

## Defamation Law and the Crumbling Legitimacy of the Fourth Estate

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Just a half-century ago, “the news media were one of America’s most trusted institutions.”<sup>1</sup> Today, however, almost half of Americans say they have little or no trust in newspapers, and more than half say the same about television news.<sup>2</sup> Although some degree of public distrust of the media is healthy, distrust of this magnitude represents a crisis of legitimacy.

The role of the press in safeguarding democracy is enshrined in the U.S. Constitution. The Constitution protects press freedom not as an end in itself and “not as a favor to a particular industry”<sup>3</sup> but as a means of making our system of government possible. The framers recognized that the republic’s fate depends on citizens having access to reliable and timely information about their world. Trustworthy news enables us to participate in informed public discussion, forge consensus, and hold democratically elected leaders accountable.<sup>4</sup> If we lack access to (or cannot agree upon) the most basic facts about global, national, and local events or the myriad issues that affect our lives, it is impossible to understand and

<sup>1</sup> JONATHAN M. LADD, WHY AMERICANS HATE THE MEDIA AND HOW IT MATTERS 1 (2012) (providing results of American National Election Study). In 1974, a Gallup poll found that 69 percent of Americans had a “great deal” or “fair amount” of trust in the media to report “the news fully, accurately and fairly.” *Media Use and Evaluation*, GALLUP, <https://news.gallup.com/poll/1663/media-use-evaluation.aspx> (last visited Apr. 22, 2024). The same poll conducted in 2022 found that only 16 percent of Americans had a “great deal” or “quite a lot” of confidence in newspapers, and television news fared even worse, with only 11 percent expressing those levels of confidence. Megan Brenan, *Media Confidence Ratings at Record Lows*, GALLUP (July 18, 2022), <https://news.gallup.com/poll/394817/media-confidence-ratings-record-lows.aspx>; Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, GALLUP (July 5, 2022), <https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx>.

<sup>2</sup> Brenan, *supra* note 1. Forty-six percent of Americans say that they have little or no trust in newspapers, and 53 percent say they have little or no trust in television news. *Id.*

<sup>3</sup> *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting from denial of certiorari).

<sup>4</sup> For further discussion of the views of the framers concerning the role of the press, see Christina Koningisor & Lyrissa Barnett Lidsky, *First Amendment Disequilibrium*, 110 VA. L. REV. 1, 10–11 (2024).

respond to the challenges facing us and our country. Without shared facts about the world, the stability of our communal life is in jeopardy.<sup>5</sup>

It may seem quixotic to lament the public's loss of faith in traditional media actors at a time when we have – on demand – an unprecedented level of access to information.<sup>6</sup> Social media enables more people than ever before to share content and commentary with mass audiences. Yet this very informational abundance – soon to be magnified by generative artificial intelligence – can make it increasingly difficult to know which information to trust. And even though some types of information are superabundant, other types are becoming scarcer. Case in point: Historically, local newsgatherers played a key, democracy-enhancing role by keeping their communities informed about local events and holding local elected officials to account. Now, however, the market for local news has evaporated, turning more and more cities into “news deserts.” Meanwhile, fewer national legacy news providers can afford to invest in the processes and expertise needed to produce high-quality news about our increasingly complex world.<sup>7</sup> As such, the true crisis of press legitimacy is the declining cultural investment in the systematic gathering of high-quality news produced by independent, transparent, and trustworthy sources.

What caused the Fourth Estate to crumble? Although scholars usually point to a handful of cultural and economic factors as undermining news quality and press credibility, various critics now identify a more covert culprit: the U.S. Supreme Court. The Court is partly to blame for the press's declining credibility, these critics claim, because the Court's First Amendment decisions hinder the ability of state defamation law to hold the press accountable for defamatory falsehoods. The implication is that the press would regain much of its credibility if the Court were to remove these constitutional barriers – especially the requirement that public officials and public figures demonstrate “actual malice” on the part of the press for a defamation claim to prevail. As this chapter explains, the current landscape of high-profile defamation cases, and the public reaction to them, casts doubt on whether restoring public trust in the press could be so easy.

<sup>5</sup> RICHARD L. HASEN, *CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS – AND HOW TO CURE IT* 24 (2022) (describing the threat to democracy posed by “a public that cannot determine truth or make voting decisions that are based on accurate information, and a public susceptible to political manipulation through repeatedly amplified, data-targeted, election-related content, some of it false and misleading”).

<sup>6</sup> Jack M. Balkin, *Free Speech v. the First Amendment*, 70 UCLA L. REV. 1206, 1264 (2023) (“Digital media can make more valuable information about public issues available to more people than ever before in human history.”).

<sup>7</sup> For discussion of the Fourth Estate ideal, see, for example, ERIN C. CARROLL, *PLATFORMS AND THE FALL OF THE FOURTH ESTATE: LOOKING BEYOND THE FIRST AMENDMENT* 529–31 (2020); LEONARD LEVY, *EMERGENCE OF A FREE PRESS* xii (1985) (describing the conception of press freedom during the framing era: “[a] free press meant the press as the Fourth Estate, or, rather, in the American scheme, an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented, manageable, and accountable”).

