

THE WEAPONIZED LAWSUIT AGAINST THE MEDIA: LITIGATION FUNDING AS A NEW THREAT TO JOURNALISM

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This Article identifies a new front in the current war against the media—one in which billionaire private actors clandestinely fund other people's lawsuits in an attempt to censor press entities. The use of strategic litigation to shutter media outlets constitutes a major threat to the expressive order. And the current climate of press failures, institutional disaggregation, decreasing accountability journalism, and declining public trust—the very vulnerability of the press today—significantly amplifies the chilling impact of strategic third-party funding. It does so whether the strategy is death-by-a-thousand-litigations or titanic, bankruptcy-inducing damage verdicts.

Still, contrary to the assertions of both funders and their opponents, finding an appropriate response to these developments is far from easy under current law. It is neither realistic nor constitutionally palatable to prohibit third-party funding in media cases. Such funding can play a valuable role by ensuring that even penurious individuals can vindicate viable claims against media organizations. Yet existing champerty and maintenance jurisprudence cannot adequately address the problem. A richer, more multivalent approach is called for. In that spirit, this Article proposes a realistic four-pronged strategy: (1) judicial discretion to order disclosure of third-party funding in discovery; (2) waiver or reduction of appeal bonds in third-party-funded media cases where such bonds would effectively make verdicts against the media unappealable; (3) development of counter-funding strategies and support of third-party-funding

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watchdogs; and (4) consideration of a litigation misuse claim against third-party funders in cases where their support is designed to shutter press outlets.

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INTRODUCTION

From Donald Trump's vituperative threats against the press during the 2016 presidential election,¹ to judicial distaste for modern journalistic practices,² to declining public esteem for a self-sabotaging press,³ news organizations today are facing a war against the media. An important new salvo in that war is third-party litigation funding supporting proxy plaintiffs' tort actions against the press. Wealthy private donors, seeking to shut down outlets they dislike, are inaugurating a modern wave of censorship-by-litigation.⁴

1. President Trump consistently criticized and threatened the press during his campaign, stoking widespread public demonization of the media. *See, e.g.*, Nancy Benac & Jonathan Lemire, *Beat the Press: Trump's Contempt for Media Is Calculated*, ASSOCIATED PRESS (June 15, 2016, 12:30 PM), <http://bigstory.ap.org/article/472b8a9dc6d44f928e722e5601681823/beat-press-trumps-contempt-media-calculated> (discussing Trump's "menu" of takedowns for the media); Pamela Engel, *Donald Trump Vows to Rewrite Libel Laws to Make It Easier to Sue the Media*, BUS. INSIDER (Feb. 26, 2016, 10:25 PM), <http://www.businessinsider.com/donald-trump-libel-laws-sue-media-2016-2> (explaining Trump's threat to change libel laws to make it easier to sue the media, which he called "among the most dishonest groups of people I've ever met"); John Hayward, *Trump Wins Because Voters Lost All Faith in His Critics*, BREITBART (Mar. 1, 2016), <http://www.breitbart.com/big-government/2016/03/01/trump-wins-because-voters-lost-all-faith-in-his-critics> (noting that "Trump's voters have lost faith in the . . . media"); Adam Liptak, *Donald Trump Could Threaten U.S. Rule of Law, Scholars Say*, N.Y. TIMES (June 3, 2016), <http://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html> (highlighting Trump's "blustery attacks" on the media).

2. *See, e.g.*, AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* 115 (2015) [hereinafter GAJDA, *THE FIRST AMENDMENT BUBBLE*] (describing increased liability of news organizations in tort actions despite First Amendment protections).

3. *See, e.g.*, *How Trust Can Be Broken, and the Decline of Confidence in the Press*, AM. PRESS INST. (Apr. 17, 2016, 10:30 AM), <https://www.americanpressinstitute.org/publications/reports/survey-research/lose-trust> (indicating public trust in the media has declined over the past twenty years); Amy Mitchell et al., *The Modern News Consumer: Trust and Accuracy*, PEW RES. CTR. (July 7, 2016), <http://www.journalism.org/2016/07/07/trust-and-accuracy> (demonstrating low levels of public trust in the media); *see also infra* text accompanying notes 148–56 (discussing media self-sabotage).

4. Recent actions reveal two avenues of attack. On one track, billionaires establish litigation funding vehicles to support legal challenges against ideologically disfavored media and solicit both plaintiffs and funders. Last year, for example, Frank VanderSloot, a politically-connected Republican billionaire unhappy with liberal magazine *Mother Jones's* coverage, established a litigation funding vehicle with \$1 million in seed money to defray legal fees for anyone seeking to sue *Mother Jones* or the "liberal press." Monika Bauerlein & Clara Jeffery, *We Were Sued by a Billionaire Political Donor. We Won. Here's What Happened.*, MOTHER JONES (Oct. 8, 2015, 3:51 PM), <http://www.motherjones.com/media/2015/10/mother-jones-vandersloot>

These third-party litigation funding⁵ developments in the press context have led to public debate. Some view such litigation support as a powerful threat to freedom of the press;⁶ others express concern,

melaleuca-lawsuit; *see also* Order Granting *Mother Jones* Defendants' Motion for Summary Judgment, *VanderSloot v. Found. for Nat'l Progress*, No. CV-2013-532 (Idaho 7th Dist. Oct. 6, 2015), <https://assets.documentcloud.org/documents/2451499/vanderslootdecision.pdf>; *infra* Section I.C.

On the other track, billionaires engage in clandestine "revenge" funding of other people's lawsuits against media entities the funders wish to annihilate. The example of this type of action is the recent revelation that Silicon Valley billionaire Peter Thiel had secretly funded \$10 million in legal fees for Hulk Hogan's infamous lawsuit against Gawker over the gossip site's posting of an unauthorized sex tape. *See* Nellie Bowles & Dan Yadron, *Billionaire's Revenge: Facebook Investor Peter Thiel's Nine-Year Gawker Grudge*, *GUARDIAN* (May 25, 2016, 6:54 PM), <https://www.theguardian.com/technology/2016/may/25/peter-thiel-gawker-hulk-hogan-sex-tape-lawsuit>. Thiel's financial support of Hogan was purportedly an act of revenge in response to Gawker's earlier unauthorized revelation of Thiel's homosexuality. Ryan Mac & Matt Drange, *This Silicon Valley Billionaire Has Been Secretly Funding Hulk Hogan's Lawsuits Against Gawker*, *FORBES* (May 24, 2016, 7:29 PM), <http://www.forbes.com/sites/ryanmac/2016/05/24/this-silicon-valley-billionaire-has-been-secretly-funding-hulk-hogans-lawsuits-against-gawker> [hereinafter Mac & Drange, *Silicon Valley Billionaire*]. Thiel's financial support helped Hogan win a \$140 million judgment against Gawker, as a result of which both Gawker and its founding editor ultimately filed for bankruptcy protection. Lukas I. Alpert, *Gawker Files for Bankruptcy, Will Be Put up for Auction*, *WALL ST. J.* (June 10, 2016, 4:55 PM), <http://www.wsj.com/articles/gawker-declaring-bankruptcy-will-be-put-up-for-auction-1465578030>; Sydney Ember, *Gawker, Filing for Bankruptcy After Hulk Hogan Suit, Is for Sale*, *N.Y. TIMES* (June 10, 2016), <http://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html>. In light of other lawsuits pending against the company, there is speculation that Thiel's funding may have been part of "a coordinated strategy against Gawker." Ryan Mac & Matt Drange, *Behind Peter Thiel's Plan to Destroy Gawker*, *FORBES* (June 7, 2016, 2:51 PM), <http://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker> [hereinafter Mac & Drange, *Behind Peter Thiel's Plan*]; *see infra* Section I.A.

Of course, this rough categorization of the two current approaches to the third-party funding of litigations against the media should not hide the reality that such lawsuits are doubtless points on a spectrum both in terms of intent and of effect.

5. The terms litigation funding, litigation financing, third-party litigation funding, outside funding, and third-party funding are used interchangeably here. The category of litigation funding covers a variety of financing scenarios. *See, e.g.*, Radek Goral, *Justice Dealers: The Ecosystem of American Litigation Finance*, 21 *STAN. J.L. BUS. & FIN.* 98, 100–02 (2015). This Article does not seek to analyze them in a granular way.

6. *See, e.g.*, Kerry A. Dolan, *Battle of the Billionaires? eBay's Pierre Omidyar Supports Gawker in Its Appeal of Hulk Hogan Lawsuit*, *FORBES* (May 27, 2016, 6:16 PM), <http://www.forbes.com/sites/kerryadolan/2016/05/27/billionaire-battle-thiel-ebay-gawker-hulk-hogan-appeal-lawsuit> (reporting that eBay founder Pierre Omidyar's media company expressed concerns about the Gawker case's effect on the First

but do not view it as a major danger yet;⁷ and still others affirmatively applaud it as an instance of the tables being turned against an increasingly unaccountable and sensationalist media undeserving of special constitutional treatment.⁸

While third-party funding in media cases can theoretically help poor but meritorious plaintiffs, in reality it can too easily distort the litigation process and threaten chilling effects for an already weakened and financially unstable press.⁹ The challenging environment in which modern media operate amplifies the hazards posed by lawsuits brought not to impose reasonable costs for journalistic error, but to cripple or completely shutter certain kinds of press voices.¹⁰ Procedural hurdles, such as apparent limits on

Amendment); Jeet Heer, *Peter Thiel's Revenge Against Gawker Is Neither Justice Nor Philanthropy*, NEW REPUBLIC (May 27, 2016), <https://newrepublic.com/article/133806/peter-thiels-revenge-gawker-neither-justice-philanthropy> (describing Thiel's efforts as an attempt to destroy a disfavored media outlet rather than balance competing interests of freedom of the press and freedom of privacy); Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4 (observing that Thiel's efforts could serve as a "blueprint" for other wealthy individuals to attack specific media outlets).

7. See, e.g., Kevin Drum, *Just How Bad Is Gawker, Anyway?*, MOTHER JONES (May 27, 2016, 12:18 PM), <http://www.motherjones.com/kevin-drum/2016/05/just-how-bad-gawker-anyway-0> (expressing concern that Thiel's actions could set bad precedent, but noting that the author is not yet convinced); David Harsanyi, *Was It Wrong for Peter Thiel to Fund Hulk Hogan's Gawker Lawsuit?*, NAT'L REV. (June 10, 2016), <http://www.nationalreview.com/article/436422/pieter-thiel-gawker-lawsuit-free-expression-or-censorship> (indicating that the idea of limitless third-party funding could be concerning, but questioning whether the Thiel case represents this danger).

8. See, e.g., Sam Wolfe, Opinion, *In Defense of Peter Thiel*, STAN. DAILY (Nov. 14, 2016), <http://www.stanforddaily.com/2016/11/14/in-defense-of-peter-thiel> ("To the extent that this sets a 'precedent' and deters similar acts of journalistic malpractice, it is a good one."); cf. Eugene Kontorovich, *Peter Thiel's Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WASH. POST (May 26, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns> (characterizing Thiel's action as fitting into the modern paradigm of ideological litigation, and locating the threat to the press less in third-party funding than in damage rules and privacy doctrine).

9. See *infra* Section II.B (discussing how third-party funding is particularly worrisome for media cases). I use the terms "media" and "press" interchangeably in this Article although I realize, of course, that the terms are viewed as distinct by many. I argue that third-party litigation funding in media cases can jeopardize the press in that it can threaten journalistic activity undertaken by media entities of all kinds. For discussion of the various factors that weaken the media ecosystem today, see *infra* Section II.B.2.

10. See, e.g., Heer, *supra* note 6 (arguing that Thiel's efforts amount to destroying a media outlet, as opposed to finding a reasonable, balanced judicial outcome).

disclosure obligations and financially prohibitive appeal-bond requirements, amplify the problem.¹¹ All told, a chilling effect on journalism is a predictable consequence. We should take no comfort from the apparent paucity of such cases at this point; secrecy makes outside financial support of strategic actions against the media difficult to discover. Success in a few cases could reinvigorate a plaintiffs' bar looking for opportunities to sue the media going forward. That will surely not escape the press's notice.

The problem is figuring out the right solution—a surprisingly complicated task. Third-party funding cannot realistically (and should not) be prohibited per se only in press cases. At a minimum, our system allows too many instances of interest-group funding to be able to carve out a workable press exception, even if there were an appetite to protect the press especially.¹² Recent U.S. Supreme Court precedent, not to mention lower court activity, casts doubt on constitutional recognition of press exceptionalism.¹³ Moreover, attempts to prohibit funding in ideological actions against the press would surely raise non-trivial First Amendment-based objections from the funders and plaintiffs. Traditional champerty and maintenance-based objections to non-plaintiff funding of litigation cannot provide uniform relief either because many jurisdictions now view such prohibitions on champerty and maintenance as anachronistic.¹⁴ Relying on attorneys' professional conduct rules is also unlikely to be effective in disciplining third-party funding in media cases, at a minimum because the rules permit informed consent by clients.¹⁵ Moreover, we should not lose sight of the possibility that third-party funding of suits against the media might sometimes provide social and journalistic benefits.¹⁶

So, what is to be done? This Article suggests a four-pronged approach. First, the law should clearly recognize that courts have the discretion to require disclosure concerning at least the existence of

11. See *infra* Sections III.C.1 and III.C.2.

12. See, e.g., Kontorovich, *supra* note 8 (noting the common practice of third-party funding in modern public interest litigation).

13. See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352–54 (2010) (refusing to single out press corporations as particularly constitutionally protected speakers, despite the First Amendment's Press Clause).

14. See Kontorovich, *supra* note 8; *infra* Section III.B.

15. See MODEL RULES OF PROF'L CONDUCT r. 1.8(f) (AM. BAR ASS'N 2016) (permitting lawyers to accept compensation from a third party if, inter alia, the represented client gives informed consent).

16. See, e.g., Kontorovich, *supra* note 8.

third-party funding from the parties as a matter of discovery.¹⁷ This disclosure could provide important information not just to the court and defense,¹⁸ but also, where disclosure would be appropriate and consistent with privilege, to the public at large. Where general disclosure is possible, the public would have the opportunity to understand the full context of the third-party-funded action at issue against the press. The proposed disclosure approach would not conflict with constitutional commitments, including the First Amendment's petition rights, protection of anonymous speech, or prohibitions of compelled speech.¹⁹

Second, courts should waive ordinarily-applicable appeal-bond requirements when such requirements would effectively preclude appeal from massive damages judgments in cases where the underlying claims implicate the First Amendment. Specifically, courts should not require posting of such supersedeas bonds if the bond requirements would cause the media defendant sufficient financial distress to provoke bankruptcy and therefore bar the realistic possibility of appeal.

Third, this problem invites private-sector engagement to promote a more balanced third-party funding environment in media litigation. In that vein, this Article recommends attention to the best ways of generating concerted efforts from the private sector to help media defendants fund their defenses in strategic third-party-funded suits. In addition to generating media-protective counter-funding, the private sector should inaugurate and support watchdog institutions to enhance both funder and media accountability.

