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The Filming Dilemma: The Potential Speech Cost Presented by Camera Coverage of Defamation Cases

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The Filming Dilemma: The Potential Speech Cost Presented by Camera Coverage of Defamation Cases

*Alexandra M. Gutierrez**

ABSTRACT

For the better part of the last century, journalists have used free-press and free-speech principles to advocate for camera access to newsworthy trials. But it was not until 2022 that news organizations succeeded in broadcasting defamation proceedings, and—in the process—gave libel litigants a novel opportunity to present their stories both to jurors and to the public at large. Because news organizations are themselves frequent targets of defamation lawsuits, this development may not be a categorical good for the press. The filming of defamation proceedings could provide motivated litigants with one more incentive to sue real and perceived critics, insofar as it could turn a lawsuit into a platform for publicity. This essay examines this tension for the press, situating the Johnny Depp v. Amber Heard trial and the Alex Jones damages trials within an environment where anti-press litigants increasingly weaponize libel litigation against the news organizations that cover them.

*Associate, Williams & Connolly. My thanks to the editors of the *Missouri Law Review* for their keen edits, my fellow Symposium participants for their thought-provoking ideas, and Ned Levin and Emily Chertoff for their insightful comments and support.

TABLE OF CONTENTS

ABSTRACT	685
TABLE OF CONTENTS.....	686
I. INTRODUCTION.....	687
II. PRESS ADVOCACY FOR CAMERAS IN COURTROOMS	691
III. THE WEAPONIZATION OF DEFAMATION LITIGATION	694
IV. THE FILMING OF DEFAMATION PROCEEDINGS.....	702
<i>A. Depp v. Heard</i>	704
<i>B. The Alex Jones Damages Trials</i>	707
V. CAMERAS AS A LITIGATION INCENTIVE TO DEFAMATION PLAINTIFFS ..	710
<i>A. Ability To Connect with Supporters Directly</i>	710
<i>B. Ability To Inflict Reputational Harm on Defendant</i>	710
<i>C. Ability To Attract Publicity Generally</i>	711
<i>D. Ability To Fundraise</i>	712
VI. CONCLUSION	713

I. INTRODUCTION

In 1984, the freshly-launched Cable News Network (“CNN”) sought to do something extraordinary: bring cameras into a courtroom to provide nationwide live coverage of a defamation trial.¹ The case was *Westmoreland v. CBS Inc.*, and the newsworthiness of the trial was beyond dispute.² General William C. Westmoreland, a four-star general and former Army Chief of Staff, filed a \$120 million lawsuit against CBS, alleging the broadcast news network defamed him by reporting he had distorted intelligence data to mislead the American people about the prospects of winning the Vietnam War.³ Due to the public interest in the *Westmoreland* trial, and because all the litigants consented to the broadcast of the proceedings, CNN deemed the case a worthy vehicle for challenging the federal judiciary’s total bar against cameras in courtrooms.⁴

Before *Westmoreland*, cameras had generally been absent from courtrooms, as the American Bar Association (“ABA”) concluded in 1937 that the “broadcasting or televising of court proceedings” can “detract from the essential dignity” of courtroom proceedings and should not be permitted.⁵ The ABA rooted its conclusion in the idea that cameras tended to convert trials into media circuses, as had occurred when newsreel companies descended on a 1935 trial for the kidnapping and murder of pilot Charles Lindbergh’s child.⁶ But the longstanding general prohibition

¹ See *Westmoreland v. CBS Inc.*, 596 F. Supp. 1166, 1167 (S.D.N.Y. 1984) (denying petition by CNN “for permission to record and distribute live comprehensive televised coverage” of trial), *aff’d sub nom.* 752 F.2d 16 (2d Cir. 1984).

² See *id.* at 1169 (“[T]he subject matter of this trial is of the most serious public importance.”).

³ See *id.*; see also Rudy Abramson, *Westmoreland to Drop Libel Suit Against CBS: General, Network to Make Joint Announcement Today on Ending of \$120-Million Legal Action*, L.A. TIMES (Feb. 18, 1985), <https://www.latimes.com/archives/la-xpm-1985-02-18-mn-3110-story.html> [<https://perma.cc/ZBJ6-2K22>] (summarizing documentary).

⁴ *Westmoreland*, 596 F. Supp. at 1167 (describing CNN’s petition as seeking a “experimental exception” to Canon 3 A(7) of the Code of Judicial Conduct for the United States Courts and Local General Rule 7 of the Southern District of New York).

⁵ Kyle C. Kopko & Erin Krause, *Shooting From the Hip: Concealed Cameras in the United States Supreme Court*, 99 JUDICATURE 60, 62, 67 (2015) (describing and quoting Canon 35 of the ABA Code of Conduct, superseded by Canon 37(a)). The ABA has since repealed its prohibition on cameras in the courtroom. Fred Barbash, *ABA Repeals its 1937 Canon Against Cameras in the Courtroom*, WASH. POST (Aug. 12, 1982), <https://www.washingtonpost.com/archive/politics/1982/08/12/aba-repeals-its-1937-canon-against-cameras-in-the-courtroom/2418b074-dbe0-4aac-acf6-ff0b6b71f5b4> [<https://perma.cc/8TBV-YPAY>].

⁶ Richard P. Lindsey, *An Assessment of the Use of Cameras in State and Federal Courts*, 18 GA. L. REV. 389, 389–90 (1984) (summarizing trial of Bruno Hauptmann and adoption of American Bar Association canon of judicial ethics discouraging use of cameras in courtrooms).

against cameras in the courtroom started to weaken by the time of the *Westmoreland* defamation trial. The Supreme Court ruled just three years earlier that the filming of a criminal trial was not categorically barred by the Constitution, and the overwhelming majority of states had already adopted rules allowing cameras in courtrooms under some circumstances.⁷

With momentum on its side, CNN pressed its case that the allowance of cameras in the courtroom had democratic upside. It argued that cameras would not interfere with the administration of justice, and that there was a strong interest in permitting the press to sit in as the eyes of the public by allowing viewers at home to decide for themselves if CBS's reporting on General Westmoreland was true and fair.⁸ Although CNN initially had some persuasive success when the district court denied the petition "in spirit of its merit,"⁹ its arguments foundered before the Second Circuit. The Second Circuit rejected CNN's argument that both its own speech interests and the public's right to "see and hear a trial" trumped the Judicial Code of Conduct.¹⁰ The Second Circuit, however, allowed that federal courts could change their rules to permit filming if they desired.¹¹

Even though CNN failed to gain access to the civil defamation trial, the filming of high-profile criminal proceedings became more common in the years following the *Westmoreland* decision, with front-page murder trials becoming their own sort of television events. The trials of O.J. Simpson, Casey Anthony, George Zimmermann, and Derek Chauvin each received gavel-to-gavel coverage and drew an excess of ten million viewers.¹² But until recently, there was no "must-see TV" equivalent for

⁷ See *Westmoreland v. CBS Inc.*, 596 F. Supp. 1166, 1168 (S.D.N.Y. 1984), *aff'd sub nom.* 752 F.2d 16 (2d Cir. 1984) (citing *Chandler v. Florida*, 449 U.S. 560 (1981)).

⁸ See *Televising the CBS Trial*, WASH. POST (Aug. 27, 1984), <https://www.washingtonpost.com/archive/local/1984/08/27/televising-the-cbs-trial/a848f06c-d5a3-47ba-852c-1132429d1fb6/> [<https://perma.cc/GXS9-XTAP>].

⁹ *Westmoreland*, 596 F. Supp. at 1170.

¹⁰ *Westmoreland*, 752 F.2d at 22.

¹¹ *Id.* at 24 (noting that the right to have cameras in the courtroom is "created by consent of the judiciary, which has always had control over the courtrooms").

¹² See Kent Babb, *How the O.J. Simpson Murder Trial 20 Years Ago Changed the Media Landscape*, WASH. POST (June 9, 2014, 6:23 PM), https://www.washingtonpost.com/sports/redskins/how-the-og-simpson-murder-trial-20-years-ago-changed-the-media-landscape/2014/06/09/a6e21df8-eccf-11e3-93d2-edd4be1f5d9e_story.html [<https://perma.cc/B4AX-F5H6>] (estimating that "[a]round 95 million viewers" tuned into the 1995 trial of O.J. Simpson for the murders of his former spouse Nicole Brown Simpson and her friend Ronald Goldman); Aja Romano, *Why We're Relitigating the Casey Anthony Case Now — And Why We Shouldn't*, VOX (Dec. 20, 2022, 5:54 PM), <https://www.vox.com/culture/23506125/casey-anthony-evidence-where-the-truth-lies-how-true-or-false> [<https://perma.cc/U824-DB8E>] (reporting that approximately "40 million viewers worldwide tuned into at least some"

the defamation trial.¹³ This changed in 2022 when two sets of very different defamation disputes captured the nation's attention.

The first of these 2022 cases to upset the status quo involved actors and ex-spouses Johnny Depp and Amber Heard, whose dueling defamation claims were destined to attract the public's interest due to their celebrity status and the case's intersection with the #MeToo movement.¹⁴ Depp claimed his ex-wife defamed him when she described herself as a "public figure representing domestic abuse" in an op-ed for the *Washington Post*, and Heard counterclaimed that Depp had defamed her by calling her a "liar" and "hoax artist."¹⁵ The media livestreamed the trial proceedings and pulled daily audiences in the millions, and Depp himself admitted this public attention was its own kind of remedy in that it allowed him to take control of the narrative regarding his relationship with Heard.¹⁶

The second nationally televised defamation dispute of 2022 was of a very different character, involving celebrity and speech of a whole other sort. Alex Jones, a right-wing media personality, had long advanced the

of the 2011 trial of Casey Anthony for the murder of her two-year-old daughter); Bill Carter, *Zimmerman Verdict Drew 10 Million to Cable TV News*, N.Y. TIMES (July 15, 2013), <https://www.nytimes.com/2013/07/16/business/media/zimmerman-verdict-drew-millions-to-cable-tv.html> [https://perma.cc/869N-ZRQF] (reporting that more than 10 million viewers watched the verdict in the 2013 trial of George Zimmermann for the murder of unarmed black teenager Trayvon Martin); John Koblin, *More than 18 Million Tuned in for the Chauvin Verdict*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/business/media/chauvin-verdict-viewers.html> [https://perma.cc/YE57-AYJA] (reporting that more than 18 million viewers watched the delivery of the verdict in the 2021 trial of police officer Derek Chauvin for the murder of unarmed man George Floyd and that "CNN's sibling network, HLN, which covered the entirety of the trial, had its highest ratings since its coverage of the George Zimmerman trial in 2013").

