MLRC Media Law Resource Center
BULLETIN

2021 Issue No. 2 October 2021

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The Libel-Proof Plaintiff:
Sorting Fact and Opinion in the Age of Rhetorical Hyperbole

By Dan Novack & Sara Shayanian[1]

Truth is an absolute defense to defamation, but it's not the only defense. For instance, if a statement is an opinion, it is fully protected by the First Amendment. After all, there are no wrong opinions – just awful ones.[2]

Defendants can also argue lack of reputational harm. Imagine a public figure who is so outrageous that any claim about them, no matter how outlandish, could be believed. Pop culture guru Bill Simmons calls it the Tyson Zone, in honor of boxer Mike Tyson. Try picking out which one of these "Iron Mike Facts" is false.

1) Arrested roughly 38 times before aged 13.
2) Had teeth shattered by headbutt from his pet Bengal Tiger
3) Bit someone's ear off
4) Hosted an Animal Planet show about pigeons
5) His face tattoo artist sued Warner Brothers to stop the release of The Hangover 2.

Trick question! They are all true. A legal analogue of the Tyson Zone is the "libel-proof plaintiff," a doctrine positing that certain disgraced individuals' reputations are so beyond repair that even libelous statements cannot damage them. No matter the falsehood, defendants are free to beat a horse's dead reputation.

Recent years have yielded little evidence that this doctrine is particularly robust, outside of an occasional Lenny Dykstra sighting.[3] It's an exceptionally rare category, and for good reason. Words matter.

Yet, an emerging trend threatens to turn this theory on its head, allowing defendants to weaponize their **own** outrageousness to escape liability via the doctrine of rhetorical hyperbole. By tanking their own reputation for calling it straight, they can live to defame another day. Call it the libel-proof defendant, who can say whatever they want because no one should believe them.

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[2] *Gertz v. Robert Welch, Inc.*, 418 U. S. 323, 339-340 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas").

[3] https://www.dwt.com/blogs/media-law-monitor/2020/10/lenny-dykstra-mets-teammate-libel-suit.

Sometimes the Best Defense Is More Offense

Take, for example, Barstool Sports, a loutish news and commentary site that found itself in the legal crosshairs of actor and podcaster Michael Rapaport for a series of defamatory statements.[4]

In 2017, Barstool contracted with Rapaport to work with the news site on various projects. The relationship quickly deteriorated, leading to all out Twitter war between Barstool employees and the actor. In the months following the soured relationship, Barstool employees published dozens of tweets, posts, and articles that accused Rapaport of being, among other things, a racist, a stalker, committing domestic violence, and having herpes.

Courts traditionally parse alleged defamatory statements based on how a reasonable person would perceive them. In March 2021, U.S. District Court Judge Naomi Reice Buchwald dismissed Rapaport's herpes-related defamation claim on the grounds that Barstool was engaging in rhetorical hyperbole, a category of overheated, non-literal speech protected by the First Amendment.

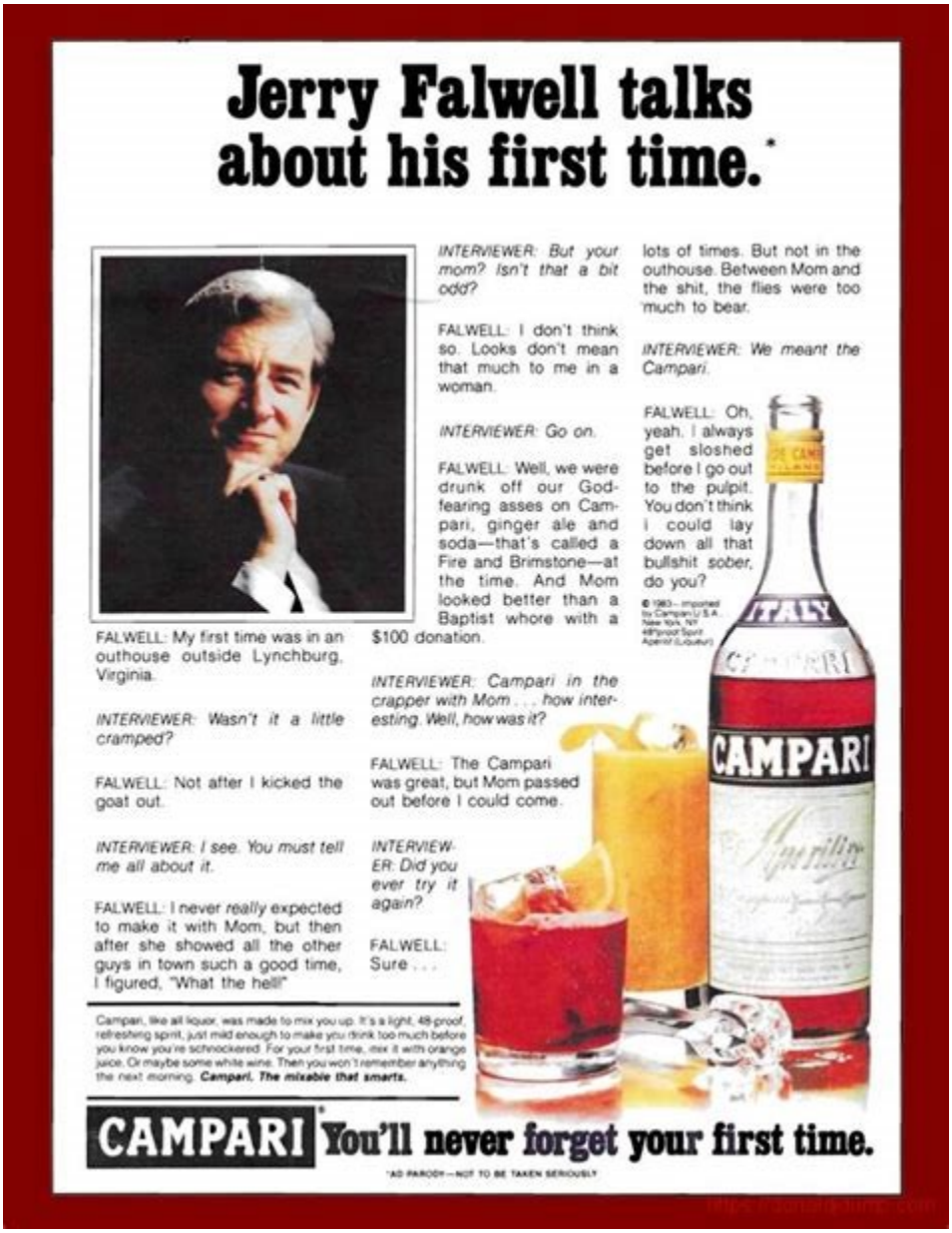
Rhetorical Hyperbole applies to ostensibly factual statements that, devoid of context, could be read as defamatory. The doctrine recognizes the right to speak in loose, figurative terms. Who among us hasn't decried "highway robbery" far from any thoroughfare?

In Barstool's case, the judge was similarly persuaded that viewers would understand the insults to be mere epithets. Finding that audiences recognize Barstool's allegations as representing "often overtly biased" viewpoints, the court concluded that it would be "obvious to even the most casual observer" that Barstool didn't really mean what it said. In sum, the judge noted that viewers reasonably anticipate "hearing opinionated viewpoints" -- which includes accusations of herpes and racism.

The Rhetorical Hyperbole Doctrine

Rhetorical hyperbole has long served as an out for extravagant exaggerations that no one would take literally — what *Seinfeld*'s Jackie Chiles might call "outrageous, egregious, preposterous." In 1988, *Hustler* magazine published a fake interview with the Reverend Jerry Falwell about losing his virginity to his mother in an outhouse. Falwell sued. Because it was an obvious joke, the U.S. Supreme Court unanimously agreed that no one could take it seriously.

[4] *Rapaport v. Barstool Sports, Inc.*, 2021 U.S. Dist. LEXIS 59797 (S.D.N.Y. Mar. 29, 2021).



In 2001, the daredevil Evel Knievel was photographed alongside his wife, Krystal, and another young woman at ESPN's Action Sports and Music Awards. ESPN later published the photo with the caption "you're never too old to be a pimp". Knievel sued, claiming he had been accused of criminal activity.[5]

Rather than home in on the word "pimp," U.S. District Judge Donald W. Molloy examined the broad context of the caption. Reviewing the subject, setting, format, general tenor, use of figurative or hyperbolic statements, and lack of objective truth or falsity, the Court held that

[5] *Knievel v. ESPN*, 393 F.3d 1068, 1075 (9th Cir. 2005).

"pimp" was rhetorical hyperbole. The "youthful, non-literal" language would give readers the clear impression that it was not offered literally.

Given the focus on literal versus non-literal commentary, some observers were surprised to see MSNBC host Rachel Maddow defeat a defamation lawsuit from OAN.[6] After all, she said OAN "really literally is paid Russian propaganda." But as anyone who has ever watched NBC Parks & Recreation well knows, "literally" is rarely taken literally these days.

Maddow was commenting on a Daily Beast expose that revealed OAN and Russia-backed Sputnik shared a reporter. Because the facts of the article were conveyed accurately, Judge Cynthia Bashant threw the case out. On appeal, the Ninth Circuit Court of Appeals held that the challenged statement "was an obvious exaggeration, cushioned within an undisputed news story."

[6] *Herring Networks, Inc. v. Maddow*, 2021 U.S. App. LEXIS 24493 (9th Cir. 2021).

A Litigation Trump Card

Where Barstool departs from Hustler, ESPN, and Maddow is its willingness to throw its own credibility under the bus. As a website and podcast network, Barstool blends sports, commentary, and comedy. Asking readers and listeners – from devoted to casual – to accurately parse fact from fiction is a tall order.

Unsurprisingly, Barstool's legal defense was lifted straight out of Donald Trump's playbook.[7]

Back when Trump's Twitter was active (#RIP), the masses delighted and cringed in equal measure reading the former president's missives and musings on the platform. One person who fell into the latter camp was Stephanie Clifford, better known by her adult-film nom de guerre Stormy Daniels. Clifford, who claimed she had an affair with Trump in the mid-2000s, alleged that she had been threatened to leave the former president alone after she promised to divulge details of the affair to a magazine.

After she publicly unveiled a sketch of a Trump goon she claims approached her, Trump took to Twitter to repost a statement that claimed Clifford had lied about the incident. He referred to Clifford's accusations as a "total con job" and claimed the sketch was of a "non-existent man."

Clifford sued, but U.S. District Court Judge James Otero ruled in Trump's favor, deeming the statement rhetorical hyperbole. He reasoned that because Trump tweeted in "an incredulous tone," his words could not have been taken literally.

But wouldn't a reasonable audience view Trump's statement as a factual one, given that he knows whether he sent a goon after Clifford?

Given the choice to treat him literally or seriously, the court chose neither.

You F**Ed Up. You Trusted Us!

Once Trump established the "no reasonable person believes me" defense, it was inevitable that Fox News would run it. [8]

In 2016, Karen McDougal made headlines over her alleged affair with Trump, for which she was paid $150,000 by the *National Enquirer* for an exclusive they never ran. Fox News host Tucker Carlson gamely defended Trump, stating that McDougal "approached Donald Trump and threatened to ruin his career and humiliate his family" if he didn't give her money. Only, McDougal never actually approached Trump. She sued for defamation. Fox News won on rhetorical hyperbole grounds, notwithstanding the fact that Carlson exhorted his audience: "Remember the facts of the story. These are undisputed."

