Truth Suits

Litigating Against the Viral Spread of Disinformation

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Before the term "super spreader" became inseparable from the coronavirus, it was sometimes used to describe individuals (and artificial intelligence) responsible for the "viral" spread of online information. That parallel is sensible. In many ways, disinformation and viruses are similar: A germ of an idea passes from a host to direct contacts who (knowingly or unknowingly) contaminate their own contacts, thereby perpetuating an exponential spread that is difficult to contain.

Disinformation has serious consequences for democracy, national security, public health, and individual rights. Increasingly, victims are attempting to combat disinformation via litigation. Litigation is an imperfect and inefficient tool for most victims of disinformation. Federal and state laws were not designed to combat the viral spread of information in the modern social media ecosystem. Thus, for the foreseeable future, victims' ability to challenge the spread of disinformation will continue to depend less on lawsuits and more on communications strategies (including access to the traditional news media) and the voluntary policies enshrined in private companies' user agreements.

In court, disinformation victims most commonly seek to remedy their harm by alleging that they were defamed. Before the internet existed—indeed, well before there was electricity—the common-law tort of defamation existed as a tool to protect an individual's reputation. William Shakespeare wrote in *Othello*:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.

The tort's imperfections match its age. More than a century ago, a *Columbia Law Review* article described the law of defamation as the legal doctrine most "open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies" and as "absurd in theory, and very often mischievous in its practical operation." *See* Van Vecthen Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV., no. 8, Dec. 1903, 546–73.

As lawyers, we have witnessed the strengths and weaknesses of defamation litigation as a strategy against the spread of disinformation. We have represented victims of disinformation, relying on defamation causes of action, in which our clients have alleged that viral online conspiracy theories, motivated by partisan ends, have upended their lives and devastated their reputations. We have also defended clients against claims of defamation based on statements about issues of public concern. Our work in this space has even pulled us into court as defamation defendants, when a defendant

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in one of our active matters sued each of us personally for defamation based on public statements in which we summarized the defamation allegations that appeared in our client's complaint.

How Defamation Law Protects and Fails

Our experiences in these matters have caused us to reflect on how the law of defamation protects, and fails to protect, those who claim to be victims of disinformation, as well as how efforts to combat that disinformation intersect with the First Amendment principles that allow free speech and a free press to flourish. The features of the modern-day super spreader create the particular challenges the legal system faces in combating it.

In the era of the town crier, news spread only as fast as humans (or their animal companions) could travel. When the U.S. Continental Congress declared independence in July 1776, for instance, the monumental news was known almost instantly in Philadelphia but did not reach New York for days, Boston for a couple of weeks, and South Carolina for almost a full month. Although gossip has been subject to "viral" spread since the dawn of language, it was not until mass media came along that a drastic decrease occurred in the so-called "cycle rate"—or the time it takes for a message to move through hubs from one person to many people through chains of messages, rather than traditional word of mouth from one person to another person. With traditional newspaper and television media, the cycle rate is typically a day, although extraordinary events move faster. News of President John F. Kennedy's assassination was broadcast live, and within hours nearly half of the homes in the United States with television sets were tuned in to the news. Modern online communication, particularly via social media channels, has further compressed the cycle rate to minutes, if not seconds. Today, by the time a victim of disinformation learns about what is circulating online, it is likely that the narrative already will have spread exponentially.

While allegations of political "censorship" against leading technology companies are very much in vogue, the reality for most victims of disinformation is that very little can be done to stop the spread of a viral conspiracy theory. Information moves too quickly across platforms, and new venues for disinformation continue to emerge, including platforms that appear to be designed to create a home for alternative factual realities. The policies adopted by more established online platforms tend to be aimed at certain categories of prohibited speech—such as speech advocating violence or hate crimes. It is only recently that they have begun to suspend or ban users who violate terms of service or contravene guidance respecting particular subject matters beyond hate and violence.

