmody Tilley, *(Re)categorizing Defamation*, 94 TULANE L. REV. 435 (2020). This Article does not wade into that specific discussion. Its point is that the push to use disinformation as a rationale for dismantling the constitutionalized defamation regime in *Sullivan* and its progeny goes far beyond recommending a shift in the approach to various elements of the *Sullivan* balance. It can justify virtually complete minimization of the social value of free speech and press in judicial considerations of the balance between the importantly incommensurable values of press and reputation protection. By implicitly defining the press almost solely through the dangers its errors pose to the public, it tips the balance completely against the press.

traditionally seen principally as a tool to compensate victims and restore the reputation, status and dignity of the individuals whose social standing has been harmed by false and defamatory statements. The social interest was still grounded on the individual dignitary interest in reputation. When defamation law is portrayed as a far more broadly socially beneficial weapon in the anti-disinformation arsenal, then the cases are restyled as epic battles between equivalently weighty social interests in public discourse and self-governance. Recasting the story as one of competing and equal collective interests changes both the rhetorical and substantive assessment of what is at stake in the contest between free speech and reputation.

Important recent empirical work by Professors RonNell Andersen Jones and Sonja West shows that the Supreme Court's articulated attitude toward the press is significantly more negative today than previously.⁷⁵ Of course, this does not mean that the Court would necessarily be inclined to reverse *Sullivan*. But it does indicate that the press does not come before the Court today with any special benefit of the doubt.⁷⁶ "All told," Jones and West's data "suggest that any hopes that the judiciary can be trusted to be a savior of press freedom in America might be misplaced."⁷⁷

Aware of Justices Gorsuch and Thomas's public positions regarding *Sullivan*, plaintiffs have started filing petitions for certiorari in cases they believe would test the stability of current defamation doctrine.⁷⁸ Although the Court has not yet granted certio-

75. Jones & West, *supra* note 9, at 375 ("We find that there has been a stark deterioration in both the quantity and quality of the Court's depictions of the press across a variety of measures. Our data show that the Justices are now less likely to talk about the press than they were in the past, and that, when they do, it is more often in a negative light.").

76. Half a century ago, "the Justices viewed the press as a 'powerful antidote' to government abuse and a necessary component of democracy." *Id.*, at 377 (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966)). Now, however, Professors Jones and West's study "point[s] in the direction of a . . . Court with a decreased respect for the press and a diminished opinion of its value." *Id.* at 379. The negativity of tone is striking: "[W]hen the Court is taking the opportunity to opine on the subject, the opinion it now projects is that the press lacks credibility in some way—for example, by behaving unethically, providing inaccurate information, or sensationalizing events." *Id.* at 403.

77. *Id.* at 380.

78. Thus far, numerous filings have addressed different aspects of the *Sullivan* regime. For example, in *Coral Ridge*, Coral Ridge Ministries Media had sued the Southern Poverty Law Center for defamation in its designation of Coral Ridge as an anti-LGBT hate group. While the district court had dismissed the action on two grounds—actual malice and opinion—the Eleventh Circuit Court of Appeals affirmed the dismissal on actual malice grounds alone. *Coral Ridge Ministries Media, Inc. v. Southern Poverty Law Ctr.*, 142 S. Ct. 2453, 2454 (2022) (Thomas, J., dissenting). Although Coral Ridge Ministries' cert petition was

rari in these cases,⁷⁹ the variety of opportunities for revision to the *Sullivan* regime offered to the Court in the recent past suggest a

recently denied, it is notable that the case was apparently rescheduled for conference twelve times this Term. *Id.* at 2453 majority opinion); Docket Files of Coral Ridge Ministries Media v. Southern Poverty Law Center, <https://supremecourt.gov/docket/docketfiles/html/public/21-802.html> [<https://perma.cc/RTD6-CBDR>]. Conference was rescheduled on March 17, March 23, March 30, April 12, April 20, April 27, May 10, May 17, May 24, June 1, June 7, and June 14 (all in 2022). *Id.* Justice Thomas's dissent from the denial of certiorari in *Coral Ridge Ministries* sent a striking message implicitly expanding his critique of *Sullivan* beyond actual malice, to include opinion and to signal a call to reverse all the pro-press aspects of the post-*Sullivan* cases. See *Coral Ridge*, 142 S. Ct. at 2455 (Thomas, J., dissenting); Jeff Koseff & Matthew Schafer, *How States and Congress Can Prepare for a Looming Threat to Freedom of Speech*, LAWFARE (July 5, 2022, 9:27 AM), <https://www.lawfareblog.com/how-states-and-congress-can-prepare-looming-threat-freedom-speech> [<https://perma.cc/DG42-WFH4>]. While the appellate court had dismissed the plaintiff's claim on actual malice grounds in *Coral Ridge*, the district court had also held that because "'hate group' has a highly debatable and ambiguous meaning, Coral Ridge's designation as such is not 'provable as false.'" *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1277 (M.D. Ala. 2019) (quoting *Milkovich v. Lorain Journal*, 497 U.S. 1, 19 (1990)). If calling a group a "hate group" is effectively opinion, this might call *Milkovich* into question. See *Reighard v. ESPN, Inc.*, No. 355053, 2022 Mich. App. LEXIS 2720, at *28–46 (May 12, 2022) (Boonstra, J., concurring) (“[T]he United States Supreme Court [should] look anew at the morass that the law of defamation has become . . . [and] take a fresh look at the jurisprudence in this area.”).

By asking the question “whether *Bell Atlantic Corp. v. Twombly* . . . and *Ashcroft v. Iqbal* . . . *sub silentio* overturned the balance struck in *Sullivan* and its progeny, and created a new, more robust privilege,” the petition for certiorari in *BYD v. Vice* offered the Court the opportunity to resolve differences among the circuits by interpreting the pleading requirement for plausibility in claims of actual malice in plaintiff-supportive ways. Petition for Writ of Certiorari at ii, *BYD Co. v. Vice Media LLC*, 143 S. Ct. 103 (2022) (No. 21-1518), *cert. denied*; see also Reynolds, *supra* note 21, at 480–81. The petition for certiorari in *Tah v. Global Witness Publishing* also called on the Court to address the pleading standards for actual malice under *Twombly* and *Iqbal*. Petition for Writ of Certiorari at 2–4, *Tah v. Global Witness Publ'g, Inc.*, 142 S. Ct. 427 (2021) (No. 21-121), *cert. denied*.

In *Page v. Oath Inc.*, Trump campaign adviser Carter Page sued for defamation in Yahoo! News and *Huffington Post* articles discussing information in an “intelligence report” from a “well-placed Western intelligence source” suggesting Page met with high-ranking Russian officials and discussed benefits to Russia of a Trump electoral win in 2016. The Delaware Supreme Court affirmed the dismissal of his action for failure to state a claim. *Page v. Oath Inc.*, 270 A.3d 833, 835–36 (Del. 2022), *cert. denied*, 142 S. Ct. 2717 (2022). In his petition for certiorari, Page asked the Court to reconsider its constitutionalized defamation doctrine and permit states to determine the placement of the burden of proof for proving falsity in defamation cases. Petition for Writ of Certiorari, at 10, *Page v. Oath Inc.*, 142 S. Ct. 2717 (2022) (No. 21-1369) (“This case presents an opportunity for this Court to reconsider, in part, its constitutionalization of state defamation law.”). The dissent in *Page* explicitly tied its analysis to press power: “American society is simply not willing to let corrective speech act as the only restraint on media power; the law of defamation is one of the few tether lines on the press, which has emerged as an American institution of enormous influence.” *Page*, 270 A.3d at 853 (Valihura, J., dissenting).

79. Presumably, the Court did not see these cases as the appropriate vehicles for a consideration of Justices Thomas and Gorsuch's challenges to the *Sullivan* regime. The issue in *BYD* did not address the fundamental *Sullivan* doctrine (and might be seen to prompt consideration of the *Twiqbal* pleading standards regime more generally). And the facts in *Page v. Oath* led the Delaware Supreme Court to a supportable conclusion that the gist of the statements at issue was substantially true and that, in any event, they were not

broad-based strategy of attack looking for the right case to trigger reconsideration of the doctrine. The possibility of reversing the constitutional gloss on defamation law is likely to invite additional filings—with attractive facts and refreshed arguments—going forward. All of this leads to a concern that the Court would revisit constitutionalized defamation law in the “right” case.⁸⁰ Thus, while neither *Sullivan* nor its progeny have yet been reversed or materially revised by the Supreme Court, the groundwork for change is already being laid.⁸¹

B. A Doctrinal Slippery Slope for State Law Defamation as well?

Beyond reversal or radical revision of the *Sullivan* framework, the anti-disinformation frame can also be used to justify changes to substantive state defamation and privacy law as well. While there is variation among the states as to the privileges available to

made with actual malice. The broader context of the *Page* suit was the controversial decision of BuzzFeed to publish the contents of the Steele Dossier, opposition research prepared by a former British spy on behalf of the Democratic National Committee and Hillary Clinton’s presidential campaign and purporting to support allegations of misconduct and conspiracy in the relations between Donald Trump and the Russian government. While some aspects of the Steele Dossier were subsequently discredited, there have been reports that later inquiry apparently supported some of its claims of secret contacts between Trump operatives and Russian officials and spies. See, e.g., Marshall Cohen, *The Steele Dossier: A Reckoning*, CNN POLITICS, <https://edition.cnn.com/2021/11/18/politics/steele-dossier-reckoning/index.html> [https://perma.cc/7YME-QUJF] (Nov. 18, 2021, 7:19 PM). Regardless, BuzzFeed’s decision to leak the Steele Dossier was controversial within the journalistic community. See, e.g., Philip Bump, *BuzzFeed, the Russia Dossier and the Problem of Too Much Information*, WASH. POST (Jan. 11, 2017, 10:11 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/11/the-problem-of-too-much-information/> [https://perma.cc/BM7L-3CNU]; Kyle Pope, *The Media’s Belated Rush to Judgment on the Trump Dossier*, COLUM. JOURNALISM REV. (Nov. 17, 2021), <https://www.cjr.org/opinion/the-medias-belated-rush-to-judgment-on-the-trump-dossier.php> [https://perma.cc/72W5-KYQ8].

80. There has been public discussion of whether Sarah Palin’s defamation action against *The New York Times*, see discussion *infra* note 109, may be positioned that way. Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression*, 44 HASTINGS COMM. & ENT. L. J. 133, 156–58 (2022). But because the recent amendments to New York’s anti-SLAPP law require a plaintiff to prove actual malice in order to prevail in a case involving a public issue, the standard would remain the same even if the Court were to reverse *Sullivan* as a matter of constitutional law. See, e.g., Anne M. Champion & Lee R. Cain, *New York Times v. Sullivan is Safe from Sarah Palin*, BLOOMBERG LAW (Feb., 25, 2022, 4:00 AM) <https://news.bloomberglaw.com/privacy-and-data-security/new-york-times-v-sullivan-is-safe-from-sarah-palin> [https://perma.cc/68UE-49MQ]; see also Eugene Volokh, *Perhaps the S. Ct. Will Reconsider the “Actual Malice” Libel Test – but Not in Palin v. N.Y. Times*, REASON (Feb. 15, 2022, 4:35 PM), <https://reason.com/volokh/2022/02/15/perhaps-the-s-ct-will-reconsider-the-actual-malice-libel-test-but-not-in-palin-v-n-y-times/> [https://perma.cc/5XBQ-XFJZ].

81. See *supra* notes 66–80 and accompanying text.

defendants under the state common law of defamation, at least some state laws provide significant protection to press defendants.⁸² As the 2022 MLRC WHITE PAPER reports, media defendants often win defamation cases on libel-specific tort defenses.⁸³ To the extent that defamation actions are rebranded as anti-disinformation vehicles, however, the rationale could be used to attack such defendant protections under state common law as well.⁸⁴

One important inflection point that could well affect the ways in which courts other than the Supreme Court deal with defamation cases going forward is the American Law Institute's ("ALI") new project revising the Restatement Second of Torts, Defamation.⁸⁵ Although the ALI's Restatement cannot itself revise constitutional limits on defamation law, it can foreground jurisdictional variations and highlight trends that appear more or less friendly to plaintiffs. Surely the new Restatement will attempt to address how to apply traditional tort principles to social media, artificial intelligence, and new manipulative technologies.⁸⁶ To the extent that this new Restatement, when adopted, becomes as influential as the Restatement Second of Torts, any narrowing interpretations of existing doctrine reflected in the new Restatement could lead to constricted applications of common law aspects of the defamation tort as well.

82. See, e.g., Michael Norwick, *Chapter 3: The Empirical Reality of Contemporary Libel Litigation*, in MLRC, *NEW YORK TIMES V. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT* (Media Law Resource Center 2022) 97, 98, 115–17.

83. *Id.* at 113.

84. The MLRC has recently argued that these common law protections are key to press work and appropriately balance freedom of the press with the interest in reputation. See *id.* at 98. The revision or reversal of the *Sullivan* framework would also doubtless have trickle-down effects on privacy law. See Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 CORNELL L. REV. 317, 362–72 (2019) (noting that the *Sullivan* regime undermined privacy in addition to its effect on defamation law). Some scholars have argued in support of pro-plaintiff changes in state defamation law apart from the reversal of the *Sullivan* precedent. See generally Patrick M. Garry, *The Erosion of Common Law Privacy and Defamation: Reconsidering the Law's Balancing of Speech, Privacy, and Reputation*, 65 WAYNE L. REV. 279 (2020).

85. See *Restatement of the Law Third, Torts: Defamation & Privacy*, AM. L. INST., <https://www.ali.org/projects/show/torts-defamation-and-privacy/> [<https://perma.cc/GFX2-7MK4>]; see also Arbel & Mungar, *supra* note 12, at 455.

86. See generally Lyrissa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL'Y & L. 155 (2016) (recommending ways to adapt the opinion privilege and actual malice standard to social media cases).

III. THE MODERN DEFAMATION RENAISSANCE

Critics of *New York Times v. Sullivan* have influentially asserted in recent years that *Sullivan*'s constitutional requirements create an insurmountable hurdle to otherwise-meritorious defamation claims and therefore incentivize the press to spread lies with impunity about public officials and public figures.⁸⁷ But recent empirical data and an overview of the defamation litigation landscape suggest a different story.

A. What the Data Tells Us About Defamation Litigation Today

The history of U.S. defamation cases appears to be one of ebb and flow.⁸⁸ After a spate of high-profile defamation actions in the 1980s,⁸⁹ libel litigation subsided⁹⁰ until a notable uptick in defamation claims in recent years.⁹¹ Contrary to the “near immunity from liability” supposedly guaranteed by actual malice standard,⁹² the data indicate that the subsidence in libel trials over the relevant time period is entirely consistent with the overall reduction in the

87. In Justice Gorsuch's recent words, “the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability.” *Berisha v. Lawson*, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J. dissenting); see also Logan, *supra* note 7, at 810 (concluding that “[i]n sum, the threat that defendants today face from libel litigation is virtually nil”).

88. See generally Samantha Barbas, *The Press and Libel Before New York Times v. Sullivan*, 44 COLUM. J.L. & ARTS 511, 514 (2021). While in the 1970s, the defamation tort “appeared headed for obsolescence,” the 1980s reflected “a dramatic proliferation of highly publicized libel actions brought by well-known figures who [sought and often received] staggering sums of money.” Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1 (1983).

89. See, e.g., Smolla, *supra* note 88, at 1.

90. See, e.g., Logan, *supra* note 7, at 778; see also *id.* at 808–10 (describing findings of MLRC 2018 report on libel litigation).

91. According to the 2022 MLRC WHITE PAPER, and contrary to the assumptions of *Sullivan* critics, “the available data indicates that the number of libel complaints brought against media has actually increased in recent years.” Norwick, *supra* note 82, at 115. The uptick in defamation cases has been noted elsewhere as well. See, e.g., Jane E. Kirtley, *Uncommon Law: The Past, Present and Future of Libel Law in a Time of “Fake News” and “Enemies of the American People,”* 2020 UNIV. CHI. LEGAL F. 117, 117 (2020); George Freeman & Lee Levine, Opinion, *An Increase in Libel Suits Shows Why We Need to Keep Protections for the News Media*, WASH. POST (Mar. 8, 2022, 12:21 PM), <https://www.washingtonpost.com/opinions/2022/03/08/libel-suit-increase-times-v-sullivan-news-media/> [https://perma.cc/HPS8-8VMD]; Ronald L.K. Collins, *First Amendment News 285: The Rise of Defamation Lawsuits By and Against Public Figures*, FIRE (Feb. 3, 2021), <https://www.thefire.org/first-amendment-news-285-the-rise-of-defamation-lawsuits-by-and-against-public-figures/> [https://perma.cc/DCH7-XN7F].

92. Logan, *supra* note 8, at 778.

number of trials of all sorts.⁹³ Moreover, despite any reduction in the number of defamation trials, the evidence suggests that settlements have replaced trials in many instances and that the number of defamation complaints has not diminished.⁹⁴ *Sullivan* critics' focus on assertedly low rates of plaintiff success on appeal⁹⁵ ignores cases that are settled prior to appeal or not appealed at all.⁹⁶ The data show that "'plaintiffs have won [nine] out of [nineteen] (47.4%) appeals of awards under the actual malice standard since the beginning of the 2000s, a far cry from 'immunity.'"⁹⁷ According to the MLRC's study, "while entire defense victories declined from 62.4% in the 1980s to 42.6% in the 2010s, settlements rose from a mere 7.5% of cases in the 1980s to 31.9% in the 2010s."⁹⁸ In any event, the uptick in highly-publicized actions by public figures now suggests that whatever the past, public figure plaintiffs now do not seem averse to threatening or filing litigation claims⁹⁹—or finding the lawyers who will represent them in doing so.¹⁰⁰ Moreover, the MLRC study demonstrates that actual malice was decisive for media wins in public figure cases in only a small percentage of the dispositive motions filed.¹⁰¹

In sum, empirical data do not support the exaggerated propositions that *Sullivan* has immunized the press from liability or that the actual malice requirement has foreclosed a flood of otherwise-

93. Norwick, *supra* note 82, at 100; *see also id.* at 98 ("The plain answer is that there is no evidence that *Sullivan* is impacting the year-to-year declines in *any* media trials.").

94. *Id.* at 97, 99.

95. Between 2010 and 2017, four out of nine, or 44.4%, of plaintiffs' damage awards in fact were affirmed on appeal in their entirety. *Id.* at 108–09 n.59. The MLRC data indicate that even though media defendants have done well on appeal, "the actual malice standard only helps them some of the time, and the data does not support the notion that actual malice has become a more potent weapon over the decades." *Id.* at 109. Indeed, between 2000 and 2017, "plaintiffs in actual malice cases did better on appeal than cases tried under negligence and other legal standards." *Id.*

96. *Id.* at 108. The 2022 MLRC WHITE PAPER points out that "[b]etween 2000 and 2017, 33 of 70 (47%) of the awards that survived post-trial motions were not appealed or were settled." *Id.* at 109.

97. *Id.* at 110.

98. *Id.* at 119.

99. This rests on the assumption that an increase in public figure litigation activity logically suggests a decline in deterrent effect. Of course, this doesn't indicate anything about the degree of any such reduction (assuming the *Sullivan* standard did have such an effect).

100. *See infra* Section III.B.

101. Norwick, *supra* note 82, at 111–12. Although the media won seventy-five percent of the dispositive motions brought by the MLRC's sample of news media defendants, "only [sixteen percent] of the motions were defense wins . . . on the issue of actual malice." *Id.* at 111.

meritorious defamation claims.¹⁰² Instead, the data show an increase in libel claims during the Trump era, an increase in settlements, and an increase in the number of plaintiffs prevailing in dispositive motions (and even at trial). The data contradict the assertion that the threat of libel suits for the press is “virtually nil.”¹⁰³

B. *Cautionary Messages to the Press from Some High-Profile Litigations*

A look at some recent, highly-publicized defamation cases shows why they might reasonably be perceived as threatening by the press and might incentivize timorous journalistic coverage.¹⁰⁴ Since the start of the Trump presidency, “political” libel cases by prominent and visible political people—some brought by repeat player “libel bull[ies]”¹⁰⁵—have been growing.¹⁰⁶ Familiar examples include Donald Trump’s numerous defamation suits against news organizations and others,¹⁰⁷ former Congressman and rabid Trump-supporter Devin Nunes’s numerous defamation suits against a variety of news organizations,¹⁰⁸ Sarah Palin’s claims

102. Norwick, *supra* note 82, at 114.

103. See Logan, *supra* note 8, at 810.

104. This Section highlights some recent defamation actions and does not purport to be exhaustive.

105. See, e.g., Casey Sullivan, *Trump ‘Libel Bully’ Article Was Never Rejected, Says ABA*, BLOOMBERG L. (Nov. 3, 2016, 4:07 PM), <https://news.bloomberglaw.com/business-and-practice/trump-libel-bully-article-was-never-rejected-says-aba> [https://perma.cc/L5CD-V3TN]; see also Ballard Spahr LLP & Davis Wright Tremaine LLP, *Chapter 4: The Reality of Contemporary Libel Litigation*, in 2022 MLRC WHITE PAPER 153 (listing cases by “prominent political figures and government officials” against news media “for reporting that criticizes official conduct”).

106. See Norwick, *supra* note 82, at 117 (characterizing various Trump-era cases as “politically charged”).

107. See, e.g., Marc Tracy, *Trump Campaign Sues The Washington Post for Libel*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/business/media/trump-washington-post-libel-lawsuit.html> [https://perma.cc/EE9C-WLVQ]; Donald J. Trump for President, Inc. v. Northland TV, LLC, 2020 U.S. Dist. LEXIS 110004 (W.D. Wis. June 23, 2020); Donald J. Trump for President, Inc. v. CNN Broad., Inc., 500 F. Supp. 3d 1349 (N.D. Ga. 2020); see also Susan E. Seager, *Trump is a Libel Bully but Also a Libel Loser*, COMM. LAW., Fall 2016, at 1; Dan Mangan, *Defamation Lawsuit over Trump Rape Claim by Writer E. Jean Carroll Set to Resume Discovery, Lawyers Say*, CNBC, <https://www.cnbc.com/2022/05/05/trump-defamation-lawsuit-by-e-jean-carroll-set-to-resume-discovery.html> [https://perma.cc/9U3R-XL4P] (May 5, 2022).

108. See, e.g., Nunes v. Lizza, 12 F.4th 890 (8th Cir. 2021); Nunes v. CNN, Inc., 31 F.4th 135 (2d Cir. 2022); Nunes v. WP Co. LLC, 2021 U.S. Dist. Lexis 150498 (D.D.C. Aug. 11, 2021); Nunes v. NBCUniversal Media, LLC, 582 F. Supp. 3d 387 (E.D. Tex. 2022); Nustar Farms v. Ryan Lizza & Hearst Mag. Media, ___ F. Supp. 3d ___ (N.D. Iowa 2020); Nunes v. Twitter, Inc., 105 Va. Cir. 230 (2020); Nunes v. Meredith, 2022 U.S. Dist. LEXIS 109476 (E.D. Cal. June 21, 2022); Nunes v. NBCUniversal Media, LLC, ___ F. Supp. 3d ___ (S.D.N.Y.

against *The New York Times*,¹⁰⁹ One America News Network's suit against Rachel Maddow and MSNBC,¹¹⁰ and Trump-aligned Arizona Sheriff's Joe Arpaio's claims against various media organizations.¹¹¹ Even when not brought directly by politicians, several of the high-profile cases have been infused with politics and fought over political ideology.¹¹² Observers see these suits as part of a

2022); *Nunes v. CNN*, 520 F. Supp. 3d 549, 561–62 (S.D.N.Y. 2021) (dismissing \$435 million defamation suit); *see also* Norwick, *supra* note 82, at 117. Recently, the Southern District of New York refused to dismiss one of the counts of defamation in Devin Nunes' action against Rachel Maddow over her discussion of Russian interference in American elections. *Nunes v. NBCUniversal Media, LLC*, ___ F. Supp. 3d ___ (S.D.N.Y. 2022); *supra* note 15 (citing to Nunes' recent action against *The Guardian*).

109. *See, e.g.*, Jeremy W. Peters, *Sarah Palin v. New York Times Spotlights Push to Loosen Libel Law*, N.Y. TIMES (Jan. 23, 2022), <https://www.nytimes.com/2022/01/23/business/media/sarah-palin-libel-suit-nyt.html?searchResultPosition=19> [<https://perma.cc/R4Y6-D26T>] [hereinafter Peters, *Sarah Palin v. New York Times*]. Former Alaska Governor Sarah Palin sued *The New York Times* in 2017 on the basis of an editorial that alleged her political action committee "incited" the 2011 mass shooting that wounded Arizona Democratic Representative Gabby Giffords. The op-ed, which was later corrected, incorrectly indicated that the shooting was incited by an advertisement by Palin's PAC which showed Democratic congressional districts such as Giffords' with an image of crosshairs over them. The 2017 action was dismissed by the Southern District of New York in 2017, *Palin v. New York Times Co.*, 264 F. Supp. 3d 527 (S.D.N.Y. 2017), but the Second Circuit overturned that decision in 2019. *Palin v. New York Times Co.*, 940 F.3d 804, 807–08 (2d Cir. 2019) (holding that "the district court erred in relying on facts outside the pleadings to dismiss the complaint . . . [and] that Palin's Proposed Amended Complaint plausibly states a claim for defamation and may proceed to full discovery"). The case proceeded to trial and the jury found for *The New York Times*. *See, e.g.*, Jeremy W. Peters, *Sarah Palin's Libel Claim Against The Times Is Rejected by a Jury*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/business/media/new-york-times.html> [<https://perma.cc/74FT-G7AY>] [hereinafter Peters, *Sarah Palin's Libel Claim*]. The day before the jury's verdict, Judge Rakoff stated that he would set aside the verdict if the jury returned a verdict in Palin's favor. *See, e.g.*, Jeremy W. Peters, *Judge Plans to Dismiss Sarah Palin's Lawsuit Against The Times*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/14/business/sarah-palin-new-york-times.html> [<https://perma.cc/NK4J-CETR>] [hereinafter Peters, *Judge Plans to Dismiss*]. The following opinion explains the circumstances and the judge's reasoning. *Palin v. New York Times Co.*, 588 F. Supp. 3d 375 (S.D.N.Y. 2022) (motion for judgment as a matter of law/directed verdict), *motion for reconsideration denied*, 2022 U.S. Dist. LEXIS 97056 (S.D.N.Y. 2022). The Second Circuit denied Palin's mandamus petition. Order, *In re Sarah Palin*, No. 22-629 (2d Cir. June 16, 2022), <https://s3.documentcloud.org/documents/22062242/palin-mandamus.pdf> [<https://perma.cc/N3YD-QYAV>]. Her appeal to the Second Circuit will thus proceed in the ordinary course. *See* Brief of Appellant, *Palin v. New York Times Co.*, No. 22-558 (2d Cir. Sept. 15, 2022), https://drive.google.com/file/d/1UUGbE7lwIJYnr3dsfdq15CkV996CI6w_/view [<https://perma.cc/J2RR-ZAWL>].

