

Politics & Policy

Defamation Law Can Slow the Plague of Fake News

Challenging falsehoods about voting machines is a good place to start.

By [Cass R. Sunstein](#)

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Stop the lie at the source. *Photographer: Stephen Maturen/Getty Images*

Misinformation and fake news are now threatening public health and endangering democracy itself. What might help contain the problem? Part of the answer lies in a very old remedy: the law of defamation.

To see how this might work, consider the situation of Smartmatic and Dominion Voting Systems, two companies that provide software and other services for electronic voting machines. President Donald Trump's lawyer, Rudy Giuliani, has publicly attacked both companies,

suggesting that outcomes in “Michigan, Arizona and Georgia and other states” were affected by “SMARTMATIC, who was really doing the computing. Look up SMARTMATIC and tweet me what you think?”

Commentators for Fox News, Newsmax and One America News have implied or suggested that the companies’ technologies have changed votes. Yet Smartmatic says it has done hardly any business in the U.S. since 2007, and in the 2020 election, it did none at all in Michigan, Arizona and Georgia.

In response to the false attacks on his company, Antonio Mugica, Smartmatic’s CEO, has retained a noted defamation lawyer, J. Erik Connolly, who has demanded retractions from Fox, Newsmax and One America News, and threatened the possibility of a lawsuit. Connolly knows just what he is doing: “We’ve gotten to this point where there’s so much falsity that is being spread on certain platforms, and you may need an occasion where you send a message, and that’s what punitive damages can do in a case like this.”

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For its part, Dominion has threatened similar legal action against the Trump campaign in general and against Sidney Powell, a former lawyer for the campaign. If Smartmatic or Dominion actually brought suit, and if either won in court or just extracted a large settlement, its success would be a kind of thunderclap and have a major impact on journalists, broadcasters and others.

To find out if such a lawsuit could succeed, we need to revisit the Supreme Court’s 1964 decision in *New York Times v. Sullivan*, where the court launched a revolution in defamation law. Its central holding was that if you are a “public figure,” you cannot win a defamation suit unless you establish “actual malice.”

Unfortunately, that term is misleading. The court's standard did not require "malice" at all. *New York Times v. Sullivan* rules that a speaker can be held liable for defamation if (a) she knew that what she was saying was false or (b) she acted with "reckless indifference" to the question of truth or falsity. Even if a speaker sincerely thinks she is telling the truth, she is unprotected if it should have been obvious that she wasn't – if, for example, all of the reliable evidence suggested she was speaking falsely.

In 1974, the Supreme Court went on to make it clear that if you are not a public figure, you can win a defamation suit if the speaker has merely acted "negligently." That's far easier to establish than "reckless indifference." A journalist might act negligently, in the sense that she really should have known that what she was saying was false, even if she wasn't exactly reckless.

In light of these principles, both Smartmatic and Dominion would have a good chance of winning. You could debate whether either or both companies should be counted as "public figures." But even if they do, both of them have strong arguments that they should be entitled to recover damage awards.

Let's stipulate that it might be hard to show that people at Fox, Newsmax and One America News actually knew they were promoting stories that were untrue. If so, it's relatively easy to argue that their statements about Smartmatic and Dominion were "recklessly indifferent" to the question of truth or falsity.

In this light, any lawyer would advise the three networks that they are at serious risk. That might be why Fox has been working hard to correct the record by having an expert on voting machines debunk the false claims of the network's own commentators about Smartmatic.

Beyond this specific situation, *New York Times v. Sullivan* can be used as a sword against the kind of misinformation that proliferates today. That's deeply ironic, because the ruling was originally meant to provide a shield – giving broad protection to journalists, broadcasters and speakers of all kinds on the theory that most false statements are relatively innocent. In the court's apparent view, "knowing falsehoods" – lies – would be pretty rare, and even recklessness would be unusual.

That was then, and this is now. For contemporary victims of misinformation, the *New York Times* decision can be deployed as a potent weapon not only against those who peddle lies, but also against those who are heedless of truth.

It has long been clear that in democracies that cherish freedom of speech, speakers need, and deserve, a shield. But it is increasingly clear that in democracies intent on self-preservation,

victims of damaging falsehoods need, and deserve, a sword.

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