¹³ See *10 TV Trials That Shook the World: Casey Anthony, OJ Simpson, Rodney King*, HOLLYWOOD REP. (July 5, 2011), <https://www.hollywoodreporter.com/gallery/10-tv-trials-shook-world-208094/> [https://perma.cc/SV3F-FFWX] (ranking America's most high-profile televised trials and not including any defamation trial).

¹⁴ Neal Rothschild & Sara Fischer, *America More Interested in Depp-Heard Trial Than Abortion*, AXIOS (May 17, 2022), <https://www.axios.com/2022/05/17/amber-heard-johnny-depp-trial-social-media> [https://perma.cc/NK2F-M9EN] (describing public interest in *Depp v. Heard*).

¹⁵ Julia Jacobs, *Amber Heard's Account of Abuse Challenged by Johnny Depp's Lawyer*, N.Y. TIMES (May 17, 2022), <https://www.nytimes.com/2022/05/17/arts/amber-heard-johnny-depp-abuse.html> [https://perma.cc/ZGU4-NMJL]; see also Counterclaims at *4, *Depp v. Heard*, CL-2019-0002911 (Va. Cir. Ct. Aug. 10, 2020).

¹⁶ Kenzie Bryant, *How Court TV's Wall-to-Wall Coverage Transformed the Johnny Depp-Amber Heard Story*, VANITY FAIR (May 2, 2022), <https://www.vanityfair.com/style/2022/05/how-court-tvs-wall-to-wall-coverage-transformed-the-johnny-depp-amber-heard-story> [https://perma.cc/3ZA6-GF5A] (describing Depp's desire to have an "unalloyed chance to share his side of things").

conspiracy theory that the Sandy Hook school shooting was a hoax, and the victims' families responded by filing defamation actions in Texas and Connecticut.¹⁷ Again, the video-streaming of the Texas and Connecticut damages trials added a new dimension to the litigation. The filming gave the families an official platform to communicate to the world that their children were real and lost to them, but it also gave Jones an opportunity to create video clips for his own audience and to spin the narrative that *he* was the true victim.¹⁸

This new televised access to defamation proceedings comes at an unfavorable time for media defendants. The tort of libel has been increasingly weaponized against the press, with politically and financially powerful plaintiffs bringing costly lawsuits against news organizations with renewed frequency.¹⁹ High-profile public figure cases are routinely making it to discovery and to trial, and the First Amendment protections of *New York Times v. Sullivan* have simultaneously come under attack and been recognized as inadequate to protect news organizations from the burdens that even unsuccessful libel suits impose.²⁰ Motivated political actors have recently opened up about their goals of weakening newsrooms through litigation, using promises of lawsuits against the mainstream media to gain attention and raise funds.²¹

¹⁷ See *Alex Jones, Infowars, and the Sandy Hook Defamation Suits*, FIRST AMEND. WATCH (Dec. 2, 2022), <https://firstamendmentwatch.org/deep-dive/alex-jones-infowars-and-the-sandy-hook-defamation-suits/> [https://perma.cc/3E2Q-ENSE] (tracking *Heslin v. Jones*, No. D-1-GN-18-001835, 2018 WL 4620309 (Tex. Dist. Aug. 31, 2018); *Lafferty v. Jones*, No. CPL-UWY-CV-18-6046436-S, 2018 WL 11470376 (Conn. Super. Dec. 5, 2018); and related defamation suits).

¹⁸ See Anna Merlan, *Alex Jones Isn't Testifying in Court, He's Making Video Clips*, VICE (Sept. 23, 2022, 5:34 PM), <https://www.vice.com/en/article/jgpveg/alex-jones-isnt-testifying-in-court-hes-making-video-clips> [https://perma.cc/5CNQ-UCYL] [hereinafter Merlan Vice article].

¹⁹ See Matthew L. Schafer & Jeff Kosseff, *Protecting Free Speech in A Post-Sullivan World*, 75 FED. COMM. L.J. 1, 28 (2022) (describing vulnerability of *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964), and politically-oriented defamation litigation against news organizations).

²⁰ *Id.*

²¹ See *Kash Patel Legal Offensive Trust*, THE THINKING CONSERVATIVE (Feb. 24, 2023), <https://www.thinkingconservative.com/kash-patel-legal-offensive-trust/> [https://perma.cc/H6SV-VEKA] (explaining that the “Kash Patel Legal Offensive Trust is a fund designed to give those smeared by the fake news media and big tech a voice”); Mike Levine, *Trump Loyalist Kash Patel's Tax-Exempt Charity Raises Questions, Experts Say*, ABC NEWS (Mar. 8, 2023, 3:17 AM), <https://abcnews.go.com/US/trump-loyalist-kash-patels-tax-exempt-charity-raises/story?id=97657747> [https://perma.cc/W7XP-CVSA] (describing mission of former Trump White House official's “legal offense trust” as “bring[ing] the fake news media to their knees’ by funding lawsuits on behalf of the ‘everyday Americans’ across the country who have been ‘defamed’”).

News organizations have many valid and salutary reasons for desiring to film defamation proceedings that have attracted public interest, such as enhancing the public's basic understanding of the legal system.²² But in this climate, the filming of such proceedings may act as an incentive for opportunistic plaintiffs to bring defamation actions, with the possibility of this form of publicity serving as a benefit unto itself. While news organizations have long pressed for access to court proceedings as a free speech issue, the filming of defamation proceedings may have the counterintuitive effect of encouraging lawsuits that chill speech in their own way. This Essay explores this tension, but it does not argue against the filming or webcasting of defamation proceedings. Indeed, while the filming of defamation proceedings specifically may impose a cost on speech, the benefits of filming court proceedings as a general matter may nonetheless outweigh these costs.

Part I of this Essay addresses the press's traditional treatment of camera access to courtrooms as a speech-generative, free-press issue. Part II describes the renewed trend of anti-press litigants weaponizing libel litigation to inflict damage on the news media, while bringing attention to one's own cause. Part III then considers the *Depp v. Heard* and Alex Jones defamation proceedings as television news events, where the public attention itself may be a desired remedy for the litigants. Part IV finally observes that in a media environment where press coverage is its own value, the filming of defamation trials could have the perverse incentive of encouraging lawsuits *against* the press.

II. PRESS ADVOCACY FOR CAMERAS IN COURTROOMS

Since the rise of broadcast journalism, news organizations have frequently sought to film court proceedings,²³ arguing for their access as a

²² See *infra* Part II.

²³ See, e.g., *Combined Commc'ns Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982) (unsuccessful challenge to rule prohibiting television broadcasting of courtroom proceedings); *Dorfman v. Meiszner*, 430 F.2d 558, 560 (7th Cir. 1970) (another example of an unsuccessful challenge to rule prohibiting television broadcasting of courtroom proceedings); *Lyles v. State*, 330 P.2d 734, 738 (Okla. Crim. App. 1958) (dispute over presence of television cameras at criminal proceedings); *Court TV to Bring Cameras into the Court Room for Johnny Depp, Amber Heard Defamation Trial*, PR NEWSWIRE (Apr. 5, 2022, 2:15 PM), <https://www.prnewswire.com/news-releases/court-tv-to-bring-cameras-into-the-court-room-for-johnny-depp-amber-heard-defamation-trial-301518199.html> [https://perma.cc/6CEY-B65Q] ("Court TV has previously led the charge for media access and served as the pool feed while providing extensive on the ground coverage for recent milestone legal cases including those involving Derek Chauvin, Kim Potter and the three men convicted of killing Ahmaud Arbery.").

matter of policy and First Amendment rights.²⁴ While free press advocates have been unable to achieve recognition of a constitutional right to film court proceedings,²⁵ courts acknowledge that this activity nonetheless implicates a speech interest and enhances the press's ability to cover legal issues.²⁶ More importantly for free press advocates, the vast majority of states have adopted rules allowing the filming of at least trial-level proceedings subject to certain conditions.²⁷

²⁴ See, e.g., *Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 774, 779–81 (Fla. 1979) (addressing both constitutional and policy arguments in favor of allowing cameras in courtrooms); see also Oliver Darcy, *One Major Difference Between the Trial for Alex Jones and the Oath Keepers Revives Court Transparency Question*, CNN BUS. (Oct. 5, 2022, 10:47 PM), <https://www.cnn.com/2022/10/05/media/federal-courtrooms-cameras-reliable-sources/index.html> [<https://perma.cc/453D-R74R>] (“Lisa Zycherman, deputy legal director for the Reporters Committee for Freedom of the Press, which has argued for increased transparency in courtrooms, told me that she believes the many reasons put forth by the federal judiciary to forbid courtroom cameras don’t hold much water.”); Henry Weinstein, *Court TV Founder Defends Live Trial Coverage*, L.A. TIMES (Jan. 18, 1996), <https://www.latimes.com/archives/la-xpm-1996-01-18-me-25872-story.html> [<https://perma.cc/Z6DK-QTBU>] (“Faced with the disturbing prospect that live courtroom coverage of trials could be drastically curbed in California, the founder of Court TV issued a ringing defense of live coverage Wednesday, declaring that cameras in courts are based on the nation’s deeply rooted tradition of public trials.”).

²⁵ See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 610 (1978) (stating in dicta that “there is no constitutional right to have [live witness] testimony recorded and broadcast. . . . Nor does the Sixth Amendment require that the trial – or any part of it – be broadcast live or on tape to the public.”); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (suggesting that the “freedoms granted in the First Amendment” do not “extend a right to the news media to televise from the courtroom”); but see also *Phila. Bail Fund v. Arraignment Ct. Magistrate Judges*, 440 F. Supp. 3d 415, 425 (E.D. Pa. 2020) (recognizing limited First Amendment “right to audio-record in a non-disruptive and quiet manner the preliminary arraignment and the determination of bail where the court has a policy or custom not to make official audio recordings or transcripts of its own”); Cristina Carmody Tilley, *I Am A Camera: Scrutinizing the Assumption That Cameras in the Courtroom Furnish Public Value by Operating As A Proxy for the Public*, 16 U. PA. J. CONST. L. 697, 713 (2014) (noting that the question of whether there exists a First Amendment right to film court proceedings “appears to remain open, and litigants have revived the argument from time to time in the federal courts of appeal”).