110. *See, e.g.*, Celine Castronuovo, *OAN Loses Appeal in Defamation Lawsuit Against Rachel Maddow*, THE HILL (Aug. 17, 2021, 2:04 PM), <https://thehill.com/homenews/media/568213-oan-loses-appeal-in-defamation-lawsuit-against-rachel-maddow/?rl=1> [<https://perma.cc/64M9-R7EP>]; *Avenatti v. Fox News Network, LLC*, 41 F.4th 125 (3d Cir. 2022).

111. *Arpaio v. Robillard*, 459 F. Supp. 3d 62 (D.D.C. 2020); *Arpaio v. Zucker*, 414 F. Supp. 3d 84 (D.D.C. 2019); *Arpaio v. Cottle*, No. 18-cv-02387, 2019 U.S. Dist. LEXIS 236331 (D.D.C. Dec. 3, 2019).

112. Dominion and Smartmatic's suits implicate right-wing claims that election fraud tainted the legitimacy of the 2020 presidential election, while parents' claims against Alex

strategic front in the attack on the mainstream media;¹¹³ many were incorporated by Trump and his supporters into their narrative of disciplining the liberal, “fake news” press.¹¹⁴

Another group of recent cases with a political valence involved moneyed, high-profile individuals, including foreign millionaires and public officials in foreign governments as well as controversial U.S. businessmen.¹¹⁵ Deep-pocketed plaintiffs motivated by per-

Jones and InfoWars over his conspiracist denial of the Sandy Hook school shooting seek to put both political conspiracies and current debates about gun control on trial. *Lafferty v. Jones*, 336 Conn. 332 (2020); *Jones v. Pozner*, No. 03-18-00603-CV, 2019 Tex. App. LEXIS 9641 (3d Dist. Nov. 5, 2019); *Jones v. Heslin*, No. 03-20-00008-CV, 2020 Tex. App. LEXIS 6498 (3d Dist. Aug. 14, 2020). Right-wing sting organization Project Veritas’s claims against *The New York Times* and Stanford University over deception and inaccuracy charges were clearly designed to establish the organization as a legitimate news entity while whitewashing its goal of attacking mainstream “liberal” media and non-profit organizations. *See, e.g.*, Bill Grueskin, *A Matter of Opinion: Project Veritas, the New York Times, and a Bitter Defamation Suit*, COLUM. JOURNALISM REV. (May 18, 2021), <https://www.cjr.org/opinion/ny-times-project-veritas-defamation-lawsuit.php> [<https://perma.cc/K3QP-EFAC>]. Complaint, *Project Veritas v. Leland Stanford Junior Univ.*, 2022 U.S. Dist. LEXIS 88742* (W.D. Wash. 2022) (No. 2:21-cv-1326). High school student Nicholas Sandmann’s many lawsuits over coverage of a video of an interaction between him and Nathan Phillips in front of the Lincoln Memorial in 2019 implicated much broader fights over MAGA politics and ideology. *See, e.g.*, Kirtley, *supra* note 91, at 137–41. Suits brought by Russian oligarchs against BuzzFeed over the Steele Dossier are as much about Russian involvement in the Trump presidency as they are about their own personal reputations. *See, e.g.*, Complaint, 2018 N.Y. Misc. LEXIS 1657 (N.Y. Sup. Ct. 2018) (No. 154895/2017). Controversial mine owner Don Blankenship’s suit over the characterization of a conviction was inflected by his political views on criticism of government regulation. Complaint, *Blankenship v. Fox News Network, Inc.*, 2022 U.S. Dist. LEXIS 18890 (S.D. W. Va. 2022) (No. 2:19-cv-00236).

113. *See, e.g.*, David L. Hudson, *How Trump and Nunes Use Defamation Lawsuits To Silence Their Critics*, FIRST AMEND. WATCH (June 30, 2022), <https://firstamendmentwatch.org/how-trump-and-nunes-use-defamation-lawsuits-to-silence-their-critics/> [<https://perma.cc/3XUD-AYLN>]. The Palin appeal brief makes this explicit: “Defamation actions are the necessary and indispensable means of checking and balancing the exponentially increasing power of the Fourth Estate . . .” *Palin Appellant’s Brief, supra* note 109, at 31. Less publicly visible political actors have sued the press for defamation as well. *See, e.g.*, *Moore v. Cecil*, 488 F. Supp. 3d 1144 (N.D. Ala. 2020); *Moore v. Senate Majority PAC*, 2022 U.S. Dist. LEXIS 96658 (N.D. Ala. 2022); *Bertrand v. Mullin*, 846 N.W.2d 884 (Iowa 2014); *Grayson v. No Labels, Inc.*, 2022 U.S. Dist. LEXIS 96317 (M.D. Fla. 2022).

114. *See, e.g.*, Cameron Knight, *Nick Sandmann Gets Shout Out from President Trump Following March for Life Speech*, CINCINNATI ENQUIRER (Jan. 27, 2020, 9:29 AM), <https://www.cincinnati.com/story/news/2020/01/27/nick-sandmann-gets-shout-out-trump-following-march-life/4586818002/> [<https://perma.cc/6K2P-7CZ3>].

115. For a summary of such cases involving foreign actors, *see, e.g.*, Ballard Spahr et al., *supra* note 105, at 150, 155–56. Even *Berisha v. Lawson*—the case used by Justice Gorsuch to launch his attack on the continuing viability of *Sullivan*—has been described as a defamation action by a well-known foreign figure seeking to squelch criticism and corruption claims. *Id.* at 149–50. In the U.S., Murray Energy’s scorched earth campaigns against numerous news organizations and James VanderSloot’s attempt to discipline progressive magazine *Mother Jones* serve as examples. *See, e.g.*, Liz Spayd, *A Rare Libel Suit Against The Times*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/public-editor/murray-energy-libel-suit.html> [<https://perma.cc/W23H-JMTB>]; Monika Bauerlein,

sonal animus and represented by celebrity trial lawyers¹¹⁶ brought suits against press organizations in cases without a direct political connection as well.¹¹⁷

Regardless of their ultimate outcome, these cases were often the subject of media attention and public comment. They doubtless raised the press' awareness of being in the litigation sight-lines of political figures and other powerful actors with non-economic motives for suit.

C. Current Doctrine—A Mixed Picture with Pro-Plaintiff Trends

The overall doctrinal landscape of defamation law is particularly complicated today. On the one hand, the jurisprudence of *New York Times v. Sullivan* and progeny, as well as some state law news-protective privileges and pleading rules are still generally defense-protective.¹¹⁸ However, in addition to the sheer increase in the number of recent defamation actions are some notable developments indicating at least a degree of pro-plaintiff recalibration.

1. Pro-Plaintiff Trends

Recent defamation litigation suggests a variety of pro-plaintiff trends, such as an increase in the number of instances in which defense motions to dismiss are rejected—leading to extended

The Legal War Against Mother Jones Keeps Getting More Intense, MOTHER JONES (Nov. 2, 2021), <https://www.motherjones.com/media/2021/11/the-legal-war-against-mother-jones-keeps-getting-more-intense/> [<https://perma.cc/N8U5-CBZY>] (“[L]awsuits aren’t necessarily about winning. Some are just about inflicting as much pain as possible.”); Emily Bazelon, *Billionaires vs. the Press in the Era of Trump*, N.Y. TIMES MAG. (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/magazine/billionaires-vs-the-press-in-the-era-of-trump.html> [<https://perma.cc/7HBR-PEHQ>]; Shine Tu & Nicholas Stump, *Free Speech in the Balance: Judicial Sanctions and Frivolous SLAPP Suits*, 54 LOYOLA LA L. REV. 623 (2021) (describing pattern of *Murray* cases).

116. See Jonathan Peters, *What the Lawyers Who Sue the Press Think of the Press, and Media Law*, COLUM. JOURNALISM REV. (July 30, 2020), <https://www.cjr.org/analysis/lawyers-who-sue-the-press.php> [<https://perma.cc/W5UR-SHTE>] (quoting the headline “Have a score to settle with the press? . . .”).

117. Although styled a privacy rather than a defamation action, wrestler Hulk Hogan’s \$140 million suit that bankrupted Gawker is also a relevant example because of its likely chilling effects on the press. The Hogan case is intimidating not only because its damage award shuttered a news organization, but also because the litigation was secretly funded by Silicon Valley billionaire Peter Thiel with the specific intent of censoring Gawker. See, e.g., Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761, 777–78 (2017).

118. See *infra* Section III.C.2.

motion practice, discovery, full trials and high dollar verdicts for plaintiffs; the expansion in defamation remedies including more anti-libel injunctions; the openness of media defendants to accept extremely high-value settlements; the unexpected increase in criminal libel prosecutions; and the more plaintiff-friendly interpretation of some defamation elements.

a. Avoiding Early Dismissals

Although many defamation plaintiffs have ultimately lost in court, several—including high-profile plaintiffs such as Sarah Palin, Dominion, and Smartmatic—have avoided early dismissals despite the *Sullivan* doctrine’s defense protections.¹¹⁹ This is a tremendously important development because it imposes high costs—in legal fees and personnel time and attention—and also creates significant incentives to settle cases.¹²⁰ Uncertainty of outcome, the need to devote resources to legal matters and distract journalists from current work, and the expenses of litigation are all likely to create incentives toward risk-aversity—particularly for small news organizations, new outfits with shaky funding, and independent journalists.¹²¹

b. High-Value Damage Awards, Settlements, and Legal Fees

Both damage awards and settlements involving the press have recently reached stratospheric levels. There have been “megaverdicts” in defamation cases since the 1980s,¹²² but those numbers have been dwarfed by some of the more recent figures. As evidenced by recent verdicts for Sandy Hook parents, Roy Moore, Johnny Depp, and university administrator Nicole Eramo, multi-million (and even billion) dollar verdicts are becoming practically

119. See, e.g., *Nunes v. WP Co. LLC*, 2021 U.S. Dist. Lexis 150498 (D.D.C. 2021); *Palin v. New York Times Co.*, 940 F.3d 804 (2d Cir. 2019); see also Ballard Spahr, *supra* note 105, at 143–49 (describing cases that have survived summary dismissal).

120. See *infra* Section III.A.

121. See, e.g., Laura Spinney, *How News Publications Put Their Legal Risk on Freelancers*, COLUM. JOURNALISM REV. (Apr. 28, 2021), <https://www.cjr.org/analysis/freelance-liability-risk.php> [<https://perma.cc/EVH6-H3L9>].

122. What appeared “staggering” in the 1980s (quoting Smolla, *supra* note 88) has greatly increased, with the median award against media companies having risen five-fold since the 1980s, to \$1.1 million as reported by a 2018 study. Alexandra M. Gutierrez, *The Case for A Federal Defamation Regime*, 131 YALE L.J.F. 19, 31 (Sept. 15, 2021), https://www.yalelawjournal.org/pdf/F7.GutierrezFinalDraftWeb_wiezxwoo.pdf [<https://perma.cc/B966-74XS>].

commonplace when plaintiffs win.¹²³ Plaintiffs in defamation cases now routinely make eye-popping claims of hundreds of millions—or billions, as in the pending Dominion and Smartmatic cases—and sometimes win astronomical awards.¹²⁴ As noted above, observers see the \$144 million damage award in Hulk Hogan’s breach of privacy case against Gawker, which led to Gawker’s bankruptcy and demise,¹²⁵ as a “bellwether”¹²⁶ for media liability more generally. To the extent that juries reflect public sentiment distrustful of the press, we can expect a continuing trend of high damage awards, which are likely, in turn, to reinforce public distrust.¹²⁷

Studies indicate that media defendants typically appealed verdicts against them in defamation litigation in the 1980s.¹²⁸ Throughout most of the twentieth century, the institutional press had a practice of refusing to pay settlements in defamation cases.¹²⁹ By contrast, media defendants today “decline appeals in nearly a quarter of cases” and settle after trial as quickly as possible.¹³⁰ They sometimes do so for exorbitant amounts of money.

123. In what may be the biggest defamation verdict in U.S. history, a Connecticut court ordered InfoWars’ Alex Jones to pay damages and fees totaling approximately \$1.5 billion to nine plaintiffs in one of the Sandy Hook defamation cases. *See, e.g.*, Timsit, *supra* note 38. *See also* Associated Press, *A Democratic-aligned Super PAC is Ordered to Pay Roy Moore \$8.2M in a Defamation Suit*, NPR (Aug. 13, 2022, 11:19 AM), <https://www.npr.org/2022/08/13/1117365135/roy-moore-defamation-suit-award-super-pac> [<https://perma.cc/XFF7-AHCK>] (reporting on recent award by an Alabama jury of \$8.2 million in damages to Roy Moore over a television ad recounting accusations of misconduct with underage girls); Williamson, *supra* note 37 (reporting \$4.1 million in compensatory and \$45 million in punitive damages for plaintiff in a different case brought against Alex Jones of InfoWars over the Sandy Hook shooting); Bill Wyman, *5 Takeaways from the Rolling Stone Defamation Verdict*, COLUM. JOURNALISM REV. (Nov. 29, 2016), https://www.cjr.org/analysis/rolling_stone_verdict_defamation_case.php [<https://perma.cc/SYK3-HYTB>] (describing University of Virginia administrator’s \$3 million damage award from *Rolling Stone* magazine over statements about her in a discredited story about an alleged gang rape at the school); *see also supra* notes 53–57 and accompanying text (describing *Depp v. Heard* case and verdict).

124. *See supra* note 3. Damage claims in the hundreds of millions or more are not limited to large companies. Sandy Hook parents have won over a billion dollars in damages across their lawsuits against Alex Jones and InfoWars. *See supra* note 123. High schooler Nick Sandmann sued CNN for \$275 million. Julia Fair, *Nick Sandmann’s Settlement with CNN Was Almost Public. A Birthday and a Pandemic Changed That*, CINCINNATI ENQUIRER, <https://www.cincinnati.com/story/news/2020/08/24/kentucky-nick-sandmann-how-much-settlement-amount-cnn-public-covid-19-delay/3428644001/> [<https://perma.cc/C6C9-GRAS>] (Aug. 25, 2020, 12:15 PM).

125. *See Levi, supra* note 117. Gawker declared bankruptcy because it was unable to pay for the supersedeas bond that would have permitted it to appeal the jury’s award. *Id.*

126. *See Gutierrez, supra* note 122, at 37.

127. *See id.*, at 36; Bazelon, *supra* note 117.

128. *See Gutierrez, supra* note 122, at 31; Norwick, *supra* note 82, at 121.

129. *See Barbas, supra* note 88, at 526, 529 n.149.

130. *See Gutierrez, supra* note 122, at 31; *see also* Norwick, *supra* note 82, at 120–21.

Because the details of these settlements are often kept private by non-disclosure agreements, there is a paucity of public information about the range of settlement amounts.¹³¹ Still, some recent settlement amounts have been publicly disclosed. For example, the \$177 million settlement figure paid by the media in the “pink slime” case¹³² is said not to include the amount contributed by ABC’s insurer.¹³³ ABC maintained that its reporting was factually accurate despite the settlement.¹³⁴ Settlements for such large amounts and astronomical damage awards, even if relative unicorns, are likely to encourage the filing of defamation actions.

In addition to the monetary recoveries and settlements in defamation cases, the expenses and legal fees of defamation actions are extensive and particularly harmful to local media.¹³⁵ Much has been written about the existential threats to local news and the extensive “news deserts” that dot the U.S. informational landscape.¹³⁶ An article in *Poynter* has estimated that defamation suits can cost newspapers an average of \$500,000 to win dismissal—a

131. See, e.g., Norwick, *supra* note 82, at 121–22. Most of the cases were settled, but Sandmann has refused to provide any public information about the amounts. Nicholas Sandmann (@N1ckSandmann), TWITTER (Dec. 17, 2021, 5:05 PM), <https://twitter.com/n1cksandmann/status/1471964919637876736> [<https://perma.cc/ADF5-23AD>]. Sandmann did recently lose five of his actions. *Sandmann v. New York Times Co.*, 2022 U.S. Dist. LEXIS 132990, at *4–5, *22–25 (E.D. Ky. 2022).

132. See sources cited *supra* note 42; *infra* notes 133–34, 139.

133. See Christine Hauser, *ABC’s “Pink Slime” Report Tied to \$177 Million in Settlement Costs*, N.Y. TIMES (Aug. 10, 2017), <https://nytimes.com/2017/08/10/business/pink-slime-disney-abc.html> [<https://perma.cc/M2HZ-2GP8>]; Gutierrez, *supra* note 122, at 37 (describing settlement of over \$177 million by ABC’s parent company Walt Disney to end a \$1.9 billion defamation action over an ABC program’s characterization of Beef Products’ beef as “pink slime”).

134. D. Victoria Baranetsky & Alexandra Gutierrez, *OP-ED: What a Costly Lawsuit Against Investigative Reporting Looks Like*, COLUM. JOURNALISM REV. (Mar. 30, 2021), https://www.cjr.org/tow_center/costly-lawsuit-against-investigative-reporting-looks-like.php [<https://perma.cc/CRU2-R2W9>] (noting that “ABC maintains that its reporting was factually accurate” despite its \$177 million settlement).

135. See, e.g., Nicole J. Ligon, *Protecting Local News Outlets from Fatal Legal Expenses*, 95 N.Y.U. L. REV. ONLINE 280, 281 (2020); see also Baranetsky & Gutierrez, *supra* note 134; Kevin Drum, *A Billionaire Sued Us. We Won. But We Still Have Big Legal Bills to Pay.*, MOTHER JONES (Nov. 2, 2015), <https://motherjones.com/kevin-drum/2015/11/billionaire-sue-d-us-we-won-we-still-have-big-legal-bills-pay/> [<https://perma.cc/J7BE-2VLN>].

136. See Jones & West, *supra* note 9, at 378–79 (citing PENELOPE MUSE ABERNATHY, *THE EXPANDING NEWS DESERT* (2018)).

figure that would pay the salaries of ten reporters.¹³⁷ Smaller news outlets have faced bankruptcy as a result of high legal fees.¹³⁸

Finally, many news organizations today are owned by corporate entities whose main interests are not limited to journalism and journalism values. Especially for such news outlets, important questions are raised about the alignment of interests of reporters, news organizations and non-journalist corporate owners.¹³⁹ Risk-averse corporate owners might well both enter into settlements and also put pressure on their news outlets to avoid controversial reporting that would likely generate defamation lawsuits and create drains on the parent companies' balance sheets.

c. Anti-Libel Injunctions and Criminal Libel Law

Recent scholarship has shown that, contrary to expectations, anti-libel injunctions have been issued in increasing numbers in addition to high damage awards and settlements.¹⁴⁰ Thus, even if the possibility of large damage awards would not necessarily deter judgment-proof social media defamers,¹⁴¹ anti-libel injunctions can serve as effective deterrents. Violating an anti-libel injunction is punishable by contempt and possible imprisonment.¹⁴² The Supreme Court elected not to rule on the permissibility of injunctive relief in libel cases in *Tory v. Cochran*.¹⁴³ Since then, while some scholars and courts have differed regarding the constitutional permissibility of such anti-libel injunctions,¹⁴⁴ some have argued that

137. Kelly McBride, *McClatchy Could Hire 10 Reporters for the Money It Will Spend to Get Kevin Nunes Lawsuit Dismissed*, POYNTER (Apr. 11, 2019), <https://www.poynter.org/ethics-trust/2019/mcclatchy-could-hire-10-reporters-for-the-money-it-will-spend-to-get-devin-nunes-lawsuit-dismissed/> [<https://perma.cc/82SE-33JV>].

138. Ligon, *supra* note 135, at 281.

139. The “pink slime” case, for example—in which the reporters and network did not admit to falsity in their reporting—nevertheless led to a shockingly high settlement by their corporate owner. *See supra* notes 42, 133–34.

140. *See, e.g.*, Eugene Volokh, *What Cheap Speech Has Done: (Greater) Equality and Its Discontents*, 54 U.C. DAVIS L. REV. 2303, 2312 (2021) [hereinafter Volokh, *What Cheap Speech Has Done*]; Eugene Volokh, *Anti-Libel Injunctions*, 168 U. PA. L. REV. 73, 76–77, 136 (2019) [hereinafter Volokh, *Anti-Libel Injunctions*]; David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 2 (2013).

141. *See* Volokh, *What Cheap Speech Has Done*, *supra* note 140, at 2310–11.

142. *Id.* at 2312.

143. *Tory v. Cochran*, 544 U.S. 734, 734 (2005).

144. For scholars arguing that anti-libel injunctions can pass constitutional muster, *see, e.g.*, Volokh, *Anti-Libel Injunctions*, *supra* note 140, at 78; Ardia, *supra* note 140, at 2; Doug Rendelman, *The Defamation Injunction Meets the Prior Restraint Doctrine*, 56 SAN DIEGO L. REV. 615, 616 (2019). Some courts “still categorically forbid injunctions against

properly drawn injunctions should pass constitutional muster.¹⁴⁵ Of course, under what has come to be known as the “modern rule,” injunctions are allowed to restrict speech that has been adjudicated to be unlawful,¹⁴⁶ and the constitutional viability of the injunctions will depend on the breadth and specifics of the injunction.¹⁴⁷

Finally, although many have assumed that libelous statements do not lead to criminal prosecutions, recent scholarship has shown that this assumption is inaccurate and that there has been an uptick in criminal prosecutions for libelous speech in the jurisdictions in which criminal libel is still cognizable.¹⁴⁸

d. Pro-Plaintiff Doctrinal Interpretations, Particularly in Online Cases

Courts and scholars have been complaining that the *Sullivan* approach to defamation undercounts the social value and importance of reputation and privacy and over-values the interests of the press. Accordingly, some have begun to adopt doctrinal interpretations designed to readjust the balance. In the context of public figure findings, for example, while some courts continue to apply the actual malice standard by characterizing plaintiffs as limited purpose public figure simply because of their status as victims or because they gave news interviews,¹⁴⁹ recent cases have required

defamation.” Steve Tensmeyer, *Constitutionalizing Equity: Consequences of Broadly Interpreting the “Modern Rule” of Injunctions Against Defamation*, 72 N.Y.U. ANN. SURV. AM. L. 43, 50 (2017).

145. See Volokh, *What Cheap Speech Has Done*, *supra* note 140, at 2313 (noting cases); Ardia, *supra* note 140, at 5–7.

146. See, e.g., Tensmeyer, *supra* note 144, at 45.

147. See generally Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)*, 45 HARV. J.L. & PUB. POL’Y 147 (2022).

148. See, e.g., Volokh, *What Cheap Speech Has Done*, *supra* note 140, at 2315; Volokh, *Anti-Libel Injunctions*, *supra* note 140, at 120–28 (discussing criminal libel laws); see also Thomas F. Harrison, *‘Disinformation’ can be a Crime, 1st Circuit rules*, COURTHOUSE NEWS SERV. (Nov. 8, 2022), <https://www.courthousenews.com/disinformation-can-be-a-crime-1st-circuit-rules/> [<https://perma.cc/9RVG-AU44>] (detailing a case brought against poster of a comment to a newspaper article). For a report on misuse of criminal libel laws outside the U.S., see generally Rosario Soraide, *The “Misuse” of the Judicial System to Attack Freedom of Expression: Trends, Challenges and Responses*, UNESCO (2022), <https://unesdoc.unesco.org/ark:/48223/pf0000383832> [<https://perma.cc/B6F5-B9UD>].

149. See, e.g., *McKee v. Cosby*, 874 F.3d 54, 61–62 (1st Cir. 2017); see also Reynolds, *supra* note 21, at 478 (“By accusing someone—especially someone famous—of rape, one automatically becomes a public figure, . . .”); Derigan Silver, *Going Viral: Limited-Purpose Public Figures, Involuntary Public Figures, and Viral Media Content*, 27 COMM. L. & POL’Y 1, 9–28 (2022); Edward Wasserman, *Digital Defamation, the Press and the Law*, AMER.

more.¹⁵⁰ In *LaLiberte v. Reid*, for example, the Second Circuit held that the plaintiff, who had attended a council meeting to oppose California's sanctuary-state law and whose picture had been posted on social media and elicited allegedly defamatory responses from MSNBC anchor Joy Reid, was not a limited purpose public figure "primarily because she lacked the regular and continuing media access that is a hallmark of public-figure status."¹⁵¹

As for actual malice, some recent courts have found that republication after doubts emerged should be sufficient to indicate reckless disregard.¹⁵² Courts have also been presented with complaints arguing that evidence of non-compliance with a press organization's own standards should be sufficient at least to avoid dismissal. In *Weisenbach v. Project Veritas*, for example, the court recently concluded that the plaintiff's "mosaic of averments," including that the defendant had developed a pre-conceived story line and solicited confirming information, were sufficient to plead actual malice and survive dismissal.¹⁵³ And while some courts continue to interpret opinion and rhetorical hyperbole in expansive and press-protective ways,¹⁵⁴ others suggest more stringent appli-

PROSPECT, (Aug. 23, 2021), <https://prospect.org/justice/digital-defamation-press-and-the-law/> [https://perma.cc/2ESQ-PX4E]; Abramson, *supra* note 74, at 24–25 (2017); Ashley Messenger & Kevin Delaney, *In the Future Will We All Be Limited-Purpose Public Figures?*, 30 COMM. LAW. 4, 5 (2014).

150. *Jones v. Pozner*, No. 03-18-00603-CV, 2019 Tex. App. LEXIS 9641, at 21–23 (Tex. App. 2019) (finding that giving an interview or starting a charitable organization is not enough to make someone a limited purpose public figure); *see also* *Nunes v. Lizza*, 486 F. Supp. 3d 1267, 1296 (N.D. Iowa 2020); *Reighard v. ESPN*, No. 355053, 2022 Mich. App. LEXIS 2720, at 20–21 (May 12, 2022) (complaining that courts increasingly find public figure status simply on the basis of the coverage plaintiffs have received). Media advocates have been sounding the alarm about the threats perceived by the press as a result of these pro-plaintiff decisions in defamation cases. The very fact that the MLRC produced a 204-page white paper arguing that Sullivan—an "essential precedent"—be preserved is a testament to the media defense bar's concern. *See* *Norwick*, *supra* note 82.

