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

Clay Calvert*

Abstract

This Article examines how defamation law promotes a culture of hyperbole and exaggeration on television news talk shows at the expense of more meaningful dialogue and discourse. The Article uses the 2020 federal court rulings in McDougal v. Fox News Network, LLC and Herring Networks, Inc. v. Maddow as analytical springboards to address this problem. In both cases, judges dismissed defamation claims stemming from comments made by well-known talk-show hosts—Fox News’s Tucker Carlson in McDougal and MSNBC’s Rachel Maddow in Herring Networks—on the ground that their remarks would not be understood by viewers as factual assertions. In concluding that Carlson’s and Maddow’s statements amounted to nonactionable expressions of opinion, the judges evaluated the nature of news talk shows and reasoned that they constitute venues where viewers today expect bombast and bluster. While the outcomes are laudable for safeguarding political opinions, they are highly problematic for a democratic society because they incentivize hyperbole over rational discussion of political topics that affect voters’ decisions. In brief, Carlson and Maddow are allowed to cast aspersions and then to claim in their defense that no one would believe them as factual assertions. The

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more hosts ratchet up the level of rhetoric on their shows and cultivate reputations for bloviation, the more likely they are to successfully defend against defamation lawsuits. This Article argues that courts in future defamation cases should consider news talk shows on a program-by-program basis rather than continue to flesh out a nascent, genre-based presumption that news talk shows as a whole trade in protected opinions.

TABLE OF CONTENTS

I. INTRODUCTION	54
II. THE VALUE OF POLITICAL OPINIONS IN FIRST AMENDMENT LAW AND THE ROLE OF CONTEXT IN THE FACT-VERSUS-OPINION DICHOTOMY	59
A. <i>The Primacy of Political Opinions Under the First Amendment</i>	59
B. <i>Journalistic Context in Libel Law</i>	62
III. THE DETERIORATION OF POLITICAL DISCOURSE: AN UNSEEMLY FLIPSIDE OF THE FREE SPEECH VICTORIES IN MCDUGAL AND HERRING NETWORKS	66
IV. CONCLUSION.....	69

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 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.

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).

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,

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

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>.

Gardner rather wryly wrote in summing up the ruling, “[d]on’t always mistake what Tucker 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

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).

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 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

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”).

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.

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 Amendment³¹ jurisprudence, and 2) square with the notion that 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

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 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

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 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

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.

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).

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-neighbor 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 America 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 a commentator on

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).

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 assertion.

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.

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.

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 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

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—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.*

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 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

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.

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.*

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 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-

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.

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.").

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

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 replications 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).

safeguarded categories, the appellate court added that “consideration should be given to the context and all surrounding circumstances, including the 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 MCDUGAL 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

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

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 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

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.

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.’”).

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 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 plaintiff defamation verdicts. Carlson’s and Maddow’s shows may appear on cable news channels where one might reasonably expect to hear facts, but

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.

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).

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 engage in overheated rhetoric, exaggeration, and colorful commentary, the more likely this presumption is

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.

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.