

Does the Press Have a Right to be Wrong?:
Fake News, Press Freedom, and Defamation Law in 2021

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Abstract

The following study analyzes defamation lawsuits filed against Fox News and its on-air personalities by companies that manufactured and maintained voting machines used in the 2020 US presidential election. Smartmatic and Dominion accused Fox in court of broadcasting debunked allegations that the companies had rigged the election against incumbent president (and longtime Fox viewer) Donald Trump. The size of the sought-after damages, and the size of Fox itself, make this the largest “fake news suit” in history. This study explores the merits of the suits, defenses to defamation (particularly opinion, political speech, and retraction) and the potential ramifications of a judgement for either side. The study is particularly interested in whether defamation law can be utilized against the fake news phenomenon while still preserving the fundamental American right to a free and independent press. In short, is there a happy middle ground that prohibits news sites from disseminating verifiably false information that does not restrict legitimate journalism?

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Chapter 1

Introduction

“If this case does not rise to the level of defamation by a broadcaster, then nothing does.”

~ *Dominion v. Fox News Complaint, 2021*

Background of the Problem

The 2020 US presidential election was, to avoid a more connotational term, contentious. Incumbent president Donald Trump sowed doubts about the integrity of the upcoming election in the lead-up to voting. He alleged a conspiracy of widespread planned voter fraud in favor of his opponent, Democratic nominee Joe Biden. Trump claimed at a campaign rally “the only way we’re going to lose this election is if the election is rigged”¹ and repeatedly declined to commit to accepting the results should he lose.²

Exacerbating those doubts was the coronavirus pandemic. Due to safety concerns with in-person voting, a record number of Americans mailed in their ballots. Because mail-in ballots take longer to process than in-person ones, and because many key states could not start counting mail-in ballots until Election Day,³ it was widely expected that the winner would not be determined on Election Night, as was typical. In addition, the majority of absentee and mail-in ballots were predicted to favor Democrats,⁴ in part due to Trump’s persistent attacks on mail-in

¹ Morgan Chalfant, *Trump: 'The only way we're going to lose this election is if the election is rigged,'* The Hill (Aug. 17, 2020). <https://thehill.com/homenews/administration/512424-trump-the-only-way-we-are-going-to-lose-this-election-is-if-the>

² Felicia Somnez, *Trump declines to say whether he will accept November election results,* The Washington Post (Jul. 19, 2020). https://www.washingtonpost.com/politics/trump-declines-to-say-whether-he-will-accept-november-election-results/2020/07/19/40009804-c9c7-11ea-91f1-28aca4d833a0_story.html

³ *When states can begin processing and counting absentee/mail-in ballots, 2020,* Ballotpedia. https://ballotpedia.org/When_states_can_begin_processing_and_counting_absentee/mail-in_ballots,_2020

⁴ Derek Thompson, *The Democrats' Vote-by-Mail Conundrum,* The Atlantic (Sep. 30, 2020). <https://www.theatlantic.com/ideas/archive/2020/09/the-democrats-vote-by-mail-conundrum/616535/>

voting that discouraged his base from using them. This produced an unfortunate situation where Trump had strong leads in key swing states on Election Night that diminished (and in some cases, disappeared) as mail-in votes were counted in the following days. Trump lambasted this development, characterizing spikes in his opponent's tallies as "vote dumps"⁵ and insisting they were evidence of voter fraud. He refused to concede and insisted that the election had been rigged against him. The president's personal legal team (distinct from attorneys working for him in his capacity as president) filed widely ridiculed lawsuits challenging the results in several states declared for Biden, all of which were dismissed.

Fox News is the largest cable news network in the United States; by its own count, Fox News Media reaches 200 million people every month.⁶ While it does not overtly advertise itself as such, Fox is commonly considered a right-leaning organization, with a long history of supporting Republican candidates and conservative policies. Its most recognizable on-air personalities - Sean Hannity, Tucker Carlson, Laura Ingraham and, before his dismissal for sexual harassment accusations, Bill O'Reilly - are outspoken conservatives. Fox News has long had a close relationship with Donald Trump, who appeared on and promoted the network before, during and after his presidency.

Before his own election in 2016, Trump advanced the theory that then-president Barack Obama had not been born in the United States in multiple Fox interviews. The "birther conspiracy" is a disproven and widely maligned mistruth Fox News received ample criticism for broadcasting at the time. But endorsing it endeared Trump with the Republican base⁷ and firmly established his reputation as a political bomb-thrower, unshackled from norms such as decency

⁵ *Fact check: Vote spikes in Wisconsin, Michigan and Pennsylvania do not prove election fraud*, Reuters (Nov. 10, 2020). <https://www.reuters.com/article/uk-factcheck-wi-pa-mi-vote-spikes/fact-check-vote-spikes-in-wisconsin-michigan-and-pennsylvania-do-not-prove-election-fraud-idUSKBN27Q307>

⁶ Fox Annual Report (2020). <https://investor.foxcorporation.com/static-files/3cfbceb7-b29f-408a-9666-7affafe3cfd0>

⁷ Adam Serwer, *Birtherism of a Nation*, The Atlantic (May 13, 2020). <https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/>

or the truth. Trump would go on to spread similar lies about vice presidential candidate Kamala Harris's birthplace during the 2020 election. Harris, like Obama, is black on her father's side.

In the weeks following Election Day, Fox News gave airtime to conspiracies spread by Trump that the voting had been rigged, and that voting software companies Dominion and Smartmatic had been involved. Trump lawyers Rudy Giuliani and Sidney Powell, who were at the time actively suing state governments on the president's behalf, appeared frequently on Fox to make the case for widespread voter fraud, with little evidence to back their claims. Individual Fox hosts themselves alleged the election was fraudulent, and, crucially to this case, that Dominion and Smartmatic had engaged in "vote-switching."⁸ All this, despite the fact that Fox News had called the election for Biden, and that other programs on the same network had dismissed and debunked claims of voter fraud.

In February 2021, after Trump had left office (finally conceding the election in the aftermath of the January 6th Capitol riot that drastically turned public opinion against him), Smartmatic sued Fox News and the Fox Corporation, along with on-air personalities Lou Dobbs, Jeanine Pirro, and Maria Baritromo, as well as Powell and Giuliani, for defamation. In March, Dominion sued Fox News, Powell, Giuliani, and MyPillow CEO Mike Lindell, who had also been spouting allegations of election fraud for months. Both companies seek billions of dollars in damages, claiming Fox's election coverage caused grievous economic harm and sparked targeted harassment of its employees.⁹

⁸ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 223. <https://www.documentcloud.org/documents/20527880-dominion-v-fox-news-complaint>

⁹ *Smartmatic USA Corp. v. Fox Corp.*, (Feb. 4, 2021). p. 237. <https://www.courthousenews.com/wp-content/uploads/2021/02/SMARTMATIC-fox.pdf>; *Dominion v. Fox News*, p. 83.

Statement of the Problem

Dominion and Smartmatic's lawsuits raise an obvious legal issue: could a verdict or judgement in their favor curtail press freedom? American journalism operates under broad First Amendment protections, guaranteeing freedom of speech and freedom of the press. Such protections are necessary to maintain an independent media that can hold power to account - a Fourth Estate, if you will. Do lawsuits over factual inaccuracies threaten those protections?

The title of this study is a rhetorical question; admittedly, more style than substance. The press has long held the right to be wrong, even if being wrong hurts a public figure or organization's reputation. The principal question, since 1964 with the landmark *New York Times v. Sullivan*, is whether such falsehoods were printed or broadcast with knowledge the information was false, or with reckless disregard of whether it was false or not.¹⁰

Consequently, Dominion and Smartmatic have high bars to meet. This is good - it should be difficult to sue a media organization for defamation. It prevents powerful people, corporations or the government from censoring unfavorable coverage through the courts. A handy illustration of this danger is, ironically, Trump himself. The infamously litigious businessman declared on the 2016 campaign trail that a goal of his presidency was to "open up our libel laws [sic] so when they write purposely negative and horrible and false articles, [the subjects of those articles] can sue them and win lots of money."¹¹ The subtext was clear: powerful people, like Trump, want to be able to sue media companies that publish negative stories about them to make the coverage go away. News organizations, even those with ideological bents, must be able to operate with a

¹⁰ *New York Times v. Sullivan*, United States Supreme Court, 376 US 254, (Mar. 9, 1964). <https://tile.loc.gov/storage-services/service/ll/usrep/usrep376/usrep376254/usrep376254.pdf>

¹¹ Hadas Gold, *Donald Trump: We're Going to 'Open Up' Our Libel Laws*, Politico (2/26/2016). <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

generous amount of legal wiggle room; otherwise, they could not operate at all. Dominion and Smartmatic's lawsuits risk undermining that wiggle room.

But this case intersects with another important subject: fake news. False or misleading stories masquerading as news coverage have always been a problem in democratic states, but have exploded in the era of social media, now that images, articles and videos can be shared with millions anywhere in the world, by anyone in the world, with no editor to spoil the fun. Right-wing fake news was a widespread phenomenon during the 2016 campaign, when misleading posts and outright lies were shared about Trump's opponent, former Secretary of State Hillary Clinton, on Facebook and Twitter.

Fake news is a serious problem that requires immediate redress. It not only distorts the truth about important issues, it erodes trust in legitimate journalism. But does Fox's 2020 election coverage rise to the level of fake news...and is the proper redress really litigation?

Purpose of the Study

This case gives us an opportunity to explore this issue. We can examine the intricacies of an active defamation suit to predict what precedent, if any, it would set. Namely, could it stem the spread of fake news, and would it have unintended consequences and hamstring the freedom of the press?