²⁶ See, e.g., *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 114 (2d Cir. 1984) (recognizing speech interest in recording court proceedings, but determining that prohibition on such activity qualified as a permissible time, place, and manner restriction); *Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d at 780 (rejecting argument that First Amendment mandates that electronic media be permitted to cover courtroom proceedings but agreeing with policy arguments for cameras in courtroom).

²⁷ Mitchell T. Galloway, Note, *The States Have Spoken: Allow Expanded Media Coverage of the Federal Courts*, 21 VAND. J. ENT. & TECH. L. 777, 791 (2019) (summarizing state court policies toward news coverage of judicial proceedings).

The constitutional and policy arguments for the video-recording of civil and criminal proceedings—and their respective levels of success—were captured in the *Petition of Post-Newsweek Stations* case, which the Supreme Court of the United States later upheld in *Chandler v. Florida*. The case arose from a 1975 petition filed by Florida television stations requesting that the Supreme Court of Florida revise the State’s Code of Judicial Conduct to allow for the broadcast of judicial proceedings.²⁸

The *Post-Newsweek* petitioners first asked for the recognition of a constitutional right, rooted in the First and Sixth Amendments, to film both civil and criminal proceedings.²⁹ This would have significantly broadened the right to attend criminal proceedings in person.³⁰ The Supreme Court of Florida, however, rejected this argument, concluding that while the Constitution did not require a prohibition against the filming of court proceedings, it also did not establish a right to this activity.³¹

The *Post-Newsweek* petitioners’ policy arguments for filming court proceedings were more successful than their constitutional ones. The stations argued that allowing the news media to film court proceedings would enhance transparency and the public’s understanding of the justice system, increase confidence in it, and even potentially improve the professionalism of the courts.³² The stations also asserted that filming could be unobtrusive and done in a way that would not disturb judicial proceedings.³³ The Supreme Court of Florida accepted these arguments, concluding that the benefits of filming courtroom proceedings outweighed potential costs and that Florida’s prohibition against this activity should be amended.³⁴ As a result, the Supreme Court of Florida amended its canon to allow for electronic media coverage of proceedings in both trial and appellate courts, subject to judge discretion and certain limitations.³⁵

²⁸ *Chandler v. Florida*, 449 U.S. 560, 564 (1981).

²⁹ *Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 774 (Fla. 1979).

³⁰ *See id.* The standard arguments in favor of such a constitutional right to record are that, at minimum, the public has a right to attend criminal proceedings; that the filming of court proceedings expands public access to such proceedings; and that to prohibit video cameras would be to discriminate between the television and print media. *See Westmoreland v. CBS Inc.*, 752 F.2d 16, 21 (2d Cir. 1984) (summarizing and rejecting constitutional arguments in support of filming judicial proceedings); Audrey Maness, Note, *Does the First Amendment’s “Right of Access” Require Court Proceedings to Be Televised? A Constitutional and Practical Discussion*, 34 PEPP. L. REV. 123, 177 (2006) (providing overview of constitutional arguments for telecasting of court proceedings).

³¹ *Petition of Post-Newsweek Stations*, 370 So. 2d at 774.

³² *See id.* at 780–81 (discussing informative value of television coverage of governmental proceedings).

³³ *See id.* at 779–80.

³⁴ *Id.* at 781.

³⁵ *Chandler v. Florida*, 449 U.S. 560, 565–66 (1981).

The Supreme Court of the United States ultimately upheld this rule in *Chandler v. Florida*, which agreed that the filming of court proceedings was constitutionally permissible.³⁶

The pro-press policy arguments that convinced Florida to allow cameras in its courtrooms in the 1970s have since carried the day, as each state now allows cameras under certain conditions.³⁷ While federal courts still generally prohibit the use of cameras in courtrooms, the Second and Ninth Circuits have allowed for their use in limited circumstances, as have three district courts.³⁸ Members of Congress have also periodically introduced legislation that would require the federal courts to permit the use of cameras, subject to certain opt-out provisions,³⁹ and such legislation has received the support of the country's largest broadcast news professional organization, the Radio Television Digital News Association.⁴⁰

III. THE WEAPONIZATION OF DEFAMATION LITIGATION

While getting cameras into courtrooms may be a priority of news organizations, staying out of court as a defamation defendant is imperative. Because plaintiffs believe news organizations have large audiences and deep pockets, such organizations are attractive targets for defamation actions.⁴¹ News organizations are also frequently subjected to “strategic lawsuits against public participation,” or “SLAPPs,” brought by

³⁶ *Id.* at 575.

³⁷ See Maggie Clark, *States Slowly Opening Courts to Cameras*, STATELINE (Feb. 9, 2012), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/02/09/states-slowly-opening-courts-to-cameras> [<https://perma.cc/2PTN-4GYG>] (“All 50 have declared themselves willing to open up some court business to cameras, although the levels of openness vary from state to state.”); SARAH ECKMAN, CONG. RES. SERV., R44514, VIDEO BROADCASTING FROM THE FEDERAL COURTS: ISSUES FOR CONGRESS, 1 (2019) <https://sgp.fas.org/crs/misc/R44514.pdf> [<https://perma.cc/QFA5-CWXJ>] (discussing same).

³⁸ See ECKMAN, *supra* note 37 at 7 n.33.

³⁹ See *id.* at 24–27 (discussing recent bills that would allow cameras in federal courthouses, including the Cameras in the Courtroom Act, the Sunshine in the Courtroom Act, and the Transparency in Government Act).

⁴⁰ RTDNA (@RTDNA), X (Mar. 19, 2021, 1:39 PM), <https://twitter.com/RTDNA/status/1372980943267319809> [<https://perma.cc/3QR4-X9MC>].

⁴¹ See generally *MLRC 2018 Report on Trials and Damages*, 1 MEDIA L. RES. CTR. BULL. (Apr. 2018) (tracking defamation lawsuits against media defendants); Marc A. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 5 J. MEDIA L. & PRAC. 91, 91–96 (1984) (describing media organizations as frequent defamation defendants and describing economic incentives for lawsuits against the press).

plaintiffs seeking to silence defendants by burdening them with meritless, bad-faith litigation.⁴² This was an issue both before and after the *New York Times v. Sullivan* decision, but it has recently become a pronounced problem for news organizations, coinciding with the appearances of cameras at defamation proceedings, as discussed *infra* Part IV.⁴³

By the 1940s, legal commentators already recognized that the press could be “inhibited by the fear of costly litigation” and acknowledged that the “use of the libel suit as a means of browbeating political opponents” was, even then, “not a recent innovation.”⁴⁴ Ideological conflict over civil rights and Communism marked the period after World War II, and segments of the public grew increasingly hostile toward the press covering these social and political developments in ways they believed contrary to their ideological goals.⁴⁵ The problem worsened as the years progressed. According to contemporary sources, the number of libel suits against newspapers doubled from the 1940s to the 1950s, and the damages sought in these cases also skyrocketed.⁴⁶ A jury award in the hundreds of thousands of dollars was not uncommon.⁴⁷

Once the 1960s rolled around, juries in libel actions began to award damages in the millions, creating the possibility that a press-hostile

⁴² See Shannon Hartzler, Note, *Protecting Informed Public Participation: Anti-SLAPP Law and the Media Defendant*, 41 VAL. U. L. REV. 1235, 1258–68 (2007).

⁴³ See Samantha Barbas, *The Press and Libel Before New York Times v. Sullivan*, 44 COLUM. J.L. & ARTS 511, 513–14 (2021) (describing a “libel climate” in the 1950s and 1960s in which “controversies around communism and civil rights, hostility towards the press, and large jury verdicts in tort cases encouraged the use of large-scale libel litigation as a weapon in political and cultural battle”).

⁴⁴ *Libel and Slander – Use of Action in Ideological Conflict – Designating One as Communist Libelous Per Se*, 14 U. CHI. L. REV. 697, 698–99, 704 (1947); see also Lili Levi, *Disinformation and the Defamation Renaissance: A Misleading Promise of “Truth,”* 57 U. RICH. L. REV. 1235, 1251 (2023) (describing ongoing “defamation renaissance” that began in 2010s).

⁴⁵ See Barbas, *supra* note 43, at 534, 537.

⁴⁶ *Id.* at 535, 539; see also Francis D. Murnaghan, *From Fictment To Fiction To Philosophy — The Requirement Of Proof of Damages in Libel Actions*, 22 CATH. U. L. REV. 1, 4 n.9 (1972) (quoting 1 A. HANSON, LIBEL AND RELATED TORTS, Preface at vii (1969) as indicating “that, commencing in the late 1950’s, a movement developed by which ‘the number of libel suits brought expanded by several hundred percent’”); Note, *Punitive Damages in Defamation Litigation: A Clear and Present Danger to Freedom of Speech*, 64 YALE L.J. 610, 615 (1955) (recognizing threat of excessive damages to speech and observing that “there are well-financed, highly organized, and resourceful private interest groups which might attempt to enforce their views or force others to withhold opinion by bringing or threatening such suits”).

⁴⁷ See Barbas, *supra* note 43, at 535–39 (describing “exponential” increase in size of jury awards and providing examples).

plaintiff could bankrupt a news organization over a single story.⁴⁸ Segregationists who sought to shut down sympathetic coverage of the civil rights movement used these suits to their advantage. For example, one Alabama sheriff brought a three million dollar suit against the publisher of *Ladies Home Journal* for its reporting on police brutality against civil rights demonstrators.⁴⁹ Similarly, CBS faced a \$1.5 million suit for reporting on the obstacles Black Alabamans faced when registering to vote.⁵⁰ The litigation strategy was obvious, with one Alabama newspaper even running an article about the rash of pro-segregation libel suits under the headline, “State Finds Formidable Club to Swing at Out-of-State Press.”⁵¹ By 1964, damages claimed in pending lawsuits against the press totaled more than \$280 million, which is approximately \$2.8 billion today.⁵² The ultimate goal was to “use the cost of defending litigation and the threat of massive liability to drive Northern reporters out of the South.”⁵³

The case of *New York Times v. Sullivan* represents another case in which the claimant weaponized the press. A police commissioner sued the *Times*, along with four Black clergymen, over minor inaccuracies contained in an advertorial describing police brutality toward civil rights activists.⁵⁴ The suit was a sham in multiple respects. The trial judge in the case previously prohibited the National Association for the Advancement of Colored People (“NAACP”) from operating in Alabama,

⁴⁸ *Id.* at 540–42 (describing media concerns regarding increase in damages claims and discussing award of \$3-million verdict to football coach Wally Butts in his lawsuit against Curtis Publishing Company, which published the *Saturday Evening Post*).