Defamation does not fit comfortably, if at all, into the content policies of most platforms. For example, Reddit's "Content Policy" explains that behavior that "isn't allowed" includes

threatening violence, sharing personal information, spamming, or "harassing, bullying, threatening, intimidating, or abusing someone with the intent to create a hostile environment or discourage them from participating in Reddit." False and defamatory speech does not appear in any of the categories. Instead, Reddit explains:

> Reddit has a diverse user base with a wide array of viewpoints, ideas and perspectives. As such, users are permitted to post potentially objectionable content as long as it doesn't violate the Content Policy. If you see something that makes you uncomfortable or that you disagree with but doesn't violate the rules, it may be best to move to a different sub or post. There are thousands of communities on Reddit, we're sure you'll be able to find a subreddit you enjoy!

Reddit offers a way to report "misinformation" in its reporting tool, but it is unclear what would qualify as misinformation triggering Reddit's removal process. Some online platforms have expressed a view that the only circumstance in which they would consider removing defamatory content is if (and only if) a court has adjudicated the subject and found the information to constitute libel.

First Amendment law relies on the principle that the best, and often only, weapon against speech is counter speech. As useful as it may have been in the context of the town square or past eras in which communities overwhelmingly obtained their news from the same newspapers and mass media outlets, that paradigm seems quaint in the modern media environment, and particularly so in the echo chamber of social media. The inability to fight false speech with the truth is the result of "homophily," the "tendency of similar individuals to form ties with each other." Social media platforms pair an individual's ability to cultivate a

Illustration by Nicole Xu

specific list of users to follow (or block)—seeing not only what these users generate but also what they like and re-post—with algorithms that sustain the individual's preferences by exposing the user to further validating content, called a "filter bubble." Such environments, which allow users to avoid views contrary to their own, appear to function less as free marketplaces of ideas, where contrary ideas compete, and more as free marketplaces of association, where self-selecting groups of individuals join together in communities increasingly impenetrable by disfavored facts and theories.

Self-selecting informational bubbles complicate the efficacy of counter speech, whether true or false, once a conspiracy theory has taken hold within the group. Instead, disinformation super spreaders may become even more entrenched in their views and, in the face of inconsistency or contradiction, co-opt the counter narrative to serve their own political views. One researcher commented that even where there may be some success in convincing individuals to update their beliefs based on new information, they often "interpret the information that they receive in an attitude-consistent manner—for instance, by assigning blame or responsibility for the facts in question in a manner that is consistent with their political views or by expressing distrust in the credibility of the information that they have learned." B. Nyhan, *Why the backfire effect does not explain the durability of political misperceptions*, Proceedings of the Nat'l Acad. of Scis. (Apr. 13, 2021).

In the modern media environment, litigation and the threat of litigation can, in certain circumstances, serve as a useful antidote to disinformation, in part because it forcibly removes individuals from their self-selected informational filters and assigns to neutral decision makers the task of rendering a judgment reflecting what is true or false. Relying on the judicial system as an antidote to disinformation raises serious questions, nonetheless. Should courts, rather than the marketplace of ideas, be the preferred venue for testing the veracity of information? Even if courts present a better alternative for disinformation victims than making use of traditional counter speech, is litigation a realistic option for most victims? These two questions have related answers. The reality is that litigation is too inefficient to serve as a systemic solution for the problem of disinformation, in part because it remains accessible to only a small subset of disinformation victims. Even for those victims who have cognizable claims and the means to assert them, litigation may serve as a blunt tool that poses more problems than it solves.

Obstacles to Litigation

As an initial matter, defamation—the chief legal tool available to victims of disinformation—is designed exclusively to remedy harm to reputation. This renders the tort completely irrelevant to most forms of disinformation, particularly information that is not "of or concerning" a specific person or business. It does not matter, for example, how harmful disinformation about vaccinations, election fraud, or the assassination of John F. Kennedy may be—if such disinformation does not target a specific individual or entity, it will not be actionable as defamation. It is perfectly legal to defame a religion, race, animal, or the deceased. Thus, the legal system will have no role to play for many of the most virulent forms of disinformation.