## 8.1 THE USUAL SUSPECTS

Scholars and commentators have identified a number of potential contributors to the deterioration of public trust in the press. For example, many observers suggest that the growing distrust in the news media is simply a facet of the public's declining trust in all types of public and private institutions.<sup>8</sup> A recent Gallup poll found historically low levels of public trust in the justice system, the medical system, the presidency, public schools, Congress, and many other institutions.<sup>9</sup> However, even in the context of this overall decline of institutional trust, the growing skepticism toward news media is exceptional: Journalists are less trusted than most other professionals, and only 11 percent of those polled expressed a great deal or quite a lot of confidence in television news; newspapers fared slightly better, but only 16 percent of those polled expressed confidence in them.<sup>10</sup>

A primary contributor to public distrust in traditional news media providers is the collapse of the economic model supporting news production. Over the past quarter of a century, the Internet has gobbled up advertising revenues that were once used to finance news production, while simultaneously subjecting traditional news providers to increased competition from low-quality "cheap news." The rise of generative artificial intelligence threatens to accelerate these competitive forces,<sup>11</sup> which fuel public distrust in the press by making fact-based news both less profitable to produce and harder to distinguish from misinformation. These forces also change

<sup>8</sup> Ideally, identification of the factors contributing to the crisis of legitimacy facing the press would be provided by polling a representative sample of Americans and recording their answers. In fact, Pew research provides tantalizing clues about why Americans distrust the media. Jeffrey Gottfried et al., *Americans Are Largely Skeptical of the News Media, But Say There Is Room for Confidence to Improve*, PEW RESEARCH CENTER (Aug. 31, 2020), <https://www.pewresearch.org/journalism/2020/08/31/americans-are-largely-skeptical-of-the-news-media-but-say-there-is-room-for-confidence-to-improve/>. Other researchers are conducting qualitative research to uncover the explanation. *Assessing the News Media: Trust, Coverage, and Threats to a Free Press*, AP-NORC, <https://apnorc.org/projects/assessing-the-news-media-trust-coverage-and-threats-to-a-free-press/> (last visited Apr. 22, 2024). One problem, however, is that people are not always aware of why they feel the way they do, and the reasons they give for their distrust are not always the reasons that motivate them.

<sup>9</sup> Jones, *supra* note 1. Journalists are less trusted than most other professionals as well. Megan Brenan & Jeremy M. Jones, *Ethics Ratings of Nearly All Professions Down in U.S.*, GALLUP (Jan. 22, 2024), <https://news.gallup.com/poll/608903/ethics-ratings-nearly-professions-down.aspx>. Public distrust in news media also extends beyond the United States. Nic Newman, *Overview and Key Findings of the 2023 Digital News Report*, REUTERS (June 23, 2023), <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2023/dnr-executive-summary>; Nic Newman & Richard Fletcher, *Bias, Bullshit and Lies: Audience Perspectives on Low Trust in the Media*, REUTERS (Dec. 1, 2017), <https://reutersinstitute.politics.ox.ac.uk/our-research/bias-bullshit-and-lies-audience-perspectives-low-trust-media>.

<sup>10</sup> Brenan & Jones, *supra* note 9.

<sup>11</sup> Mark Jamison, *Journalism's Creative Destruction Opportunity*, AMERICAN ENTERPRISE INSTITUTE (Mar. 7, 2024), <https://www.aei.org/technology-and-innovation/journalisms-creative-destruction-opportunity/>.

both the style and substance of news content in ways that can undermine press credibility.

Instead of relying on traditional media to set their news agenda, many Americans now rely on social media connections, algorithms, and influencers to curate their (mostly free) news content.<sup>12</sup> Although some of this free content is produced by news entities that once would have reaped advertising revenue from providing it, the vast bulk of that revenue is now rechanneled to online classified advertising sites<sup>13</sup> or to platforms that offer the kind of micro-targeted advertising precision that even digital news providers simply cannot match.<sup>14</sup> This flight of advertising revenue has disrupted various legacy news producers,<sup>15</sup> but newspapers – long the bedrock of news production and resource-intensive investigative journalism<sup>16</sup> – have experienced the most dramatic impact.<sup>17</sup>

It is not just advertisers who have fled to the tech platforms – so, too, have audiences.<sup>18</sup> Between roughly 2000 and 2022, daily newspapers lost two-thirds of their readers,<sup>19</sup> with total revenues falling by over 80 percent.<sup>20</sup> While The New York Times and The Wall Street Journal have been able to offset lost advertising revenue

<sup>12</sup> Newman, *supra* note 9.

<sup>13</sup> Eero Korhonen, *Research: What Really Happened to Newspaper Revenue*, GOOGLE IN EUROPE (June 3, 2021), <https://blog.google/around-the-globe/google-europe/research-what-really-happened-newspaper-revenue/>.

<sup>14</sup> Emily J. Bell et al., *The Platform Press: How Silicon Valley Reengineered Journalism*, TOW CENTER FOR DIGITAL JOURNALISM (May 26, 2017), <https://academiccommons.columbia.edu/doi/10.7916/D8R216ZZ>.

<sup>15</sup> An excellent recent article by Dr. Laurie Thomas Lee (*How Local TV News Is Surviving Disruption as Newspapers Fail: Lessons Learned*, 3 J. FREE SPEECH L. 241 (2023)) describes how federal regulation and oversight, along with other competitive strategies and advantages, have been key to the financial survival of local news. It is not clear whether television news reporters make up for the loss of local newspaper reporters, which one writer has described as “the backbone of every local journalism ecosystem.” Frank Racioppi, *Can Podcasting Replace the Death of Local Journalism*, EAR WORTHY (Nov. 4, 2022), <https://medium.com/ear-worthy/can-podcasting-replace-the-death-of-local-journalism-ee486f9d2e74>.

<sup>16</sup> *How News Happens*, PEW RESEARCH CENTER (Jan. 11, 2010), <https://www.pewresearch.org/journalism/2010/01/11/how-news-happens/>.

<sup>17</sup> The cable news picture is mixed. Cable news today is more profitable in 2022 than it was a decade ago, but audiences are shifting. Fox News experienced primetime news audience growth of 10 percent between 2021 and 2022, but CNN’s primetime audience fell by 25 percent, and MSNBC’s by 10 percent. *Trends and Facts on Cable News: State of the News Media*, PEW RESEARCH CENTER (Sep. 14, 2023), <https://www.pewresearch.org/journalism/fact-sheet/cable-news/>.

<sup>18</sup> Heather Kelly, *From TV to TikTok, How We Get the News Is Changing Fast*, WASH. POST (Nov. 23, 2023), <https://www.washingtonpost.com/technology/2023/11/15/news-trends-social/>.

<sup>19</sup> *Trends and Facts on Cable News*, *supra* note 17.