⁴⁹ KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 85 (Univ. Press of Kan. 2011).

⁵⁰ *Id.*

⁵¹ *Id.* at 84.

⁵² See John Herbers, *Libel Actions Ask Millions in South; 17 Suits by Public Officials are Pending in Courts*, N.Y. TIMES (Apr. 4, 1964), <https://www.nytimes.com/1964/04/04/archives/libel-actions-ask-millions-in-south-17-suits-by-public-officials.html> [<https://perma.cc/6WZQ-APKB>] (“At least 17 libel actions brought by public officials in three Southern states against newspapers, magazines and a television network are pending in state and Federal courts. Total damages sought exceed \$288 million.”); ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 36 (Vintage Books 1991) (“By the time the Supreme Court decided the Sullivan case, in 1964, Southern officials had brought nearly \$300 million in libel actions against the press.”).

⁵³ Howard M. Wasserman & Charles W. “Rocky” Rhodes, *Solving the Procedural Puzzles of the Texas Heartbeat Act and its Imitators: New York Times v. Sullivan as Historical Analogue*, 60 HOUS. L. REV. 93, 106 (2022).

⁵⁴ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 257–58 (1964).

lauded the Confederacy, and ran a segregated courtroom.⁵⁵ None of the witnesses in the trial proceedings testified to believing that any of the statements in the advertorial, which did not use the commissioner's name, actually referred to him.⁵⁶ Nor did the commissioner make any other "effort to prove that he suffered actual pecuniary loss as a result of the alleged libel."⁵⁷ Even so, the all-white jury awarded the commissioner \$500,000 in damages.⁵⁸ By the time the Supreme Court of the United States heard *Sullivan* on appeal, three other cases related to the advertorial remained pending, with damages of two million dollars claimed.⁵⁹

With its opinion in *Sullivan*, the Supreme Court sought to temper these sorts of weaponized cases against the press and civil rights movement.⁶⁰ *Sullivan* invalidated the Alabama verdict and constitutionalized the law of libel in the process. By establishing the heightened First Amendment "actual malice" standard, *Sullivan* imposed a new burden on public officials by requiring them to show that false statements were made not with mere negligence but with actual knowledge of falsity or reckless disregard for the truth in order to prevail.⁶¹ In the following decade, the Supreme Court extended this actual malice rule to public figures and to individuals who inserted themselves into controversies of public concern.⁶² During this period of First Amendment-expansion, there were virtually no reported cases of public officials recovering in defamation actions, and commentators described "fear of libel" as a "much less pervasive influence" on news organizations.⁶³

⁵⁵ Anthony Lewis, *The Sullivan Case*, NEW YORKER (Nov. 5, 1984), <https://www.newyorker.com/magazine/1984/11/05/the-sullivan> [<https://perma.cc/RYS7-NAWB>].

⁵⁶ *Sullivan*, 376 U.S. at 260.

⁵⁷ *Id.*

⁵⁸ *Id.* at 256.

⁵⁹ *Id.* at 278 n.18.

⁶⁰ John Bruce Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 2 (2014) ("The opinion initially was the subject of high praise for its impact on the law of libel and on First Amendment rights, and for protecting the newspaper and the nascent civil rights movement from potentially stifling damage awards.").

⁶¹ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

⁶² See generally *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (extending actual malice rule to public figures to show actual malice); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (same to "limited-purpose public figures").

⁶³ David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 430 (1975); see also Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 608 (1983) (describing the failure of public figures to succeed in defamation actions in the immediate period following *Sullivan*).

But *Sullivan* and its progeny did not result in the “obsolescence” of the tort of libel, as some anticipated, nor did it immunize the press from weaponized suits.⁶⁴ Starting again in the 1980s, governors, mayors, and other public officials began filing multimillion-dollar lawsuits against media outlets in response to public criticism of them.⁶⁵

Westmoreland v. CBS Inc. itself was one strategic attack against the media. A neo-conservative financier bankrolled the \$120 million lawsuit, which was understood to be part of a political effort to intimidate CBS and delegitimize its reporting on the Vietnam War.⁶⁶ In 1984, the president of CBS News described the libel suit as a “rallying point for people who seek to use [the tort of defamation] as an instrument for damaging the image, spirit and aggressiveness of the news media” and suggested that General Westmoreland was “merely the point man in their search-and-destroy mission.”⁶⁷ When all was said and done, the third parties put more than three million dollars toward the suit, only for Westmoreland to drop the case in the trial’s final days.⁶⁸ The settlement terms did not require CBS to make any correction to its reporting or pay any money to General

⁶⁴ Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 1 (1983).

⁶⁵ *Id.* at 2.

⁶⁶ See Walter Schneir & Miriam Schneir, *Beyond Westmoreland: The Right’s Attack on the Press*, NATION (Mar. 30, 1995), <https://www.cia.gov/readingroom/document/cia-rdp90-00552r000605820001-1> [<https://perma.cc/D33Z-VC5F>] [hereinafter Schneir & Schneir] (describing the “Westmoreland affair” as the New Right’s “most ambitious” “anti-media project”); David Margolick, *Westmoreland v. CBS: Legal Drama Intensified by 2 Contrasting Lawyers*, N.Y. TIMES (May 31, 1984), <https://www.nytimes.com/1984/05/31/nyregion/westmoreland-v-cbs-legal-drama-intensified-by-2-contrasting-lawyers.html> [<https://perma.cc/2T53-6NE6>] (“CBS and its lawyers charge that Mr. Burt and the Capital Legal Foundation’s prime financial backers—among them, Richard Mellon Scaife, the Olin Foundation and the Smith Richardson Foundation—are using the general to advance their own objectives: to legitimize the Vietnam War, intimidate the media and lower the legal obstacles to libel judgments.”).

⁶⁷ See Schneir & Schneir, *supra* note 66; see also Margolick, *supra* note 66 (“General Westmoreland has been captured by neo-conservative groups, who are knowingly abusing the legal process to refight their version of the Vietnam War,” said [Cravath’s David] Boies. ‘Any private group without its own agenda would have told him, ‘Look, you’re going to lose.’”).

⁶⁸ See M.A. Farber, *Suit Against CBS is Being Dropped by Westmoreland*, N.Y. TIMES (Feb. 18, 1985), <https://www.nytimes.com/1985/02/18/movies/suit-against-cbs-is-being-dropped-by-westmoreland.html> [<https://perma.cc/AM3G-GKZ7>] (describing settlement and litigation expenses); George Lardner Jr., *Pittsburgh Millionaire Financed Westmoreland’s Suit Against CBS*, WASH. POST (Feb. 28, 1985), <https://www.washingtonpost.com/archive/politics/1985/02/28/pittsburgh-millionaire-financed-westmorelands-suit-against-cbs/b7548b38-4d7f-4920-afef-d97add6322cc/> [<https://perma.cc/L9ML-Q34D>] (reporting that more than \$2 million of General Westmoreland’s legal expenses were paid by one funder alone).

Westmoreland.⁶⁹ However, CBS did not come out unscathed. The network incurred millions of dollars in legal fees, and its journalists had to spend time preparing for depositions and cross-examinations instead of reporting news stories.⁷⁰

Plaintiffs periodically filed weaponized lawsuits like *Westmoreland* between the 1980s and 2000s, but it was not until the mid-2010s that the defamation claim became a common political tool used against the press's legitimacy.⁷¹ During his 2016 campaign and over the course of his administration, the mainstream media became a favorite target of former President Donald Trump, who called the press an "enemy of the people" and "fake news."⁷² He and his campaign escalated those attacks through multiple lawsuits against news organizations, including one against CNN for \$475 million.⁷³ Former Alaskan governor and vice-presidential candidate Sarah Palin railed against the "lamestream media" as she described the press, only to later sue the *New York Times* in a case that went to a jury.⁷⁴ Additionally, former Senate candidates Joe Arpaio and Don Blankenship have each been aggressive defamation plaintiffs,

⁶⁹ See Farber, *supra* note 68 (stating settlement terms).

⁷⁰ *Id.*

⁷¹ See Levi, *supra* note 44 ("Since the start of the Trump presidency, 'political' libel cases by prominent and visible political people—some brought by repeat player 'libel bullies'—have been growing."); 1 LAW OF DEFAMATION § 1:5 (2d ed. 2023) ("In the ensuing decades, the 'rejuvenation' [of libel law predicted in the 1980s] has morphed into a veritable defamation 'explosion.' During a six-month period in 2019, some two hundred or more reported state and federal court decisions involving defamation actions were published. These published judicial decisions, of course, are merely the tip of the iceberg.").

⁷² MARVIN KALB, ENEMY OF THE PEOPLE: TRUMP'S WAR ON THE PRESS, THE NEW MCCARTHYISM, AND THE THREAT TO AMERICAN DEMOCRACY 1–2 (Brookings Inst. Press 2018).

⁷³ See, e.g., Donald J. Trump for President, Inc. v. CNN Broad., Inc., 500 F. Supp. 3d 1349 (N.D. Ga. 2020); Donald J. Trump for President, Inc. v. Northland Television, LLC, No. 20-CV-385-WMC, 2020 WL 3425133 (W.D. Wis. June 23, 2020); Donald J. Trump For President, Inc. v. N.Y. Times Co., No. 152099/2020, 2020 WL 962293 (N.Y. Sup. Feb. 26, 2020); Michael M. Grynbaum, *Trump Sues CNN for Defamation, Seeking \$475 Million*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/business/media/trump-cnn-lawsuit.html> [https://perma.cc/94GQ-YDQC] (reporting on President Trump's lawsuits against CNN, the New York Times, and the Washington Post).