U.S. District Court Judge Mary Kay Vyskocil found that the "general tenor" of Carlson's show would inform viewers that he is not "stating actual facts" about the topics he discusses and is

[7] *Clifford v. Trump*, 2018 U.S. District LEXIS 178688 (C.D. Cal. Oct. 15, 2018).

[8] *McDougal v. Fox News Network*, LLC, 2020 U.S. Dist. LEXIS 175768 (S.D.N.Y. 2020).

instead engaging in "exaggeration" and "non-literal commentary." Vyskocil concluded that "any reasonable viewer" would have an appropriate amount of skepticism about the statements Carlson makes. But does that conclusion square with the evidence that Fox News viewers do in fact believe Fox News content?

As Tucker Carlson said in his 2003 book, *Politicians, Partisans, and Parasites*, "I'm always amazed by how many people assume that talk show hosts are merely pretending to be outraged or interested in the things they talk about.... I believe every bit of it, sometimes more than I say on the air. They hate hearing this, but it's true. In fact, I do believe everything I say."

False Flags and False Krakens

Rhetorical hyperbole is there to protect obvious gags, not the subtle stuff. To be clear, not every judge is taking the bait. Last year, a Texas Appellate court rejected InfoWars host Alex Jones' defense that he was merely engaged in rhetorical hyperbole when he called the Sandy Hook massacre a false flag.[9]

Similarly, ex-Kraken Trump Lawyer Sidney Powell's rhetorical hyperbole defense was rejected by Judge Carl J. Nichols of the District of Columbia.[10] Dominion Voting Systems sued Powell for claiming on television that the company was involved in "massive election fraud" and that she had "evidence . . . of substantial sums of money being given to family members of state officials who bought [Dominion] software."

Powell contended that no reasonable person could conclude that her statements were statements of fact because they "concern the 2020 presidential election, which was both bitter and controversial," and were made "as an attorney-advocate for [Powell's] preferred candidate and in support of her legal and political positions."

Suffice to say, the Court didn't agree that being in the tank for Trump was sufficient warning to viewers not to believe anything Powell said, holding that without a "common understanding of facts," the defense failed.

I Love Inside Jokes. I'd Love to Be a Part of One Someday.

If large swaths of the country believe a damaging lie about you, it's cold comfort that a federal judge finds them unreasonable.

Courts are understandably struggling to understand how provocateurs' words are understood by fans and casuals alike. But, rather than make assumptions about a hypothetical viewer's media literacy, judges should embrace their roles as fact-finders if they are determined not to let a jury hear the case. Survey data, which is used in trademark cases to provide evidence of consumer confusion, could be of value.

[9] *Jones v. Heslin*, 2020 Tex. App. LEXIS 2441 (Tex. App. 2020).

[10] *US Dominion, Inc. v. Powell*, 2021 U.S. Dist. LEXIS 150495 (D.D.C. 2021).

Consider the history of successful cases against the tabloids. While no reasonable person should believe what they read in the scandal sheets, real people do, and judges have punished harmful lies accordingly. Courts should resist the temptation to play media critic and simply hold liars accountable.

Privileging Opinion, Denigrating Discourse: How the Law of Defamation Incentivizes News Talk-Show Hyperbole

By Clay Calvert∗

I. INTRODUCTION

In September 2020, a federal court dismissed a defamation case against Fox News Network stemming from talk-show host Tucker Carlson's assertion that former Playboy model Karen McDougal had engaged in "a classic case of extortion" against President Donald J. Trump.[1] In tossing out McDougal's lawsuit, United States District Judge Mary Kay Vyskocil deemed the accusation "nonactionable hyperbole,"[2] rather than a provably false factual assertion of criminal activity that would have allowed the claim to proceed.[3] In brief, it fell on the opinion side of the often blurry line in defamation law separating protected opinions from actionable facts.[4]

Judge Vyskocil's conclusion, standing alone, is neither intriguing nor groundbreaking. After all, it is well established that rhetorical hyperbole is shielded from liability in defamation law.[5] Such speech is safeguarded "because the language used is so expansive that the reader or listener knows it is only an opinion, that it is not an assertion of fact."[6] Furthermore, the outcome was

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1. McDougal v. Fox News Network, LLC, 2020 U.S. Dist. LEXIS 175768, *5 (S.D.N.Y. Sept. 24, 2020).

2. *Id.* at *16.

3. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19–20 (1990) (noting that "a statement on matters of public concern must be provable as false before there can be liability under state defamation law," and adding that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"); *see also* Moldea v. New York Times Co., 22 F.3d 310, 314 (D.C. Cir. 1994) (observing that "an accusation of criminal conduct is a classic libel").

4. *See* Robert D. Sack, Sack on Defamation: Libel, Slander and Related Problems § 4:1, at 4–3 to 4–4 (5th ed. 2017) ("No task undertaken under the law of defamation is more elusive than distinguishing between fact and opinion.").

5. *See, e.g.,* Sindi v. El-Moslimany, 896 F.3d 1, 14 (1st Cir. 2018) ("Statements that are merely 'imaginative expression' or 'rhetorical hyperbole'—in other words, statements that 'no reasonable person would believe presented facts'—are not actionable." (quoting Levinsky's, Inc. v. Wal-Mart Stores, 127 F.3d 122, 128 (1st Cir. 1997)); Pierson v. Nat'l Inst. for Labor Rels. Research, 319 F. Supp. 3d 1100, 1108 (N.D. Ind. 2018) ("Rhetorical hyperbole is a well-recognized category of 'privileged defamation.'") (quoting Dilworth v. Dudley, 75 F.3d 307, 309 (7th Cir. 1996)).

6. Clay Calvert, Daniel V. Kozlowski & Derigan Silver, Mass Media Law 237 (21st ed. 2020).

unsurprising because the United States Supreme Court already had determined that words similar to extortion, such as "blackmail"[7] and "scab,"[8] are protected when loosely deployed.

What is notable, however, about Judge Vyskocil's analysis in *McDougal v. Fox News Network LLC*[9] is that it adds to growing judicial recognition that statements uttered on news-oriented talk shows should be presumptively discounted by viewers as bluster and bombast.[10] As Judge Vyskocil put it when discussing Fox News's "Tucker Carlson Tonight" program, the "'general tenor' of the show should . . . inform a viewer that he is not 'stating actual facts' about the topics he discusses and is instead engaging in 'exaggeration' and 'non-literal commentary.'"[11] She deemed persuasive Fox News Network's argument "that given Mr. Carlson's reputation, any reasonable viewer 'arrive[s] with an appropriate amount of skepticism' about the statements he makes."[12] Judge Vyskocil added that a determination of rhetorical hyperbole is especially likely "in the context of commentary talk shows like the one at issue here, which often use 'increasingly barbed' language to address issues in the news."[13]

This logic is extremely important. It provides a legal incentive for news talk shows to ramp up their general level of bloviation and exaggeration in order to defend against defamation lawsuits. In a nutshell, and as the title of this Article connotes, cases such as *McDougal* laudably protect and privilege political opinions but, in doing so, they also exacerbate the erosion of meaningful dialogue and discourse on news talk shows by incentivizing hyperbole. Bluntly stated, Tucker Carlson's brand of political discussion allows him to cast aspersions and then to claim no one would believe them as factual statements.[14] Or, as Hollywood Reporter legal correspondent Eriq Gardner rather wryly wrote in summing up the ruling, "[d]on't always mistake what Tucker

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7. *See* Greenbelt Coop. Pub. Ass'n v. Bresler, 398 U.S. 6, 14 (1970) (concluding that "even the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable").

8. *See* Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 285–86 (1974) (concluding that "Jack London's 'definition of a scab' is merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join").

9. 2020 U.S. Dist. LEXIS 175768 (S.D.N.Y. Sept. 24, 2020).

10. As addressed below, *McDougal* follows closely on the heels of another federal district court decision, *Herring Networks, Inc. v. Maddow*, 445 F. Supp. 3d 1042 (S.D. Cal. 2020), involving a defamation case stemming from comments uttered by the host of a cable news channel talk show. *See infra* notes 21–30 and accompanying text (addressing *Herring Networks*).

11. *McDougal*, 2020 U.S. Dist. LEXIS 175768, at *17 (quoting Milkovich v. Lorain J. Co., 497 U.S. 1, 20–21 (1990); Levinsky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 128 (1st Cir. 1997)).

12. *Id.* (alteration in original) (quoting 600 W. 115th Corp. v. Von Gutfeld, 603 N.E.2d 930, 936 (1992)).

13. *Id.* at *14 (citing Rodney A. Smolla, 1 Law of Defamation § 6:92 (2d ed. 2020)).

14. As one newspaper tidily encapsulated the latter part of this principle in reporting on Judge Vyskocil's ruling, "Mr. Carlson's viewers may not necessarily believe everything they hear." Michael M. Grynbaum & Nicholas Bogel-Burroughs, *Karen McDougal's Defamation Suit Against Fox News is Dismissed*, N.Y. TIMES (Sept. 24, 2020), https://www.nytimes.com/2020/09/24/business/media/tucker-carlson-karen-mcdougal-lawsuit.html.

Carlson says for fact."[15] Indeed, Judge Vyskocil reasoned that Carlson's "overheated rhetoric is precisely the kind of pitched commentary that one expects when tuning in to talk shows like Tucker Carlson Tonight, with pundits debating the latest political controversies."[16] The irony of Fox News Network's defense here is readily apparent: Statements made on a news channel should not be trusted or treated as factual.[17]

To be clear, Judge Vyskocil did not go so far to as to hold that the extortion accusation was an opinion *solely* because it was leveled on Tucker Carlson Tonight. The nature of Carlson's program, instead, was one facet of a larger contextual picture. That broader framework included:

1) the fact that "accusations of crimes [such as extortion] . . . are unlikely to be defamatory when, as here, they are made in connection with debates on a matter of public or political importance;"[18]

2) Carlson's statements, both before and after the extortion allegation, suggested he was pointing out apparent hypocrisy;[19] and

3) what Judge Vyskocil called "disclaimers" uttered by Carlson, including openly casting doubt on his own source for the extortion allegation—former Trump attorney Michael Cohen—and Carlson's use of the modifying phrase "sounds like" immediately prior to uttering "a classic case of extortion."[20]

Significantly, *McDougal* was not the only 2020 defamation case involving a talk show on a cable news channel in which a judge pointed to the nature of the program as a key factor for holding that a statement was protected opinion. *Herring Networks, Inc. v. Maddow*[21] centered on a claim by the owner of the heavily conservative-leaning One America News Network ("OAN") against MSNBC talk-show host Rachel Maddow.[22] During a July 2019 segment of The Rachel Maddow Show, the eponymous host asserted that OAN is "the most obsequiously pro-Trump right wing

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15. Eriq Gardner, *Fox News Beats Lawsuit Over Tucker Carlson's "Extortion" Analogy*, HOLLYWOOD REP. (Sept. 24, 2020), https://www.hollywoodreporter.com/thr-esq/fox-news-beats-lawsuit-over-tucker-carlsons-extortion-analogy.

16. *McDougal*, 2020 U.S. Dist. LEXIS 175768, at *19.

17. As the author of this Article told *Washington Post* media critic Erik Wemple, there is "more than a small dose of irony in arguing in your defense that what you are stating on a news network is not factual." Erik Wemple, *The Recklessness of Tucker Carlson*, WASH. POST (June 26, 2020), https://www.washingtonpost.com/opinions/2020/06/26/recklessness-tucker-carlson/.

18. *McDougal*, 2020 U.S. Dist. LEXIS 175768, at *14.

19. *Id.* at *15

20. *Id.* at *18.

21. 445 F. Supp. 3d 1042 (S.D. Cal. 2020).

