Background and Summary for Discussion of the AALS Section on Defamation and Privacy

[*Note*: I have adapted this background and summary from my forthcoming works: Lyrissa Lidsky, *The Gordian Knot of Defamation Reform*, *in* MEDIA AS A GOVERNANCE INSTITUTION (Gus Hurwitz, Kyle Langvardt, & Elana Zeide, eds. 2023) (University of Oxford 2023); and Lyrissa Lidsky, *The Gordian Knot of Defamation Reform*, JOURNAL OF FREE SPEECH LAW (2022). If you'd like full citations, or you'd like to cite this document, please email me at the University of Florida Levin College of Law and I'll send you the current drafts of those pieces: lidsky@law.ufl.edu.]

Can the *Restatement (Third) of Torts: Defamation Law* "Modernize and Simplify" the Tort?

Lyrissa Lidsky

INTRODUCTION

Dean John Wade, who replaced the great Torts scholar William Prosser on the Restatement (Second), put the finishing touches on the defamation sections in 1977. Apple Computer had been founded a year before, and Microsoft two, but relatively few people owned computers yet. The 24-hour news cycle was not yet a thing, and most Americans still trusted the press.

A lot has changed since 1977. Billions of people now publish their most profound, trivial, or scurrilous thoughts—unexpurgated—to mass audiences. Trying to compete with "cheap speech" has economically devastated large swaths of the news industry, stripping talent and expertise from newsrooms. Meanwhile, and perhaps unsurprisingly, public trust in news media has eroded dramatically. These developments pose the biggest challenge for defamation law since the invention of the printing press. Yet they have not inspired dramatic reform to the common law of defamation. Or at least not yet. As the American Law Institute begins a new Restatement of defamation law, it is important to consider what a successful program of reform might look like.

To provide background for discussion of that topic, I examine below some of the most important "reforms" to defamation law since 1977 and speculate about why those reforms have been predominantly constitutional and statutory, with common law developments playing a less important role. I then evaluate recent critiques of defamation law's constitutional dimensions by two U.S. Supreme Court Justices, paying special attention to Justice Neil Gorsuch's argument that changed circumstances related to cheap speech justify reconsidering and perhaps eliminating some First Amendment constraints on the common law of defamation. I tally defamation law's scorecard in vindicating reputation and deterring disinformation and offer the outlines of an approach for untangling (rather than cutting) the inseverable interweaving of tort, constitutional, and statutory law. Finally, I broadly summarize the status of the draft of the Restatement of defamation law, with due regard the fact that the draft has not been approved, and may not be, by the American Law Institute. **The views I express here are solely my own.**

DEFAMATION LAW REFORM: 1977-PRESENT

In its long history, defamation has been a sin, a crime, and a tort. In the United States, it now exists as a complex body of doctrine comprised of common law, constitutional law, and statutory law. The most important changes to defamation law since 1977 were constitutional and statutory rather than common law changes. In 1977, the U.S. Supreme Court was still in the process of "constitutionalizing" defamation law. That process began with the Court's seminal decision in *New York Times v. Sullivan* in 1964. There, for the first time, the Court interpreted the First and Fourteenth Amendments to set limits on state common law in defamation cases involving public officials; the Court held these limits were necessary to prevent state tort law from chilling uninhibited, robust, and wide-open commentary about government officials acting in their official capacity. Famously, *Sullivan* held that these officials could not recover for defamation absent proof that the person who allegedly defamed them knowingly or recklessly disregarded the falsity of the defamatory statement. But *Sullivan* was just the beginning. The Court later interpreted the First and Fourteenth Amendments to limit the common law in ways that reshaped practically every element of the defamation tort in cases involving litigants who were public officials, public figures, or ordinary people involved in matters of public concern—that is to say, almost all cases! The effect of the Court's defamation jurisprudence was to impose a labyrinthine set of constitutional doctrines on the tort of defamation. It also imposed on lower courts the burden of interpreting these doctrines to apply to novel situations and deciding whether to do so narrowly or, as they did in the case of deciding which plaintiffs qualified as public figures, expansively. Nonetheless, the Supreme Court's constitutional doctrines fundamentally recalibrated the balance between reputation and free expression in defamation law: The common law could provide more protection for free expression than these doctrines required, but it could not provide less.