The recency is key to the purpose of this study. Covering, as it does, as contentious a topic as Trump and the 2020 election, and as controversial a media organization as Fox News, this case invites knee-jerk reactions with open arms. But with such momentous potential consequences, it requires us to set aside opinion and really parse through the facts - a crucial exercise for anyone practicing law, or reporting, or simply experiencing difficult situations in life

with no clear right or wrong answer. The facts of, say, the *Sullivan* case are interesting, perhaps, but are dated, far removed from our cultural zeitgeist. Studying this case forces us to truly believe in our opinion, even if the result feels instinctively wrong to us.

Our investment in such a study is derived from living in the era in which it occurs. Fox News affects our everyday lives, it warps the culture around us; the outcome of this case - whether Fox is permitted by the courts to continue operating as it has *will* affect us, not as lawyers or journalists, but as people.

It can be safely assumed that anyone reading this wants to see fake news curtailed. The purpose of this study is to analyze and appraise a potential remedy. If we want to prescribe this medicine, we need to understand the side effects.

Research Questions

The following research questions are designed to paint as full and clear a picture of defamation jurisprudence in the twenty-first century. The questions will hopefully allow us to make educated guesses not just on the result of these specific lawsuits but on how fake news will be adjudicated in the years to come and how it will affect existing and future media organizations, legitimate or otherwise.

1. Does Fox News's coverage of Dominion and Smartmatic's role (or lack thereof) in the 2020 election rise to the level of "actual malice" as established by *New York Times v. Sullivan*?
2. Can Fox successfully raise any of the common defenses to defamation (statement of opinion, political statement, retraction) in this case?
3. Do those defenses protect *journalistic integrity* in this case?

4. What are the potential short- and long-term consequences of rulings against Fox News?
5. Can fake news be dealt with through litigation?

Scope of Study

An important clarification is required at the outset about what legal issues this study will cover. Given this project focuses on journalistic principles, its analysis will be limited to the legal issues and ramifications that affect media organizations. Multiple defendants in the Dominion and Smartmatic lawsuits do not fit in this category. Mike Lindell is alleged to have made defamatory statements about Dominion as a private citizen; this study does not intend to examine defamation law as it pertains to private citizens, and thus will not cover that aspect of Dominion's lawsuit.

Trump's lawyers Sidney Powell and Rudy Giuliani are named as defendants in both suits as well, again as private citizens. To reiterate, that aspect of the suit is not of interest to this study. However, given that both made their allegedly defamatory statements on Fox News, they will be included in this study from the perspective of *coverage* produced by Fox News, and to what degree Fox embraced their statements, failed to properly correct their statements, or aired their statements with "reckless disregard" of their truth value.

Smartmatic sued individual Fox personalities, including Lou Dobbs, Jeanine Pirro, and Maria Baritromo alongside their employer. While the constitutional issue of individual journalists or media personalities being sued by private companies they reported on is important and merits legal analysis, including it here would balloon this study's length and muddy its focus. As such, the study does not intend to examine the merits of Smartmatic's suit against Dobbs, Pirro and Baritromo as individuals, but only as employees of Fox News.

Definition of Terms

The following terms will appear frequently throughout the study and are clarified here for the reader's convenience.

Defamation: A false statement purporting to be fact about a person or organization that unjustly harms their reputation. Can be a tort or a crime. Slander is spoken defamation; libel is printed defamation. While the suits against Fox News allege defamation in general, they accuse Fox of both slander and libel, as they cite both television coverage and headlines & Tweets produced by Fox.

Fox News: An American cable news channel and the defendant of the two lawsuits covered by this study. Fox News' parent company, Fox News Media, and the mass media company that owns both, the Fox Corporation, are also named as defendants in the suits. Given that the plaintiffs have demonstrated a legal connection between all three, this study refers to them collectively as "Fox" and "Fox News."

Fake News: "Fabricated information that mimics news media content in form but not in organizational process or intent. Fake-news outlets, in turn, lack the news media's editorial norms and processes for ensuring the accuracy and credibility of information."¹² Fake news can be defamatory, but is not necessarily. Fake news can be propagandistic in nature, but, again, is not necessarily.

¹² David M. J. Lazer, et al., "The Science of Fake News," *Science* 09 Mar 2018: Vol. 359, Issue 6380, pp. 1094-1096. <https://science.sciencemag.org/content/359/6380/1094.full>

Chapter 2

Literature Review

“The Earth is round. Two plus two equals four. Joe Biden and Kamala Harris won the 2020 election for President and Vice President of the United States. The election was not stolen, rigged, or fixed. These are facts. They are demonstrable and irrefutable.”

~*Smartmatic v. Fox News Complaint*, 2021

The Lawsuits

Factual Allegations

Somebody had to watch a *lot* of Fox News to prepare the Dominion and Smartmatic lawsuits. Both suits are meticulously detailed, featuring comprehensive timelines of statements made on Fox, both by hosts and guests, both on the channel itself and on individual social media accounts. Read in one sitting, Fox News’s election fraud narrative appears not just dishonest, but malicious.

Dominion identified what it calls a “disinformation campaign” as beginning on November 8th, 2020, the day after Fox News had called the election for Joe Biden, when Fox Host Maria Baritromo invited Trump lawyer Sidney Powell onto her program *Sunday Morning Futures*. Powell proclaimed there was “a massive and coordinated effort to steal this election” and accused Dominion of “flipping votes in the computer system or adding votes that did not exist.”¹³

Perhaps even more alarmingly, Baritromo’s own questions lent credence to this baseless conspiracy theory. “Sidney, we talked about the Dominion software,” Baritromo remarked. “I

¹³ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 24.

know that there were voting irregularities. Tell me about that.”¹⁴ *Know* that there were voting irregularities? This seems odd, given that Baritromo herself had reported in October that Trump’s lead in many states would close as the natural result on in-person ballots, not fraud.¹⁵

The first references to Smartmatic came on November 12, 2020, on *Lou Dobbs Tonight* from the eccentric mind of Rudy Giuliani. That the right-wing media landscape spent as much time and effort impugning Smartmatic as it did is mind-boggling. Whereas Dominion software was used across the country in the 2020 election, including in crucial battleground states where the election was decided, Smartmatic machines were only used in Los Angeles County. LA is not, and has not been in decades, a competitive county, and it does not reside in a competitive state.

Nevertheless, Giuliani made some truly bizarre claims about the company on *Dobbs*, including that it was “formed really by three Venezuelans, who were very close to [] dictator, Chávez, of Venezuela. And it was formed in order to fix elections.”¹⁶ Dobbs himself added “This looks to me like it’s the end of what has been a four and a half...year long effort to overthrow the President of the United States” and “it has the feeling of a cover-up in certain places.”

Both of these interviews mark the opening salvos of two major allegations of wrongdoing Dominion and Smartmatic advance Fox News undertook. The first was the continuous invitations extended to Powell and Giuliani to appear on Fox to promote these conspiracy theories. Neither lawyer ever produced any evidence for their claims of fraud or vote-switching; Giuliani was, in fact, rather thoroughly humiliated when he was forced to confess in a federal Pennsylvania court that the lawsuit he had filed against the state’s election officials contained no evidence of fraud. Nevertheless, both would appear on Fox almost daily for the preceding two

¹⁴ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 24.

¹⁵ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 24.

¹⁶ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 41-42.

months. To repeatedly return and lend airtime to sources that are not credible is, according to any (and every) editor, journalistic malpractice. Dominion and Smartmatic call it reckless disregard for the truth - an important legal standard, if you recall.

Both companies allege Fox did not just fail to fact-check Powell and Giuliani, but that they *knew* their frequent guests's claims were baseless and continued to invite them on anyway. Tucker Carlson mocked Powell on his own show over her failure to produce evidence for her accusations. Dobbs privately "raised doubts about Powell's claims to others" at the network.¹⁷

Second, and even more damningly for the network, was their hosts's active endorsements of Powell and Giuliani's claims. In neither interview did the journalist simply ask questions and observe, and in neither did they particularly challenge their guests. This behavior would continue for the duration of Fox's election coverage. The Fox personalities themselves would ask loaded questions ("What exactly [are you] doing on the Trump team in his efforts to identify problems with the election?" Jeanine Pirro, November 14) or endorse the efforts of Powell and Giuliani to overturn the election ("Rudy, we're glad you're on the case and, and pursuing what is the truth." Lou Dobbs, November 12) or making claims of election fraud themselves ("This is the worst in our country's history. There is no election in our presidential history, our nation's history in which there were so many anomalies, so many irregularities and so much clear evidence of fraud." Lou Dobbs, November 16) ("The 2020 election is an electoral 9/11...and a cyber Pearl Harbor." Lou Dobbs, December 10.) ("Smartmatic election software was developed, Sidney Powell says, in Venezuela, with porous security and built-in functionality allowing the administrators to override security features. We haven't seen this, so we don't know." Maria Baritromo, November 22).

¹⁷ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 30.

The final sentence from Baritromo's quote there is crucial: she had no evidence for the claims she was repeating on her show. None of the Fox hosts who regurgitated Powell and Giuliani's claims of fraud had ever seen evidence of vote-switching, or hacked machines, or Venezuelan dictators rigging the election for the Democrats. That they made them anyway, repeatedly, demonstrates, according to Dominion and Smartmatic, a reckless disregard for the truth. Fox continued to invite Powell onto their programs even after the Trump campaign had publicly distanced themselves from her.