22. *See* Erik Wemple, *Vanity Fair 'Updates' Story About Donald Trump Jr., OAN*, WASH. POST (May 9, 2020), https://www.washingtonpost.com/opinions/2020/05/09/vanity-fair-updates-story-about-donald-trump-jr-oan/ (contending that OAN "takes a back seat to no one—not even Fox News's 'Hannity'—when it comes to jaw-dropping innovations in pro-Trump news coverage").

news outlet in America [and] really literally is paid Russian propaganda."[23] United States District Judge Cynthia Bashant concluded that the "really literally is paid Russian propaganda" assertion was protected opinion and she dismissed the complaint.[24]

In reaching that determination, she addressed several variables, including the forum of the The Rachel Maddow Show.[25] The judge noted that while viewers of news channels want facts, "Maddow made the allegedly defamatory statement on her own talk show news segment where she is invited and encouraged to share her opinions with her viewers."[26] In brief, Judge Bashant drew a pivotal boundary separating a newscast from a news talk show, with the former providing a venue where one expects facts and the latter offering a location where one anticipates opinions.[27] The "medium" of a news talk show, to use Judge Bashant's term, thus made "it more likely that a reasonable viewer would not conclude that the contested statement implies an assertion of objective fact."[28] That holding is not surprising, particularly given that Maddow delivers remarks on her show in a format that one media critic calls "sarcasm news," replete with "ironic Maddowian intonations."[29] The case is now on appeal to the U.S. Court of Appeals for the Ninth Circuit, with an attorney for Herring Networks contending that "[t]he words—'that OAN is really literally paid Russian propaganda'—do not convey an opinion. This is a blatant defamatory falsehood."[30]

This Article initially explains in Part II how the decisions in both *McDougal* and *Herring Networks*: 1) fully comport with the principle that opinions about politics and matters of public concern are privileged in First Amendment[31] jurisprudence, and 2) square with the notion that

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23. *Herring Networks*, 445 F. Supp. 3d at 1046.

24. *Id.* at 1054.

25. In addition to addressing the forum of the *The Rachel Maddow Show*, the court also considered: 1) the nature of the entire segment in which Maddow made her allegedly defamatory remarks, and 2) the specific context of the "language surrounding the allegedly defamatory statement" by Maddow, including the fact that Maddow was openly drawing much of her views from a *Daily Beast* article that described how a reporter for OAN was also being paid for her work with a Russian propaganda outlet called Sputnik. *Id.* at 1051–53.

26. *Id.* at 1049.

27. *See id.* at 1050 (opining that "Maddow's show is different than a typical news segment where anchors inform viewers about the daily news. The point of Maddow's show is for her to provide the news but also to offer her opinions as to that news").

28. *Id.*

29. Alissa Quart, *The Sarcastic Times*, COLUM. JOURNALISM REV. (Mar./Apr. 2009), https://archives.cjr.org/essay/the_sarcastic_times.php?page=all.

30. Press Release, Herring Networks, Inc., *One America News Elevates $10 Million Defamation Lawsuit Against Rachel Maddow and MSNBC to Ninth Circuit*, OAN (June 3, 2020), https://www.oann.com/one-america-news-elevates-10-million-defamation-lawsuit-against-rachel-maddow-and-msnbc-to-ninth-circuit/ (emphasis omitted). *See* Appellant's Opening Brief at 29, Herring Networks, Inc. v. Maddow, No. 20-55579 (9th Cir. Oct. 12, 2020) ("Maddow's show is not mere political punditry.").

31. The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-five years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties applicable for governing the actions of state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding "that freedom of speech and of the press—which are protected by the First

context is key when determining if a statement is one of fact or opinion.[32] Part III then argues that despite such congruency with extant legal principles, *McDougal* and *Herring Networks* unfortunately foster a communicative environment on news talk shows that encourages—maybe even values—"overheated rhetoric,"[33] "exaggeration"[34] and "colorful commentary"[35] by transforming those communicative characteristics into a key facet of an opinion defense against defamation lawsuits targeting comments by the hosts of such programs.[36] In other words, just as courts today in defamation cases hold that audiences should expect opinions and hyperbole when speech is conveyed in online social media fora,[37] so too should the viewers of television news talk shows—as a genre of programming—expect hyperbole, thereby instantiating into defamation law the underpinnings of a ready-made opinion defense. In short, it pays off in defamation law for news-oriented talk shows to routinely trade in over-the-top opinions and bombast rather than to develop a reputation for rational, even-handed debate regarding political issues where viewers expect fact-based assertions. Perhaps more provocatively, decisions such as *McDougal* and *Herring Networks* reward the likes of Fox News and MSNBC for transforming news talk shows into infotainment spectacles.[38] Part IV concludes by calling on courts to consider the nature of specific news talk shows on a program-by-program basis in defamation lawsuits rather than continue to flesh out a nascent, genre-based presumption that news talk shows as a whole trade in protected opinions.[39]

II. THE VALUE OF POLITICAL OPINIONS IN FIRST AMENDMENT LAW AND THE ROLE OF CONTEXT IN THE FACT-VERSUS-OPINION DICHOTOMY

This Part has two sections. Section A provides a primer on the high value placed on opinions about political issues and matters of public concern in First Amendment jurisprudence. Section

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Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

32. *See infra* Part II.

33. McDougal v. Fox News Network, LLC, 2020 U.S. Dist. LEXIS 175768, *19 (S.D.N.Y. Sept. 24, 2020).

34. Herring Networks, Inc. v. Maddow, 445 F. Supp. 3d 1042, 1050 (S.D. Cal. 2020).

35. *Id.*

36. *See infra* Part III.

37. *See* Ganske v. Mensch, 2020 U.S. Dist. LEXIS 151152, at *12–13 (S.D.N.Y. Aug. 20, 2020) (noting that "[i]n analyzing the unique context of statements made on Internet fora, courts have emphasized the generally informal and unedited nature of these communications," and adding that "the fact that Defendant's allegedly defamatory statement that Plaintiff's tweet was 'xenophobic' . . . appeared on Twitter conveys a strong signal to a reasonable reader that this was Defendant's opinion"); Jacobus v. Trump, 51 N.Y.S.3d 330, 339 (N.Y. Sup. Ct. 2017) (addressing the influence of the internet as a medium of expression on whether courts consider statements conveyed on it to be fact or opinion); *see also* Lyrissa Barnett Lidsky & RonNell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL'Y & L. 155, 178 (2016) (observing that some libel opinions "explicitly reference the informal nature of social-media sites as a basis for branding allegedly libelous speech posted there as opinion").

38. *See* CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 103 (2000) (defining infotainment as "a bastardized hybrid of news and entertainment that panders to viewers' wants rather than attempting to meet their needs").

39. *See infra* Part IV.

B then addresses the pivotal role that context plays in sorting out whether an allegedly defamatory assertion is an actionable fact or a protected opinion.

A. The Primacy of Political Opinions Under the First Amendment

In both *McDougal* and *Herring Networks*, federal district courts protected the ability of television news talk-show hosts to give their opinions on politically oriented issues.[40] In *McDougal*, the issue was whether a woman with whom President Trump allegedly had a year-long affair about a decade before he became president had later tried to extort Trump in exchange for her silence about the matter.[41] In *Herring Networks*, the subject on which Rachel Maddow expressed her view was whether a news organization known for supporting President Trump was engaged in propaganda paid for by Russia.[42]

Protecting opinions on political matters is, in fact, deeply engrained in First Amendment jurisprudence, not just within the realm of defamation law.[43] Indeed, Professor Ashutosh Bhagwat contends that speech "advocating political opinions, no matter how objectionable . . . is clearly entitled to well-neigh absolute constitutional protection."[44] To wit, the U.S. Supreme Court has protected "Fuck the Draft" as an opinion regarding the merits of conscription and the war in Vietnam.[45] Similarly, it has safeguarded the right to burn the flag of the United States of American to express an opinion opposing the renomination of Ronald Reagan by the Republican Party in 1984 for the position of the nation's president.[46]

When it comes to tort law, the Court has invoked the First Amendment to protect from liability members of the Westboro Baptist Church who expressed their opinions about "the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy."[47] Similarly, the Court protected Hustler Magazine's ability to express its opinion in a fictional ad parody that the Reverend Jerry Falwell was a hypocrite.[48] Importantly, Falwell was more than just a religious leader; he was "active as

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40. *See* McDougal v. Fox News Network, LLC, 2020 U.S. Dist. LEXIS 175768, at *27 (S.D.N.Y. Sept. 24, 2020); Herring Networks, Inc. v. Maddow, 445 F. Supp. 3d 1042, 1055 (S.D. Cal. 2020).

41. *See* 2020 U.S. Dist. LEXIS 175768, at *1 ("Specifically, Ms. McDougal alleges that the host of the show, Tucker Carlson, accused her of extorting now-President Donald J. Trump out of approximately $150,000 in exchange for her silence about an alleged affair between Ms. McDougal and President Trump.").

42.445 F. Supp. 3d at 1046.

43. *See* Philip Hamburger, *Getting Permission*, 101 NW. U. L. REV. 405, 482 (2007) ("It has become commonplace to assume that the First Amendment primarily protects political opinion."); Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 225, 276 (1994) ("First Amendment protection is at its strongest when government seeks to regulate expression of political opinions.").

44. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 60 (2012).

45. Cohen v. California, 403 U.S. 15, 16 (1971).

46. Texas v. Johnson, 491 U.S. 397, 406 (1989).

47. Snyder v. Phelps, 562 U.S. 443, 454 (2011).

48. Hustler Magazine v. Falwell, 485 U.S. 46, 48 (1988).

a commentator on politics and public affairs,"[49] thus rendering the ability to issue opinions critical of him even more imperative. Indeed, in ruling in favor of Hustler Magazine and its publisher, Larry Flynt, the Court stressed "the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" under the First Amendment.[50] This taps into the Court's observation in the defamation case of *Gertz v. Robert Welch, Inc.*, that the proper remedy for opinions with which one disagrees is not to be found in a court of law, but rather by voicing competing opinions in the metaphorical marketplace of ideas.[51]

Indeed, in the defamation case of *Milkovich v. Lorain Journal Co.*, the Court clarified that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."[52] The Court in *Milkovich* added that requiring defamation plaintiffs to prove that a message states actual facts about them assures "that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation."[53] In delivering the Court's opinion, Chief Justice William Rehnquist noted that the use of "loose, figurative, or hyperbolic language"[54] would tend to negate that an allegation of criminal activity was to be taken as a factual assertation.

In short, to the extent that the courts in both *McDougal* and *Herring Networks* protected opinions relating to matters of political and public concern, the decisions fall neatly in line with a long tradition of safeguarding such viewpoints under the First Amendment. As the next section indicates, those rulings also are in accord with judicial precedent that takes into account context—including the journalistic context of where a story appears or is broadcast—in determining if a statement should be deemed factual or opinionated.

B. Journalistic Context in Libel Law

In distinguishing facts from opinions, lower courts today often consider multiple factors, including the journalistic or media context in which a statement is uttered or appears.[55] Consider, for example, the state libel laws of New York and Arizona, both of which U.S. District Judge Mary Kay Vyskocil deemed relevant in *McDougal*.[56] New York's highest appellate court

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49. *Id.* at 47.

50. *Id.* at 50.

51.418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); *see also* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992) ("The 'marketplace of ideas' is perhaps the most powerful metaphor in the free speech tradition.").

52.497 U.S. 1, 20 (1990).

53. *Id.*

54. *Id.* at 21.