⁷⁴ See *Palin v. N.Y. Times Co.*, 604 F. Supp. 3d 208, 212 (S.D.N.Y. 2022) (providing procedural history of case); Andy Barr, *Palin Trashes 'Lamestream Media'*, POLITICO (Nov. 18, 2009, 7:29 PM), <https://www.politico.com/story/2009/11/palin-trashes-lamestream-media-029693> [https://perma.cc/M998-BW8C].

claiming damages in the hundreds of millions and billions against news organizations.⁷⁵

Though none of these high-profile public-official lawsuits have yet to return a verdict against a news organization,⁷⁶ the lawsuits have still managed to cause some harm. Even an early dismissal of the case can cost a news organization hundreds of thousands of dollars in legal fees on drafting and arguing motions.⁷⁷ Continuing into the early litigation phase,

⁷⁵ See, e.g., *Blankenship v. Fox News Network, LLC*, No. 2:19-cv-00236, 2022 WL 321023 (S.D. W. Va. Feb. 2, 2022) (suing multiple news organizations in connection with minor factual inaccuracies regarding plaintiff's criminal history); *Arpaio v. Cottle*, 404 F. Supp. 3d 80 (D.D.C. 2019) (suing *New York Times* columnist for criticism of Arpaio's practices as Maricopa County sheriff); see also Eriq Gardner, *Media Companies Must Face Coal Executive's \$12 Billion Libel Suit*, HOLLYWOOD REP. (Apr. 1, 2020, 11:38 AM), <https://www.hollywoodreporter.com/business/news/media-companies-face-coal-executives-12-billion-libel-suit-1287901/> [<https://perma.cc/GY37-GN3H>] (reporting on Blankenship's litigation against ABC, Fox News, and others); Jessica Campisi, *Judge Tosses out Joe Arpaio's \$300M Defamation Lawsuit Against CNN, Other Media Outlets*, THE HILL (Nov. 1, 2019, 2:24 PM), <https://thehill.com/regulation/court-battles/468562-federal-judge-tosses-joe-arpaios-300m-defamation-lawsuit-against-cnn/> [<https://perma.cc/9VAD-4M3D>].

⁷⁶ Michael Norwick, *The Empirical Reality of Contemporary Libel Litigation, in NEW YORK TIMES V. SULLIVAN: THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT*, MEDIA L. RES. CTR. (2022) (analyzing defamation litigation against media defendants from 2009 onward). Although none of the aforementioned suits have resulted in verdict against news organizations, that is not to say that there have been no successful defamation verdicts against other types of defendants. See, e.g., Bill Donahue, *Cardi B's \$4M Defamation Verdict Against Tasha K Upheld By Appeals Court*, BILLBOARD (Mar. 21, 2023), <https://www.billboard.com/pro/cardi-b-defamation-verdict-tasha-k-upheld-appeals-court/> [<https://perma.cc/FS2N-WWR6>]. Additionally, a number of legal commentators believe that Fox News may be found liable in the \$2.7-billion defamation suit brought by Smartmatic. Alison Durkee, *Why Fox News' Next Defamation Suit—From Smartmatic—Might Require Another 'Big Check' To Settle*, FORBES (Apr. 19, 2023, 12:02 PM), <https://www.forbes.com/sites/alisdurkee/2023/04/19/why-fox-news-next-defamation-suit-from-smartmatic-might-require-another-big-check-to-settle/?sh=11fe3dcb9dfc> [<https://perma.cc/N66E-48BA>].

⁷⁷ See Kelly McBride, *McClatchy Could Hire 10 Reporters for the Money It Will Spend to Get Devin Nunes Lawsuit Dismissed*, POYNTER (Apr. 11, 2019), <https://www.poynter.org/ethics-trust/2019/mcclatchy-could-hire-10-reporters-for-the-money-it-will-spend-to-get-devin-nunes-lawsuit-dismissed/> [<https://perma.cc/V24K-FKB4>] (“While newspapers have insurance for a judgment or a settlement, they rarely recoup their lawyers’ fees, even when a suit is dismissed. The average cost to get a defamation or libel suit against a newspaper dismissed is \$500,000, according to industry experts.”); Justin Baragona, *OAN Loses Appeal Against Maddow, Must Pay MSNBC at Least \$250,000*, DAILY BEAST (Aug. 17, 2021, 4:47 PM), <https://www.thedailybeast.com/oan-loses-appeal-against-rachel-maddow-must-pay-msnbc-at-least-dollar250000> [<https://perma.cc/ZM6M-BU58>] (“After

discovery can push litigation expenses into the millions.⁷⁸ In some cases, news organizations would prefer to settle for astronomical sums rather than bear the risk of an even more eye-popping verdict, as was the case for ABC when it settled for more than \$177 million to drop a \$1.9 billion defamation suit in 2017.⁷⁹ Additionally, libel lawsuits also take time and resources from newsrooms⁸⁰ and impose the very “chilling effect”—particularly upon smaller and mid-sized outlets—that *Sullivan* sought to mitigate.⁸¹ For a tort that is intended to remedy harms to one’s name, libel lawsuits can also have the somewhat ironic effect of damaging the media defendant’s reputation and eroding trust in the quality of its news product.⁸² When a company’s mission is to publish factual and accurate information, litigation alleging that it publishes false information without regard for the truth is particularly harmful.

This trend of weaponized lawsuits against the press seems unlikely to abate anytime soon. Distrust in media remains at near-record highs, with self-identified conservatives in particular holding the press in low

MSNBC and Maddow later asked for the right-wing channel to pay \$350,000 in legal fees, the court permanently dismissed the case this past February and awarded MSNBC and Maddow a total of \$247,667.50.”); *see also* David A. Barrett, *Declaratory Judgments for Libel: A Better Alternative*, 74 CAL. L. REV. 847, 860 (1986) (“Even if the defendant believes the possibility of losing the action is remote, the size of the claim forces the defendant to defend itself vigorously” using a “full-scale defense, often conducted by a top law firm[.]”).

⁷⁸ *See* D. Victoria Baranetsky & Alexandra Gutierrez, *What a Costly Lawsuit Against Investigative Reporting Looks Like*, COLUM. JOURNALISM REV. (Mar. 30, 2021), https://www.cjr.org/tow_center/costly-lawsuit-against-investigative-reporting-looks-like.php [<https://perma.cc/3LC3-LMB4>] (writing that discovery in a lawsuit held to be a SLAPP still required the billing of “millions in legal fees on discovery alone”).

⁷⁹ Christine Hauser, *ABC’s ‘Pink Slime’ Report Tied to \$177 Million in Settlement Costs*, N.Y. TIMES (Aug. 10, 2017), <https://www.nytimes.com/2017/08/10/business/pink-slime-disney-abc.html> [<https://perma.cc/QS2J-AHSG>].

⁸⁰ *See id.*

⁸¹ *See* Barrett, *supra* note 77 (“[M]ounting evidence indicates that, apart from certain ‘large and profitable’ media defendants which deny any impact on their editorial practices, many publishers and broadcasters are feeling a significant chilling effect.”); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300 (1964) (Goldberg, J., concurring) (“[I]f newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.”).

⁸² *See* Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 228 (1985) (“By invoking the formal judicial system, the plaintiffs legitimize their claim of falsity.”); Kishanthi Parella, *Public Relations Litigation*, 72 VAND. L. REV. 1285, 1294 (2019) (“While a dismissal can protect a defendant from a frivolous lawsuit in a court of law, it does not similarly protect the defendant from harm in the court of public opinion.”).

regard.⁸³ Republican politicians, like former President Trump and Florida Governor Ron DeSantis, have recently and explicitly stated their desires to punish the media through litigation, in addition to advocating for changes in defamation law.⁸⁴ Supreme Court Justices Clarence Thomas and Neil Gorsuch also indicated their beliefs that it should be easier to bring libel actions, inviting test cases to challenge *Sullivan*.⁸⁵ Political entrepreneurs have shown eagerness to accept this invitation, establishing funds and organizations with the express mission of suing the press.⁸⁶

IV. THE FILMING OF DEFAMATION PROCEEDINGS

In 2022, a new development occurred in this already-charged libel climate: defamation proceedings became filmed events. The defamation lawsuit between actors and ex-spouses Johnny Depp and Amber Heard

⁸³ See Megan Brenan, *Americans' Trust In Media Remains Near Record Low*, GALLUP (Oct. 18, 2022), <https://news.gallup.com/poll/403166/americans-trust-media-remains-near-record-low.aspx> [<https://perma.cc/RYC3-Y8QU>]; see also Meredith Conroy, *Why Being 'Anti-Media' Is Now Part Of The GOP Identity*, FIVETHIRTYEIGHT (Apr. 5, 2021, 6:00 AM), <https://fivethirtyeight.com/features/why-being-anti-media-is-now-part-of-the-gop-identity/> [<https://perma.cc/PE9Y-68X7>] (“Hostility and distrust of the news media, in other words, has become a point of political identity among Republicans.”).

⁸⁴ See Elahe Izadi & Lori Rozsa, *DeSantis Wants 'Media Accountability.' A New Bill Makes Suing Journalists Easier*, WASH. POST (Mar. 23, 2023, 5:00 AM), <https://www.washingtonpost.com/media/2023/03/23/desantis-florida-libel-defamation-media/> [<https://perma.cc/LVX2-62NU>] (discussing politicians' views on defamation law); Tom Kludt, *Ron DeSantis Loves to Bash the Press. Will That Playbook Work in a Presidential Race?*, VANITY FAIR (Mar. 10, 2023), <https://www.vanityfair.com/news/2023/03/ron-desantis-press-playbook-presidential-race> [<https://perma.cc/XH4Q-HR8F>] (describing Gov. DeSantis's “dogfighting” with the media and his proposal to “make it easier to sue news outlets for defamation” in the context of his 2024 presidential bid).

⁸⁵ *Berisha v. Lawson*, 41 S. Ct. 2424 (2021) (Thomas, J., dissenting from denial of certiorari); *Id.* at 2428–29 (Gorsuch, J., dissenting from denial of certiorari); see also Linda Greenhouse, *Bring Me a Case*, N.Y. TIMES (Nov. 13, 2013), <https://www.nytimes.com/2013/11/14/opinion/bring-me-a-case.html> [<https://perma.cc/N3AL-36WK>] (observing that dissents from denial can be understood as overtures to raise a specific issue).