151. *LaLiberte v. Reid*, 966 F.3d 79, 83 (2d Cir. 2020) (reaffirming Second Circuit's prior four-part test for limited purpose public figure status).

152. *See, e.g.,* W. Wat Hopkins, *Defamation, Actual Malice and Online Republication: Lessons Learned From Eramo v. Rolling Stone et al.*, 17 APPALACHIAN J.L. 127, 141 (2017/2018) (explaining, regarding *Eramo v. Rolling Stone*, that the jury found actual malice due to the alleged victim's "back-tracking" and the fact that the publisher retained the story on the magazine's website even after questions were raised about its accuracy); *see also infra* note 289 and accompanying text.

153. *Weisenbach v. Project Veritas*, No. 10819-2021, 48–49 (Pa. Com. Pl. July 15, 2022); *see also* *Lidsky*, *supra* note 35 (discussing the *Weisenbach* case).

154. For recent examples of broad interpretations of rhetorical hyperbole, *see, e.g.,* *McDougal v. Fox News Network, LLC*, 489 F. Supp. 3d 174, 177, 188 (S.D.N.Y. 2020) (dismissing Karen McDougal's slander per se action against Fox News over Tucker Carlson's on-air accusation that she extorted President Donald J. Trump out of approximately \$150,000 in exchange for her silence about an alleged affair between them on grounds of

cation of the defamation exceptions—at least at the pleading stage.¹⁵⁵

This pro-plaintiff doctrinal attitude is also particularly evident in cases requiring the application of print-based defamation law to the online context. For example, one of the more notable pro-plaintiff defamation developments last year was the fact that some courts—contrary to prior expectations—characterized hyperlinks to underlying stories or documents to be “republications.”¹⁵⁶ Some courts have interpreted post-publication tweets linking to the original story after a news organization has received a plaintiff’s claims of defamation to constitute republications raising “reasonable expectation[s] that discovery will reveal evidence’ of actual malice.”¹⁵⁷ In addition to republication arguments, plaintiff’s lawyers are also seeking to expand libel by implication claims.¹⁵⁸

More generally, one scholar asserts that “media defendants fare worse in state courts on average.”¹⁵⁹ Because the majority of defamation cases are litigated in state court, and due to statewide variation with respect to discovery, admissibility of expert testimony, availability of interlocutory appeals, and recognition of reporting privileges such as fair report, it is “difficult for reporters to bullet-proof their stories in anticipation of faraway claims.”¹⁶⁰

rhetorical hyperbole and failure to allege actual malice); *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1160 (9th Cir. 2021); *Cheng v. Neumann*, No. 2:21-cv-0081-LEW, 2022 U.S. Dist. LEXIS 19835, at *30 (D. Me. 2022).

155. For recent cases rejecting a broad reading of rhetorical hyperbole, see, e.g., *U.S. Dominion Inc. v. Powell*, 554 F. Supp. 3d 42, 57 (D.D.C. 2021); *Nunes v. Lizza*, 12 F.4th 890, 898 (8th Cir. 2021); see also *Weisenbach*, No. 10819-2021 at 35–36 (rejecting Project Veritas’s argument that its statements about *Weisenbach* were merely online hyperbole).

156. See, e.g., *Nunes*, 12 F.4th at 900; see also Noah Feldman, Opinion, *Court Opens a Libel Door and Bruises Free Speech*, BLOOMBERG (Sept. 24, 2021, 6:30 AM), <https://www.bloomberg.com/opinion/articles/2021-09-24/devin-nunes-win-in-libel-case-court-test-bruises-freedom-of-speech> [https://perma.cc/5M29-V44U] (criticizing this development). Recently, a federal court held that under Hawaii law, “liking” a Facebook post that contains a defamatory statement “does not constitute adoption or republication of the post.” *Gallagher v. Maternitywise Int’l, LLC*, Civ. No. 18-00364 LEK-KJM, 2022 U.S. Dist. LEXIS 198917, at *8–9 (D. Haw. 2022).

157. See, e.g., *Nunes*, 12 F.4th at 901 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). By contrast, other courts have held that referencing or linking to the original story should not be considered a republication. See, e.g., Mike Nepple, *Eighth Circuit: Post-Complaint Hyperlink to Unchanged Story Constitutes a Republication, May Show Actual Malice*, MLRC MEDIA LAW LETTER, Sept. 2021, at 13–15.

158. Nepple, *supra* note 157, at 15.

159. Gutierrez, *supra* note 122, at 32.

160. *Id.* On the federal side, there is also an uncertain element in the possibility of a Supreme Court rollback of the constitutional protections of the *Sullivan* regime. *Id.* at 41.

2. The Counter-Story

Still, as noted above, the doctrinal picture is complicated. Scholars have rightly pointed to the complexity of constitutionalized defamation doctrine and the degree to which the rules have led courts to inconsistent rulings.¹⁶¹ While that creates some room for pro-plaintiff trends, it would be an exaggeration to say it establishes a clear new judicial consensus on the side of reputation-protection. Moreover, from high pleading standards¹⁶² and other procedural protections in actual malice claims¹⁶³ that lead to libel defendants' frequent successes in motions to dismiss early in the litigation life-cycle, to the increase in strong anti-SLAPP legislation in major press jurisdictions such as New York,¹⁶⁴ defamation law is still by-and-large pro-defendant, especially if the plaintiff is a public figure.¹⁶⁵ *Sullivan*-skeptics therefore argue that more is needed to recalibrate the balance between speech and reputation interests than is offered under the current doctrinal picture.

161. See, e.g., Anderson, *supra* note 17, at 492; Reynolds, *supra* note 21, at 477–78.

162. Cases have applied the high pleading standards under *Twombly* and *Iqbal* to defamation cases where actual malice is to be proved by the plaintiff. See Judy M. Cornett, *Pleading Actual Malice in Defamation Actions After Twiqbal: A Circuit Survey*, 17 NEV. L.J. 709, 710 (2017). For a recent summary and critique, see Justin W. Aimonetti & M. Christian Talley, Comment, *How Two Rights Made A Wrong: Sullivan, Anti-Slapp, And The Underenforcement Of Public-Figure Defamation Torts*, 130 YALE L.J.F. 708, 712, 715–16 (2021).

163. See, e.g., *New York Times v. Sullivan*, 376 U.S. 254, 284–86 (1964) (explaining the need for procedural rules to encourage speech); David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1051–57 (2006). For discussions of procedural protections grounded on the First Amendment, see, e.g., Susan Gilles, *Taking First Amendment Procedure Seriously: An Analysis of Process in Libel Litigation*, 58 OHIO STATE L.J. 1753 (1998); see also Matthew Schafer, *Ten Years Later: Pleading Standards and Actual Malice*, COMM. LAW., Winter 2020, at 32–34.

164. For a critical view, see, e.g., Aimonetti & Talley, *supra* note 162.

165. See, e.g., Abramson, *supra* note 74, at 23; Messenger & Delaney, *supra* note 149, at 4–5. One of the areas in which scholars report doctrinal disarray is the status of corporate plaintiffs. See, e.g., Matthew D. Bunker, *Corporate Chaos: The Muddled-Jurisprudence of Corporate Public Figures*, 23 COMM. L. & POL'Y 1, 16, 19 (2018) (discussing “serious incoherence” of corporate public figure doctrine). In addition to pro-defense elements in constitutionalized defamation doctrine, common law privileges also impose constraints on plaintiffs in defamation actions. See, e.g., Garry, *supra* note 84 (criticizing expansive interpretations of such privileges).

a. Stringent Pleading Standards, Anti-SLAPP Statutes, and Common Law Privileges

Because the pleading standards set out by the Supreme Court in *Twombly* and *Iqbal*¹⁶⁶ are now applied by many federal courts at the motion to dismiss stage in defamation actions, the plaintiff must show a plausible claim of actual malice without access to discovery or risk dismissal.¹⁶⁷ While the Second Circuit recently applied the plausibility standard in a more plaintiff-friendly fashion in *Palin v. New York Times*, other courts have used it to dismiss actual malice claims rapidly,¹⁶⁸ leading one commentator to conclude that “the *Twombly/Iqbal* doctrine stands as an almost insuperable barrier to libel plaintiffs pleading malice.”¹⁶⁹ To be sure, there are conflicts among the lower federal courts with respect to their interpretations of what degree of plausibility is required to satisfy the federal pleading standard of *Twombly* and *Iqbal* in the actual malice context,¹⁷⁰ but defamation plaintiffs object that the stringent interpretation of the federal pleading standards used by some courts protect intentional liars through unfair procedural rulings that undermine the *Sullivan* balance of interests itself. Recently, Charles Harder’s¹⁷¹ petition for certiorari in *BYD Co. Ltd. v. Vice Media LLC* asserted that the application of the pleading standards of *Twombly* and *Iqbal* has created “*Sullivan-on-steroids*.”¹⁷²

Another statutory barrier to defamation recovery for plaintiffs is the proliferation of anti-SLAPP statutes. Some states—and particularly those in key press jurisdictions such as New York—have

166. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) are often referred to as adopting the “*Twiqbal*” pleading standard.

167. See generally Schafer, *supra* note 163. For an earlier discussion, see Clay Calvert, Emma Morehart & Sarah Papadelias, *Plausible Pleading and Media Defendant Status: Fulfilled Promises, Unfinished Business in Libel Law on the Golden Anniversary of Sullivan*, 49 WAKE FOREST L. REV. 47, 49–50 (2014).

168. Schafer, *supra* note 163, at 30.

169. Reynolds, *supra* note 21, at 476.

170. For example, as pointed out in the *BYD* cert petition, the Eleventh Circuit Court of Appeals and the District Court for the Eastern District of Pennsylvania have interpreted the *Twombly* and *Iqbal* standards stringently, requiring dismissal unless the plaintiff satisfies this “onerous” standard. Petition for Writ of Certiorari at 20, *BYD Co. Ltd. v. Vice Media LLC* (U.S. 2022). On the other hand, the Eighth and First Circuit Courts of Appeals have “applied a somewhat more relaxed standard.” *Id.* at 21.

171. See *infra* Section III.D (discussing Harder as one of the notable plaintiff’s defamation lawyers).

172. *BYD* Petition for Writ of Certiorari, *supra* note 170, at 4. As noted above, the *BYD* petition for certiorari was denied.

adopted particularly stringent provisions.¹⁷³ For example, under New York's newly expanded statute, all plaintiffs whose suits satisfy the anti-SLAPP trigger (of a communication in connection with an issue of public interest) must prove actual malice in order to recover damages.¹⁷⁴

As for the state common law of defamation, some complain that the press-protective privileges such as fair report—and, in some states, a neutral reportage privilege¹⁷⁵—are interpreted by some courts to privilege defendants' newsworthiness claims unduly.¹⁷⁶

173. See, e.g., Bunker & Erickson, *supra* note 80, at 147, 156–61. In addition to the variation within the statutory anti-SLAPP approaches, circuits differ as to the applicability of state anti-SLAPP legislation in federal courts. See, e.g., Shannon Jankowski & Charles Hogle, *SLAPP-ing Back: Recent Legal Challenges to the Application of State Anti-SLAPP Laws*, 37 COMM. LAW. 29 (2022). The Second Circuit Court of Appeals recently held that the California anti-SLAPP act did not apply in federal court. *LaLiberte v. Reid*, 966 F.3d 79, 86 (2d Cir. 2020) (noting also that the fifth, eleventh and D.C. Circuits sided with the second, while the first and ninth saw no conflict between their states' anti-SLAPP laws and the federal rules).

174. N.Y. CIV. RIGHTS LAW § 70-a (2023); see also Bunker & Erickson, *supra* note 80, at 156–57.

175. The neutral reportage privilege is a response to a broad republication doctrine whereby the person repeating and further distributing defamation is deemed liable for republishing the libel. The privilege, articulated in 1977 by the Second Circuit in *Edwards v. Audubon*, 556 F.2d 113 (2d Cir. 1977), sought to protect news organizations against liability for republishing newsworthy charges about public figures if they were made by responsible people and institutions, on condition that the publisher reported them neutrally, without endorsing the truth or falsity of the statements. The privilege has not been accepted by most courts, however. For some prior discussions of the neutral reportage privilege, see generally David A. Elder, *Truth, Accuracy and Neutral Reportage: Beheading the Media Jabberwock's Attempts to Circumvent New York Times v. Sullivan*, 9 VAND. J. ENT. & TECH. L. 551, 655–826 (2007); Justin H. Wertman, *Newsworthiness Requirement of the Privilege of Neutral Reportage is a Matter of Public Concern*, 65 FORDHAM L. REV. 789, 794–822 (1996). See also Christina Mazzeo, *Neutral Reportage Privilege: The Libel Defense Needed in a Struggling Democracy*, MARQUETTE U. (2019), https://epublications.marquette.edu/cgi/viewcontent.cgi?article=1550&context=theses_open [<https://perma.cc/2XXB-QCKG>]. In *U.S. Dominion v. Fox News*, the Delaware trial court applying New York law rejected Fox's summary judgment argument that it should be granted a neutral report privilege. Order at 69–73, *U.S. Dominion Inc. v. Fox Network LLC*, Nos. N21C-03-257, N21C-11-082 (Del. Super. Ct. Mar. 31, 2023). In addition to concluding that New York law did not recognize such a privilege, the *Dominion* court expressed doubt that Fox News would satisfy the requirements of such a privilege in any event. *Id.* at 72 (“Even if the neutral report privilege did apply, the evidence does not support that FNN conducted good-faith, disinterested reporting.”); see also *infra* notes 309–12 (discussing the *Dominion v. Fox* case). *Dominion* and Fox News settled the litigation immediately prior to trial, *Fox News Settles Defamation Suit for \$787.5 Million, Dominion Says*, N.Y. TIMES (Apr. 19, 2023), <https://www.nytimes.com/live/2023/04/18/business/fox-news-dominion-trial-settlement> [<https://perma.cc/9KE8-9XGT>]. The *Dominion* settlement occurred after this Article was in final proofs and the discussion in notes 311–12 has not been revised to include the settlement.

176. See, e.g., Garry, *supra* note 84, at 293; see also Norwick, *supra* note 82, at 98, 113 (noting that media defendants won in defamation cases far less on the issue of actual malice as libel-specific defenses in state tort law).

D. A Weaponizing Development—The Rise of the Plaintiff's Defamation Bar

One of the factors likely enhancing the effect/impact of the new arguments in favor of revisiting the *Sullivan* jurisprudence is the rise of a nascent but powerful plaintiff's defamation bar. This development is important not only for what it adds to legal arguments and litigation strategy, but also because of the public relations effects on audiences of high-profile, prominent advocates focusing on public opinion.

Historically, media lawyers familiar with defamation doctrine defended press outlets against claims of litigation, and the defamation bar was defense-centered.¹⁷⁷ Recently, however, some notable lawyers have begun taking on defamation cases on the plaintiffs' side.¹⁷⁸ For example, Hulk Hogan's attorney Charles Harder has a national reputation and represents high-profile individuals, including numerous political plaintiffs.¹⁷⁹ L. Lin Wood represented Nicholas Sandmann in suits against CNN and the *Washington Post*.¹⁸⁰ Clare Locke (law firm of partners Tom Clare and Elizabeth Locke) are similarly high-profile, representing, *inter alia*, Sarah Palin, Dominion Voting Systems, Project Veritas, and a number of

177. See, e.g., Barbas, *supra* note 88. Major newspapers addressed the threat of increased libel litigation by hiring sophisticated and experienced defamation counsel both to help train reporters to avoid defamation and to deploy effective litigation strategies in responding to such actions. See, e.g., *id.* at 528; see also Patrick File, *Retract, Expand: Libel Law, the Professionalization of Journalism, and the Limits of Press Freedom at the Turn of the Twentieth Century*, 22 COMM. L. & POL'Y 275 (2017) (discussing libel liability mitigation by retraction statutes). These efforts placed press issues on the national agenda and began to influence public perception of the benefits of the press as watchdog with professionalized practices. *Id.* at 283–84.

178. See Schafer, *supra* note 163, at 38 (“[T]he plaintiff's defamation bar is savvy and better organized than it used to be”).

179. See, e.g., Peters, *supra* note 116 (“Harder has become something of a public figure himself, described by the *Post* as ‘[o]ne of the most feared libel lawyers in America’ and by the *Hollywood Reporter* as ‘arguably the highest-profile media lawyer in America.’”); Meg Dalton, *One Legal Case Could Open a Can of Worms for Defamation Suits Against Writers*, COLUM. JOURNALISM REV. (Apr. 23, 2018), <https://www.cjr.org/watchdog/one-legal-case-could-open-a-can-of-worms-for-defamation-suits-against-writers.php> [<https://perma.cc/36NR-79PZ>].

180. See, e.g., Peters, *supra* note 116; Alan Judd, *Amid Personal Turmoil, Libel Lawyer Lin Wood Goes on the Attack for Trump*, ATLANTA J. CONST. (Dec. 18, 2020), <https://www.ajc.com/news/amid-personal-turmoil-libel-lawyer-lin-wood-goes-on-the-attack-for-trump/UBHBVKB65NGE7PU3RO5YYGTHXE/> [<https://perma.cc/73AU-93GZ>] (describing controversy over Wood's recent political behavior); In the Matter of L. Lin Wood, SDB 7564, Order No. 12 (Ga. 2022), <https://drive.google.com/file/d/1Wcl-iq3cANJA1e2vG0LZkaEtRrlgnSGA/view> [<https://perma.cc/YG2N-ACY8>] (exemplifying Wood's recent Georgia bar problems).

other high-visibility plaintiffs.¹⁸¹ Smartmatic's lawyer, J. Erik Connolly, represented the plaintiff in the "pink slime" case against ABC.¹⁸² Long-time law school dean and First Amendment expert Rodney Smolla is representing Dominion in its suit against Fox.¹⁸³ While all these attorneys are independent, and many are "celebrity" lawyers in their own right, one observer asserts that "[t]here are loose ties connecting the lawyers involved in some of these cases."¹⁸⁴

On the purely legal side, significant practical consequences flow from the rise of an expert plaintiff's defamation bar. Sophisticated lawyers can indirectly threaten and affect the behavior of the media without even suing them.¹⁸⁵ One of the most notable impacts rests on the early involvement of such lawyers, at the pre-publication stage. Elizabeth Locke's website proudly asserts, for example, that she has "killed flawed articles, storylines, and broadcast segments" in major news outlets and that "some of her biggest wins are the false stories the public will never hear about."¹⁸⁶ This

181. Peters, *supra* note 116; Erik Larson, *Conservative Power Couple Wage Legal War on Stolen-Election Myth*, BLOOMBERG L. (Feb. 26, 2021), <https://news.bloomberglaw.com/us-law-week/conservative-power-couple-wage-legal-war-on-stolen-election-myth-1> [<https://perma.cc/8L6E-7C5Z>]; see also Jonathan Peters, "I Also Consider Myself A First Amendment Lawyer", 18 VA. SPORTS & ENT. L.J. 109 (2019) [hereinafter Peters, *I Also*].

182. Smith, *supra* note 19; see also *supra* notes 42, 133–34, 139 (describing pink slime case and over \$177 million settlement).

183. Peters, *supra* note 32; David L. Hudson, Jr., *Rodney Smolla*, THE FREE SPEECH CTR.: THE FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1308/rodney-smolla> [<https://perma.cc/K75Y-JX6R>] (describing Smolla's professional background).

184. David Folkenflik, *Palin's Defamation Case Is Part of a Conservative Strategy to Take on the Media*, NPR (Feb. 25, 2022, 5:14 AM), <https://www.npr.org/2022/02/25/1083003350/palins-defamation-case-is-part-of-a-conservative-strategy-to-take-on-the-media> [<https://perma.cc/7DZY-YAH5>] (transcript of radio broadcast).

185. See Fabio Bertoni, *Why The Washington Post Wasn't Named in the Johnny Depp-Amber Heard Trial*, NEW YORKER (June 3, 2022), <https://www.newyorker.com/news/daily-comment/why-the-washington-post-wasnt-named-in-the-johnny-depp-amber-heard-trial> [<https://perma.cc/W2YF-Y7EH>] (noting that although Amber Heard's editorial appeared in the *Washington Post*, Depp's lawyers strategically chose not to sue the *Post*, and the *Post* did not have the occasion to make press freedom arguments). While this could be seen by the *Post* as an implicit assurance of newspapers' practical libel immunity, the newspaper could be sued later and the size of the judgments in the action could understandably have a deterrent effect.

186. *Profile of Elizabeth M. Locke*, CLARE LOCKE LLP, <https://clarelocke.com/professionals/Elizabeth-m-locke-p-c/> [<https://perma.cc/D82F-BUSG>]; see also Lachlan Cartwright, *New York Times, NBC, and '60 Minutes' Bigwigs Hired These Media Assassins to Fight #MeToo Stories*, DAILY BEAST, <https://www.thedailybeast.com/60-minutes-boss-hired-law-firm-over-metoo-story> [<https://perma.cc/C9CB-XLZJ>] (July 20, 2018, 3:44 PM) (quoting media lawyer's view that Clare Locke are "bragging about killing stories . . . [and] not focusing on litigation but the pre-publication element to squash a story").

suggests that plaintiff's lawyers are now successfully framing at least some of the stories that news organizations ultimately publish. "Killing" articles before they are published is even more effective than defamation litigation in disciplining the press.

Even if the articles aren't "killed," one effect of having high-end, experienced plaintiff's-side trial counsel in defamation cases is that the lawyers know how to focus and stage their lawsuits. For example, many begin by threatening and/or bringing various suits across the country against many potential defendants.¹⁸⁷ Procedural sophistication is to be expected as well.¹⁸⁸ For example, there has been much widespread speculation about why the *Depp v. Heard* case was brought in Virginia, focusing on Virginia's relatively weak anti-SLAPP legislation, the extremely limited summary judgment practice for defendants, and Virginia's lengthy long arm statute.¹⁸⁹ Similarly, sophisticated trial lawyers with high public profiles would be in a good position to identify the "right" case to challenge the *Sullivan* framework.

As for the conduct of the litigation itself, observers have noted that the new breed of plaintiff's defamation lawyer knows how to draft lengthy pleadings that augment the workload of the judge and increase the likelihood of overcoming the procedural hurdles of the constitutionalized defamation regime.¹⁹⁰ Sophisticated

187. One example is the lawsuits brought against virtually every mainstream news organization on behalf of Nicholas Sandmann. *See, e.g.,* Cameron Knight, *Sandmann Files 5 More Defamation Lawsuits Against Media Outlets*, CINCINNATI ENQUIRER (Mar. 3, 2020, 11:51 AM), <https://www.cincinnati.com/story/news/2020/03/03/sandmann-files-5-more-defamation-lawsuits-against-media-outlets/4938142002/> [<https://perma.cc/9KYT-9EKU>].

188. *See* Schafer, *supra* note 163, at 38 ("There are now CLEs led by high-profile plaintiff-side defamation litigators on how to file defamation complaints in the era of *Twombly* and *Iqbal* . . .").

189. Brandon H. Elledge, Timothy Taylor, Christine N. Walz & Caitlin A. Eberhardt, *Virginia's Not For Lovers: Why Virginia May See More Defamation Claims After Depp v. Heard*, HOLLAND & KNIGHT ALERTS (June 7, 2022), <https://www.hklaw.com/en/insights/publications/2022/06/virginias-not-for-lovers-why-virginia-may-see-more-defamation-claims> [<https://perma.cc/K3LG-8M53>]. Heard's appeal made a *forum non conveniens* argument. Heard Appellant Brief, *supra* note 58, at 1.

190. *See, e.g.,* Baranetsky & Gutierrez, *supra* note 134 (describing the "thick playbook" employed by plaintiff's defamation lawyers, which advises lawyers to "[f]ile a really long complaint with copious other documents."); Tim Cushing, *Judge Tosses Defamation Suit Brought By ShotSpotter Against Vice Media For Reporting On Its Shady Tactics*, TECHDIRT (July 8, 2022, 9:31 AM), <https://www.techdirt.com/2022/07/08/judge-tosses-defamation-suit-brought-by-shotspotter-against-vice-media-for-reporting-on-its-shady-tactics/> [<https://perma.cc/3JV5-66GP>] (describing 413-page complaint in *ShotSpotter Inc. v. Vice Media LLC*); *see also* Peters, *I Also*, *supra* note 181, at 121 (describing aggressive use of republication claims); Schafer, *supra* note 163, at 38 ("[L]ongwinded complaints building ever fantastical tales of actual malice to avoid dismissal should be expected.").

defamation lawyers are also likely to be aware of nuanced plaintiff doctrinal trends and can style their arguments to take advantage of these developments in both their doctrinal and policy arguments. On the theoretical front, these lawyers can shift the narrative in their complaints to emphasize how harms to their clients also undermine democracy and society more broadly.

The impact of these lawyers is not limited to the concrete legal issues. The most publicity-savvy and publicly-recognizable of these attorneys are also in the position to spin and sway public opinion through their own public status. Importantly at least for public relations, these attorneys characterize themselves as First Amendment lawyers.¹⁹¹ Having done so enables them to fight back against what they see as the press' colonization of the First Amendment.¹⁹² In addition to associating them with freedom of speech and press for rhetorical and public perception purposes, then, this characterization of their role implicitly argues for a press-neutral First Amendment.¹⁹³

191. Peters, *I Also*, *supra* note 181, at 109 (reporting this in an article based on interviews with eight well-known plaintiff's defamation lawyers).

192. *Id.* at 119–21 (quoting Harder's and John Walsh's views to that effect). Elizabeth Locke reportedly said in a speech to the Federalist Society that "the pendulum has swung too far in the direction of freedom of the press." Cartwright, *supra* note 186.

193. To be sure, one might ask why the rise of the new plaintiff's bar isn't just an overdue correction to a history of inadequate lawyering for plaintiffs whose reputations suffered harm without remedy. Professor Samantha Barbas has recently described the history of the defense defamation bar and explained that one of the most effective strategies deployed against defamation plaintiffs by the sophisticated defamation lawyers hired by major newspapers in the late nineteenth and early twentieth centuries was a strategy based on procedure, motion practice and delay. Barbas, *supra* note 88, at 530. At least one important reason for the effectiveness of the strategy was a less able, less sophisticated, and less moneyed plaintiff's bar. *Id.* at 528. Couldn't today's sophisticated plaintiff's lawyers simply say that defamation plaintiffs are finally—and appropriately—getting the level of lawyering previously available only to well-funded and well-insured media entities? See Peters, *I Also*, *supra* note 181, at 119–22 (quoting plaintiff's lawyers implicitly making that argument). One answer is that the clever strategies used by defense lawyers in the nineteenth and early twentieth centuries were effectively required by the insufficient protection for the press in the time of pre-*Sullivan* defamation doctrine. Scholars also note the increasing professionalization of journalism over this period. See generally File, *supra* note 177. Despite their likely imperfections in application, such codes and professional constraints would presumably have helped rein in the worst excesses of prior years. In any event, the past twenty years has seen a remarkable decline in the economic and political power of the mainstream press, reducing the disparity in representation. Furthermore, to the extent that today's plaintiff's defamation bar uses legal tools strategically with the result of hamstringing the press in its coverage of public figures and powerful entities, there is an appreciable cost to the public interest. In the United Kingdom, for example, attention is now being paid to the involvement of sophisticated libel counsel in press reluctance to cover their wealthy and powerful clients (often Eastern European or Russian oligarchs). See *infra* notes 267–70 and accompanying text.