55. *See* Sack, *supra* note 4, at § 4:3.1, at 4–33 to 4–34 (noting that "[a] letter to the editor, . . . an editorial or op-ed column or broadcast, a cartoon, a critical parody or satire of a public person, a sports column, criticism on a radio talk show, or a critical review are ordinarily not actionable") (internal citations omitted).

56. *See* McDougal v. Fox News Network, LLC, 2020 U.S. Dist. LEXIS 175768, at *9 (S.D.N.Y. Sept. 24, 2020) ("The Court will not conduct a full choice of law analysis here . . . because . . . the two potential sources of law—

has ruled that, among other factors, "either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are" relevant in the fact-versus-opinion inquiry.[57]

Under this factor, courts examine "the over-all context in which the assertions were made," including "the nature of the particular forum" in which a statement appeared or was published.[58] For example, "a letter to the editor of a professional journal [is] a medium that is typically regarded by the public as a vehicle for the expression of individual opinion."[59] Similarly, New York's highest appellate court has observed that a newspaper's

> Op Ed page is a forum traditionally reserved for the airing of ideas on matters of public concern. Indeed, the common expectation is that the columns and articles published on a newspaper's Op Ed sections will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion.[60]

Such journalistic context standing alone, however, does not necessarily dictate whether a statement will be characterized as fact or opinion. As the New York Court of Appeals put it, "an article's appearance in the sections of a newspaper that are usually dedicated to opinion does not automatically insulate the author from liability for defamation."[61] The specific journalistic forum thus simply provides a helpful—not determinative—metric or variable in the fact-versus-opinion analysis.[62]

Of particular relevance for this Article is the ruling of a New York trial court in *Huggins v. Povitch*.[63] It pivoted on allegedly defamatory remarks made by a guest named Melba Moore on The Maury Povich Show, a syndicated television talk show.[64] In applying New York law, Justice Beverly S. Cohen observed that "when . . . statements by their context, form and purpose indicate that they are opinions and not assertions of fact, a libel action cannot be maintained."[65] In separating facts from opinions, Justice Cohen wrote that "the contextual approach long taken by New York" includes examining "the nature of the particular forum" in which the statements

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New York and Arizona—are identical on all relevant points and because Defendant's constitutional defenses may apply regardless of which state's law governs.").

57. Mann v. Abel, 885 N.E.2d 884, 886 (N.Y. 2008).

58. Brian v. Richardson, 660 N.E.2d 1126, 1130 (N.Y. 1995).

59. *Id.*

60. *Id.*

61. *Id.*

62. *See id.* (noting "that the forum in which a statement has been made, as well as the other surrounding circumstances comprising the 'broader social setting,' are only useful gauges for determining whether a reasonable reader or listener would understand the complained-of assertions as opinion or statements of fact").

63. 1996 WL 515498 (N.Y. Sup. Ct. Apr. 19, 1996).

64. *Id.* at *1.

65. *Id.* at *6.

were made.[66] Here, she focused both on the nature of talk shows generally and, more specifically, on The Maury Povich Show.[67]

"The talk show format provides a forum for debate of public issues and the expression of opinion," Justice Cohen reasoned, adding that it involves "give and take" between the host and the interviewees. [68] More specifically regarding The Maury Povich Show, Justice Cohen found that it "generally focuses upon current controversial topics of interest and debate by presenting invited guests with relevant backgrounds to share their experiences, observations and opinions with members of the studio audience."[69] When viewed collectively along with other variables,[70] the nature of talk shows and The Maury Povich Show factored into Justice Cohen's conclusion that it would be "obvious to the viewer that hotly contested matters are about to be discussed and that Moore's remarks are likely to reflect a certain personal bias that should not be taken as objective fact."[71]

Another defamation case, albeit one applying California law rather than New York's principles, in which a court examined the nature of a talk show is *Condit v. Dunne*.[72] There, United States District Judge Peter Leisure considered the syndicated radio program The Laura Ingraham Show.[73] He did so when sorting out whether allegedly defamatory comments made on the show by author-defendant Dominick Dunne about U.S. Congressman Gary Condit regarding Condit's possible connection to the disappearance of Chandra Levy were ones of fact or opinion.[74] Dunne had argued that the forum of a radio talk show is one in which listeners recognize that guests "offer their views on the show rather than facts."[75] Judge Leisure acknowledged a distinction between talk shows and news publications.[76] He rather bluntly—and perhaps disparagingly toward Ingraham, were she to view herself as a truth spreader—opined, after reviewing the transcript of Ingraham's interview with Dunne, that "listeners seeking the facts likely do not tune in to 'The Laura Ingraham Show.'"[77] Yet, just as New York courts consider the journalistic

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66. *Id.*

67. *Id.* at *7.

68. *Id.*

69. *Id.*

70. Among other contextual factors that were relevant for Justice Cohen on the fact-versus-opinion issue were the specific topic under discussion—namely, a "bitter divorce"—and the fact that Povich and other guests repeatedly stated that the guest who uttered the allegedly defamatory remarks was rendering "her own personal views" about the divorce in question. *Id.*

71. *Id.*

72. 317 F. Supp. 2d 344 (S.D.N.Y. 2004). The court debated between applying the law of California and the law of New York before ultimately concluding "that California has a more significant interest in the litigation than does New York, and accordingly [the court] applies California's defamation law." *Id.* at 355.

73. *Id.* at 348–50.

74. *Id.*

75. *Id.* at 362.

76. *Id.* at 362–63.

77. *Id.* at 363.

context or media forum where a statement is made to be a useful but non-controlling factor on the fact-versus-opinion issue,[78] Judge Leisure held that Dunne was not immune from liability for defamation simply because his comments were made on Ingraham's show.[79] Indeed, the judge concluded that other factors suggesting that Dunne's comments would be taken literally by listeners were sufficient to override the opinion-oriented, talk-show context on which he made them.[80]

Although neither The Maury Povich Show in *Huggins* nor The Laura Ingraham Show in *Condit* was a cable news channel talk show, the cases nonetheless demonstrate that judicial consideration of the nature of a talk-show forum in cases such as *McDougal* and *Herring Networks* is not unusual. It is, instead, par for the judicial course when sussing out the difference between facts and opinions.

Significantly for battles such as those involving Tucker Carlson and Rachel Maddow, New York courts also consider as part of the journalistic forum analysis the reputation of the individual who delivers or reports the allegedly defamatory remarks.[81] This, in other words, is where it seemingly pays off in spades—at least when it comes to defending against defamation claims—for a news talk-show host to garner a reputation for engaging in hyperbole, sarcasm and irony, not a straight-up delivery of facts and opinions. Cultivating such an on-air persona and even, perhaps, promoting it via advertisements and marketing might well spell the difference between a statement being protected as an expression of opinion rather than subject to liability as a factual assertion.

Arizona's law of defamation, which Judge Vyskocil in *McDougal* deemed "identical on all relevant points"[82] with that of New York, also considers "the *medium* and *context* in which the statement was published"[83] in resolving the fact-versus-opinion issue. As the Arizona Court of Appeals wrote in 1999, "[s]tatements that can be interpreted as nothing more than rhetorical political invective, opinion, or hyperbole are protected speech."[84] In resolving whether allegedly defamatory remarks fall into one of those safeguarded categories, the appellate court added that "consideration should be given to the context and all surrounding circumstances, including the

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78. *Supra* notes 61–62 and accompanying text.

79. *See Condit*, 317 F. Supp. 2d at 363 ("Defendant, however, is not immunized from a defamation suit simply because he recited false accusations on a talk show as opposed to a news program.").

80. *See id.* (asserting that "a reasonable listener, aware of the media frenzy and cognizant of the apparent nature of 'The Laura Ingraham Show,' nonetheless could interpret defendant's comments as assertions of fact, because the comments themselves set forth specific, detailed bases for the accusation that plaintiff was criminally involved in Ms. Levy's disappearance," and adding that "[w]hile the setting for defendant's comments would suggest that he merely voiced his opinion, the suggestion is overcome by the content of defendant's statements, because the statements can be interpreted as explicit republications of actual, detailed facts").

81. *See* Brian v. Richardson, 660 N.E.2d 1126, 1130 (N.Y. 1995) ("Finally, the identity, role and reputation of the author may be factors to the extent that they provide the reader with clues as to the article's import.").

82. McDougal v. Fox News Network, LLC, 2020 U.S. Dist. LEXIS 175768, at *9 (S.D.N.Y. Sept. 24, 2020).

83. Sign Here Petitions LLC v. Chavez, 402 P.3d 457, 463 n.3 (Ariz. Ct. App. 2017) (emphasis in original). Arizona embraces the State of Washington's approach in this regard. *Id.*

84. Burns v. Davis, 993 P.2d 1119, 1129 (Ariz. Ct. App. 1999).

impression created by the words used and the expression's general tenor."[85] In short, as in the Empire State, context—including the particular medium on which speech is conveyed—is part and parcel of the fact-versus-opinion analysis in Arizona.

This Part illustrated that the decisions in *McDougal* and *Herring Networks*: 1) comport with a long First Amendment tradition of safeguarding political opinions, and 2) are in accord with typical judicial consideration in defamation cases of the journalistic or media context in which a statement appears or is broadcast when resolving whether it is one of fact or opinion. The next Part, however, argues that both decisions facilitate the denigration of discourse on news talk shows by incentivizing hosts such as Tucker Carlson and Rachel Maddow to engage in constant hyperbole and exaggeration in order to better defend against defamation lawsuits.

III. THE DETERIORATION OF POLITICAL DISCOURSE: AN UNSEEMLY FLIPSIDE OF THE FREE SPEECH VICTORIES IN MCDOUGAL AND HERRING NETWORKS

Among the time-honored core rationales for protecting free expression under the First Amendment is the facilitation of democratic self-governance.[86] Alexander Meiklejohn was, as one scholar notes, "perhaps the leading proponent of the self-government theory."[87] Meiklejohn maintained that the dual points of ultimate interest in safeguarding political speech are serving "the minds of the hearers"[88] and "the voting of wise decisions."[89] In other words, political discussion is essential to help citizens make informed choices.[90]

Under this Meiklejohnian view, as former Yale Law School Dean Robert Post writes, "[t]he quality of public debate . . . is to be measured by its capacity to facilitate public decision-making."[91] Indeed, Meiklejohn used the metaphor of a traditional townhall meeting, where citizens come together to discuss public issues, to also suggest that a certain amount of order is needed to elevate the quality of this debate and to prevent a "dialectical free-for-all."[92] Today, television news talk shows are in some ways, as the author of this Article contended more than

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85. *Id.*

86. *See* David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 360 (2015) (observing that one of "the foundational rationales for extending special protection to speech" is "its necessity as a means of effectuating democratic self-governance").

87. MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 9 (2001).

88. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

89. *Id.*

90. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 46 (1986) (observing that for Meiklejohn, "the principle of free speech plays a practical role for a self-governing society, protecting discussion among the citizens so that they can best decide what to do about the issues brought before them for decision").

91. ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY MANAGEMENT 271 (1995).

92. MEIKLEJOHN, *supra* note 88, at 23. He added that "[t]he First Amendment . . . is not the guardian of unregulated talkativeness." *Id.* at 25.

two decades ago, the modern equivalent of townhall meetings where matters of public concern are discussed and debated for all to watch.[93]

Decisions such as those in *McDougal* and *Herring Networks* carry the potential to erode the quality of political discourse by rewarding news talk-show hosts with an opinion defense, partly because the general tone and tenor of their programs is loaded with colorful commentary and features factual exaggeration,[94] and, in so doing, potentially undermine wise and informed political decision-making. Certainly, viewers expect news talk-show hosts to offer their opinions on issues. That is a given. But it is quite another thing to build into the law a contextual presumption that seemingly factual assertions—"really literally is paid Russian propaganda"[95] and "a classic case of extortion"[96]—should be discounted to a large degree because they are uttered on a news talk show.