The Article's final recommendation, informed by the policies underlying traditional abuse of process tort claims and anti-SLAPP

17. Might we look to impose disclosure obligations on funders as a regulatory matter, rather than on plaintiffs in discovery? Currently, no such obligations exist, and imposing them on funders would surely invite constitutional objections. *See infra* Section III.C.1.

18. I do not mention jury consideration because, under current law, even if some third-party funding information would be considered relevant for discovery purposes, its relevance for admissibility purposes is far more questionable. *See, e.g.*, FED. R. EVID. 401-03. Therefore, even if juries would theoretically be moved to lower damage awards upon realizing that what they thought was a David versus Goliath contest was actually a bitter fight between one Goliath and another, current law would almost certainly prevent such revelations to them. *See infra* notes 201-06 and accompanying text.

19. *See infra* note 199.

statutes,²⁰ is the recognition of a litigation-misuse claim available to media defendants in response to cases brought to cripple particular media outlets.²¹ With such a claim available, media defendants could arm themselves against disguised attacks on the Fourth Estate as such. This recommendation is made tentatively because it raises difficult tensions between protecting press integrity and punishing motive in the context of arguably meritorious litigation. Still, when plaintiffs claim titanic damages awards in third-party-funded lawsuits to bankrupt the media defendant, even substantively non-frivolous claims become abusive. The Article therefore suggests that the meritoriousness inquiry include a proportionality analysis—focusing not only on the viability of the claim, but on the relationship between the claimed violation and the damages requested. To the extent that a litigation-misuse tool addressing funder motivation triggers concerns about undermining plaintiffs' rights to be heard, a requirement that litigation-misuse claims be grounded specifically on the details of the funding agreement in any given case can help mitigate such fears.

The Article proceeds as follows. Part I describes the publicly known instances of third-party litigation funding in media cases. Part II notes the rise of third-party litigation funding generally and then turns its focus to the distinguishing features of such funding in the press context. Part III then moves to the issue of appropriate responses. Having situated this type of funding in media cases in the context of prior strategic attempts to use law to quell press attention (as reflected in *New York Times Co. v. Sullivan*²²), Section III.A nevertheless rejects a special press exemption to third-party litigation funding today. Section III.B then sketches and describes the limits of champerty and maintenance doctrines in disciplining third-party litigation funding today. Section III.C ultimately suggests a four-pronged strategy. It recommends plaintiff-focused disclosure via discovery, limits on the obligation to post supersedeas bonds for stays pending appeal in appropriate cases, the promotion of counter-funding models in response to litigation funding designed to squash the press, and the possibility of responsive litigation-misuse claims.

20. See *infra* Section III.C.4 (discussing abuse of process and state statutes protecting defendants from SLAPP (Strategic Lawsuits Against Public Participation) actions).

21. See *infra* Section III.C.4.

22. 376 U.S. 254 (1964).

I. STRATEGIC LITIGATION FUNDING BY PRIVATE PARTIES IN MEDIA CASES

There have been few revelations thus far of third-party litigation funding in cases against the press. Yet the lack of known cases hardly means that such sponsorship has not occurred *sub rosa*.²³ Nor does it mean that third-party litigation funding will continue to be an infrequent and insignificant threat. A third party might fund litigation in media cases for either economic (profit-seeking) or non-economic (ideological and/or personal) reasons. Although the economic investment approach to media litigation funding still appears to be hypothetical at the moment, there is reason to suspect that this will not remain the case for long.²⁴ On the ideological front, however, two cases have already arguably mapped out litigation strategies that other third-party litigators could follow to harass the media.²⁵

A. *The “Revenge” Action: Billionaire Peter Thiel and the Complicated Story of Bollea v. Gawker*

*Bollea v. Gawker*²⁶ is a recent example of how a wealthy individual can use the courts to target and weaken a media outlet with which he disagrees. Gawker Media was an Internet media company, founded by former *Financial Times* journalist Nick Denton in 2002, that operated a variety of web properties largely offering gossip, “snarky,

23. Without disclosure, there is no basis on which to judge the frequency of such funding.

24. No third-party-funded cases against the media based primarily on economic, profit-seeking grounds have been publicly identified thus far. The growing sector of third-party litigation firms focusing on commercial litigation, however, *see infra* notes 75–77 and accompanying text, suggests that at least some media cases will be accepted by such firms for strictly financial reasons. Query whether legal changes prompted by non-economic funding initiatives could increase the economic appeal of similar suits in the future.

25. There may be more such suits in the future now that, as some reporters complain, Thiel and VanderSloot have offered a blueprint or template for private action against the media. *See, e.g.*, Davey Alba & Jennifer Chaussee, *Got a Beef with the Media? Pay Someone Else to Sue Them*, WIRED (May 28, 2016, 7:00 AM), <http://www.wired.com/2016/05/thiel-gawker-hulk-litigation-finance>; Felix Salmon, *Peter Thiel Just Gave Other Billionaires a Dangerous Blueprint for Perverting Philanthropy*, FUSION (May 25, 2016, 10:30 PM), <http://fusion.net/story/306927/peter-thiel-gawker-dangerous-blueprint>.

26. Verdict, *Bollea v. Gawker Media, LLC*, No. 12012447CI-011, 2016 WL 1138279 (Fla. Cir. Ct. Mar. 21, 2016). For a procedural history of the case, see *infra* note 35.

aggressive commentary, breaking news and click-friendly headlines.”²⁷ The company’s flagship site, Gawker.com, earned a reputation as one of the, if not *the*, most reviled Internet news sites according to critics across the political and journalistic spectrum.²⁸ Gawker defenders sought to praise its independence, its fearlessness and willingness to tackle the powerful, and the degree of reportorial freedom it gave its staff.²⁹

27. Mac & Drange, *Behind Peter Thiel’s Plan*, *supra* note 4. Gawker Media consisted of, inter alia, Gawker, Deadspin (focusing on sports), Jezebel (focusing on women), Gizmodo (focusing on gadgets), and Valleyway (focusing on Silicon Valley). *Id.*

28. *Id.* (describing Gawker as “a company even the most ardent press advocates must hold their noses to defend”); *see also* Ember, *supra* note 4 (noting Gawker “pioneered the wry tone and take-no-prisoners approach that came to embody a certain style of web journalism”); *Publish and Be Damned: Gawker.com Shuts down*, *ECONOMIST* (Aug. 26, 2016), <http://www.economist.com/news/business/21705982-controversial-news-and-gossip-website-bows-out-gawkercom-shuts-down> [hereinafter *Publish and Be Damned*] (reporting that Gawker’s “list of enemies grew long”).

29. *See, e.g.*, Nick Denton, *How Things Work*, *GAWKER* (Aug. 22, 2016, 4:33 PM), <http://gawker.com/how-things-work-1785604699> [hereinafter Denton, *How Things Work*]; Farhad Manjoo, *Gawker’s Gone. Long Live Gawker.*, *N.Y. TIMES* (Aug. 24, 2016), <http://www.nytimes.com/2016/08/25/technology/gawkers-gone-long-live-gawker.html> [hereinafter Manjoo, *Gawker’s Gone*] (stating that Gawker’s goals were to “afflict the comfortable” and instill a “more antagonistic, more suspicious tendency in the press, especially toward the most powerful people in politics, business and the media”); Peter Preston, *Gawker Has Gone. We Can’t Just Look the Other Way*, *GUARDIAN* (Aug. 28, 2016, 2:00 AM), <https://www.theguardian.com/media/2016/aug/28/gawker-gone-cant-look-other-way-press-freedom> (arguing that in addition to the *New York Times* model of ethically trustworthy reporters, “voices with ‘a complete absence of high standards’ have a role too”); *see also* Chava Gourarie, *Gawker Can’t Hide Its Bad Behavior Behind Press Freedom*, *COLUM. JOURNALISM REV.* (May 26, 2016), http://www.cjr.org/criticism/gawker_cant_hide_its_bad_behavior_behind_press_freedom.php (describing long-time tech reporter Matt Ingram’s view that “Gawker is one of the few outlets that is really critical of Silicon Valley”); Rich Juzwiak, *There’s Someone Else I’ve Got to Be*, *GAWKER* (Aug. 22, 2016, 1:59 PM), <http://gawker.com/theres-someone-else-ive-got-to-be-1785591867> (“[W]ith Gawker not around, there’s one less site invested in calling bullshit, one less site to shake you from the comfort of black-and-white thinking and selective reasoning.”); *Letters from Our Exes*, *GAWKER* (Aug. 22, 2016, 3:45 PM), <http://gawker.com/letters-from-our-exes-1785587207> (highlighting the views of several former Gawker editors discussing their editorial independence); Hamilton Nolan, *What Was Gawker?*, *GAWKER* (Aug. 22, 2016, 2:15 PM), <http://gawker.com/what-was-gawker-1785565897> (describing Gawker as a place “where you can do what you want”); Tom Scocca, *Gawker Was Murdered by Gaslight*, *GAWKER* (Aug. 22, 2016, 2:56 PM), <http://gawker.com/gawker-was-murdered-by-gaslight-1785456581> (explaining that Gawker’s editorial freedoms may have caused the site to spiral out of control); Jia Tolentino, *Gawker’s Essential Unevenness*, *NEW YORKER* (Aug. 20, 2016), <http://www.newyorker.com/culture/jia-tolentino/gawkers-essential-unevenness> (“A media organization that is founded on hostility to the powerful and is run with almost no internal hierarchy will naturally be

In 2012, Gawker obtained a 2006 videotape of retired wrestler Terry Bollea—who had wrestled professionally as Hulk Hogan³⁰—having sex with the wife of his then-best friend, shock jock Bubba “the Love Sponge” Clem.³¹ Gawker decided to post less than two minutes of the thirty-minute video, on the ground that it was newsworthy.³² By 2013, the tape had been viewed by four million people.³³

Apparently infuriated by Gawker’s action in posting the tape and refusing to take it down,³⁴ Hogan ultimately sued Gawker, Denton, and then-editor A.J. Daulerio in Florida state court for invasion of privacy and infliction of emotional distress.³⁵ Hogan’s lawyers

irregular. It will be invasive in ways that serve the public interest and in ways that cross a shifting public line.”).

30. In this Article, I refer to Hulk Hogan and Terry Bollea interchangeably.

31. See, e.g., A.J. Daulerio, *Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe for Work, but Watch It Anyway*, GAWKER (Oct. 4, 2012, 1:15 PM), <http://gawker.com/5948770/even-for-a-minute-watching-hulk-hogan-have-sex-in-a-canopy-bed-is-not-safe-for-work-but-watch-it-anyway>. In her testimony, Hogan’s sexual partner and Clem’s wife, Heather, stated that her husband had taped the encounter, among a number of other sexual encounters he had encouraged and taped of his wife and other partners. Anna M. Phillips, *Woman Who Had Sex with Hulk Hogan Says Her Husband Liked to Film Her Having Sex with Men*, NAT’L POST (Mar. 17, 2016, 9:34 AM), <http://news.nationalpost.com/news/world/woman-who-had-sex-with-hulk-hogan-says-her-husband-liked-to-film-her-having-sex-with-men>.

32. Daulerio, *supra* note 31; see also GAJDA, *THE FIRST AMENDMENT BUBBLE*, *supra* note 2, at 232–33.

33. Clay Calvert, *Panel III: The Future of the Press and Privacy*, 19 COMM. L. & POL’Y 119, 126 (2014) (Gajda excerpt).

34. For an explanation of Gawker’s refusal to take down the tape, see John Cook, *A Judge Told Us to Take down Our Hulk Hogan Sex Tape Post. We Won’t.*, GAWKER (Apr. 25, 2013, 4:28 PM), <http://gawker.com/a-judge-told-us-to-take-down-our-hulk-hogan-sex-tape-po-481328088>.

35. Hogan began his litigations over the tape with a suit against the Clems in Florida state court. See *Bollea v. Clem*, 937 F. Supp. 2d 1344, 1348 (M.D. Fla. 2013). He first sued Gawker on October 15, 2012, in a diversity action in federal court, asserting tort claims. See *Bollea v. Gawker Media, LLC (Bollea I)*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *2 (M.D. Fla. Nov. 14, 2012). The court denied Hogan’s preliminary injunction motion to force the removal of the Gawker post. *Id.* at *3–5. Hogan then added a copyright infringement claim to his federal court complaint and again unsuccessfully sought a preliminary injunction on the revised ground that Gawker’s post constituted copyright infringement. See *Bollea v. Gawker Media, LLC (Bollea II)*, 913 F. Supp. 2d 1325, 1326–27 (M.D. Fla. 2012). Thereafter, Bollea dismissed his federal action and added Gawker to his state court suit, dropping Todd Clem (“the Love Sponge”) but retaining Heather Clem as a defendant. See *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. Dist. Ct. App. 2014). He had settled with Todd Clem for \$5000. See Phillips, *supra* note 31. Gawker removed the case to federal court, asserting jurisdiction on the ground that Clem had been fraudulently misjoined solely to destroy complete diversity

subsequently dropped his negligent infliction of emotional distress claim, so the case proceeded on the privacy elements of the complaint.³⁶ Hogan claimed damages of \$100 million.³⁷

Despite Hulk Hogan's notoriety, publicity-seeking, and open public discussions of his sex life during his celebrity,³⁸ the jury in his privacy action found resoundingly for him and awarded \$140 million in damages, representing \$115 million in compensatory damages and \$25 million in punitive damages.³⁹ The compensatory award was \$15 million *more* than the amount Hogan initially sought in his complaint.⁴⁰

Because Florida law would only grant Gawker an automatic stay pending appeal if the company posted a supersedeas bond of \$50

jurisdiction (and because the case raised federal questions). *Clem*, 937 F. Supp. 2d at 1348–50. The federal court remanded the case back to state court after finding that *Clem* was not fraudulently misjoined and that a federal constitutional issue was not necessarily raised by Hogan's complaint. *Id.* at 1350, 1356. The state court issued the temporary injunction requiring Gawker to remove its post, but that was ultimately reversed by the state appellate court. *Gawker Media*, 129 So. 3d at 1198. Thus, the case went to trial in Pinellas County and resulted in the enormous damage award that has triggered much press attention. *See infra* note 39 and accompanying text.

36. Andrew Ross Sorkin, *Gawker Founder Suspects a Common Financer Behind Lawsuits*, N.Y. TIMES (May 23, 2016), <http://www.nytimes.com/2016/05/24/business/dealbook/gawker-founder-suspects-a-common-financer-behind-lawsuits.html> [hereinafter Sorkin, *Gawker Founder Suspects*].

37. First Amended Complaint & Demand for Jury Trial with Injunctive Relief Sought at 17, *Bollea I*, No. 8:12-cv-2348-T-27TBM, 2012 WL 5511847.

38. Hogan's lawyers strove to minimize this history by distinguishing between Bollea and his Hulk Hogan character, attributing prior statements about Hogan's sex life to the Hulk Hogan character rather than the man himself. *See* Nick Denton, *The Hogan Verdict*, GAWKER (Mar. 22, 2016, 3:28 PM), <http://gawker.com/the-hogan-verdict-1766460791> [hereinafter Denton, *The Hogan Verdict*] (describing the argument but claiming that Terry Bollea the man and Hulk Hogan the character were inherently interdependent and indistinguishable). In light of Hulk Hogan's public persona, his admission of an extramarital affair in his autobiography, his participation in a reality show about his personal life with his family, and his (and others') public statements about the sex tape, however, the federal court concluded the video was a matter of public concern. *Bollea I*, 2012 WL 5509624, at *3.