The question of who funds these lawsuits and lawyers is significant in terms of assessing the plaintiffs' litigation incentives. This is a particular worry if the plaintiffs' litigation costs are borne by third parties with personal or political axes to grind against the defendant news organization.¹⁹⁴ The question has no clear answer because litigation funding is not transparent; neither the plaintiffs' lawyers nor the plaintiffs themselves publicly address who is paying their legal fees.¹⁹⁵ Still, there is some evidence that some of the

194. Peter Thiel, for example, funded Hulk Hogan's lawsuit against Gawker. See Levi *supra* note 117, at 763–64 n.4. Gawker had outed Thiel as gay in an article and he disapproved of the site's reporting standards. When his funding of *Bollea v. Gawker* was revealed, Thiel said "that his crusade against Gawker was 'less about revenge and more about specific deterrence.'" Alan Yuhas, *Peter Thiel Justifies Suit Bankrupting Gawker, Claiming to Defend Journalism*, THE GUARDIAN (Aug. 15, 2016, 6:59 PM), <https://www.theguardian.com/technology/2016/aug/15/peter-thiel-gawker-bankruptcy-lawsuit-hulk-hogan-sextape> [<https://perma.cc/MBA7-PXK6>]. This is an explicit admission of a chilling goal. Interestingly, Thiel also indicated at the time—without providing any details—that he had financed other lawsuits as well. *Id.*

Both because of lack of information and questions as to the particular relevance of the lawyers' motivations, it is beyond the scope of this Article to speculate on the possibility that some of these plaintiff-side lawyers' defamation cases might be ideologically or politically inspired. The question arises because some of those lawyers have publicly claimed political positions or been associated with high-profile political figures. For example, Lin Wood has made no secret of his support of Donald Trump and electoral conspiracy theories. See, e.g., Judd, *supra* note 180. Tom Clare and Libby Locke, the Clare Locke principals, have been public about their conservative political leanings (although they claim that reputation is a nonpartisan issue for them and that their firm is apolitical, representing high-profile Democrats as well as Republicans). Erik Larson, *Conservative Power Couple Wage Legal War on Stolen-Election Myth*, BLOOMBERG L. (Feb. 26, 2021 8:57 AM), <https://news.bloomberglaw.com/us-law-week/conservative-power-couple-wage-legal-war-on-stolen-election-myth-1> [<https://perma.cc/V74N-85YA>]. Charles Harder as well has represented both Donald and Melania Trump and other members of the Trump family, while claiming that his cases are not political. See, e.g., Jacob Pierce, *How Charles Harder Went From Local Democratic Politics to Defending the Trump Family*, SAN JOSE INSIDE (Nov. 14, 2018), <https://www.sanjoinside.com/news/how-charles-harder-went-from-local-democratic-politics-to-defending-the-trump-family/> [<https://perma.cc/A4EK-5R3B>]. The one thing that seems clear is that these lawyers believe modern defamation law is too press-friendly. See, e.g., Beth Reinhard & Emma Brown, *Trump Family Relies on Nemesis of Free-Speech Advocates in Legal Battles*, WASH. POST (July 25, 2018, 2:19 PM), https://www.washingtonpost.com/investigations/trump-family-relies-on-nemesis-of-free-speech-advocates-in-legal-battles/2018/07/25/5b807006-4d71-11e8-b966-bfb0da2dad62_story.html [<https://perma.cc/JSZ3-XW3T>] (describing Harder's preferred alternative to the actual malice standard). The question of strategic third-party litigation funding is addressed below.

195. For example, there has been no public acknowledgement of who is paying for Sarah Palin's case against *The New York Times*. Jack Shafer, Opinion, *Is a Mystery Donor Funding Sarah Palin's Crusade Against the New York Times?*, POLITICO (Feb. 17, 2022, 4:29 PM), <https://www.politico.com/news/magazine/2022/02/17/palin-libel-suit-new-york-times-00009884> [<https://perma.cc/7NX7-LCQR>]; Seth Stevenson, *Sarah Palin Wasn't the Point*, SLATE (Feb. 15, 2022, 5:25 PM), <https://slate.com/news-and-politics/2022/02/sarah-palin-loses-new-york-times-lawsuit-verdict.html> [<https://perma.cc/H8A8-MZ95>]. Charles Harder has not spoken about his legal fees for the Trump family. See, e.g., Reinhard & Brown, *supra* note 194. Even when funding disclosure has been ordered by the court, as in one of the defamation actions by Devin Nunes's family, the information has not been further publicly disclosed. See Nunes

cases brought by “new breed of libel plaintiffs lawyers . . . sending chills down the spines of media companies”¹⁹⁶ might be supported by third-party funders with anti-press and often conservative ideological leanings.¹⁹⁷ The third-party funding of plaintiffs’ defamation cases can enhance incentives to sue and burnish the plaintiffs’ lawyers’ celebrity reputations. But, especially when such funding is designed as part of a coordinated right-wing strategy to censor the mainstream “liberal” press, it is democratically worrisome.¹⁹⁸

IV. THE PERILS OF REFRAMING DEFAMATION AS A CURE FOR DISINFORMATION AND A SEARCH FOR “TRUTH”

The rise of the sophisticated and high-profile plaintiff’s bar, the increasing complexity of defamation doctrine with pro-plaintiff trends even under the *Sullivan* regime, and the notable development of a “defamation renaissance” including what could reasonably be characterized as weaponized defamation suits¹⁹⁹ all suggest that adopting more stringent defamation laws would have outsized negative effects on the press without clear corresponding benefits for public discourse and self-government. In fact, the Gorsuch-approved approach promises to be a “lose-lose” proposition.

v. Lizza, No. 20-cv-4003-CJW, 2021 U.S. Dist. LEXIS 254428, at 2–3, 19 (N.D. Iowa 2021). With regard to corporate defamation cases—and specifically the Dominion and Smartmatic cases—while the corporate coffers could presumably support some of this litigation, the question is how much. Query whether the additional actions Dominion is reportedly considering against 150 people would not be too rich for even the company’s litigation budget.

196. Reinhard & Brown, *supra* note 194 (quoting Bruce Sanford about Charles Harder).

197. As evidenced by Peter Thiel’s support of Hulk Hogan’s lawsuit against Gawker and Frank VanderSloot’s announced launch of a plaintiff’s legal fee support organization, wealthy private individuals might serve as third-party funders of defamation actions against the media. See Levi, *supra* note 117, at 763–64 n.4. Crowd-funding appeals have been launched as well, including on former President Trump’s Twitter feed. See, e.g., *Tucker Carlson Tonight* (Fox News broadcast Feb. 21, 2022), <https://video.foxnews.com/v/6298438798001> [<https://perma.cc/TS9P-YP6R>] (broadcasting Kyle Rittenhouse’s public appeal on Fox News for funding to sue media). Recently, liberal advocacy organizations as well have become involved in defamation litigation funding on the plaintiffs’ side. For example, the Law as Truth Project of the organization Protect Democracy has been litigating some cases on behalf of election workers and a postmaster accused of election fraud. *Fighting Disinformation in Court*, PROTECT DEMOCRACY (Oct. 31, 2022), <https://protectdemocracy.org/work/fighting-disinformation-in-court/> [<https://perma.cc/FX2B-RXUD>].

198. There are a number of material differences between the scenario described in text and the history of strategic impact litigation to advance civil rights. From the point of view both of transparency and democratic legitimacy, it is one thing to coordinate and fund efforts to litigate to expand civil rights and another to fund efforts to create a censorious and partisan environment in which the press is hampered in fulfilling its public interest mission.

199. See David J. Acheson & Ansgar Wohlschlegel, *The Economics of Weaponized Defamation Lawsuits*, 47 SW. L. REV. 335 (2018).

A. *Why Reject the Thomas and Gorsuch Attacks?*

While some have agreed with Justice Thomas that *Sullivan* “was not very grounded in the original public meaning of the First Amendment” and that for originalists, “the decision is exceedingly difficult to defend,”²⁰⁰ Justice Thomas’s libel originalism has also been criticized as historically incomplete and normatively undesirable.²⁰¹ The historical record with respect to the Press Clause and American views of defamation at the founding and thereafter is thin, contradictory and subject to interpretation. At a minimum, *aporia* and conflicting precedents should lead away from radical change on originalist grounds. Justice Thomas’s approach would undermine almost sixty years of post-*Sullivan* stability without sufficiently clear historical justification. Moreover, as a normative matter, does the current moment justify returning to as crabbed a view of the free press and free speech as that of Blackstone?²⁰²

Justice Gorsuch’s argument weaponizes Justice Thomas’s approach by providing a contemporary reason to return to a pre-*Sullivan* world. Just as Justice Thomas’s originalism does not justify jettisoning *Sullivan* and its progeny, the turn embraced by Justice

200. See Sunstein, *supra* note 31, at 410–11 (seemingly adopting Justice Thomas’s historical conclusions).

201. See Levine & Wermiel, *supra* note 64, at 23 (characterizing Justice Thomas’s discussion of original intent as “curious and decidedly selective”); Matthew Schafer, *A Response to Justice Thomas*, in 2022 MLRC WHITE PAPER 9, 10 (arguing that “history, rather than undercutting *Sullivan*, supports the Court’s constitutionalization of the common law of libel”) [hereinafter Schafer, *A Response to Justice Thomas*]; James Maxwell Koffler, *The Pre-Sullivan Common Law Web of Protection Against Political Defamation Suits*, 47 HOF-STRA L. REV. 153 (2018) (arguing that lower courts applied the common law to rule against political plaintiffs in defamation cases prior to 1964 and that *Sullivan* was historically defensible); Matthew Schafer, *In Defense: New York Times v. Sullivan*, 82 LA. L. REV. 81, 97, 99 (2021) [hereinafter Schafer, *In Defense*]; Josh Blackman, *Originalism and Stare Decisis in the Lower Courts*, 13 N.Y.U. J. L. & LIBERTY 44, 55 (2019); Marty Lederman, *Justice Thomas’s Attack on New York Times v. Sullivan: Old Originalism in New Originalist Garb*, BALKINIZATION (Feb. 23, 2019), <https://balkin.blogspot.com/2019/02/justice-thomas-and-nyt-v-sullivan-old.html> [<https://perma.cc/X7L9-S8GY>]; see also Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 570 (2019) (“Republicans made strained arguments, to be sure, but their core insight endures: political entrenchment and politically biased enforcement are a clear danger to republican government.”); RonNell Andersen Jones & Sonja R. West, *Presuming Trustworthiness*, KNIGHT FIRST AMEND. INST. (Nov. 18, 2022), <https://knightcolumbia.org/content/presuming-trustworthiness> [<https://perma.cc/6X85-6PZJ>] (noting the “tonal shift in the [Court’s] originalist vision of press trustworthiness.”). Pre-*Sullivan* state law does not clearly establish a single historical account. For a rejection of originalism as a method to assess the actual malice rule, see McGowan, *supra* note 21, at 526–28.

202. See Schafer, *A Response to Justice Thomas*, *supra* note 201, at 12–13, for the same point.

Gorsuch to refashioning defamation law as a tool to combat disinformation is likely to be overbroad, ineffective, and all too easily co-opted into a strategy for press intimidation.²⁰³ Questions can be raised about Justice Gorsuch's account of the current media landscape.²⁰⁴ Furthermore, Justice Gorsuch's invocation of disinformation selects too narrow a focus; his principal problem seems to be social media.²⁰⁵

There is an inevitable conflict between the interests in protecting reputation and promoting free speech and the work of the free press.²⁰⁶ This Article starts from the assumption that the public value of a free press is so democratically important that it deserves primacy, especially if the positive impact on reputation of changing the *Sullivan* balance has not been clearly established. This is particularly so if economists are right in their recent doubts that increasing the stringency of defamation laws will actually have the reputation-enhancing effects that its proponents assume.²⁰⁷ If there is a realistic possibility that more stringent defamation law will sometimes harm plaintiffs' reputations rather than helping them,²⁰⁸ there should at least be rigorous analysis of the compar-

203. See discussion *infra* Section IV.C.

204. The Logan/Gorsuch conclusion that "there is scant evidence suggesting that [libel judgments threatening hard-hitting reporting] is a risk in the current environment," Logan, *supra* note 7, at 812, seems questionable in light of the story told in Part III, *supra*, of successful actions, protracted litigation, and high defense costs regardless of outcome. Moreover, as Professor McGowan has noted, "the low level of risk from defamation suits depends in part on the *Sullivan* web of rules, so the level of risk as such cannot be used to critique those rules." McGowan, *supra* note 21, at 529.

205. But see David A. Anderson, *Second Thoughts: A Response to David A. Logan's Rescuing Our Democracy by Rethinking New York Times v. Sullivan*, 82 OHIO STATE L.J. ONLINE 23, 27 (2021) (arguing that Section 230 is instead the "place to start" in reforming the debasement of public discourse).

206. See, e.g., Acheson & Wohlschlegel, *supra* note 199, at 353; see also Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 485 (2020) (noting that both regulating and not regulating against disinformation pose risks to the First Amendment).

207. See generally Arbel & Mungan, *supra* note 12; Hemel & Porat, *supra* note 12. These two sets of law and economics scholars have raised questions about the likely effect of stringent defamation law regimes on plaintiffs themselves. Both articles explain that if we consider audience reactions, calculating the consequences to a move to a more stringent defamation regime is more complicated than the traditional account on which Justice Gorsuch's assumptions are based. So, for example, it is possible that in the face of a more stringent defamation law regime, audiences will believe remaining false statements about defamation plaintiffs and therefore reputational harm in such circumstances could exceed that under the *Sullivan* regime. While these scholars' assumptions about audience reactions to defamation law changes can raise questions, their focus on the complexity of the relationship between protecting reputation and increasing the stringency of defamation laws is surely correct and a very important contribution.

208. Arbel & Mungan, *supra* note 13, at 483; Hemel & Porat, *supra* note 13, at 50.

ative degree of harm under the *Sullivan* framework and a regime without that constitutional protection. The anti-disinformation frame, which has no inherent limiting principle, can incentivize overbroad reform. To the extent that the press is cast as the problem for democracy, then balancing its protection makes far less sense. Ultimately, then, the Gorsuch analysis, rather than righting the balance for both the press and defamed plaintiffs, could risk unjustified harm to both.

B. *Questioning the Effectiveness of the Defamation Action in Combating Disinformation*

Even if the judicial system could debunk lies and establish authoritative truths in the public interest (and would we want it to),²⁰⁹ it is unlikely that defamation actions can actually authoritatively establish the broader truths that anti-disinformation reformers by definition wish to target and combat the harms of systemic disinformation.²¹⁰ For one thing, some of the most damaging political disinformation distorting public debate does not defame anyone and cannot satisfy the “of and concerning” standard.²¹¹ Even when online speech harms reputations, it is often distributed by anonymous posters who will be hard to identify and impecunious besides.²¹² Defamation trials such as *Depp v. Heard* also dem-

209. For doubts about the desirability of courts as “truth commissions,” see, e.g., Jane Kirtley, *Getting to the Truth: Fake News, Libel Laws, and “Enemies of the American People”*, 43 HUM. RTS. 6, 9 (2018).

210. See, e.g., Michael J. Gottlieb & Meryl Conant Governski, *Truth Suits: Litigating Against the Viral Spread of Disinformation*, LITIG., Spring 2022, at 18, 20 (“Litigation is an imperfect and inefficient tool for most victims of disinformation.”); RonNell Andersen Jones & Lyrissa Lidsky, *Truth Was Never the Point*, SLATE (June 1, 2022, 9:17 PM), <https://slate.com/news-and-politics/2022/06/johnny-depp-amber-heard-defamation-scotus.html> [https://perma.cc/53ZN-LCUA] (“[A]scertaining truth and correcting falsehood is a tall order—one that defamation law has very limited ability to solve.”); RonNell Andersen Jones & Lyrissa Lidsky, *The Limits of Dominion’s Lawsuit Against Fox*, SLATE (Mar. 23, 2023), <https://slate.com/news-and-politics/2023/03/fox-dominion-trial-defamation.html> [https://perma.cc/H9AZ-JMJ8] (“[D]efamation law cannot provide an authoritative declaration of all societal truth.”).

211. It is likely that “[f]alsehoods that cause personal damage are a minuscule fraction of online falsity, which is a massive cultural and technological failure, not the work of professional journalists who cut corners because they think some jurisprudential loophole lets them.” Wasserman, *supra* note 149.

212. Unconcern with falsity is much more likely online, with untrained TikTokers and Facebook groups posting and reposting disinformation. Yet because plaintiffs will rationally avoid suing the nameless and impecunious posters who are likely to be principally responsible for online disinformation, they will ironically go after news organizations that are less responsible for the deluge of falsity and at least aspire to comply with journalistic norms of accuracy.

onstrate that instead of stemming disinformation, such actions can become super-spreaders of disinformation themselves. Would cognitive biases likely lead audiences to be more susceptible to believing falsity repeated in a publicized defamation trial? And even if truth were established and disinformation debunked in a defamation suit, would politically fractured and polarized audiences be persuaded? Even if some would, can we confidently believe that judicial truth-statements or even jury verdicts are likely to have measurable corrective effects on overall audience beliefs in today's fractured and polarized information environment?

1. The Illusory Search for Authoritative "Truth" Through Litigation

Putting a focus on disinformation makes the court case into an arbiter of truth at the end of which truth is authoritatively established. But, first, query whether this is what defamation law does or is designed to do.²¹³ Moreover, defamation suits are incapable of consistently producing the *kind* of "truth" that those who seek to stem disinformation and systemic "fake news" would like courts to establish authoritatively. Even if the plaintiff is found to have proved the falsity of a particular defamatory statement, for example, that is not the same as having established the "truth" in broad political, commercial and socio-cultural contexts. Furthermore, individual attacks on systemic problems cannot consistently provide systemic solutions.²¹⁴ A single jury finding, for example, that a state postal official did not in fact post-date mail-in ballots during the 2020 presidential election does not in itself debunk the claim that the election was "stolen" by Democrats through election fraud.

213. See, e.g., Kirtley, *supra* note 91, at 122–23 (criticizing initiatives that "presume that truth is something that can be concretely determined through an adversarial proceeding" and finding it "troublesome when a governmental or quasi-governmental entity is tasked with determining what is 'the truth.'"); Kirtley, *supra* note 209, at 9; Kyle Jahner, *Nunes Libel Case Raises Actual-Malice Liability for Retweets*, BLOOMBERG L., <https://news.bloomberglaw.com/us-law-week/actual-malice-liability-for-retweets-raised-by-nunes-libel-case> [https://perma.cc/GN5D-E3P2] (Sept. 21, 2021, 4:06 PM) (quoting Prof. Kirtley's view that libel laws are "not designed to produce truth. They're designed to address the harm from untruths.").

214. For a similar point in connection with the Alex Jones trial in Texas, see Dahlia Lithwick, *Why the Alex Jones Verdict Felt So Unsatisfactory*, SLATE (Aug. 8, 2022, 12:34 PM), <https://slate.com/news-and-politics/2022/08/alex-jones-will-keep-broadcasting-infowar-s-despite-verdict.html> [https://perma.cc/AB9Q-NWM7].

Worse yet, defamation cases and public reactions to them²¹⁵ can also in fact spread disinformation. Influential public accounts of defamation trials can err both as to law and evidence. Also troublingly, the defamation actions can establish the *wrong* “truth.” The fallibility problem must be confronted: obviously, juries and judges can be wrong. Moreover, the “truths” of such defamation actions can themselves be highly contested, especially in social media discourse.²¹⁶ Different audiences can interpret the truths of anti-disinformation defamation cases differently. And while there are some examples of political information that are clearly strategically false and feed paranoid partisanship²¹⁷—we can imagine other examples whose falsity is more difficult to establish or more con-testable.²¹⁸ The assumption about defamation suits as vehicles

215. Audience involvement and interpretation can all too easily lead to error and spread disinformation both about the facts at issue and the law itself. For example, cognitive science describes people’s susceptibility to cognitive biases such as confirmation bias and repetition bias, which could undermine the litigation’s debunking goal. *See infra* Section IV. B.1.a.

216. *See, e.g.*, Jon Allsop, *The Margins of Alex Jones*, COLUM. JOURNALISM REV. (Aug. 10, 2022), https://www.cjr.org/the_media_today/alex_jones_trial_sandy_hook.php [<https://perma.cc/VQU7-G4XG>].

If reasonable observers saw the recent trial as a debacle for Jones, the problem is that plenty of unreasonable observers were also watching, including *Infowars*, and will have seen not a humiliating comeuppance but yet another government conspiracy, with Jones playing the self-aggrandizing victim. Jones continued to broadcast during the trial, and to raise funds off of it; when he showed up at court, he wore a mock gag across his mouth with “Save the 1st” printed across it.

Id.; Anna Merlan, *InfoWars Cannot Stop Covering Its Own Damages Trial*, VICE (Aug. 2, 2022, 9:00 AM), <https://www.vice.com/en/article/qjkkzd/InfoWars-cannot-stop-covering-its-own-damages-trial> [<https://perma.cc/7WQN-DB5E>].

217. The “Big Lie” that the 2020 election was “stolen” from Donald Trump is a perfect example. Witnesses at the House January 6th Committee hearings testified that Donald Trump’s top aides, including Attorney General Bill Barr, virtually unanimously told him on Election night that he had lost and that his claims about voter fraud were “nuts” and “completely bogus.” *See, e.g.*, Alex Seitz-Wald, *‘Detached from Reality’: Trump Insiders Worked to Convince Him He Lost*, NBC NEWS (June 13, 2022, 8:38 PM), <https://www.nbcnews.com/politics/congress/jan-6-committee-turns-trumps-election-lies-loses-key-witness-rcna32988> [<https://perma.cc/A82S-KTNV>]. While Donald Trump himself has consistently fanned the “Big Lie” story publicly, Alyssa Farah Griffin, the former White House Director of Strategic Communications, is reported to have said on CNN’s *State of the Union* that Trump “blurted out watching Joe Biden on TV, ‘Can you believe I lost to this guy?’” Julia Shapero, *Trump Privately Admitted He Lost Election to Biden: Ex-White House Aide*, AXIOS (June 19, 2022), <https://www.axios.com/2022/06/19/trump-admitted-election-alyssa-farah> [<https://perma.cc/EK74-T3C6>]; *see also* Philip Bump, *Could Prosecutors Convince a Jury That Trump Knew He Lost in 2020?*, WASH. POST (Apr. 5, 2022, 12:56 PM), <https://www.washingtonpost.com/politics/2022/04/05/could-prosecutors-convince-jury-that-trump-knew-he-lost-2020/> [<https://perma.cc/XB7D-NCJ6>].

218. *See, e.g.*, Jeff Kosseff, *America’s Favorite Flimsy Pretext for Limiting Free Speech*, THE ATLANTIC (Jan. 4, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/shouting->

for establishing truth can also lead to terrible harm, not only to the parties—some of whom can become the subjects of horrible harassment—but to members of the public who take the other side, and therefore to the construction of productive public debate.²¹⁹ Indeed, the intensity and virulence of side-taking in such cases can deter other people from joining the discussion or even filing their own meritorious lawsuits.

a. *Depp v. Heard* as an Object Lesson

The story of the viral *Depp v. Heard* defamation trial provides an instructive example. The court permitted the trial to be televised, over Heard's attorneys' objections.²²⁰ The trial, with all its lubricious marital details, became a bread-and-circuses side-show.²²¹ In addition to garnering nearly daily coverage in the mainstream press, the trial became a sensation on YouTube, TikTok and the rest of social media.²²² Rabid fans—particularly of Johnny

fire-crowded-theater-speech-regulation/621151/ [https://perma.cc/FJ6Q-YBMY] (arguing that “the prevailing view of what counts as misinformation changes over time,” pointing to the CDC's initial COVID-19 guidelines and the mainstream acceptance of the lab-leak theory).

219. Depp supporters were asked to leave the courtroom after shouting expletives at Heard. One of the women escorted out tweeted: “I Cant Wait For The Day I Kill Amber Heard.” Elizabeth Rosner and Ben Kessler, *Johnny Depp Fans Booted From Court for Alleged Violent Threats Against Amber Heard*, N.Y. POST (Apr. 14, 2022, 7:21 PM), <https://nypost.com/2022/04/14/johnny-depp-fans-booted-from-court-for-alleged-violent-threats-against-amber-heard/> [https://perma.cc/2XY5-6THJ]; Emily Yahr, *‘She’s a Person’: Amber Heard’s Supporters Endure Insults, Mockery*, WASH. POST (May 24, 2022, 2:52 PM), <https://www.washingtonpost.com/arts-entertainment/2022/05/24/amber-heard-supporters-johnny-depp-trial/> [https://perma.cc/2T3V-YVJJ].

220. Jacobs, *supra* note 56. Heard's appeal asserted numerous errors on the part of the trial judge. See Heard Appellant Brief, *supra* note 58.

221. See, e.g., Jessica Bennett, Opinion, *Why Nobody Wins in the Depp-Heard Verdict*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/opinion/depp-heard-won-lost-verdict.html> [https://perma.cc/282X-ZBX2] (characterizing trial as a “circus”).

222. Julia Jacobs & Adam Bednar, *The Johnny Depp vs. Amber Heard Libel Case Is in the Jury’s Hands*, N.Y. TIMES (May 27, 2022), <https://www.nytimes.com/2022/05/27/arts/depp-heard-closing-arguments-libel.html?searchResultPosition=8> [https://perma.cc/UF3U-TX4A]. It has been reported that the hashtag #JusticeforJohnnyDepp surpassed a billion views on TikTok. See, e.g., Ezra Marcus, *Johnny Depp Case Brings Stan Culture Into the Courtroom*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/04/29/style/johnny-depp-amber-heard-fans.html?action=click&module=RelatedLinks&pgtype=Article> [https://perma.cc/U68V-G2CX]; Jessica Winter, *The Johnny Depp-Amber Heard Trial Is Not As Complicated As You May Think*, NEW YORKER (May 23, 2022), <https://www.newyorker.com/culture/cultural-comment/the-johnny-depp-amber-heard-trial-is-not-as-complicated-as-you-may-think> [https://perma.cc/FE3U-6SRD].