Judge Vyskocil in *McDougal* seemingly was edging her way toward embracing such a presumption. That was evident when she concluded that "overheated rhetoric is precisely the kind of pitched commentary that one expects when tuning in to talk shows like Tucker Carlson Tonight."[97] In other words, viewers expect hyperbole not just on Carlson's show, but also, as the judge wrote, on shows "like" it.[98]

Are the "minds of the hearers," to use Meiklejohn's fine phrase,[99] actually served in positive fashion by Carlson's "bloviating for his audience,"[100] as Judge Vyskocil suggested Carlson's statements might be characterized, when it comes to "the voting of wise decisions"?[101] That seems highly doubtful, but Carlson's approach for conducting a news talk show certainly seems to serve his ratings. *The New York Times* recently reported that "[i]n June and July [2020], Fox

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93. Clay Calvert, *Meiklejohn, Monica, & Mutilation of the Thinking Process*, 26 PEPP. L. REV. 37, 56 (1998) (asserting that "television news talk shows, call-in radio, and news websites are the modern-day equivalent of town meetings (even if the participants often are pundits or journalists themselves)" and adding that journalists, as the moderators of these virtual townhall meetings, "must exercise control, at the very least, because their voices at the metaphorical town meeting are certainly the loudest and most powerful due to their increased access to the means of mass communication for transmitting and propagating their views").

94. *See* Herring Networks Inc. v. Maddow, 445 F. Supp. 3d 1042, 1053 (S.D. Cal. 2020) (noting that "Maddow had inserted her own colorful commentary into and throughout the segment, laughing, expressing her dismay (i.e., saying 'I mean, what?') and calling the segment a 'sparkly story' and one we must 'take in stride,'" and adding that for Maddow "to exaggerate the facts and call OAN Russian propaganda was consistent with her tone up to that point, and the Court finds a reasonable viewer would not take the statement as factual given this context"); McDougal v. Fox News Network, LLC, 2020 U.S. Dist. LEXIS 175768, at *17 (S.D.N.Y. Sept. 24, 2020) (finding that the "'general tenor' of [Carlson's] show should then inform a viewer that he is not 'stating actual facts' about the topics he discusses and is instead engaging in 'exaggeration' and 'non-literal commentary'").

95. *Herring Networks*, 445 F. Supp. 3d at 1046.

96. *McDougal*, 2020 U.S. Dist. LEXIS 175768, at *5.

97. *Id.* at *19.

98. *Id.*

99. MEIKLEJOHN, *supra* note 88, at 25.

100. *McDougal*, 2020 U.S. Dist. LEXIS 175768, at *17.

101. MEIKLEJOHN, *supra* note 88, at 25.

News was the highest-rated television channel in the prime-time hours of 8 to 11 p.m. Not just on cable. Not just among news networks. *All* of television."[102] Carlson's show airs during that window at 8:00 p.m. weekdays.[103]

Now, however, there's another fiscal benefit beyond advertising-generating ratings for the over-the-top tack of Carlson and his ilk, namely, a ready-made defense against defamation lawsuits that no one would believe that what such hosts state are factual assertions. In other words, there are two economic incentives for news talk shows to gravitate toward hyperbole and exaggeration: attracting higher ratings and defending against pro-plaintiff defamation verdicts. Carlson's and Maddow's shows may appear on cable news channels where one might reasonably expect to hear facts, but the nature of how they conduct their programs lets viewers know not to expect them. In brief, the rulings in *McDougal* and *Herring Networks*, while safeguarding political opinions, incentivize a news talk-show environment that privileges bluster and fulmination over reason and rationality. It pays off—at least when it comes to defending against defamation lawsuits—for news talk shows to charge at full speed toward the issues and people they attack and do so with a verbal arsenal packed with exaggeration, hyperbole, and sarcasm.

IV. CONCLUSION

The U.S. Supreme Court famously observed more than fifty-five years ago in the seminal defamation case of *New York Times Co. v. Sullivan* that in the United States there is a "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[104] In ruling in favor of the talk-show hosts in both *McDougal* and *Herring Networks*, Judge Vyskocil and Judge Bashant certainly embraced that spirited ethos. Furthermore, as Part II pointed out, the judges' logic and reason are fully consistent with the long-standing notion that political opinions are privileged under the First Amendment and that the journalistic context or forum where speech is conveyed is relevant in determining if that speech should be regarded as fact or opinion.[105]

This Article, however, raised what might be considered an axiological question of whether, in promoting the value of robust and wide-open discourse on matters of political and public concern, decisions such as *McDougal* and *Herring Networks* denigrate the values of reasoned debate and an informed citizenry by encouraging hyperbole and exaggeration on television news talk shows. Certainly, neither judge ruled that solely because the allegedly defamatory comments were uttered on such shows meant that they necessarily should be treated as opinions. Each, however, made it clear that in taking a larger contextual approach when examining the fact-versus-opinion dichotomy, the news talk-show context represents an important contextual variable that militates toward a finding of opinion.[106] The more television news talk-show hosts

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102. Michael M. Grynbaum, *Boycotted. Criticized. But Fox News Leads the Pack in Prime Time*, N.Y. TIMES (Aug. 9, 2020), https://www.nytimes.com/2020/08/09/business/media/fox-news-ratings.html (emphasis in original).

103. *Tucker Carlson Tonight*, FOX NEWS CHANNEL, https://www.foxnews.com/shows/tucker-carlson-tonight (last visited Oct. 15, 2020).

104. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

105. *Supra* Part II.

106. *See supra* notes 12–13, 16 and 26–27.

engage in overheated rhetoric, exaggeration, and colorful commentary, the more likely this presumption is to become cemented in defamation law and, in turn, the more likely those hosts are to wiggle off the hook of defamation liability.

Defamation law, however, should not encourage a race to the bottom when it comes to political discourse—a race to rhetoric over reason, as it were. Rather than adopting a sweeping, genre-based presumption that news talk shows are expected by viewers to trade in protected opinions, courts should carefully consider each program, along with the reputation of its host, on an individual basis. That approach might at least slow the development of a genre-wide presumption. Ultimately, of course, news talk-show hosts and their respective channels will determine the tenor of their own programs based on a quest for ratings, but defamation law should not add incentive to the denigration of discourse about matters of public concern.

This article was originally published in the Pepperdine Law Review, Volume 2020, Issue 1, pp. 55-70. MLRC republishes it with permission from the Pepperdine Law Review and Professor Clay Calvert.

The Defense of Rhetorical Hyperbole: How Is It Being Used (or Overused) in Today's Polarized Environment?

Theodore J. Boutrous, Jr., Gibson Dunn
Professor Clay Calvert, University of Florida College of Law
Dan Novack, Penguin Random House
George Freeman, MLRC

This is a transcript of a May 13, 2021 Zoom discussion. The text has been edited for clarity and readability.

George Freeman

This is a really interesting and timely discussion that we're going to have on the libel defense of rhetorical hyperbole. And we have with us three real experts in that area. We have Ted Boutrous, who is a partner in the LA Office of Gibson Dunn and is the co-chair of the firm's litigation group and a member of the firm's executive committee. In 2019, at a dinner I attended, Ted was honored with the award of "Litigator of the Year" by the American Lawyer. And in part, the award was given for his representation of CNN and Jim Acosta in the case where the Trump Administration pulled his press credentials because they didn't like the questions he was asking. And Ted also represented Brian Karem, the Playboy reporter, on the same issue.

We also have with us Clay Calvert. Clay is a professor at the University of Florida College of Law and is director of the Brechner First Amendment Project there. He won an award as the Teacher/Scholar of the Year for the entire University of Florida in 2020-21. He is the co-author of a very popular media law textbook that I think is used mainly by undergraduates.

And finally, we have Dan Novak. Dan is Senior Counsel at Penguin Random House, so he is in book publishing, and is best known to me as being the Co-Chair of the New York State Bar Association's Media Law Committee, which has wrestled with a whole variety of problems here in New York. Dan has written a recent article in the Hollywood Reporter on the very subject that we're going to be discussing today. So welcome all and thank you panelists for joining us.

Ted, let me start with you. And talk a little bit, if you could, about the case you handled in this area that I think raises a lot of the questions that I have about this defense. It's a good starting point. And that's the Rachel Maddow case. And if you could just very briefly describe the case and maybe give a little extra emphasis on the rhetorical hyperbole part of it.

Ted Boutrous

Sure, George, it's great to be with everyone. And I think this really is a timely topic because we're seeing rhetorical hyperbole being asserted as a defense by everybody. And the Rachel Maddow case, I think, falls really squarely in the heart of the opinion and rhetorical hyperbole doctrine. By the way, the libel suit was filed by OAN, so a supposed broadcast news network has sued the anchor at MSNBC, and MSNBC itself, for defamation because Rachel did a piece in which the whole focus was a Daily Beast article that had come out that day. And the Daily Beast

article reported that a correspondent on OAN was also simultaneously on the payroll of Sputnik, the Russian propaganda arm. And she called it the most sparkly story of the day. She did a very entertaining, lively description of the article, used quotes from the article and made very clear throughout her segment that she was just describing and characterizing what the article reported. There was no challenge to the article itself by OAN when it sued. And the article itself reported that this Kristian Rouz, the reporter, had written like 1000 articles for Sputnik; he was getting paid while he was reporting on-air. The article in the Daily Beast also had quoted an FBI agent who said, "this completes the merger between Russian state-sponsored propaganda and American conservative media."

And so, Rachel thought this was amazing. And she said, "you hear a lot where boy this sounds like Russian propaganda," and then she said - these are the six words they challenged - that OAN "really literally is paid Russian propaganda." And OAN sued and said that suggested that they were actually an organ of the Russian government and that they were committing treason, and that OAN itself was part of a Russian operation. We pointed out in our anti-SLAPP motion, which we won, that it was clear that she was expressing her views and being hyperbolic and using rhetorical flourishes. But she was simply describing what she had just read from the Daily Beast article. And in fact, right before and right after her rhetorical flourish, she said, "the Daily Beast reports that one of the correspondents on OAN is simultaneously being paid by Sputnik," which, by the way, had just been reported to have been part of the 2016 election interference, which the Daily Beast article noted and Rachel noted. And the district court agreed with us that this was clear, even though she used the word "literally," the word "literally" is defined in dictionaries as both being literal, but also as a way to be ironic and hyperbolic. And the judge found that the context of the statement made very clear that all she was doing was putting her own rhetorical stamp on what the Daily Beast reported. So the court granted our motion, dismissed the case, and awarded us about $250,000 in attorneys' fees. Now the case is fully briefed in the Ninth Circuit and we're awaiting argument. [The Ninth Circuit affirmed the decision on August 17, 2021].

George Freeman

Ted, how much of the focus was on the the word "literally"? Because to me, when I first read about this case, it struck me as a hard hurdle to overcome where you're saying the word "literally." I mean, if "literally" means anything, let's say its primary meaning, before you get to a secondary meeting that you talked about, how can it mean literal and hyperbolic at the same time? It seems to me the word doesn't mean anything then?

Ted Boutrous

It definitely, at first blush, posed a challenge because, as you all know, the language from the Supreme Court's cases is, "loose, figurative, and hyperbolic language." And "figurative" and "literally" are the seeming opposites. The plaintiff focused on that. But the judge agreed with us on two fronts. One, there is the dictionary definition, which she quoted that "literally" means "virtually," and used in an exaggerated way to emphasize a statement or description that is not literally true or possible. And then, the district court found that you had to look at the context. So even though "literally," in a different context, may mean "literally," here, where it was very clear that Rachel Maddow was just describing, in a colorful way, what the Daily Beast had reported.