39. Final Judgment, *Bollea v. Gawker Media, LLC*, No. 12012447CI-011, 2016 WL 4073660 (Fla. Cir. Ct. June 8, 2016); Verdict, *Bollea v. Gawker Media, LLC*, No. 12012447CI-011, 2016 WL 1138279 (Fla. Cir. Ct. Mar. 21, 2016); Nick Madigan, *Jury Tacks \$25 Million to Gawker's Bill in Hulk Hogan Case*, N.Y. TIMES (Mar. 21, 2016), <http://www.nytimes.com/2016/03/22/business/media/hulk-hogan-damages-25-million-gawker-case.html>.

40. *See* Robert W. Wood, *Hulk Hogan Jury Awards Punitive Damages, Verdict Swells to \$140.1 Million*, FORBES (Mar. 21, 2016, 8:30 PM), <http://www.forbes.com/sites/robertwood/2016/03/21/hulk-hogans-gets-punitive-damages-verdict-swells-to-140-1-million>; *see also* Denton, *The Hogan Verdict*, *supra* note 38 (describing bases of damage calculation).

million⁴¹—which it could not do—Gawker filed for bankruptcy, citing the Hulk Hogan damages award for its decision to seek bankruptcy protection.⁴² Subsequently, the Gawker properties (minus Gawker.com) were sold for \$135 million to Spanish-language broadcaster and publisher Univision in a bankruptcy auction.⁴³ Gawker.com ceased operations,⁴⁴ and Univision renamed its Gawker Media properties Gizmodo Media Group.⁴⁵

In the meantime, before Gawker filed for bankruptcy, the *National Enquirer* obtained and published a transcript of a different Hulk Hogan

41. See Order Granting in Part Plaintiff's Motion to Vacate; Denying Stay of Execution Pending Appeal; and Denying Defendant's Motion for Stay to Seek Appellate Review at 7–8, *Bollea v. Gawker Media, LLC*, No. 12012447CI-011 (Fla. Cir. Ct. July 29, 2016) (refusing to grant Gawker a stay of execution or to waive its obligation to post a massive appeal bond and, inter alia, threatening defendants with contempt for stock valuation); Peter Sterne, *Jury Awards Hulk Hogan \$115 Million as Gawker Looks to Appeal*, POLITICO (Mar. 18, 2016, 8:07 PM), <http://www.politico.com/media/story/2016/03/jury-awards-hulk-hogan-115-million-as-gawker-looks-to-appeal-004433> (explaining that the Florida statute, amended in 2006, allows for an automatic stay if the appellant pays a supersedeas bond, which for Gawker would amount to \$115 million; the statute, however, caps these bonds at \$50 million); see also Order Denying Defendant's Motion to Dismiss and Motion for New Trial, *Bollea v. Gawker Media LLC*, 2016 WL 4073637 (Fla. Cir. Ct. June 6, 2016) (denying a new trial). For further discussion of the impact of supersedeas bonds in media cases, see *infra* Section III.C.2.

42. See Sydney Ember, *Nick Denton Files for Bankruptcy, Just Weeks After Gawker Did*, N.Y. TIMES (Aug. 1, 2016), <http://www.nytimes.com/2016/08/02/business/media/nick-denton-gawker-bankruptcy.html>. Pursuant to the federal bankruptcy rules, the company's Chapter 11 filing would toll its obligation to begin paying the damages award in *Bollea v. Gawker*. *Id.* Additionally, Nick Denton filed for personal bankruptcy. *Id.*

43. See Disclosure Statement for the Debtors' Joint Chapter 11 Plan of Liquidation for Gawker Media Group, Inc., Gawker Media LLC, and Gawker Hungary KFT, *In re Gawker Media LLC*, Case No. 16-111700 (SMB) at 9 (Bankr. S.D.N.Y. Sept. 30, 2016) [hereinafter *In re Gawker Disclosure Statement*] (indicating that Unimoda, a wholly owned subsidiary of Univision that ultimately purchased the Gawker Media assets for \$135 million, was the only other bidder). Gawker used a \$90 million “stalking horse” bid from magazine company Ziff Davis to commence the auction process. *Id.* at 9, 27; see also Maria Chutchian, *Court Wrestles over Whether Gawker CEO Can Hide Behind Bankruptcy Shield*, FORBES (June 14, 2016, 3:56 PM), <http://www.forbes.com/sites/debtwire/2016/06/14/bankruptcy-court-wrestles-over-whether-gawker-ceo-can-hide-behind-bankruptcy-shield> (explaining that the Ziff deal was “intended to help fund an appeal of the judgment”).

44. *Publish and Be Damned*, *supra* note 28.

45. Veronica Villafañe, *Univision Rebrands Gawker Media as Gizmodo Media Group; Starts Translating Content for Univision.com*, FORBES (Sept. 22, 2016, 10:01 PM), <http://www.forbes.com/sites/veronicavillafane/2016/09/22/univision-rebrands-gawker-media-as-gizmodo-media-group-starts-translating-content-for-univision-com>.

sex tape—one that had been sealed by the trial judge in Hogan’s original suit against Gawker and that showed Hogan using a racial slur and uttering racist comments.⁴⁶ In response, Hogan commenced another suit against Gawker for allegedly improperly leaking the transcript to the *National Enquirer*.⁴⁷ It is not clear, however, whether Gawker had the racial slur sex tape—or if Hogan *thought* Gawker might have obtained and potentially intended to post it—before Hogan commenced his original breach of privacy action against Gawker.⁴⁸

Although rumors had been circulating that someone in Silicon Valley was funding the Hulk Hogan lawsuit,⁴⁹ it was not until May 2016, after the trial had concluded, that *Forbes* broke the story of Peter Thiel’s involvement in financing the original lawsuit.⁵⁰ Ultimately, Thiel acknowledged his financial support in an interview printed in the *New York Times*, in which he said that his funding of the litigation

46. See Associated Press, *Hulk Hogan Sues Gawker, Again, over Racist Comment Leak*, NBC NEWS (May 2, 2016, 5:59 PM), <http://www.nbcnews.com/news/us-news/hulk-hogan-sues-gawker-again-over-racist-comment-leak-n566256> [hereinafter *Hogan Sues Gawker, Again*]. The transcript had never been posted by Gawker. *Id.* This sex tape segment showed Hogan expressing racist views and using the “n word.” (There were apparently three tapes of Hogan’s trysts with Heather Clem, one of which reflected the racist language.) Hogan had apparently contacted the FBI about that tape on the ground that someone was attempting to use it to extort him. Eriq Gardner, *Hulk Hogan Brings Second Lawsuit Against Gawker*, HOLLYWOOD REP. (May 2, 2016, 11:26 AM), <http://www.hollywoodreporter.com/thr-esq/hulk-hogan-brings-second-lawsuit-889386>. The FBI released its transcripts in response to a Freedom of Information Act request from Gawker’s lawyers—a request they had made seeking to obtain evidence that Hogan knew of the taping. *Id.* The transcript of the racist conversation was sealed by the court in the first action. *Id.* It was ultimately unsealed after the end of the trial. Tom Kludt, *Documents the Hulk Hogan Jury Didn’t Get to See*, CNN MONEY (Mar. 24, 2016, 10:07 AM), <http://money.cnn.com/2016/03/20/media/hulk-hogan-gawker-unsealed-documents>.

47. Complaint and Demand for Jury Trial at 2, *Bollea v. Don Buchwald & Assoc., Inc.*, No. 16-002861-CI, 2016 WL 2344775 (Fla. Cir. Ct. May 2, 2016). Gawker has denied Hogan’s claim that it released the transcript to the *National Enquirer*. *Hulk Hogan Sues Gawker, Again*, *supra* note 46. Hulk Hogan was fired by World Wrestling Entertainment after publication of the racist statements. Letitia Stein, *Hulk Hogan Seeks Second Slam of Gawker over Racist Comments Leak*, REUTERS (May 2, 2016, 5:16 PM), <http://www.reuters.com/article/us-people-hulkhogan-idUSKCN0XTIUY>.

48. This uncertainty about when Hogan learned Gawker might have obtained the sex tape containing racial slurs invites suspicion about whether Hogan commenced his original action against Gawker principally to prevent Gawker from posting that racially offensive sex tape. See Sterne, *supra* note 41; see also Denton, *The Hogan Verdict*, *supra* note 38 (making this claim).

49. See Mac & Drange, *Behind Peter Thiel’s Plan*, *supra* note 4 (noting that Denton “floated rumors” that the litigation was being bankrolled by someone in the tech world).

50. *Id.*

against Gawker was one of the “greater philanthropic things” he had ever done.⁵¹ He admitted that he had hired a legal team “to look for cases that he could help financially support.”⁵² Thiel characterized his actions against Gawker as being “less about revenge and more about specific deterrence” against a unique and damaging “bully.”⁵³ *Forbes* characterized his actions as “secretly declar[ing] a multi-front war against Gawker, seeking to crush it by any means necessary.”⁵⁴

Thiel is well known as a co-founder of PayPal, an early Facebook investor, and a launcher of major data-mining company Palantir.⁵⁵ He is also a libertarian outlier in the liberal circles of Silicon Valley tech billionaires⁵⁶ and has been a donor to journalism causes such as the Committee to Protect Journalists.⁵⁷ Thiel is on the board of Facebook and is expected to remain a board member despite his controversial role in the Hogan lawsuit.⁵⁸ An outspoken and sometimes eccentric

51. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), <http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html> [hereinafter Sorkin, *Secret War*].

52. *Id.* Thiel was presumably referring to the Charles Harder law firm, which represented Hogan and appeared to have filed numerous actions against Gawker. See Katie Rogers & Danielle Ivory, *For Gawker, Legal Issues Beyond Hogan*, N.Y. TIMES (May 30, 2016), <http://www.nytimes.com/2016/05/31/business/media/gawker-lawsuits.html>.

53. Sorkin, *Secret War*, *supra* note 51.

54. Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4 (discussing “numerous Thiel-backed lawsuits”). For another legal threat against Gawker by the same law firm, see Sydney Ember, *Gawker Article on Trump's Hair Draws Threat from Hulk Hogan's Lawyer*, N.Y. TIMES (June 14, 2016), <http://www.nytimes.com/2016/06/15/business/media/gawker-article-on-trumps-hair-draws-lawsuit-threat.html> (noting that it was unclear whether Thiel was behind Harder's complaint regarding a Gawker story about Donald Trump's hair).

55. See, e.g., Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4 (noting these affiliations and estimating Thiel's worth as \$2.7 billion).

56. See, e.g., Dan Primack, *Peter Thiel Gives Full-Throated Endorsement of Donald Trump*, FORTUNE (July 22, 2016, 7:25 AM), <http://fortune.com/2016/07/21/peter-thiel-gives-full-throated-endorsement-of-donald-trump> (noting that Thiel was a Trump delegate and one of the principal speakers at the Republican National Convention); see also Farhad Manjoo, *Peter Thiel's Embrace of Trump Has Silicon Valley Squirming*, N.Y. TIMES (July 20, 2016), <http://www.nytimes.com/2016/07/21/technology/peter-thiels-embrace-of-trump-has-silicon-valley-squirming.html>.

57. See Ryan Mac & Matt Drange, *Gawker, Others Respond to Peter Thiel's Backing of Hulk Hogan*, FORBES (May 25, 2016, 2:22 PM), <http://www.forbes.com/sites/mattdrange/2016/05/25/gawker-others-respond-to-peter-thiels-backing-of-hulk-hogan> [hereinafter Mac & Drange, *Gawker, Others Respond*].

58. Kathleen Chaykowski, *Facebook's Sheryl Sandberg Says Peter Thiel Has “Strong Views” and Did Not Act on Behalf of the Board*, FORBES (June 1, 2016, 5:59 PM),

figure,⁵⁹ Thiel apparently nursed a personal dislike of Gawker because its Valleywag site had outed him as gay in 2007.⁶⁰ Indeed, he had once characterized Valleywag as “the Silicon Valley equivalent of Al Qaeda.”⁶¹ For reasons he has never publicly explained, Thiel himself had not sued Gawker over its coverage of him.⁶²

The details of Thiel’s support of the Hogan action against Gawker have not been made publicly available. We do not know whether Thiel paid for all of Hogan’s legal fees, although it has been suggested that he funded the action for \$10 million.⁶³ We also do not know whether Hogan’s victory in the lawsuit would obligate him to repay the legal fees funded by Thiel or whether Hogan entered into a litigation finance agreement giving Thiel some additional financial benefit from having funded the suit.⁶⁴ In an interview with the *New York Times*, Thiel said, “I would underscore that I don’t expect to make any money from this. This is not a business venture.”⁶⁵ Nevertheless, the details are murky because the specifics of the funding arrangement are reportedly subject to a confidentiality agreement.⁶⁶

One thing we do know, however, is that Charles Harder’s law firm, which represented Hogan in his action against Gawker, has also filed lawsuits against Gawker in other cases.⁶⁷ It is rumored that Thiel may

<http://www.forbes.com/sites/kathleenchaykowski/2016/06/01/sheryl-sandberg-peter-thiel-will-remain-on-facebooks-board>.

59. See, e.g., Mac & Drange, *Behind Peter Thiel’s Plan*, *supra* note 4 (referring to Thiel’s quixotic interests).

60. Sorkin, *Secret War*, *supra* note 51.

61. Mac & Drange, *Behind Peter Thiel’s Plan*, *supra* note 4; Andrew Ross Sorkin, *Peter Thiel Is Said to Bankroll Hulk Hogan’s Suit Against Gawker*, N.Y. TIMES (May 25, 2016), <http://www.nytimes.com/2016/05/25/business/dealbook/peter-thiel-is-said-to-bankroll-hulk-hogans-suit-against-gawker.html> [hereinafter Sorkin, *Thiel Bankroll*].

62. See Sorkin, *Gawker Founder Suspects*, *supra* note 36 (quoting Denton as hypothesizing that Thiel preferred to keep his name out of any messy litigation and instead devised a different plan for revenge). Possible explanations obviously range from concerns about the viability of the action to a desire to avoid the extensive discovery that such actions would likely have entailed.

63. See Mac & Drange, *Behind Peter Thiel’s Plan*, *supra* note 4; Sorkin, *Secret War*, *supra* note 51.

64. See, e.g., Mac & Drange, *Silicon Valley Billionaire*, *supra* note 4; Robert W. Wood, *Funding Key to Hulk Hogan’s Gawker Suit, Kanye West, and Many Other Cases*, FORBES (May 25, 2016, 1:38 AM), <http://www.forbes.com/sites/robertwood/2016/05/25/funding-key-to-hulk-hogans-gawker-suit-kanye-west-and-many-other-cases>.