An important note about the two companies - they are completely separate entities. They are, in fact, competitors. Despite this, Giuliani claimed in his initial *Dobbs* appearance that "Dominion is a company that's owned by another company Smartmatic."¹⁸ This is false, yet this and similar allegations of the two companies being connected were made numerous times on the network. While attempting to fully comprehend the rationale behind right-wing misinformation, we confess, is a hazardous undertaking, this was probably because Giuliani wanted the best of both worlds. He wanted to discuss Smartmatic's Venezuelan origins (we will explore this later), but knew that Smartmatic's own machines had played a miniscule role in the 2020 election, so he sought to tie them to the much larger Dominion that actually operated in swing states. Thus, we speculate, he is able to allege communist interference on a larger scale than if he had not falsely connected the two.

This creates an amusing dichotomy between the two lawsuits: Smartmatic frequently mentions allegations made against Dominion as well, to demonstrate how often they were lumped together, in what appears to be a display of solidarity with its competitor. Dominion, on the other hand, distances itself from Smartmatic, stressing that it has absolutely no Venezuelan

¹⁸ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 41.

connections, attempting to avoid the communism issue altogether. It is an intriguing preview of the companies's differing strategies.

And now, to address the Venezuela allegations. Personalities on Fox claimed many times that Smartmatic was not only founded in Venezuela, but that it was founded at the behest of former Venezuelan leader Hugo Chávez, funded by the Venezuelan government, for the specific purpose of rigging elections. The motivation behind this is crystal clear: Venezuela is something of an obsession on the right, who gesture furiously at its economic struggles as evidence of the failures of communism, with a healthy sprinkling of old-fashioned xenophobia thrown in to spice the narrative up. Spookily ascribing supposed wrongdoing in the United States to big, bad Venezuela further galvanizes the base.

Of course, none of it is true. Smartmatic was founded in Florida and is incorporated in Delaware (as all red-blood American companies are). It is a wholly-owned subsidiary of a Dutch company, which is itself a wholly-owned subsidiary of a British company. It is true that Smartmatic machines have been used in Venezuelan elections in the past, but the company cut ties with the country after the government announced results different from those Smartmatic had tabulated, and went so far as to publicly denounce the Venezuelan government in 2017.¹⁹ Not only is Smartmatic pointedly not associated with Venezuela, its lack of association *stems* from election fraud.

A novel insight in Dominion's lawsuit is that there were multiple communications between them and Fox News before the suit was filed. On November 12th, Dominion began sending an email titled "SETTING THE RECORD STRAIGHT: FACTS AND RUMORS." The email debunked many of the falsehoods Powell and Giuliani had been repeating on air, and featured third-party sources, including government officials, concluding the 2020 election was

¹⁹ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 121-122.

free and fair. The email was sent to the producers for Dobbs's, Pirro's and Baritromo's programs, along with numerous other Fox shows. It would continue sending similar fact sheets throughout the two month period leading up to Biden's inauguration. Nobody from Fox ever responded to these communications, and they continued broadcasting allegations at odds with the facts provided by Dominion.²⁰ This, in particular, demonstrates some degree of malice.

Contradictions on Fox Itself

Fox did not speak with a unified voice on this issue. Peculiarly, many reporters and correspondents on Fox directly contradicted the narrative that was building on Dobbs's, Pirro's, and Baritromo's programs.

Ironically, Fox was actually the first network to call Arizona for Biden on Election Night. The Fox News Decision Desk, with Bret Baier and Martha MacCallum, reported that Biden had won the presidential election on November 7th, after calling Nevada and Pennsylvania for the former vice president. This was, as stated previously, the day before Powell's first appearance on Fox promoting conspiracies of election fraud.

Even after Powell and Giuliani's regular appearances began, other hosts on Fox sang a different tune. On November 15th, senior Fox anchor Eric Shawn said "there is no evidence of any widespread fraud affecting the outcome of the presidential election...such baseless and false claims are an insult to the thousands of election officials and workers across the country."²¹ On November 19th, the Decision Desk called Georgia for Biden, even as Powell was accusing Dominion of bribing Georgia election officials on Baritromo's show.²² On November 21st, Fox host Jesse Watters acknowledged on his program *Watters' World* that his team had been unable to

²⁰ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 40-43.

²¹ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 154.

²² *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 37.

independently verify Powell’s claims about the voting machines being used to rig the election.²³ The infamous Tucker Carlson, today Fox’s most recognizable personality, wrote an article detailing his numerous requests to Powell to produce any evidence for her voter fraud claims. “She never sent us any evidence, despite a lot of polite requests,” he wrote. “When we kept pressing, she got angry and told us to stop contacting her. When we checked with others around the Trump campaign, people in positions of authority, they also told us Powell had never given them any evidence to prove anything she claimed.”²⁴

This places the defamation cases in an interesting position. Fox could credibly argue this demonstrates they *did* conduct accurate reporting in the aftermath of the election - at least, on some of their shows. It could also help prove that Fox did not promote these conspiracies as a unified organization; rather, individual hosts reported on the allegations at their own discretion.

But, as Dominion and Smartmatic point out, this demonstrates even more disregard for the truth: Fox allowed multiple hosts to broadcast allegations other hosts knew were untrue. How can Fox defend its reporting on Dobbs or Pirro or Baritromo when other journalists at the same organization called those stories false? The trial theatrics write themselves: imagine a Dominion lawyer standing before a demonstrative with Dobbs’s comments on the left and Carlson’s on the right.

The Profit Motive

The Supreme Court has ruled “the fact that the defendant published the defamatory material in order to increase its profits [does not] suffice to prove actual malice.”²⁵ This is not to

²³ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 152-153.

²⁴ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 155-156.

²⁵ *Harte-Hanks Communications, Inc. v. Connaughton*, United States Supreme Court (Jun. 22, 1989), No. 88-10, https://scholar.google.com/scholar_case?case=3982044238018836189&hl=en&as_sdt=2006&as_vis=1

say evidence of a profit motive *cannot* be introduced at court - just that its inclusion is not a silver bullet (in any case, the plaintiff in the aforementioned case won its defamation suit against the newspaper in question, with a unanimous court, no less). So, it is hard to predict whether a judge would allow such evidence in if the case goes to trial. Regardless, there is still value in discussing the evidence of a profit motive Dominion and Smartmatic provide in this study because it gives a window into the circular, self-perpetuating nature of fake news.

Consider again Fox calling Arizona for Biden on Election Night. This put them at odds with their conservative audience, who had been stewing in theories of a potentially rigged election for months. Not an hour after the network's Arizona call, Trump advisor Jason Miller and Republican National Committee spokeswoman Liz Harrington lambasted Fox on Twitter, with the former accusing them of "trying to invalidate [Republican] votes" and the latter calling them "HACKS."²⁶ Both, alongside thousands of unverified Twitter users, demanded Fox retract their Arizona call. Fox refused, and called the election for Biden a week later.

The long-lasting friendship between Fox and President Trump was starting to crack. On November 9th, Trump retweeted rival right-wing media group Newsmax several times, and early the next morning retweeted a Breitbart story critical of Fox's election coverage. The dam broke the morning of November 12th, when a host on Fox morning show America's Newsroom said "nothing filed, any challenge so far, appears likely to overturn the results in any state." Trump exploded, tweeting "@FoxNews daytime ratings have completely collapsed. Weekend daytime even WORSE. Very sad to watch this happen, but they forgot what made them successful, what got them there. They forgot the Golden Goose. The biggest difference between the 2016 Election, and 2020, was @FoxNews!" Hours later, he retweeted someone declaring "#foxnews is

²⁶ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 20-21.

dead.”²⁷ The president they had offered safe haven to for years to spout mistruths and political attacks had turned on them because they had accurately reported he had lost the election.

By the end of the day, the Fox Corporation’s stock had dropped by 6%.²⁸ By November 15th, only three days later, Fox’s Daytime audience had nosedived by 34%; its primetime audience by 37%.²⁹ Fox’s most popular viewer had convinced millions of like-minded Americans to defect to Newsmax, who sextupled their daytime audience in the same timeframe.³⁰

Fox, Dominion alleges, was caught between a rock and a hard place. With collapsing ratings, the network felt that it had no choice but to broadcast what its audience wanted, what Newsmax was willing to broadcast: lies about the election. So, it continued inviting Powell and Giuliani on, knowing full well their claims were baseless.

The cynical gamble paid off initially. At a time when Fox’s ratings were still on a downward spiral, Baritromo’s November 15th show, on which both Powell and Giuliani appeared, pulled two million viewers, ranking second in all cable news shows that day. After she went off the air, the @MariaBaritromo Twitter account promised to “keep investigating.”³¹ Fox, it appears, knew what was selling and intended to continue.

With these exhibitions of fealty, Fox finally wooed Trump back. His interview with Baritromo on *Sunday Morning Futures* was the highest rated cable news show on November 29th. On that program, Baritromo again accused Dominion of rigging the election and called it “disgusting” and “corrupt.”³² This obviously lured Trump’s supporters back to the network: Fox

²⁷ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 26-27.

²⁸ Matthew Fox. *Fox Corp. tumbles 6% as Trump retweets support for rival networks Newsmax and OANN*, Business Insider (Nov. 12, 2020), <https://www.businessinsider.nl/fox-corp-tumbles-6-as-president-trump-retweets-support-for-rival-networks-newsmax-and-oann/>

²⁹ Fox News Channel (FNC) Nielsen Ratings, <https://ctv.kwayisi.org/networks/fox/>.