Even for individuals who have colorable defamation claims based on disinformation, most will be unable or (justifiably) disinclined to pursue defamation litigation given the practical, emotional, and financial barriers to mounting a multiyear legal campaign to defend one's personal reputation. All litigation presents hurdles for aspiring plaintiffs, but defamation presents especially daunting obstacles, which at times prove insurmountable. The subject matter of defamation actions—harm to personal reputation—makes certain victims reluctant to sue for fear of putting their identity and character on trial. Even victims of demonstrable disinformation may be reluctant to sign up for the scrutiny and unwanted attention that are natural consequences of filing a lawsuit for defamation of the plaintiff's reputation. This is especially so for private individuals who have eschewed the public limelight. Indeed, private figures who are defamed often face the choice of allowing online trolls to harass them without accountability or granting those same trolls discovery into the victim's private communications and records. The thought of turning private information over to the perpetrators of online conspiracy theories can by itself dissuade a victim from litigating. This says nothing about the personal security risks victims must accept in certain contexts.

Victims who do pursue lawsuits may find the process frustrating in both its pace and inability to remedy the harm. Results do not come quickly, in part because the absence of any prospect of preliminary injunctive relief makes the final adjudication the *only* relevant adjudication. Short of settlement, the odds of obtaining a retraction, let alone one that has the same reach and impact as the original disinformation, are slim.

Although there is a plaintiffs-side defamation bar, it remains the case that many lawyers refuse to take on such actions. Some are unwilling to take on any economic risk in such cases, given that few victims can establish the kind of concrete economic damages that would afford any meaningful recovery. Others are understandably reluctant to take on cases that could be branded as opposed to First Amendment values.

Beyond the practical obstacles, the First Amendment and certain state laws addressing strategic lawsuits against public participation (SLAPP) also discourage lawyers and victims of disinformation from filing defamation suits. Many current anti-SLAPP statutes have fee-shifting provisions that impose potential financial penalties on defamation plaintiffs. Substantively, motions to dismiss defamation actions are difficult to survive by design. The First Amendment

imposes a heavy burden on plaintiffs, particularly those who are "public figures" or can be characterized as such. *See N.Y. Times v. Sullivan*, 376 U.S. 254 (1964). Where that is the case, the actual malice standard requires proving that the defendant had subjective knowledge of the falsity of the statements alleged to be defamatory. Pleading what someone else was thinking is not easy. In the words of the U.S. Court of Appeals for the District of Columbia, this standard operates as a "famously daunting" pressure point that is the final stop for many defamation complaints. *See Tah v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231, 240 (D.C. Cir. 2021). In his opinion dissenting from the panel majority's dismissal of that case for failure to sufficiently plead actual malice, Judge Laurence Silberman urged the Supreme Court to overrule the actual malice standard articulated in *New York Times v. Sullivan*, but the Court declined review.

Even when a defamation claim survives a motion to dismiss, challenges abound in the discovery stage. Media shield laws limit traditional discovery tools, making it difficult to adduce facts and evidence that prove a conspiracy theory is false. Plus, litigating against evangelists of disinformation does not go hand-in-hand with targeted, reasonable, or fact-based motions or discovery. In some cases, the litigation itself can serve as a platform that amplifies the disinformation. It is also expensive and time-consuming to prove "falsity" against certain kinds of conspiracy theories, which often require a plaintiff to invest considerable time in attempting to disprove far-fetched negatives. For example, while it may seem straightforward to demonstrate that a local business does *not* run a pedophilia ring out of a nonexistent basement, that challenge becomes considerably more complicated when one is required to disprove mutating theories of "evidence" based on the supposedly hidden meaning in images, symbols, or words like "pizza" and "pasta." (In the so-called "pizzagate" conspiracy theory, proponents argue that emails discussing "pizza" and "pasta" reflect a hidden code for child sex ring operations.) The cost of discovery is aggravated by the difficulty of obtaining discoverable materials from anonymous social media users and ephemeral messaging applications where communications disappear after an amount of time designated by the user. These kinds of challenges can make the cost of litigation insurmountable, given that defamation is a common-law tort that understandably offers no general or specific fee-shifting options.