⁸⁶ See, e.g., Yaron Steinbuch, *Kyle Rittenhouse Launches Initiative to Combat 'Lies' From Media Outlets, Personalities*, N.Y. POST (Feb. 22, 2022, 8:12 AM), <https://nypost.com/2022/02/22/kyle-rittenhouse-launches-initiative-to-combat-lies-from-media/> [<https://perma.cc/N7GU-CKT8>] (reporting that Kenosha shooter Kyle Rittenhouse had launched “The Media Accountability Project as a tool to help fundraise and hold the media accountable for the lies they said and deal with them in court”); Levine, *supra* note 21 (explaining that the mission of former Trump appointee Kash Patel's “Legal Offense Trust was to ‘bring the fake news media to their knees’ by funding lawsuits on behalf of the ‘everyday Americans’ across the country who have been ‘defamed’”).

became a television and social media sensation, with some commentators describing it as a contender for “trial of the century.”⁸⁷ Just months after that trial ended, more than a million viewers tuned into a separate pair of damages trials focused on the amount of harm conspiracy theorist Alex Jones caused by perpetuating the hoax that the Sandy Hook school shooting was fake and involved actors.⁸⁸

Both the *Depp v. Heard* and Alex Jones trials attracted substantial publicity and gave the parties an opportunity to use the courtroom as a platform to communicate with their supporters. These actions, where the public understanding of the truth of a matter was at issue, took on a meta dimension, where that same public understanding was being shaped and reshaped as the trials unfolded. In the process, these trials showed that the broadcasting of defamation proceedings could have an impact on public opinion that rivaled the actual trial outcomes⁸⁹—an extralegal benefit that could have its own appeal to a litigant.

⁸⁷ See Kristin Bender, *What Makes Trials Famous?*, AM. BAR. ASS’N (Jan. 30, 2023), https://www.americanbar.org/groups/litigation/publications/litigation_journal/2022-23/winter/what-makes-trials-famous/ [<https://perma.cc/BE2X-XHTG>]; Simon Dumenco, *Depp-Heard: 6 Lessons from ‘Hollywood’s Trial of the Century’*, ADAGE (May 31, 2022), <https://adage.com/article/media/depp-heard-6-mediaeconomy-lessons-trial/2418586> [<https://perma.cc/W8V3-8LUY>]; Ashley Collman, *Johnny Depp’s Trial Against Amber Heard Became the Biggest News Event in the Country Because it’s the Perfect Storm of America’s Obsession with Celebrity*, INSIDER (May 28, 2022, 9:03 AM), <https://www.insider.com/why-the-world-became-obsessed-with-the-depp-v-heard-trial-2022-5> [<https://perma.cc/DRL2-VJGP>].

⁸⁸ See *Lawyer Grills InfoWars Producer Daria Karpova Over Sandy Hook Shooting ‘Hoax’ Reports*, LAW & CRIME NETWORK (July 27, 2022), <https://www.youtube.com/watch?v=pKb-ySKkN5Q> [<https://perma.cc/BG92-NVJ9>] (showing nearly 1.5 million views for one witness’s testimony); *Lawyer Asks Alex Jones if He Knows What ‘Perjury’ Is After Surprise Text Message Reveal*, LAW & CRIME NETWORK (Aug. 3, 2022), <https://www.youtube.com/watch?v=tpnSClAk5A8> [<https://perma.cc/Z9CH-69S7>] (showing nearly 1.3 million views for testimony from Alex Jones).

⁸⁹ This outcome was anticipated by the trial judge in *Westmoreland*, who presciently observed that a verdict in that case “may settle liability as between the parties; but it is unlikely to settle anything for anyone else,” and that the filming of the trial would have been “more important than its decision” because “historians and commentators on the war and on the press w[ould] not accept the verdict of the jury and the rulings of the judge as definitive answers” but would instead “seek lessons and conclusions by analysis of the witnesses’ testimony.” *Westmoreland v. CBS Inc.*, 596 F. Supp. 1166, 1169 (S.D.N.Y. 1984).

A. Depp v. Heard

The case of *Depp v. Heard* arose from a 2018 op-ed Amber Heard published in the *Washington Post*.⁹⁰ In the article, Heard referred to herself as a “public figure representing domestic abuse” and wrote that she saw “how institutions protect men accused of abuse.”⁹¹ She also tweeted a link to the op-ed, which was headlined, “I spoke up against sexual violence—and faced our culture’s wrath. That has to change.”⁹² Two years before publishing the article, Heard filed a restraining order against her then-husband Johnny Depp and initiated divorce proceedings, alleging he had been violent toward her.⁹³ The op-ed itself, however, did not refer to Depp by name.⁹⁴

Depp then brought a fifty-million-dollar defamation action against Heard in Virginia state court, alleging the article defamed him by implication.⁹⁵ Heard counterclaimed, arguing that Depp’s attorney defamed her by accusing her of perpetuating a “hoax” through her abuse allegations.⁹⁶ Depp previously lost a similar libel case against a British tabloid, where there was a lower evidentiary burden to prove libel and where the court still concluded Heard’s abuse allegations were substantially true.⁹⁷

The *Depp v. Heard* trial was inevitably going to attract public attention. Depp is among Hollywood’s highest-paid actors, having made hundreds of millions of dollars from the *Pirates of the Caribbean* film

⁹⁰ Amber Heard, *I Spoke up Against Sexual Violence—and Faced our Culture’s Wrath. That has to change.*, WASH. POST (Dec. 18, 2018, 5:58 PM), https://www.washingtonpost.com/opinions/ive-seen-how-institutions-protect-men-accused-of-abuse-heres-what-we-can-do/2018/12/18/71fd876a-02ed-11e9-b5df-5d3874f1ac36_story.html [<https://perma.cc/2LYQ-7PHD>].

⁹¹ *Id.*

⁹² *Id.*; see also Jessica Winter, *The Johnny Depp–Amber Heard Verdict Is Chilling*, NEW YORKER (June 2, 2022), <https://www.newyorker.com/culture/cultural-comment/the-depp-heard-verdict-is-chilling> [<https://perma.cc/UM6D-H2XR>] (summarizing allegedly defamatory statements).

⁹³ See Rory Carroll, *Amber Heard Settles Domestic Abuse Case Against Johnny Depp*, GUARDIAN (Aug. 16, 2016, 2:29 PM), <https://www.theguardian.com/film/2016/aug/16/amber-heard-assault-allegations-johnny-depp-divorce> [<https://perma.cc/VN5A-VU9Z>].

⁹⁴ See Heard, *supra* note 90.

⁹⁵ See Adam Manno, *Why Johnny Depp’s Decision to Sue Amber Heard in Virginia Paid Off*, DAILY BEAST (June 1, 2022, 8:21 PM), <https://www.thedailybeast.com/why-johnny-depps-decision-to-sue-amber-heard-in-virginia-paid-off> [<https://perma.cc/UA7T-MH5W>].

⁹⁶ *Id.*

⁹⁷ Bryant, *supra* note 16.

franchise.⁹⁸ Amber Heard was famous enough in her own right, having appeared in supporting roles in dozens of films, including superhero blockbusters.⁹⁹ The couple's divorce was already a subject of tabloid fascination, and the court proceedings would require both to appear on the stand and testify about their personal lives.¹⁰⁰ Furthermore, the fact that the op-ed was published in the wake of the #MeToo discourse regarding sexual assault and partner violence made the trial all the more salient for both the public and commentators.¹⁰¹

With all the public interest in *Depp v. Heard*, multiple media outlets requested to film the trial.¹⁰² Heard objected to the presence of a camera in the courtroom, arguing it was inappropriate to film the proceedings given the allegations of domestic abuse involved.¹⁰³ Heard's attorneys also noted that Depp's supporters were already primed to go after her, arguing that "[w]hat they'll do is take anything that's unfavorable — a look; [t]hey'll take out of context a statement, and play it over and over and over and over again."¹⁰⁴ Depp, meanwhile, supported the filming of the trial.¹⁰⁵

After considering the request, the court decided to allow gavel-to-gavel coverage of the proceeding.¹⁰⁶ The court explained that its decision was in part an administrative response to media interest in the case and

⁹⁸ See Dorothy Pomerantz, *Hollywood's Highest-Paid Actors*, FORBES (Sept. 8, 2010, 2:00 PM), <https://www.forbes.com/2010/09/08/depp-stiller-hanks-sandler-business-entertainment-highest-paid-actors.html?sh=4f9266f11ca8> [https://perma.cc/R9KJ-MQ6H]; Joshua L. Weinstein & Sharon Waxman, *Johnny Depp's Swipe of 'Pirates' Profits: \$350 Million*, THE WRAP (July 5, 2011, 4:52 PM), <https://www.thewrap.com/johnny-depps-swipe-pirate-profits-350-million-exclusive-28817/> [https://perma.cc/WBL6-T56R].

⁹⁹ See Dumenco, *supra* note 87 (describing Heard's acting career).

¹⁰⁰ See Constance Grady, *Johnny Depp, Amber Heard, and Their \$50 Million Defamation Suit, Explained*, VOX (Nov. 3, 2022, 4:46 PM), <https://www.vox.com/culture/23043519/johnny-depp-amber-heard-defamation-trial-fairfax-county-domestic-abuse-violence-me-too> [https://perma.cc/Z9RH-BHK4].

¹⁰¹ See David Sillito, *Amber Heard and Johnny Depp's 'Trial by TikTok'*, BBC (June 1, 2022), <https://www.bbc.com/news/world-us-canada-61649522> [https://perma.cc/LQM8-4T6G] (describing case as "symbolic"); see also Michelle Goldberg, *Amber Heard and the Death of #MeToo*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/05/18/opinion/amber-heard-metoo.html> [https://perma.cc/MCE7-R79A] (commenting on *Depp v. Heard* in the context of #MeToo).