³⁰ *Newsmax TV Ratings*, CableRankins, <https://ctv.kwayisi.org/networks/nmax/>.

³¹ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 39.

³² *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 54.

announced at the end of 2020 that, even with the Trump-induced dip, they had attracted 2.7 billion views in November, making it their “highest month in history” in multiplatform views and multiplatform minutes.³³ “[The d]efendants knew the story could not change the outcome of the election,” Smartmatic’s lawyers wrote. “It could, and did, make them money.”³⁴

Even if a jury never sees this evidence (to reiterate, they do not have to in a defamation case), it is eye-opening. Fox spent decades building an audience of unprecedented size with a strategy of conservative spin and falsehood. That audience, accustomed to conspiracy theories and echo chambers, coalesced around Fox ally Trump in 2016 and carried him to the White House. Fox News was a kingmaker - one of its most rabid fans had become president.

But it backfired. The Fox audience had not merely become susceptible to fake news. They had grown to *expect* it, to demand it. So when Fox reported the truth after the election, its once sycophantic fanbase turned on them in an instant, because they were not tuning in for the truth. And the only way Fox could get them to change the channel back was to peddle lies. Fox, which had four years prior delivered Trump the presidency, now knelt before him. The channel, which media experts had long opined controlled its viewers with mind-numbing propaganda, had been jerked to heel by its own audience with a throttling leash.

This is probably the most concerning detail of this case - not that a major media outlet broadcast fake news to millions of Americans, but that millions of Americans demanded fake news, and punished outlets that did not provide it. That a major media outlet broadcast fake news not as insidious state propaganda, but to keep their own business afloat.

³³ *Fox News Digital Scores Best November in Its History*, Business Wire (Dec. 22, 2020), [https://www.businesswire.com/news/home/20201222005476/en/FOX-News-Digital-Scores-Best-November-in-Its-History#:~:text=NEW%20YORK%2D%2D\(BUSINESS%20WIRE,in%20history%20across%20both%20categories](https://www.businesswire.com/news/home/20201222005476/en/FOX-News-Digital-Scores-Best-November-in-Its-History#:~:text=NEW%20YORK%2D%2D(BUSINESS%20WIRE,in%20history%20across%20both%20categories).

³⁴ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 12.

Fox's Response

In a move demonstrating the risks of basing one's senior project on a developing news story, Fox responded to Dominion and Smartmatic while this study was being drafted. The network motioned to dismiss both lawsuits, claiming neither had shown evidence of actual malice in their complaints.

“The news media has a right in a democracy,” wrote Fox’s lawyers. “To inform citizens by reporting and commenting on a President’s allegations challenging the security of our elections.”³⁵ Powell and Giuliani’s claims, and, by extension, the president’s, were newsworthy, (especially because they came from public political figures) and there is nothing inherently defamatory in giving airtime to newsworthy statements even if their veracity is in doubt. As Fox correctly points out, the press does not actually have a duty to rebut false claims made by guests on their networks. The press is not required to “suppress newsworthy statements merely because it has serious doubts regarding their truth,” Fox writes, citing Second Circuit precedent. “Nor must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation.”³⁶

Nevertheless, they argue, Fox hosts made genuine efforts on this front, citing multiple occasions where anchors pressed Powell and Giuliani for evidence to back up their claims - including the specific spat Carlson had with Powell Smartmatic’s suit references.³⁷ As this study predicted, Fox also referenced the numerous times anchors not named in the suits reported there was no evidence of fraud.

³⁵ *Dominion v. Fox News: Motion to Dismiss for Failure to State a Claim*, (May 18, 2021). p. 5. <https://www.courthousenews.com/wp-content/uploads/2021/05/FOX-News-Media-Motion-to-Dismiss-Dominion-5.18.21.pdf>

³⁶ *Edwards v. National Audubon Society*, Second Circuit Court of Appeals, (May 25, 1977), 77-7018, <https://casetext.com/case/edwards-v-national-audubon-society-inc>

³⁷ *Smartmatic v. Fox News: Motion to Dismiss Pursuant to the First Amendment and CPLR §§3211(a)(1), (a)(7), and (g)*, (Feb. 8, 2021). p. 31-44. <https://www.courthousenews.com/wp-content/uploads/2021/02/Fox-Smartmatic-MTD-Brief.pdf>

According to Fox, then, they are guilty of nothing more telling both sides of the story, and they dramatically declare “the freedoms of speech and press would be illusory if the prevailing party could obtain billions of dollars from the press for providing the losing side a forum.”³⁸ The consistent references to “sides” in Fox’s motions are intriguing, and will be the subject of discussion later in this study.

More broadly, Fox argues every statement named in the lawsuits against them are protected by the First Amendment; specifically, under the doctrine of neutral reportage, wherein the reporting of potentially defamatory statements is not defamation on the part of the publisher if the mere statement of those claims is newsworthy (Fox’s motion rather deliberately identifies this principle as a doctrine, not a privilege - this is important because a privilege implies protection from the charge of defamation, while a doctrine codifies that such an action is *not* defamation).³⁹ This, of course, circles back to Fox’s argument that its hosts only neutrally reported the Trump team’s allegations of election fraud. Fox also cites precedent for broad First Amendment protections for reporting on government and judicial proceedings; namely, that they are constitutionally permitted to air statements made by attorneys involved in active litigation. Given that legal proceedings in America are inherently adversarial, lawyers can be expected to make adversarial and perhaps bloviating comments about their opponents, and federal New York precedent protects the right of the press to air these comments.⁴⁰

As for the trickier aspect of the suits, the comments made by Fox personalities themselves (Dobbs’s “cyber Pearl Harbor” comes to mind), Fox summons the crucial defense of opinion.

³⁸ *Dominion v. Fox News MTD*, (May 18, 2021). p. 6.

³⁹ *Smartmatic v. Fox News MTD*, (Feb. 8, 2021). p. 18.

⁴⁰ *McNally v. Yarnall*, United States District Court, SD of New York, (May 13, 1991), No. 90 Civ. 306 (RWS), <https://law.justia.com/cases/federal/district-courts/FSupp/764/853/2287755/>

Fox refers to the statements made by its hosts as merely opinion; the more outrageous ones, such as Dobbs’s Pearl Harbor tweet, as constitutionally protected “fiery rhetoric” and “rhetorical hyperbole” that is to be expected of cable news pundits.⁴¹ Specifically, Fox points out that such statements of opinion can be protected even if they could appear to be statements of fact as long as they are characterized as mere allegations.⁴² This principle will be the subject of much discussion in Chapter 3.

The most eye-catching sections of Fox’s motions are the shots it fires across the plaintiff’s bows. While not quite doubling down on claims of Venezuelan origin, Fox brings the country up *a lot* in their filing against Smartmatic, at one point calling details about their ties to the Chávez government “publically available.”⁴³ Dominion gets it even worse; Fox references news stories and court cases preceding the 2020 election or their own coverage calling the company’s software into question, accusing Dominion of “serious system security vulnerability and operational issues” by proxy.⁴⁴ Whether this is just saber-rattling or a legitimate prologue of Fox’s legal strategy is unclear.

Overall, Fox spends its filings correctly outlining the high bar set by the actual malice standard. Fox’s lawyers appear tuned in to public concerns over the case; namely, whether their client’s loss could hamper press freedom. As such, their motions call heavily upon First Amendment principles they argue the court is duty-bound to protect, whether anyone agrees with Fox’s coverage or not.

Effects of Fox’s Coverage

⁴¹ *Dominion v. Fox News MTD*, (May 18, 2021). p. 26-27.

⁴² *Brian v. Richardson*, New York State Court of Appeals, (Nov. 29, 1995), 87 N.Y.2d 46, <https://law.justia.com/cases/new-york/court-of-appeals/1995/87-n-y-2d-46-0.html>

⁴³ *Smartmatic v. Fox News MTD*, (Feb. 8, 2021). p. 9-10, 12, 22, 26,

⁴⁴ *Dominion v. Fox News MTD*, (May 18, 2021). p. 4-5, 9-11.

Dominion and Smartmatic both allege that Fox's election coverage irreparably harmed their reputations. As Smartmatic's lawsuit points out, average Americans had never heard either company prior to Fox's coverage of them (Americans do not follow election machine brands the same way they follow soft drink or film studio brands, for instance), and that their "first exposure" to Smartmatic was when Fox "branded" them as "the communist/socialist foreign-funded company that rigged the 2020 US election."⁴⁵ This line is crucial context in either company's status as "public figures", a crucial element of defamation suits under *Sullivan*.

Dominion records that its employees have been stalked, harassed, and threatened physically, and the company ran up a security bill of over \$600,000 protecting its employees. Dominion also seeks lost profits, claiming Fox prevented them from becoming a billion-dollar company, a development they projected was likely after the contracts they scored in the 2020 election.⁴⁶ This is the source of those eye-popping headlines about the billions of dollars Fox, its hosts, and Powell and Giuliani are being sued for: along with lost profits and enterprise value, Dominion and Smartmatic also demand compensatory and punitive damages, as well as expenses and attorneys fees.⁴⁷

The harms suffered by Dominion and Smartmatic are, of course, key to this study, as its entire purpose is to analyze the merits of defamation suits. But it is important to keep in mind the societal consequences of misinformation. The suits themselves do not, employing social justice language about the truth being a victim and the integrity of the American tradition of the transfer of power being irreparably damaged.

⁴⁵ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 229.

⁴⁶ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 131.

⁴⁷ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 136-137.