<sup>20</sup> Dana A. Sherer & Clare Y. Cho, *Stop the Presses? Newspapers in the Digital Age*, CONG. RSCH. SERV., R47018 (2022), <https://crsreports.congress.gov/product/pdf/R/R47018>. See also ACCENTURE, *USA NEWS MEDIA LANDSCAPE TRENDS 5* (2021), [https://newsmediaanalysis.com/wpcontent/uploads/2021/06/accenture\\_analysis\\_USAnewsmedia.pdf](https://newsmediaanalysis.com/wpcontent/uploads/2021/06/accenture_analysis_USAnewsmedia.pdf) [<https://perma.cc/Z3YY-QRHG>] (“Between 2004 and 2018 total newspaper revenues fell by \$30 billion, to \$27.4 billion. This amounted to a 52% fall.”).

with subscription dollars,<sup>21</sup> they are the rare exceptions. Between 2004 and 2020, more than 2,100 papers closed,<sup>22</sup> and some of the survivors dwindled to become what the NewsGuild has labeled “ghost newspapers” – downsized shells of their former selves.<sup>23</sup>

The declining financial fortunes of newspapers have affected overall news quality across the media landscape. How could they not? The brain drain in journalism over the last two decades has been cataclysmic. Between 2008 and 2020, newspapers cut newsroom employees by 57 percent.<sup>24</sup> In 2023, newsrooms experienced the “worst job cuts” in years, and 2024 began with reports of storied newspapers – including, for example, the Los Angeles Times and the Washington Post – delivering more bad news about newsroom staffing.<sup>25</sup> However, it is not only the evisceration of expertise that hurts news quality. It is also that resources have been disproportionately withdrawn from the production of local news and investigative journalism; these are the very kinds of journalism that help citizens participate meaningfully in shaping their communities and holding officials to account. Without journalistic watchdogs, corruption flourishes and communities suffer.

In the meantime, the need to compete for attention in a crowded marketplace has shaped news content in ways that magnify public distrust. To survive, legacy media have been forced to compete to break news faster than their online competitors, to hijack readers’ attention with sensational content, and, in many cases, to cultivate niche audiences by appealing to partisan loyalties.<sup>26</sup> This competition forces the

<sup>21</sup> Adam Grundy, *Internet Crushes Traditional Media: From Print to Digital*, U.S. CENSUS BUREAU (June 7, 2022), <https://www.census.gov/library/stories/2022/06/internet-crushes-traditional-media.html>.

<sup>22</sup> PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 9, 15 (2020). See also *id.* at 12 (“[A]bout 1,800 of the communities that have lost a paper since 2004 do not have easy access to any local news – such as a local online news site or a local radio station.” Some of the surviving papers and chains have been bought by hedge funds, who have been accused of “selling everything not bolted down, cutting every possible cost, and taking every penny of cash flow home with them.”). Jeff Jarvis, *Is It Time to Give Up on Old News?* WHITHER NEWS (Jan. 24, 2024), <https://medium.com/whither-news/is-it-time-to-give-up-on-old-news-488194f359ba>.

<sup>23</sup> *The ‘Ghost Newspapers’ Are Here*, THE NEWSGUILD (Mar. 28, 2018), <https://newsguild.org/the-ghost-newspapers-are-here/>

<sup>24</sup> *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RESEARCH CENTER (July 13, 2021), <https://www.pewresearch.org/short-reads/2021/07/13/u-s-newsroom-employment-has-fallen-26-since-2008/>. See also Sasha Lekach, *Fewer Than Half of Newspaper Jobs from 15 Years ago Still Exist*, MASHABLE (Apr. 4, 2017), <https://mashable.com/article/newspaper-publishers-jobs-decline-bl>.

<sup>25</sup> Oliver Darcy & Jon Passantino, *News Industry off to Brutal 2024 Start as Mass Layoffs Devastate Publishers, Raising Questions About the Future of Journalism*, CNN BUSINESS (Jan. 25, 2024), <https://www.cnn.com/2024/01/25/media/news-industry-future/index.html>; Michael M. Grynbaum et al., *The News About the News Business Is Getting Grimmer*, N.Y. TIMES (Jan. 1, 2024), <https://www.nytimes.com/2024/01/24/business/media/media-industry-layoffs-decline.html>.

<sup>26</sup> It is well known at this point that social media platforms prioritize “engagement.” See Cortelyou C. Kenney, *Defamation 2.0*, 56 LOY. L. REV. 1, 18–19 (2023) (discussing the effect

legacy press to try to give audiences what they want, which paradoxically causes those same audiences to disrespect the press for pandering.

Of course, it does not help that the term “news” is frequently applied not only to fact-based reporting on newsworthy events but also to commentary, infotainment, and clickbait. Nor does it help that the purveyors of all of these forms of content often adopt the label of “journalists.” Even legacy media themselves have contributed to blurring the lines between these categories, making it unsurprising that the public mistrusts their motives. They have also contributed to the problem by, at times, constructing their own “filter bubbles,” hobbling their ability to connect with those they cover. In the meantime, demagogues stoke the public’s disdain for the press for their own political gain, portraying the press as biased and untrustworthy and encouraging partisans to brand any news with which they disagree as “fake.”<sup>27</sup>

## 8.2 IS LIBEL LAW TO BLAME?

These factors have contributed to media distrust, but certain prominent voices point to an unexpected contributor to the eroding public trust in US media: American libel law exceptionalism.

### 8.2.1 Does US Libel Law Incentivize Press Irresponsibility?

Libel law in the United States provides broader protections for media errors than its common law counterparts. This is by design. Until 1964, in both the United States and the United Kingdom, a plaintiff could succeed in a libel action by proving the publication of a defamatory communication concerning the plaintiff. Fault was presumed, falsity was presumed, and damages were presumed, though defendants could escape liability by proving privilege or truth.

of engagement strategy in the exacerbation of polarization). Newspapers respond to the economic incentives by gearing their content to online audiences. See Richard Posner, *Bad News*, N.Y. TIMES (July 31, 2005) (discussing the economic incentives propelling media toward sensationalism and partisanship) and Balkin, *supra* note 6, at 1265 (“In the attention economy, what often works best is repetition, attention seeking, and the generation of conflict and spectacle.”).

