

Defamation, Disinformation, and the Press Function

RonNell Andersen Jones

8.1 INTRODUCTION

Coordinated campaigns of falsehoods are poisoning public discourse.¹ Amidst a torrent of social-media conspiracy theories and lies – on topics as central to the nation’s wellbeing as elections and public health – scholars and jurists are turning their attention to the causes of this disinformation crisis and the potential solutions to it.

Justice Neil Gorsuch recently suggested that, in response to this challenge, the U.S. Supreme Court should take a case to reconsider *New York Times v. Sullivan*, the foundational First Amendment precedent in defamation law.² A major premise of Justice Gorsuch’s critique of *Sullivan* is that the changing social-media dynamics – and the disinformation crisis that has accompanied them – threaten the nation’s democracy. He argues this changed terrain may call for less stringent constitutional protections in defamation actions. This chapter explores and challenges that critique. Justice Gorsuch is correct that rampant social-media disinformation poses a grave risk to our political and social stability, but there is a troubling disconnect between the anti-disinformation and pro-democracy concerns he articulates and the doctrinal revisions he considers. When the interrelationships between disinformation, defamation, and democracy are interrogated – and especially, when they are situated within the constitutional value of the press function that served as the backdrop for *Sullivan* – it becomes clear that unwinding the *Sullivan* doctrine would not be a productive tool for remedying the problem of rampant social-media

¹ See Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RSCH. CTR. (Oct. 19, 2017), <https://perma.cc/4DNE-2XUY>; *During This Coronavirus Pandemic, “Fake News” Is Putting Lives at Risk: UNESCO*, U.N. NEWS (Apr. 13, 2020), <https://perma.cc/4PZJ-72XH> (discussing the “contamination” of information exchange caused by orchestrated campaigns that repeat and amplify disinformation).

² *Berisha v. Lawson*, 141 S. Ct. 2424, 2424 (2021).

lies. Indeed, doing so carries the very real risk of exacerbating the problem. Abandoning the *Sullivan* line of protections would impair those valuable press speakers who are actively prioritizing trustworthy newsgathering and corrective reporting, and it would do so with no meaningful payoff in solving the online-disinformation problem that seems to be driving this proposed reconsideration.

This inquiry matters. *Sullivan* is not exclusively a press-freedom case, but at this critical juncture, it is a centerpiece of protection for some core press functions (performed by both legacy media and others) that are crucial to healthy public discourse. A *Sullivan* scaleback harms those entities that are incentivized to get information right, to invest in careful newsgathering, and to engage in important journalistic investigations exposing those who peddle disinformation. At a moment of declining newsroom and press-litigation resources and of increased willingness of public people to weaponize defamation as a tool for silencing and deterring critics, the risks of self-censorship voiced by the unanimous *Sullivan* Court are especially grave.

Representative democracy needs the press function to survive and flourish. There is every reason to believe that a rollback of *Sullivan* would compound rather than alleviate the disinformation problem and would further imperil the fragile democracy.

8.2 THE SULLIVAN DOCTRINE

New York Times v. Sullivan came to the Supreme Court at another moment of intense focus on the need for vibrant dialogue in American democracy. As the Civil Rights Movement pressed across the Deep South, its story was carried through the nation by way of prominent Northern newspapers, especially *The New York Times*.³ The case arose out of a full-page editorial advertisement that the *Times* published, which criticized the way that police had used violence and illegal tactics to try to quell the peaceful protests in Montgomery, Alabama.⁴ The basic thrust of the charges contained in the advertisement was true, but the advertisement contained minor factual errors.⁵ Sullivan, the Montgomery police commissioner, sued for defamation, and Alabama common law did not require that he prove either falsity or fault. The trial judge instructed that the statements were libelous per se and that general damages could be presumed. A jury

³ *New York Times Co. v. Sullivan*, 376 U.S. 254, 256–57 (1964).

⁴ *Id.* at 257–58.

⁵ *Id.* at 257–59. For example, the advertisement said that protestors sang “My Country ‘Tis of Thee,” when they in fact sang “The Star-Spangled Banner.” Under Alabama law, a publication was libelous per se if the words tended to injure a person’s reputation, and Sullivan successfully argued that the words were “of and concerning” him by reflecting poorly on the performance of the government agency he oversaw. “Once ‘libel per se’ ha[d] been established, the defendant ha[d] no defense as to stated facts unless he [could] persuade the jury that they were true in all their particulars.” *Id.* at 267.

awarded a half-million-dollar verdict against the newspaper, which was upheld by the Alabama Supreme Court.⁶ The suit – one of eleven filed by Alabama officials alleging libelous reporting of local events and seeking a total of more than five and a half million dollars in damages – was a clear effort to wield defamation law as a silencing mechanism, and it worked. The newspaper pulled correspondents out of the state for a year in response.⁷

In a unanimous opinion that centered on the intersection of democratic self-governance and free speech, the Supreme Court held that the Constitution imposes limitations on defamation liability.⁸ The First Amendment, the Court said, prevents “a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁹ The deliberately demanding standard operates “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁰ Criticism of the powerful – and the conversations that emerge out of this criticism – are at the core of the First Amendment’s purpose and value to us as a citizenry.¹¹ The doctrinal incentives should spur and support those conversations. The *Sullivan* fact pattern demonstrated the chilling effect posed by the threat of staggeringly expensive litigation and damages. The standard that the Court developed in *Sullivan* offered protection to some false statements, which the Court deemed “inevitable in free debate,” as a way of ensuring that true statements would have “the breathing space” that they need to survive.¹² After *Sullivan*, a set of cases extended this actual-malice standard to so-called public figures¹³ – those who have achieved either broad fame or have become central to some specific conversation on a matter of public concern.¹⁴ *Sullivan* is not a press-specific case – its standard applies anytime a public plaintiff brings a defamation action – but in the last six decades, it has been relied upon heavily by those performing the press function.