The Supreme Court's constitutional doctrines did not foreclose common law creativity in adapting to changing circumstances, but in the decades following the Court's last major defamation decision in the early 1990s, legislators, not courts, played the leading role in enacting pro-defendant reforms. In the 1980s and early 1990s, scholars called for defamation reform to respond to a "dramatic proliferation of highly publicized libel actions brought by well-known figures who seek, and often receive, staggering sums of money." These calls for comprehensive reform had little traction in state courts, but starting in the 1990s and continuing to the present, states passed legislation to respond to the perceived problem of powerful actors weaponizing libel actions against ordinary citizens. The original impetus for such laws was the work of Professors George Pring and Penelope Canan. Pring and Canan documented the rise of a type of suit they branded Strategic Lawsuits Against Public Participation, or SLAPPs; they used this term to describe frivolous defamation suits brought by powerful local actors such as real estate developers to stifle the criticisms and civic participation of ordinary citizens in forums such as zoning board meetings. Their influential work, which culminated in a 1996 book, detailed how such suits invaded not just First Amendment rights to free expression but also the right of citizens to petition their governments for redress of grievances. Pring and Canan brought public attention to the weaponization of defamation law by the powerful against the relatively powerless, and their work inspired more than half of all state legislatures to pass laws establishing procedures to allow defendants to obtain early dismissals of frivolous libel suits and sometimes attorneys' fees as well. Where such anti-SLAPP laws exist, and especially in jurisdictions adopting them in their stronger forms, they have dramatic effects on libel litigation—and not just on cases that fit Pring and Canan's original paradigm.

As important as anti-SLAPP legislation is, the most dramatic defamation reform of the last forty or so years took place in 1996, with the passage of section 230 of the Communications Decency Act. It is not a stretch to say that this statutory defamation reform helped propel the Cheap Speech Revolution. Section 230(c) immunized internet service providers and website operators from liability for defamatory communications posted by their users. Congress granted this immunity to the actors we would later come to call platforms and, still later, Big Tech. Congress's legislative efforts stemmed from dissatisfaction with the common law's attempt to apply traditional defamation law principles to internet service providers. Prior to the passage of section 230, two influential district court decisions held that internet service providers who exercised editorial control by editing or taking down user-generated content would be liable for defamatory content posted by their users, just as newspapers are liable for defamatory content they publish in letters to the editor; whereas, internet service providers who eschewed editorial control would be liable only upon notice of users' defamatory content and failure to remove it, just as bookstores and other content "distributors" are. These decisions disincentivized internet service providers from taking down problematic content to avoid being treated like traditional media "publishers."

Yet instead of merely insulating internet service providers from liability akin to that of traditional publishers, the broad language of section 230's immunity insulated them from distributor, or notice and takedown, liability as well, ostensibly to fuel the growth of the Internet as an economic engine. Whether this was necessary is arguable, since most of the world imposes notice and takedown liability on Google, Facebook, and other Big Tech actors. Nonetheless, the effect of section 230 has been to foreclose U.S. victims defamed online or in social media from accessing the deep pockets of Big Tech. Only the person posting the defamatory statement may be sued, regardless of whether that person can even be found or has resources to litigate or satisfy a defamation judgment. Section 230's effect on the development of defamation law over the last quarter of a century cannot be overstated. Absent section 230, suits against online intermediaries would be much more common than they are today, and common law courts would certainly bear more responsibility for adapting defamation principles to Big Tech practices—shaping those practices in the process. If the Supreme Court narrows the scope of immunity under section 230 this term, we can once again expect a dramatic reshaping of Big Tech practices.

To say that constitutional and statutory developments were the biggest news of defamation law over the last 45 years is not to say that the common law has not responded at all to some of the novel issues cheap speech poses. For example, courts have had to decide whether an Internet post is slander or libel, whether a person who provides a hyperlink to an article has "published" it for defamation purposes, and what to do about defamation cases based on reviews or rankings determined by algorithms. New issues continue to arise, and as they do, courts tend to adapt common law doctrines by analogizing new communications formats to old, though they sometimes resort to creatively using equitable doctrines, such as libel injunctions, to deter those who might not be deterred by orders to pay money damages.

Even so, the common law's creativity in responding to cheap speech has been stymied by its inherent incrementalism and respect for precedent: Even now, only a minority of states have eradicated the outmoded distinctions between libel and slander, which arose from a jurisdictional battle between ecclesiastical and seigneurial courts in England and which commentators have decried for hundreds of years. But an even bigger obstacle to comprehensive common law reform is the Supreme Court's pervasive constitutionalization of the underlying tort. Having tilted the scales toward the First Amendment in most defamation

cases, the Supreme Court left little leeway for states to add reputational protections for their citizens, and, for much of this time, the substantive and procedural constitutional protections seemed more than sufficient to protect free expression, especially when coupled with statutes allowing for early dismissals of frivolous actions. The effect has been a sort of practical pre-emption of common law rebalancing of reputation versus expression. Now, however, there is growing discontent with our information ecosystem: Is defamation law reform the answer?

DEFAMATION LAW'S NEW CRITICS

Today's public conversation about defamation law reform is being galvanized by a spate of high-profile lawsuits and critiques of the law offered by a President, two Supreme Court justices, and both progressive and conservative critics. Today's conversation is animated by concerns about the effects of cheap speech on the information ecosystem, with many critics asking if the constitutional strands of current defamation law tilt the scales too sharply in favor of free expression.