Proving pecuniary damages poses an additional hurdle to successful defamation actions. A plaintiff can rarely prove that a defamatory statement resulted in a particular lost business opportunity or other traceable loss. For the vast majority of Americans whose livelihoods are not inextricably tethered to their name, it is difficult to assign a monetary value to reputation or the harm done to it. Doing so also requires the considerable expense of hiring a testifying expert and paying for the related work and motion practice. Even when these obstacles can be overcome, anonymous platform users may not be identifiable or may be judgment-proof due to a lack of assets. All of these factors combine to make defamation actions inefficient even for those who can, against the odds, prevail on the question of liability following a trial on the merits.

In light of the legal and financial disincentives to bringing defamation actions, it is inevitable that many actionable claims for the spread of damaging and egregious disinformation are never filed. Some of the cases that are being filed are relying on the financial backing of personally motivated benefactors. For example, billionaire Peter Thiel admitted to funding a defamation lawsuit filed by Hulk Hogan against Gawker Media, which resulted in a $140 million jury verdict, as part of a vendetta against the company. A legal regime raises serious concerns for our democracy when it results in deep-pocketed parties being far more likely to bring disinformation-based suits than claimants of limited means, irrespective of the comparable merits of the claims or the systemic risks (if any) posed by the defamers.

Notwithstanding these flaws, we do not believe that the answer is to "open up" U.S. libel laws to invite a litigation free-for-all on the subject of disinformation. The vital constitutional principles embedded throughout this area of law, including the need to ensure robust protection for a free and independent press, demand a cautious and balanced legal approach. Consider, for example, the doctrine of the "reporter's privilege." In 2003, news reports surfaced about the role that Ambassador Joseph Wilson and his wife, Valerie Plame, an operative for the Central Intelligence Agency (CIA), played in the investigation of the George W. Bush administration's claim that "Saddam Hussein recently sought significant quantities of uranium from Africa." *See In re Grand Jury Subpoena, Judith Miller*, 438 F.3d. 1141, 1143 (D.C. Cir. 2006). A grand jury empaneled to investigate Ms. Plame's outing as a CIA operative issued a number of subpoenas, including one to *New York Times* reporter Judith Miller. Ms. Miller refused to comply and was held in contempt for failing to divulge her source, spending 85 days in jail before identifying her source as Vice President Dick Cheney's chief of staff, Scooter Libby. In a seminal ruling, the D.C. Circuit upheld the contempt finding, holding that the First Amendment does not provide journalists with an absolute constitutional privilege to withhold their sources from criminal grand jury subpoenas, and noting that the federal common-law "reporter's privilege" was neither absolute nor applicable.

The Law and Journalism

Over the past two decades, all three branches of federal government, and many state governments, have labored to adopt clear definitions of the protections afforded to journalists in both criminal and civil contexts. Slightly more than a dozen states have codified an absolute privilege from forced disclosure of materials obtained in the news-gathering process, including the

identity of a source, with limited exceptions. For example, the District of Columbia affords a reporter's privilege to "any person who is or has been employed by the news media in a news gathering or news disseminating capacity" and broadly defines "news" to include "[a]ny printed, photographic, mechanical, or electronic means of disseminating news and information to the public." *See* D.C. Code § 16-4701. More than 20 states have passed qualified privileges, and the remaining states without specific laws largely recognize common-law reporter privilege. Although the *Miller* case renewed interest in a federal shield law for reporters, no such law has been enacted. In a recent iteration of the federal shield concept, Sen. Ron Wyden (D-Or.) has proposed the Protect Reporters from Excessive State Suppression (PRESS) Act, which would protect from disclosure the phone records and data of a reporter, defined in the act as any individual who "gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

The spread of disinformation, like the spread of virus and disease, wreaks havoc on the health of our institutions and norms.