<sup>27</sup> See generally Sonja R. West, *Presidential Attacks on the Press*, 83 MO. L. REV. 915 (2018) (discussing what makes some of President Donald Trump’s attacks on the press different than those of his predecessors); Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AM. L. REV. 232 (2017) (discussing President Donald Trump’s successful deployment of the term “fake news” to influence public beliefs about the press); RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. L.J. 1301 (2017) (discussing President Donald Trump’s description of the press as “the enemy” and the risks such construction poses); HASEN, *supra* note 5, at 21 (“Rather than improving our politics, cheap speech makes political parties increasingly irrelevant by allowing demagogues to appeal directly and repeatedly at virtually no cost to voters for financial and electoral support, with incendiary appeals and often with lies.”).

US law began to diverge markedly from UK law starting with the U.S. Supreme Court's 1964 decision in *New York Times Co. v. Sullivan*.<sup>28</sup> In *Sullivan*, the Court, for the first time, held that the First Amendment imposes limits on the common law of defamation.<sup>29</sup> Most famously, the Court held that states could not allow public officials to recover compensation for defamation unless they proved actual malice using clear and convincing evidence.<sup>30</sup> In other words, defendants would face liability for defamatory statements about public officials only if they knew the statements to be false or recklessly disregarded the truth or falsity.<sup>31</sup> A defendant's negligence in ascertaining truth was insufficient. The Court reasoned that negligent errors are "inevitable" in public debate<sup>32</sup> and thus held that imposing liability for them would dampen the vigor of the press in its coverage of public officials.<sup>33</sup>

*Sullivan* was only the beginning. The Court soon extended the actual-malice rules to criminal defamation cases and to cases brought by "public figures" – people we might today call influencers. Lower courts embraced a broad view of this category, burdening a wide swath of plaintiffs with proving that media defamation defendants "in fact entertained serious doubts as to the truth"<sup>34</sup> of what they published about them before they could recover compensation for damage to their reputations. The Court subsequently established a different set of rules for private figures involved in newsworthy events or "matters of public concern." These plaintiffs cannot recover compensation without proving falsity and some degree of fault: If they choose to prove negligence, they must also prove actual injury; if they choose to prove actual malice, presumed damages are available.<sup>35</sup> In addition, all categories of plaintiffs described above can only sue for defamation based on assertions of objective fact.<sup>36</sup> This last move rendered the Supreme Court's First Amendment overhaul of the common law almost total, with practically no element left

<sup>28</sup> 376 U.S. 254 (1964).

<sup>29</sup> *Id.* at 264–65.

<sup>30</sup> *Id.* at 279–80.

<sup>31</sup> *Id.*

<sup>32</sup> Restatement (Second) of Torts §613 cmt. j (AM. L. INST. 1977) (stating that requiring proof of fault as to falsity "has, as a practical matter, made it necessary for the plaintiff to allege and prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff").

<sup>33</sup> The Court also held that a government official cannot construe "an otherwise impersonal attack on governmental operations [as] a libel of an official responsible for those operations." *Sullivan*, 376 U.S. at 292. The effect was to set limits on states' application of the common law element of identification in defamation actions.

<sup>34</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

<sup>35</sup> *Philadelphia Newspaper v. Hepps*, 475 U.S. 767, 777 (1986) ("the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.")

<sup>36</sup> Although the Court indicated in *Dun & Bradstreet* that states may be free to impose strict liability for defamation in cases involving private figures and matters of purely private concern, such cases are but a sliver of all defamation cases, and rarely do such cases involve media defendants. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985).



untouched. However, probably the most consequential change was overturning the common law's presumptions of fault and falsity and imposing an actual-malice requirement in the vast bulk of cases involving the media.

Together, these changes meant that US plaintiffs – especially public officials and public figures – face a higher barrier to holding the media accountable for defamatory falsehoods than plaintiffs in other common law countries do. Unlike the United States, these countries do not require proof of actual malice. Under UK law, for instance, courts will presume fault if plaintiffs can demonstrate “serious harm.” Falsity is also presumed, although UK law continues to make truth a defense.<sup>37</sup> Defendants may also avoid liability if they can show that they acted reasonably in publishing a matter in the public interest.<sup>38</sup> This defense is the codified version of what was once called a privilege for “responsible journalism.”<sup>39</sup> When invoked, it has the effect of applying a fault requirement to the media defendant that is akin to a negligence standard. Australia, Canada, and South Africa follow similar approaches.

### 8.2.2 *Defamation Law and Public Trust in the Press*

So how might American libel law exceptionalism affect public trust? According to critics, libel laws can incentivize the press to get things right by holding them responsible for getting things wrong. By absolving the press of responsibility for getting things wrong about public officials or public figures unless they “in fact entertained serious doubts”<sup>40</sup> as to the information's truth or falsity, the United States' actual-malice rule has removed this incentive for accuracy. For these observers, the extent to which ordinary people in the United States understand how difficult it is for those in the public eye to hold the press (or any other speaker) responsible for falsehoods about public matters is inversely related to the likelihood of those ordinary people believing what they read or hear and trusting those who write or speak.

Defamation scholar David Anderson made essentially this argument thirty years ago,<sup>41</sup> although in a more extended and sophisticated form. Anderson argued that

<sup>37</sup> Defamation Act 2013, c. 26, § 2(1) (UK) (providing that truth is a defense to a defamation action).

<sup>38</sup> Defamation Act of 2013, sec. 4. DARIO MILO, DEFAMATION AND FREEDOM OF SPEECH 72–73 (2008).

<sup>39</sup> *Id.* at 85, 93. The UK passed anti-SLAPP legislation in 2023. This legislation, which was passed in the form of amendments to the Economic Crime and Corporate Transparency Act 2023, only applies to allegations of economic crime. The new law places the burden on the claimant to show likelihood of success at trial. See Juliette Garside, “Designed to Distress and Deter”: The Impact of SLAPP Lawsuits on Journalists and Free Speech, *THE GUARDIAN* (Nov. 23, 2023), available at <https://www.theguardian.com/media/2023/nov/03/designed-to-distress-and-deter-the-impact-of-slapp-lawsuits-on-journalists-and-free-speech>.