¹⁰² Gene Maddaus, *Why Was Depp-Heard Trial Televised? Critics Call It 'Single Worst Decision' for Sexual Violence Victims*, VARIETY (May 27, 2022, 4:15 PM), <https://variety.com/2022/film/news/johnny-depp-amber-heard-cameras-courtroom-penney-azarate-1235280060/> [https://perma.cc/FXR3-35PZ].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

suggested that maintaining a livestream would obviate the need for reporters to flood the courthouse.¹⁰⁷ The proceedings were streamed across E! News, YouTube, Court TV, and the Law & Crime Network.¹⁰⁸ These streams quickly acquired massive audiences, which only increased as the trial progressed.¹⁰⁹ Court TV's viewership quadrupled during the trial.¹¹⁰ The Law & Crime Network reportedly saw a fifty-fold increase in viewers, with its streaming audience hitting a peak of 1.25 million when Depp took the stand.¹¹¹

Internet users widely shared trial footage over social media, with users largely rallying in support of Depp and vilifying Heard.¹¹² Clips of Depp and his legal team went viral, with TikTok videos hashtagged #JusticeForJohnnyDepp generating more than twenty billion views.¹¹³ By contrast, #JusticeForAmberHeard received fewer than 150 million views as social media users and platform algorithms favored anti-Heard content.¹¹⁴ This social media frenzy had not played out with the earlier British libel trial, which occurred off-camera and attracted only some in-person queueing of “diehard” fans outside the courthouse doors.¹¹⁵

Having welcomed the cameras into the courtroom, Depp played to them during the six-week trial.¹¹⁶ During his cross-examination, Depp testified that he brought the lawsuit against Heard because he wanted to

¹⁰⁷ *Id.*

¹⁰⁸ See Danielle Braff, *Trial by Tiktok: How Social Media Hijacked the Depp v. Heard Defamation Trial*, ABA J., 34 (Oct. 1, 2022, 1:00 AM), <https://www.abajournal.com/magazine/article/how-social-media-hijacked-the-depp-v.-heard-defamation-trial> [<https://perma.cc/J4QD-7HZ2>].

¹⁰⁹ See Maddaus, *supra* note 102 (describing growth in trial viewership as “exponential[]”).

¹¹⁰ See Bender, *supra* note 87.

¹¹¹ See *id.*; Maddaus, *supra* note 102.

¹¹² Leigh Gilmore, *Johnny Depp's Strategy of Destruction*, WBUR (June 1, 2022), <https://www.wbur.org/cognoscenti/2022/06/01/johnny-depp-amber-trial-heard-me-too-intimate-partner-violence-leigh-gilmore> [<https://perma.cc/82ZB-FZR9>] (“[I]n this trial, every look—every word—from Amber Heard has been memed and mocked across social media via a steady stream of #AmberHeardIsALiar hate.”).

¹¹³ See Braff, *supra* note 108, at 34.

¹¹⁴ See *id.* (tallying views as of September 2022); Jessica Winter, *The Johnny Depp–Amber Heard Trial Is Not as Complicated as You May Think*, NEW YORKER (May 23, 2022), <https://www.newyorker.com/culture/cultural-comment/the-johnny-depp-amber-heard-trial-is-not-as-complicated-as-you-may-think> [<https://perma.cc/9NT8-5262>] (commenting on the proliferation of “anti-Heard content on Facebook and Instagram”).

¹¹⁵ Henry Mance, *Johnny Depp, the High Court and the Reality of Fame*, FIN. TIMES (July 30, 2020), <https://www.ft.com/content/e7607bb7-63e3-4084-ae9-73a717c7a75b> [<https://perma.cc/T99D-QB4S>] (describing role of fame in Depp's British case against Heard without discussing social media treatment of proceedings).

¹¹⁶ Bryant, *supra* note 16 (reporting that Depp “wanted it televised”).

be “able to speak and use [his] own voice.”¹¹⁷ As the proceedings continued, commentary suggested that even if Depp ultimately lost his case against Heard, he would likely still win in the court of public opinion.¹¹⁸ One public relations expert in crisis management suggested that through the filmed proceedings, Depp was “showing studios and showing publicists that he can win audiences over.”¹¹⁹ Indeed, the filming of the litigation was itself a “PR advantage” that gave the case value apart from any winning verdict.¹²⁰

The jury ultimately ruled in Depp’s favor on his defamation claims, awarding him more than ten million dollars in damages.¹²¹ However, the jury also agreed that Depp’s attorney had defamed Heard by stating she had perpetrated a hoax and thus awarded her damages totaling two million dollars.¹²² Within a week of receiving the verdict, Depp joined TikTok and promptly amassed ten million followers.¹²³ He dedicated his first video to the fans who watched and stood by him during the trial.¹²⁴

B. The Alex Jones Damages Trials

On a few key dimensions, the Alex Jones proceedings were of a different character than *Depp v. Heard*. Jones had already been subject to default judgments in the defamation cases against him for failure to

¹¹⁷ *Id.*

¹¹⁸ See, e.g., *id.* (“[I]f you’ve been watching, it’s difficult to shake the feeling that Depp’s presentation of his case to as broad an audience as possible will be some kind of victory for the actor.”); Dumenco, *supra* note 87 (“In a way, the Depp-Heard trial is, for better or worse, a referendum on celebrity popularity.”).

¹¹⁹ Jacob Shamsian & Ashley Collman, *Amber Heard Overacted on the Stand, but Johnny Depp’s Defamation Lawsuit is Still Hers to Lose, Experts Say*, INSIDER (May 7, 2022, 8:44 AM), <https://www.insider.com/experts-amber-heard-over-acted-on-the-stand-will-win-2022-5> [<https://perma.cc/F6VG-BSUV>].

¹²⁰ Victoria Bekiempis, *Could Amber Heard Win Her Appeal Against Johnny Depp?*, VULTURE (Aug. 19, 2022), <https://www.vulture.com/2022/08/can-amber-heard-win-appeal-against-johnny-depp.html> [<https://perma.cc/T3S3-L9KB>].

¹²¹ Judgment Order at 1, 6–8, *Depp v. Heard*, No. CL-2019-2911, 2019 WL 8883669 (Va. Cir. Ct. 2019).

¹²² *Id.*

¹²³ Annabel Nugent, *Johnny Depp Reaches 10 Million Followers on TikTok Within 24 Hours of Posting his First Video*, THE INDEP. (June 9, 2022, 12:48 PM), <https://www.independent.co.uk/arts-entertainment/films/news/johnny-depp-followers-tiktok-video-b2097395.html> [<https://perma.cc/RS22-MJQ8>].

¹²⁴ Kisha Forde, *Johnny Depp Dedicates First TikTok to “Unwavering Supporters” Following Amber Heard Court Battle*, E! NEWS (June 7, 2022, 4:38 PM), <https://www.eonline.com/news/1333705/johnny-depp-dedicates-first-tiktok-to-unwavering-supporters-following-amber-heard-court-battle> [<https://perma.cc/4NSS-45SG>].

participate in discovery,¹²⁵ and there was no Hollywood element to his case. But like the trial in *Depp v. Heard*, the Jones damages trials showed that a courtroom could become its own communicative platform with cameras present.

Jones, the founder of the conspiracy theory media franchise Infowars, was sued in Texas and Connecticut by the family members of Sandy Hook victims for his baseless pronouncements that the Sandy Hook school shooting was a “false flag” event designed to sway public opinion toward gun control.¹²⁶ The victims’ family members alleged they had been threatened and harassed for years as a result of Jones’s falsehoods.¹²⁷

In many ways, these Sandy Hook claims represent model defamation actions. There was a clear harm in stating—without a shred of proof and contrary to all of the evidence otherwise—that the plaintiffs were not parents of murdered children but instead actors complicit in a left-wing conspiracy.¹²⁸ Neither the Texas nor Connecticut courts, however, had to reach the merits of whether Jones had propounded this conspiracy theory with actual malice.¹²⁹ Because Jones had refused to comply with his discovery obligations, default judgments were entered against him in both states.¹³⁰

With default judgments issued against Jones, the cases proceeded to damages trials, each one livestreamed.¹³¹ Legal commentators closely followed the livestreams and delivered play-by-plays of the proceedings on Twitter, now known as X.¹³² Jones’s Infowars fans also closely followed the livestreams, leaving comments threatening the plaintiffs and

¹²⁵ Elizabeth Williamson, *Alex Jones Loses by Default in Remaining Sandy Hook Defamation Suits*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2021/11/15/us/politics/alex-jones-sandy-hook.html> [https://perma.cc/4UBS-6PSU].

¹²⁶ Shannon Bond, *How Alex Jones Helped Mainstream Conspiracy Theories Become part of American life*, NPR (Aug. 6, 2022, 5:00 AM), <https://www.npr.org/2022/08/06/1115936712/how-alex-jones-helped-mainstream-conspiracy-theories-into-american-life> [https://perma.cc/U7PZ-3CGP].

¹²⁷ Christine Hauser, *Alex Jones Loses by Default in Sandy Hook Defamation Lawsuits*, N.Y. TIMES (Oct. 11, 2021), <https://nyti.ms/3nUFnHm> [https://perma.cc/94V8-U6HJ].

¹²⁸ Aja Romano, *Alex Jones’s Lies Have Cost Him \$965 Million in a Second Sandy Hook Trial*, VOX (Oct. 12, 2022, 5:09 PM), <https://www.vox.com/culture/23292298/alex-jones-sandy-hook-defamation-trial-heslin-lewis-infowars> [https://perma.cc/NF9D-P3XN] (summarizing claims and effects on plaintiffs and broader discourse).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.* (“A host of journalists and law bloggers have been live-tweeting the trial minute to minute, from the courtroom and while following the courtroom livestream.”).

repeating Jones's theory that the Sandy Hook shooting was staged.¹³³ The comments were so harassing and persistent that the feed's operator, the Law & Crime Network, disabled the comment section entirely.¹³⁴

In contrast to the *Depp v. Heard* trial, here it was the defendant who leveraged the cameras to communicate with his fans. During the Texas proceedings, Jones arrived wearing tape over his mouth, symbolizing that the lawsuit violated his free-speech rights.¹³⁵ At one point he even left the courtroom to make an Infowars segment, mocking a plaintiff's testimony as it was ongoing.¹³⁶ With the Connecticut trial, Jones used his testimony to promote his cryptocurrency donation page, spelling out the URL and confirming that the donations went right to his "personal wallet."¹³⁷ When the plaintiffs' attorney asked him if he was making an advertisement on the stand, Jones responded, "We're fighting the Deep State, we need money."¹³⁸ Infowars then ran that clip and others repeatedly, overlaid with the URL to the donation page.¹³⁹ The narrative on the website was that Jones was being persecuted through these trials, and that his supporters needed to give him money (or buy his health supplements) to keep him from being silenced.¹⁴⁰

Between the two damages trials, Jones was found to owe more than \$1 billion in damages.¹⁴¹ Although Infowars is now in bankruptcy, it remains operational with estimated annual revenues of seventy million dollars and still raises funds off the trial.¹⁴²

¹³³ Laura June, *The YouTube Channel Streaming Alex Jones's Trial Disabled The Chat Because of Threats to Sandy Hook Victims' Families*, BUZZFEED (Sept. 20, 2022, 3:48 PM), <https://www.buzzfeednews.com/article/lauraxjune/alex-jones-sandy-hook-trial-youtube-chat-disabled> [<https://perma.cc/AVV6-PJ65>].