⁶ *Id.* at 256.

⁷ Walter Dellinger, *The Right to Be Wrong*, N.Y. TIMES (Sept. 1, 1991), <https://perma.cc/54EG-LRF5>.

⁸ *Sullivan*, 376 U.S. at 286.

⁹ *Id.* at 279–80.

¹⁰ *Id.* at 270.

¹¹ *Id.* at 272.

¹² *Id.* at 271–72.

¹³ *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 323 (1974).

¹⁴ Separately, Justice Gorsuch’s dissent from denial of certiorari in *Berisha* raised the question of whether the new social media landscape also changes the scope and contours of public figuredom.

8.3 JUSTICE GORSUCH'S CRITIQUE

In his dissent from denial of certiorari in *Berisha v. Lawson*,¹⁵ Justice Gorsuch argued that, in light of the new media landscape and the disinformation crisis that it has enabled, the Court should reconsider the *Sullivan* framework.¹⁶

The libel plaintiff in *Berisha*, the son of a former president and prime minister of Albania, contended that a book defamed him by implicating him in an arms-dealing scandal.¹⁷ Justice Gorsuch maintained that his colleagues on the Court should have taken the case. He argued that a “new media environment” that “facilitates the spread of disinformation” requires reevaluation of the constitutional standard.¹⁸ Pointing to the rapid spread of social-media conspiracy theories and other online lies, he suggested that “the deck seems stacked . . . in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.”¹⁹ Indeed, he noted, “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].”²⁰ Justice Gorsuch suggested that the justification undergirding the *Sullivan* standard may have less force “in a world in which everyone carries a soapbox in their hands”²¹ and where there are fewer “safeguards . . . to deter the dissemination of defamatory falsehoods and misinformation.”²² Social-media lies are so fast and so appealing, Gorsuch wrote, that “falsehood and rumor dominate[] truth.”²³ Importantly, then, the factual foundation for Justice Gorsuch’s concern appears to be rooted in dissemination and spread – concerns about the way that modern social-media technology amplifies untruths and the way that propaganda outpaces truthful information from the trustworthy professional newsgatherers that may have predominated the communication landscape as understood by the Justices who decided *Sullivan*.

¹⁵ *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting from denial of certiorari).

¹⁶ With his *Berisha* opinion, Gorsuch became the second Justice to suggest a rethinking of *Sullivan*. Justice Thomas, who also dissented from denial of certiorari in *Berisha*, had already taken this position two years earlier, rooting his argument primarily in a view of First Amendment originalism. *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring); see also *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 142 S. Ct. 2453 (2022) (Thomas, J., dissenting from denial of certiorari) (arguing for reconsideration of *Sullivan*).

¹⁷ *Berisha*, 141 S. Ct. at 2424 (The 2016 Jonah Hill movie *War Dogs* is loosely based on this true story of young Floridians who convinced the Pentagon to award them a \$300 million contract to arm America’s allies in Afghanistan.).

¹⁸ *Id.* at 2427.

¹⁹ *Id.* at 2428.

²⁰ *Id.* at 2427.

²¹ *Id.*

²² *Id.*

²³ *Id.* (“A study of one social network reportedly found that ‘falsehood and rumor dominated truth by every metric, reaching more people, penetrating deeper . . . and doing so more quickly than accurate statements.’”).

Today, the thinking goes, the best way to curb these viral, coordinated falsehoods is to make it easier to bring defamation actions. In Justice Gorsuch's view, lowering the barrier to doing so would serve anti-disinformation and pro-democracy aims.

8.4 A POOR TOOL FOR THE CRISIS

Upon closer consideration, however, it seems the doctrinal revision Justice Gorsuch has in mind would have the exact opposite effect. As a practical, legal, and structural matter, it would advance neither the goal of curbing disinformation nor the interest in fostering a healthy democratic public sphere.

As an important starting matter, much of the most-problematic disinformation at the core of the crisis is not itself defamation. Huge swaths of the rampant lies that have caused the gravest concern in recent years – falsehoods about medical treatments,²⁴ vaccination,²⁵ elections,²⁶ climate change,²⁷ and a wide variety of other social and political issues – are not attacks on the reputation of any individual or entity. They lie, to be sure. But they do not defame. When a widely shared social-media post claims broadly that an election was stolen or a vaccine is a deep-state plot, there is no obvious reputational attack at issue and thus no basis for a libel suit.