65. Sorkin, *Secret War*, *supra* note 51.

66. Sorkin, *Thiel Bankroll*, *supra* note 61.

67. See Mac & Drange, *Behind Peter Thiel’s Plan*, *supra* note 4; Sorkin, *Secret War*, *supra* note 51 (“He funded a team of lawyers to find and help ‘victims’ of the company’s coverage mount cases against Gawker.”).

have also funded some of those actions.⁶⁸ Query, for example, whether Harder's representation of Hogan in his current action against Gawker for allegedly leaking the transcript of his racist statements also involves funding by Thiel.⁶⁹ Reporters and editorial writers addressing this issue assert that Thiel appears to be engaged in a broad-based, and now successful, effort to shut down Gawker.⁷⁰ Thiel's own recent *New York Times* opinion piece suggests he sees a distinction between exploitative and responsible journalism and promises that he would "gladly support someone else in the same position [as Hogan]."⁷¹ In the final dénouement of the Gawker case, Hogan agreed to settle his action against Gawker for \$31 million.⁷²

The facts of the Hogan case invite reference to the old adage that "hard cases make bad law." After all, everyone involved—from Gawker to Hogan to Thiel—behaved badly. Still, as *Politico's* Jack Shafer concluded, "[b]y secretly investing in the Hogan lawsuit, Thiel

68. See, e.g., Michael Cieply, *Gawker Case Calls Attention to a Go-to Hollywood Lawyer*, N.Y. TIMES (May 29, 2016), <http://www.nytimes.com/2016/05/30/business/media/gawker-case-calls-attention-to-a-go-to-hollywood-lawyer.html>.

69. See Complaint and Demand for Jury Trial, *supra* note 47, at 33 (signed, inter alia, by Harder).

70. See, e.g., Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4. Two days after *Forbes* broke the Hogan secret funding story, Gawker founder Denton issued an open letter to Thiel and challenged him to a public debate. Kate Vinton et al., *Gawker Founder Speaks out About Thiel Involvement in Hulk Hogan Case*, FORBES (May 26, 2016, 6:28 PM), <http://www.forbes.com/sites/katevinton/2016/05/26/thiel-denton-speak-out-publicly-about-gawker-case> (linking to the letter). Among other things, the letter asked Thiel a number of questions, including whether he was funding other cases and were seeking to "bankrupt, buy or wound Gawker Media." *Id.*; see also Katie Rogers & Michael J. de la Merced, *Nick Denton, Gawker Founder, Assails Peter Thiel as "Vindictive" Foe*, N.Y. TIMES (May 26, 2016), <http://www.nytimes.com/2016/05/27/business/dealbook/gawker-sale-peter-thiel.html>. Thiel did not respond and has only spoken about the matter publicly in one interview with a *New York Times* reporter. See Sorkin, *Secret War*, *supra* note 51.

71. Peter Thiel, Opinion, *Peter Thiel: The Online Privacy Debate Won't End with Gawker*, N.Y. TIMES (Aug. 15, 2016), <http://www.nytimes.com/2016/08/16/opinion/peter-thiel-the-online-privacy-debate-wont-end-with-gawker.html> ("The press is too important to let its role be undermined by those who would search for clicks at the cost of the profession's reputation.")

72. Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <http://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html>. A federal bankruptcy judge approved the settlement on December 13, 2016. Matt Drange, *Judge Approves \$31 Million to Hulk Hogan in Gawker Liquidation Plan*, FORBES (Dec. 13, 2016, 2:41 PM), <http://www.forbes.com/sites/ryanmac/2016/12/13/judge-approves-gawker-settlement-as-hulk-hogan-is-set-to-be-paid>.

has done the impossible: He's made us sympathize with Gawker."⁷³ He has also, some fear, offered a powerful playbook to other billionaires with vendettas against the press and determination to control the ways in which they are publicly portrayed.⁷⁴

The playbook seems to invite the rise of a specialist plaintiffs' bar in media cases. For example, the Thiel funding seems tied to the rise of a particularly effective litigation law firm focused on suing the media.⁷⁵ Now a media star,⁷⁶ Hogan's lawyer, Charles Harder, may herald the growth of a media-litigation industry pushing to challenge press protections in tort cases.⁷⁷ Furthermore, reports that Harder has recently taken on the representation of disgraced ex-Fox News chairman Roger Ailes in his attempts to dispute *New York Magazine* coverage of sexual harassment claims against him⁷⁸ suggest an "if we build it, they will come"⁷⁹ effect.

There is evidence that this new plaintiffs' bar has targeted a disfavored media outlet. Documents submitted to a federal court, for example, show that Harder was "fishing for Gawker-related cases"

73. Jack Shafer, *Peter Thiel Does the Impossible! Nobody's Ever Sympathized with Gawker Before*, POLITICO (May 25, 2016), <http://www.politico.com/magazine/story/2016/05/gawker-peter-thiel-fourth-estate-213918>.

74. See, e.g., Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4; Salmon, *supra* note 25.

75. See Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4.

76. See Eriq Gardner, *Ailes Media Litigator Charles Harder on His Improbable Rise with Clients Melania Trump and Hulk Hogan*, HOLLYWOOD REP. (Sept. 22, 2016, 6:15 AM), <http://www.hollywoodreporter.com/thr-esq/ailes-media-litigator-charles-harder-930963> (calling Harder "perhaps the highest-profile media lawyer in America").

77. *Id.* (quoting Harder as saying, "I don't believe in a reckless press. The First Amendment isn't unlimited"). Harder is also said to agree with Donald Trump that "libel laws need a further look" and that the "actual malice standard is too stringent." *Id.* Harder has recently undertaken to represent Shiva Ayyadurai, who claims to have invented email, in a \$15 million defamation action against tech website TechDirt and its founder, Mike Masnick. See, e.g., Jeff John Roberts, *"Inventor of Email" Slaps Tech Site with \$15M Libel Suit for Mocking His Claim*, FORTUNE (Jan. 5, 2017, 4:17 AM), <http://fortune.com/2017/01/05/email-inventor-techdirt>.

78. See Brian Stelter, *Roger Ailes Enlists Lawyer Behind Hulk Hogan and Melania Trump Suits*, CNN MONEY (Sept. 5, 2016, 6:13 PM), <http://money.cnn.com/2016/09/05/media/roger-ailes-charles-harder>; see also Dylan Byers, *Melania Trump Sues Daily Mail for Libel*, CNN MONEY (Sept. 1, 2016, 7:22 PM), <http://money.cnn.com/2016/09/01/media/melania-trump-daily-mail-libel-suit> (reporting that Harder filed suit on behalf of Melania Trump for "false and defamatory statements" in stories about her employment and immigration history).

79. Adapting a frequently quoted line from the 1989 baseball film *Field of Dreams*. FIELD OF DREAMS (Gordon Company 1989).

before he even represented Hogan.⁸⁰ Under such circumstances, it is likely that members of this specialist media plaintiffs' bar would work cooperatively. For example, Harder appears to have been in contact with and offering support to Meanith Huon, a Chicago attorney with his own suit against Gawker, in September 2012, one month before Gawker released the Hogan tape.⁸¹ Such communication indicates that attorneys and private third-party funders can and will coordinate behind the scenes to eliminate media that publish articles with which the funder personally disagrees.

B. Armstrong v. Simon & Schuster—The Precursor to Bollea v. Gawker

*Armstrong v. Simon & Schuster*⁸² appears to be the one pre-Hogan instance in the relatively recent past in which a third-party funder in a journalism case was publicly revealed.⁸³ In *Armstrong*, reporter James Stewart faced a defamation claim over his 1991 book *Den of Thieves*.⁸⁴ The book explored the infamous Wall Street scandals of the time, including those resulting in criminal cases against arbitrageur Ivan Boesky and junk-bond specialist Michael Milken.⁸⁵ Unsurprisingly, it

80. David Bixenspan, *Emails Show Hulk Hogan's Lawyers Working Against Gawker Pre-Sex Tape Leak*, LAW NEWZ (Dec. 18, 2016, 4:04 PM), <http://lawnewz.com/celebrity/emails-show-hulk-hogans-lawyers-working-against-gawker-pre-sex-tape-leak>.

81. *Id.* (quoting email from Harder suggesting edits to Huon's complaint, indicating that his firm was "helping [Huon] out at this point[,] but refusing to be named on the papers).

82. 280 A.D.2d 430 (N.Y. App. Div. 2001); 649 N.E.2d 825 (N.Y. 1995).

83. It is very difficult to find prior cases of admitted third-party funding in tort cases against the press. See Barry Meier, *Revenge and the Future of Media Finances*, N.Y. TIMES (May 26, 2016), <http://www.nytimes.com/2016/05/27/business/revenge-and-the-future-of-media-finances.html>. This should not be surprising, given the historical prohibition of funding arrangements characterizable as champerty and maintenance. See *infra* notes 187–89 and accompanying text. For an intriguing new example, see David Orozco, *The Use of Legal Crowdsourcing ("Lawsourcing") to Achieve Legal, Regulatory, and Policy Objectives*, 53 AM. BUS. L.J. 145, 146 (2016) (reporting that "Dorian Nakamoto is crowdsourcing the funding of his lawsuit against Newsweek" after the magazine published an article Nakamoto claims incorrectly identified him as the creator of e-currency Bitcoin); see also Joe Mullin, *Dorian Nakamoto, Fingered as Bitcoin Creator, Wants to Sue Newsweek*, ARS TECHNICA (Oct. 14, 2014, 11:00 AM), <http://arstechnica.com/tech-policy/2014/10/dorian-nakamoto-fingered-as-bitcoin-creator-wants-to-sue-newsweek>.

84. *Armstrong*, 649 N.E.2d at 826. For a description of the book and the litigation, see Roger Parloff, *Milken's Revenge? Roger Parloff on the Extravagant and Ultimately Futile Libel Suit Against the Journalist James B. Stewart*, LEGAL AFF. (July/August 2002), http://www.legalaffairs.org/issues/July-August-2002/story_parloff_julaug2002.msp.

85. JAMES B. STEWART, *DEN OF THIEVES* 15 (1991) (calling the scandal "the greatest criminal conspiracy the financial world has ever known"); see Parloff, *supra* note 84.

was attacked as slanted and inaccurate, and lawyers for various major characters in the book claimed that their portrayals libeled them.⁸⁶

Still, none of the major characters portrayed in the book ultimately sued, despite their threats.⁸⁷ The person who did sue was Michael Armstrong—a former attorney of Lowell Milken, Michael’s brother, and a very minor character in the book.⁸⁸ Armstrong’s claim against Stewart and his publisher was that *Den of Thieves* had libeled him in one paragraph by suggesting that he had encouraged a client to perjure himself.⁸⁹ Despite the fact that Armstrong was featured so minimally in the book, his litigation strategy was a no-holds-barred, broad-ranging attack—what one of Stewart’s lawyers called “a big, protracted war.”⁹⁰ Armstrong also apparently sought all sorts of sensitive information, including the identities of many confidential sources⁹¹—something fundamentally threatening to a reporter. The case cost over \$3.5 million, took nine years, generated thousands of pages of documents, and was ultimately dismissed.⁹²

Stewart’s lawyer had apparently suspected from the beginning, when the case was first filed in 1992, that the plaintiff could not be financing such a case entirely on his own.⁹³ In 1996, following an application by Stewart’s lawyers, the court mandated disclosure, which revealed that Armstrong was funding his litigation with a \$1.6 million loan from Lowell Milken.⁹⁴ The loan agreement indicated that if Armstrong lost the suit, Lowell Milken would forgive the debt entirely, and if Armstrong won, Milken would have a right to repayment of the principal plus 12.5% interest.⁹⁵ Stewart saw the Milken brothers as the “shadow party in interest” in the *Armstrong* case, attempting both to “get” Stewart and to deter other reporters from engaging in aggressive journalism about the Milkens.⁹⁶

86. Parloff, *supra* note 84.

87. *Id.*

88. *Id.*

89. *Id.*; see *Armstrong*, 649 N.E.2d at 827–28.

90. Parloff, *supra* note 84 (quoting Robert Cusumano).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. See *id.* (suggesting that the Milkens hid behind a proxy rather than bringing their own action for fear of broad-ranging discovery).

Although Lowell Milken supported Armstrong's litigation financially, that support was limited.⁹⁷ Milken spent significantly less than Thiel's reported outlay in the Hulk Hogan case⁹⁸ and seemed to be very specifically motivated to remove a book that cast the Milken in a bad light.⁹⁹ The Thiel story appears more complex and potentially threatening to the press as a whole, especially if it is true that Thiel is funding the Harder law firm's other lawsuits against Gawker.

C. The Litigation Clearinghouse Vehicle: Billionaire Frank VanderSloot and the Invitation to Fund Litigation Against Progressive Magazine Mother Jones and the "Liberal Press"

By contrast to litigation funders taking their "revenge" against particular media organs by funding individual suits they identify, some funders now seek to create funding clearinghouses to support challenges to media whose viewpoints they oppose. For example, Frank VanderSloot—reputedly the richest man in Idaho, a major donor to Mitt Romney's super-PAC during the 2012 presidential election, and a foe of "liberal media"—sued liberal magazine *Mother Jones* for defamation in connection with a story that criticized his stance on gay rights.¹⁰⁰ From the perspective of *Mother Jones*, the case was "a push, by a superrich businessman and donor, to wipe out news coverage that he disapproved of."¹⁰¹ *Mother Jones* further believed that, "[h]ad he been successful, it would have been a chilling indicator that the 0.01 percent can control not only the financing of political campaigns, but also media coverage of those campaigns."¹⁰²

97. Reports suggest that the initial loan was supposed to be up to \$500,000, and that it increased to \$1.6 million, but that Lowell Milken stopped covering further expenses thereafter. *Id.*

98. Compare Parloff, *supra* note 84 (\$1.6 million from Milken), with Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4 (\$10 million from Thiel).

99. See Parloff, *supra* note 84.

100. See Bauerlein & Jeffery, *supra* note 4. On February 6, 2012, during the presidential primaries, *Mother Jones* published an article about major Republican donor Frank VanderSloot and his company, claiming that VanderSloot had "gone to unusual lengths to oppose gay rights in Idaho, and that [his company] had run into trouble with regulators." *Id.* Although *Mother Jones* posted a correction of some material in the story at VanderSloot's request, VanderSloot filed a defamation suit against the magazine and its reporters. *Id.* In the meantime, *Mother Jones* had broken a story about comments by Mitt Romney that some say cost him the White House. *Id.* VanderSloot had been a Romney national finance chair. *Id.*

101. *Id.*

102. *Id.* VanderSloot strategically filed his lawsuit in state court in Bonneville County, Idaho, where his company "is the biggest employer and the sponsor of everything from the minor league ballpark to the Fourth of July fireworks." *Id.*

Mother Jones ultimately won the case, but the magazine reported that the plaintiff's "take-no-prisoners legal assault" had consumed \$2.5 million in legal fees over two-and-a-half years.¹⁰³ The magazine's report about the case indicated that the decision to fight rather than "cave" was not "an easy choice."¹⁰⁴

More arresting than that, however, was the statement that VanderSloot issued after the *Mother Jones* decision. VanderSloot asserted that he had been "absolutely vindicated"¹⁰⁵ in the action and announced the establishment of a fund to pay the legal fees of people wishing to sue *Mother Jones* or other members of the "liberal press."¹⁰⁶ He also announced that he was contributing the first \$1 million to his litigation fund.¹⁰⁷ Even more strikingly, VanderSloot also made a call to arms to like-minded others, asking them to contribute to the "Guardian of True Liberty" fund if they wished to push back against *Mother Jones* and other media sources of its ilk.¹⁰⁸ In other words, VanderSloot

Further, he "asked for damages of up to \$74,999—exactly \$1 under the amount at which the lawsuit could have been removed to federal court." *Id.*

103. *Id.*

104. *Id.*

105. Mike Masnick, *Mother Jones Wins Ridiculous SLAPP Suit Filed by Billionaire . . . Who Still Claims Victory*, TECHDIRT (Oct. 9, 2015, 9:33 AM), <https://www.techdirt.com/articles/20151008/15392532481/mother-jones-wins-ridiculous-slapp-suit-filed-billionaire-who-still-claims-victory.shtml>. Even though he lost the case, VanderSloot presumably found such vindication in the trial judge's statements in dictum suggesting that she did not approve of *Mother Jones*'s form of journalism. See *Vandersloot v. Found. for Nat'l Progress*, No. CV-2013-532, slip op. at 51–53 (7th Dist. Ct. Idaho Oct. 6, 2015), <https://assets.documentcloud.org/documents/2451499/vanderslootdecision.pdf> (critiquing the "non-objective bias of *Mother Jones* and its approach in seeking out only the negative to support its position").