Depp—were joined by men’s rights activists,²²³ wannabe social media “influencers,”²²⁴ conservative online sites,²²⁵ and YouTubers seeking to cash in on the spectacle²²⁶ all engaged in interpreting the action for the public. Audiences developed passionate and highly partisan views on the trial.²²⁷ But rather than “dislodg[ing] disinformation from public dialogue,” the lawsuit “just created more.”²²⁸

Although the legal issue at trial was limited to whether Depp had proved the falsity of the specific statement published by Heard in her *Washington Post* op-ed,²²⁹ the trial was consistently interpreted in social media as being about the truth of the parties’ marriage, whether Heard abused Depp, and irrelevant issues such as who soiled a bed with feces.²³⁰ Social media seemingly sought to establish “truth” by crowdsourcing the evidence and assessing the testimony.²³¹ The trial by TikTok displaced the jury and fore-

223. See, e.g., Jill Filipovic, Opinion, *The Trolling of Amber Heard Sends a Perilous Message to Women*, CNN (May 17, 2022, 6:08 PM), <https://www.cnn.com/2022/05/17/opinions/amber-heard-johnny-depp-trial-women-filipovic/index.html> [https://perma.cc/LE78-AZUC].

224. See, e.g., Choire Sicha, *The Mainstream Media Lost the Depp-Heard Trial and the Lifestyle Influencers Turned Court Correspondents Won.*, N.Y. MAG.: INTELLIGENCER (June 3, 2022), <https://nymag.com/intelligencer/article/johnny-depp-amber-heard-trial-influencers.html> [https://perma.cc/AQ75-W6VA]; see also Filipovic, *supra* note 223 (on “seemingly average citizens who have become self-styled experts on everything from domestic abuse to body language to personality disorders”).

225. See, e.g., Winter, *supra* note 222 (discussing *Daily Wire* expenditures “to promote mainly anti-Heard content on Facebook and Instagram about the trial”).

226. The trial incentivized the commercialized commentary of those who wanted to make money and/or enhance their standing online and whose mercantile interests doubtless had an impact on their contributions to the public conversation about the case. See, e.g., Jessica Lucas, *YouTube Lawyers Are Getting Famous Covering the Johnny Depp-Amber Heard Trial*, INPUT MAG. (May 16, 2022), <https://www.inputmag.com/culture/johnny-depp-amber-heard-trial-youtube-lawyers-commentary> [https://perma.cc/J67Y-BEUC]; Winter, *supra* note 222.

227. See, e.g., Marcus, *supra* note 222.

228. Jones & Lidsky, *supra* note 210.

229. Some observers seemed to argue that the phrasing alone of the contested op-ed sentence should have made that impossible. See, e.g., Winter, *supra* note 222; Goldberg, *supra* note 22.

230. See, e.g., Connie Rusk, *Inside Johnny Depp and Amber Heard’s Toxic Relationship From Poo in Bed to Boot Rows*, MIRROR UK (Apr. 21, 2022, 8:31 PM), <https://www.mirror.co.uk/3am/celebrity-news/inside-johnny-depp-amber-heards-26763166> [https://perma.cc/22Y S-P2VD].

231. See, e.g., David Sillito, *Amber Heard and Johnny Depp’s ‘Trial by TikTok’*, BBC NEWS (June 1, 2022), <https://www.bbc.com/news/world-us-canada-61649522> [https://perma.cc/LP3E-BVRG] (“Two people arguing a completely opposed view of events that took place behind closed doors means that millions can see the evidence for themselves and make up their own mind. We can all be detectives.”); Bennett, *supra* note 221. Such engagement involved “crowdsourcing” evidence at trial. See, e.g., Marcus, *supra* note 222 (explaining a Tik-

grounded the audience reaction in the supposed establishment of truth. Commenters shared opinions and impressions of the evidence, party testimony, and even the signals sent by the celebrities' clothing.²³² The televised *Depp v. Heard* trial led to viral critiques of Amber Heard and the spread of false claims (such as Ms. Heard using cocaine on the stand).²³³ The immediate availability of video from the trial gave audiences the impression that they could affect the outcome in the courtroom.²³⁴ The discourse about the case on social media was not only partisan and hyperbolic, but also incomplete and selective.²³⁵

Token user's video, with more than 16 million views, that challenged Heard's reference to using a Milani makeup palette to hide bruises).

232. See, e.g., Vanessa Friedman, *In Court, Johnny Depp and Amber Heard Dress to Suggest*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/style/amber-heard-johnny-depp-clothes.html> [<https://perma.cc/H5P2-LCKT>].

233. See, e.g., Amanda Hess, *TikTok's Amber Heard Hate Machine*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/05/26/arts/amber-heard-tiktok-johnny-depp.html?searchResultPosition=26> [<https://perma.cc/D2TY-GCTB>]; Amanda Tait, *Amber Heard v. Johnny Depp Has Turned into Trial by TikTok—and We're All the Worse for It*, THE GUARDIAN (May 11, 2022), <https://www.theguardian.com/commentisfree/2022/may/11/amber-heard-johnny-depp-trial-tiktok-fans> [<https://perma.cc/5LQL-A3DV>]. Videos about how Amber Heard could go to jail and misrepresenting the basis of the case “drown[ed]” anyone who sought out TikToks about the trial—indicating the variety and breadth of false information circulating on social media. Madison Malone Kircher, *The Depp-Heard Verdict Shattered the Greatest Myth About TikTok, Once and for All*, SLATE (June 3, 2022), <https://slate.com/human-interest/2022/06/amber-heard-johnny-depp-trial-tiktok-video-conspiracy.html> [<https://perma.cc/38G2-ZA93>].

234. Hess, *supra* note 233.

235. For example, very little was made online about the prior U.K. judgment that many of Heard's abuse allegations about Depp were substantially true. This is doubtless at least partly due to the fact that many of the social media participants were Depp “stans” who engaged in picking apart Heard's testimony. There was also some recalibration in the court of public opinion after Johnny Depp fans crowdfunded the purchase of thousands of pages of unsealed court documents which placed Depp in a more negative light. See, e.g., Cheyenne Roundtree, *Johnny Depp Stans Rushed to Fork Over Cash for Unsealed Court Docs. Did It Backfire?*, ROLLING STONE (Aug. 6, 2022), <https://www.rollingstone.com/culture/culture-news/johnny-depp-amber-heard-backfire-1391807/> [<https://perma.cc/UQ8C-R6QL>]; Kenzie Bryant, *Unsealed Pretrial Documents in Johnny Depp's and Amber Heard's Defamation Cases Stoke More Attention*, VANITY FAIR (Aug. 2, 2022), <https://www.vanityfair.com/style/2022/08/johnny-depps-and-amber-heards-defamation-cases-unsealed-pretrial-documents> [<https://perma.cc/TS5V-Y888>]; Marlow Stern, *Unsealed Johnny Depp v. Amber Heard Court Documents Reveal Shocking New Claims*, DAILY BEAST (Aug. 1, 2022, 6:25 AM), <https://www.the-dailybeast.com/unsealed-docs-from-johnny-depp-v-amber-heard-defamation-trial-contain-shocking-new-claims> [<https://perma.cc/L96S-GQLT>]; Kalhan Rosenblatt & Kat Tenbarge, *New Documents Trigger Fresh Online Battle Between Amber Heard and Johnny Depp Fans*, NBC NEWS (Aug. 1, 2022, 7:21 PM), <https://www.nbcnews.com/pop-culture/pop-culture-news/twitter-users-rally-amber-heard-unsealed-documents-trial-ex-johnny-depp-renc41022> [<https://perma.cc/NS6T-5KSV>] (reporting trending hashtag #AmberHeardDeservesAnApology).

The social media content fueled stories on mainstream tabloid media.²³⁶ The trial empowered a “new media class” online which posed a challenge to the mainstream press’s authority and ability to set the agenda for public discourse.²³⁷ For the tabloid media, it replaced editorial judgment with the judgment of the crowd.²³⁸

Dehumanizing harassment and death threats were directed at Heard throughout the trial.²³⁹ Parody videos of her testimony were “a TikTok cliché.”²⁴⁰ Legions of Depp fans took to social media to swarm and trash their counterparts who championed Heard.²⁴¹ They also sought to make their power felt in Hollywood with an attempt to get Heard’s acting career derailed.²⁴²

All in all, the defamation trial and the ways in which it was processed were super-spreaders of disinformation, demonstrating how the modern defamation renaissance can extend and weaponize disinformation rather than stemming it.²⁴³ And, at the end of the day,

236. Hess, *supra* note 233.

237. See Sicha, *supra* note 224; Kircher, *supra* note 233 (discussing unscrutinized rhetoric “[a]ccepted as fact because it was delivered in a confident tone from a source who promised not to lie to you like a traditional media outlet”).

238. Hess, *supra* note 233 (“[V]iewers can shape public opinion in real time. Once a fan fiction scenario gains enough momentum to achieve escape velocity, it is elevated into mainstream tabloids . . .”).

239. See, e.g., Lucas, *supra* note 226; Rory Satran, *In the Johnny Depp vs. Amber Heard Trial, Every Detail is Scrutinized on TikTok—Even Her Braids*, WALL ST. J. (May 23, 2022), <https://www.wsj.com/articles/amber-heard-trial-tiktok-braids-trial-hair-11653280686> [https://perma.cc/6T92-ZL72]; @johnnydeppfanpage85, *Amber Heard Snorting Coke on Stand, TIKTOK*, <https://www.tiktok.com/@johnnydeppfanpage85>. Marisa Dellatto, *Anti-Amber Heard Twitter Campaign One Of ‘Worst Cases of Cyberbullying,’ Report Says*, FORBES (July 18, 2022, 12:50 PM), <https://www.forbes.com/sites/marisadellatto/2022/07/18/anti-amber-heard-twitter-campaign-one-of-worst-cases-of-cyberbullying-report-says/?sh=4ccd8a87d64a> [https://perma.cc/99G5-RQMQ]; Filipovic, *supra* note 223 (“[T]he impact of this trial . . . [is] also about what message is being sent by these vicious online attacks on Amber Heard. The misogyny of fandom has produced toxic results before . . .”).

240. Winter, *supra* note 222.

241. Siegel, *supra* note 50; Filipovic, *supra* note 223.

242. A “Remove Amber Heard from Aquaman 2” petition, describing Heard as a “domestic abuser” who “fabricated incidents” for court, had over 4.5 million signatures. Jeanne Larson, *Remove Amber Heard from Aquaman 2*, CHANGE.ORG, <https://www.change.org/p/dc-entertainment-remove-amber-heard-from-aquaman-2> [https://perma.cc/3MPP-YG G4]. Some argue that fans were “demanding a return for the precious resource of their attention.” See Crouse, *supra* note 16.

243. See, e.g., Jacobs, *supra* note 56; Kircher, *supra* note 233. In addition to the virality of misinformation about the trial and its meaning, the fact that audiences were barraged with so many TikTok videos and other social media commenting meant that they did not have the time or attention to consider what they were seeing critically. *Id.* In addition, significant segments of the public might have been confused by the verdict against Heard on Depp’s claims but in her favor on her counterclaim. See Brief of Appellant at 3, Heard v.

it did not establish in any authoritative way either the falsity of Amber Heard's op-ed statement or the "truths" of the parties' relationship. It gave some members of the audience the illusion of having influenced the course of the trial.²⁴⁴ It allowed others, possibly, to influence the unsequestered jury to the extent that the jury was exposed to social media.²⁴⁵ And it may offer a blueprint for others accused of misconduct.²⁴⁶

With respect to the broader socio-political and cultural implications of the case, the trial did not establish a public consensus either. It became one more contribution to the political partisanship of the times. The Heard op-ed piece was an attempt by the actor to participate in the public discussion of the broad issue of domestic abuse and misogyny. Many commenters found broader—but, importantly, contradictory—political truths in the trial and the verdict. Some decried the case as a backlash to the #MeToo movement,²⁴⁷ a testament to misogyny,²⁴⁸ and an example of revenge

Depp, No. 1062-22-4 (Va. Ct. App. filed Nov. 11, 2022) (making the argument that verdicts both against and in favor of Heard create confusion).

244. This is not only because many posters on social media directed their comments to Depp's attorneys. Hess, *supra* note 233 ("[S]omeone is always pleading for an internet artifact to be 'forwarded to Camille,' as if obsessive fan attention alone might crack the case."). It is also because the trial unearthed witnesses who expressed willingness to appear. See, e.g., Hess, *supra* note 233 (noting that Depp's team called a witness found on Twitter); Crouse, *supra* note 16 (describing how fanbases with an unprecedented influence over pop culture narrative might feel entitled to criticize the personal lives of celebrities); see also Ryan Smith, *Fact Check: Did Amber Heard Lawyer Say She Used Specific Makeup on Bruises?*, NEWSWEEK (Apr. 27, 2022, 1:00 PM), <https://newsweek.com/fact-check-amber-heard-lawyer-specific-makeup-bruises-johnny-depp-defamation-trial-1701478> [<https://perma.cc/K7L2-LB5M>] (describing a TikTok in which Milani Cosmetics discussed when a product mentioned in the trial had been publicly introduced).

245. See, e.g., Marcotte, *supra* note 56 (suggesting that the jury was exposed to pro-Depp sentiment online and in right wing media); Jessica Winter, *The Johnny Depp-Amber Heard Verdict Is Chilling*, NEW YORKER (June 2, 2022), <https://www.newyorker.com/culture/cultural-comment/the-depp-heard-verdict-is-chilling> [<https://perma.cc/QM7S-L6V9>]; Kircher, *supra* note 233.

246. Angela Fu, *What Does the Depp v. Heard Verdict Mean for the Media? It's Hard to Say*, POYNTER (June 13, 2022), <https://www.poynter.org/ethics-trust/2022/what-does-the-depp-v-heard-verdict-mean-for-the-media-its-hard-to-say/> [<https://perma.cc/5AGM-MQCD>]; Filipovic, *supra* note 223 ("[D]omestic violence victims and abusers alike are watching this play out.").

247. See, e.g., Marcotte, *supra* note 56 ("[T]his verdict . . . [is] part of a larger backlash to the #MeToo movement and other movements like Black Lives Matter"); Winter, *supra* note 245 (arguing that the trial turned Heard's op-ed into an ouroboros).

248. Eliana Dockterman, *The Depp-Heard Trial Perpetuates the Myth of the Perfect Victim*, TIME (June 2, 2022, 5:21 PM), <https://time.com/6183505/amber-heard-perfect-victim-myth-johnny-depp/> [<https://perma.cc/ZJ2C-ZS7H>]; Ashley Fetters Maloy, Karen Heller & Anne Branigin, *Depp-Heard Verdict Will Have Chilling Impact on #MeToo, Advocates Fear*, WASH. POST (June 2, 2022, 12:32 PM) <https://www.washingtonpost.com/arts-entertainment/2022/06/02/me-too-amber-heard-johnny-depp/> [<https://Y8YH-5MU4>]. *But see* Natalie Shure,

porn,²⁴⁹ while others celebrated it as a blow to the #MeToo movement, men's rights and the excesses of "cancel culture"²⁵⁰ and wondered why Heard stayed with her alleged abuser.²⁵¹ For each side, the other's interpretation was dismissed as disinformation. A trial about a particular statement made in an op-ed about the broad issue of domestic abuse was transformed on social media into a referendum over far broader partisan political beliefs (not to mention personal fan preferences).

The politicization of the case is likely to have chilling effects—both on victims of abuse who will be afraid to bring suits against their abusers who have defamed them,²⁵² and on the press. Admittedly, although the Heard op-ed was published in the *Washington Post*, Depp chose not to sue the newspaper. While one might suppose this result reinforces the claim of media immunity from defamation liability, it nevertheless threatens a chilling effect. Realistically, news organizations will factor in the result of the case and the rabid public comment about it as they consider reporting on newsworthy issues such as #MeToo and domestic violence accusations.²⁵³ The chilling effect is likely to be particularly extensive

Stop Trying to Extract Larger Lessons From the Amber Heard–Johnny Depp Trial, NEW REPUBLIC (May 16, 2022), <https://newrepublic.com/article/166501/amber-heard-johnny-depp-trial> [<https://perma.cc/R8MA-TEG9>] (arguing the case has little social applicability).

249. See, e.g., Winter, *supra* note 224.

250. See, e.g., Carly Mayberry, *Johnny Depp, Amber Heard and the Dangers of Cancel Culture*, NEWSWEEK (May 2, 2022, 11:53 AM), <https://www.newsweek.com/johnny-depp-amber-heard-dangers-cancel-culture-1701880> [<https://perma.cc/SXA7-6UT5>]; see also Hess, *supra* note 237 (Depp's "campaign has since attracted the support of men's rights activists, right-wing media figures, #BoycottDisney campaigners eager to capitalize off Depp's status as a fallen Disney franchise star, sex abuse conspiracists, armchair true-crime detectives, anyone wary of 'the mainstream media' and plenty of opportunists eager to draft off the trial traffic."). After the verdict, the GOP House Judiciary Committee's Twitter account is reported to have tweeted a Captain Jack Sparrow video. See Marcotte, *supra* note 56 (reproducing an image of the tweet and characterizing it as "the official party taunting #MeToo supporters online after the verdict").

251. See Winter, *supra* note 222.

252. See, e.g., Alanna Vagianos, *Feminist Groups Finally Speak Out In Support Of Amber Heard*, HUFFPOST (Nov. 16, 2022, 2:28 PM), https://www.huffpost.com/entry/feminist-groups-finally-speak-out-in-support-of-amber-heard-depp_n_6375256ae4b0afce046a5f07 [<https://perma.cc/86FU-TLFQ>]. Heard's brief on appeal made the point that the court's rulings below, "if allowed to stand, undoubtedly will have a chilling effect on other women who wish to speak about abuse involving powerful men." Brief of Appellant at 1, *Heard v. Depp*, No. 1062-22-4 (Va. Ct. App. filed Nov. 11, 2022).

253. For a similar point, see Jeremy W. Peters, *Depp Trial Exposes Risks to Media in Airing #MeToo Accusations*, N.Y. TIMES (June 3, 2022), <https://www.nytimes.com/2022/06/03/business/media/depp-heard-journalism-metoo.html?searchResultPosition=17> [<https://perma.cc/MDZ3-ABRA>]; see also Jon Allsop, *The Depp-Heard trial and the Many Factors That Shape Free Speech*, COLUM. JOURNALISM REV. (June 6, 2022), https://www.cjr.org/the_media_today/depp_heard_trial_free_speech_defamation.php [<https://perma.cc/C7GG-CFU4>].

with respect to the most cutting-edge and controverted public issues—the very issues that an independent press should cover most extensively.²⁵⁴

b. What Audiences Believe and How That Can Change

To the extent that the goal is to shake the audience's belief in harmful disinformation, is it likely that the results of a defamation action will in fact influence the audience's beliefs about controversial political and cultural issues? At a minimum, this is an as-yet-untested empirical issue.

One of the major factors that makes political disinformation so dangerous, according to many, is that political falsity is difficult to dislodge, particularly in a partisan political environment. Cognitive scientists have identified a number of heuristics and cognitive biases—including confirmation bias, repetition bias, familiarity- and fluency-biases, illusory truth effect, motivated reasoning—that are likely to make false information sticky and false beliefs hard to counteract effectively.²⁵⁵ The public interest will be diserved if a strategic defamation action designed to combat disinformation actually ends up reinforcing the false beliefs it was designed to neutralize.

The issue of audience belief raises questions at a more granular level as well. If the trial is a show trial, designed to prompt much public and online discussion, then how and when do we assess the impacts of the viral communications landscape on what people believe? For example, with respect to timing, when do we assess whether the audience's false beliefs have been undercut or shifted by their exposure to a defamation trial? Plus, a trial level decision can be reversed on appeal. Or a court can dismiss a case by issuing a judgment notwithstanding the verdict.²⁵⁶ Further, substantively,

Furthermore, if individual sources are deterred from speaking to the press as a result of trials like *Depp v. Heard*, the press will face significant reporting hurdles. See Bertoni, *supra* note 185.

254. For discussions of press self-censorship and the chilling effect, see, e.g., Anderson, *Is Libel Law Worth Reforming?*, *supra* note 17, at 488; Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 685, 708 (1978).

255. See, e.g., Sunstein, *supra* note 31, at 406–07; Lili Levi, *Media Literacy Beyond the National Security Frame*, 2020 UTAH L. REV. 941, 955 (2020) and sources cited therein. See *supra* Section III.A (discussing complex and conflicting empirical data regarding the effects of disinformation on social media).

256. See Peters, *Judge Plans to Dismiss*, *supra* note 109 (on Judge Rakoff's statement while the Palin jury deliberated).

there are privileges and protections for the defendant even in the common law that might impact what audiences understand and believe of the results.

Finally, there is the influence of spin. Even when plaintiffs win in defamation actions brought to combat disinformation, there is a danger that these defendants will convince their audiences that they are free speech martyrs. Alex Jones is a case in point.²⁵⁷

c. A Boomerang Effect on Trust in the Press?

In theory, one of the indirect benefits of fighting disinformation could be a reversal of the public's current distrust in institutions including the press.²⁵⁸ This is of course possible, with the right case and ignoring the skewing effects of political partisanship on belief.²⁵⁹ But to the extent that a hard-fought defamation trial increases partisanship and even spreads disinformation, then it can have a boomerang effect, confirming and enhancing public distrust of the press. When the dust clears after high-profile defamation actions such as *Depp v. Heard*, many who sought "truth" in the courtroom might find themselves disappointed by the trial, the obsessive coverage, and the virulent and ugly partisanship it engendered. For those who did not emerge rabid partisans, the defamation trial might be processed as one more example of how both courts and the press fail. At a minimum, we cannot predict in advance how the anti-disinformation defamation suits will impact media distrust. This corrosive effect on institutional trust is dangerous even beyond the specific harms of particular disinformation campaigns.

257. Although the plaintiffs won and obtained stratospheric damage awards in both of the recent defamation trials over Jones's comments about the Sandy Hook shooting, he played to his base by saying "We're fighting Goliath" as he livestreamed the verdict on InfoWars, used the verdict as a fundraising opportunity, mocked the jurors, and decried "show trials." See Timsit, *supra* note 38; Anna Merlan, *Alex Jones Isn't Testifying in Court, He's Making Video Clips*, VICE (Sept. 23, 2022), <https://www.vice.com/en/article/jgpveg/alex-jones-isnt-testifying-in-court-hes-making-video-clips> [<https://perma.cc/ZV7K-JFAR>].

258. See, e.g., Madeline Halpert, *Trust In U.S. Institutions Hits Record Low, Poll Finds*, FORBES, <https://www.forbes.com/sites/madelinehalpert/2022/07/05/trust-in-us-institutions-hits-record-low-poll-finds/?sh=7577b88cddb5> [<https://perma.cc/BPR4-EF57>] (July 5, 2022, 2:57 PM); Megan Brenan, *Americans' Trust In Media Remains Near Record Low*, GALLUP (Oct. 18, 2022), <https://news.gallup.com/poll/403166/americans-trust-media-remains-near-record-low.aspx> [<https://perma.cc/73KA-8Z7L>].

259. See *infra* Section IV.D.

C. *Considering the Chilling Effect in Context*

Lowering the bar to defamation liability will not significantly reduce the systemic problem of disinformation, but both external and internal factors today will enhance the likelihood that such a change will super-size the chilling effect on the press.

1. The External Context—Anti-Disinformation as Strategic Anti-Press Targeting

The attack on the *Sullivan* framework and the recharacterization of defamation laws as weapons in battling disinformation cannot be fully understood without addressing the recent history of assaults on the “fake news” press.²⁶⁰ The key point is that Donald Trump and his allies have effectively wielded the need to reform defamation law as an anti-press dog whistle. Their suits and threats to sue seek both to shape the narrative about them and to diminish the legitimacy and credibility of the press that criticizes them.

News establishments are quite aware of their own vulnerabilities in a skeptical climate. The drumbeat of “fake news” attacks

260. See Michael M. Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People’*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html> [<https://perma.cc/P4CE-JRJB>]. Then-President Trump’s vituperations against the “fake news” press doubtless primed the pump of the public’s distrust of the press. Even after the election of President Biden, audience distrust of the press (as well as other institutions) remains high; Michael Dimock & John Gramlich, *How America Changed During Donald Trump’s Presidency*, PEW RESEARCH CTR. (Jan. 29, 2021), <https://www.pewresearch.org/2021/01/29/how-america-changed-during-donald-trumps-presidency/> [<https://perma.cc/VDC9-8N4E>] (“Half of U.S. adults said in 2019 that made-up news and information was a very big problem in the country, exceeding the shares who said the same thing about racism, illegal immigration, terrorism and sexism.”). See also Lili Levi, *Racialized, Judaized, Feminized: Identity-Based Attacks on the Press*, 20 FIRST AMEND. L. REV. 147, 201 (2022). The first strategic step in undermining defamation law was former President Trump’s promise to “open up” defamation doctrine in 2016. This tactic, although mostly irrelevant doctrinally, was designed to move defamation from the realm of law to the realm of politics by attracting public attention and mobilizing public opinion. Defamation laws would have to be made more stringent because the press—which, Trump warned, functioned as the “enemy” of the American people—defamed good people with impunity while disseminating disinformation (and, particularly, liberal disinformation). See generally Levine & Wermiel, *supra* note 64. It stands to reason that Trump’s comments about the failure of defamation law to protect reputation influenced the views of at least some members of jury pools, not to mention judges. Jeffrey Gottfried & Jacob Liedke, *Partisan Divides in Media Trust Widen, Driven by a Decline Among Republicans*, PEW RSCH. CTR. (Aug. 30, 2021), <https://www.pewresearch.org/fact-tank/2021/08/30/partisan-divides-in-media-trust-widen-driven-by-a-decline-among-r-epublicans/> [<https://perma.cc/6QD4-KLGB>].

against the mainstream press (and even against the right-wing press when it does not follow the partisan line) has surely generated institutional PTSD for journalists and publishers. Apart from their own defensiveness, risk-aversity and intimidation that this sustained onslaught is likely to have triggered, journalists and publishers are aware that jury pools and judges have also been functioning under the campaign of press delegitimation. Against that background, it is reasonable to expect that the current defamation renaissance, with its increase in high-profile, high-damage, high-cost defamation actions against the press, often brought by plaintiffs for mostly non-financial reasons, will further ratchet up the chilling effect on the press.²⁶¹

The current libel climate surely sends constraining signals even post-Trump.²⁶² When the uncertainty of a complex doctrinal area with mixed pro-defense and pro-plaintiff judicial trends is added to the abstract possibility of massive verdicts if the defendant loses and the high costs of litigation²⁶³ (particularly with savvy plaintiff's lawyers whose strategies for "libel bully" clients hike up costs), a super-sized chilling effect is likely.²⁶⁴ Importantly, the

261. Plaintiff's defamation lawyer Charles Harder has taken the position that "there needs to be a chilling effect on the irresponsible writers." Dalton, *supra* note 179 (quoting Harder's GQ profile).