²⁴ See Davey Alba, *Facebook Groups Promoting Ivermectin as a Covid-19 Treatment Continue to Flourish*, N.Y. TIMES (Sept. 28, 2021), <https://perma.cc/8748-A5UF> (highlighting the role of Facebook groups in spreading disinformation about ivermectin as a treatment for COVID-19); Jennifer Nilsen, *Cord Blood and Medical Misinformation: The Big Business of Unproven Stem Cell Treatments*, MEDIA MANIPULATION CASEBOOK (Nov. 1, 2021), <https://perma.cc/S59X-E4NH> (tracking the origin and spread of disinformation related to unproven stem cell treatments as a “near cure-all” for any ailment).

²⁵ See Linda Qiu, *No, Covid-19 Vaccines Are Not Killing More People than the Virus Itself*, N.Y. TIMES (May 7, 2021), <https://perma.cc/7928-YT25> (reporting on popular social media claims asserting that COVID-19 vaccinations have caused more deaths than the virus itself); Reuters Fact Check, *Fact Check-VAERS Data Does Not Prove Thousands Died from Receiving Covid-19 Vaccines*, REUTERS (Apr. 2, 2021, 8:35 AM), <https://perma.cc/E9FA-TBDT> (fact-checking a widely viewed Facebook video claiming the COVID-19 vaccine killed thousands of people); Katherine J. Wu, *No, There Are No Microchips in Coronavirus Vaccines*, N.Y. TIMES (Dec. 17, 2020), <https://perma.cc/7928-YT25> (debunking popular online claims that Pfizer's coronavirus vaccine contains a tracking microchip planted by the government); Sarah Evanega et al., *Coronavirus Misinformation: Quantifying Sources and Themes in the COVID-19 'Infodemic'*, CORNELL (July 23, 2020), <https://perma.cc/BF54-4R6J> (tracking common COVID conspiracies, including miracle cures, “deep state” conspiracies, and assertions about population control).

²⁶ See Davey Alba, *These Two Rumors Are Going Viral Ahead of California's Recall Election*, N.Y. TIMES (Sept. 15, 2021), <https://perma.cc/M4TX-M2MH> (explaining the rumor preceding California's gubernatorial recall election that holes in ballot envelopes were being used to screen votes); Linda Qiu, *The Election Is Over, but Ron Johnson Keeps Promoting False Claims of Fraud*, N.Y. TIMES (Mar. 21, 2021), <https://perma.cc/B9U5-QU8X> (tracking the continued spread of disinformation regarding a fraudulent presidential election, despite claims having been addressed and debunked by government cybersecurity leaders).

²⁷ See Jeffrey Pierre & Scott Neuman, *How Decades of Disinformation about Fossil Fuels Halted U.S. Climate Policy*, NPR (Oct. 27, 2021), <https://perma.cc/YEN5-YW6L> (tracking the oil industry's coordinated efforts to undermine data showing the effects of climate change).

Justice Gorsuch's stated concerns are about falsehoods more generally, and he is not wrong that these fast-spreading lies are polluting public discourse and inflicting harm. However, the harm inflicted is a harm against public sensibility that stems from an assault on facts, not a harm against a potential defamation plaintiff that stems from an assault on reputation.²⁸ While defamation law aims to ensure that our public discourse has an anchor in truth, it only concerns itself with one quite-specific anchor, and it is not the one with which Justice Gorsuch seems most concerned. Adjustment of the *Sullivan* standard simply does not do the major anti-disinformation and pro-democracy work that needs to be done.

Occasionally, of course, the two overlap – for example, when disinformation is not merely a generic lie about a stolen election but a lie about a particular postmaster backdating mail-in ballots,²⁹ or particular election workers tampering with votes,³⁰ or a particular voting-machine company rigging an outcome³¹ – and defamation litigation might then be a useful, pro-democratic tool in the ways Gorsuch apparently envisions. Some conspiracy theories spread falsehood that is reputation-harming.³² But there is no reason to believe that disinformation as a wider phenomenon is going to serve itself up in a way that merits a defamation claim.

Indeed, significant research in this area suggests that it often does not. Much social-media disinformation is generated by a very small number of initial producers for money or political gain and then disseminated broadly on platforms by armies of others who make broad claims that are false but not harmful to any individual reputation. A powerful recent illustration is the so-called Disinformation Dozen, a

²⁸ Bente Birkeland, *Election Defamation Lawsuits Open New Front in Fight against Defamation*, NPR (Mar. 27, 2021, 7:00 AM), <https://perma.cc/AS9L-4D99> (“Many conspiracy theories do not target a specific person or company, so there’s no one to file a lawsuit against.”); John Cook, Ullrich Ecker & Stephan Lewandowsky, *Misinformation and How to Correct It*, in *EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES* 1, 3 (Robert A. Scott, Stephen M. Kosslyn & Marlis Buchmann eds., 2015) (noting the ways that anti-science campaigns “misinform the public on issues that have achieved consensus among the scientific community, such as biological evolution, and the human influence on climate change”).