106. Masnick, *supra* note 105; see also VanderSloot: "I'm Establishing a Fund to Defend Conservatives Defamed by Liberal Press," E. IDAHO NEWS (Oct. 6, 2015, 8:40 PM), <http://www.eastidahonews.com/2015/10/vandersloot-ive-established-a-fund-to-defend-conservatives-defamed-by-liberal-press> [hereinafter *VanderSloot Fund*].

107. *VanderSloot Fund*, *supra* note 106.

108. *Id.* VanderSloot's statement follows:

I am proud of the part I have played in exposing Mother Jones for what it is. Our case against Mother Jones was about setting the record straight and holding Mother Jones accountable for its biased bullying of people with conservative values they disagree with. And that is exactly what our lawsuit accomplished.

Today I am going one step further, to make sure that Mother Jones cannot pick on other people who do not have the means to defend themselves. To push back on Mother Jones' attempts to stifle free speech from those who disagree with its left-wing agenda. Today, I am announcing the establishment of the "Guardian of True Liberty Fund" in honor of Judge Williamson's bold statements revealing Mother Jones' biased and unfair

created a private institutional tool with the goal of crippling certain media and sent a message to those with the means and desire to join in such an effort that an institutional clearinghouse to do so was available. Such a well-funded, well-staffed, mono-focused litigating machine could promise efficiency in censorship of selected media.

II. THIRD-PARTY LITIGATION FUNDING AND WHAT MAKES MEDIA CASES DIFFERENT

To avoid the charge that the threat of litigation funding in the modern press context is exaggerated, it is helpful to situate the issue against the increasing acceptance of third-party litigation funding in other contexts and explain why third-party funding creates a particular problem in the journalism environment.

A. *The Controversy over Litigation Funding*

Much has been written recently about the rise of third-party litigation funding.¹⁰⁹ In the commercial context, third-party funding is now a multi-million-dollar industry.¹¹⁰ The rise of third-party funding has led to controversy, with opponents concerned about the

journalism to help pay for the legal expenses of people who have been defamed by Mother Jones magazine or other liberal press because of their conservative values. Freedom is not free!

I am pledging the first million dollars to this fund. I will be urging others who share my (and the Court's) view about the press's pattern and practice of character assassination to contribute to the fund as well. If Mother Jones or the liberal press has published false and defamatory things about you because you speak out in support of conservative values, please contact my office at 208-528-2011 for further details.

Id.

109. See, e.g., ABA COMM'N ON ETHICS 20/20, WHITE PAPER ON ALTERNATIVE LITIGATION FINANCE, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES 1 (2012) [hereinafter ABA WHITE PAPER], http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (compiling several sources discussing the phenomenon); Maya Steinitz, *The Litigation Finance Contract*, 54 WM. & MARY L. REV. 455, 460 n.6 (2012) (reviewing recent cases and legislation).

110. See Alba & Chaussee, *supra* note 25; see also Joshua Hunt, *What Litigation Finance Is Really About*, NEW YORKER (Sept. 1, 2016), <http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about> (recognizing Legalist, an algorithm-based third-party funding start-up funded in part with a grant from Thiel's foundation, as a new entrant into the third-party funding landscape); Martha C. White, *The Legal Strategy That Bankrupted Gawker Comes to Main Street*, NBC NEWS (Aug. 30, 2016, 11:03 AM), <http://www.nbcnews.com/business/business-news/legal-strategy-bankrupted-gawker-comes-main-street-n639971> (mentioning other algorithm-based funding firms).

potentially distorting effects of litigation funding—such as potentially increasing frivolous litigation, affecting parties' motivations to settle, and imposing additional costs on courts and the judicial system.¹¹¹ The empirical data on the issue are contested.¹¹²

B. The Particular Problems of Third-Party Funding in Media Cases

The bottom line is that while the commercial, economically-motivated type of third-party funding raises questions about its impact on the judicial process, third-party funding in the media context implicates something different: the democratic, constitutionally grounded roles of free speech and the press. The problem is more acute when the funding is secret. Clandestine third-party litigation funding in media cases is likely to enhance the chilling effect of lawsuits

111. For a sampling of articles addressing these issues, see, e.g., Michael Abramowicz, *Litigation Finance and the Problem of Frivolous Litigation*, 63 DEPAUL L. REV. 195, 195 (2014); David S. Abrams & Daniel L. Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding*, 15 U. PA. J. BUS. L. 1075, 1075 (2013); Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 620–21 (2007); Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 652 (2005); Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 673 (2011); Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA L. REV. 388, 395 & n.23 (2016) (and sources cited therein); see also JOHN BEISNER ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, SELLING LAWSUITS, BUYING TROUBLE: THIRD PARTY LITIGATION FUNDING IN THE UNITED STATES I, 4–8 (2009), <http://www.instituteforlegalreform.com/uploads/sites/1/thirdparty litigation financing.pdf> (wholesale critique); STEVEN GARBER, RAND INST. FOR CIVIL JUSTICE LAW, FIN., & CAPITAL MKTS. PROGRAM, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWN, AND UNKNOWN 18–20 (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP306.pdf.

112. See Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 455 & n.14 (2011) [hereinafter Sebok, *Betting on Tort Suits*]; Goral, *supra* note 5, at 100 & n.5.

In addition, scholarship about non-commercial third-party funding, especially with respect to the press, is sparse. For blog posts by law professors addressing the issue in the Gawker context, see Simona Grossi, *Hulk Hogan v. Gawker Media and the Problem of Invisible Funding*, MEDIUM (May 26, 2016), <https://medium.com/@sgrossi/hulk-hogan-v-gawker-media-and-the-problem-of-invisible-funding-7dc2ff60d258>; Howard Wasserman, *Litigation Financing and the First Amendment*, PRAWFSBLAWG (May 27, 2016, 10:44 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/05/litigation-financing-and-the-first-amendment.html> [hereinafter Wasserman, *Litigation Financing*]; Howard Wasserman, *Thiel, Settlement, and Third Party Funding*, PRAWFSBLAWG (May 28, 2016, 5:16 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/05/peter-thiel-settlement-and-third-party-funding.html> [hereinafter Wasserman, *Thiel, Settlement*].

against the press at a time when the press is most vulnerable.¹¹³ Non-disclosure distorts the meaning of the lawsuit. It hides the degree to which an action by one plaintiff may actually be a proxy claim. It limits the participants' ability to recognize when a plaintiff's purportedly compensatory lawsuit is actually part of a broader attack on the fundamental democratic role of the press.

1. *Potential chilling effects*

Third-party funding of litigation designed to attack the Fourth Estate threatens to create significant chilling effects for the media. This is because ideological litigation funders seeking to censor press defendants are presumably not significantly constrained by the economic calculus familiar to traditional plaintiffs in commercial litigation.¹¹⁴ If the point is censorship, they could well embrace economically questionable scorched-earth litigation tactics or refuse reasonable settlements in order to increase the costs of publication. Such prospects would predictably intimidate at least some segments of the media. Because so many press entities now operate on narrow financial margins, they are likely to make economically risk-averse decisions to avoid or reduce coverage inviting strategic third-party-funded lawsuits.¹¹⁵

The VanderSloot-type litigation fund, focused on intimidating certain types of reporting, arguably would have incentives to fund as many media actions as possible, regardless of ultimate outcome, to intimidate the "liberal press" in general with large and distracting litigation costs. This kind of strategy would reinforce a message that publishing "liberal" as opposed to "conservative" articles would trigger asymmetric litigation costs.¹¹⁶ A desire to inflict death by a thousand cuts would prompt the commencement of many suits against the

113. Nicholas Lemann, *How Peter Thiel's Gawker Battle Could Open a War Against the Press*, NEW YORKER (May 31, 2016), <http://www.newyorker.com/news/news-desk/how-peter-thiels-gawker-battle-could-open-a-war-against-the-press> (discussing the economic and cultural vulnerability of today's press).

114. See Davey Alba, *You Too Can Invest in Lawsuits. But Not Quite like Peter Thiel*, WIRED (Aug. 29, 2016, 7:00 AM), <https://www.wired.com/2016/08/now-can-invest-lawsuits-just-like-peter-thiel> (contrasting ideological litigation funders against commercial companies, which are constrained by their fiduciary duties to their shareholders not to "waste money on personal vendettas").

115. See *infra* Section II.B.2.

116. Even if they would ultimately win such actions, the press would be aware that they would face larger litigation costs for "liberal" articles than for non-"liberal" articles. In these kinds of ideological funding scenarios, funders do not necessarily have the incentives to limit their funding to the most winnable, profit-making cases (as they might in commercial, investment-type lawsuits outside third-party funding contexts).

targeted media, practically regardless of likely outcome, so long as the financial burden on the press of publishing “liberal” articles would be significantly greater than the burden of publishing “conservative” articles. The predictable chilling effect would be attributable to the third-party funding and not simply the success of the plaintiffs’ suits.

Thiel-type funders of “revenge” litigation with the goal of bankrupting a targeted outlet might use different strategies of attack.¹¹⁷ Such funders would wish to identify cases with the possibility of existence-threatening damage awards. In turn, a rational media outlet would only publish an article that carried with it the possibility of existence-threatening damages if it believed that the likelihood of losing a lawsuit was extremely small.¹¹⁸ (This is in part because the benefit to the outlet of any given article is itself low.) But in these circumstances, even small errors in judgment regarding that probability would be catastrophic.¹¹⁹ A few expensive litigations would not be too expensive for a billionaire funder. The funder would either win supra-normal damages or cripple the target with a series of hard-fought and therefore expensive litigations.

The differences between the likely strategies of Thiel-type and VanderSloot-type funders indicates that news media today are facing a spectrum of litigation threats—a “perfect storm” of varied censorship strategies. The rather binary description of the Thiel and VanderSloot strategies above should not obscure the reality that they are on a spectrum. For example, Thiel can simultaneously fund a Gawker-type existence-threatening case and a number of other lower-value lawsuits designed to raise expenses for the targeted media outlet. Under such circumstances, it is rational for every media outlet today to worry *both* about catastrophic litigation outcomes and nuisance litigation raising the costs of doing business. This

117. See Denton, *The Hogan Verdict*, *supra* note 38 (claiming the Gawker verdict’s size is “chilling” for “publishers with a tabloid streak”).

118. See *Risks Associated with Publication*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/risks-associated-publication> (last visited Feb. 5, 2017) (discussing the types of risks publishers take each time they publish a story). Admittedly, this is probably most true of traditional media players. For digital media, such as Gawker, the sheer speed of posting, a sensibility that apparently privileges writers over editors, and an expansive scope of operations might suggest less lawyer involvement or influence in the assessment of the risks posed by stories.

119. Such errors are likely to be due not only to the fact-specificity of results in tort suits against media but also to what Professor Amy Gajda has described as media lawyers’ optimistic views of the scope of constitutional press protection. See GAJDA, *THE FIRST AMENDMENT BUBBLE*, *supra* note 2, at 115.

combination of intimidating strategies would therefore have an even more effective chilling effect.

This is not to say that the press should be immunized from damages in meritorious suits by the fortuity that the plaintiffs do not have the resources to sue. Rather, it is to say that the availability of ideological third-party funding distorts the litigation process and indirectly enhances the press's timorousness.¹²⁰

The interests of a litigation funder seeking to censor the defendant could diverge from the interests of the individual plaintiff in a satisfactory resolution of his own personal claims. Several aspects of the Hogan case raise the censorship question: the excessive amount of damages claimed by the plaintiff,¹²¹ Hogan's refusal to settle despite offers from Gawker,¹²² legal tactics that appeared to make it difficult for Gawker to survive a verdict,¹²³ and the many lawsuits—some possibly also funded by Thiel—pending against Gawker.¹²⁴ Of course, we do not know whether Hogan would have proceeded with his lawsuit against Gawker if Thiel had not bankrolled it. As a reasonably wealthy celebrity, Hogan presumably could have financed a litigation against Gawker without Thiel's support. Still, given his status as a public figure, Hogan might have wondered about the likelihood of success. Under such circumstances, would he have chosen to self-pay millions of dollars in legal fees for maximalist litigation tactics, especially after his expensive divorce?¹²⁵ Without unlimited outside funding, Hogan might have chosen to negotiate a

120. Some overprotection of the press at the expense of some potential plaintiffs is assumed in the structure of press-protective constitutional norms. Error is inevitable, particularly in real-time reporting. There were errors in the advertisement at issue in *New York Times Co. v. Sullivan*, even though they were insubstantial. See, e.g., Christopher W. Schmidt, *New York Times v. Sullivan and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293, 320 (2014) (calling the *New York Times's* process in that case "sloppy"). But if unlimited amounts of money were available to every potential plaintiff with a minimally meritorious claim of error on the part of the press, the press would experience significant, if not existential, financial threats. Plaintiffs who might otherwise have been satisfied with apologies or small sums of money might well litigate much further with other people's money.

121. Kontorovich, *supra* note 8.

122. Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4.

123. *Id.* (noting that Hogan dropped his negligent infliction of emotional distress claim, which meant Gawker's insurance company was no longer on the hook for part of the damages).

124. *Id.*

125. See Tom Weir, *Details of Hulk Hogan's Costly Divorce Become Public*, USA TODAY (Nov. 23, 2011, 2:03 PM), <http://content.usatoday.com/communities/gameon/post/2011/11/hulk-hogan-divorce-settlement-costly-details-linda-bollea/1>.

settlement in lieu of amassing millions of dollars in legal fees by continuing his legal battle.¹²⁶ Furthermore, Hogan's decision to dismiss claims that might have triggered Gawker's insurance coverage indicates an intent to shut down the media outlet rather than simply to collect damages for breaches of privacy or reputational harm.¹²⁷ To be sure, neither of these propositions is self-evidently accurate.¹²⁸ Still, the question of chill is about appearance as much as reality. When the plaintiff is one of numerous cat's paws that strategic funders use to impact the media industry as a whole, both the targeted outlet and the rest of the press cannot but help receive the message.