The Media Law Resource Center's data confirm the popular impression that more defamation lawsuits have been brought in the last few years. Moreover, the ones that have been brought seem to be more visible. High-profile plaintiffs appear to have multiplied, with household names such as Sarah Palin, Devin Nunes, Roy Moore, and Donald Trump all suing for defamation. Other recent lawsuits are noteworthy because they involve high-profile defendants and important societal issues. Notable in this regard are:

- the many lawsuits by women called liars after alleging sexual harassment by Donald Trump;
- the lawsuits brought by parents accused of being "crisis actors" after their children were murdered at Sandy Hook, which have resulted in judgments of more than a billion dollars against Internet personality Alex Jones;
- the lawsuits, now settled or dismissed, by a Kentucky teen whose perplexity was misreported by many media sources as racism based on a viral video that contained its own refutation;
- the lawsuit brought and won by actor Johnny Depp against his former wife Amber Heard for accusing him of sexual violence, and her countersuit, also won in part, for his accusations that she fabricated evidence to further her defamatory accusations;
- the lawsuits, now settled, by Georgia poll workers accused of tampering with the results of the 2020 presidential election;
- and the lawsuits, ongoing, by the providers of electronic voting machines alleged by prominent Trump partisans and conservative news networks to have fraudulently delivered the 2020 election to President Biden.

Like high-profile defamation lawsuits of past eras, these involve high-profile political figures, celebrities, and reputable media; unlike their high-profile predecessors, they also involve fringe media outlets, a President—as both defendant and plaintiff, and even individuals posting to social media through pseudonymous parody accounts, such as @DevinNunesCow.

More interesting than the number of recent libel lawsuits is the prominence of libel law's recent critics. While running for President, Donald Trump promised to "open up" libel laws.

Critics derided Trump's promise, noting—correctly—that Presidents control neither state common law nor the interpretation of the First Amendment. Yet though Trump's promise to change libel law may not have amounted to much in the short term, Justices Clarence Thomas and Neil Gorsuch may have begun playing a long game to galvanize constitutional reform. Justice Thomas began calling for reconsideration of *New York Times v. Sullivan* in his concurrence in the Court's denial of certiorari in *McKee v. Cosby* in 2019, which was a defamation case brought by a woman against the former actor Bill Cosby. Cosby had accused her of lying about him sexually assaulting her. Although Justice Thomas's opinion in that case seemed quixotic at the time, he subsequently has asked the Supreme Court to consider rolling back or eliminating the constitutional protections grafted onto libel law in two more libel cases in which the Court denied certiorari. Justice Gorsuch has written separately in one of these cases, *Berisha v. Lawson*, to echo Thomas's call for reconsideration—though on different grounds. The latest of these cases was relisted repeatedly before the Court denied certiorari, and in light of the recent activism of the Supreme Court in overturning settled constitutional precedents, court prognosticators suspect the Court may take a case revisiting its defamation jurisprudence soon.

So far, Justice Clarence Thomas has grounded his critique of the Court's defamation jurisprudence largely in originalism concerns, calling *New York Times v. Sullivan* and subsequent Supreme Court cases extending it as "policy-driven decisions masquerading as constitutional law" that lack any relation to the "text, history, or structure of the Constitution." Justice Thomas 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." He indicates this inquiry would reveal that the Court's defamation jurisprudence is supported by "little historical evidence" and should be overruled. Scholar Matthew Schafer has already cast doubt on Thomas's historical evidence concerning the original meaning of the First Amendment, and the Justice's reliance on s*candalum magnatum,* a disavowed action by which British monarchs and "great men of the realm" (i.e., members of the peerage) criminally punished their critics, is singularly unpersuasive and even embarrassing (my assessment, not Schafer's). Be that as it may, however, the originalist portion of Thomas's argument, even were he correct in his historical analysis, is likely to convince only those who believe that the First Amendment should protect no more speech today than it did in 1791 (or perhaps in1868, when the Fourteenth Amendment was ratified).

Justice Thomas's policy arguments are more persuasive. These focus on the "real-world" negative effects of the Court's constitutionalization of defamation law. He asserts that the Court's defamation jurisprudence has "allowed media organizations and interest groups 'to cast false aspersions on public figures with near impunity.'" His boldest claim, however, is that the actual-malice standard fosters lies in public discourse by "insulat[ing] those who perpetrate [them] from traditional remedies like libel suits." He cites examples of conspiracy theories, hoaxes, and campaigns of online character assassination as evidence for the proposition that "lies impose real harm." Although he does not fully connect the premises of his argument to his conclusion, he seems to assert that the common law of libel, left to its own devices, could deter viral lies and other pernicious disinformation. Beyond that, he does not elaborate on how unshackling the common law from First Amendment constraints would deter the proliferation of lies, and he does not ground the need for this deterrent fully in "cheap speech" concerns.

Justice Gorsuch, on the other hand, spotlights changes in the communication environment since 1964 as a basis for reconsideration of *Sullivan,* and he claims that these changes

undermine the rationales of the Court's actual malice standard and public figure doctrine. If Justice Gorsuch is correct in his criticisms, his call for reform should resonate even with those who have no truck with originalism. It is therefore useful to evaluate Gorsuch's concerns and determine what types of reforms might ameliorate them.