She was just using rhetorical hyperbole and colorful language as opposed to anybody thinking she was reporting a new breaking news fact, i.e., "hey, OAN is really part of the Russian government," which is what they were claiming.

George Freeman

Ted, what troubles me a little bit is that you used the word "exaggeration." That's kind of the opposite definition of "literally" -- that it's exaggerated or hyperbolic, which is the word we're really focusing on. What did your team, or maybe more precisely, what did your client -- to the extent you can discuss that -- think about employing a defense where you're effectively saying, "well, no one really believes the word she says anyhow, but that's why we have a good defense." Is that something a journalist really is proud of or wants to be described as? How did you cope with the "principle" part of this in terms of how you describe yourself?

Ted Boutrous

We didn't make that argument. We didn't say people wouldn't believe what Rachel Maddow was saying. In fact, we said that what she was saying was true, based on the way she described the article. And in fact, as I mentioned, the article itself quoted a former FBI agent saying that OAN simultaneously employing a reporter for Sputnik was a merger of Russian propaganda and conservative right-wing journalism. And so we didn't make that argument -- Tucker Carlson made that argument in his case.

I think, George, one of the things that I sense sparked you to convene us here is that there's a new movement, a trend. And we did not make this argument -- we said Rachel reports the facts, and gives her opinion here; she was describing an article in a colorful, lively way, and that's what the judge found. But in the Tucker Carlson case, and you're hearing from Sidney Powell, Lin Wood in the Joy Reid case, who is now withdrawn after we sought to revoke his pro hac status, of all people literally said that when he told people that Mike Pence should be hung and put before a firing squad, before and after the insurrection, that he was engaged only in rhetorical hyperbole. So he's invoking it. And Tucker Carlson -- just to go back -- he made the argument (and it was accepted) that no one believes he's actually telling the truth. That opinion is probably good for all of us because I think it's really at the edge. But that's a bit of a dangerous argument that people lie so much and that there's so much disinformation out there, that nobody believes anything, and that's rhetorical hyperbole.

George Freeman

Is it fair to say then, Ted, that your defense really wasn't rhetorical hyperbole but that it was more the standard opinion defense -- that it was based on stated facts that were true and undisputed. And this was a conclusion, i.e., an opinion, that stemmed from those facts. So, really in a sense, it wasn't a rhetorical hyperbole case. Is that fair to say?

Ted Boutrous

It's fair to say that the judge kind of looked at it as both: that Rachel Maddow was stating an opinion based on published facts. You're absolutely right, George. And then the lane which they were attacking was a rhetorical flourish. So it was a little bit of a hybrid. And it was much easier

when you look at the full article, and you looked at her segment, and it's just absolutely clear that what she's saying is: here's what the Daily Beast reported, oh, my God, this is crazy -- that they literally have a guy from Sputnik on their reporting and the Daily Beast had reported that some of the Sputnik party line was infused into his reporting on OAN. So, it really was more in that genre, George, that she was reporting on something that had been published, that was true, and she gave her spin and did it in a colorful way. So we had a little bit of a blending of the two.

George Freeman

How much of your defense was that Rachel Maddow was just talking about what the Daily Beast said, because now we're getting into what seems to be Fox's defense in the voting machine cases, which is to say, "hey, it was out there, other people were saying it, so therefore, as a news organization, we're allowed to say it ourselves." Even though that's technically not what libel law says; you're as guilty for republishing as you are for making the original statement. And we don't, unfortunately, have a neutral reportage defense available in most jurisdictions, which I think is a major, major mistake, but so be it. So how much of your defense was to try to get the judge to buy the fact that you were just repeating what was out there anyhow and that's what a news person is supposed to do? Which it seems to me we often kind of try, through the back door, to get judges to buy into neutral reportage even though we know that's not technically the law.

Ted Boutrous

I think that's an excellent question. We focused on the fact that OAN was not challenging the truth of the Daily Beast reporting. In fact, they admitted it. They did us the favor of submitting a little declaration from the reporter, documenting how many articles he had written for Sputnik and how much he had been paid. And so, we argued, and the Ninth Circuit is pretty clear, that if the underlying information is true, or if you didn't act with actual malice, with respect to its falsity, then just simply expressing your opinion based on something that's been reported by others is protected. I have real problems with the argument that you can put on the air and publish things that you know are totally untrue -- clearly false -- and say: "well, this is part of the public debate," and not have to pay the consequences for it. I think that's really dangerous.

George Freeman

Okay, well, that was very interesting because you really seem to have cabined your defense in a way that I think casual observers who read about the case wouldn't have thought; in a way that I think narrows what your case was really all about, at least as you argued everything. What the judge does, the judge does. You raise the Tucker Carlson case and Clay, maybe you could tell us what that case was about, and how it's either the same or different from what Ted just described?

Prof. Clay Calvert

Sure. So that's the one that actually caught my attention and prompted me to write my law review article about the two cases together. In that case, the one involving Tucker Carlson, the phrase was "a classic case of extortion," used in relation to Karen McDougal, the Playboy model with whom former President Trump had an affair. And he was suggesting that McDougal was engaging in a "classic case of extortion." And the Fox News defense in that case was exactly as

Ted said, that nobody would believe Tucker Carlson because he had cultivated such a reputation for being over-the-top and using rhetorical hyperbole. So that really is what sparked my view. And so to hear Ted kind of distinguish the Rachel Maddow case makes a lot of sense when you hear that side of it. What got my attention on the Rachel Maddow case was exactly the word people have been shouting about, "literally." So the judge in the Tucker Carlson case also said that on a medium or genre of programming, such as a television news talk show, as distinct from a television newscast, people have come to expect a kind of bombast and bluster, and especially from Tucker Carlson. And so what really got me is the big picture or macro level -- that this actually incentivizes talk show hosts to be over-the-top. Because when it comes to defenses, they can say, "well, simply nobody believes me." And so that creates this cycle in our polarized cable news world that we have, where we're already polarized. It incentivizes being more over-the-top. What I was really concerned about is kind of an academic argument; the discourse and dialogue and rational discussion has kind of dropped out of the middle. We get the extremes on cable channels, and then this incentivizes certain hosts like Tucker Carlson to be more over-the-top because it protects them in defamation cases.

George Freeman

First of all, the judge suggested -- and this is quite stunning -- that Tucker Carlson exaggerates, gives non-literal commentary and simply bloviates. I mean, that's a pretty stark characterization of a supposed journalist. Do you have any idea, Clay, from your research for this article, is Tucker Carlson happy with this description that his lawyers gave the court, which is that: no one believes him anyhow. I mean, how can a journalist really live with that sort of reputation?

Prof. Clay Calvert

And I think that's really the problem that when you're on a news network -- something that's called a news network -- you should at least have some faith and confidence in the facts that you're discussing. And obviously, as I write, this is good news in that it privileges political opinion, which is at the heart of the First Amendment. But the bad news is it suggests you can't even believe that there are truthful facts that underlie those opinions. So, in a pure opinion defense, you roll out facts, A, B, C, and D, and then you state your opinion, and you're protected because you've explained all of those underlying facts. But here, it's like we can't even trust any underlying facts. So that's what really caught my attention. And it was disturbing for me. You go back and there are other cases, like Maury Povich, but that's not really a news talk show. But it's the whole notion that a genre of programming now kind of creates its own defense. We're not at that point. And one of the things I talked about is making a program by program, or host by host argument, in these cases, but we should not go down that slope of just saying, "okay, it's a television news talk show, so therefore, we can automatically discount it." That's the slippery slope I see.

George Freeman

I think I just was arriving at the New York Times when the Globe case appeared, which I think was really the first case of this genre. That was the case where the supermarket tabloid -- I believe it was the Globe -- had on its cover, a 104-year-old woman who they said was still a newspaper delivery person. . .

Ted Boutrous

Who quit because she was pregnant. She was a newspaper deliverer, 104, and she quit because she was pregnant.

George Freeman

And of course, the Globe thought she was dead, so all bets were off. But it turned out she was alive. And she neither, surprisingly enough, was pregnant nor was still delivering newspapers, although she once had. And I guess it wasn't libelous because there's nothing really wrong with being pregnant and being a newspaper deliverer, but she did sue for false light. And my recollection is she won like $75,000 or something like that. But the reason I'm telling the story of that case is that I think it was the first case where this defense of "no one believes us anyhow" was raised. The folks at the Times were outraged that any newspaper, even a supermarket tabloid, would have the chutzpah to basically employ a defense that asserts, "well, no one believes us anyhow." Because doesn't that totally denude you of the very asset you're supposed to be showing off, which is your credibility and your believability? But I guess my question is: is Tucker Carlson happy to make a defense that says no one believes me anyhow? And I guess the second question, which I don't agree with you on, is: I can't imagine that's the reason why he's so outrageous -- that it's a kind of libel defense strategy -- and that's why he does it. I mean, I think it might be a happy circumstance for him that he has that defense because he says such extreme things. But I can't imagine that's a strategy of "I'll say, more and more outrageous things," just so that I can have a good libel defense. I mean, most journalists don't think in terms of being sued. So, any thoughts on that?

Prof. Clay Calvert

Well, yeah, he's probably not happy about that aspect of it. And maybe it's not a strategy. But I think the the larger climate, in terms of news talk shows facilitates this -- is my bigger point. Because as we gravitate toward the extremes, it incentivizes to be more over-the-top. So yeah, you're right; It's probably not his initial strategy. But it's just a polarized climate; basically, we run to the extremes, and the middle drops out. And my big picture is: we lose the rational debate and discussion and discourse. That was the big picture of my article.

George Freeman

So even though the MLRC -- we on this call -- are libel defense lawyers, should we be unhappy about the result of these two cases? Or at least the Tucker Carlson case, let's say?

Prof. Clay Calvert

Well, I guess we're happy in terms of media defense lawyers winning the cases and defending them. I guess the larger picture is just thinking about the political discussion, the level of discourse that we have, and that was really my big issue. So that's where it's much more of an academic piece. Clearly, when we're talking about the Ollman factors, and context is key, as Ted said in all of this discussion, it's not easy to sort out fact from opinion, but obviously, the journalistic context of the Ollman factors is right there. And so now we're dealing with: where does it appear? Well, it's on a television news talk show versus a television news cast. And then

the question is: are we going to always lump in all television news talk shows as creating a presumption that it's going to be opinion versus fact?

Ted Boutrous

I have a question for Clay because what was really striking about the Tucker Carlson ruling -- and I don't think Karen McDougal appealled -- but the big difference was he described the facts in a way that was completely false. He said that Karen McDougal approached Donald Trump and told him that if he didn't give her money, she would reveal the affair and ruin his family. And that was just totally false. She had no dealings with Donald Trump. She had done this National Enquirer deal that had nothing to do with Donald Trump. And then Tucker Carlson said "extortion," and the court relied on all the cases we know about "blackmail" and "extortion" as rhetorical hyperbole. But here, he wasn't talking rhetorically -- he was saying that this was extortion, the crime, in the context of describing what Michael Cohen said. And Michael Cohen didn't say that about Karen McDougal, so it was a completely false predicate. And that's just totally different than the kind of cases we're usually talking about. So I think it's a really problematic ruling, just in terms of doctrine, for those reasons.