The Hogan case provides a useful illustration of the potential impact on the targeted outlet itself. Gawker's Denton specifically identified the Hogan verdict as the reason for Gawker's bankruptcy filing.¹²⁹ Would the jury have awarded such a disproportionate, bankruptcy-triggering damages award if it had known about Thiel's secret funding of the case? Had the jury known that Thiel was bankrolling Hogan, they might not have seen themselves as "delivering a rebuke to morally reprobate coastal elites on behalf of a hometown hero."¹³⁰ Certainly if the funding had been publicly

126. See Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4 (reporting that Gawker offered to settle Bollea's claims on several occasions). While inadequate settlements coerced by mounting legal fees should not be considered an appropriate result, parties may choose to settle for reasons other than such coercion, and legal fee coercion is not the only conclusion to be drawn from settlement.

127. See Matthew Ingram, *The Gawker vs. Hulk Hogan Case Just Got a Lot More Important*, FORTUNE (May 25, 2016, 2:19 PM), <http://fortune.com/2016/05/25/gawker-hogan-thiel>; Shafer, *supra* note 73; Sorkin, *Thiel Bankroll*, *supra* note 61.

128. On the settlement point, for example, conclusions about the lack of settlement cannot be reached without considering what settlement offers were made, and whether they would have adequately addressed Hogan's expressed financial goals for the case, his apparent interest in using the case as a career-refreshing vehicle, and perhaps any desire to control more damaging postings about him by Gawker. Similarly, Hogan has not provided any public explanation for the Harder firm's decision to drop his original claim of negligent infliction of emotional distress. Although one plausible interpretation of that decision is that it was an intentional attempt to style the lawsuit in a way that would impede Gawker's access to insurance coverage, it is not the only available explanation. Christopher C. French, *Sex, Videos and Insurance: How Gawker Could Have Avoided Financial Responsibility for the \$140 Million Hulk Hogan Sex Tape Verdict*, 90 S. CAL. L. REV. POSTSCRIPT 101, 105-06 (2016) (arguing that Gawker simply did not have enough insurance and that adequate insurance could have protected the company from liability).

129. See *In re Gawker Disclosure Statement*, *supra* note 43; see also Denton, *How Things Work*, *supra* note 29.

130. Shafer, *supra* note 73 (asking, in the context of addressing the secrecy of his funding, "[d]id [Thiel] figure that the jury would have responded differently had it

known it would have changed the story told of the case. In any event, the Hogan lawsuit already had a substantive impact on Gawker's own coverage.¹³¹ Having started as a gossip purveyor, Gawker announced that it was changing its focus to become a politics site in late 2015.¹³² Even in its prior incarnations, however, Gawker had broken numerous significant news stories in addition to its tawdry celebrity revelations.¹³³ It had also significantly changed the digital news landscape overall¹³⁴ and served as a powerful incubator of young

known that the case wasn't pitting a wrestler against a rude and smutty New York Web empire but was really a multibillionaire's personal vendetta?"); *see also* Denton, *The Hogan Verdict*, *supra* note 38 (suggesting that the jury used a high damage award to send a message about privacy); Denton, *How Things Work*, *supra* note 29 (identifying the challenge of facing Hogan in front of a "home-town jury"); Goral, *supra* note 5, at 108 n.44 (noting that third-party funding disclosure has the potential to make juries less sympathetic to the funded litigant). Of course, the opposite could have happened too, with jurors deciding that if the third-party funder had enough confidence to support the case, they should follow suit as well.

This is not an argument that such information be admissible in evidence for consideration by the jury, as current evidence rules in the federal courts, and state jurisdictions as well, would be unlikely to deem it permissible. It is rather a statement about the potentially distorting effects of having third-party litigation funding hidden from public view.

131. *See* Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4.

132. *See id.*; Nathan McAlone, *Gawker Will Become a Politics Site—and That Means Layoffs*, BUS. INSIDER (Nov. 17, 2015, 3:08 PM), <http://www.businessinsider.com/gawker-will-become-a-politics-site-and-that-means-layoffs-2015-11>. It is at least possible that the Hogan lawsuit, as well as regret over other sex-related disclosures, led to the shift in Gawker's focus toward politics over gossip. *See supra* note 35. *But see* Denton, *The Hogan Verdict*, *supra* note 38 (implying an evolution in conceptions of Internet journalism and user interests).

133. *See, e.g.*, Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4 (observing that a Gawker story had resulted in a congressman resigning); Sorkin, *Secret War*, *supra* note 51 (recounting Denton's list of Gawker's journalistic coups); *see also* Gourarie, *supra* note 29 ("The good Gawker serves an important role in the media ecosystem . . ."); Stephen Marche, *Gawker Smear Me, and yet I Stand with It*, N.Y. TIMES (May 31, 2016), <http://www.nytimes.com/2016/05/31/opinion/i-stand-with-gawker.html> (highlighting the value of Gawker); Denton, *How Things Work*, *supra* note 29 (believing that "Gawker shed an enormous amount of light").

134. *See* Manjoo, *Gawker's Gone*, *supra* note 29 (describing Gawker as the "first real digital media company . . . [that used its understanding of] the pace, culture and possibilities of online news . . . to unleash a set of technical, business and journalistic innovations on the news industry that have altered the way we produce, consume and react to media today"); *see also* Gourarie, *supra* note 29 ("Gawker isn't always worth defending, but when it is, it's because of the heat it puts on the powerful, not a blanket approval of everything the outlet publishes.").

journalistic talent.¹³⁵ Gawker's bankruptcy means that an entity that produced some good journalism and promoted an independent journalistic sensibility no longer exists.¹³⁶ As for the rest of the Gawker properties, there is no guarantee that the new owners will produce more coverage and better reporting.¹³⁷

Also changing the scope of third-party funding is the staggering amount of money in private hands today.¹³⁸ For someone worth billions of dollars, a few million spent on legal fees to promote what he or she perceives as important values might not seem to be a very significant expenditure. The ability to negotiate contract provisions and the possibility of diversification in the third-party funding portfolio could further cushion the risk of financial loss for a billionaire funder.¹³⁹ More importantly, the VanderSloot model could further

135. See Denton, *How Things Work*, *supra* note 29 (explaining that rather than credentials, Gawker looked for "raw writing talent"); Scocca, *supra* note 29 (referencing the "achievements of the people who've left" Gawker).

136. Denton, *How Things Work*, *supra* note 29. Denton himself has expressed doubt that a buyer would be found for Gawker.com given its reputation and its litigation history. Tolentino, *supra* note 29 (quoting Denton as saying that "[t]he campaign being mounted against [Gawker's] editorial ethos and former writers has made it too risky" for anyone to purchase Gawker.com).

137. Recent developments suggest that Univision is more timorous about controversial stories. See Sydney Ember, *Gawker's New Owner Deletes Six Posts Involved in Lawsuits*, N.Y. TIMES (Sept. 10, 2016), <http://www.nytimes.com/2016/09/11/business/media/gawkers-new-owner-deletes-six-posts-involved-in-lawsuits.html> (describing Univision's decision to delete six Gawker stories that are currently subjects of litigation despite editorial objections by former Gawker editors); see also Benjamin Mullin, *Old Gawker Media Stories Are Getting New Life in Spanish*, POYNTER (Sept. 22, 2016), <http://www.poynter.org/2016/old-gawker-media-content-is-getting-new-life-in-spanish/431597> (explaining that Univision is exploring the fit between Gizmodo Media content and Univision's Spanish-speaking audience, and that its plans for the brand are still under development). On the other hand, Univision has hired a respected journalist to lead the brand. Villafañe, *supra* note 45. We do not know whether the revamped Gizmodo properties will be run independently or incorporated into the larger Univision brand. All this makes it difficult to predict with precision the ways in which Univision's version of Gawker journalism will diverge from the original platforms.

138. See Robert Frank, *400 Richest Americans Now Worth \$2 Trillion*, CNBC (Sept. 16, 2013, 3:33 PM), <http://www.cnbc.com/2013/09/16/400-richest-americans-now-worth-2-trillion.html> (explaining that "[t]he 400 richest are now worth more than the GDPs of many nations").

139. Indeed, several billionaires have already proven they are not shy about suing media companies and journalists directly. Will Evans, *Peter Thiel Isn't the Only Billionaire Waging Legal Battles Against the Press*, POYNTER (May 26, 2016), <http://www.poynter.org/2016/billionaires-versus-the-press/413957> (listing lawsuits

organize and coordinate that money for press-censoring litigations by reducing collective action constraints on potential plaintiffs—inviting legal mobilization of disparate participants with the common goal of punishing certain types of press organs.¹⁴⁰

The ability to control press behavior through the strategic use of third-party funding can enhance both political and industry influence. Many worry today about the outsize influence of massive private wealth on our politics through, inter alia, campaign contributions.¹⁴¹ Imagine how amplified such political influence could be if the super-wealthy could wield it through litigation-responsive control over the media. Influence over the media could even come to be seen as trumping campaign contributions for effective influence over politics.

As for industry influence, concern about litigation funders' ability to wield disproportionate power through networks of associations is entirely rational, given that such funders could well be plugged in to the many different industries that touch the activities of media organizations today. Again, Thiel's pursuit of press litigations is illustrative. He is on the board of Facebook, which is becoming increasingly central in the distribution of news.¹⁴² As such, it is a competitor as well as a partner of other news organizations.¹⁴³ This is not to say that the full Facebook board would act in contravention of its fiduciary duties merely to further a fellow board member's personal vendetta. Rather, it is to note plausible convergences of

against journalists by Sheldon Adelson, Frank VanderSloot, Donald Trump, Jeff Greene, David and Charles Koch, and Steve Wynn).

140. For an analogy, see, e.g., Schmidt, *supra* note 120, at 310–13 (explaining that use of race-neutral litigation tactics enabled alliances across class and ideological barriers to form against the Civil Rights Movement and the press reporting on it).

141. See Drew Desilver & Patrick Van Kessel, *As More Money Flows into Campaigns, Americans Worry About Its Influence*, PEW RES. CTR. (Dec. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence> (finding that most Americans think “money has a greater—and mostly negative—influence on politics than ever before”).

142. See Shafer, *supra* note 73 (“How do we feel about a Facebook board member paying out of his pocket to destroy a major digital publisher, especially in an era where Facebook is gaining primacy as the ultimate platform for news?”); see also Jim Rutenberg, *Behind the Scenes, Billionaires' Growing Control of News*, N.Y. TIMES (May 27, 2016), <http://www.nytimes.com/2016/05/28/business/media/behind-the-scenes-billionaires-growing-control-of-news.html> (reporting that in response to skepticism about Thiel's role as a board member, Facebook has said that “no one person or even group of people controls what news its algorithmic formulas spit out for individual news feeds”).

143. Shafer, *supra* note 73.

personal and institutional interest. A mainstream news distributor like Facebook might see economic advantages in industry realignments that strategic litigation against selected media entities could accomplish. Because the media ecosystem today consists of complex interrelationships among different types of information providers, such considerations could become more widespread.

Third-party funding can affect the media industry in another way as well—by taking advantage of factions and tensions within the press community. Targeted ideological litigation funding can be particularly effective, especially when targeted at an unpleasant element in the media. Such narrow targeting may well give mainstream news organizations an incentive not to wade into the fight on behalf of entities with which they do not identify. The *New York Times* surely does not see itself as engaging in the same type of reporting as Gawker. Even a marginal mainstream newspaper or local television outlet might hesitate to support a controversial “gossip” outlet—because of a concern about tarnishing its brand by association and because of a belief that the Gawker-like outlet did not engage in true journalism. Such an attempt to create a wedge within the media between the legitimate press and the scandalous gossip outlets like Gawker is problematic.¹⁴⁴

144. Thiel himself has said that he does not have a war against journalists and that he contributes financially to the traditional and ethical press. Sorkin, *Secret War*, *supra* note 51. From this perspective, the demise of a “bully” like Gawker would actually work to promote and enhance the reputation and status of the legitimate press. Thus, any theoretical concerns about a chilling effect would be unrealistic and, in any event, due to the plaintiff’s substantive victory rather than the funding.

While intuitively attractive to many, this is a difficult argument to maintain with consistency today. One problem is that it is difficult to make the distinction between the “real” press and its illegitimate “wannabes.” Particularly in the era of digital media and the citizen journalist, of Twitter journalism and Facebook news feeds, where different versions of journalism and different kinds and sources of reporting are developing, the notion that the mainstream institutional press is the only “real” or “legitimate” journalism is hard to maintain.

In any event, a practical problem with this argument is that Gawker was a more complicated entity than might have at first appeared. No one can deny that the site had profited from sensationalist, gossipy, and innuendo-laden “reporting” that did not satisfy mainstream journalistic standards. This type of coverage, however, was not terribly different from the British tabloid newspapers with which the British-born Denton was doubtless very familiar. See, e.g., Lili Levi, *Journalism Standards and “The Dark Arts”: The U.K.’s Leveson Inquiry and the U.S. Media in the Age of Surveillance*, 48 GA. L. REV. 907, 909 (2014) [hereinafter Levi, *Journalism Standards*] (describing the British tabloid phone hacking scandal); see also Denton, *The Hogan Verdict*, *supra* note 38; Preston, *supra* note 29. Moreover, Gawker had also broken important and “real” news stories. See *supra* notes 133–34. Who is to say that such outlets should be shut

Moreover, corporate realignments following media litigations might well influence the developing structure of the media industries. For example, Univision's acquisition of Gawker Media properties further consolidates the media sector. Prior media consolidation has already led to what many see as insufficient diversity in media content.¹⁴⁵ Added to consolidation would be the possibility that a Gawker reborn would be far more well-behaved and supine than the irreverent original. The behavioral and structural censorship effects of third-party litigation funding, both direct and indirect, are troubling in and of themselves, but the possibility of the two developing in tandem should be particularly concerning to all media outlets.

2. *Modern press operations magnify the threats of chill for a vulnerable press*

What makes third-party litigation funding particularly problematic in the media context has much to do with the contextual realities of current press operations. The press today is bleeding from a thousand cuts, not one mortal wound.¹⁴⁶ It is also a complex ecosystem with many different types of participants and complex interrelationships. So, even if third-party funding does not pose the threat of a mortal wound in any given case, it becomes one aspect of the mosaic of powerful forces that undermine the press.¹⁴⁷

The press should have a sense of purpose, and not just a commercial one. Legal protections for journalistic activity are supposed to support that sense of purpose. But the modern press finds itself subject to an array of both external and internal threats to

down through the clandestine and strategic efforts of private vigilantes? See Denton, *How Things Work*, *supra* note 29; Scocca, *supra* note 29.

145. See Michael Corcoran, *Twenty Years of Media Consolidation Has Not Been Good for Our Democracy*, MOYERS & COMPANY (Mar. 30, 2016), <http://billmoyers.com/story/twenty-years-of-media-consolidation-has-not-been-good-for-our-democracy> (explaining that six corporations own approximately ninety percent of the nation's media companies).

146. See Amy Mitchell & Jesse Holcomb, *State of the News Media 2016*, PEW RES. CTR. (June 15, 2016), <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016> (observing that declining print readership and advertising revenue, greater competition for digital advertising revenue, and increasingly smaller reporting staffs are some of the challenges facing the media industry).