In an opinion dissenting from denial of certiorari in *Berisha v Lawson*, Justice Gorsuch postulates that the framers understood the importance of press freedom to the healthy functioning of democracy. Nonetheless, he writes "like most rights, [freedom of the press] comes with corresponding duties." One of those duties is the duty "to try to get the facts right—or, like anyone else, answer in tort for the injuries they cause." The implicit message of his dissent is that the press once tried to get the facts right, but this may no longer be the case.

Although Justice Gorsuch criticizes *Sullivan* as "overturning 200 years of libel law," his chief lament is not an originalist one. Instead, his chief argument is that changes in "our Nation's media landscape" since 1964 have undermined *Sullivan*'s logic. According to Justice Gorsuch, "revolutions in technology" have allowed "virtually anyone in this country" to "publish virtually anything for immediate consumption virtually anywhere in the world." Justice Gorsuch concedes "this new media world has many virtues," such as enhancing individuals' access to information and opportunities to debate, but he appears to believe social media's virtues are outweighed by their negative effects on information quality. According to Gorsuch, the social media revolution has undermined the economic model that once gave newspapers and broadcasters professional and economic incentives to strive for accuracy and the ability to invest in the reporters, editors, and fact-checkers necessary to deliver it. He also blames the "new media environment" for the spread of disinformation, which financially rewards it creators, "costs almost nothing to generate," and spreads more effectively than real news.

Gorsuch suggests that these changes undermine the justifications for *Sullivan*'s actual malice standard. For example, he questions the need for actual malice to play a role in protecting "critical voices" from defamation liability, implying that the sheer quantity of people who possess an electronic "soapbox" is sufficient to guarantee a diversity of views. He further indicates that while the actual malice rule may have made sense in a media environment that had "other safeguards" against "defamatory falsehoods and misinformation," it no longer makes sense once those safeguards—such as the media's professional and economic incentives to deliver accurate information—have (or so he claims) evaporated.

In the meantime, Gorsuch criticizes the evolution of the actual malice standard "from a high bar to recovery into an effective immunity from liability." Perplexingly, he contends that actual malice now creates a legal incentive for "publishing *without* investigation, fact-checking, or editing," a contention with which many media lawyers would surely disagree. Defendants win cases, after all, by negating fault. But for Justice Gorsuch, the actual malice standard "has evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable." Thus, he concludes, the actual malice standard now thwarts rather than bolsters the "informed democratic debate" that First Amendment theory envisions.

He also decries the fact that "today's world," with its "highly-segmented media," casts more and more citizens as "public figures" for defamation purposes, leaving "far more people without redress than anyone [in 1964] could have predicted." The effect, he speculates, may be to deter "people of good-will" from entering "public life" or engaging "in democratic self-governance." Again he suggests that *Sullivan*'s original justifications may be thwarted rather than advanced by the expansion of the public figure doctrine in the social media era, and he

asks the Supreme Court as a whole to "return[ ] its attention" to the limits its jurisprudence has placed on the common law of defamation.

DEFAMATION'S SCORECARD

Between them, Justices Thomas and Gorsuch lay the fault for the unfortunate state of public discourse at the feet of today's defamation law, with Justice Gorsuch specifically faulting the law's inability to address the dangers of "cheap speech" because of the actual malice and public figure doctrines. He further suggests that revisiting the constitutional limits on defamation law, might help bolster the declining quality of journalism, combat the rise of disinformation and lies, deter campaigns of character assassination, and foster "informed democratic debate." Is he correct?

First, it is important to note that the common law of defamation was famously complex even prior to the intervention of constitutional law in 1964, and nothing has happened since then to significantly reduce that complexity. Defamation law comes by its complications honestly: Laws protecting reputation appeared in Anglo-Saxon law before the Norman Conquest, and at least as early as the Thirteenth Century, defamation was a spiritual offense, punishable by excommunication in ecclesiastical courts. Later, ecclesiastical and seigneurial courts divided jurisdiction between them for different kinds of defamation, and in the later Middle Ages and into the sixteenth and seventeenth centuries the Crown punished "disgraceful words and speeches against eminent persons," known as *scandalum magnatum*. Each of these historical developments contributed to the anomalies and absurdities of the common law of defamation, and that was *before* the Supreme Court began adding many more in the thirty years following 1964.

Taking these complexities into account, it is fair to judge defamation law by how well it protects the values it purports to protect. The tort side of defamation is meant to protect individual reputation, a value no "civilized society" can "refuse to protect." The tort reflects society's "basic concept of the essential dignity and worth of every human being." The tort exists not only to safeguard and vindicate reputational injury but also to compensate injured individuals for dignitary, relational, and economic harms that flow from reputational injury. Moreover, the tort exists to exert a civilizing influence on public discourse: It not only gives society a means for announcing that certain speech violates our norms of propriety but also helps set a necessary anchor in truth. Yet the interests protected by defamation law are not the only interests implicated by the tort's operations, and the purpose of the "constitutional" parts of defamation law are to make sure that the protection of reputation does not unduly punish or deter the publication of truthful information that the public needs both for democratic self-governance and informed individual decision-making. Further, the constitution protects citizens' rights to participate in forming public opinion and thereby shaping public policy. Statutory modifications, such as anti-SLAPP laws and the immunity provided to internet service providers by the Communications Decency Act, also attempt to prevent the tort from unduly chilling valuable social activity. Given the complex balancing performed by the constitutionalized and statutorily modified tort of defamation, how does the law score in achieving its various purposes?