²⁹ Complaint at 10, *Weisenbach v. Project Veritas*, No. 10819-21 (Pa. Ct. Com. Pl. Aug. 13, 2021); *Project Democracy Joins Defamation Suit Against Project Veritas: Group Maliciously Lied About a PA Postmaster in the Aftermath of 2020 Election*, PROTECT DEMOCRACY (Aug. 16, 2021), <https://perma.cc/4TB5-UUQR>.

³⁰ Complaint, *Freeman v. Hoft*, No. 4:21-cv-0 1424 (E.D. Mo. Dec. 5, 2021); Betsy Woodruff Swan, Kyle Cheney & Josh Gerstein, *Pa. Voting Official Sues Trump, Giuliani, Others over 2020 Allegations*, POLITICO (Nov. 2, 2021, 11:05 PM), <https://perma.cc/JJ4R-4VWQ>.

³¹ *US Dominion, Inc. v. Fox News Network, LLC*, No. N21C-03-257 EMD (Del. Super. Ct. Mar. 26, 2021); *Smartmatic USA Corp. v. Fox Corporation*, No. 151136/2021 (N.Y. Sup. Ct. Feb. 8, 2021); *Smartmatic USA Corp. v. Michael J. Lindell*, No. 22-cv-00098-WMW-JFD (D. Minn. Jan. 18, 2022).

³² See, e.g., Dave Collins, *Alex Jones Ordered to Pay \$965 Million for Sandy Hook Lies*, AP NEWS (Oct. 12, 2022), <https://perma.cc/7BU4-Q4DS>.

group of individuals found to be responsible for almost two-thirds of the anti-vaccine content circulating on social-media platforms.³³ While some of the content produced by the Disinformation Dozen has been leveled at individuals,³⁴ much of the false and deceptive anti-vaccination content is packaged in the form of misleading data designed to sway opinion rather than target reputation.³⁵ This is not a *Sullivan* problem, and reconsideration of *Sullivan* is not a solution to it. There is no reason to believe that adjusting constitutional free speech standards in defamation law would be an efficient or effective tool for tackling the core of the issue.

To the extent that the concern here is actively defamatory disinformation campaigns – wholly invented, consciously distributed conspiracy theories that knowingly target an individual’s reputation with falsehoods for clicks³⁶ – this material already falls outside the scope of *Sullivan* protection. A number of important debates are emerging about the purveyors of these falsehoods – including whether even a successful defamation suit can dislodge an audience’s belief in these conspiratorial lies or meaningfully impact the incentives of those producing them.³⁷ But this defamatory material is, by definition, distributed with knowing falsity or reckless disregard for the truth. The *Sullivan* doctrine, as it now stands, envisions liability for these actors, and a reconsideration of the doctrine would, again, be a poor instrument for tackling the concerns that continue to exist.

Moreover, as a practical matter, the online social-media mobs disseminating lies are not natural targets for defamation suits, because there are so many communicators in the amplification process and because so many of them may be

³³ *The Disinformation Dozen*, CTR. FOR COUNTERING DIGITAL HATE (Mar. 24, 2021), <https://perma.cc/FFQ3-N2VJ>; Audrey McNamara, *A Dozen Anti-vaccine Accounts Are Responsible for 65% of Disinformation Shared Online, New Report Finds*, CBS NEWS (Mar. 25, 2021, 10:09 PM), <https://perma.cc/FC2K-J3QX> (noting that nearly two-thirds of anti-vaccine content that had been shared or posted on Facebook and X more than 812,000 times between February 1 and March 16, 2021, came from twelve accounts).

³⁴ *The Disinformation Dozen*, *supra* note 33 (describing allegation that Bill Gates had a role in planning the COVID-19 pandemic).

³⁵ *Id.* at 12–21; Sheera Frenkel, *The Most Influential Spreader of Coronavirus Misinformation Online*, N.Y. TIMES (Nov. 25, 2022), <https://perma.cc/BBC6-X7VK>; Davey Alba & Sheera Frenkel, *From Voter Fraud to Vaccine Lies: Misinformation Peddlers Shift Gears*, N.Y. TIMES (Jan. 7, 2021), <https://perma.cc/R4U4-VCNL> (discussing campaigns spreading lies about vaccines being delivered with a microchip or being harmful to health).

³⁶ See, e.g., Terrence McCoy, *Inside a Long Beach Web Operation That Makes Up Stories about Trump and Clinton: What They Do for Clicks and Cash*, L.A. TIMES (Nov. 22, 2016), <https://perma.cc/RD6R-LZB2> (describing the process by which writer Paris Wade found a “totally misleading” photograph to “trick people into treading the news”); Laura Sydell, *We Tracked Down a Fake-News Creator in the Suburbs. Here’s What We Learned*, NPR (Nov. 23, 2016, 3:31 PM), <https://perma.cc/K986-S564> (describing the rapid spread of a fabricated story about an FBI agent murdered for leaking Hillary Clinton’s email).