262. *See supra* Section I.

263. Recent law and economics literature explains that plaintiffs' decisions to sue are influenced not only by the likelihood of their winning their claims substantively, but also by litigation costs. *See, e.g.*, Acheson & Wohlschlegel, *supra* note 199, at 357–58, 362, 365. The sophisticated plaintiff's lawyers' strategies described in Section III.D amplify and weaponize those costs. *See supra* Section III.D.

264. Some reporters see the possible reversal of *Sullivan* as a "catastrophic" development for the press. *See, e.g.*, Bertoni, *supra* note 185. This is because of the degree of risk-aversity they expect of news organizations: "Any report that was not based on videotape of them in media res would be a bet-the-company gamble." *Id.* While others do not see the threat to the actual malice standard in such apocalyptic terms, journalists and the media in general do expect "a chilling effect" on important public interest reporting as a result. *See* Allsop, *supra* note 253.

To be sure, as Professor Barbas has explained, the press had "worked to coexist with libel doctrines that were, on their face, favorable towards plaintiffs" for two centuries by "develop[ing] strategies to avoid and defeat libel suits." Barbas, *supra* note 88, at 544. Even though formal law favored plaintiffs, the press in practice managed, and even took publication chances sometimes, when the context demanded it. *Id.* at 531–32. Does this mean that lowering the bar to defamation liability today would also lead to the same kind of accommodation by the press, instead of the catastrophic chill that the media fears? Professor Barbas's account reveals how the socio-historical contexts influence the libel climate and the ability of the press to rely on established informal protocols to avoid liability. *Id.* at 515, 544 (noting the changes in the libel climate after 1945). The libel climate today does not justify reassuring historical references to the press's ability to operate in the 1920s and 1930s. To the contrary, this Article suggests that the current context presents an equivalent "libel crisis" that led to and was reversed by *Sullivan*. *Id.* at 544.

chilling effects may be asymmetrical; smaller outfits and the decimated ranks of local news organizations are particularly at risk. And query whether the “responsible” press would be more responsive to the chill than the “tabloid” press.

In contexts such as this, it is also important to note that the incentives of journalists, editors, publishers and, where applicable, corporate owners of the news organizations are not necessarily aligned. In making risk determinations now, when the political climate has largely turned against the legacy press, news organizations must inevitably weigh the impact and strategies of the plaintiff’s bar, the funding of strategic litigation, their impressions of how far particular plaintiffs will take their cases, the uncertainty of the legal climate, the Supreme Court’s virtually complete reversal of its former positive attitude toward the press, jaundiced public opinion, and the feasibility of settlement. There are many levels at which the chilling effect and press intimidation can operate.

2. The Internal Context—Chill as Priority-Ordering and Content-Skewing

As for the internal context, it is helpful to drill down into the likely profile of the chilling effect and think about which particular types of public interest reporting are likely to be most at risk, particularly in light of the possibly inconsistent interests of reporters, editors, media lawyers, and news management.

The chilling effect is likely to be complex and nuanced in operation. The publisher, editor, or writer are virtually never faced with a binary choice in story coverage. Typically, there are many possible stories. The question is whether the existence of libel bullies and gigantic damage awards demanded by intimidating lawyers, not to mention litigation expenses (including journalist and editorial time), are likely to affect choices among the many possible stories to investigate and publish. Plausible rationalizations to “pass” on a story abound: another outlet could cover it, or the publisher will tackle it later in better circumstances, or the risk of liability could create problems for other, more important stories the news organization is pursuing, or (if the threats come early enough) the investment in the story is not yet so significant as to prevent a pivot to a more uncontroversial story. Even a slight skew over time in the decisional processes can be quite consequential overall. So, at a minimum, the chilling effect should be assessed in terms of

how and with regard to which metrics a news organization prioritizes its newsgathering and story priorities.

Impacts on news organizations are likely to be both visible and explicit as well as subtle and graded. Even if changes to defamation law would not bankrupt large news organizations, their effect on local news outlets, magazines, and other smaller outfits could be catastrophic.²⁶⁵ Local news, which provides benefits far beyond those of large national organizations, is already existentially under attack. Journalists too face employment uncertainties today. With the catastrophic decline in the fortunes of newspapers and the many newspaper closures in the past decade, journalism jobs are harder to find and doubtless easier to lose. Many journalists are hired on a freelance basis by news organizations today. Therefore, concerns about job security may rationally induce excessive journalistic risk-aversity; no reporter wants to be the one who bankrupts her paper.

In addition, the anti-disinformation frame might well increase the likelihood of cases being brought even if plaintiffs are unlikely to win. This alone is likely to have a deterrent effect on press coverage. That is particularly the case if changes in the defamation regime increase the incentives for public officials to sue.²⁶⁶ When journalists are threatened by seasoned libel plaintiffs known for their no-holds-barred litigiousness, it stands to reason that they might either avoid or put off the story, or look for much more certainty than would be professionally warranted under traditional ethical and journalistic standards.

Investigative reporting takes a substantial amount of time and is conducted by full-time employees of news organizations, requiring significant investments of time and money. When such watchdog or accountability reporting involves whistleblowers—as it often has in the context of national security, but is now the case in other areas as well—it is often unrealistic to find other witnesses to corroborate the whistleblower's story. In those sorts of contexts, the reporters and editors cannot be *absolutely* certain of the truth of their reporting (or at least absolutely certain within the time frame that makes the story relevant). Would a significant change from the *Sullivan* framework mean that national security re-

265. Ligon, *supra* note 135, at 290–91.

266. See Acheson & Wohlschlegel, *supra* note 199, at 370 (interpreting prior work by Professor Ronald Cass on comparative deterrent effects).

porting or #MeToo reporting or other newsworthy whistleblower reporting would be particularly deterred? If so, the chilling effect would not be equally distributed across the news organization's coverage. This potential content skew that can be expected with reversal of the *Sullivan* protections is a quiet danger of the chilling effect. In turn, this is particularly worrisome in light of the contemporary obscurity of so much governmental, social media and commercial activity.

The recent history of the abuse of strong defamation laws in the U.K. should serve as an object lesson here with respect to chilling effects on reporting.²⁶⁷ As one recent report describes it, "for years, oligarchs and other wealthy foreigners and corporations have used British courts to sue journalists over reporting they don't like, taking advantage of the country's historically weak libel laws."²⁶⁸ In response, the British government launched a consultation on tackling SLAPPS.²⁶⁹ Among the various options under consideration in the consultation was the possibility of introducing an actual malice standard in British defamation law.²⁷⁰ While this result is unlikely as a practical matter because of the massive changes it could introduce into British defamation law, Parliament's public consideration of the chilling effect of overly pro-plaintiff defamation law is telling.

3. The Irresponsible Press and the Puzzle of "Optimal"²⁷¹ Chill

To be sure, critics respond that not all chilling effects are bad and that the mere possibility of deterrence should not inevitably

267. JOHN HEATHERSHAW, ET AL., *THE UK'S KLEPTOCRACY PROBLEM: HOW SERVICING POST-SOVIET ELITES WEAKENS THE RULE OF LAW* (2021), <https://www.chathamhouse.org/sites/default/files/2023-01/2021-12-08-uk-kleptocracy-problem-heathershaw-mayne-et-al.pdf> [<https://perma.cc/7ZV9-7F72>].

268. Jon Allsop, *As Britain Looks to Strengthen Its Libel Laws, the US Weighs Weakening Its Own*, COLUM. JOURNALISM REV. (Mar. 18, 2022), https://www.cjr.org/the_media_today/britain_us_libel_law_russia.php [<https://perma.cc/P4LC-FW4U>]; David Segal, *Do Russian Oligarchs Have a Secret Weapon in London's Libel Lawyers?*, N.Y. TIMES (Mar. 29, 2022), <https://www.nytimes.com/2022/03/29/business/oligarchs-london-putin-russia.html> [<https://perma.cc/6P8N-B9KR>].

269. See Segal, *supra* note 268; Haroon Siddique, *English Courts Get New Powers to Dismiss Slapp Cases Against Reporters*, THE GUARDIAN (July 19, 2022, 7:01 PM), <https://www.theguardian.com/media/2022/jul/20/english-courts-get-new-powers-to-dismiss-slapp-cases-against-reporters> [<https://perma.cc/ZE9Q-BM9F>].

270. Segal, *supra* note 268.

271. Sunstein, *supra* note 31, at 407 (discussing the First Amendment's treatment of false statements and arguing that "[w]hat societies need is not the absence of 'chill,' but an optimal level of it").

outweigh the importance of reputation. On this view, deterrence that minimizes error by the press is to be praised.²⁷² But while the notion of “optimal” chill makes intuitive sense, it obviously raises difficult questions. How can it ever be tested? With respect to what baseline? By whom? The reporter, editor, publisher? One practical reality would be that editorial judgment and journalistic norms would be replaced with jury-defined standards. Would this inevitably lead to anti-press results in a context in which the public is disenchanted with the media? When—at what point of journalistic investment should this inquiry be focused? How is one to assess “optimal chill” in an environment in which the litigation incentives are skewed by the limitlessly-wealthy libel plaintiff whose main intention is to punish the defendant in order to deter future speech and criticism?²⁷³ How would this influence news organization decision-making in situations in which there is no clear answer even in the industry itself as to whether a story should be published?²⁷⁴

272. Indeed, media critics argue, the likelihood that Fox News changed its programming and fired one of its commentators presumably in response to the Dominion lawsuit is evidence of the desirable and appropriate chilling effect of such anti-disinformation defamation cases. *See, e.g.*, Grynbaum, *supra* note 19. On their view, news organizations hewing to professional norms should not be concerned about liability under a system that more equally balances the plaintiffs’ reputational interests with the interests of the press defendants. This, however, is either naïve or cynical. As *Sullivan* recognized, errors are inevitable even when reporters and publishers seek to hew to journalistic norms. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964) (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)). This becomes an even more complicated issue when we consider the rise of partisan news organizations and news outlets that self-consciously do not hew to the neutrality-and-objectivity norms of the twentieth century mainstream press. In any event, regardless of final outcome, a post-*Sullivan* legal regime will invite lengthy and expensive intrusions into editorial judgment by self-interested plaintiffs seeking to censor press coverage and manage the public narrative about them.

273. Some of these plaintiffs, such as Donald Trump, have publicly admitted that they do not care whether they win their cases so long as they make the defendants miserable. Bazelon, *supra* note 115; Acheson & Wohlschlegel, *supra* note 199, at 368–70, 375; *see also* Bazelon, *supra* note 115 (“Superrich plaintiffs . . . aren’t subject to the same market forces. They can treat suing the press as an investment, with the payoff being, at a minimum, the expense and time required for the other side to produce documents and sit for depositions . . .”). Professors Acheson and Wohlschlegel argue that even though some public officials are doubtless deterred from suing for defamation as a result of the *Sullivan* rules, “reduced likelihood of success for plaintiffs at trial will have a *smaller* deterrent effect on the number of lawsuits brought by public officials than on the number brought by other plaintiffs, despite the potential abuse of libel laws by public officials.” Acheson & Wohlschlegel, *supra* note 299, at 370 (interpreting prior work by Professor Ronald Cass).

274. An example may be the Steele Dossier, *see* Cohen, *supra* note 79. Defamation actions were brought against BuzzFeed over its publication of the dossier by several Russians and were resolved by settlement in 2021. *See, e.g.*, Josh Gerstein, *Russian Entrepreneur Drops Suit Against BuzzFeed over Steele Dossier*, POLITICO (Nov. 17, 2021, 6:45 PM), <https://www.politico.com/news/2021/11/17/steele-dossier-lawsuit-buzzfeed-522855> [<https://perma.cc/BW89-KFGW>]; Charlotte Klein, *Buzzfeed’s Legal Battle over the Steele Dossier Finally Seems to Be Ending*, VANITY FAIR (Nov. 18, 2021), <https://www.vanity>

Is the optimal chill inquiry to be context- and content-agnostic? If the easy answer to optimal chill is procedural—focused on vetting and verification protocols—they are already in place in the traditional media. Furthermore, if we are to address the issue of optimal chill, don't we also commensurately have to consider what is the "optimal" amount of reputation protection?²⁷⁵ If reputation-protection is not to be absolute, then by what standard are we to evaluate the optimal reputational trade-off? Assessing the comparative externalities of shifts in the stringency of defamation law is both difficult and uncertain.²⁷⁶

Charges of irresponsibility against the press have a long pedigree in the United States. The yellow press of the late nineteenth century, for example, was excoriated for reckless and irresponsible reporting, including making up stories and facts.²⁷⁷ The professionalization of journalism in the early twentieth century led to the development of shared industry norms of accuracy and the adoption of verification processes.²⁷⁸ Are the incentives to propagate defamatory falsehoods by the press materially greater today than previously? Does the press in fact hew to an "ignorance is bliss" attitude, as Justice Gorsuch fears?²⁷⁹

Because *Sullivan's* actual malice standard requires evidence of the speaker's subjective understanding, reporters who actively follow traditional journalistic guidelines, consult multiple sources, and take other active steps to verify their stories are protected from liability even if what is ultimately published contains defamatory

fair.com/news/2021/11/buzzfeeds-legal-battle-over-the-steele-dossier-finally-seems-to-be-ending [https://perma.cc/GZW5-UUYD]. BuzzFeed's publication of the Steele Dossier was quite controversial at the time, in press circles as well as political ones. See, e.g., Sara Fischer, *The Media's Epic Fail*, AXIOS (Nov. 14, 2021), https://www.axios.com/2021/11/14/steele-dossier-discredited-media-corrections-buzzfeed-washington-post [https://perma.cc/PGQ4-LDUM]; see also Complaint, *Fridman v. Buzzfeed, Inc.*, No. 154895/2017 (N.Y. Sup. Ct. May 26, 2017) https://www.courthousenews.com/wp-content/uploads/2017/05/buzzfeed.pdf [https://perma.cc/PE2T-AQ62].

275. For arguments about the complexity of the incentives analyses, see generally Arbel & Mungan, *supra* note 12; Hemel & Porat, *supra* note 12. See also *supra* note 207 (sketching the economists' arguments).

276. See, e.g., Acheson & Wohlschlegel, *supra* note 199, at 355.

277. Barbas, *supra* note 88, at 523; see also Jessica E. Jackson, *Sensationalism in the Newsroom: Its Yellow Beginnings, The Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 ND J.L. ETHICS & PUB POL'Y 789, 790–800 (2005).

278. See File, *supra* note 177, at 285–303.

279. See *supra* notes 27–31 and accompanying text (Justice Gorsuch's language in *Berisha v. Lawson*).

falsehood.²⁸⁰ In light of the inquiry into the reporting and editorial process permitted by Supreme Court precedent such as *Harte-Hanks Communications v. Connaughton*²⁸¹ and *Herbert v. Lando*,²⁸² not to mention the more pro-plaintiff trend in judicial interpretations of doctrine described above, news organizations know that clear evidence of compliance with professional standards of care makes rapid dismissals much easier. By contrast, “willfully blind publishers run a substantial risk of liability.”²⁸³ The 2022 MLRC WHITE PAPER—written by sophisticated media defense lawyers—concludes that “the case law simply does not support the suggestions that “ignorance is bliss” is a viable legal strategy. Instead, lawyers say, application of actual malice standard in actual cases teaches precisely the opposite.”²⁸⁴ Knowledgeable editors and media lawyers who work with the mainstream press describe their own experience as completely inconsistent with Justice Gorsuch’s factual assertions about reporting practices and incentives.²⁸⁵ The mainstream press continues to have journalists and editors engage in pre-publication review (even if there are sometimes imperfections in the processes.) Professional journalists and newspaper management are also aware of the changing legal landscape. In addition, the economics of increasingly subscription-based contemporary media create incentives to generate trust in the quality of their reporting.²⁸⁶

The reactions of the traditional press to revelations of error are instructive. News organizations and reporters have journalism ethics codes and media corrections policies.²⁸⁷ Examples such as

280. Ballard Spahr, *supra* note 105, at 166.

281. *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657 (1989).

282. *Herbert v. Lando*, 441 U.S. 153 (1979).

283. Ballard Spahr, *supra* note 105, at 166.

284. *Id.*

285. See, e.g., Richard Tofel & Jeremy Kutner, *Chapter 2: A Response to Justice Gorsuch*, in 2022 MLRC WHITE PAPER, at 79.

286. *Id.* at 82–83 (noting increased incentives to the production of quality journalism in order to maintain high subscription numbers).

287. News organizations have corrections policies and professional journalism associations articulate ethics norms that foreground accuracy and corrections of error. See, e.g., *Corrections*, ONAETHICS, <https://ethics.journalists.org/topics/corrections/> [<https://perma.cc/6BYH-JUPV>]; *The Elements of Journalism*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/elements-journalism/> [<https://perma.cc/2KU6-9QYQ>]; *SPJ Code of Ethics*, SOC’Y OF PRO. JOURNALISTS, <https://www.spj.org/ethicscode.asp> [<https://perma.cc/C9A9-APBF>]. Although there are doubtless many instances when these norms are aspirational only, particularly when the issue is not brought to the attention of the national audience, their public articulation is notable, as are high-profile instances evidencing compliance. For an account of the professionalization of

The New York Times immediately pulling the piece that sparked the Palin suit are typical.²⁸⁸ The facts of current cases such as *Eramo v. Rolling Stone* provide a playbook for the rest of the media on what to avoid.²⁸⁹ All this supports the mainstream press's articulated commitment to accurate reporting and timely correction of error. Of course, it would be naive to say that the mainstream press never disseminates inaccurate information, forwards manipulated or conspiracist information, or otherwise amplifies false and harmful narratives about matters of public interest. But accuracy and correction are important to journalistic ethics and imperfect compliance should not negate their significance as professional norms to which mainstream journalists aspire.²⁹⁰ It would be ironic, then, if anti-disinformation cases were to be brought against news organizations whose professional commitments emphasize journalistic norms at least aspirationally.²⁹¹

the press in the early twentieth century and the development of libel avoidance vetting programs, see Barbas, *supra* note 88, at 522–30; File, *supra* note 177.

288. *The Times* did issue a correction saying there was no link between that political rhetoric and the shooting. Marc Tracy, *Sarah Palin's Defamation Suit Against New York Times Is Reinstated*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/business/sarah-palin-lawsuit-new-york-times.html> [<https://perma.cc/T2SQ-GQ9B>]; see also Defendant's Motion to Dismiss at 20–21, *Palin v. The New York Times Company* (S.D.N.Y. Jun. 14, 2017) (No. 1:17-cv-04853).

289. *Rolling Stone* had published an article in 2014 titled *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*. *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 867 (W.D. Va. 2016). Thereafter, questions were raised about the accuracy of the story in the *Washington Post* and elsewhere, and *Rolling Stone* solicited a review by the Columbia School of Journalism of the editorial process leading to the publication of the piece. *Id.* at 868. The detailed Columbia Journalism School report branded the article as a “journalistic failure.” *Id.*

290. See generally BILL KOVATCH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* (2021) (describing modern journalism norms).

291. Proponents say that the internet has democratized speech, with the result that anyone, regardless of journalistic training or compliance with journalistic norms, can disseminate with virtual impunity defamatory lies that both harm individual reputations and broader public debate. Volokh, *What Cheap Speech Has Done*, *supra* note 140, at 2308; see also Garry, *supra* note 84, at 287 (on defamatory culture). On this view, even if we could expect professional journalists to avoid negligent or intentional spread of falsity or disinformation, libel reform is necessary because the information marketplace includes far more than professional journalistic speakers.

The problem is that disadvantaging the professional press because other, untrained voices can disseminate falsehoods is likely to lead to ineffective, “tail wags dog” policy, bad incentives and perverse consequences. Apart from strategic disinformation campaigns by sophisticated government operatives, much online disinformation that goes viral doubtless begins with heedless posts by angry people, some freed to vent via anonymity and many likely judgment-proof. In addition to the likelihood that many online defamers are judgment proof, the nature of online communication makes it unlikely that plaintiffs would sue to ensure deterrence even without the hope of financial benefit. See McGowan, *supra* note 21, at 535. Virality online is hardly predictable and while strategic groups can form online, on-

What is really going on behind the argument for the anti-disinformation frame for defamation actions is thus probably a concern over what many see as the increasingly propagandistic and partisan press on cable (not to mention social media). On this view, the partisan press is itself centrally and intentionally part of the dissemination of disinformation. Progressives assert that Fox News eschews neutrality and is now so partisan that it no longer deserves the appellation of news.²⁹² The concern is the harms to democracy that flow from partisan audience segregation on television and social media—the echo chambers and filter bubbles that can further polarize citizens and diminish their ability to participate

line voices are not typically coordinated or organized enough to become predictable as influential targets, so the likelihood that a defamation claim against one poster is likely to deter other online disinformation effectively is questionable. The result will be that reformed defamation law will not be able to stop viral online disinformation but will function as an invitation to target the press, which has more incentives for accuracy. But if the Justice Gorsuch anti-disinformation justification for reversing *Sullivan* is successful, then defamation plaintiffs will have incentives to sue easy-to-identify members of the press, which is already held in distrust. The result will be that reformed defamation law will not be able to stop viral online disinformation but will function as an invitation to target the press. See McGowan, *supra* note 21, at 535 (“[T]hese concerns [chilling effect and press-targeting incentives] suggest that unreliable content might crowd out content that takes care to be accurate.”).

292. Professor McGowan explains that although “[l]iberals do not attack *Sullivan* overtly[.]” they recently “worry a lot about some types of falsity.” McGowan, *supra* note 21, at 519–20. To be sure, the early American press was decidedly partisan. See, e.g., Sonja R. West, *The “Press,” Then and Now*, 77 OHIO ST. L.J. 49, 91–95 (2016). “Yellow journalism” of the nineteenth century thrived on sensationalizing lies. See, e.g., Barbas, *supra* note 88; Jessica E. Jackson, *Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 NOTRE DAME J.L. ETHICS & PUB. POLY 789 (2005). Scholars of journalism suggest that the dominance of a neutral and objective image of the press developed in response to the particular characteristics of the mid-twentieth century economic model for newspapers. See, e.g., C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317 (1998); MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* (1978); PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATION* (2005).

But many progressives see Fox as something materially different from that history. Journalist and Editor of *Press Watch*, Dan Froomkin, said of Fox News: “The problem with Fox ‘News,’ the cable TV channel, isn’t just what it is—it’s also what it isn’t. It is a purveyor of propaganda and misinformation. What it’s not is a source of ‘news’—at least not by any normal definition.” Dan Froomkin, Opinion, *Fox News Isn’t News*, NBC NEWS (Apr. 9, 2022), <https://www.nbcnews.com/think/opinion/fox-news-study-comparing-fox-cnn-highlights-cable-tvs-harm-rena23620> [<https://perma.cc/W2P8-TVX4>]. Although some class Fox as a political organization rather than media, others see it principally as an outrage organization. See, e.g., Matt Walton, Opinion, *It’s Time that Fox News is Considered a Political Organization, Not a News Network*, INSIDER (Mar. 28, 2022), [https://perma.cc/U3L3-PT53](https://www.businessinsider.com/fox-news-cable-political-organization-subscription-network-tucker-carlson-hannity-2021-3); Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (March 4, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> [<https://perma.cc/9MGF-QF24>] (discussing the network as an extension of the Trump White House during his presidency, and as a mouthpiece for electoral conspiracy theories thereafter).

in politics with full information.²⁹³ Progressive analysts point to the ways in which Fox News is “a uniquely damaging part of the American news landscape.”²⁹⁴ A prototypical example of this view focuses on the role of Fox in promoting the “stolen” election trope and the election denial that led to the insurrection at the Capitol on January 6, 2021.²⁹⁵ Critics see in Fox News not only a failure to

293. See RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT*, 68–69 (2022). The social science research thus far has not fully supported the general public intuition about increasing online audience segregation as a result of echo chambers and filter bubbles. See Daniel Muise et al., *Quantifying Partisan News Diets in Web and TV Audiences*, *SCI. ADV.*, July 13, 2022. However, a recent study suggests that prior work on audience segregation, by focusing only on the on-line news environment, has missed the impact of partisan television news programming on partisan audience segregation. *Id.* (finding that roughly “[seventeen percent] of Americans are partisan-segregated through television versus roughly [four percent] online,” that TV consumers’ news diets are more concentrated on preferred sources, that television news consumers are more likely to maintain their partisan news diets monthly, that “television is the top driver of partisan audience segregation among Americans,” and that partisan cable news audiences are growing even as the entire television new audience is shrinking). The authors of the study warn that exposure to opposing views is critical for democratic function.

While proponents of the anti-disinformation defamation action particularly against right-wing media entities could look for support to the focus of the Muise study on cable’s effects on partisanship in audiences, it should be noted that the results of this study refer to general political partisanship on television versus online, rather than addressing the specific question of comparative exposure to disinformation as such. Moreover, the vast majority of Americans “still consume relatively balanced news diets.” Homa Hosseinmardi, *Cable News Has a Much Bigger Effect on America’s Polarization than Social Media, Study Finds*, NEIMANLAB (Aug. 11, 2022), <https://www.niemanlab.org/2022/08/cable-news-has-a-much-bigger-effect-on-americas-polarization-than-social-media-study-finds/> [<https://perma.cc/R6VQ-QLHS>]. Of course, the significance of the percentage of partisan audience segregation depends on the comparison point: while seventeen percent of the television audience is not a particularly large percentage, it might be quite an impactful number from the point of view of the percentage of voters needed to sway an election. Muise et al., *supra*, at 8. But consumers of news on television can also be exposed to news and information online and from other sources such as radio (not addressed in the Muise study) and social exposure. Also, the study finds that about “[seventy percent] [of right-leaning viewers] and [about] [eighty percent] [of left-leaning viewers] do switch [their news diets] within six months. To the extent that long-lasting echo chambers do exist, then, they include only about [four percent] of the population.” *Id.*

294. Philip Bump, *The Unique, Damaging Role Fox News Plays in American Media*, *WASH. POST* (April 4, 2022, 11:23 AM), <https://www.washingtonpost.com/politics/2022/04/04/unique-damaging-role-fox-news-plays-american-media/> [<https://perma.cc/8XNB-HTS4>] (identifying “Fox News’s strength on the political right, the demonstrated way in which it shapes its viewers’ beliefs, its grip on Republican power and the views of its leadership”). The Bump article also cites to recent research supporting the conclusion that Fox “engages in partisan coverage filtering.” *Id.* (referring to David E. Brookman & Joshua L. Kalla, *The Impacts of Selective Partisan Media Exposure: A Field Experiment with Fox News Viewers*, *OSF Preprints*, April 1, 2022, doi:10.31219/osf.io/jrw26.).