<sup>40</sup> *St Amant*, 390 U.S. at 731.

<sup>41</sup> David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 490 (1991). Anderson also argued that “[w]ithout libel law, [the] credibility of the press would be at the



the actual-malice rule degrades news quality: “[B]y eliminating most of the risks associated with the journalism of scandal, at least when it is directed at public officials or public figures,”<sup>42</sup> the actual-malice rule makes it easier for the press to give in to the ever-present “market pressures to serve the public appetite for scandal.”<sup>43</sup> Roughly contemporaneously, Anderson’s argument was echoed by then-scholar (now-Supreme Court Justice) Elena Kagan, who asked, “Is it possible that *Sullivan* bears some responsibility for a change in the way the press views itself and its conduct – a change that the general public might describe as increased press arrogance?”<sup>44</sup> Like Anderson, Kagan decried the actual-malice rule’s contribution to “the ‘tabloidization’ of the mainstream press”<sup>45</sup> and questioned whether a different standard might, “in the long term[,] benefit journalism” and improve the quality of public discourse.<sup>46</sup>

The social media revolution has lent these arguments renewed resonance. Supreme Court Justices Clarence Thomas and Neil Gorsuch have criticized *Sullivan*’s legacy in nonprecedential opinions dissenting from the Court’s denial of certiorari. For Thomas, beyond being the product of “policy-driven decision masquerading as constitutional law,” constitutionalizing libel law was bad policy. According to his account, the actual-malice rule enables “media organizations and interest groups ‘to cast false aspersion on public figures with near impunity.’” Gorsuch amplified the “bad policy” aspect of Thomas’s position by focusing on how the actual-malice rule, together with changes in the communications environment since 1964, undermines high-quality, fact-based, democracy-enhancing journalism.<sup>47</sup>

mercy of the least scrupulous among us, and public discourse would have no necessary anchor in truth.” *Id.* Yonathan A. Arbel has constructed lab experiments that confirm the existence of the “credibility effect” of defamation law. *See generally The Credibility Effect: Defamation Law and its Audiences*, 52 J. LEGAL STUD. 417 (2023) (finding defamation law makes people more trusting of reports from various media sources).

<sup>42</sup> *Id.* at 534.

<sup>43</sup> *Id.* at 533.

<sup>44</sup> Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW AND SOCIAL INQUIRY 197, 208 (1993) (reviewing ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991)).

<sup>45</sup> *Id.* at 207.

<sup>46</sup> *Id.*

<sup>47</sup> U.S. Supreme Court Associate Justice Clarence Thomas called for reconsideration of *New York Times Co. v. Sullivan* in 2019 in three opinions: *McKee v. Cosby*, 139 S. Ct. 675, 675 (2019) (Thomas, J., concurring in denial of certiorari); *Berisha v. Lawson*, 141 S. Ct. 2424, 2424 (2021) (Thomas, J., dissenting from denial of certiorari); *Coral Ridge Ministries Media v. S. Poverty L. Ctr.*, 142 S. Ct. 2453, 2454 (2022) (Thomas, J., dissenting from denial of certiorari). Justice Thomas’s critique of *Sullivan* is largely grounded in originalism concerns. He asserts that the Court should inquire “whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual malice standard for public figures or otherwise displaces vast swaths of state defamation law.” *McKee*, 139 S. Ct. at 680 (Thomas, J., concurring). Federal appeals court judge Lawrence Silberman subsequently echoed Justice Thomas’s criticisms in *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 251 (D.C. Cir. 2021) (Silberman,

In his dissent in *Berisha v. Lawson*, Gorsuch postulated that the framers understood the importance of press freedom for the healthy functioning of democracy.<sup>48</sup> However, he also suggested that press freedom comes with a duty “to try to get the facts right,” implying that the press no longer make this effort, even if they once did.<sup>49</sup>

Gorsuch lays a portion of the blame on the social media revolution, acknowledging that economic and technological changes have not been kind to “our [n]ation’s media.”<sup>50</sup> Citing scholars David Logan and Richard Epstein, Gorsuch first explains how changes to the economic model supporting traditional media undermined their incentives and ability to invest in the reporters, editors, and fact-checkers necessary to get the facts right.<sup>51</sup> Before the social media revolution, “many major media outlets” invested the time and resources necessary “to report true stories” because they could reap the economic benefits of the public’s “confidence that what they read [wa]s true.”<sup>52</sup> However, in this “new media environment,” false information “costs almost nothing to generate,” spreads more effectively than real news, and is more lucrative to generate than real news.<sup>53</sup>

Despite acknowledging these contributors to declining press credibility, Gorsuch also blames the Supreme Court’s interpretation of the First Amendment for undermining journalistic incentives for accuracy. He specifically targets the actual-malice rule and its expansion beyond public officials to the growing category of those in the public eye.<sup>54</sup> For Gorsuch, even if the actual-malice rule might have made sense in an environment in which media actors had professional and economic incentives not to publish “defamatory falsehoods and misinformation,” the rule’s rationale has evaporated along with those “other safeguards”<sup>55</sup> for accuracy. Today, he claims, the combination of the actual-malice rule “with the business incentives fostered by our new media world” works “against those with traditional (and expensive) journalistic

J., dissenting). Recently, Justice Alito weighed in, also in a dissent from the denial of certiorari in a defamation case concerning whether the existence of a false factual assertion is a question for the judge or the jury. *Nat’l Rev., Inc. v. Mann*, 140 S. Ct. 344, 344 (Alito, J., dissenting from denial of certiorari). However, Justice Alito did not focus on actual malice but instead expressed concern about whether existing standards provide sufficient protection for opinion on important public policy issues. *Id.* at 346–48. For further analysis of the arguments of Justices Thomas and Gorsuch, see generally Ronnell Andersen Jones, *Defamation, Disinformation, and the Press Function*, 3 J. FREE SP. LAW 103 (2023); Lili Levi, *Disinformation and the Defamation Renaissance: A Misleading Promise of “Truth,”* 57 U. RICH. L. REV. 1235 (2023); Lyrrisa Lidsky, *Cheap Speech and the Gordian Knot of Defamation Reform*, 3 J. FREE SP. LAW 79 (2023); Lyrrisa Lidsky, *Untangling Defamation Law: Guideposts for Reform*, 88 MO. L. REV. 663 (2023).