³⁷ See, e.g., David Bauder, *Is Alex Jones Verdict the Death of Disinformation? Unlikely*, AP NEWS (Oct. 17, 2022), <https://perma.cc/BA3W-FSRV>; Zeynep Tufekci, *Opinion, We Should Try to Prevent Another Alex Jones*, N.Y. TIMES (Oct. 16, 2022), <https://perma.cc/zFGD-NKA6>.

anonymous.³⁸ Take, for example, one common disinformation pattern: A lie initiates on an anonymous web platform like 4chan, makes its way through private or semiprivate groups on social media, then gains traction on Reddit or YouTube before finally emerging into mainstream social-media platforms like X, Facebook, and Instagram.³⁹ Breaking down the networks that power the spread of that disinformation might require thousands of actions against individual users. The ability to target any one user might pose real challenges. It would, as a starting matter, require knowledge of identity. But both inauthentic bots that mimic human behavior through programming and deceptive accounts that strategically adopt personas of individuals from marginalized groups are regularly deployed to amplify messages and shape political discourse.⁴⁰ Moreover, real human social-media users may shield their identities through pseudonyms or more sophisticated tactics that obscure a user's IP address or geographic location.⁴¹ Bringing a suit against an unknown defendant is possible but not always practical, and plaintiffs may not be able to justify the expense of such extensive discovery.⁴² Additionally, pursuing action against an unknown defendant runs the risk that revealing the defendant's identity may defeat jurisdiction or lead to the conclusion that the individual lacks the personal resources to pay out damages in the event of a successful claim.⁴³ Individual social-media users are likely not attractive targets for defamation suits because they lack the assets to pay damages,⁴⁴ and the platforms themselves are statutorily immune from most defamation suits under Section 230 of the Communications Decency Act.⁴⁵ Thus,

³⁸ See Darrell M. West, *How to Combat Fake News and Disinformation*, BROOKINGS (Dec. 18, 2017), <https://perma.cc/XNH6-ZDCY> (noting the link between disinformation and “the likelihood that people will engage in worse behavior if they believe their actions are anonymous and not likely to be made public”).

³⁹ Claire Wardle, *5 Lessons for Reporting in an Age of Disinformation*, FIRST DRAFT (Dec. 27, 2018), <https://perma.cc/9XDC-5VSR>; Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online* 27, DATA & SOC'Y RSCH. INST. (May 15, 2017), <https://perma.cc/HCY7-SRYE> (noting the disinformation goals of advancing ideology and earning money through advertising revenue).

⁴⁰ Brian Friedberg & Joan Donovan, *On the Internet, Nobody Knows You're a Bot: Pseudonymous Influence Operations and Networked Social Movements*, 6J. DESIGN & SCI. (Aug. 7, 2019), <https://perma.cc/98RE-UCCU>; Matthew Hindman & Vlad Barash, *Disinformation, 'Fake News' and Influence Campaigns on Twitter* 16, KNIGHT FOUND. (Oct. 2018), <https://perma.cc/AB8A-635V> (noting the proliferation of academic research documenting the role of bots in promoting fake news).

⁴¹ See Friedberg & Donovan, *supra* note 40.

⁴² Erik P. Lewis, *Unmasking “Anon12345”: Applying an Appropriate Standard When Private Citizens Seek the Identity of Anonymous Internet Defamation Defendants*, 2009 U. ILL. L. REV. 947, 953–54.

⁴³ *Id.*

⁴⁴ Steven Seidenberg, *Lies and Libel: Fake News Lacks Straightforward Cure*, ABA J. (July 1, 2017, 12:15 AM), <https://perma.cc/UCQ5-2BDQ> (noting that many potential defendants “lack sufficient funds to justify bringing lawsuits against them.”).

⁴⁵ 47 U.S.C. § 230.

the adjustment to *Sullivan* that Justice Gorsuch floats as an anti-disinformation, pro-democracy tool is unlikely to be effective against many of the key targets. In a wide array of disinformation cases, defamation suits are simply the wrong tool for the job.

8.5 PRESERVING THE PRESS FUNCTION

The actual likely targets of such suits? News organizations, which carry libel insurance and have more assets, and so are much more susceptible to the kind of situation *Sullivan* squarely addresses – defamation suits used by the powerful to intimidate and silence their critics.⁴⁶

Thus, it is not merely the case that an unwinding of *Sullivan* is a poor instrument for addressing the concerns that are at stake in the social-media disinformation crisis. After all, to say that it is not a full solution does not mean that it might not be a partial one worthy of consideration. But weighed against these weak benefits are some staggering costs to the operation of the press function, which has to be a part of the equation if the goal is to reduce disinformation and preserve the discourse central to democracy.

Defamation law is a tool that is not particularly viable against the online mobs of coordinated lies, but that will, without the carefully crafted constitutional buffers from *Sullivan*, increase the burden on those that are financially and professionally invested in providing accurate information to the polity. Removing those protections, then, would not only fail to meaningfully advance Justice Gorsuch's anti-disinformation and pro-democracy goals, but actively harm them.