They have a point. A recent Ipsos/Reuters poll found over half of registered Republicans believe the election was stolen from Trump.⁴⁸ That means over a quarter of all Americans buying into “the Big Lie” with zero evidence, because unsubstantiated allegations have blared across their favored news sources for months.

On January 6th, 2021, thousands of those Americans, those riled-up conspiracy theorists, stormed the US Capitol to prevent Congress from certifying the election results. Five people died, hundreds more were injured. Several of the rioters bore anti-Dominion signs.⁴⁹

Eric Gavelek Munchel broke into the Senate chamber clad in combat fatigues and armed with handcuff-style zip ties. Days earlier, he had posted a photograph of himself on social media with an American flag in one hand, a shotgun in the other...and Fox News playing on the TV behind him.⁵⁰

It is important to defend free speech and an independent press. It is important that those constitutional protections be preserved. But it is also important that we understand what kind of news we are dealing with here. And it is important we understand the consequences of inaction.

⁴⁸ *Ipsos/Reuters Poll: The Big Lie*, (May 21, 2021), Washington D.C., <https://www.ipsos.com/sites/default/files/ct/news/documents/2021-05/Ipsos%20Reuters%20Topline%20Write%20up-%20The%20Big%20Lie%20-%2017%20May%20thru%2019%20May%202021.pdf>

⁴⁹ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 72.

⁵⁰ *Dominion v. Fox News Complaint*, (Mar. 26, 2021). p. 70.

Chapter 3

Analysis

“[The] ‘general tenor’ of the show should then inform a viewer that [Tucker Carlson] is not ‘stating actual facts’ about the topics he discusses and is instead engaging in ‘exaggeration’ and ‘non-literal commentary.’”

~*McDougal v. Fox News*, Order Granting Motion to Dismiss, 2020

Defamation Defenses

The following section of this study will analyze the merits of Fox’s possible defenses to the defamation claims brought against it. Fox’s motions in these cases raise several defenses of varying strength, likely to, as one legal reporter opined, “see what sticks.”⁵¹ There is no denying that Dominion and Smartmatic have built very strong, detailed cases against Fox, but, to reiterate once more, they have a very high bar to vault.

To simplify matters, this section will draw almost exclusively from Fox’s motion to dismiss in the Dominion case. It is more detailed and more refined (having come out two months after the Smartmatic motion) and also focuses on the allegations of defamation against Fox News exclusively, while the Smartmatic one also deals with the allegations against Dobbs, Pirro and Baritromo. As we established at the beginning of this study, we will not be analyzing the legal merits of those charges, so the Dominion motion is a superior resource for us in this chapter.

A fair warning - this section will, more so than the ones preceding it, feature the opinion of the author. These opinions are based in legal studies and as comprehensive an analysis of the

⁵¹ Erik Wemple, *Fox News seeks refuge in bothsidesism*, The Washington Post, (May 21, 2021), <https://www.washingtonpost.com/opinions/2021/05/21/fox-news-seeks-refuge-bothsidesism/>

facts contained in both parties filings. The intention of including such opinion is not to force-feed any readers the author's worldview, but to assess the validity of arguments either side may bring in a potential court proceeding. Any reader skeptical of the author's conclusions is encouraged to read the briefings themselves, which have been sourced in this study, and draw their own conclusions.

Truth

Truth is an absolute defense to defamation because, by definition, a defamatory statement must be false. The New York Times assuredly injured Harvey Weinstein's reputation by reporting sexual assault allegations against him, but they did not defame him, because those allegations have been proven true. You cannot defame someone over something they did.

Fox has little hope in arguing outright truth. The election was not stolen. Dominion and Smartmatic did not switch votes from Trump to Biden. Powell and Giuliani never produced, and Fox reporters never uncovered, any evidence to prove otherwise. Fox is unable to say outright that these allegations are true in open court - Powell and Giuliani could not, after all.

Fox's snide remarks about Dominion's old security problems and Smartmatic's founder's Venezuelan heritage are nothing but peacocking. Nothing they have any documentary evidence for even approaches the explosive allegations broadcast on Fox. At best, Fox could argue Dominion's issues in Georgia in 2019⁵² could justify coverage that called for additional security measures, but that is not what they said *on air*. They said Dominion switched votes. The Georgia case does not prove that. It is so far removed from the actual facts of this case that it may be ruled inadmissible.

⁵² *Dominion v. Fox News MTD*, (May 18, 2021). p. 9.

A savvy defense is to argue not for the truth of the claims, but the truth of their existence. Put more simply: while it is not true that Dominion or Smartmatic stole the election, it *is* true that Trump, Powell, and Giuliani said they did. Fox brings a handful of New York state appellate cases to shore this up. Of particular note is the aforementioned *Edwards v. National Audubon Society Inc.* (1977), which established that reporting accusations made by public officials may be permitted if what “is newsworthy about such accusations is that they were made.”⁵³ Fox accurately points out that dozens of other media organizations, including international outlets, as well as outlets with liberal partisan leanings, reported on Powell and Giuliani’s allegations as well, and wonders in their motion to dismiss why they were sued while their competitors were spared

Why, indeed. This rhetorical question is sardonically amusing - Fox casts itself as the victim of a grace double standard. It is true that reporting allegations is not defamatory. Encouraging guests to repeat those allegations, continuing to invite them after multiple failures to produce evidence, asking leading questions that presume truth in the allegations is another story, and that is what Fox did. That is what sets its coverage apart from its competitors.

Fox also cites *Orr v. Lynch* (1977), which elaborates on the reporting of allegations. News outlets are not liable for defamation as long as they do not “represent these quotations as the true facts” and that journalists must be able to report allegations without “assuming responsibility for the veracity of the quoted remarks.”⁵⁴ This is, ironically, a rather well-written characterization of Fox’s competitor’s coverage of Trumpworld’s claims of election fraud - neutral, representing them only as unproven statements made by individuals with histories of lying. But, again, this is not what Fox did. Lou Dobbs thanked Giuliani for fighting for the *truth*.

⁵³ *Edwards*, (1977).

⁵⁴ *Orr v. Lynch*, Appellate Division of the Supreme Court of New York, Third Department, (Jan. 26, 1978), 60 A.D.2d 949, <https://casetext.com/case/orr-v-lynch-1>

Maria Baritromo called the election fraud disgusting during her interview with Trump - to do so implies truth. Fox did not merely report these quotations; they repeated them daily, sometimes hourly, and ascribed legitimacy to them. This goes beyond the behavior protected by *Orr* and *Edwards*.

Fox made further arguments in favor of reporting true events - offering they were entitled to specific protections because the events were legal proceedings, which itself is covered by its own body of jurisprudence. At the time when Powell and Giuliani were appearing on Fox, they were engaged in active litigation across the country, having filed lawsuits in multiple states where Trump had suffered narrow losses. The aforementioned *McNally v. Yarnall* (1991) protects “comments made by attorneys to the press in connection with the representation of their clients.”⁵⁵ These protections are enshrined in New York state law as well, with N.Y. Civ. Rights Law §74 barring civil action for the publication of a fair and true report of a judicial proceeding. So, not only could Fox cover Powell and Giuliani’s statements because they were public figures, they were also, specifically, lawyers involved in ongoing litigation. As Fox notes, every allegedly defamatory statement occurred while those lawsuits were pending.

This is, perhaps, the most laughable argument in Fox’s motion. Powell and Giuliani’s lawsuits were widely ridiculed as baseless and desperate. All four of Powell’s federal suits were dismissed immediately for a variety of overlapping reasons: mootness, lack of standing, Eleventh Amendment immunity, and even failure to state a claim.⁵⁶ The written opinions by the presiding judges derided Powell’s conspiracy-mongering disguised as legal reasoning, with an Arizona judge writing “Allegations that find favor in the public sphere of gossip and innuendo cannot be

⁵⁵ *McNally*, (1991).

⁵⁶ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 201.

a substitute for earnest pleadings and procedure in federal court. They most certainly cannot be the basis for upending Arizona's 2020 General Election."⁵⁷

As for Fox's contention that the litigation was ongoing, this further highlights the illegitimacy of Powell's lawsuits. A Michigan judge addressed this, saying "If Plaintiffs had legitimate claims regarding the manner by which ballots were processed and tabulated on or after Election Day, they could have brought the instant action on Election Day or during the weeks of canvassing that followed - yet they did not."⁵⁸ That is to say - valid legal claims should be filed as soon as possible after the actionable wrongdoing. That Powell waited until a month after the election, and weeks after hand recounts had certified it, to file her lawsuits indicates she did not believe her claim valid, and that she had motivations other than successfully representing her client in filing them. Them being filed so late, coincidentally, gives Fox more time to cover them.

McNally and §74 protect legitimate judicial proceedings, where the attorney quoted is zealously representing their client with the intention of winning. Powell's suits were so ramshackle that she either did not believe they had any merit and was filing them for the publicity, or she is an appallingly bad lawyer. Either way, for Fox to cover her suits as legitimate, good faith legal proceedings is misrepresentation. It is true that Fox was not *required* to criticize Powell's legal instincts, or debunk every one of her allegations every time they reported she made them. But to repeatedly invite her on to deliver proto-closing arguments on daytime cable news, when they, and she, almost certainly knew the cases would go nowhere and had zero basis in fact, goes beyond mere reporting. That is an endorsement - particularly when the baseless claims she was making were so corrosive to democracy and American civil society.

⁵⁷ *Bowyer v. Ducey*, United States District Court, District of Arizona, 20-2321, (Dec. 9, 2020).