<sup>48</sup> *Berisha*, 141 S. Ct. at 2425 (Gorsuch, J., dissenting from denial of certiorari).

<sup>49</sup> *Id.* at 2426.

<sup>50</sup> *Id.* at 2427.

<sup>51</sup> *Id.* at 2427–28.

<sup>52</sup> *Id.* at 2428.

<sup>53</sup> *Id.* at 2427.

<sup>54</sup> *Id.* at 2428–30.

<sup>55</sup> *Id.* at 2427.

standards – and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.”<sup>56</sup> Gorsuch even argues that the actual-malice rule incentivizes the media to publish reputation-damaging falsehoods “without investigation, fact-checking, or editing.” This argument ignores the mechanics of the actual-malice rule: Defendants’ efforts to confirm the truth tend to negate the fact that they entertained serious doubts as to falsity and to absolve them of liability.<sup>57</sup> Regardless, the argument that the actual-malice rule acts as “an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable”<sup>58</sup> rather pointedly raises the question of whether reforming that rule might produce more of the kinds of news that democracy can use.

It is intuitively persuasive that replacing the actual-malice rule with a negligence standard might enhance news quality. But Gorsuch’s argument contains many assumptions that do not hold up under scrutiny, particularly considering the spate of recent defamation victories that plaintiffs have won against the press and other high-profile defendants – with no noticeable improvement to our information ecosystem.

Gorsuch’s argument ignores the fact that the scope of defamation law is limited and contributors to misinformation are many. Defamation law exists to protect reputations by vindicating victims of reputational injury and compensating them for dignitary, relational, and economic harms. While defamation law plays a role in setting the boundaries of civilized discourse – and thus, indirectly anchoring that discourse in truth – it can only do so in cases involving an individual plaintiff whose reputation has been harmed. However, most falsehoods that pollute public discourse are not aimed at individuals but instead involve complex public policy issues. Many of these falsehoods emanate not from legacy media but from sources unlikely to be deterred by defamation lawsuits, such as state actors, politicians peddling lies for political ends, delusional conspiracy theorists, and fervent partisans who believe what they want to believe. Journalists who fail to investigate, edit, or verify the information they publish – sometimes because of bias – undoubtedly contribute to the problem, but the only cases that defamation law can address are those involving reputational harm.

Gorsuch also overstates the difficulties plaintiffs face in proving actual malice. Actual malice is difficult to prove, but it is not “effective immunity from liability,”<sup>59</sup> as evidenced by the success of plaintiffs in achieving large jury verdicts in recent cases involving proof of actual malice.<sup>60</sup> In the two defamation cases brought by

<sup>56</sup> *Id.* at 2428.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari).

<sup>60</sup> Another notable recent victory by a private figure was *Gibson Bros., Inc. v. Oberlin College*, 187 N.W.3d 629 (Ct. App. Oh. 2022) (affirming a judgment of \$22.8 million for bakery owners against a private college and its dean of students).

writer E. Jean Carroll against President Donald Trump,<sup>61</sup> one jury awarded Carroll \$10 million, and another jury awarded her \$83.3 million. Elsewhere, an appeals court affirmed an award of over \$10 million to actor Johnny Depp in a case against his ex-wife, Amber Heard,<sup>62</sup> and a jury awarded a climate scientist, Michael Mann, over \$1 million in damages.<sup>63</sup>

Aside from jury verdicts demonstrating that actual malice is not an insurmountable barrier to plaintiff recovery, Gorsuch ignored that many defamation cases – including those involving media misconduct – lead to settlements. A case in point is the jaw-dropping \$787.5 million settlement in *Dominion Voting Systems v. Fox News*.<sup>64</sup> While many lessons can be drawn from the case – as discussed below – the size of the settlement surely indicates that Fox did not believe that the actual-malice rule provided “effective immunity”<sup>65</sup> from defamation liability.

Another flaw in this argument is that it focuses solely on the actual-malice rule in isolation, overlooking the incentive structure of US defamation law as a whole. Under current defamation law, media organizations face the ever-present threats of enormous litigation costs and stratospherically large damages awards, which surely affect their incentives at least as much as the actual-malice rule. For smaller news organizations, the cost of defending a defamation action can be ruinous, even if the organization is likely to win. Furthermore, even a small prospect of being held liable for enormous damages is an incentive to get the facts right – at least for most rational

<sup>61</sup> E. Jean Carroll brought two defamation cases against former President Donald Trump, before his reelection, and won both. Carroll successfully proved actual malice in the first trial, which ended in a \$5 million verdict in May 2023. *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2024 WL 97359 (S.D.N.Y. Jan. 9, 2024). The first jury’s finding had an issue-preclusive effect in the second trial. *Carroll v. Trump*, No. 20-CV-7311 (LAK), 2023 WL 5731152 (S.D.N.Y. Sept. 6, 2023) (holding that jury’s finding of actual malice in prior defamation action against the former President was entitled to issue-preclusive effect). In 2024, the second trial resulted in a verdict of \$83.3 million for the plaintiff.

<sup>62</sup> *Depp, II v. Heard*, No. CL-2019-0002911, 2022 WL 2342058 (Va. Cir. June 24, 2022) (trial order) (reducing jury award of \$5 million in punitive damages to actor Johnny Depp to \$350,000 but leaving standing the jury’s verdict of \$10 million in compensatory damages).