The line-drawing required to apply media shield statutes is particularly challenging in cases involving independent gadflies and partisan activists who self-brand as "journalists." As seen in the D.C. statute and the proposed PRESS Act, modern laws trend toward a broad definition of a "reporter" qualifying for the privilege. Some states' laws are so broad that anyone who can claim to publish "information" online can likely avail themselves of the protection and thereby shield all of their nonpublic materials from discovery. For instance, anyone with a social media account could claim under the proposed PRESS Act that their "work" requires them to "gather, prepare, collect, write, edit, and publish" what can be characterized as "news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." The expansive nature of these protections raises the question of whether the same level of immunity granted to members of the traditional media should be extended to anyone who makes use of modern social media platforms.

In recent years, a small number of courts have confronted the question of whether, and in what circumstances, an internet user who publishes content primarily on his or her own social media deserves to be cloaked with the reporter's privilege and relieved from discovery obligations in civil litigation. In *Too Much Media, LLC v. Hale*, the Supreme Court of New Jersey refused to apply New Jersey's reporter's privilege—which it described as the "broadest in the nation"—"to a self-described journalist who posted comments on an Internet message board" about her investigation into "criminal activity" and "corruption" because she "exhibited *none* of the recognized qualities or characteristics traditionally associated with the news process, nor has she demonstrated an established connection or affiliation with any news entity." *See* 206 N.J. 209, 216, 218–19, 222–23, 228 (2011) (emphasis in original). The court reasoned that absent such requirements, any of the "millions of bloggers who have no connection to traditional media," or "anyone with a Facebook account, could try to assert the privilege." That same year, an Oregon federal district court, in an unpublished decision, rejected a claim of privilege by a "self-proclaimed 'investigative blogger'" who labeled herself a journalist but provided no evidence that would suggest such a status, like a journalism education, credentials, relationship with a recognized news entity, or adherence to journalism standards and norms. Other cases have suggested, without directly holding, that the party asserting the privilege must follow *some* kind of objective standards of journalism.

It is unclear whether the historical purpose of the reporter's privilege—to provide robust protection to the right of a free press enshrined in the First Amendment—aligns well with the universe of actors who now claim the privilege's protection. It is eminently sensible to demand a demonstration of extraordinary need before a civil, or even criminal, party in court is permitted to engage in discovery that may interfere with or chill the collection and dissemination of news. But should that balance of equities operate in the same manner when applied to an individual who does not pretend to be interested in the collection and dissemination of objectively truthful information, but instead uses social media tools to disseminate one-sided partisan advocacy or speech designed to provoke outrage? Does the breathing space necessary to protect the First Amendment require legal protection for "news-gathering" that involves neither news nor verifiable factual information?

The existing case law helps identify certain principles by which to assess whether the reporter's privilege will apply in future cases, but they fall well short of offering the kind of clarity that would allow individuals and entities to organize their conduct. In the absence of clarifying legislation (at the federal or state level), future litigation

will determine how statutory definitions of "reporter" will apply to the lone-wolf social media poster who claims to be protected by the "reporter's privilege." Notwithstanding that information flows freely across borders such that a defamatory statement in the modern environment rarely resides within a particular jurisdiction, the unlikelihood of new federal legislation on this topic means that cases applying a patchwork of inconsistent state laws will continue to define this important standard for the foreseeable future.

There may be other torts or causes of action that could be brought alongside a defamation claim, such as intentional infliction of emotional distress or fraudulent misrepresentation. However, for the most part, these tools are equally ill suited to the task of combating disinformation for all of the same reasons. In sum, systemic barriers continue to preclude our legal system from redressing the substantial costs disinformation imposes on our democracy.