Prof. Clay Calvert

That's exactly what I meant about the underlying facts, and that we should at least know the underlying facts there. And then you can state your opinion based on those. In this case, we simply don't have that. That's great that there's an opinion, but we need it to be based on certain facts that are true. And that's where I think it harms the news business generally.

George Freeman

How much does it matter that the statement at issue there was really a statement of alleging a crime? Because in Milkovich, they said: what this article really said was that Milkovich had perjured himself on the stand, and we send people to jail for that. So the fact that it was a crime seems to take it out of the rhetorical hyperbole/opinion box and made it into a factual allegation of criminal behavior. And I think that was key in Milkovich. And yet here, it seems not to matter. And in Greenbelt, for that matter, in the blackmail case. And I never really understood Greenbelt, because of that. I mean, if you're alleging a crime it starts to get difficult to call that opinion, or rhetorical, doesn't it?.

Prof. Clay Calvert

Right, and we have the term "extortion" in the Tucker Carlson case. And I think that's the facsimile for "blackmail" in the Greenbelt case that you mentioned. And that's where they line up and you say: if we're going to call "blackmail" rhetorical hyperbole then "extortion" is going to be rhetorical hyperbole. And that makes sense. But again, when you're imputing criminal conduct to someone, and you think about libel per se or defamation per se, that's one of the four big categories. So that's dangerous.

George Freeman

Let me let me ask the two of you a question that troubles me a little bit, which is, if this is a trend and this is going to be more acceptable as a defense, how is that going to affect the voting machine cases? Because, it seems to me, it gives Fox, and maybe potentially even Giuliani and Sidney Powell, a stronger defense than they might have had three or four years ago before this has come into currency. Any thoughts on that?

Ted Boutrous

I think that they're making a very similar argument to what the district court accepted in McDougal. I think that the district court in McDougal took these concepts too far. I don't think other courts are going to accept those arguments. And, the difference, as Clay points out: "extortion" was used by Tucker Carlson, but it wasn't like, when I went to the store they said: I had to buy this product for this amount, and I said, "oh, that's like extortion." He was talking about the criminal charges against Michael Cohen and claimed that Karen McDougal engaged in in extortion. And so I think in the voting machine cases, they're making this argument: hey, there was a debate out there, we were just showing both sides of the debate. It's not that you have an opinion about the facts, right? The facts are the facts. But if you don't know the true facts, and you're relying on things that are false, and then giving your opinion but stating those as facts, that's not going to work under the opinion doctrines. I don't think that Sidney Powell and Lin Wood and others are going to get very far with that argument. I think it's going to fail. And I think it'll be easy to distinguish McDougal as either incorrect or not having any binding effect.

George Freeman

You mentioned Sidney Powell. Does Fox have a better argument along those lines because they were just repeating what Giuliani and the president's lawyers were saying?

Ted Boutrous

If they had reported something like this: "Giuliani's making these claims; Sidney Powell is making these claims; there's absolutely no evidence to support; gee, that would be terrible if it happened, but there's no evidence to support it." I think that would be protected.

George Freeman

Be protected as neutral reportage, which is what it is, but somehow they would concoct some other reason to protect it, right? I mean, it really should be neutral reportage defense, right? But they have to come up with some other nomenclature.

Ted Boutrous

Exactly. We'll be careful since I'm never rooting against a media entity, but I saw some of the shows; their personalities were saying that these things happened -- Chavez in Venezuela and all this stuff. And that there was fraud and they were reporting it. And they were putting people on there who were stating it as fact. And Sidney Powell now says she's invoking "nobody would have believed me, because I was just stating my opinion." No, she was stating it as fact, on behalf of the President United States. And I just think that's totally different. And it goes far beyond what the doctrines are meant to protect.

George Freeman

Clay, do you agree?

Prof. Clay Calvert

Yes, I agree. The neutral reportage privilege is basically as you suggested. That's what they're trying to claim. But as I recall, you have to have a trustworthy source for that. And that's where that falls down. So even if you were to make that argument, it's not the *Edwards v. Audubon Society* case. You've got to have a responsible, credible source making those allegations about a matter of public concern. And so are you going to say Sidney Powell or Lin Wood are responsible sources?

Dan Novack

Len Niehoff wrote an excellent article about when accusations are flying around, who's lying? Who's not? I think what these courts miss is: are there facts and evidence, that the speaker is attesting to, that exist? And so, in the Maddow case, here they are; here's the facts. In the Tucker case, same thing except the facts were not true. And in these Dominion cases, the facts aren't real. Sidney Powell is saying, "I have binders of evidence." Mike Lindell is saying, "I have binders of evidence." But they don't show you the evidence. And so I don't think it's an edge case. They just don't show you anything. They say, "take my word for it." And that's where I think you can distinguish between what could be conceived as either opinion or rhetorical hyperbole, or not.

George Freeman

Dan, I think in your article, as I recall, you focus a little bit on the notion that we've talked about: judges are saying that the public -- the audience -- understands that, say, Tucker Carlson is not to be believed; that he exaggerates. Is that placing too much burden and responsibility on the viewer? I mean, those of us in the media understand there's a difference between what Fox, or any of these cable channels, put on during the daytime, which is news reporting, and what goes on in the evening, which is their commentary. Lord knows where the internet is in all this; where you expect to have opinion and where you expect to have fact. In a newspaper, it's fairly well demarked. But that is really a premise of this argument: that the reader will understand or the viewer will understand that on this show, you really are getting just bloviation, whereas on another show you're getting fact. I once was in a libel case involving the Times where we made an opinion defense and the judge, I think correctly, said this was on a news page of the New York Times; that's where readers expect facts, not opinion. So, talk about that a little bit. And I guess the litigation question, which is a secondary question, if that's the case. How do you actually discover what the viewer believes? In every case, does there have to be polling or expert witnesses about what viewers believe or think when they're watching a TV show? It seems kind of strange and foreign to us. So how do you deal with all that?

Dan Novack

One thing that this problem stems from is that 20 to 30 years ago we had sort of a television-news monoculture. You could choose ABC, CBS, NBC, and you had a fairly narrow band of

reported facts. There wasn't great disagreement among the networks. And so when these doctrines were developed about viewers, viewers largely looked and resembled each other, and therefore, the so-called reasonable viewer, like the reasonable person in negligence or any form of tort law, doesn't exist in real life. The reasonable viewer, just like the reasonable driver, is supposed to resemble the lived experiences of Americans. And now we have everyone in their different camps largely. And so because there's no monoculture, everything is chaotic and atomized. I think the challenge that we're seeing is in the judge wanting to talk about who the reasonable viewer is and the hypothetical is no longer bearing relationship to reality. Now I can sort of empathize with the notion that I don't think Tucker Carlson is reasonable or truthful; I think he's a liar. And so maybe when I watched that show, I'm not persuaded that Karen McDougal extorted the president, but I'm not representative of anybody other than myself. And so I think that it's almost too cute by half because it's allowing the judge to decide what maybe the ideal viewer should be bringing into it -- the biases, media literacy, etc. When there's all this plain evidence staring us in the face that Fox News viewers take this quite seriously, and decided to hate Karen McDougal, subject her to hatred, shame and ridicule, scorn, all the classic defamation prerequisites based on what Tucker Carlson said that wasn't true. So that's where I think the tension is coming from: is that we don't have a reasonable viewer that's paradigmatically representative anymore. Instead, we have to look at whether or not people in real life are going to interpret this as factual. And that is something that's even harder for judges to do than conjure a fake hypothetical person.

George Freeman

But judges are saying that, right? I mean, despite what you just said, judges are saying, "well, the viewers know or the viewers don't know."

Dan Novack

They don't know any viewers. So, I empathize with the task these judges have -- it's hard -- but they don't know viewers. They're not traveling across the country, like Tocqueville, and figuring out what people are doing and perceiving. If they want to play that game and say, "well, people don't really believe this," then there should be some empirical rigor to it. And we do it in trademark law. We don't just say this is confusing, end of case; we look to substantiate that. That could be a completely different can of worms.

George Freeman

Maybe the result of this empirical evidence will be that viewers don't believe anyone, even Walter Cronkite, and then what?

Dan Novack

The other headwind, is that, sure, some viewers might believe this. But that can cut in both directions because viewers might be trained to believe this but they're the viewers that are already predisposed to hate Karen McDougal or any enemy of Donald Trump. I think that in the Tucker Carlson case, the arguments that he made were actually going to damages. Saying: my viewers hate enemies of the President; I don't have to give them a good reason; I can give them a bad reason. And how was she really damaged? Because I could have gone out there and said

anything and they would turn their scorn towards her. And so maybe it's just an argument that she wasn't really hurt in her profession because her profession relies upon people who don't despise the president to give her opportunities or things like that.

George Freeman

Karen McDougal's profession?

Dan Novack

What are her damages? She's losing endorsements. She's losing speaking opportunities. We didn't get to that phase in her case. But presumably, besides emotional pain and suffering, there's damages here. And so what are the damages when a group of people that will hate you purely for your political affiliation -- which is either you are for the president or against the president.

George Freeman

She was a Playboy model, is that correct?

Dan Novack

Yeah. And she's a fitness spokesperson of sorts. And so my point is that they don't care if she's a stripper, even if she were. They care that she's a stripper, like Stormy Daniels, who has stripped, that hates Trump. And an enemy of Trump means that you don't do business with them, you boycott, you sanction, etc. And so I think that just gets to the fact that we have maybe two or more camps in America and maybe there's not a lot of crosstalk anymore. And it's a damages argument to me. It's not an argument of what a reasonable person would interpret because you're supposed to, like in the Rachel Maddow case, look at the plain transcript, and you can see that she's put it all out there. She's used the word literally in a way that -- I put in the chat, since Parks and Recreation has been out -- "literally" doesn't mean "literally" at all anymore. And so I don't think anyone would have interpreted "literally" in the platonic ideal. As opposed to Carlson, who had a false premise.

The same is true of Trump in a different way when he batted away the Stormy Daniels case. This is the one where she says that somebody approached her in a parking lot and said, "lay off Trump." She had an artist provide a rendering of the alleged individual who approached her and released it online. And Trump retweeted somebody essentially saying: this is a hoax; it's not real; she made it up. Now, if Tucker Carlson went on TV and said, "this is a hoax, she made it up," he doesn't know anything. He's just looking at the strength of her corroboration and deciding that it's not true. I think this is where rhetorical hyperbole departs from opinion because you can say things that are literally true or false provable in some epistemological sense, but nonetheless, not being offered in that way because they don't know any better. Trump, on the other hand, knows whether or not he sent a goon after Stormy Daniels, so when he denies it he's acting on personal knowledge and conveying to audiences that this did not factually happen. As opposed to: "I don't think this actually happened," based on whatever factors motivate me and my reasoning.

And so it's becoming a doctrine that I think is being utilized primarily by right wing, or adjacent entities, to say, "who are you going to believe? Me or your lying eyes?" Or neither; you don't

have to believe anything anymore. And so, it's weaponizing their personas in a way that I don't believe the Maddow case does. I don't think you really have to get into who Rachel Maddow is as a person to look at the plain language there. Whether she's generally hyperbolic, or not, the language is hyperbolic in a way. But they're saying: we're crazy; we're wild; we're loose, we get into scrapes with people; all you have to understand is that when I argue with somebody, I'm not restrained by facts. And so therefore, you should just understand that this is a beef. And that's all it is.

George Freeman

I think we've really focused here on on cable TV, and I think that's where the focus ought to be because that's where these cases are. But isn't the same set of arguments applicable to the internet? In other words, we say as a matter of law that libel on the internet is the same as libel in a newspaper; the law applies to both the same. That's what we tell students. But yet, doesn't language on the internet come with even less credibility and less truth bearing than language on cable TV, which then again, as we've discussed, has less expectation of truth than a newspaper or a television news show that really is news? Where does the internet fit in here?