<sup>63</sup> Plaintiff Michael Mann was a university professor who sued the National Review, Competitive Enterprise Institute, Rich Lowry, and writers Rand Simberg (for CEI) and Mark Steyn (for National Review). For a description of the litigation, see *Nat’l Rev. v. Mann*, 140 S. Ct. 344 (mem.) (Alito, J., dissenting from denial of certiorari) (2019). The original caption of the case was *Mann v. National Review*, but National Review and Lowry were dropped from the case before trial. The Editors, *Michael Mann Owes Us \$1 Million*, NATIONAL REV. (Mar. 13, 2024, 2:11 PM), <https://www.nationalreview.com/2024/03/michael-mann-owes-us-1-million/>. Mann prevailed against Simberg and Steyn. For a description of the jury verdict, see Suman Naishadham, *Jury Awards Climate Scientist Michael Mann \$1 Million in Defamation Lawsuit*, ASSOCIATED PRESS (Feb. 8, 2024, 9:36 PM), <https://apnews.com/article/climate-change-defamation-michael-mann-penn-state-6128qe2d8d2143768d28995c8389gef>.

<sup>64</sup> David Folkenflik & Mary Yang, *Fox News Settles Blockbuster Defamation Lawsuit with Dominion Voting Systems*, NPR (Apr. 18, 2023, 4:35 PM), <https://www.npr.org/2023/04/18/1170339114/fox-news-settles-blockbuster-defamation-lawsuit-with-dominion-voting-systems>.

<sup>65</sup> *Berisha*, 141 S. Ct. at 2428 (Gorsuch, J., dissenting from denial of certiorari).

actors with something to lose. Defamation law might not offer the solution to improving news quality if these incentives are failing, as they appear to be.

Moreover, a set of recent high-profile defamation cases indicate that some defendants are almost impervious to the supposed accountability incentives of defamation law. These cases suggest that if defamation law should re-anchor public discourse in truth, it simply is not happening. One such case involves the legacy media defendant Fox News. In 2021, Dominion Voting Systems sued Fox News for defamation in the course of the network's coverage of the 2020 election.<sup>66</sup> In the wake of the election, then-President Trump and some of his partisans began to insist that election fraud deprived Trump of victory.<sup>67</sup> Among those they blamed for fraud was Dominion Voting Systems, the producer of the electronic voting machines used in some states.<sup>68</sup> Although Fox News had initially declared that former Vice President Joe Biden won the election, it hosted and sometimes seemed to endorse various Trump partisans presenting spurious "evidence" that Dominion rigged its voting machines to deliver the election to Biden.<sup>69</sup> Dominion sued Fox for \$1.6 billion.<sup>70</sup>

Discovery in the case unveiled considerable evidence that many of Fox's executives and hosts doubted the veracity of the "evidence" against Dominion. Emails and texts between them suggested that they knew the falsehoods about Dominion were untrue, with some even referring to the allegations and those peddling them as "nuts" and "crazy."<sup>71</sup> Nonetheless, Fox continued to air lies about Dominion, making the calculated gamble that its audience would desert it if it stopped publicizing "the Big Lie," a gamble that appeared to pay off.<sup>72</sup> Despite entering into the largest libel settlement in history, Fox News overcame what should have been a serious reputational setback for a news purveyor to remain the most-watched

<sup>66</sup> See generally Complaint, U.S. Dominion, Inc. v. Fox New Network, 2021 WL 1153152 (Del. Super. Ct. 2021).

<sup>67</sup> Jemima McEvoy, *These Are the Voter Fraud Claims Trump Tried (and Failed) to Overturn the Election With*, FORBES (Dec. 17, 2020, 3:35 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/12/17/these-are-the-voter-fraud-claims-trump-tried-and-failed-to-overturn-the-election-with/?sh=f05dcd58c5a>.

<sup>68</sup> *Id.*

<sup>69</sup> Brian Stelter, "Tons of Crazy": *The Inside Story of How Fox Fell for the 'Big Lie'*, POLITICO (Nov. 15, 2023, 5:00 AM), <https://www.politico.com/news/magazine/2023/11/15/big-lie-fox-news-brian-stelter-book-00127133>.

<sup>70</sup> Jonah E. Bromwich & Ben Smith, *Fox News Is Sued by Election Technology Company for over \$2.7 Billion*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/business/media/smartmatic-fox-news-lawsuit.html>.

<sup>71</sup> Alison Durkee, "Mind Blowingly Nuts": *Fox News Hosts and Execs Repeatedly Denounced 2020 Election Fraud Off-Air – Here Are Their Most Scathing Comments*, FORBES (Feb. 17, 2023, 8:04 AM), <https://www.forbes.com/sites/alisondurkee/2023/02/17/mind-blowingly-nuts-fox-news-hosts-and-execs-repeatedly-denounced-2020-election-fraud-off-air-here-are-their-most-scathing-comments/?sh=z800063318f3>.

<sup>72</sup> See *supra* note 64.

cable news network in the United States.<sup>73</sup> In fact, a year on from the settlement, it attracts more viewers to its prime-time news than its two top cable competitors combined.<sup>74</sup> Although it is impossible to know whether the settlement has increased Fox's commitment to providing its viewers with fact-based news, one observer noted that they "don't see any reason why the lawsuit changes the way that Fox does business because the way it does business makes it money."<sup>75</sup>

Scholar RonNell Andersen Jones made this point in an opinion piece in *The New York Times*, and she has documented further failures of libel law to produce accountability.<sup>76</sup> President Trump has promised to continue to repeat his defamatory accusations about Carroll "a thousand times," even after juries found him liable for almost \$90 million for accusing her of lying about him sexually assaulting her.<sup>77</sup> Likewise, Trump's former attorney, Rudy Giuliani, has continued to accuse two Georgia poll workers of election fraud despite a jury's deliberation leading to their being awarded \$148 million.<sup>78</sup> Elsewhere, internet radio personality Alex Jones has continued to tell lies about the families of children killed at Sandy Hook despite a jury verdict of almost \$1 billion against him. In these cases, court judgments ostensibly provided the plaintiffs with authoritative declarations of truth, and yet large segments of the court of public opinion remained unconvinced. Consider, for example, that mere months after Carroll won her second verdict,<sup>79</sup> Trump secured the Republican nomination for president.<sup>80</sup> Carroll's

<sup>73</sup> Dominick Mastrangelo, *Fox News Takes the Hits, but Its Audience Looks Resilient*, THE HILL (Mar. 12, 2023, 12:00 PM), <https://thehill.com/homenews/media/389441-fox-news-takes-the-hits-but-its-audience-looks-resilient/>.