⁵⁸ *King v. Whitmer*, United States District Court, Eastern District of Michigan, Southern Division, 20-13134, (Dec. 7, 2020), <https://casetext.com/case/king-v-whitmer-1>

Fox's motion seems unconcerned with Powell's legal shut-out. After all, they write, the losers deserve coverage too - recall their earlier sermons about the importance of hearing all sides of the story, especially when the "lamestream" media deprives conservatives of airtime. Fox is, after all, Fair and Balanced™, no?

It is here that bothsidesism, as it so often does in discussions of American news, rears its ugly head. It has long been seen as a journalistic virtue - almost a cliché in newsrooms. But the notion that "all opinions must be given equal weight" has long been a shield for fringe, reactionary and groundless ideas to shoulder into the mainstream. Treating both sides equally makes sense at a football game, it does not in, for instance, a climate change debate, when one side can summon decades of scientific research to support its claims, and the other can summon only a Koch paycheck. Broadcasting both sides does not mean broadcasting a truth and a lie, and it especially does not mean treating both as the truth. Broadcasting both sides in November of 2020 should have entailed inviting on Democrats who were pleased with the outcome of the election, and Republicans who were not. It should *not* have entailed inviting lunatics frothing about electoral fraud without evidence. That Fox treats that behavior as newsworthy is telling.

We acknowledge that statements made by public figures are newsworthy, even (and in some cases especially) outlandish ones. One must wonder why obviously false statements are newsworthy, or certainly whether they are worth continuous, months-long coverage. But we further acknowledge journalists covering these statements are under no obligation to assign negative weight to them in their reporting. But Fox *did* assign weight - positive weight, by airing those statements repeatedly and endorsing them

Because the issue with this truth defense is that it only protects Fox from liability from the statements made by Powell and Giuliani (Fox is forced, as so many defendants are, to throw

its co-defendants under the bus in this case). It does *not* protect them from statements from their own employees on air and on social media. *Edwards* does not protect allegations made by journalists, because a journalist's allegations are not newsworthy *per se* the way a public figure's are.

Thus, we must turn to a different defense.

Opinion

Opinions also, by definition, cannot be defamatory, because defamation must purport to be fact. To return to our earlier example, simply printing an op-ed titled "I do not like Harvey Weinstein" would not be defamatory, because it is clearly just the opinion of an overpaid Beltway columnist and would be treated differently than a supposedly factual statement about Weinstein.

Fox characterizes its hosts's statements in this case "fiery rhetoric...on matters of public concern," which is constitutionally protected according to *Brian v. Anderson* (1995), even if those opinions may seem to rely on facts.⁵⁹ Fox even cites a case it had itself won the year prior, the infamous *McDougal v. Fox News* (2020), wherein a judge determined Tucker Carlson's "pitched commentary...on political controversies" did not constitute "factual representations."⁶⁰ We will discuss *McDougal* at length later.

For its part, Smartmatic argued Fox aired multiple statements of fact alleging voter fraud. They compiled numerous incidents where Powell and Giuliani claimed they were collecting forensic and algorithmic evidence to prove their claims, or characterized their ongoing work as an investigation, to no pushback or requests for clarification from the hosts. More damingly, they

⁵⁹ *Brian*, (1995).

⁶⁰ *McDougal v. Fox News*, United States District Court, Southern District of New York, 1:19-cv-11161, (Sep. 24, 2020), <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2019cv11161/527808/39/>

point to specific instances where Lou Dobbs said “we have tremendous evidence already, of fraud in this election,” and Jeanine Pirro told her audience that Powell had collected multiple affidavits alleging fraud and described how trustworthy they were.⁶¹

The so-called fact-opinion distinction is a messy one. The precedent on the issue is contradictory, and the outcome of this case rests on how purportable a judge or jury believes an opinion must be to constitute a statement of fact.

We must first distinguish between pure opinion and mixed opinion. Pure opinion is based on facts the speaker has either just stated, or someone else had just stated, or have gone unspoken but are well-known (for instance, a man remarking “The Sacramento Kings are horrible,” to a group of friends who all know about the Kings’s losing record).⁶² Pure opinion is nonactionable. Fox argues its hosts’s claims were pure opinion, because they were made either in response to exclamations from Powell and Giuliani, or relied on widely available knowledge of Trumpworld’s claims of electoral fraud.

Mixed opinion, on the other hand, “impl[ies] the existence of undisclosed facts unknown to [its] audience,” and can indeed be defamatory.⁶³ The Supreme Court enumerated the distinction between the two in *Milkovich v. Lorain Journal* (1990), when the Court refused to “create a wholesale defamation exemption for anything that might be labeled ‘opinion’” and explained that “expressions of ‘opinion’ may often imply an assertion of objective fact.”⁶⁴ Dominion and Smartmatic argue the Fox personalities engaged in mixed opinion because the unseen and unheard “evidence” Powell and Giuliani still had not produced formed the basis of their opinions.

⁶¹ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 78-84.

⁶² Pooja Bhaskar, *Milkovich, #Metoo, and “Liars”*: *Defamation Law and the Fact-opinion Distinction*, *Fordham Law Review*, Vol. 88, Is. 2, p. 703 (2019).

⁶³ Bhaskar, p. 703.

⁶⁴ *Milkovich v. Lorain Journal*, United States Supreme Court, 497 U.S. 1, (Jun. 21, 1990), <https://supreme.justia.com/cases/federal/us/497/1/>

The obvious issue here is that the line between pure and mixed opinion is very blurry; it feels distinctly “I’ll know it when I see it,” and leaves much discretion to judges and juries. Courts have gone different ways. In *Davis v. Boenheim* (2015), the New York Court of Appeals (which could conceivably hear the Smartmatic case at some point) found that the statements in question were actionable because they were capable of being proven true or false and because the context in which they were printed, and the speaker’s position of authority and access to knowledge within an organization, implied the statements were based in some undisclosed fact.⁶⁵ However, in *Hill v. Cosby* (2016), the US Court of Appeals for the Third Circuit (which could conceivably hear the Dominion case at some point), a figure possessing similar connections to their own organization was not found to be relying on undisclosed facts, and their statements about the plaintiff ruled nonactionable.⁶⁶ The law on this issue, it appears, is far from settled.

However, the statements at issue in this case are, in the author’s opinion, not ambiguous. Dobbs and Pirro both definitely stated on their official Twitter accounts that the election was stolen. Not that they believed the election was stolen, or that they had heard from Fox sources the election was stolen, but that it was a fact the election was stolen. Fox claims the rhetorical grotesqueness of Dobbs’s “cyber Pearl Harbor” quote protects them according to *McDougal* because its *so* kooky that no one could take it seriously as a statement of fact. But a statement of fact is not less guilty of being so just because it is phrased bizarrely. Otherwise, any trickster could tweet claims of fact in Pig Latin, or with emojis between every word, and then argue their claims are nonactionable because no one should have believed them anyway.

⁶⁵ *Davis v. Boenheim*, New York State Court of Appeals, 22 N.E.3d 999, 1005, (Oct. 21, 2014), <http://www.nycourts.gov/ctapps/Decisions/2014/Oct14/145opn14-Decision.pdf>

⁶⁶ *Hill v. Cosby*, Third Circuit Court of Appeals, No. 16-1362, (Dec. 14, 2016), <https://caselaw.findlaw.com/us-3rd-circuit/1757644.html>

McDougal exposes a rotten hypocrisy at the heart of the Fox Corporation. Fox advertises itself as a news organization. It calls itself trusted. It promotes Dobbs, Pirro and Baritromo as journalists. Even Carlson, who Fox acknowledges publicly as more pundit than journalist, describes his show as “the sworn enemy of lying,” which implies...honesty, or at least an assumption that Carlson’s opinions are based in objective truth.⁶⁷

But upon being dragged into court to answer for their ridiculous statements, Fox turns around and argues no “reasonable viewer” should take anything they say as explanations of fact. Such an argument is appalling even for Carlson, an opinion broadcaster, but Fox now in court seeks to apply that precedent to others at the organization *whom it bills as legitimate journalists*.

There is a disconnect between how Fox advertises itself to its older audience and how it describes itself as a business to judges - a public face and a private one. According to Fox’s own logic, is it even a news organization at all? Is it all pretend role-play? Are Fox’s lawyers giving the game away, in open court, that the whole operation is a scam to rack in ratings for media-illiterate retirees?

This legal reasoning calls their own audience stupid. Fox can say no reasonable viewer should take them seriously, but people do. Lots of people do. And lots of people took their coverage of election fraud seriously - over half of all Republicans, to quantify it. And Fox *knows* that people take them seriously, and they are culpable in it. The absence of media literacy that attracts people to untrustworthy sources was not an accident. Fox billed itself as the only source conservative Americans, drilled into their heads every day that every news outlet not dripping in nativist rhetoric was biased. Fox News does not get to whistle and wonder why the uneducated masses could possibly fall for their charade. *They* built that audience that tunes in every day and absorbs everything they see as fact.

⁶⁷ *Tucker Carlson Tonight*, Fox News, <https://www.foxnews.com/shows/tucker-carlson-tonight>.

Political Speech

Distinct from the protections for statements of generic opinion are those made for political and electoral purposes, which are, like legal communications, inherently adversarial. Fox alludes to these protections when referring to Powell and Giuliani as “public figures” and to President Trump as a “public official.” The backdrop of all the alleged defamatory opinions was the 2020 presidential election, a political enterprise. The accusations of voter fraud had been started by Trump, a candidate in that election. While Fox may be guilty of amplifying those accusations, they certainly did not start them. Again, it is up for interpretation whether this was a legitimate debate worthy of sustained news coverage, but one cannot deny it was a political controversy that at the very least warranted reporting.