Let's start with the good news. One value that today's defamation law attempts to serve is to encourage media to perform their watchdog role by providing robust coverage of public officials and public figures. By that standard, media in the U.S., including our newspapers and broadcasters, have more scope and license to cover and criticize public figures and public officials than any other media in the world. We can see the effects of these robust First

Amendment protections in the intense coverage of presidents, congressional leaders, judges, and other influential public officials. It occasionally seems as if no personal predilection of our public officials is too inconsequential to escape notice. It is especially remarkable that the media continue to intensively cover now-former President Trump despite his long-standing propensity to bring defamation lawsuits against those who criticize him. We also see the effects of First Amendment doctrines that protect newsworthy information about public figures in the spotlight the media shine on celebrities, businesspeople, and other so-called "influencers." Concededly, coverage is less robust at local levels, but that appears to be a product of economics more than law. Even so, whether *Sullivan*'s actual malice rule is essential to enabling the press to play their watchdog role is hard to know, but it stands to reason that being absolved of liability for inevitable human error and simple negligence might aid the vigor with which the press pursues the powerful.

That said, *Sullivan*'s protective mantle for journalistic errors is not the only variable to consider in evaluating the incentive structure of today's defamation laws. For publishers subject to it, the potential chilling effect defamation law exerts on free expression flows not just from the likelihood a jury or judge will hold a publisher liable; the chilling effect also flows from the high cost of defending against even meritless suits and the unpredictable extent of damages, both of which are exacerbated by the common law's famous complexities and anomalous doctrines such as presumed damages, as well as those of constitutional law. Legal complexity contributes to the high costs of libel defense, and the unpredictability of damages that may be "presumed" when plaintiffs do prevail exert a degree of chill on coverage. This chill would be fine, even desirable, if only meritorious plaintiffs recovered and recoveries were predictably related to actual reputational harms suffered. Yet a survey of the libel landscape reveals lottery-like windfalls for a select few that are only marginally connected to their injuries.

Contrary to Justice Gorsuch's assertion, some of these recoveries are by plaintiffs who are public figures. Although verdicts for plaintiffs are rare, plaintiffs who do win sometimes obtain verdicts in the millions (or now, the billion, as in Alex Jones cases). Other recent "wins" include the recent libel verdict against actor Amber Heard procured by her ex-husband Johnny Depp based on allegations of spousal abuse, and the verdict against Oberlin College by a bakery falsely accused of racist acts. Settlements, too, may reach the millions, as attested recently by those obtained by Kentucky teen Nicholas Sandmann against the Washington Post and other media organizations that falsely accused him of bigoted misconduct. (Other *Sandmann* cases were recently dismissed.) Moreover, in the cases Smartmatic and Dominion Voting Systems have brought against Fox News and others, the plaintiffs seek damages in the billions with a straight face. Although these verdicts, settlements, and claims may not deter the judgment-proof nor those ignorant of the law, any media organization must take the unpredictable risk of being sued and found liable into account, even if the Supreme Court's First Amendment jurisprudence has stacked the constitutional deck in favor of free expression.

Even if defamation law may incentivize, for some, robust coverage of society's influencers, it does a relatively poor job of vindicating wrongfully tarnished reputations. Gorsuch's diagnosis of the constitutional difficulties that make defamation cases seem impossible for public figures and public officials are real, primarily because lower courts have expanded the public figure category to include almost anyone who is involved in public life in any way. And even those clearly categorized as public figures may choose to prove actual malice in order to seek punitive damages.

A recent case illustrates why some might believe the actual malice standard prevents the media from being held responsible for getting the facts wrong. Former vice-presidential candidate Sarah Palin sued the *New York Times* for libel based on an erroneous editorial blaming a Palin political website for inciting a mass shooting. Palin's website had featured crosshairs over an Arizona congressional district, and the site "targeted" congressperson Gabrielle Giffords for electoral defeat. After Giffords and others were shot by a deranged gunman in 2011, a controversy arose over what inspired the gunman, but a contemporaneous police report made clear that the gunman was not motivated by politics. Nonetheless, in 2017, the *Times* brought up the previously discredited theory about Palin's website, claiming that "the link to the political incitement was clear." The *Times* quickly discovered the error and issued a correction hours after it was published. When the case went to trial, the focus was on whether the error was and "honest mistake" or instead deliberate or reckless. The evidence focused on the rush to finish the piece on deadline, the editors' erroneous correction to the work of the writer, the subsequent request for the writer to double-check the piece, and the error made by the fact-checker. Although Palin testified about the alleged harms she had suffered, the trial focused more on the *Times*' journalistic process than the wrong to Palin. And Palin lost based on the latter issue: The jury found no liability, and the trial judge openly stated that he would have found Palin's evidence insufficient to prove the *Times*' error was deliberate or reckless had the jury found differently. Thus, Palin received vindication—if that is what she was seeking, as opposed to scoring political points—only to the extent of bringing publicity to the *Times*' error, which the trial judge called a product of "unfortunate editorializing."