295. Fox aired a three-minute segment asking an expert on voting machines some factual questions in which he debunked some false claims in shows hosted by Lou Dobbs, Jeanine Pirro and Maria Bartiromo. Smith, *supra* note 19; see also HASEN, *supra* note 293, at 9 (noting that that Fox News called the 2020 race for Biden quickly, and that the network

distinguish between news and opinion programming, but a platform for the repeated dissemination of conspiracist political thinking. Even now, the pendency of the Dominion and Smartmatic defamation actions against the network have not stopped Fox opinion programming from disseminating conspiratorial ideas about the Federal Bureau of Investigation's ("FBI") exercise of a warrant for classified documents at former President Trump's Mar-a-Lago.²⁹⁶

Supporters of the anti-disinformation frame for libel litigation argue that the possibility of massive defamation liability for such slanted coverage would create the right incentives for the network to avoid sensationalist and false disinformation-based programming.²⁹⁷ Particularly if Fox News is more responsive to what its viewers want than to right-wing institutional ideology as such, promoters of defamation suits foresee a salutary deterrent effect.²⁹⁸

While the desire to eliminate news media dissemination of partisan lies is laudable, it is unrealistic to expect a fundamental reversal in media style, particularly in a media environment in which news outlets have economic incentives to cater to partisan audiences by stoking outrage. On both cable and online, there are financial incentives to disseminate partisan, sensationalistic and often fear-mongering political programming in order to engage partisan audiences.²⁹⁹ Highly-partisan opinion programming is

debunked some of Trump's election fraud claims all the while some of its political opinion shows were featuring guests claiming election fraud).

296. See, e.g., Caleb Ecarma, *Fox News Isn't Ready to Dump Trump, Even if the Murdochs Are*, VANITY FAIR (Aug. 10, 2022), <https://www.vanityfair.com/news/2022/08/fox-news-dump-trump-murdochs> [<https://perma.cc/FQ3R-HKVN>]; Sarah Fischer, *FBI's Mar-a-Lago Search Ignites the Right*, AXIOS (Aug. 23, 2022), <https://www.axios.com/2022/08/23/trump-popular-fbi-truth-social> [<https://perma.cc/K3DB-9Z6G>].

297. See, e.g., Grynbaum, *supra* note 19; Jeremy Stahl, *A New Anti-Trump Defamation Suit Shows One Way Forward Against the Big Lie*, SLATE (Nov. 3, 2021, 3:35 PM), <https://slate.com/news-and-politics/2021/11/trump-giuliani-ellis-sued-defamation-pennsylvania.html> [<https://perma.cc/A7VX-8QUM>].

298. Blake Hounshell & Jeremy W. Peters, *A Former Fox News Insider Spills the Beans*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/2022/08/19/us/politics/chris-stirewalt-fox-news.html> [<https://perma.cc/AE3G-HB2B>] (reporting on Fox News "whistleblower," who argued that the right-wing cable networks such as Fox see economic advantage to sensationalist programming that will help them retain their base).

299. See, e.g., HASEN, *supra* note 293, at 59–60. For an argument that Fox News' programming style would not change radically, see, e.g., Clare Malone, *The Fallout of Fox News' Public Shaming*, NEW YORKER (Mar. 15, 2023), <https://www.newyorker.com/news/annals-of-communications/the-fallout-of-fox-news-public-shaming> [<https://perma.cc/2N7P-4LAN>]. To the extent that audiences are demographically and politically segmented now, there is a lessening of the economic incentive that drove outlets in the twentieth century to pursue broad audiences—the mass medium programming for the mass audience. News outlets now increasingly cater to relatively homogeneous audiences and seek their loyalty. See Anthony

both relatively inexpensive and designed to engender viewer loyalty to popular commentators.³⁰⁰ At least without catastrophic losses in anti-disinformation defamation cases, measurable changes in the cable networks' perceptions of their audiences' interests, and a desire to program away from the extremes of their partisan audiences, incentives will remain, especially in the right-wing media sphere, to program for outrage, follow tabloid style and offer branded opinionated commentary. To be sure, some—and perhaps even significant—changes can be expected. Despite the pull of perceived market forces pushing toward audience segmentation, even entities seeking to respond to consumer demand are likely to discern the likely fluidity of political commitments and identities for many people over time. Some attempt to play to cross-partisan audiences can then become an element of good business. But even when facing major defamation liability, partisan entities could adopt a strategy of minimal compliance with legal requirements,³⁰¹

Nadler, *Confronting Media Gerrymandering*, NEIMANLAB: PREDICTIONS FOR JOURNALISM (2023), <https://www.niemanlab.org/2022/12/confronting-media-gerrymandering/> [<https://perma.cc/6P4A-LUAF>]. A recent report asserts that although the American public is cord-cutting and the overall audiences for television programming are shrinking, partisan cable audiences are growing. Muise et al., *supra* note 293. This creates a financial incentive to provide the kind of partisan programming that such audiences seek. Zeynep Tufekci, Opinion, *We Should Try to Prevent Another Alex Jones*, N.Y. TIMES (Oct. 16, 2022), <https://www.nytimes.com/2022/10/16/opinion/alex-jones-sandy-hook.html> [<https://perma.cc/9GKT-N96E>] (using the financial success of InfoWars's inflammatory and conspiracist programming as evidence that “the current media ecology makes it lucrative to lie outrageously”); *see also* JEFFREY M. BERRY & SARAH SOBIERAJ, *THE OUTRAGE INDUSTRY: POLITICAL OPINION MEDIA AND THE NEW INCIVILITY* 6 (2014).

300. *See, e.g.*, Sam Lebovic, *Fake News, Lies, and Other Familiar Problems*, KNIGHT FIRST AMEND. INST. (Nov. 18, 2022), <https://knightcolumbia.org/content/fake-news-lies-and-other-familiar-problems> [<https://perma.cc/2S9L-Z4WJ>] (“[C]ommentary has proven a much better business model than hiring journalists.”).

301. Even though Fox News aired a fact-checking segment and terminated the Lou Dobbs show on the network, the fact that it continues to air inflammatory claims, for example about the FBI's search for documents at Mar-a-Lago, indicates that it has not left its opinionated programming behind. *See, e.g.*, David Folkenflik, *Amid Lawsuit from Election Tech Company, Fox News Media Cancels 'Lou Dobbs Tonight'*, NPR (Feb. 7, 2021, 7:48 AM), <https://www.npr.org/2021/02/07/965014010/amid-lawsuit-from-election-tech-company-fox-news-media-cancels-lou-dobbs-tonight> [<https://perma.cc/6Q3P-CQNQ>]; Tom Joes, *Why Did Fox News Dump Lou Dobbs?*, POYNTER (Feb. 8, 2021), <https://www.poynter.org/newsletters/2021/why-did-fox-news-dump-lou-dobbs/> [<https://perma.cc/AE9B-CRMQ>]. Its actions in canceling the Dobbs program and presenting some fact-checking corrections may be influenced by a desire to forestall the possibility of massive punitive damages should the network lose the Dominion and Smartmatic cases. *See* HASEN, *supra* note 293, at 9–10 (describing networks “walk[ing] a tightrope between giving viewers what they wanted and seeking to avoid liability”). Still, Fox has been distancing itself from Trump in its recent programming. *See, e.g.*, Jeremy W. Peters, *Murdoch's News Outlets Extend Their Criticism of Trump*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/10/business/media/trump-fox-news-murdoch.html> [<https://perma.cc/DH4U-TJ7H>]. This could be an indication of its response to its perception of its viewers' current political beliefs. *Cf.* Kevin Roose, *Don't*

reliance on friendly interpretations of state law privileges, and public claims of ‘cancel culture’ censorship to inflame their audiences. An overall wholesale shift away from ‘tabloidism’ and opinion journalism is unlikely, especially for the more partisan of the partisan right-wing media, unless the networks conclude that such a change is what the vast majority of their existing and potential viewers demand. This then suggests that very little beyond what existing law can do would be accomplished with respect to diminishing disinformation by dismantling the protections of constitutionalized defamation law for that purported reason.

Moreover, lest progressives imagine the anti-disinformation defamation strategy as limited to right-wing targets, the left-leaning press can (and has already) become the target of conservative attacks and defamation suits as well. Sarah Palin’s appeal brief, which echoes the arguments of Justice Gorsuch and Judge Silberman, is a case in point.³⁰² Critics on the right have been loudly complaining that news organizations and social media discriminate against conservative speech and ideas.³⁰³ They are likely to

Expect Alex Jones’s Comeuppance to Stop Lies, N.Y. TIMES, <https://www.nytimes.com/2022/08/06/technology/alex-jones-conspiracy-theories.html> [https://perma.cc/VMT4-L24K] (Sept. 29, 2022) (describing the “more subtle” generation of conspiracists who have learned from Alex Jones’s mistakes and “tiptoe right up to the line of defamation, being careful not to do anything that could get them sued or barred from social media”). Public perception of the ‘tone at the top’ also seems to matter: the amount of disinformation and hateful speech has reportedly increased on Twitter since Elon Musk’s purchase of the platform. See, e.g., Tiffany Hsu, *Resistance to Misinformation is Weakening on Twitter, a Report Found.*, N.Y. TIMES (Nov. 7, 2022), <https://www.nytimes.com/2022/11/07/business/media/twitter-misinformation-report.html> [https://perma.cc/XGK9-64QS]. What the Murdochs will do with Fox News in the future will therefore be an important factor.

302. Palin Appellant Brief, *supra* note 109, at 31–35.

303. See McGowan, *supra* note 21, at 517 (describing “the deep conviction among many conservatives that large media companies are biased against conservative views” which explains why the actual malice rule “became a candidate for expression of conservative grievance” and arguments for reversal of *Sullivan* on the right); Tina Nguyen, *How Right-Wing Media Groups Are Trying to Drive Rachel Maddow Off the Air*, VANITY FAIR (May 31, 2017), <https://www.vanityfair.com/news/2017/05/rachel-maddow-advertiser-boycott> [https://perma.cc/T3BF-B53M]; see also Mary Kay Linge, *How the New York Times Has Published Lies to Serve a Biased Narrative*, N.Y. POST (May 8, 2021, 12:33 PM), <https://nypost.com/2021/05/08/how-the-new-york-times-publishes-lies-to-serve-a-biased-narrative/> [https://perma.cc/8PDL-DPF5]; EMILY A. VOGELS, ANDREW PERRIN & MONICA ANDERSON, MOST AMERICANS THINK SOCIAL MEDIA SITES CENSOR POLITICAL VIEWPOINTS 3 (Pew Rsch. Ctr., Aug. 19, 2020), <https://www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints/> [https://perma.cc/7KD5-FTYA]. For a recent instance of the conservative argument in the context of Elon Musk’s release of the “Twitter Files” on Twitter’s refusal to share controversial *NY Post* story on Hunter Biden’s emails, see Elizabeth Dvoskin, *Facebook and Twitter Take Unusual Steps to Limit Spread of New York Post Story*, WASH. POST (Oct. 15, 2020, 10:52 AM), <https://www.washingtonpost.com/technology/2020/10/15/facebook-twitter-hunter-biden/> [https://perma.cc/KTG3-PQXN]; Cat

frame anti-disinformation defamation actions as yet another example of censorship of ideas unpopular with the liberal press.³⁰⁴ While many observers see clear differences between Fox and fact-based liberal press outlets,³⁰⁵ others worry about partisanship and

Zakrzewski & Faiz Siddiqui, *Elon Musk's 'Twitter Files' Ignite Divisions, but Haven't Changed Minds*, WASH. POST (Dec. 3, 2022, 6:39 PM), <https://www.washingtonpost.com/technology/2022/12/03/elon-musk-twitter-files/> [<https://perma.cc/PQY8-AYUS>]; see also Justin Ling, *Elon Musk's Twitter Files Are a Feast for Conspiracy Theorists*, WIRED (Dec. 8, 2022, 7:00 AM), <https://www.wired.com/story/twitter-files-qanon-conspiracy-theories/> [<https://perma.cc/Z9PW-ZSR4>]; HASEN, *supra* note 293, at 165. Progressives reject this narrative concerning the liberal-leaning media's coverage decisions. See, e.g., Adam Serwer, *Why Conservatives Invented a 'Right to Post'*, THE ATLANTIC (Dec. 9, 2022), <https://www.theatlantic.com/ideas/archive/2022/12/legal-right-to-post-free-speech-social-media/672406/> [<https://perma.cc/JJ83-NYFA>]; Robert Mackey & Micah Lee, *Left-Wing Voices Are Silenced on Twitter as Far-Right Trolls Advise Elon Musk*, THE INTERCEPT (Nov. 29, 2022, 12:20 PM), <https://theintercept.com/2022/11/29/elon-musk-twitter-andy-ngo-antifascist/> [<https://perma.cc/4L4H-VVCN>]; HASEN, *supra* note 293, at 17.

304. See, e.g., Jim Geraghty, *Why the Legal Case against Fox News Might Fail*, NAT'L REV. (Mar. 28, 2023), <https://www.nationalreview.com/the-morning-jolt/why-the-legal-case-against-fox-news-might-fail/> [<https://perma.cc/4PUZ-NVC5>] (reporting Fox lawyer Paul Clement's argument that "[c]onservative media faces a built-in challenge in these libel . . . cases. If *The New York Times* gets sued, it's going to be able to point to a dozen other mainstream-media household-name media companies that reported the same thing in the same way . . . Given the way the media works, in the balance of reporting, the conservative media, or somebody like Fox, is in a much more vulnerable position. If they report it, and the underlying allegations aren't true, they're much more out there on an island.").

Although only indirectly related to the press, it should be noted that defendants in some of Dominion's defamation lawsuits have sought to argue that the plaintiffs' cases constituted abuse of process and that the lawsuits were brought retaliatorily, to silence the defendants, to quash political dissent, and to suppress public criticism. U.S. Dominion Inc. v. MyPillow Inc., No. 1:21-CV-0445 CJN, 2022 WL 1597420, at *2-4 (D.D.C. May 19, 2022) (dismissing Lindell and MyPillow's abuse of process counterclaims); U.S. Dominion Inc. v. Powell, No. 1:21-CV-00040 CJN, 2022 WL 4534942, at *1-2 (D.D.C. Sept. 28, 2022) (dismissing Sidney Powell's abuse of process counterclaim).

Analogically, what might be called "anti-anti-disinformation" defamation actions—have also been brought in response to anti-disinformation initiatives by platforms and others. For example, controversial conservative commentator Candace Owens sued Lead Stories LLC for defamation after Lead Stories issued a "hoax alert" fact-check on Owens' claims about COVID-19 on Facebook. Owens v. Lead Stories, LLC, No. S20C-10-016 CAK, 2021 WL 3076686, at *11-12, *14, *15 (Del. Super. July 20, 2021), *aff'd*, Owens v. Lead Stories, LLC, 273 A.3d 275 (Del. 2022), *cert. denied*, 143 S. Ct. 97 (2022) (dismissing action on hyperbolic language theory); see also Joshua A. Geltzer & Neal K. Katyal, *The True Danger of the Trump Campaign's Defamation Lawsuits*, THE ATLANTIC (Mar. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/true-danger-trump-campaigns-libel-lawsuits/607753/> [<https://perma.cc/7543-VYWZ>] (arguing that the concern is less that the plaintiffs will ultimately win than the intimidating effect of a barrage of such suits).

305. See, e.g., Froomkin, *supra* note 292 (comparing "fundamentally fact-based" CNN or MSNBC from Fox which engages in "partisan coverage filtering" to keep newsworthy information from viewers "based on which party it benefits"); Tom Jones, Opinion, *No, Fox News and MSNBC Are Not the Same Thing*, POYNTER (Feb. 1, 2021), <https://www.poynter.org/newsletters/2021/no-fox-news-and-msnbc-are-not-the-same-thing/> [<https://perma.cc/6727-BJNT>].

outrage on all sides, perhaps as a result of market conditions.³⁰⁶ It is hard to believe that wealthy and powerful conservative interests will not launch a barrage of libel suits against what they characterize as left-leaning media disinformation couched in arguably defamatory language. They may even win some if they focus on public issues as to which truth and falsity are not so clearly established.

Short of the clear electoral lies peddled by the right-wing media regarding the 2020 presidential election, there are public issues as to which truth and falsity are not so evident, information whose reliability changes over time as the matters at issue are subject to further study and clarification, and statements as to which people could reasonably disagree but that become politicized in our current context of political polarization.³⁰⁷ Moreover, even mainstream news organizations today engage in both reporting and opining, informing and sensationalizing, to varying degrees and in different contexts, sometimes transparently and sometimes obscurely. The combination of an expansive definition of disinformation, a reversal of the *Sullivan* framework and an aggressive plaintiff's defamation bar presents worrisome possibilities for truncating political discourse under such circumstances.

Current litigation indicates that reversal of *Sullivan* is not necessary in order to hold defendants to account. The plaintiffs in the Sandy Hook cases against Alex Jones and Infowars won their astronomical damage awards on the basis of courts and juries applying *existing* constitutionalized defamation law. The currently pending defamation actions against Fox News and other right-

306. As Jack Shafer pointed out last year, speaking both of Fox News and MSNBC, “the networks’ sense of what’s newsworthy is a function of the networks’ political priors, and the priors of its desired audience By flattering the perceived political prejudices of their audiences and avoiding a story when the news becomes inconvenient to their agenda, the networks behave like vendors of political entertainment.” Jack Shafer, Opinion, *Why Fox Stopped Talking About Trump*, POLITICO (Nov. 30, 2021, 2:15 PM), <https://www.politico.com/news/magazine/2021/11/30/cable-news-negative-partisanship-problem-523518> [<https://perma.cc/9Y8V-VBZD>]; see also Sean Illing, *How Fox News Evolved into a Propaganda Operation*, VOX (Mar. 22, 2019, 11:20 AM), <https://www.vox.com/2019/3/22/18275835/fox-news-trump-propaganda-tom-rosenstiel> [<https://perma.cc/VUD5-M8QZ>] (quoting Tom Rosenstiel’s view that while Fox News, CNN and MSNBC are “not mirror images of each other” MSNBC and CNN are also building their networks on outrage); HASEN, *supra* note 293, at 71–72. See generally Brookman & Kalla, *supra* note 294 (finding partisanship on both sides).

307. On how none of the sixty-two election fraud cases brought by Trump supporters revealed credible evidence calling the 2020 election results into serious question. See HASEN, *supra* note 293, at 83; see also *id.* at 149 (regarding who decides what information is “bogus”). As for informational evolution, shifts in government statements about the COVID-19 pandemic over time are a good example.

wing media properly pose significant threats of liability based on *existing* constitutionalized defamation doctrine.³⁰⁸ Fox has taken the position that it simply aired information trumpeted by newsworthy public figures. Dominion claims that worry about harm to the Fox News brand motivated the network's "personalities" to endorse electoral conspiracy theories that they knew were false. In denying the network's summary judgment motion in *U.S. Dominion v. Fox*, the court rejected each of Fox News' claimed privileges. Discovery in the case has revealed the extent to which Fox News personnel expressed doubt about the election fraud claims and the reliability of their guests on popular shows hosted by Tucker Carlson, Sean Hannity, Jeanine Pirro and Maria Bartiromo.³⁰⁹

308. Peters, *supra* note 32; David Folkenflik, *Fox Producer's Warning Against Jeanine Pirro Surfaces in Dominion Defamation Suit*, NPR (Sept. 6, 2022, 5:00 AM) <https://www.npr.org/2022/09/06/1121187542/dominion-voting-fox-news-lawsuit-pirro> [<https://perma.cc/8NEH-G2NM>]; see also Adam Serwer, *The Right-Wing War on Free Speech Could Backfire*, THE ATLANTIC, <https://www.theatlantic.com/ideas/archive/2022/09/fox-news-trump-libel-defamation-nyt-sullivan/671330/> [<https://perma.cc/CNU2-59N9>] (Sept. 7, 2022, 11:50 AM) ("Conservatives who believe that the end of the actual-malice standard would fatally injure the mainstream outlets they loathe should probably be careful what they wish for.") The *Dominion* lawsuit has led to extensive press coverage. For a small sampling of articles on the subject, see, e.g., William P. Barr, Opinion, *Dominion's Weak Case Against Fox*, WALL ST. J. (Mar. 23, 2023), <https://www.wsj.com/articles/dominion-should-lose-its-case-against-fox-defamation-voting-trump-election-malice-sullivan-hosts-1e6a8a11> [<https://perma.cc/YZ79-3JZ3>]; Paul Farhi, Jeremy Barr & Sarah Ellison, *'Incredibly Damning:' Fox News Documents Stun Some Legal Experts*, WASH. POST (Feb. 23, 2023), <https://www.washingtonpost.com/media/2023/02/23/fox-news-dominion-lawsuit-legal-analysis/> [<https://perma.cc/CJZ8-EPJQ>]; Noah Feldman, *Fox News Can Be Held Accountable While Protecting Free Speech*, WASH. POST (Mar. 18, 2023), https://www.washingtonpost.com/business/2023/03/18/dominion-libel-lawsuit-against-fox-news-tests-media-s-free-speech/542efdf2-c587-11ed-82a7-6a87555c1878_story.html [<https://perma.cc/MC53-RT3P>]; Jeremy W. Peters, *Fox's P.R. Woes May Not Directly Translate to Legal Ones*, N.Y. TIMES (Mar. 12, 2023), <https://www.nytimes.com/2023/03/12/business/media/fox-news-dominion-lawsuit-evidence.html> [<https://perma.cc/4KR7-QGYX>]; Jeremy Barr, *Is Sean Hannity a Journalist? Role of Hosts Is Key in Fox News Lawsuit.*, WASH. POST (Mar. 20, 2023), <https://www.washingtonpost.com/media/2023/03/20/fox-lawsuit-hosts-journalists-hannity-dominion/> [<https://perma.cc/PK4J-CF24>]; Ankush Khadori, *Is Fox News Really Doomed?*, N.Y. MAG.: INTELLIGENCER (Mar. 16, 2023), <https://nymag.com/intelligencer/2023/03/fox-news-looks-likely-to-lose-dominion-voting-systems-case.html> [<https://perma.cc/SH4B-LBXP>].

U.S. Dominion v. Fox News was scheduled to go to trial in April 2023. The Delaware court, applying New York law, recently denied Fox's motion for summary judgment. Order at 66, *U.S. Dominion, Inc. v. Fox Network, LLC*, Nos. N21C-03-257, N21C-11-082 (Del. Super. Ct. Mar. 31, 2023). In addition to rejecting Fox News's claim that it should not be considered to have published false and defamatory statements because it simply provided a platform for newsworthy guests to express their opinions, the court rejected the network's arguments that its programming was privileged as neutral reportage, fair report, or opinion. *Id.* at 69–80. The court denied Dominion's motion for summary judgment on actual malice, so unless they settle, Fox and Dominion will go to trial over the issue of actual malice. *Id.* at 49–50.

309. The Delaware trial court's summary judgment opinion catalogs some of these instances. See *id.* at 85–130. Mainstream media also covered the *Dominion v. Fox* discovery

Documents also indicate that negative reaction from Fox viewers to the network's early decision to call Arizona for Biden in 2020 led Fox personnel to express significant concern about losing the network's core audience to other conservative media.³¹⁰ Thus, without predicting the result in the *Dominion* case,³¹¹ it is reasonable to

extensively. See, e.g., Aaron Blake, *Analysis: Fox News-Dominion Lawsuit: A Timeline of the Major Revelations*, WASH. POST (Mar. 14, 2023), <https://www.washingtonpost.com/politics/2023/03/14/timeline-all-major-events-fox-news-dominion-case/> [<https://perma.cc/G2BX-J84V>]; Sarah Ellison, Paul Farhi & Jeremy Barr, *Fox News Feared Losing Viewers by Airing Truth About Election, Documents Show*, WASH. POST. (Feb. 17, 2023), <https://www.washingtonpost.com/media/2023/02/17/fox-news-dominion-ratings-fear/> [<https://perma.cc/E4LZ-6PW5>]; Charlotte Klein, "Our Viewers . . . Believe It": What Fox News Execs and Stars Were Really Thinking While the Network Boosted Donald Trump's Election Lies, VANITY FAIR (Feb. 17, 2023), <https://www.vanityfair.com/news/2023/02/fox-news-dominion-lawsuit> [<https://perma.cc/8G37-NBTJ>]; Jeremy W. Peters, *In Testimony, Hannity and Other Fox Employees Said They Doubted Trump's Fraud Claims*, N.Y. TIMES (Dec. 21, 2022), <https://www.nytimes.com/2022/12/21/business/media/sean-hannity-fox-trump-election.html> [<https://perma.cc/9LXJ-R9UU>]; Jeremy W. Peters, *Inside the 3 Months That Could Cost Fox \$1.6 Billion*, N.Y. TIMES (Mar. 20, 2023), <https://www.nytimes.com/2023/03/20/technology/fox-news-dominion-texts.html> [<https://perma.cc/HLG9-X2GP>]; Jeremy W. Peters & Katie Robertson, *Murdoch Acknowledges Fox News Hosts Endorsed Election Fraud Falsehoods*, N.Y. TIMES (Feb. 27, 2023), <https://www.nytimes.com/2023/02/27/business/media/fox-news-dominion-rupert-murdoch.html> [<https://perma.cc/2CQL-MPLD>].

310. See, e.g., Ellison, Farhi & Barr, *supra* note 309; Malone, *supra* note 299.

311. I am not purporting to predict the result in the *Dominion v. Fox News* litigation here. It is not clear whether there will be either a judgment or a settlement before this Article goes to press. In any event, lengthy appeals are sure to follow any outcome at trial. It is clear, however, that the Delaware trial court's finding, applying New York law, that the neutral reportage privilege, the fair report privilege, and the opinion privilege do not apply to the facts in the case are very consequential for Fox. A settlement seems more likely after the summary judgment decision.