Sullivan is notable today for the protections it affords the press. It is important to remember that the Court did not hand down *Sullivan* just to keep newspapers open - its purpose was to foster healthy public debate. The opinion reads “erroneous statement is inevitable in public debate, and...it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”⁶⁸ Critics must be allowed to make, and papers to print, claims or accusations that are not perfectly sourced, or at the very least would be difficult to prove as being completely true in court. Without that freedom, public debate would be stale as its participants tiptoed around issues they are unsure could weather sustained scrutiny.

The grey area here is who or what constitutes a public figure. The plaintiff in *Sullivan*, Sullivan, was an Alabama county commissioner. He obviously applies as an elected official, given that he had to engage in political speech to achieve his post. But the Court was divided over whether mere “public figures” should be held to the same standard as public officials. While the heart of *Sullivan* was unanimous, only five justices actually endorsed the theory that public

⁶⁸ *Sullivan*, (1964).

officials and public figures are equal in the eyes of defamation law.⁶⁹ It is difficult to argue the two operate on level playing fields. Elected officials, as office holders, have greater opportunity for redress and rebuttal - their position is inherently powerful - and have had practice in the arena of tough political speech. And surely there is a greater public interest in reporting on elected officials, who have sworn a duty to the American people, than on simply, say, film stars?

Dominion and Smartmatic's status as "public figures" is itself complicated. Obviously, neither hold office, but they *were* participants in the 2020 election. The press has a vital public interest in covering elections. And as corporations, with the ability to retain large law firms, they certainly have opportunity for redress. But, as they point out in their initial suits, Dominion and Smartmatic were not well known before Fox's coverage of them, because until then most Americans did not really care who built the voting machines. An argument could be made that Dominion and Smartmatic were not public figures *until* Fox covered them, and it seems unjust to demand they meet the burden required of public figures when the alleged defamatory statements shackled them with that status in the first place.

It is not an argument, of course, that Dominion and Smartmatic are making right now, at least not seriously. They expected any court reviewing their initial filings would consider them public figures out of hand, and so those filings are written with that burden in mind, alleging actual malice. Should the cases go to trial, Dominion and Smartmatic will almost definitely be considered public figures - the potential fight over the distinction heavily favors Fox. It is still an element of the case judges reviewing the cases should ponder.

⁶⁹ James A. Freund, *Political Libel and Freedom of the Press*, Proceedings of the American Philosophical Society, Vol. 112, No. 2, p. 119 (Apr. 15, 1968), <https://www.jstor.org/stable/pdf/985928.pdf>

Retraction

Retraction has an interesting role in defamation law - it is both a defense and a remedy. If the publisher retracts an allegedly defamatory statement, and perhaps issues an apology for publishing it in the first place, the court will likely view the publisher favorably should the allegedly defamed party bring suit. If the retraction was issued before the claim was brought, a court might even consider the claim moot and dismiss it, on the grounds that a public retraction leaves the plaintiff's reputation at no considerable risk.

But such a retraction is often a sought after remedy in defamation cases that do move forward. Should a plaintiff prevail in their defamation suit, one of the most common courses of action they demand is forcing the defendant to forswear the statements in question, usually in a venue at least as public as where the defamatory statement was made.

Dominion and Smartmatic both sent retraction demands to Fox News before filing their lawsuits. Fox News never issued one, and neither Dobbs, Pirro nor Baritromo ever walked back their statements on the air. However, all three of them gave a more moderate concession - the exact same concession across all, interestingly.

Smartmatic sent their retraction demand on December 10th, 2020. On December 18th, Lou Dobbs began his show by saying "there are a lot of opinions about the integrity of the election, the irregularities of...voting machines and voting software," and then introduced a prerecorded interview with Eddie Perez, Global Director for Technology Development at the Open-Source Election Technology Institute.⁷⁰ In his two minute segment, Perez explained to an unseen journalist (not Dobbs) that there was no evidence of any kind of fraud or vote-switching.⁷¹

⁷⁰ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 145.

⁷¹ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 145-146.

This is not a retraction. Dobbs did not interview Perez himself, as he had Powell and Giuliani. Nor did he acknowledge that Perez had just disproved baseless claims he had himself been making on air for months. Rather, with his “a lot of opinions” comment, framed Perez’s segment as one *side* of an ongoing debate. That is itself illustrative: saying that there can be different opinions on whether the election was stolen is false. Either it was or it was not - one does not have the right to form an opinion on whether an objective truth is or is not the case. This debases public debate and, intentionally or not, further muddies the fact-opinion distinction that a court will have to carefully analyze in this lawsuit.

Two days later, on December 20th, Baritromo opened her show with a similar monologue, about how Fox News was still investigating the integrity of the election. She introduced a new source for her “investigation”...and then played the exact same clip with Eddie Perez.⁷² The same day, that clip aired on *Justice w/ Judge Jeanine*, but with a guest host introducing.⁷³

To repeat: these are not retractions. They treat the issue as if it is still an open question in search of resolution.

In Fox’s defense, this does at least operate as something of a backpedal for them, and lends more credence to their claims that they reported facts in this case and only spoke to the losing side in the name of free debate. It does, of course, beg the question as to why they did not believe a retraction was necessary after Perez thoroughly debunked months of their coverage. And Dominion and Smartmatic’s “side” obviously received far less airtime. But it is better than nothing.

⁷² *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 149.

⁷³ *Smartmatic v. Fox News Complaint* (Feb. 4, 2021) p. 147.

Fox's motions do not mention retraction, which is unsurprising - to do so at this point would be tantamount to admitting culpability. But it merits mention that the day after Smartmatic filed its lawsuit, Fox cancelled Lou Dobbs's show, despite its status as one of the top-rated programs on their business network.⁷⁴ Fox has said the cancellation was part of a typical seasonal shift in programming, but the proximity of the dates make the claim of coincidence a bit harder to swallow. Certainly Dominion and Smartmatic are pleased to see Dobbs off the air. Fox *could* argue in court that cancelling Dobbs's show demonstrates good faith on their part to clean up their channel, to remove the less trustworthy voices. They could argue the cancellation was equivalent to disavowal - the court may look favorably on that argument. The question is, of course, whether they want to make that argument.

⁷⁴ Stephen Battaglio, *Fox News cancels Lou Dobbs' show; pro-Trump host not expected to be back on air*, LA Times, (Feb. 5, 2021), <https://www.latimes.com/entertainment-arts/business/story/2021-02-05/fox-news-cancels-lou-dobbs-tonight>

Chapter 4

Conclusions

“If we can send people to jail for misrepresenting the financial condition of a corporation but there is no recourse for spreading lies in a presidential campaign to try to sway people’s votes, then we have a big problem.”

~David Schulz, Senior Research Scholar in Defamation Law, Yale Law School

Predictions

Multiple legal scholars have opined that, despite the high bar in defamation cases filed by public figures, Dominion and Smartmatic have “unusually” strong claims and that Fox may legitimately be in serious jeopardy.⁷⁵ The multiple correction letters both companies sent to Fox, along with private communications they had with the network’s executive leadership that indicated top people at Fox were aware the claims their hosts were making were unsubstantiated, could go a long way toward proving actual malice in court. Yale Law professor David Schulz calls the matter “settled law” and opines that Dominion and Smartmatic can prove actual malice...but also that their victory is far from certain.⁷⁶

Red scare attorney Roy Cohn, who represented Trump in his business dealings for years, once said “I don’t care what the law is. Tell me who the judge is.”⁷⁷ In an era of hyper-politicized judicial nominations, where Trump himself, on whose behalf Fox may have undertaken this

⁷⁵ Tucker Higgins, *Dominion and Smartmatic have serious shot at victory in election disinformation suits, experts say*, CNBC, (Feb. 24, 2021), <https://www.cnbc.com/2021/02/24/dominion-smartmatic-defamation-cases-credible-experts.html>

⁷⁶ Higgins, (2021)

⁷⁷ Geoffrey C. Ward, *The Life and Times: Roy Cohn*, American Heritage Magazine, Vol. 39, Is. 5, (July/August 1988), <https://www.americanheritage.com/roy-cohn>

alleged disinformation campaign, has appointed over a quarter of the federal bench, this principle is sager than ever.⁷⁸ One of Trump's own appointees, District Judge Carl Nichols, is overseeing the Dominion case. Presiding over the Smartmatic case in New York state court is Judge David Cohen, a Democrat elected in the same 2020 election at the heart of this case.⁷⁹ This will undoubtedly affect how the two cases proceed.

A word on Trump's judges: the vast majority of them are recognized as strong conservatives, having been hand-picked by the right-wing Federalist Society. As such, one would not be foolish in anticipating knee-jerk reactions to protect all forms of free speech, and certainly to shield Fox News. But recall that Trump himself built his campaign, and his wider movement, around attacks on what he called "fake news." Trump and his followers widely supported lawsuits against media organizations he determined had not covered him fairly.

This influence is plain to see in conservative federal judges. Just this March, DC Circuit Court Judge Laurence Silberman, a Reagan appointee, issued an astonishingly blunt dissent in *Tah v. Global Witness Publishing*, calling for *Sullivan* to be overturned, and referring to the New York Times, Washington Post, Associated Press, and most major American newspapers as "virtually Democratic Party broadsheets."⁸⁰ That he would release so rankly partisan is highly unusual; that he would release it barely a month after Smartmatic sued Fox News even more so.