Based on Palin's verdict, Justice Gorsuch might be forgiven for thinking that the actual malice standard is an insurmountable barrier to plaintiffs' recoveries. This is a common and long-standing misimpression. In fact, thirty years ago, distinguished defamation scholar David Anderson in his article, *Is Libel Law Worth Reforming*?, complained that high-profile mistakes by the press created an "exaggerated impression in the minds of some potential plaintiffs and lawyers that the press is impervious to public-plaintiff libel suits" when in fact, that is not the truth, as the verdicts, settlements, and costly litigation discussed above reveal. But Palin's suit also highlights a more significant flaw in today's defamation law: Many plaintiffs would like the libel trial to act as an authoritative public declaration that they were wronged by a defendant's accusation, but this is not a result the libel trial is designed to give.

What of Truth? Justice Gorsuch laid the blame at the feet of defamation law for failing to combat disinformation and misinformation in the social media era, and he even theorized that more defamation actions would enhance press credibility. Certainly, the Justice is not alone in decrying the rise of misinformation and disinformation, though critics cast blame for the situation in different quarters: The Trump White House famously fought a rhetorical war against "fake news" in the press, and the Biden White House proposed, briefly, a Disinformation Governance Board to counter misinformation affecting national security, though the proposal was withdrawn after public outcry. Many critics blame Big Tech platforms for not doing more to eradicate false information, while others fault them for doing too much censorship along partisan lines. Meanwhile, the purveyors of false information include state actors exploiting the power of social networks to undermine social stability or pursue other political ends; rogue actors creating fake news for profit; people using social media to voice their delusional conspiracy theories; partisans primed to believe only the information they want to believe and pass it along to others; lawyers determined to represent clients using whatever "facts" are expedient, ethics rules be damned; and, finally, journalists who fail to adequately investigate, edit, or verify the information they publish—perhaps because of pre-existing biases.

Even aside from the fact that defamation law can only address lies that affect individual reputation, only some of the purveyors of misinformation or disinformation are even capable of being deterred by the prospect of a U.S. defamation lawsuit. Moreover, those who *can* be deterred are probably the smallest contributors to the disinformation crisis. Sloppy journalism might be deterred at the margins by changes in defamation law, though it is unlikely that inevitable human errors that occur in the rush to meet deadlines will cease, and changes to make it easier to sue for negligent or even innocent mistakes run the risk of deterring coverage of those with the resources (and propensity) to sue.

More to the point, the actual malice standard already allows plaintiffs to target lies, or even recklessly spread falsehoods, and a couple of recent lawsuits are setting out to prove it. Smartmatic and Dominion Voting Systems supplied electronic voting machinery for the 2020 presidential election. They became targets of President Trump's partisans, who alleged that their machines had assisted in stealing the election from Trump through fraud. Smartmatic and Dominion Voting Systems separately filed defamation cases against various purveyors of this so-called Big Lie, and these lawsuits have become test cases for whether defamation lawsuits can be used to combat hyper-partisan disinformation. But they are also test cases for whether certain news networks have gone too far in embracing such disinformation and lending their credibility to lies and reckless falsehoods.

The defendants in these suits include lawyers who formerly represented President Trump, supporters of President Trump, news networks Newsmax, One America News, Fox News and several journalists-news hosts, including Lou Dobbs and Maria Bartiromo. In its 285-page complaint against Fox, Smartmatic seeks $2.7 billion in damages. Dominion's suit against Fox seeks $1.6 billion. In both cases, defamation law's failure to insist on only compensating for actual harms means that plaintiffs can claim damages completely untethered to any objective reality.

Nonetheless, the lawsuits make damning (and credible) allegations, suggesting that the news networks promoted the Big Lie to stoke ratings--despite having evidence that the allegations of fraud made by network hosts and their guests were false. Judges have so far refused to dismiss the voting companies' claims. Should these cases go to trial, they will put a powerful spotlight on the editorial choices of the news networks, and there is some indication they have already led Fox to fire some of the news hosts who were most instrumental in trumpeting the voting fraud allegations. Whether lawsuits such as this will result in more media responsibility and credibility overall seems dubious, however, especially since the facts are distinctly atypical. Nonetheless, plaintiff victories could potentially bankrupt some of the news networks, sending a klaxon signal warning that the actual malice standard is not, after all, a free pass for falsehoods.