The Law and Limitations

It is customary to conclude discussions of this kind with sweeping policy prescriptions that purport to solve the problems we as authors have identified. Although we do believe that certain reforms may be worth pursuing, we approach this discussion cognizant of the law's limitations. The core drivers of disinformation are not legal in nature—they are problems in the way that the modern media ecosystem intersects with intense political polarization and tribalism, the commercial policies of a decentralized network of technology companies, declining public faith in long-standing institutions (including the traditional media), and widespread educational failures. And while certain laws—the immunity provision contained in section 230 of the Communications Decency Act comes to mind—are often raised as bogeymen in these debates, we are unconvinced that inviting new waves of litigation against publishers or technology companies will offer victims of disinformation swift or efficient tools for stopping the viral spread of disinformation. While certain changes can provide some measure of help to victims of disinformation, we should not and do not pretend that these changes are likely to resolve the systemic problems disinformation causes.

We are also skeptical of calls to "open up" the law in ways that would encourage many more defamation suits to be filed against the traditional or "mainstream" media, including certain efforts to overturn the actual malice standard of *New York Times v. Sullivan*. It is not uncommon for defamation lawsuits to be used as tools of retaliation that impose costs on those who can ill afford to bear them, including in frivolous, retributive cases that the plaintiff knows will ultimately be dismissed. Further, proposals to "open up" the defamation space generally misunderstand the root causes of victims' difficulties in pursuing legal remedies, and they also risk collapsing the breathing space necessary to maintain a free and independent news media and robust debate on matters of public concern.

Possible Reforms

With the above limitations in mind, we do believe that states should closely examine laws that are designed to deter lawsuits against the media to ensure that bad-faith actors cannot shield themselves from liability—or in some cases from even participating in discovery in litigation— by declaring themselves to be reporters. In particular, two types of state laws warrant attention: "media shield" and anti-SLAPP laws. Each of these types of laws is designed to discourage litigation against the media over matters of public concern, but each has been stretched to apply to individuals who do not hold themselves out as engaging in objective reporting or presentation of facts, but instead consider themselves to be engaged in some other kind of enterprise, whether partisan advocacy or, in some cases, entertainment. When combined with the constitutionally based "opinion doctrine," these laws allow individuals to argue simultaneously that they are entertainers with audiences that do not expect the presentation of accurate factual information and a part of the "media" that ought to be immune as a matter of policy from lawsuits, to encourage robust public deliberation and debate. At a minimum, states can and should ensure that the powerful statutory protections they have enacted to enable a "free press" are not abused by those who expressly disclaim the core First Amendment value of informing the public.

Other reforms require either federal legislation or Supreme Court review. For example, while many states have enacted anti-SLAPP laws to discourage frivolous defamation claims, most (but not all) federal circuits have now held that in lawsuits brought in federal court, based on federal diversity jurisdiction, state anti-SLAPP laws do not apply. This means that most defamation plaintiffs can sidestep state anti-SLAPP laws entirely, simply by filing suit in federal court. Whatever one may think about the substantive merits of various states' anti-SLAPP laws, the applicability of those laws should not turn on the happenstance of the federal appellate circuit in which litigation is filed.

If legal reforms are to have any lasting effect on the corrosive societal costs of disinformation, they will have to be pursued alongside actions by private companies, including traditional and new forms of mass media, educational institutions and nonprofit organizations, and local and community leaders. The spread of disinformation, like the spread of virus and disease, wreaks havoc on the health of our institutions and norms. As Dr. Martin Luther King Jr. observed in his Letter from a Birmingham Jail, we are all "caught in an inescapable network of mutuality, tied in a single garment of destiny." That observation is as true for the virus of disinformation as it is for the novel coronavirus. We ignore it at our own peril. ■