For Fox, the distinct possibility of a loss at trial and the fact that it has already been harmed by the public circulation of information in its internal documents indicating widespread hypocrisy might counsel serious settlement efforts. So far, the conservative press has not given a lot of coverage to the Dominion case. See Katie Robertson & Stuart A. Thompson, *Conservative Media Pay Little Attention to Revelations About Fox News*, N.Y. TIMES (Mar. 3, 2023), <https://www.nytimes.com/2023/03/03/business/media/fox-dominion-conservative-media.html> [<https://perma.cc/9MEZ-EW8B>]. However, that could well change when the trial is actually underway, giving Fox News an additional practical incentive to settle prior to trial. See also Khardori, *supra* note 308 (arguing that it would be awkward for Fox to argue at trial that "some of its hosts—people whose job is supposed to include being reasonably intelligent and informed—are, in effect, grossly incompetent").

For Dominion, a lengthy and costly arc of future litigation, the possibility of reversal on appeal as to significant legal issues, questions about how damages would be calculated, and the fact that political defamation cases involving the press have generally had pro-defense rulings and results are all realities that might make a settlement attractive despite the court's rulings against Fox on summary judgment. See Helen Coster & Jack Queen, *Analysis: Is Dominion Voting Case Against Fox News Worth as Much as \$1.6 billion?*, REUTERS (Mar. 10, 2023), <https://www.reuters.com/legal/is-dominion-voting-case-against-fox-news-worth-much-16-billion-2023-03-10/> [<https://perma.cc/A2MX-GUJ3>].

The problem for both parties with respect to settlement may be that each side has taken public positions that cast them as social heroes—Dominion as an "intrepid combatant against democracy-harming disinformation weaponized by the conservative press for

argue that if Dominion can carry its burden of proving actual malice, liability could follow for Fox without the need to cast defamation litigation as a weapon to fight political disinformation writ large. Indeed, *Dominion* itself demonstrates that the new anti-disinformation frame brings with it serious democratic costs without clear corresponding benefits.³¹²

Particularly if courts assess defamatory statements in the full context of a media outlet's overall election programming in its political talk shows; if they avoid overextending existing protections for opinion and rhetorical hyperbole to the highly inflammatory programming styles of much Fox programming; and if they reject

partisan political reasons," and Fox as a "First Amendment mascot giving conservative voices a hearing they are denied in the liberal mainstream media." These representational roles complicate the typical settlement calculus. I would suspect that the parties' willingness to settle would likely be influenced by whether the terms of the settlement could effectively be portrayed to each party's audience as a victory.

312. If Dominion wins, the only "truth" that will have been established at trial is that a jury will have found Fox News to have acted with actual malice in airing the false statements at issue in Dominion's complaint. This case cannot provide an authoritative truth about the overall "Big Lie" regarding the 2020 election. Certainly Donald Trump will not admit during his 2024 campaign that a win by Dominion establishes the falsity of his election fraud claims. It is not clear that Fox News's business model, in which its talk show pundits stoke its audience's political outrage, would fundamentally change as a result of a Dominion win at trial. See Malone, *supra* note 299. Even if Dominion wins, its extravagant damage claims (\$1.6 billion) could be reduced to a figure that can be absorbed by Fox without existential effect. In any event, if Dominion wins, Fox News will surely appeal, years will pass, and the many people who still believe that the 2020 presidential election was "stolen" will not be convinced otherwise. Whatever the short-term outcome, people who have relied on Dominion's claims to fight disinformation will inevitably feel dissatisfied.

On the other hand, the case's anti-disinformation frame could backfire. A Fox victory would inevitably be spun by the Trump machine as authoritative proof that the 2020 election was in fact "stolen" even though a Fox victory would actually rest on the arcana of defamation doctrine, it could also embolden the Fox political talk show hosts to continue stoking outrage and enhance their power at the company vis-à-vis the hard news desk. See Matt Young, AJ McDougall & Brett Bachman, *Jaw-Dropping Filings Reveal Civil War Inside Fox News*, YAHOO NEWS (Mar. 7, 2023), <https://uk.news.yahoo.com/more-batsh-t-internal-fox-233905445.html> [<https://perma.cc/V3V6-SCAV>]; David Bauder, *Records in Fox Defamation Case Show Pressure on Reporters*, ABC NEWS (Mar. 11, 2023), <https://abcnews.go.com/US/wireStory/records-fox-defamation-case-show-pressures-reporters-97785584> [<https://perma.cc/U3WJ-TURN>]. If Fox News wins, the result would also give oxygen to arguments—by progressives as well as conservatives—for defamation law "reform" that could well break down the press's protections under the *Sullivan* framework. This would be a major loss for journalism. While the *Sullivan* framework is imperfect, its elimination would protect authoritarian public officials against press critique and undermine the checking value of journalism for democracy. Accord, SAMANTHA BARBAS, ACTUAL MALICE (2023).

Alternatively, if the case settles, each side would likely be able to spin the result in its own favor. See *supra* note 311. Even if that would be unexceptionable in the typical private defamation case, it would likely undermine the goal of combating political disinformation.

the proposed expansion of a newsworthiness privilege in circumstances in which the reports can reasonably be interpreted as endorsement, the broader attack on constitutionalized defamation law and contentious attempts to define the boundaries of “real” journalism can helpfully be avoided.³¹³ And at the same time, in extreme circumstances—in cases involving knowing and amplified dissemination of deeply democratically destabilizing falsity—the existing law of defamation would serve to police the boundary of speech and protect the true function of accountability journalism.

Without signing on to every aspect of what has recently been called an “incoherent” defamation doctrine,³¹⁴ this Article has warned that the fear of disinformation’s effects and the desire for the authoritative establishment of truth can all too easily advance an anti-democratic project of press intimidation and control through excessive defamation “reform.” Rolling back First Amendment protections for defamation defendants should not be undertaken on the basis of cavalier assumptions that reversing the *Sullivan* approach will necessarily protect reputation more than the current regime, particularly in light of the predictable chilling effects to come. The relationship between protecting free speech and reputation is complicated and issues on the margins should be decided in favor of free speech and a free press.

D. *Shifting the Focus from Propagators to Consumers of Disinformation*

Many have said that a fundamental problem afflicting the media today is a failure of public trust.³¹⁵ This Article has argued that

313. See Peters, *supra* note 32 (quoting noted media lawyer as saying that a finding of liability in the voter fraud cases could “effectively rebut the recent contentions that the *Sullivan* regime doesn’t work as intended”).

314. See, e.g., Gutierrez, *supra* note 122, at 41 (calling the defamation regime “doctrinally incoherent and unworkable in practice”). See generally Logan, *supra* note 7.

315. Studies indicate that conservatives trust the media far less than liberals do. Jeffrey Gottfried, *Republicans Less Likely to Trust Their Main News Source if They See It As ‘Mainstream’; Democrats More Likely*, PEW RSCH. CTR. (July 1, 2021), <https://www.pewresearch.org/fact-tank/2021/07/01/republicans-less-likely-to-trust-their-main-news-source-if-they-see-it-as-mainstream-democrats-more-likely/> [https://perma.cc/869X-5Y5G]; Danielle Kurtzleben, *Republicans Have Long Feuded with the Mainstream Media. Now Many Are Shutting Them Out*, NPR (Aug. 7, 2022), <https://www.npr.org/2022/08/07/1115949410/republicans-have-long-feuded-with-the-mainstream-media-now-many-are-shutting-the> [https://perma.cc/BZ6P-CKMN]. Still, it is fair to say that today, there is distrust on both sides. To be sure, the press is not the only public institution whose credibility members of the public distrust. At the same time, Professor Hasen is right that “in the cheap speech

while concerns about the impact of disinformation on democracy are natural and looking to litigation for solutions often follows, the deployment of defamation law to fight disinformation and establish authoritative truth is unlikely to be successful at addressing either the systemic problem of disinformation or the institutional trust problem. Disinformation in the public sphere today is a more systemic and broader challenge than can credibly be addressed by lowering liability barriers for libel. Instead, the use of disinformation as a rationale to dismantle constitutionalized defamation law will bring with it more problems than it can realistically solve while posing a threat to the democratic role of the press. By contrast, a shift in focus—away from propagators to audiences—might address the trust problem more directly and perhaps even improve some of the media amplification of disinformation about which Justice Gorsuch expresses concern.³¹⁶ Rather than focusing on disinformation to rationalize a wholesale dismantling of the *Sullivan* compromise, then, addressing the skewed information and media trust problems directly by focusing on the audience might bear fruit.³¹⁷ This is important because of the critical role that trusted journalism, both at the local and national level, can play in stemming corruption and promoting government accountability.³¹⁸

era, credible institutions serve as bulwarks against the spread of viral disinformation.” HASEN, *supra* note 293, at 158. It is important to insure that other institutions in addition to the press gain credibility as well. In turn, this requires that these institutions’ members “continue to abide by social and professional norms,” including via self-policing and “mutual reinforcement of norms.” *Id.* at 59.

316. Exposure to politically partisan news programming might end up reducing the public’s level of trust in the press as to all it reports. See Andrew M. Guess, Pablo Barberá, Simon Munzert, & JungHwan Yang, *The Consequences of Online Partisan Media*, 118 PROC. NAT’L ACAD. SCIENCES U.S. e2013464118, e2013464118 (2021) <https://www.pnas.org/doi/epdf/10.1073/pnas.2013464118> [<https://perma.cc/R7TE-TMUD>].

317. Disinformation is not a new phenomenon in American political life and some resist the notion that we are living through a true epistemic crisis as a result of disinformation. *E.g.*, Lebovic, *supra* note 300 (“The real question is whether the proportion of the population who believe in political lies and hateful propaganda has grown.”). Professor Lebovic argues that the biggest “problem in the nation’s media ecosystem” is “the absence of countervailing forms of necessary political information.” *Id.* (emphasis omitted). Instead of attempting to “eliminate unsavory forms of expression from the public sphere,” therefore, he recommends that we think about how to create public institutions to produce such necessary political information (rather than partisan opinion). *Id.* My focus here on understanding the ways in which people are exposed to and process falsity does not preclude Professor Lebovic’s type of inquiry. Indeed, it could even be helpful in promoting the dissemination of the kind of factual political information that Lebovic believes is necessary to democracy.

318. See HASEN, *supra* note 293, at 77–80 and sources cited therein (discussing growth in corruption in the absence of local media).

The effects of disinformation can be blunted,³¹⁹ but it is important to develop an evidence-based understanding of how that happens. Recent work by political scientists indicates that “sustained consumption of cross-cutting media can moderate partisan media viewers’ attitudes, partially because it exposes them to different topics and information.”³²⁰ If, for example, audiences begin to move away from a strict diet of partisan politics of outrage fueled by conspiracy theories, then news outlets will have reduced economic incentives to provide such programming. Audience-focused approaches would mean promoting cross-cutting media exposure, working on a better understanding of the fit between journalistic practices and public expectations, deploying practical ways to enhance media literacy, addressing the evolving role of social media in the informational ecosystem, and researching effective methods to decrease susceptibility to disinformation and to increase public trust in the press, keeping partisan asymmetries in mind. Much work still needs to be done.³²¹ I admit here my working assumption: that most people want truthful information in order, for example, to vote. Surveys show that most Americans see the spread of disinformation to be a major problem that warrants solving.³²²

319. Observers remind us that the American public did not succumb to the disinformation in the news space before the midterm elections—presumably because of the countermeasures taken by governments, platforms and the media and, perhaps, public sentiment. See Ashley Gold & Sara Fischer, *Why Misinformation Didn't Wreck the Midterms*, AXIOS (Nov. 18, 2022), <https://www.axios.com/2022/11/18/misinformation-midterms-experts> [<https://perma.cc/9XZF-6GKU>].

320. *E.g.*, Brookman & Kalla, *supra* note 294. Recent empirical work also suggests that, in addition to partisanship, public distrust of the press may have to do with the fact that many Americans today do not subscribe to all the traditional goals of journalistic practice due to moral instincts. See *generally* ASSOCIATED PRESS – NORC CTR. FOR PUB. AFFS. RSCH., *A NEW WAY OF LOOKING AT TRUST IN MEDIA: DO AMERICANS SHARE JOURNALISM'S CORE VALUES?* (2021), <https://apnorc.org/projects/a-new-way-of-looking-at-trust-in-media-do-americans-share-journalisms-core-values/> [<https://perma.cc/4MS4-ZNL5>].

321. The literature and empirical data regarding the effects of disinformation on social media are complex and reveal conflicts, calling for more research. For a discussion of this in the popular press, see, e.g., Gideon Lewis-Kraus, *How Harmful Is Social Media?*, NEW YORKER (June 3, 2022), <https://www.newyorker.com/culture/annals-of-inquiry/we-know-less-about-social-media-than-we-think> [<https://perma.cc/P29N-8Q48>]. One interesting recent strategy is “prebunking” disinformation. Shannon Bond, *False Information Is Everywhere. 'Pre-bunking' Tries to Head It Off Early*, NPR (Oct. 28, 2022, 5:48 AM), <https://www.npr.org/2022/10/28/1132021770/false-information-is-everywhere-pre-bunking-tries-to-head-it-off-early> [<https://perma.cc/WZ9G-5GUG>] (describing apparent effectiveness of strategy and what we still do not know about it). Of course, the Article’s focus on the audience is not intended to indicate this as the single solution to the democratically-harmful effects of political and public health disinformation.

322. See, e.g., Amy Mitchell, Jeffrey Gottfried, Galen Stocking, Mason Walker & Sophia Fedeli, *Many Americans Say Made-Up News Is a Critical Problem That Needs To Be Fixed*, PEW RSCH. CTR. (June 5, 2019), <https://www.pewresearch.org/journalism/2019/06/05/many>

While focusing on audience reactions rather than changing defamation doctrine may at first appear to be a bigger and more thankless task, it may ultimately evolve to be both more effective and more protective of a democracy-enhancing role for the press.³²³

americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/ [https://perma.cc/96MB-XSDG]. To be sure, psychologists note the phenomenon of motivated reasoning. See, e.g., Guy-Uriel Charles, *Giving the People What They Want: Supplying the Demand for Disinformation*, BALKINIZATION (Apr. 13, 2022), <https://balkin.blogspot.com/2022/04/giving-people-what-they-want-supplying.html> [https://perma.cc/CQY5-P5CZ]; Erik Peterson & Shanto Iyengar, *Partisan Gaps in Political Information-Seeking Behavior: Motivated Reasoning or Cheerleading?*, 65 AM. J. POL. SCI. 133, 133 (2021) (“[O]verall, our findings support the motivated reasoning interpretation of misinformation; partisans seek out information with congenial slant and sincerely adopt inaccurate beliefs that cast their party in a favorable light.”); see also HASEN, *supra* note 293, at 8–9.

It makes sense that the more intensely partisan people are, the more likely they are to seek out and believe information that confirms their prior beliefs and associations. It makes sense to assume that people will engage in their own research and critical analysis about political issues only sometimes, and for some issues. See, e.g., Lebovic, *supra* note 300 (arguing how individual political “omnicompetence” is unrealistic). It makes sense that people will underestimate their own susceptibility to false beliefs even if they are aware of the problem for others. Moreover, there appears to be partisan asymmetry with respect to belief in and dissemination of misinformation, with conservative Republicans more likely to accept political disinformation. See, e.g., Ashwin Rao, Fred Morstatter & Kristina Lerman, *Partisan Asymmetries in Exposure to Misinformation*, CORNELL UNIV. (Mar. 2, 2022), <https://doi.org/10.48550/arXiv.2203.01350> [https://perma.cc/65J6-VNMW] (describing how partisanship impacts behaviors and exposures to health misinformation); YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018).

Still, how large is the percentage of the voting public that should be classed unchangeably as uninterested in truthful political information? Isn't there a difference between “fellow travelers and true believers . . . alienated individuals and all the shades in between[?]” Lebovic, *supra* note 300. Are we able to conclude that cognitive biases such as motivated reasoning apply in the same way across the board and across all political issues? Don't the polls based on them often raise questions as to methodology? See *id.* Isn't it the case that stories reporting on the polls often overread, under interpret and sensationalize the results? See *id.* Even partisan-segregated news consumers appear to be exposed to a variety of news sources over time. It is hard to assume that this type of exposure is likely to have little or no impact, regardless of the issue, the type of exposure, or the source of exposure. As Rao et al. point out with respect to COVID misinformation, the bulk of users in their study who were political moderates “selectively share more factual content [and thus] filter out misinformation.” Rao et al., *supra*. Studies suggest that there is partisan asymmetry not only with respect to what lies people believe, but also with respect to what blunts the effects of misinformation. See Jay Jennings & Natalie Stroud, *Asymmetric Adjustment: Partisanship and Correcting Misinformation on Facebook*, NEW MEDIA & SOC'Y: ONLINEFIRST, (June 28, 2021), <https://doi.org/10.1177/14614448211021720> [https://perma.cc/L9XK-427K]. This is why careful research geared to determining what “works” for different audiences is an attractive option. An evidence-based approach could generate at least modestly-effective tailored interventions rather than blunderbuss correctives whose ineffectiveness convinces people that media literacy efforts will inevitably fail.

323. My point here is not that law addressing disinformation producers will always fall short. I recognize, as argued above, that careful and rigorous application of the *Sullivan* rule and its progeny can help some anti-disinformation defamation actions trigger more accountability among partisan news outlets. In addition to defamation suits, a number of

CONCLUSION

Today, there has been a marked increase in defamation actions, particularly against the press, often seeking astronomical damages. Whether high-profile politicians waging repeat warfare, celebrities, or corporations, libel plaintiffs are seeking to polish their brands both in the courts and in the court of public opinion. Some

states have adopted legal rules to address election disinformation. *See, e.g.*, David S. Ardia, Evan Ringel & Allysan Scatterday, *State Regulation of Election-Related Speech in the U.S.: An Overview and Comparative Analysis*, UNC CTR. MEDIA L. & POL'Y (Aug. 4, 2021), <https://ssrn.com/abstract=3899542> [<https://perma.cc/6CPV-DRZK>]. California has recently adopted anti-disinformation legislation addressing COVID-related misinformation (although the statute has already been challenged under the First Amendment). *See, e.g.*, Steven Lee Myers, *Is Spreading Medical Misinformation a Doctor's Free Speech Right?*, N.Y. TIMES (Nov. 30, 2022), <https://www.nytimes.com/2022/11/30/technology/medical-misinformation-covid-free-speech.html> [<https://perma.cc/UL4L-2273>]. However, these legal approaches are unlikely to be sufficient. Dealing with the impacts of disinformation must be a multi-focal enterprise. Here I argue that careful study of what makes people believe or reject information strikes me as a practical and potentially powerful adjunct to the traditional focus. Such research can help identify strategies to reduce the spread and effectiveness of disinformation narratives. *See, e.g.*, Steven Lee Myers, *How Social Media Amplifies Misinformation More than Information*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/technology/misinformation-integrity-institute-report.html> [<https://perma.cc/2PRV-F9D3>] (describing study regarding amplification of misinformation across different social media platforms and design changes that can reduce the spread).

My recommendation of looking to the audience is not based on a blind hope that the large swaths of American news consumers—and particularly staunch conservatives—who have come to believe that news organizations are biased liars will be persuaded to change their minds about the press with a few fact checks. It is reasonable to conclude that conservative alienation writ large is unlikely to be eliminated even if “journalists were to Make Nice by finding and amplifying informed, fact-based conservative viewpoints.” *See* Doron Taussig & Anthony Nadler, *Make Nice, or Screw Them?*, COLUM. JOURNALISM REV. (Oct. 17, 2022), <https://www.cjr.org/criticism/journalism-conservative-problem-trust-engagement.php> [<https://perma.cc/TE5L-C8D6>]. At the same time, however, this does not mean that thoughtful and evidence-based debunking strategies will not be effective for significant numbers of people. The theory of motivated reasoning recognizes that “even those processing directionally will adopt uncomfortable truths when they can no longer justify an alternative.” Jennings & Stroud, *supra* note 322, at 4 (citing Ziva Kundam, *The Case for Motivated Reasoning*, 108 PSYCH. BULL. 480, 482–83 (1990)). Moreover, giving up on convincing conservatives of press legitimacy imposes its own significant costs: “You can’t enable democracy if you don’t inform a substantial portion of the public.” Taussig & Nadler, *supra*. Taussig and Nadler propose an alternative path forward, arguing that “we need media outlets that offer people the option to see themselves and their communities as a targeted, understood, respected ‘you’ without having to move into conservative media’s tent.” Now that “the method of building trust that journalists developed for the mass audience of the twentieth century no longer applies,” they claim, the focus on the audience in all its diversity, “without giving undeserved credence to the myths of the contemporary right,” could help inspire increases in cross-partisan trust in the press. *Id.* Close attention to audiences and their behaviors and beliefs by social psychologists, cognitive scientists, and other experts in social science could advance such a project. And a more granular understanding of the fluidity of political identity and what reduces the intensity of partisanship might help the management of audience-segmenting media see the benefits of effective cross-partisan programming, at least to some degree.

are using defamation law for revenge, or to punish the press for coverage they don't like, or to intimidate journalists with their reputations for litigiousness.³²⁴ With the help of increasingly prominent plaintiff-side legal representation, their defamation claims are being brought not only for the traditional goal of compensating for reputational injury but also for the asserted objective of fighting disinformation and establishing truth.

At the same time, the press-protective gloss on the law of defamation adopted in *New York Times v. Sullivan* and its progeny is under attack. With a recent plea by Justice Gorsuch about the need to inject truth into public discourse, the goal of fighting disinformation has newly emerged as a powerful tool to advance radical changes to constitutionalized defamation law. The combination of Justice Thomas's originalist attack on *Sullivan*'s constitutional legitimacy and Justice Gorsuch's anti-disinformation frame for defamation litigation might attract enough justices to lead to reversal or significant diminishment of the *Sullivan* regime's First Amendment protections for the press. Indeed, the anti-disinformation rationale can even justify further press-restrictive developments in state defamation laws as well.

This Article has argued that it is a misguided strategy to justify reversal of almost sixty years of constitutionalized defamation law on the ground that libel suits can effectively combat disinformation if only plaintiffs are not hamstrung by anachronistic legal rules. The disinformation argument for erasing *Sullivan* and its progeny risks significantly threatening the press without offering a realistic return either in protecting reputation or in curbing the systemic problem of disinformation.

The anti-disinformation rationale is overbroad and likely ineffective in most instances. But it can certainly serve as an excuse to cabin the press in the performance of its democratic functions. Broad, meta-level truths beyond the specific statements at issue in the actions are unlikely to be established in litigation. Indeed, the *Depp v. Heard* litigation has shown how such cases can trigger further disinformation. From what cognitive scientists tell us about how beliefs are created and change, it is also far from clear that

324. See Acheson & Wolhschlegel, *supra* note 199, at 370–75.

audiences will credit lawsuit results inconsistent with their own existing beliefs.³²⁵

At the same time, using disinformation to justify lowering the bar to defamation liability is likely to have excessive chilling effects on the press. The sustained attacks on the purportedly “fake news” press under which journalism has been operating, the strategic use of stratospheric damages claims by well-funded plaintiffs seeking press control often through repeat litigation, and the internal contexts of media decision-making all suggest that disinformation-grounded reform would have a particularly chilling effect on public interest reporting today. Contrary to overwrought claims regarding journalists’ perverse incentives, and despite the reality of errors and slips, both the economic and professional incentives of traditional newspapers and broadcast outlets largely promote verification procedures. To the extent that the most irresponsible among today’s information networks endorse opinionated defamatory disinformation, they should be caught in the *Sullivan* framework’s existing net.

That the defamation cases by Dominion and Smartmatic have been brought against the right-wing press over their election fraud talk show programming should not lull progressives into result-oriented acceptance of fundamental change to today’s defamation doctrine. And conservatives who call for media reform and a lower bar for defamation liability might also do well to remember that conservatives too benefit from the *Sullivan* framework.³²⁶ To be sure, concerns about the anti-democratic effects of a distorted information marketplace are real. The failure to distinguish between opinion programming and news reporting and the invitation to a politics of outrage and polarization, particularly on the very popular Fox network, have doubtless exacerbated the diffusion of disinformation. Elements of today’s information and news ecosystem have financial incentives to stoke indignation. Still, whatever their attractions in attempting to establish the falsity of the electoral “Big Lie” and its distorting effect on self-government, anti-disinformation defamation actions pending today should not blind us to

325. See Levi, *supra* note 255, at 955–56; Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232, 312 (2018).

326. See, e.g., Serwer, *supra* note 308; Jennifer Rubin, *Opinion, Are Right-wing Justices Really Sure They Want to Revisit Defamation Law?*, WASH. POST (Dec. 12, 2022, 7:45 AM), <https://www.washingtonpost.com/opinions/2022/12/12/defamation-supreme-court-fox-news-dominion-lawsuit/> [<https://perma.cc/JH9H-LYKN>].

the dangers of this recharacterization of defamation law. Former President Trump has already turned the tables on the progressive version of this kind of lawsuit with his suit against CNN for its supposed dissemination of disinformation about him and his Administration.³²⁷ Doubtless other conservative lawsuits against MSNBC and CNN for spreading disinformation are in the pipeline. Even corporations criticized for their business practices are beginning to take advantage of the rhetoric of disinformation in their libel actions against the press. With the breadth and partisan manipulability of the notion of disinformation, reducing defense protections under the *Sullivan* precedent could well trigger much more defamation litigation designed to intimidate and muzzle the journalism. Whatever the likelihood of ultimate success in such cases, their chilling effect on the press and their use to craft an anti-press narrative are hard to dispute.

The worry about disinformation is based on the harm it can wreak if it spreads virally and people believe it. The anti-disinformation defamation suit is an attempt to stop the spread of harmful political falsity by using the courts to deter its propagators. But this strategy faces significant hurdles to effectiveness. And it has been conscripted to justify the dangerous project of dismantling the *Sullivan* compromise when the *Sullivan* framework itself could suffice to police the worst instances of falsity-amplification by partisan news organizations. Rather than reforming and repurposing defamation doctrine to focus on propagators of disinformation, a more fruitful first step might be to address media distrust and audience susceptibility to falsity—the problems that make disinformation a democratic danger. By looking at what moves the audience—focusing on the consumers rather than the producers or publishers of the false speech—researchers can help reveal ways to neutralize the impacts of disinformation and to improve the public sphere while returning defamation law to its focus on individual reputation.

327. See *supra* note 15. Trump has indicated his intention to bring the same type of defamation action against other news organizations as well. See, e.g., Joseph A. Wulfsohn, *Trump Sues CNN for Defamation, Teases Lawsuits Against Other 'Fake News Media Companies' Will Follow*, FOX NEWS (Oct. 3, 2022, 7:39 PM), <https://www.foxnews.com/media/trump-sues-cnn-defamation-teases-lawsuits-against-fake-news-media-companies> [https://perma.cc/9KGP-9TUE].