FIRST DO NO HARM

As detailed above, Justice Gorsuch is simply wrong to assume that actual malice is an insurmountable barrier to recovery for defamation. Nonetheless, some of Gorsuch's skepticism regarding the current state of defamation law seems justified: Defamation law inadequately vindicates reputation, and it only combats disinformation at the margins—though contrary to his assertions, it does do that! But whether defamation law would perform these tasks better were *Sullivan* and its progeny to be repealed is by no means clear, especially since most of the purveyors of disinformation seem to be beyond the reach of defamation law. While allowing a wider swath of plaintiffs to bring suit by proving negligence rather than actual malice might

lead to more plaintiffs achieving vindication, it seems unlikely it would significantly bolster the quality of journalism in a way that leads to more "informed democratic debate."

Gorsuch's prescription ignores the problem *Sullivan*'s holding was trying to solve, namely, the use of defamation lawsuits as a tool the powerful use to delegitimize and defang their critics. In *Sullivan*, southern officials sued civil rights leaders and a northern newspaper, the New York Times, for publishing an advertisement decrying the repeated arrests and harassment of Dr. Martin Luther King. The advertisement contained minor inaccuracies, the kind that newspapers inevitably make even when trying to get the facts right. Though they should not have been, these minor errors were enough to allow the Alabama jury to award the police commissioner $3 million from the Times and the other defendants: At this time, this was the biggest libel verdict in U.S. history, and the jury made the award despite the fact that the commissioner had "made no effort to prove that he suffered actual pecuniary loss." Had the verdict been allowed to stand, the South would have continued to use libel law to hamstring the Civil Rights Movement and punish newspapers for making minor factual errors while performing their watchdog role. Had it been allowed to stand, papers like the *Times* would have faced the choice between their economic survival and ceasing to cover the most important news stories of their age.

To prevent this result, the Supreme Court famously held that public officials could not use the law of torts to punish their critics: They did so by beginning the conversion of defamation law from a no-fault regime to a largely fault-based regime, as well as one that requires plaintiffs suing for stories involving matters of public concern to prove falsity. The constitutional standards protect merely negligent defamatory falsehoods, giving journalists and citizens "breathing space" to report and opine about the doings of public officials.

Justice Gorsuch fails to appreciate that this breathing space is still necessary. Rich people still sue their critics for defamation because they can: It is a relatively easy way to inflict pain on one's critics and make would-be critics think twice, even if the defendant ultimately "wins." Politicians still sue the relatively powerless to punish them for their temerity in speaking out. The media, while not the only targets of weaponized defamation suits, still deserve protection not only because they are repeat players but also because, as Justice Gorsuch recognized, they have played a special role in producing an informed citizenry since the founding. Overturning *Sullivan* would subject an economically weakened and unpopular press to even more variable defamation laws, making them easier targets for those who despise them and their roles. If the goal is to ensure informed democratic debate does not suffer, it is hard to see how jettisoning the actual malice standard accomplishes it, unless it is replaced by a series of complex doctrinal reforms.

A PRESCRIPTION FOR REFORM

Even so, Justice Gorsuch is clearly right about one thing: Defamation law needs reform. Ideally, that reform would look comprehensively at the various common law, constitutional, and statutory components of the law and study how they work together. Ideally that reform would bring simplicity and clarity to the "doctrinal intricacy" of current law. It would consider whether doctrines such as libel, slander, and presumed damages have outlived their usefulness. It would also develop new remedies to better vindicate reputation and set the record straight, construct new incentives for journalists of all stripes to adhere to professionally developed standards for getting the facts right, and establish new deterrents to libel bullying, including by reducing the availability of lottery-like windfalls obtainable only by the fortunate few. While reform is needed, however, simply cutting the constitutional strands of the Gordian Knot of

defamation law risks unraveling protections for expression without enhancing the other goals the law is supposed to advance. Moreover, a fundamental barrier stands in the way of such reform. As David Anderson has written in a wonderful article called *Rethinking Defamation*, "The Supreme Court can't change tort law, and legislatures and state courts can't change the constitutional law." Thus, "no decision-maker is empowered to unilaterally revise" and holistically simplify the tangled skeins of current law.

THE CURRENT STATUS OF THE RESTATEMENT (THIRD) OF TORTS: DEFAMATION

What, then, is a Restatement to do? Despite my prescription for reform, I fully understand the limits of a Restatement as a vehicle for reform. The point of a Restatement is to "restate" the law as it currently exists, not to break new ground. As the American Law Institute specifies, the purpose is to provide "clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court." Clarity, coherence, and predictability are very much the point. Innovation for its own sake is not. However, the ALI has also stated that a Restatement's role is to "to simplify unnecessary complexities" as well as to "promote changes which will tend better to adapt the laws to the needs of life." Simplifying unnecessary complexity will necessarily entail abandoning some obsolete doctrines, meaning that the provisions about telegram operators have to go. Modernization also requires consideration of how to adapt existing tort principles to address the challenges created by the cheap speech revolution. As David Anderson has written: "What's needed is a rethinking of the entire enterprise of accommodating speech and reputational interests. What needs attention is the future of defamation law, not its past or present incarnation."