Performers of the press function are among the rare remaining information producers with information-production models that center on building trust, maintaining professional standards, and serving as a watchdog with an accountability mission. The press function, performed in both its traditional and its evolving structures, is invaluable to democratic self-governance.⁴⁷ This is because press communicators are among the most likely to have norms of investigating, verifying, and contextualizing material for audiences⁴⁸ and to have reader and viewer

⁴⁶ Richard Tofel & Jeremy Kutner, *A Response to Justice Gorsuch, in New York Times v. Sullivan: The Case for Preserving an Essential Precedent* (2022), <https://perma.cc/NY3G-LLZ6> (“In the realm of litigation, the ‘optimal legal strategy’ for publishers who cannot afford to be sued is, and has been, to be less aggressive in coverage. For those who still can afford it, i.e., can afford rapidly rising libel insurance rates and deductibles, the optimal strategy is to practice journalism in a way that minimizes the combined cost of insurance and litigation itself.”).

⁴⁷ See Erin Carroll, *Promoting Journalism as Method*, 12 DREXEL L. REV. 691 (2020).

⁴⁸ RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419 (2020) (describing key components of the constitutional press function); RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499 (2019) (arguing press speakers engage in special institutional First Amendment activities on behalf of audiences).

relationships that require them to hold themselves accountable and “show their work.”⁴⁹

Beyond this, the press has been responsible for some of the most vital fact-checking⁵⁰ and falsehood-countering tools of our time, actively *correcting* disinformation about public health,⁵¹ politics,⁵² and other topics important to public discourse and democracy.⁵³ Certainly, our growing understanding of disinformation (and of the audiences that are groomed to believe it) makes clear that simple counter-information and exposure alone are inadequate weapons for this battle. But it remains the case that the press performs those functions Justice Gorsuch highlights as crucial to democracy.⁵⁴ In response to the tsunami of lies, news organizations are combatting the spread of disinformation with good journalism. This press function includes investigative work that reveals the organized disinformation efforts that are of such concern to Justice Gorsuch⁵⁵ and that exposes the

⁴⁹ See, e.g., Christoph Koettl, *Satellite Images and Shadow Analysis: How the Times Verifies Eyewitness Videos*, N.Y. TIMES (Sept. 4, 2018); *Policies and Standards*, WASH. POST, <https://perma.cc/HZ5W-M5AZ>; Sarah Matthews et al., *A Reporter's Guide to Pre-Publication Review*, REPS. COMM. FOR FREEDOM PRESS, <https://perma.cc/4FK2-WBPM>.

⁵⁰ The Pulitzer Prize-winning site PolitiFact originated as an effort by the staff of the *Tampa Bay Times* to fact-check claims made in the lead-up to the 2008 election. Angie Drobnic Holan, *The Principles of the Truth-O-Meter: PolitiFact's Methodology for Independent Fact-Checking*, POLITIFACT (Apr. 18, 2022), <https://perma.cc/P6JY-SKL4>. The site now runs as a nonprofit fact-checking engine under the *Time*' parent company, the Poynter Institute, and partners with media outlets across the U.S. to spearhead state-level fact-checking sites. For example, Texas's site is supported by the work of journalists from the *Austin American-Statesman*, *Houston Chronicle*, and *San Antonio News-Express*; the *Daily Iowan* provides support for its state site; Capital Public Radio for California's; *Buffalo News* for New York; the *Detroit Free Press* for Michigan; and the *Vermont Digger* for Vermont. Texas, POLITIFACT, <https://perma.cc/37FX-RRSX>; Iowa, POLITIFACT, <https://perma.cc/VS8L-KJ22>; California, POLITIFACT, <https://perma.cc/WY7L-64SV>; New York, POLITIFACT, <https://perma.cc/6YNL-ZES3>.

⁵¹ See, e.g., Valerie Pavlonis, *Fact Check: Claim About Growing Number of Diseases Exaggerates, Omits Context*, USA TODAY (Feb. 22, 2022, 1:07 PM), <https://perma.cc/FXH3-RQFN>; Reuters Fact Check, *Fact Check—No Evidence Some Covid-19 Vaccines Increase Risk of HIV Infection*, REUTERS (Feb. 18, 2022, 1:09 PM), <https://perma.cc/K6SR-BTGN>; Glenn Kessler, *How the Falsehood of Athletes Dying of Coronavirus Vaccines Spread*, WASH. POST (Feb. 1, 2022, 3:00 AM), <https://perma.cc/4222-DDSN>; Maggie Astor, *No, Other People's Covid Vaccines Cannot Disrupt Your Menstrual Cycle*, N.Y. TIMES (Sept. 13, 2021), <https://perma.cc/VS4T-SCZT>.

⁵² See, e.g., POLITIFACT, <https://perma.cc/Y29A-HAQU>; Glenn Kessler, *Fact Checker: The Truth behind the Rhetoric*, WASH. POST, <https://perma.cc/5WET-3WBP>.

⁵³ See, e.g., Tiffany Hsu, *Tracking Viral Misinformation*, N.Y. TIMES (Feb. 24, 2022); *Fact Check*, USA TODAY, <https://perma.cc/L2K2-CJTG>.

⁵⁴ See Chip Scanlan, *Writers at Work: The Process Approach to Newswriting*, POYNTER. (Aug. 25, 2002), <https://perma.cc/4GZ5-4Q3S> (describing the general process for newsgathering and writing); *SPJ Code of Ethics*, SOC'Y PRO. JOURNALISTS (Sept. 6, 2014), <https://perma.cc/7VN6-8M4V> (describing the ethical standards guiding newswriting).