¹³⁴ *See id.* ("Despite having covered many controversial cases, we have never before taken such a drastic measure. It also was not a tough call here.").

¹³⁵ Jim Vertuno & Michael Tarm, *How Alex Jones' Bombastic Behavior Impacts him in Court*, AP (Aug. 5, 2022, 7:06 PM), <https://apnews.com/article/shootings-austin-bae315601b623812f376fe3d38c1cf5c> [<https://perma.cc/RK6F-R75J>].

¹³⁶ *Id.*

¹³⁷ Anna Merlan (@AnnaMerlan), X (Sep. 22, 2022, 3:08 PM), <https://twitter.com/annamerlan/status/1573026534322933760> [<https://perma.cc/H6Z9-HM7W>].

¹³⁸ Merlan Vice article, *supra* note 18.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See* Elizabeth Williamson & Emily Steel, *Sandy Hook Families Are Fighting Alex Jones and the Bankruptcy System Itself*, N.Y. TIMES (Mar. 18, 2023), <https://www.nytimes.com/2023/03/18/us/politics/alex-jones-bankruptcy.html> [<https://perma.cc/KU76-WMTP>].

¹⁴² *See id.*; *see also* Alex Jones, *Exclusive: DOJ Investigates Alex Jones' Cat!*, INFOWARS (Feb. 24, 2023, 12:06 PM), <https://www.infowars.com/posts/exclusive-doj-investigates-alex-jones-cat/> [<https://perma.cc/Z5VG-YGNF>] (stating that

V. CAMERAS AS A LITIGATION INCENTIVE TO DEFAMATION PLAINTIFFS

In the existing libel climate, there are multiple reasons to believe the possibility of filmed proceedings could further entice opportunistic plaintiffs to bring defamation claims, namely the ability to connect directly with supporters, harm the defendant's reputation, garner publicity, and raise money to support their platforms.

A. Ability To Connect with Supporters Directly

As both *Depp v. Heard* and the Jones trials demonstrated, filmed trials can provide litigants with a platform to communicate with and perform for their supporters. Litigants can use their testimony to present a narrative that appeals to their followings. They can present themselves as victims in a way that rallies supporters to their defense, as shown by the TikTok fanbase Depp accrued during his trial and the YouTube commenters intensely defending Jones. This advantage may be particularly attractive to individuals who have made being “anti-media” a part of their brand, as antipathy toward media has become a point of political identity for some.¹⁴³

B. Ability To Inflict Reputational Harm on Defendant

Just as the broadcast of a defamation trial may rehabilitate or even enhance the reputation of a litigant (if only among the litigant's own supporters), a broadcasted trial can also damage the reputation of a defendant.

Amber Heard's reputation was plainly damaged by the filming of her defense against Johnny Depp's defamation allegations. Heard testified as much while on the witness stand, stating she received thousands of death threats throughout the trial.¹⁴⁴ Headlines described her credibility as being in “tatters”; the hashtag #amberheardisaliar trended on Twitter; and millions signed a petition supporting her removal from the blockbuster

“Infowars founder Alex Jones released a video on Thursday showing off his daughter's cat Mushu who is being targeted by the Department of Justice in relation to the Sandy Hook lawsuits against Jones [sic]” and reminding supporters “to visit the Infowars Store to do your part in the battle against globalism by purchasing great products such as dietary supplements, books, t-shirts, survival gear and much more”).

¹⁴³ See Conroy, *supra* note 83.

¹⁴⁴ Julia Jacobs, *Amber Heard Describes Impact of Online Attacks: 'I'm a Human Being'*, N.Y. TIMES (May 26, 2022), <https://www.nytimes.com/2022/05/26/arts/amber-heard-johnny-depp-harassment.html> [<https://perma.cc/MMW7-EB58>].

Aquaman film franchise.¹⁴⁵ None of this would have occurred had the trial been closed off to cameras. After all, the British trial provoked no such backlash, even though it covered the same issues.

While defamation litigation against a media defendant necessarily differs from defamation litigation involving a divorced Hollywood couple, a motivated plaintiff may still look at *Depp v. Heard* and surmise that a filmed defamation trial could potentially harm a news outlet's reputation.¹⁴⁶

C. Ability To Attract Publicity Generally

The broadcast of a defamation trial also has the potential to raise a plaintiff's public profile in a general sense, simply by drawing more attention to the plaintiff's claim.

The difference in the degree of news coverage between Johnny Depp's American and British libel cases indicates that the use of cameras had a real impact on the level of publicity the American trial received. Because the media filmed the American trial, its dramatic moments could be easily shared on social media or packaged up for cable news. This deluge of attention only begat more attention. The *New York Times* published eighty-two stories about the American trial, compared to three

¹⁴⁵ See, e.g., Giulia Carbonaro, *Amber Heard's 'Credibility in Tatters' After Losing Depp Trial—Legal Expert*, NEWSWEEK (June 2, 2022, 8:14 AM), <https://www.newsweek.com/amber-heard-credibility-tatters-losing-depp-trial-legal-expert-1712333> [<https://perma.cc/2AZB-T5CE>]; see also Joy Press, *What Happens to Johnny Depp's and Amber Heard's Careers? Insiders Weigh In*, VANITY FAIR (June 3, 2022), <https://www.vanityfair.com/hollywood/2022/06/what-happens-to-johnny-depps-and-amber-heards-careers> [<https://perma.cc/3CZG-9WZW>].

¹⁴⁶ To be sure, a filmed defamation trial could also enhance a media organization's reputation if its employees credibly testified that they followed best reporting practices and standards.

stories about the British trial.¹⁴⁷ Even the BBC published more stories about the American trial than the British one.¹⁴⁸

Such coverage—or “earned media,” as opposed to “paid media”—can have the effect of increasing the public’s name recognition of an individual and expand familiarity with an individual’s positions.¹⁴⁹ Because defamation trials tend to attract public interest, a motivated litigant might expect any filmed proceedings to be the subject of at least some news interest.

D. Ability To Fundraise

Finally, the broadcast of a defamation trial could enhance an individual’s ability to raise funds in support of his or her cause.

The Alex Jones damages trials provided a clear example of how a filmed defamation proceeding could be used to raise money, with Jones literally calling for donations from the witness stand.¹⁵⁰ He also utilized clips of the trial to drive traffic to his Infowars website, where he promoted various kinds of dietary supplements and survivalist gear.¹⁵¹

¹⁴⁷ These figures are drawn from a Google site search of the nytimes.com domain over a three-month period encompassing each trial and using the parties’ names. *See* GOOGLE,

https://www.google.com/search?q=site%3Anytimes.com+%22johnny+depp%22+%22amber+heard%22&rlz=1C1GCEA_enUS961US962&biw=1920&bih=969&tbs=cdr%3A1%2Ccd_min%3A4%2F1%2F2022%2Ccd_max%3A6%2F30%2F2022&sxsrf=APwXEdd_skKW2n9Bg9mcDzidBeaiwVpCzw%3A1680314115534&ei=A48nZIPaH83k5NoPvaqiEA&ved=0ahUKEwjD593vyYf-AhVNMIkFHT2VCAIQ4dUDCBA&uact=5&oq=site%3Anytimes.com+%22johnny+depp%22+%22amber+heard%22&gs_lcp=Cgxnd3Mtd2l6LXNlcnAQA0oECEEYAVC2A1jTIGCWImgCcAB4AIABfYgBvQmSAQQxMi4zmAEAoAEBwAEB&scient=gws-wiz-serp#ip=1 [https://perma.cc/3R3Z-KDNQ].

¹⁴⁸ A review of BBC articles tagged Amber Heard shows forty articles concerning the American trial, compared to twenty-five articles reporting on the British proceedings. *See Amber Heard*, BBC <https://www.bbc.com/news/topics/c90xm9v15m1t?page=1> [https://perma.cc/MN4G-GEHM].

¹⁴⁹ The term “earned media” refers to any media coverage or received by a subject for which the subject has not paid. *See* Andrew T. Stephen & Jeff Galak, *The Effects of Traditional and Social Earned Media on Sales: A Study of a Microlending Marketplace*, 49 J. MKTG RES. 624, 624 (2012). Indeed, former president Donald Trump’s electoral success in 2016 has been in part tied to his ability to generate earned media. *See* Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html> [https://perma.cc/4WMX-PEKB].

¹⁵⁰ *See* Merlan Vice article, *supra* note 18.

¹⁵¹ *See id.*

While Jones was a defendant, this potential litigation incentive may be a particular draw for those who are already attempting to raise money for the purpose of suing the press.¹⁵²

VI. CONCLUSION

The filming of defamation proceedings has arrived at a time when the press is arguably more vulnerable to catastrophic libel claims than at any point since the *New York Times v. Sullivan* decision. This Essay shows that a policy understood to advance press freedoms—the allowance of cameras in courtrooms—may actually come with some costs to the press, insofar as this policy has the potential to serve as another incentive to bring weaponized lawsuits against media organizations.

Does this mean that the press should retreat from its longstanding support for camera access to courtrooms? Very likely not. The argument that camera access makes the judiciary more transparent to the public is still strong and compelling. Moreover, it would be inconsistent and unworkable for the press to advocate for camera access to all manner of criminal trials, while shying from camera coverage of defamation trials.

News organizations, however, should nevertheless be mindful that when they ask to bring cameras into courtrooms, they may one day be on the other side of the lens.

¹⁵² See Levine, *supra* note 21 (describing Kash Patel’s Legal Offense Fund); Steinbuch, *supra* note 86 (describing Kyle Rittenhouse’s Media Accountability Project).