<sup>74</sup> Business Wire, *FOX News Channel Crushes CNN and MSNBC Combined in Total Day and Primetime Viewers for the First Quarter of 2023*, YAHOO FINANCE (Apr. 2, 2024), <https://finance.yahoo.com/news/fox-news-channel-crushes-cnn-194000383.html?>.

<sup>75</sup> *The Dominion Lawsuit Showed the Limits of Fox's Influence over Its Audience*, THE ECONOMIST (Apr. 17, 2023), <https://www.economist.com/united-states/2023/04/17/the-dominion-lawsuit-showed-the-limits-of-foxs-influence-over-its-audience> (quoting A. J. Bauer, Assistant Professor in the Department of Journalism and Creative Media at the University of Alabama).

<sup>76</sup> RonNell Andersen Jones, *The E. Jean Carroll Verdict Exposes the Limits of Libel Law*, N.Y. TIMES (Jan. 28, 2024), <https://www.nytimes.com/2024/01/28/opinion/donald-trump-e-jean-carroll-libel-damages.html>.

<sup>77</sup> *Id.*

<sup>78</sup> Lindsay Whitehurst & Alanna Durkin Richer, *Jury Awards \$148 Billion in Damages to Georgia Election Workers over Rudy Giuliani's 2020 Vote Lies*, AP NEWS (Dec. 15, 2023, 7:13 PM), <https://apnews.com/article/giuliani-2020-election-georgia-defamation-moss-freeman-6f6446c4f5224f521db8ff7763fb12d1#>.

<sup>79</sup> *New Polling Shows Female Support for Trump Has Dropped*, NBC NEWS (Mar. 11, 2024), <https://www.nbcnews.com/now/video/new-polling-shows-female-support-for-trump-has-dropped-206210117618> (discussing Quinnipiac University poll).

<sup>80</sup> Stephen Fowler, *Trump and Biden Clinch 2024 Presidential Nominations*, NPR (Mar. 12, 2024, 11:56 PM), <https://www.npr.org/2024/03/12/1238033721/donald-trump-joe-biden-nomination-delegates>.

defamation victory provided only partial vindication and no deterrence, for reasons having nothing to do with defamation law exceptionalism and everything to do with political polarization and demagogic populism.

Although defendants like Trump, Jones, and Giuliani seem undaunted by enormous libel verdicts, libel lawsuits continue to force other defendants to err substantially on the side of caution. Only the largest, most well-resourced members of the legacy media can easily combat even a meritless libel action, and the rich and powerful can inflict significant penalties on their critics just by suing them.<sup>81</sup> High litigation costs and the inability to predict whether an action will result in a multimillion-dollar verdict also mean that few media defendants can afford to blithely publish falsehoods about individuals on the assumption that the actual-malice rule will protect them.

If one needed confirmation of this thesis, the evidence from the UK is instructive. Despite its more reputation-protective and press-punishing defamation laws, the British public does not appear to trust the British press significantly more than the American public trusts the American press.<sup>82</sup> Moreover, distrust in institutions, including the press, is a worldwide phenomenon. Distrust in the press is merely a symptom of what United Nations Secretary-General António Guterres has called a worldwide “Trust Deficit Disorder.”<sup>83</sup> This disorder is fueled by a complex set of factors, including “inequality . . . undermining faith in the social contract,”<sup>84</sup> which do not lend themselves to simple solutions. The depressing upshot of this analysis seems to be that defamation law is too small a piece of the distrust puzzle to make defamation reform the answer.

However, even if defamation reform is not the answer, defamation does need reform. As I have written elsewhere, defamation must introduce remedies that vindicate individual reputations and surface the truth more readily. Lower courts have already expanded the use of injunctions in libel cases, and further broadening the repertoire of remedies to include declaratory judgments might re-anchor the law’s role in vindicating plaintiffs’ truths. But such reforms should not be conducted in isolation. While expanding plaintiffs’ opportunities for vindication, defamation law reforms should also consider restricting remedies (such as presumed and

<sup>81</sup> Katie Balevic, *A Judge Dismissed a Wisconsin Politician’s Defamation Suit Against a Newspaper, but the Legal Fees May Still Shutter the Paper*, BUSINESS INSIDER (Aug. 20, 2023, 4:23 PM), <https://www.businessinsider.com/dismissed-defamation-suit-wi-politician-may-shut-ter-local-newspaper-2023-8>; Little Saigon News Files for Bankruptcy Following Defamation Dispute, AMERICAN BANKRUPTCY INSTITUTE, <https://www.abi.org/feed-item/little-saigon-news-files-for-bankruptcy-following-defamation-dispute> (last visited Apr. 22, 2024).

<sup>82</sup> Amy Watson, *Trustworthiness of News Media Worldwide*, STATISTA (Sept. 25, 2023), <https://www.statista.com/statistics/308468/importance-brand-journalist-creating-trust-news/>.

<sup>83</sup> António Guterres, *Secretary-General’s Address to the General Assembly* (Sept. 25, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-09-25/secretary-generals-address>

<sup>84</sup> *Id.*



punitive damages) that allow the rich and powerful to sue their critics into silence. Procedural mechanisms designed to reduce the cost of litigation should also be at the forefront of reform efforts. In one sense, Gorsuch and other critics of *Sullivan's* regime are right: Defamation *should* be recalibrated to reward journalists who adhere to professionally developed standards for getting the facts right. But eliminating actual malice? If only it were that simple.