147. I am not arguing that the press, because it is weakened and distrusted, should be given a doctrinal pass from liability for violations of applicable law. If a plaintiff has a good claim against a media entity, she should be able to pursue it and obtain appropriate damages if she prevails. The question is whether secret funding that distorts the litigation process and uses it as a club to bankrupt a media entity is more likely to have a chilling effect at this time in U.S. media history.

its capacity, competence, independence, and financial viability.¹⁴⁸ The end of the early Twentieth Century's economic model for the institutional press has led not only to the death of numerous press outlets, but also to desperate attempts to find a steady economic footing in the Internet age.¹⁴⁹ News organizations have made decisions that compromise their journalistic integrity for economic reasons, such as forays into native advertising that blur the boundary between editorial and advertising.¹⁵⁰ The shift from family to corporate ownership of newspapers increases the organizations' focus on short-term profits and share price.¹⁵¹ The rise of different kinds of news sources—starting with cable and then expanding to all varieties of Internet-based news outlets, including Facebook and other social media as news and information platforms—increases both the media's diversity of coverage and its susceptibility to error and slant.¹⁵² This challenge to traditional norms of neutrality in journalism has led to a multiplicity of norms and practices, and uncertainty over which ones to follow.¹⁵³ Charges and counter-charges of “fake news” have captured

148. *What Does Journalism Mean for Democracy: Fewer Journalists on the Beat*, FRANKLIN CTR. FOR GOV'T & PUB. INTEGRITY (Mar. 24, 2015, 2:17 PM), <http://franklincenterhq.org/11540/journalism-democracy-fewer-journalists>.

149. One need do nothing more than review the past decade of yearly State of the News Media reports by the Pew Foundation to recognize these economic realities. See *Previous State of the News Media Reports*, PEW RES. CTR. (June 15, 2016), <http://www.journalism.org/2016/06/15/more-state-of-the-news-media-reports>.

150. See TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* 39–45 (2012); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 84 (2006); Lili Levi, *A “Faustian Pact”? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647, 649–51 (2015) [hereinafter Levi, *A “Faustian Pact”?*].

151. See, e.g., C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 881 (2002).

152. STEVEN WALDMAN, FED. COMM'N COMM'N, *THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE* 116–33 (2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

153. For current critiques of journalistic neutrality, see, e.g., Glenn Greenwald, *The Rise of Trump Shows the Danger and Sham of Compelled Journalistic “Neutrality”*, INTERCEPT (Mar. 14, 2016, 10:17 AM), <https://theintercept.com/2016/03/14/the-rise-of-trump-shows-the-danger-and-sham-of-compelled-journalistic-neutrality> (criticizing current journalistic norms that compel large media organizations to “venerate[] *faux* objectivity over truth”); James Warren, *New Report Asks Whether Journalists Should Be Neutral in the Face of ISIS*, POYNTER (July 5, 2016), <http://www.poynter.org/2016/new-report-asks-whether-journalists-should-be-neutral-in-the-face-of-isis/419990> (detailing questions of neutrality raised by a reporter while covering conflict in Syria); see also Lili Levi, *Taming the “Feral Beast”: Cautionary Lessons from British Press Reform*, 55 SANTA CLARA L. REV. 323, 389 (2015) (noting that “journalism is now a much more tentative and iterative process” in the age of the Internet).

the public's fancy and continue to erode trust in the institutions of the press.¹⁵⁴ The result of all these trends has been that the media is more fractured and feeble than is ideal.¹⁵⁵ Its weakness makes it more vulnerable to intimidation and self-censorship.¹⁵⁶

Moreover, private wealth shows its influence on the modern press in other ways than the turn to strategic litigation funding. The past few years have shown an emerging trend of newspaper purchases by the super-wealthy.¹⁵⁷ Although some of the "billionaire saviors"¹⁵⁸ are

154. See, e.g., Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016, 5:30 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news>; Jeffrey Toobin, *Gawker's Demise and the Trump-Era Threat to the First Amendment*, NEW YORKER (Dec. 19, 2016), <http://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment> (contending that both Donald Trump's victory despite his antagonistic attitude towards the press and the outcome of the Hogan-Gawker litigation evidence a widespread view of the media as part of "an unaccountable elite").

155. WALDMAN, *supra* note 152, at 345.

156. See *Publish and Be Damned*, *supra* note 28 ("That Mr. Thiel won in the end is worrying for other media outlets. At a time when journalism's business model is threatened, he has demonstrated that they can be sued out of existence using funds from billionaires with an axe to grind, even if, as in his case, they are not bringing a case of their own."). It is unsurprising to hear criticisms that the mainstream media are already timorous, risk-averse, commercially-focused, and unable to serve as watchdog over power. They are too well behaved. The problem is that the alternative voices—the Internet-native digital media—are too unstable to take on that role. They are not sufficiently well behaved. With compulsive cycling between good and awful reporting (and the awful usually predominating), such entities disappoint the public and leave their flanks open for legal challenges like Hogan's against Gawker. Lemann, *supra* note 113 ("The roguish part of the press is proliferating."). If they are shuttered, though, where will we find the press that comforts the afflicted and afflicts the comfortable? See David Shedden, *Today in Media History: Mr. Dooley: 'The Job of the Newspaper Is to Comfort the Afflicted and Afflict the Comfortable'*, POYNTER (Oct. 7, 2014), <http://www.poynter.org/2014/today-in-media-history-mr-dooley-the-job-of-the-newspaper-is-to-comfort-the-afflicted-and-afflict-the-comfortable/273081>.

157. Brady McCombs, *Rich Newspaper Owners: Industry Savior or Foe?*, ASSOCIATED PRESS (May 3, 2016, 2:43 PM), <http://bigstory.ap.org/article/1c240897783a4629b445d4a2a1968102/rich-newspaper-owners-industry-saviors-or-foes> (discussing "rich, influence peddlers" purchases of newspapers at "bargain prices"). For example, the *Washington Post* is now owned by Amazon.com founder Jeff Bezos, the *Boston Globe* was purchased by Boston Red Sox owner John Henry, the *Minneapolis Star-Tribune* is now the property of Minnesota Timberwolves owner Glen Taylor, and the Huntsman family is purchasing the *Salt Lake Tribune*. *Id.* The very wealthy have also purchased stakes in electronic news media or launched their own. For example, eBay founder Pierre Omidyar funded First Look Media a few years ago. See Sarah Ellison, *The Unmanageables*, VANITY FAIR (Dec. 3, 2014, 8:00 AM), <http://www.vanityfair.com/news/2015/01/first-look-media-pierre-omidyar>. Although this entity was touted as a new example of fearless investigative journalism, it has been plagued with dissension. *Id.*

seen as committed to their newspapers' independence,¹⁵⁹ there are still obvious concerns about the owners' abilities—directly or indirectly—to meddle in, or at least generally influence, the editorial positions and content of their newspapers. One recent example of such owner-promoted censorship comes from billionaire casino mogul Sheldon Adelson's secret purchase of the *Las Vegas Review-Journal* last year.¹⁶⁰ The modern press is in the unenviable spot of needing money to survive and worrying that the sources of such funds will inevitably lead to some kind of incursion into its editorial freedom and ability to serve as democratic watchdog.

The press also appears to be in fading judicial favor since what has been called the Golden Age of constitutional protections for the press, from the mid-1960s to the mid-1980s.¹⁶¹ Newspaper and television network funding was critical to the development of the First Amendment press jurisprudence at that time. The institutional press itself—flush from its financial model and being the only game in town for news and entertainment—was able to take the lead in bringing and funding that litigation.¹⁶² Now, the press is in a different economic position, and ideologically strategic third-party litigation funding could further undermine many of the constitutional advances made by the press in the heady era of self-funded First Amendment litigation. Professor Amy Gajda has

158. Ryan Chittum, *Jeff Bezos's Landmark Purchase of the Washington Post*, COLUM. JOURNALISM REV. (Aug. 5, 2013), http://www.cjr.org/the_audit/jeff_bezoss_landmark_purchase.php (coining the phrase “Billionaire Savior phase of the newspaper-industry's collapse”).

159. See, e.g., McCombs, *supra* note 157 (reporting on the Hunstman family's control over the *Salt Lake Tribune*).

160. See Ken Doctor, *Sheldon Adelson Tightens Grip on Review-Journal*, POLITICO (Feb. 4, 2016, 12:34 PM), <http://www.politico.com/media/story/2016/02/sheldon-adelson-tightens-grip-on-review-journal-004384> (alleging that news reports about Adelson are “reviewed, changed or killed almost daily”); Ravi Somaiya, Ian Lovett & Barry Meier, *Sheldon Adelson's Purchase of Las Vegas Paper Seen as a Power Play*, N.Y. TIMES (Jan. 2, 2016), <http://www.nytimes.com/2016/01/03/business/media/sheldon-adelsonspurchase-of-las-vegas-paper-seen-as-a-power-play.html>; see also McCombs, *supra* note 157 (describing staff resignations as a result of perceived editorial self-censorship); Rutenberg, *supra* note 142 (indicating that following the purchase of the newspaper, editors reportedly began editing articles to portray Adelson's business dealings more positively).

161. See, e.g., RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255–56 (2014); Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1819.

162. See Jones, *supra* note 161, at 256–59 (examining several important press cases brought by newspapers or journalism organizations).

recently described the shifts in how trial courts have been addressing lawsuits against the press.¹⁶³ But media lawyers are still operating under a misapprehension, attributable to the Golden Age of press law, that the First Amendment provides extensive protection to the press.¹⁶⁴ Years ago, the press's doctrinal protections and institutional power might well have dissuaded prospective plaintiffs from suing news organizations.¹⁶⁵ Now, the tables have turned. Wealthy funders have made money available to plaintiffs to sue the media. Their high-powered and able lawyers, who have financial incentives to engage in the most aggressive litigation tactics, reinforce judges' jaundiced views of the press and sympathy for claims of privacy rights. Plaintiffs' lawyers have also taken to styling suits against the press not only in the traditional doctrinal category of defamation law, but under other legal theories as well, including copyright, breach of privacy, infliction of emotional distress, and rights of publicity.¹⁶⁶ In those sorts of claims, courts' consideration of the press as a democratic and constitutionally situated actor is more muted. The plaintiffs' bar has been said to have "strong monetary incentives" for path manipulation: "to *create* liability through repeated litigation of presently non-meritorious claims."¹⁶⁷

163. See GAJDA, *THE FIRST AMENDMENT BUBBLE*, *supra* note 2, at 115 (observing "courts' increasing impatience" with the media); *see also* Amy Gajda, *The Present of Newsworthiness*, 50 *NEW ENG. L. REV.* 145, 149 (2016) (describing more recent cases in which lower courts' attitudes toward the media appear to have become less tolerant).

164. *See, e.g.*, GAJDA, *THE FIRST AMENDMENT BUBBLE*, *supra* note 2, at 191–96 (arguing that media lawyers are citing old pro-press cases without realizing that the current environment has changed); *c.f.* Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 *HARV. L. REV.* 2259, 2263–64 (2014) (arguing that Silicon Valley lawyers are using nontraditional sources, including product terms of use, international speech norms, and statutory protections, to influence American concepts of free speech online).

165. *See* Jones, *supra* note 161, at 259–61 (discussing cases where the Supreme Court continued to characterize the media positively despite press abuses of First Amendment protections).

166. *See, e.g.*, *Bollea v. Gawker Media LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012). Indeed, Hogan's second request for a preliminary injunction seeking a take-down of the Gawker post was based on asserted copyright infringement. *Id.*; *see also* Mark Joseph Stern & Nat Stern, *A New Test to Reconcile the Right of Publicity with Core First Amendment Values*, 23 *J. INTELL. PROP. L.* 93, 94–95 (2015) (examining right of publicity claims meant to curb free expression).

167. Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation-Finance Dilemma*, 8 *J.L. ECON. & POL'Y* 613, 630 (2012). Path manipulation in this sense is the use of litigation to manipulate the direction of doctrine toward a desired goal. Plaintiffs' lawyers who are repeat players in a particular litigation context have financial incentives to bring cases even if they are not currently

III. WHAT IS TO BE DONE?

Because third-party funding of suits against the press presents a significant potential threat to the media, the obvious follow-up question is what can reasonably be done to reduce the threat. The bottom line is that secret litigation funding against the media threatens our constitutional system—not only our constitutional commitment to a free press, but also arguably the integrity of jury decision making and the right to a fair trial.¹⁶⁸ It seems intuitive that something could easily be done to address the situation. But, unexpectedly, constructing an approach to mitigate the dangers of third-party litigation funding in media cases is doctrinally difficult. Reliance on existing champerty and maintenance prohibitions is likely to be unavailing in a large minority of jurisdictions.¹⁶⁹ An exemption from litigation funding in press cases would be highly unrealistic, and prohibition of litigation funding in all cases would face quite an uphill battle. Attempts to impose disclosure duties on litigation funders—and particularly on ideologically-motivated litigation funders in media cases—would invite constitutional challenges and, in any event, would likely be impracticable.¹⁷⁰

A. *A Special Press Exemption from Third-Party Litigation Funding Today?*

Because of our particular sensitivities to the press and its role in democracy, one type of response to these arguments of press vulnerability would be to prohibit third-party litigation funding in press cases. Proponents of such a press immunity would seek to justify the special treatment of the press by looking for parallels between historical attempts to deploy litigation strategically to censor press coverage and ensure supine press institutions. They would not have to look too far back in history to find powerful examples.

supported by doctrine, in the expectation that achieving even one victory would establish precedent confusing the doctrine and inviting further expansion in the desired direction.

168. Arguably, for example, a fair trial would be jeopardized if the full context of the suit—including the third-party funder's involvement and objectives—were kept secret. See Goral, *supra* note 5, at 108 n.44 (observing that disclosing the fact of third-party funding to judges and juries may change those entities' opinions about whether the funded party deserves to prevail).

169. See Jason Lyon, Comment, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 587–90 (2010) (asserting that courts would likely consider maintenance and champerty to be obsolete).

170. See *infra* notes 177–84 and accompanying text.

The most notable instance of an attempt to use facially neutral legal rules to advance press censorship was the legal counteroffensive that southern officials adopted during the early 1960s against the Civil Rights Movement and the northern newspapers' coverage of the South's defense of segregation.¹⁷¹ That story serves as the backdrop of *New York Times Co. v. Sullivan*,¹⁷² arguably the most iconic First Amendment decision of its time.¹⁷³ It is now known that the litigation against the *New York Times* in that case was part of a concerted effort by southern lawyers and judges to use defamation law to prevent journalistic coverage of the South's resistance to civil rights.¹⁷⁴ Both the purpose and the effect of the *Sullivan* case, as well as other libel actions against the press during the civil rights era, were to intimidate the press: "The strategy was shrewd, because it put the press to a grave financial risk."¹⁷⁵

Obviously, there are fundamental differences between the government-promoted, -sanctioned, and -operationalized deployments of apparently race-neutral litigation as censorship during the civil rights era and the private litigation funding scenarios represented by the Hogan and VanderSloot stories today. The defamation suits against the northern press during the Civil Rights Movement were just one part of a multi-pronged legal attack on any attempts to undermine southern segregation.¹⁷⁶ Moreover, protecting Gawker's right to reveal

171. See, e.g., ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 34–35, 42–44, 153, 222 (1991) (describing how, by suing the press for libel, southern officials sought to "try[] to choke off a process that was educating the country about the nature of racism and was affecting political attitudes on that issue"); see also Schmidt, *supra* note 120, at 309–10 (arguing that segregationists turned to apparently race-neutral laws to counter the Civil Rights Movement on many fronts, and that defamation actions against the northern press were one example).