⁵⁵ For example, in 2016, journalists broke the story of a group of Macedonian bloggers responsible for at least 140 U.S.-politics websites propagating false and misleading content, revealed American connections to the network, and exposed a sophisticated strategy to sway public opinion in the lead-up to the 2016 U.S. presidential election. Craig Silverman & Lawrence

origins of conspiracy theories.⁵⁶ Americans are aware of the scope and gravity of the risk of disinformation in part because of the operation of this function.⁵⁷ A paring back of *Sullivan* protections, making it easier to shut down critical reporting, will make it more difficult for press organizations to do the work necessary to reveal these massive disinformation operations. The press exposes the existence of disinformation and then works to remedy its harm. At its best, the press function includes research and reporting that grapples with widely circulated false information,⁵⁸ provides accurate and well-sourced truth, and exposes the harmful consequences of the lies.⁵⁹

This may be the worst possible moment to strip the core protections for those performing this press function. Organizations that are working against disinformation with real newsgathering efforts are already seriously struggling. “[S]uccessive technological and economic assaults have destroyed the for-profit business model that sustained local journalism in this country for two centuries.”⁶⁰ Critically important democracy-enhancing local news is especially financially imperiled, in ways that have been accelerated by the COVID-19 crisis.⁶¹ Organizations that engage in *reporting* have lost most of their advertising dollars to corporations like Google and Facebook that engage primarily in *repeating* – including repeating of disinformation. Citizens in a democracy rely on performers of the press function to help them “stay connected to and informed about what is happening in their backyards – especially in their schools, their governments, and other critical institutions and infrastructures,”⁶² and in the absence of this information, streams of disinformation fill the void. Performers of the press function today not only have

Alexander, *How Teens in the Balkans Are Duping Trump Supporters with Fake News*, BUZZFEED NEWS (Nov. 3, 2016, 5:02 PM), <https://perma.cc/4FQ2-E6UU>; Craig Silverman et al., *Macedonia’s Pro-Trump Fake News Industry Had American Links, and Is under Investigation for Possible Russia Ties*, BUZZFEED NEWS (July 18, 2018, 10:24 AM), <https://perma.cc/Z3X9-LH5A>.

⁵⁶ Morning Edition, *The Origins of the Seth Rich Conspiracy Theory*, NPR (July 11, 2019, 5:22 AM), <https://perma.cc/43KK-NASN>.

⁵⁷ See, e.g., FRONTLINE, *The Plot to Overturn the Election*, PBS (Mar. 29, 2022), <https://perma.cc/K8Z4-DX88> (outlining a ProPublica/Frontline project to “trace the sources of misinformation about the 2020 election, demonstrating how a handful of people have had an outsized impact on the current U.S. crisis of democratic legitimacy”).

⁵⁸ David Klepper, *Conspiracy Theories Paint Fraudulent Reality of Jan. 6 Riot*, AP NEWS (Dec. 31, 2021), <https://perma.cc/9MGQ-48UH>.

⁵⁹ See, e.g., Vanessa Romo, *Poison Control Centers Are Fielding a Surge of Ivermectin Overdose Calls*, NPR (Sept. 4, 2021, 7:01 AM), <https://perma.cc/AB6K-588E>.

⁶⁰ See PENELOPE MUSE ABERNATHY, CTR. FOR INNOVATION & SUSTAINABILITY IN LOCAL MEDIA, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? (2020), <https://perma.cc/2DWX-E'TXX> (“In only two decades, successive technological and economic assaults have destroyed the for-profit business model that sustained local journalism in this country for two centuries. Hundreds of news organizations – century-old newspapers as well as nascent digital sites – have vanished.”).

⁶¹ *Id.*

⁶² VICTOR PICKARD, *DEMOCRACY WITHOUT JOURNALISM: CONFRONTING THE MISINFORMATION SOCIETY* (2020).

fewer resources to engage in important coverage of local and national government and other powerful people and organizations,⁶³ but also face steep rises in libel defense costs that they are no longer well-resourced enough to shoulder. The cost of defending a libel suit can easily wipe out a local news organization.⁶⁴

All of this adds up to exactly the worry the unanimous *Sullivan* Court expressed: that freedom of speech and press would not be exercised, purely because the press speaker was unable to risk the financial consequences. Justice Gorsuch himself noted in *Berisha* that the economic model that supported reporters and newsrooms has eroded. He suggests this should lead to less protection in defamation actions, but he may well have it backwards. This is not the moment to be reconsidering the valuable *Sullivan* protection, if anti-disinformation and pro-democracy goals are taken seriously.