Be that as it may, another limitation of reform through Restatement is that the Restatement of Torts traditionally focuses on, well, Torts. Although some of the fabric of First Amendment jurisprudence has been integrated into the tort elements (such as the elimination of strict liability, now mostly incorporated into common law principles), other parts operate as a largely independent overlay to the underlying tort substructures (such as the definition of public figure). The focus of the Restatement is the common law, with some room for discussing statutory interpolations. By definition, then, any "reforms" (if simplification and modernization are reforms) cannot be holistic. Moreover, the Restatement would risk its credibility if it purported to restate constitutional law, particularly in the current moment.

That said, let me briefly summarize some of the modernization and simplification that the Restatement project is undertaking. At this point, perhaps the most noteworthy is a proposal to merge the doctrines of libel and slander into a single tort of defamation, simultaneously rendering unnecessary the doctrines of libel per se, libel per quod, slander per se, and slander per quod. I'd be happy to discuss the rationale for that proposed simplification in depth, but suffice to say, at this point, that esteemed critics and reformers have been asking to eliminate this unjustified leftover from the jurisdictional battle between ecclesiastical and seigneurial courts for more than 200 years; a minority of U.S. courts have rejected the distinction, and many of those that retain it try to sidestep employing it when possible.

Beyond that, other components of the draft thus far have focused on clarification, with the imagined audience of the project being a law clerk or law student who may know relatively little about the tort. The project thus starts, in the first section, with the basic task of

clearly stating the elements. Given the interweaving of common law with constitutional law, this is no mean feat. Subsequent sections that have been drafted or are in progress cover publication, republication (just beginning), the single and multiple publication rules, the determination of meaning, what constitutes a defamatory communication, the materially false statement of fact, defamation by implication, and a very preliminary section on damages. While this may not sound like much to the uninitiated, every section requires painstaking research on the status of the law in all state appeals courts and in federal courts interpreting state law. Ever section requires editing and re-editing for consistency with other sections and to produce the clarity that is supposed to be the hallmark of Restatements. And every section must undergo, periodically, the scrutiny of an extraordinary set of advisors, to whom I am immensely grateful.

Thus far, some of the biggest challenges involve how to update the Restatement (Second) for the Internet age. One of the advantages of common law over constitutional or statutory law in this regard is its flexible incrementalism. The common law is often the "first responder" to the challenges posed by the Internet. The Restatement must not only survey the common law's early responses but also anticipate how the common law will evolve in responding to foreseeable changes in technology and social practices. For example, in updating the Restatement rules regarding publication, a thorny issue involves liability for failure to remove defamatory content from the Internet. The Restatement (Second) has rules governing failure to remove defamatory content posted by another on one's property or affixed to one's chattel, and it has rules for those who merely "transmit or deliver" defamatory falsehoods supplied by others. Prior to enactment of CDA §230, courts were grappling with how to apply these rules to internet service providers and tech platforms. The common law process was cut short by the CDA's grant of immunity to service providers. Given the prospect that CDA's immunity provisions may be repealed or modified, the new Restatement must recommend the best adaptation of common law precedent to address a tech platform's or service provider's failure to remove defamatory "user-generated" content. The Restatement (Second) rules generated confusion among courts addressing this issue, and the case law on which the Restatement (Second) based its "failure to remove" rules was sparse and conflicting. Even so, every departure from the Restatement (Second) requires long contemplation unless ample precedent supports the departure. And this issue is an easy one relative to the issues surrounding the republication rule.

The drafting of the republication section is currently in progress. It presents difficult issues that I would love for us to discuss. Is hyperlinking a republication? (Most U.S. courts say no, but what about hyperlinking "plus" some kind of endorsement?) Is "liking" republication? What if § 230 of the Communications Decency Act is repealed or limited? Should internet service providers or tech platforms be treated as publishers? distributors? common carriers? Will the Supreme Court "solve" this issue in a way that obviates any need for the Restatement to consider it? How should defamation by algorithm be handled? Which elements are affected by publication by algorithm? Might there be, as Professor Eugene Volokh has argued, a basis for a duty to remove defamatory content one has posted on a website once one knows of its defamatory nature? In light of the growing use of injunctions in defamation cases, which Professor Volokh has also documented, how should this area be included in the Restatement? What about declaratory judgments, which have never attained widespread use and may have constitutional infirmities? (I suspect these should not be

included, but only the research will tell me if that instinct is correct.) What about criminal libel? How should the Restatement reflect the significance of anti-SLAPP legislation—if it should? If *New York Times v. Sullivan* is limited by the Supreme Court, what effect might this have on the Restatement's scope or coverage? How should the Restatement address defamation by deep fake? Given that the Restatement, if approved, may not be revised for many years, what issues should the reporters anticipate? Are there any privileges that should be added to the 18 privileges in the Restatement (Second)? Can any of the existing 18 privileges be streamlined or condensed? What about the neutral reportage privilege, which previously has been conceived as constitutional? What other new issues not in the Restatement (Second) must be addressed by the Restatement (Third), what obsolete issues (such as publication to a telegraph operator) should be abandoned, and what changes to the common law since 1977 must be reflected? I would love to gather thoughts and ideas on these topics from anyone who has an interest in them.