



Persuasion

Fighting Fake News, In Court

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January 12, 2022

In November 2020, Ruby Freeman served as a temporary election worker to help count the vote in Fulton County, Georgia. “The times when I’ve decided to work for the county, I did so because I thought I could help and because I knew I could do the job well,” Freeman said in a statement issued through her lawyers. “What I didn’t know was that it would turn out like this.”

Meaning... *this*:

After the election, President Trump energetically pushed the bogus claim that Georgia’s election was rigged. Citing grainy images from a security camera, lawyers for the Trump campaign alleged that Fulton county workers had counted illegal ballots. Within hours, the claim was debunked by Georgia officials, including the Republican secretary of state’s office and the state Bureau of Investigation. The video showed “normal vote processing.”

By that time, however, various MAGA-friendly outlets had already published the accusation. They did not retract it. Instead, one of them, Gateway Pundit, identified Ruby Freeman by name, accused her of “voter fraud on a MASSIVE scale,” and added, “Maybe the Georgia police or Bill Barr’s DOJ may want to pay Ruby Freeman a visit.” The article concluded with two photographs of Freeman over the headline, “CROOK GETS CAUGHT.” Over the following days and weeks, Gateway Pundit continued to drive the story, with headlines like, “Has the FBI Spoken with Ruby Freeman or Ralph Jones Yet? And If Not, Why in the Hell Do We Have an FBI?”—complete with additional photos of Freeman.

Not surprisingly, Freeman’s life turned upside-down. “We know where you live, we [sic] coming to get you,” was one of many threats she received, according to her litigation complaint. Strangers camped out at her house, knocked on her door, harassed neighbors. She bought

security cameras and deactivated the social media accounts for her business. On January 6, 2021, the day of the U.S. Capitol insurrection, the FBI recommended she evacuate her home. She did not return for two months.

“Right now, I can’t imagine ever going back to election work,” she said in her statement. “My life has been disrupted in so many ways.” Freeman’s daughter, Shaye Moss, who was an employee of the Fulton County elections department, endured similar torments, including messages saying she should die for her “treason,” threats to her grandmother and 14-year-old son, and protests at her office demanding her firing. “I’m afraid to be out in public,” Moss said in a statement provided by her lawyer. “Now I’d rather get my groceries delivered than go to the store because even that makes me nervous.”

Although Gateway Pundit is a well-known trafficker in falsehoods—PolitiFact rates 80 percent of the site’s fact-checked articles mostly or entirely false—it’s a major conservative website. Usually, litigating against such an outfit would be prohibitively difficult for an ordinary citizen, even if the case were watertight. The result: zero accountability.

With the help of a new legal aid project, however, Freeman and Moss are breaking that pattern by suing Gateway Pundit for defamation. (They’re also suing One America News and Rudolph Giuliani in a separate action.) That project—called Law for Truth—could have interesting implications for super-spreaders of toxic disinformation.

Launched in December by Protect Democracy, a nonprofit group in Washington, Law for Truth creates a pathway for victims of political libel to fight back. It’s based on the observation that traditional defamation actions have been one of the few ways of holding purveyors of fake news accountable—for instance, by leading Fox News to retract a made-up claim that a murdered DNC staffer was responsible for the 2016 hack of the party’s email accounts. Just last month, a judge green-lighted a massive—as in \$1.6 billion—defamation lawsuit by Dominion Voting systems, an election-equipment supplier, against Fox News.

“Yet, as effective as defamation suits were when they were deployed, very few were filed relative to the sharp uptick in injurious defamation,” Ian Bassin, Executive Director and co-founder of Protect Democracy, told me. The underenforcement of defamation law is a kind of market failure, he argues. Law for Truth provides a remedy by “essentially creating a nonprofit

plaintiffs' bar focused on ensuring accountability under the law" for defamatory political disinformation.

No, the effort cannot halt the plague of disinformation. But it may change today's lopsided odds against victims. "There is a real sense of impunity among some of these outlets," said Rachel Goodman, who leads the Law for Truth legal team. "We think it would be good for defendants and potential defendants to understand that there are significant liability risks for spreading these lies."

Traditionally, civil-liberties advocates have cast a wary eye on defamation actions. All too often, litigation—actual or threatened—has been exploited by powerful interests to harass journalists and intimidate critics. Donald Trump is no stranger to this tactic, having promiscuously threatened to sue his critics both before and during his presidency. Taking journalists to court is a tried and true weapon of authoritarians. Just such abuses were the reason that, in 1964, the Supreme Court slapped down Alabama state officials' use of libel law to stifle civil rights advocacy.

What the last few years have demonstrated, though, is that underenforcement of defamation law can be just as damaging to free speech as overenforcement. In the world of social media and fake news, spreading lies is trivially easy and often profitable. Russian-style "firehose of falsehood" disinformation campaigns are a staple of the MAGA movement. The prospect of losing your reputation and your safety would deter just about anyone from participating in politics—which, of course, is the point of MAGA's campaign of intimidation against honest public officials.

Increasingly, civil-libertarians are taking this new reality on board. "There should be a right in a democracy to be involved in discussing and trying to influence matters of public concern without having to sacrifice your reputation," Nadine Strossen, a New York Law School emeritus professor and former president of the American Civil Liberties Union, told me. "That can have a negative impact on the free exchange of ideas and democratic activity."

The Law for Truth model is not without risk. “We have to keep in mind that whatever tools we create are going to be used by people whose cases are not quite as strong,” Walter Olson, a litigation expert at the Cato Institute, told me. “We need to think about what happens when people put together large financial kitties to sue in the other direction. Think about ten years from now, once it’s been fully accepted to raise money by saying, ‘We’ve got a list of media outlets we can destroy using litigation.’ It will be used to beat up on some small publications or writers who don’t have very good means to defend themselves.”

To avoid this danger, it will be important for initiatives such as Law for Truth to stay within the boundaries of existing defamation law, not stretch those boundaries with novel or expansive claims. “The two women in the Gateway Pundit suit have almost the paradigm of a defamation case,” David French, a writer, lawyer, and *Persuasion* advisor who formerly led the Foundation for Individual Rights in Education, told me. “The simple fact of the matter is that we do have large-scale, harmful lying that puts Americans, in some cases, in fear for their lives. The law has always had mechanisms for responding to that. The institutionalization of efforts to protect individuals who otherwise might not have resources to defend themselves is an important development.”

To make the best of Law for Truth, then, all concerned—courts, lawyers, and activists—need to anchor cases firmly to the traditional tort of defamation. A general claim that someone uttered a harmful political lie should never be enough to get into court and win a judgment. “There is no law against disseminating lies about democracy,” Olson said. “There is no civil liability against disseminating lies about democracy.” Which is as it should be.

Litigation thus needs to focus on defending individuals who suffer concrete reputational damage from false and malicious claims: the Ruby Freemans and Shaye Mosses of the world. Unlike professional politicians, ordinary citizens like election workers don’t sign up for the rough-and-tumble of public life, and they shouldn’t be chilled or intimidated by malicious personal destruction.

With that caveat, Law for Truth holds promise. MAGA has waged a masterly campaign of asymmetric warfare against America’s liberal norms and institutions by converting the First Amendment’s robust protections for political speech into a shield for lies.

“Every time these grifters have been faced with having to make their case in court, they have failed or completely recanted,” observes David Becker, of the Center for Election Innovation and Research. “What Protect Democracy is doing is a crucial part of the overall response that’s necessary, which is to force those whose lies have led to real, tangible harm to individuals to defend themselves—and to do it in court, where there are rules of evidence.” Democracy’s friends have our own asymmetric weapon: truth.