To be sure, press speakers are not uniformly the heroes of the disinformation story. As public confidence in the media hits record lows and the media is increasingly distrusted as overly partisan, its capacity to counter disinformation may be diminished.⁶⁵ Indeed, a general decline of public faith in authority, expertise, and the traditional institutions of knowledge and democracy means the role of the press function is itself in a state of flux.⁶⁶ Moreover, new scholarship is helping to paint a fuller picture of the interrelationship between some mainstream media outlets and the spread of disinformation. At least some research points to asymmetric political polarization within the media ecosystem that produces a “propaganda feedback loop” far less governed by the reality-check dynamic of professional journalistic norms.⁶⁷ Additionally, some have suggested that even more traditional journalistic organizations aiming for neutral, transpartisan newsgathering have become tools for the spread of distorted narratives. Sometimes this happens as traditional journalists, in the name of objectivity, engage in performative neutrality that amplifies disinformation.⁶⁸ Sometimes mainstream media outlets spread

⁶³ See Michael Ewens, Arpit Gupta & Sabrina T. Howell, *Local Journalism under Private Equity* (Oct. 10, 2021) (unpublished manuscript), <https://perma.cc/3EW3-HXW3> (tracking the change of news composition away from information about local governance and the resulting decline in participation in local elections).

⁶⁴ Meagan Flynn, *A Small-Town Iowa Newspaper Brought Down a Cop. His Failed Lawsuit Has Now Put the Paper in Financial Peril*, WASH. POST (Oct. 10, 2019, 6:41 AM), <https://perma.cc/CB8C-LY5H> (discussing a local newspaper forced to reduce its publication schedule and engage in fundraising after being sued for defamation for accurately reporting about a police officer).

⁶⁵ See Megan Brenan, *Media Confidence Ratings at Record Lows*, GALLUP (July 18, 2022), <https://perma.cc/CC3S-GYM4>.

⁶⁶ See ASPEN INST., *COMM’N ON INFORMATION DISORDER, DECLINE OF TRUST INSTITUTIONS* (2021), <https://perma.cc/4BPS-Z6NL>.

⁶⁷ YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, *NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS* (2018) (addressing the ways that the right-wing media is more susceptible to disinformation and the spread of identity-confirming falsehoods).

⁶⁸ See *id.*

disinformation into the wider public consciousness merely by telling the potentially newsworthy story of the existence of conspiracy groups and their lies, only to have the coverage itself become a tool for the spread of those lies. Because social-media algorithms rate mainstream journalistic sources as more credible, news stories that in any way reinforce conspiracy theories may be filtered less and have a unique power as a vector for virality.⁶⁹ Likewise, because users often read only headlines when scrolling through social-media timelines, researchers are finding that users are sharing journalism from the mainstream media to spread and legitimate disinformation even when the news story itself does not support the lie.⁷⁰

Plainly, there is much work to be done if we are to address all of these issues and advance pro-democracy and anti-disinformation goals. But again, rolling back the *Sullivan* doctrine is no way to do so. Constitutional protection in defamation actions is not some lever that one can pull to address these information-distribution issues. It does not speak to most outrage-media issues, does not solve most matters of propaganda masquerading as news, and is not a useful tool for addressing most confusion and magnification issues. The scope and contours of these harms, as others have noted, “are problems of amplification – amplification by social media platforms and amplification by journalists,” and the complex set of norms, regulatory incentives, and laws to address them are going to have to focus on “the architecture of our public square,”⁷¹ not a doctrine that balances reputation and public dialogue.

Justice Gorsuch is right that democracy cannot afford to ignore the imminent crisis of disinformation. But democracy also cannot afford to fruitlessly hamstring the few remaining entities making press-function contributions to its public discourse. The pattern of powerful people attempting to use defamation as a tool to punish and deter critics has not diminished.⁷² If anything, recent examples provide forceful evidence that the threat continues to loom large. At this crucial moment, when the preservation of the press function is a matter of immediate concern, the facts on the ground signal that reconsideration of *Sullivan* will not be democracy-enhancing. It will be democracy-threatening.

⁶⁹ See, e.g., Orestis Papakyriakopoulos, Juan Carlos Medina Serrano & Simon Hegelich, *The Spread of COVID-19 Conspiracy Theories on Social Media and the Effect of Content Moderation*, HARV. KENNEDY SCH. MISINFORMATION REV. (Aug. 18, 2020), <https://perma.cc/CB53-NJKD> (finding that mainstream URLs used as evidence for the truthfulness of conspiracy theories are shared up to four times as often as fake-news sites).

⁷⁰ See, e.g., Yariv Tsfati et al., *Causes and Consequences of Mainstream Media Dissemination of Fake News: Literature Review and Synthesis*, 44 ANNALS INT’L COMM. ASS’N 157–73 (2020).

⁷¹ See Nabihya Syed, *Sullivan Is Not the Problem*, KNIGHT FIRST AMEND. INST. (Nov. 15, 2021), <https://perma.cc/HGV4-AK46>.

⁷² See Justin Wise, *Trump Escalates Fight against Press with Libel Lawsuits*, THE HILL (Mar. 8, 2020), <https://perma.cc/V7T9-U57X>; Trevor Timm, *Trump’s Many, Many Threats to Sue the Press since Launching His Campaign*, COLUM. JOURNALISM REV. (Oct. 3, 2016), <https://perma.cc/D3QB-G6WA>. See also J. Clara Chan, *Devin Nunes Sues CNN for \$435 Million-Plus in Defamation Suit*, THE WRAP (Dec. 3, 2019, 3:38 PM), <https://perma.cc/R7FM-GZ5W>.