It goes even higher, too. The archconservative Justice Clarence Thomas called for *Sullivan* to be reexamined in a 2019 concurring opinion in *McKee v. Cosby* (Bill Cosby, oddly enough, has set an oddly large amount of recent defamation precedent), and suggesting *Sullivan*

⁷⁸ John Gramlich, *How Trump compares with other recent presidents in appointing federal judges*, Pew Research Center, (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>

⁷⁹ Higgins, (2021).

⁸⁰ *Tah v. Global Witness Publishing*, United States Court of Appeals, District of Columbia Circuit, No. 19-7132, (Mar. 19, 2021), [https://www.cadc.uscourts.gov/internet/opinions.nsf/C5F7840A6FFFCF648525869D004ECAC5/\\$file/19-7132-1890626.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/C5F7840A6FFFCF648525869D004ECAC5/$file/19-7132-1890626.pdf)

was a policy decision.⁸¹ Thankfully, no other justice joined his opinion, but the standard is clear: the danger to a free press, at least legally, is not coming from the progressive left.

Of course, should either case survive pretrial scrutiny, both Dominion and Smartmatic demand jury trials. That makes it even harder to predict how either ends up: the fact-opinion distinction, which would undoubtedly be a major point of contention at trial, can be tricky for even lawyers to completely comprehend, much less lay jurors. With the blurred line between reporting and punditry at Fox, those difficulties will be aggravated. At the very least, with as contentious a political topic as it covers, the jury selection would be very interesting.

But that, of course, even assumes the case reaches the trial stage. Should Fox's initial motions to dismiss fail, this study speculates the chances of a settlement dramatically increase. Fox, with all the posturing stripped away, likely fears setting a negative precedent on their brand of caustic commentary, and Dominion and Smartmatic, for all the bluster about protecting democracy in their initial filings, would doubtless rather spend the next two or three years doing something other than costly litigation, especially knowing that they would be on the hook for Fox's attorneys fees should they lose, in accordance with New York anti-SLAPP laws .

The question, then, is what the terms of the settlement would be. Dominion and Smartmatic are unlikely to accept any agreement that does not at least include a retraction, which Fox no doubt prickles at, but would rather cave to than shell out billions in potential damages. But what form would that retraction take? Pirro and Baritromo may have to disavow their statements on their own programs, but there is also the chance their shows will be cancelled, either as a clause of the settlement or as retaliation from Fox for dragging them into this lawsuit. Such an outcome would not be terrible for Fox. None of their flagship personalities - Carlson,

⁸¹ *McKee v. Cosby*, United States Supreme Court, No. 17-1542, (Feb. 19, 2019), https://www.supremecourt.gov/opinions/18pdf/17-1542_ihdk.pdf

Sean Hannity, or Laura Ingraham - are part of the suit; all at least possessed the good instincts to not overcommit to the election fraud narrative.

What can be confidently predicted, regardless of whether the case is settled or if Fox loses at trial, is that Dominion and Smartmatic will not be taking home those billion dollar requests we have seen in the headlines. Stanford Law professor Robert Rabin called those amounts “awfully large” and predicted they would be whittled down over the course of the litigation.⁸² The loss of business estimates Dominion and Smartmatic included in their initial filings are, perhaps, over appraised, given that they include potential contracts down the line they predict missing out on. Schulz said it also may be difficult for the companies to collect punitive damages, as doing so would require demonstrating Fox specifically intended to hurt the reputation of the companies themselves. Fox could rather plausibly argue the statements were meant to attack Joe Biden, or the Democratic Party, or the left in general, as cynical as that sounds.⁸³ In general, too, punitive damages are expected to value far less than the awarded compensatory damages, and are based heavily on the worth of the defendant. Together, the two companies seek almost a fifth of Fox’s total valuation; it is unlikely they will receive that.⁸⁴

A final note: although this study does not concern them, and although it lacks the space to elaborate on this prediction, Sidney Powell and Rudy Giuliani are deep in it.

Ramifications

Much of the analysis of this case has focused on the doom-and-gloom potential consequences of judgements against Fox. Commentators across American media, even those

⁸² Higgins, (2021).

⁸³ Higgins, (2021).

⁸⁴ Ian Millhiser, *Why the defamation lawsuits against Fox News could seriously hurt the company*, Vox, (Mar. 30, 2021), <https://www.vox.com/22352213/dominion-fox-news-1-6-billion-tucker-carlson-lou-dobbs-maria-bartirromo-defamation-first-amendment>

employed at outlets diametrically opposed to Fox and its mission, worry that Fox's loss is their loss too - that such a precedent could stifle freedom of the press, could open the floodgates to masses of angry companies and billionaires clamping down on negative press coverage with bogus defamation suits.

After careful examination of the facts of this case, this study concludes that such an apocalyptic scenario is unlikely, and certainly not a given. Dominion and Smartmatic's suits are *intricately* sourced and detailed. Dominion's complaint alone includes nearly three hundred pages of quotes, tweets, and transcripts from Fox shows. They do not demonstrate unavoidable errors newsrooms occasionally make in the rush to update a developing story. They demonstrate a sustained pattern of behavior, of promotion of a baseless conspiracy theory, despite multiple reporters and executives within the company understanding that the theory was baseless.

This study concludes setting a precedent forbidding behavior *that* egregious does not endanger the First Amendment, so long as any ruling specifies that it is narrowly tailored to the facts of this case. It is true that Dominion and Smartmatic, public companies, have a high bar to win a defamation suit against a news organization. It is good they have a high bar to win a defamation suit against a news organization. But the bar is high, not in the sky. *Sullivan* was never intended to offer news outlets a free pass to defame at will. If it was, the Court would not have even bothered elucidating a standard for plaintiffs to meet. When *Sullivan* was handed down, it was understood that it was *possible* for a news outlet to lose a defamation case under the standard it set. It was understood that one would *eventually*. Free speech is not, and has never been, absolute. Short of Alex Jones-level snake oil salesmanship, it is unclear what could meet the actual malice standard if the facts alleged in this case do not. News outlets that have engaged in lesser conduct would have nothing to fear from a judgement punishing Fox.

What no one else seems to be considering is the opposite scenario: what are the ramifications of Dominion and Smartmatic *losing*? The precedent that result would set is just as frightening. It would embolden Fox and other right-wing networks to speak about elections, and politics in general, as untethered from the facts as they please, so long as they call it an “ongoing public controversy” or throw in a prerecorded interview with a real expert a month after the fact. It would communicate to every partisan news outfit that the actual malice standard is so high they can get away with anything.

Even worse, it could communicate to the general public that maybe the voter fraud claims aired on Fox have some *merit*. Of course, that is not what a dismissal of the suit would *actually* mean, but if the average American hears “a court determined Fox News did not defame the election software companies when it said they rigged the election,” they could very well believe that means Dominion and Smartmatic could not prove the charge was false. The conspiracy theorists who stormed the Capitol would feel vindicated.

With a sufficiently narrow ruling, a judgement against Fox News could represent progress for democracy and the free press. It would not punish the simple, benign act of being wrong. The press should have a right to be wrong sometimes, and it would still possess the right should Dominion and Smartmatic prevail.

But it should not have the right to lie. Not about something as foundational to the United States as its democratic process.

Limitations

A victory for Dominion or Smartmatic would perhaps tame Fox, but would not sink it, especially as a court is unlikely to award the companies the billions they seek. Furthermore, litigation alone will not be enough to end fake news - at least not alone.

First of all, lawsuits are very expensive. Lawsuits against multi-billion dollar media companies are quadrupaly so. Dominion and Smartmatic are fortunate enough to have the resources to sustain years of costly litigation, but not every allegedly defamed person or entity will be.

Secondly, Dominion and Smartmatic in this case had the good fortune to be defamed by a recognizable brand, with an existing corporate hierarchy, and a legal department to send complaints to. So much fake news online is proliferated on anonymous blogs, often hosted outside the country, run through too many external servers to even trace the origin of the story. How do you sue that? And even if you could figure out who or what to sue, would it even be financially worth it? Fox News, with its billions, is at least a target worth battling for years. But some troll farm in Macedonia? “Somebody sitting on their bed that weighs four hundred pounds,” to borrow a hypothetical from Trump? A lawsuit is difficult if the defendant is too rich; it is pointless if the defendant is too poor, has nothing to lose.

And finally, as explained in the Definitions section, not all fake news is defamatory, so not all fake news could even be the subject of a lawsuit. The false report of Pope Francis endorsing Trump that went viral in 2016 was fake news. It was ridiculous. It may have even had some incremental effect on the election. But it was not defamatory. Pope Francis could not sue to have that story wiped from the Internet, or to punish its publishers.

If fake news is to truly be contained and controlled, other strategies will have to be considered. Experts have made a number of proposals, from shutting down on advertising on fake news sites,⁸⁵ to creating a licensing board for journalists,⁸⁶ to simply educating people better about what news is trustworthy and what is not. Each of these ideas has upsides and downsides, and a strong anti-fake news policy would likely require an amalgamation of them and others - and hours upon hours of careful study and consideration.

The point is that, while defamation lawsuits may help, they will not help everything. We cannot rely on wizened, conservative judges and billion-dollar corporations to save us, not if we want to see real change. We must take action ourselves.

⁸⁵ Ari Ezra Waldman, *The Marketplace of Fake News*, *Journal of Constitutional Law*, Vol 20, Is. 4, p. 857, (2018), <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1661&context=jcl>

⁸⁶ Daniela C. Manzi, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, *Fordham Law Review*, Vol. 87, Is. 6, Art. 12, p. 2649 (2019), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=5613&context=flr>

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