Dan Novack

Yeah, I don't like this deciding of which formats of information we have to discount. I feel like that's dangerous because everything is moving online anyway. Yes, there's certain common sense that people will exercise when they read things online -- maybe it's more hyperbolic. But I think it's dangerous to inculcate that view among people . . .

George Freeman

It may be dangerous, but judges are doing it with the cable TV shows . . .

Dan Novack

Well, they're not doing it across the boards. So Alex Jones tried this, he's not on cable TV, but he's a YouTuber, which is the area that is the most crazy and unrestrained in its rhetoric. And the court said, "no, if you're gonna say people are faking a school shooting, you better have facts here." So, it hasn't worked every time. I don't expect it will work in the Sidney Powell case. And I feel like there's an overreach here, and there will be an inevitable course correction. But it stems from a little bit of ambiguity about what this doctrine was supposed to protect. I think these judges are, frankly, getting a little over their skis here, because they don't know what to do with this. They're not media literate themselves. None of us are. It's too hard to figure out every emerging form of communication. And to say, well, cable news -- you just cut off a huge percentage of Americans' news source as being something that they can't expect there to be any policing of. And my attitude is: if it's a lie, it's a lie. If it's dangerous and hurtful then let's not throw our hands up in the air and say, "well, what else should we expect here?" Unfortunately, defamation law is like the worst recourse for public literacy and news literacy, but we're here. And so the judges I think, are blinking when they should stand up and say, "okay, in my courtroom, we're going to have a truth defense here or we're not."

Ted Boutrous

In the Rachel Maddow case, it was just basic fundamentals: she reported on truthful facts; she gave her opinion and used some colorful language. This is very clear. And I worry that these cases like the Tucker Carlson case, let alone Sidney Powell and Lin Wood, are going to give a bad name to really important doctrines of opinion and rhetorical hyperbole such that it's not taken seriously when it's really just absolutely protected speech and on an issue of public concern. That's my conern.

George Freeman

The thing that's so discouraging to me is that we have an answer to that and it's called neutral reportage. And neutral reportage takes into account the factors that you all are talking about. But judges are kind of floundering and there's no other doctrine that really makes sense. So why not just use neutral reportage? They were handing the solution to the judge on a silver platter because it only applies if the source you're getting the statement from is a responsible, credible source, which let's say, a Giuliani and a Sidney Powell, at this stage of their lives aren't. And secondly, which is even more important, whether you reported neutrally, which there could be a lot of doubt about in the in the election cases. So it really sets up and answers all the questions you're raising. But unfortunately, without using that doctrine, there's no clear place to use that as a criteria.

Dan Novack

It doesn't get you all the way there. One of the examples I brought up in my article is Barstool Sports which wasn't offering neutral reportage or any reportage -- they were just accusing another podcast host, Michael Rapaport of having herpes. Now, I actually don't think that having herpes should be defamatory but I'm a very open-minded person. But the same playbook was used, which is, "well, we're Barstool Sports; we're outrageous; that's our brand. And he started it," which he did. Rapaport said bad things about them. And so, the judge in that case essentially said: well, look, people understand these two entities to be fighting and stuff gets said in the heat of the battle, especially when they're brand is to be outrageous. But, one of the points I tried to make in the article is that: maybe if you are very media literate, you might know that this stuff is fake. I personally don't watch or read Barstool Sports. But if it was aggregated into my space, somebody put it into my timeline and says, "watch the Michael Rapaport has herpes video," I would think that they might have a basis for it. That's my baseline assumption. And so part of the problem is that you can't necessarily assume that people will stay in their corner; stuff just travels. And we can't rely on neutral reportage to tackle the dissemination of this stuff floating around when it's three articles removed from the original piece by Barstool, reaggregated three times, now, it's just a fact that Michael Rapaport has herpes.

George Freeman

What happened in the case? What was the outcome?

Dan Novack

He provided a negative herpes test. He doesn't have it. And there are other words that were thrown about that were deemed, I think correctly, to be opinion in that case. They called him a "racist," which is a word that is very hard to have any fixed meaning; a "fraud," words that when you're not talking about a legal context are just overheated. But they said, essentially, that it's rhetorical hyperbole because they were in the midst of a heated dispute where there was a lot of vulgarity being traded. And so I think they just sort of lumped in "having herpes" with other vulgar things you could say about somebody, like an insult.

George Freeman

That case came out the same way as the Ohio Supreme Court came out in Milkovich, before it got to the U.S. Supreme Court, which is that a sports columnist called the guy a liar, and no one believes sports columnists anyhow; they're all bloviators. And so the prior decision in Milkovich really set the tone for much of this debate, that everyone knows not to believe sports columnists; they're just kind of fooling around, which is what Barstool Sports and sports and other talk shows on radio do as well. Clay, let me go to you and just try to bring us where we are in this whole debate via-a-vis the internet. Are there precedents that say: yeah, on the internet, anything goes; no one with a right mind believes anything they read on the internet? What is there actually in the law right now after 20 years or 25 years that distinguishes these issues on the internet from the rest of the media? Because I think there are cases that have at least tried to tackle that.

Prof. Clay Calvert

There are and there's several. And I think even in the other Trump case, the Corey Lewandowski case, I recall a discussion of: how do reasonable readers interpret things, especially on Twitter, as a genre or subset of the Internet, and we tend to discount them. And so to go back to what we've been talking about, we've really had three areas: sports columns, as a genre; television news talk shows as a genre; and the internet in particular, I would say Twitter as a genre of that. And then what are the assumptions that we were talking about -- whether there really is such a thing as a reasonable reader out there? So yes, there is a lot of precedent. And in the Stormy Daniels case that you mentioned, it's a combination there, one, the person Trump, combined with, two, Twitter where we have the source and the medium, and they blend together. And maybe that's like the Tucker Carlson case, where you have a television talk show and a particular host, and you blend those two things together. And that's where you get the protection coming in. We have a medium-specific First Amendment jurisprudence. We treat broadcasting differently than we do cable than we do print. And then the internet we treat like print. Now, do we want defamation law to have almost a genre-specific defamation law on opinion? That's kind of where we're heading, I think.

Dan Novack

If I can add a couple of contemporary examples, the actor, James Woods, was called a cocaine addict by a random, anonymous, Twitter person, but because the person tweeted: "cocaine addict, James Woods, at it again," or whatever was, as opposed to, "James Woods is a cocaine addict," the judge felt that the grammatical cannons were such that it was an assertion of fact, from a completely random person that none of us online would assume knows James Woods in his real life or has any inside knowledge. James Woods prevailed on [an Anti-SLAPP motion in] that case. There was a case where Courtney Love, another Twitter icon, had made crazy allegations against a former business associate of hers. And she tried it too -- the whole, "I'm Courtney Love, everyone thinks I'm crazy." And it didn't initially work. But then later, when she accused her own lawyer of conspiring against her, the judge let her off and said: well, she seemed to really believe it. And she speaks in this very loose way online. And so it's almost like speaking to the fandoms. If you're her Twitter follower, maybe you found that result very satisfying because it jives with you. But if you were me, and you don't follow her on Twitter, you're like, "which ones am I supposed to follow as fact and which ones not?" And it's putting a lot of work on us as individuals, and you're seeing spill-over into non-defamation zones? Coca Cola, when they were sued for marketing Vitamin Water as a health drink -- which it's not, it's just water with some things in it -- they said, "well, no consumer would actually believe us when we say it's a health drink." I don't think that argument ended up going very far, but you see it emboldening sectors of society to say, "nobody believes us," when people clearly do. And to your point earlier, George, of what does it say that these people are willing to trample on their own viewers to say, "our viewers are rubes," blows my mind.

Ted Boutrous

Another danger here, just reiterating Dan and Clay, is: I'm concerned that journalists who really seek to get the actual facts, and report them, are going to be less protected by defamation law than people who are recklessly spewing falsehoods. And so I think we need to make sure that

doesn't happen. Whatever we need to do. Maybe neutral reportage, George, but that's kind of where we're headed. That the New York Times is gonna go to trial on the Sarah Palin case, where other people, like Tucker Carlson, are making blatantly false statements, and his case is dismissed.

George Freeman

That really can't be, right, I mean that's totally ass-backwards. That's a very good point that underlies the whole discussion. We parse through the words of a Washington Post article, for the exact meaning, this and that, while there are other blatant falsities that go by unpunished and that really doesn't seem to make sense.

Prof. Clay Calvert

And then even if you get to the statement and you say, "okay, let's call it factual," then you come down to the question: is it true or false? And now, because we live in our polarized worlds, and the Fox News viewers are going to say, "well, of course what he's saying is true." And imagine that jury situation; that's like another level of issue because people are going to see what's true and false; how do we even sort it out anymore because they are interpreting it from their own media echo chamber. They are interpreting it from one view. That's another whole can of worms.

George Freeman

Does anyone in the audience want to pose a question to any of the panelists or comment on anything?

Michael Norwick

Dan cites to the *Barstool Sports* case, and I read that case to really reflect a kind of internet flame war with insults being hurled back and forth over a number of different internet sites. And I'm just wondering if this sort of line of cases that say it's a different standard on the internet may not just be a good thing? Because what really struck me is that Rapaport is essentially asking the judge to be a Kindergarten Cop, to rule over a bunch of insults, and I can see judges just throwing up their hands and saying that, "I now have to rule over everything that's said over the Internet?" And so I'm just wondering if it's a bad thing that judges are holding the internet to a higher standard?

Dan Novack

I think Rapaport made a huge mistake in the sense that he larded his complaint with a lot of comments that they made, and some of them were never going to hold up under the First Amendment. The two that that skated on rhetorical hyperbole, were the "herpes" comment and a comment about him being convicted of domestic violence, which he wasn't. And so, if he had just limited his complaint to those two things, which I think are very different from him being called: a loser, a racist, pig, whatever, it may be that the judge wouldn't have felt the need to just discard with all this. And so I think part of it just reflects that it did seem like just like a food fight, and the judge wanted out. But I'm worried. Where is the line drawn? If you say enough

bad things about someone, and one of them happens to cross the line, what is the person supposed to do? So I'm not crying for Michael Rappaport. You know, he gave as good as he got in this dispute, it seemed like. But I do worry that you're going to embolden people. And this doctrine does not distinguish between public figures and private figures; a person can turn their guns on anybody, and they do for sure.

George Freeman

Does it matter on the internet whether it's on Twitter, where maybe you expect less truth and more short takes, as opposed to longer posts?

Dan Novack

That's the venue that's the most shareable, where stuff goes viral. And so that was my point earlier: by the time I've seen the Michael Rapaport thing, I'm reading a Twitter recap of something else; it gets very attenuated, and so the allegation lives on, but it's been reported out at that point, and maybe that person has a neutral reportage defense. But it really can metastasize in a way that, maybe in a New York Times article, it's not going to have an impact beyond that unless the Washington Post, say, decides they want to independently report it up themselves.

George Freeman

Thank you very much. I think this was a really good discussion on interesting issues. With most of the libel issues we discuss, everyone's on the same side, and we know where we're going. But here, there are a lot of cross-currents all over the place that I think you guys have ably talked about and have identified a dilemma for many of us as to how we should react to these questions. So, it's a particularly challenging and interesting area.

Dan Novack

George, I hope we don't have to tender our resignations to MLRC based on our heresy today, do we? [laughter]

George Freeman

Just because we believe in a strong First Amendment doesn't mean every single case in defense has to be looked at a certain way.