172. 376 U.S. 254, 294–95 (1964) (Black, J., concurring).

173. LEWIS, *supra* note 171, at 34–35, 42–44, 153, 222.

174. See, e.g., *id.* at 35 (describing, inter alia, southern press's own admission of the strategy, as evidenced by *Montgomery Advertiser* headline "State Finds Formidable Legal Club to Swing at Out-of-State Press").

175. *Id.* So many suits were brought against the *New York Times* and other news organizations (such as CBS) that journalist and legal scholar Anthony Lewis reports the filing by southern officials of "nearly \$300 million in libel actions against the press." *Id.* at 36. *New York Times* attorney James Goodale said that if the libel verdicts had not been not reversed, "there was a reasonable question of whether the *Times*, then wracked by strikes and small profits, could survive." *Id.* at 35. But see Schmidt, *supra* note 120, at 296–97 (questioning the degree of press intimidation in the 1960s because of continuing coverage of the civil rights struggle). But how can we know what was not covered even in an environment of apparently robust journalism, particularly in light of insiders' admissions about financial concerns?

176. LEWIS, *supra* note 171, at 34–35.

a wrestler's adulterous tryst or other titillating entertainment gossip is a far cry from protecting the *New York Times's* and CBS's obligation to publicize the white South's violent attempts to squash the Civil Rights Movement in the 1950s and 1960s. Still, the fact that fantastically wealthy private parties with either personal or ideological agendas—or both—seek to muzzle the press via strategic litigation triggers reminders of prior dangers to the press.

Even considering these past attempts to censor coverage, adoption of a special press immunity from third-party-funded litigation is both highly unlikely as a matter of practice and undesirable as a matter of policy (not to mention constitutional law).¹⁷⁷ On the practicability front, it is almost certain that the press would not succeed in obtaining a blanket prohibition of third-party funding in lawsuits with media defendants. For one thing, the mood of the country currently reflects a deep distaste for at least some elements of the press.¹⁷⁸ Moreover, how would such a prohibition be effectuated? How likely would it be for states in which commercial third-party litigation funding has found a place to amend their statutes? And even *Sullivan* did not imagine prohibiting state defamation law.¹⁷⁹ It simply responded to the coordinated attempt to censor the national press's political reporting by adding constitutionally grounded limits on state defamation law. How would that translate to the third-party funding context?

Attempts to prevent such funding in press cases would inevitably lead to constitutional challenges. Third-party funder proponents would seek to characterize their funding as expressive activity protected by the First Amendment.¹⁸⁰ These arguments must also be

177. Regardless of the “chaotic” current state of First Amendment doctrine, *see* Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000), potential funders would certainly argue under the First Amendment that such a ban, even if regulated via a viewpoint-neutral regulation, would be subject to strict scrutiny and likely to be struck down. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015) (holding that a town code governing the manner in which owners could display outdoor signs based on the type of information they conveyed was an impermissible content-based regulation of speech).

178. *See Mitchell et al.*, *supra* note 3.

179. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–83 (1964).

180. They would analogize their situation to that of funders in campaign finance cases. They would further argue that even if money is not expressive activity itself, speech costs money and restricting its availability therefore limits speech. *See Wasserman, Litigation Financing*, *supra* note 112. Because of the First Amendment protection of plaintiffs' petition rights, and the Court's recognition in *NAACP v. Button*, 371 U.S. 415, 428 (1963), of the associational and litigation rights protected by the First Amendment, they would likely argue for at least flow-through First Amendment protection of their funding activities.

read against the Supreme Court's less than fulsome appreciation of the press's special constitutional status in recent times.¹⁸¹ While this is not to say that objecting third-party funders would inevitably win any or all such constitutional arguments,¹⁸² and states could certainly adopt protective regulations for third-party funding (as some have already done),¹⁸³ a national prohibition of third-party funding of tort actions against the press—and only the press—would therefore be, at a minimum, impracticable.¹⁸⁴

Despite the fact that a special immunity from third-party funded lawsuits is not in the cards for the media, *Sullivan* provides important guidance about alternative next steps. One of its lessons is that federal courts should feel empowered to deploy the constitutional commitment

181. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 351 (2010) (treating media corporations no differently than their commercial counterparts).

182. There are, of course, First Amendment-based counterarguments. For example, opponents would argue that the Petition Clause cannot reasonably be read either to guarantee adequate funding for every person in every possible legal claim, or to eliminate all abuse of process prohibitions. Interpreting the Petition Clause as applying to third-party funders would also effectively end run standing requirements. As for *Button*, the main focus of that case was the protection of the organization's and its members' ability to vindicate their rights via litigation. This is different from the desire of third-party funders to support anti-media lawsuits clandestinely through other people's attempts to vindicate their own personal rights. Moreover, there are differences between constitutional challenges to statutes and individual tort suits. See Wasserman, *Litigation Financing*, *supra* note 112. The former implicate petitions to the government more directly than the latter. Cf. Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1135 (2016) (arguing for a narrow interpretation). Fundamentally, opponents would claim that paying for someone else's litigation is not the same thing as speaking, or even supporting a political candidate. Funding someone's lawsuit, particularly if it is done secretly and anonymously, is even less reasonably interpreted as a person's own expression protected under the First Amendment. At a minimum, though, the funders' arguments would require opponents to explain why a total ban of this kind of funding in press cases would be necessary, rather than a less invasive alternative, such as disclosure, for example.

183. See, e.g., Ronen Avraham & Abraham Wickelgren, *Third Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 245 (2014) (citing Maine, Nebraska, and Ohio).

184. Victims of press failures could complain as well. Why should plaintiffs against the press—as opposed to victims of other corporate activities—be completely foreclosed from access to justice if they do not have adequate litigation funds? Those plaintiffs with good claims against the media would then be doubly disadvantaged in comparison to other plaintiffs, and could themselves claim discriminatory treatment in access to the courts.

to free speech to constrain potentially speech-chilling state law.¹⁸⁵ Another lesson from the case is that if courts see litigation being used improperly as part of a predictably coordinated strategy to achieve unconstitutional ends, they should deploy judicial tools to prevent such results.¹⁸⁶ It is with a view to these lessons of the past attempts to deploy law to muzzle reporting about injustice that we should consider recommending solutions to today's press-funding cases.

B. *The Limits of Champerty and Maintenance*

The most obvious solution to the third-party funding problem might entail reliance on traditional doctrines prohibiting champerty and maintenance. In the past, third-party litigation funding would have faced significant hurdles from these doctrines.¹⁸⁷ At common law, maintenance prohibited strangers to a claim from funding that lawsuit, even if they wished to do so without a profit motive. The doctrine of champerty, a subtype of maintenance, prohibited third

185. See, e.g., Robert Post, Reply, *Understanding the First Amendment*, 87 WASH. L. REV. 549, 550–51 (2012) (characterizing *Sullivan* as “fashion[ing] the ‘actual malice’ rule precisely to nullify the transaction costs of libel litigation . . . [and] to anticipate and nullify the ‘chilling effect’ of ordinary and otherwise constitutionally defensible substantive rules of defamation liability”).

186. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 291–92 (1964). The particular approach used by the majority in *Sullivan* was the refusal to remand the case to the state courts for final application of the actual malice rule. *Id.* at 284–86. Even though that specific issue is, of course, not relevant in the context discussed here, it serves to remind us that it is appropriate for courts to recognize the ways in which a contextual appeal to legal doctrine may undermine the rule of law.

187. See generally Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 67–68 (1935) (describing the history of these legal doctrines). With roots stretching as far back as ancient law, maintenance and champerty were important elements of English law during the medieval period and thereafter. *Id.* at 48. These prohibitions came to the United States common law from England. See Joshua G. Richey, Comment, *Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation*, 63 EMORY L.J. 489, 502–08 (2013) (discussing the historical context of maintenance and champerty). They were designed to “prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of law.” 14 AM. JUR. 2D *Champerty, Maintenance, and Barratry* § 1 (2015). Not only did these doctrines reflect the medieval view that litigiousness was “quarrelsome and un-Christian,” but also an implicit recognition that such arrangements were used by powerful landowners to increase their properties and power. Radin, *supra*, at 55, 58, 60–61, 64 (“the means by which powerful men aggrandized their estates”); Richey, *supra*, at 503. Maintenance was “the last flaring up of feudalism,” while champerty “had its source in the resistance to the slowly growing capitalism that followed the Renaissance of the eleventh and twelfth centuries.” Radin, *supra*, at 65.

parties from funding lawsuits in exchange for a share in their proceeds.¹⁸⁸ In addition to common law incorporation of these doctrines, numerous states adopted statutes banning such arrangements as well.¹⁸⁹ Despite the continued existence of champerty and maintenance statutes in numerous jurisdictions, however, these doctrines are likely to be of only limited use in constraining secret third-party funding in media tort cases. The first and most obvious reason for this is that if the funding remains secret, third-party funders will by definition remain safe from unlawful maintenance or champerty challenges.

Furthermore, numerous jurisdictions have come to reject champerty and maintenance prohibitions.¹⁹⁰ Courts and most scholars appear to agree that champerty and maintenance as causes of action have gone into “desuetude” in the modern age.¹⁹¹ They see the doctrines as archaic relics of a different time, inconsistent with the modern contingency-fee lawsuit and public-interest reform litigation.¹⁹² The possibility of invigorated and even national champerty and maintenance doctrines designed to protect the press is a pipe dream in these circumstances.¹⁹³

Therefore, a plaintiff who wished to enter into a litigation funding contract that would be problematic under any or all of those statutes would find it easy enough to avoid them by arranging for the putative plaintiff to sue in a jurisdiction without such statutes. Even in

188. Lyon, *supra* note 169, at 579; Radin, *supra* note 187, at 48–49; Richey, *supra* note 187, at 502–03.

189. See Radin, *supra* note 187, at 68; Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 98 (2011) [hereinafter Sebok, *The Inauthentic Claim*].

190. See, e.g., ABA WHITE PAPER, *supra* note 109, at 11 (identifying the states that have abandoned the common law doctrine of champerty); Lyon, *supra* note 169, at 587–90; Richey, *supra* note 187, at 505; Sebok, *Betting on Tort Suits*, *supra* note 112, at 454–58; see also Avraham & Wickelgren, *supra* note 183, at 242–46 (cataloguing jurisdictions).

191. Kontorovich, *supra* note 8; see Sebok, *The Inauthentic Claim*, *supra* note 189, at 98–99 (describing the decline of champerty and maintenance prohibitions). There are still “islands” of “no-maintenance,” however. *Id.* at 121.

192. See, e.g., Lyon, *supra* note 169, at 579, 582–83, 587 (describing history); see also Bradley C. Tobias, Note, *Officious Intermeddling or Protected First Amendment Activity? The Constitutionality of Prohibitory Champerty Law After Citizens United*, 22 WM. & MARY BILL RTS. J. 1293, 1294–95 (2014) (arguing that champerty statutes are unconstitutional).

193. *Contra* Paul Bond, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1298, 1316–29 (2002) (suggesting that “champerty’s critics underestimate the continuing vitality of [champerty] doctrine” and proposing a “state Model Act of Champerty”); see also Avraham & Wickelgren, *supra* note 183, at 242–45 (discussing the remaining role of champerty and maintenance, or other doctrines designed to achieve the same results, in numerous jurisdictions).

jurisdictions that retain the champerty and maintenance prohibitions, the statutory requirements for such claims differ.¹⁹⁴ In addition, in jurisdictions that prohibit what is defined as champerty but permit what is characterized as selfless maintenance, an ideological third-party litigation funder could avoid triggering prohibitions of champerty by simply structuring the funding contract to look like permissible public-interested maintenance.¹⁹⁵ Thus, circumstances in which courts would continue to enforce champerty rules would not necessarily relieve the press of the risks inherent in ideologically motivated third-party litigation funders.

Of course, these limitations do not entirely discount the utility of champerty and maintenance statutes. Indeed, the existence of such doctrines can be useful as a way of grounding required disclosure of third-party funding in discovery in media cases.¹⁹⁶ These limitations, rather, trigger skepticism that these doctrines could stand realistically as the principal protection for media organizations facing ideologically driven funding of plaintiffs' content-related actions against them.¹⁹⁷

194. For example, some statutes apply only to lawyers and therefore leave non-lawyers free to engage in conduct prohibited to lawyers under the statutes. *See* Richey, *supra* note 187, at 502 (“[T]he unequal treatment of the doctrines by differing jurisdictions has created funding havens that result in judicial inequality for defendants.”).

195. *See* Grossi, *supra* note 112 (noting the similarities between Thiel's funding of Hogan's case against Gawker and public interest organizations representing underfunded parties).

196. *See* text accompanying note 187.

197. There is also an alternative argument that the most practical response to the third-party funding problems in media cases should be based on lawyers' codes of ethics and obligations to guard their clients' interests zealously. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT rs. 1.7, 1.8(f), 5.4(c) (AM. BAR ASS'N 2016) (discussing conflicts of interest in representation); *see also* ABA WHITE PAPER, *supra* note 109, at 15–24. Those who would support such an approach would presumably argue that if the plaintiffs' lawyers in a third-party-funded media case recommended decisions that were more in the interests of the funder than the plaintiff client, they would be in clear violation of their professional duties and could be subject to the harshest sanctions. Although this argument is very attractive—not the least of which because it avoids many of the complexities of the procedural arguments explored below—it faces the major difficulty that informed client consent can neutralize concerns about conflicts. *See* MODEL RULES OF PROF'L CONDUCT rs. 1.8 (b), 1.8 (f)(1)–(2) (outlining which prohibitions are subject to informed consent by the client). The difficulty of determining when a lawyer's decision results from compromised independence or some other possible explanation is also likely to present a hurdle. Of course, the professional conduct rules do not specifically address the issue of Thiel-type third-party funding, and arguments can surely be made about the nature and extent of

C. *An Alternative, Multi-Pronged Approach*

An alternative, multi-pronged approach is likely to be more promising. The first prong would consist of exploring ways to ground disclosure obligations on plaintiffs in discovery. The second prong would focus on mitigating financial procedural requirements that effectively foreclose appeals in tort cases against the press. The third element would be the exploration of private funding initiatives in response to strategic suits against the media. The final would offer media defendants a litigation misuse claim against third-party funders in certain circumstances. None of these alternatives is perfect. Nor is any one of them in itself sufficient to balance the need for appropriate breathing space for speech and press while protecting the legitimate interests of media subjects. Cognizant of the dangers and limits of these possibilities, this Article recommends these four options as second-best alternatives to a problem more complex than we might at first like to admit.

1. *Disclosure of third-party funding in discovery*

Although third-party litigation funding should not be prohibited *per se*, it should not be allowed to occur stealthily and in secret.¹⁹⁸ Courts should have the discretion to require disclosure of third-party funding from plaintiffs in discovery.¹⁹⁹ Even though the disclosed

informed consent and independent decisions in these sorts of cases—thus making this kind of argument worth exploring in the appropriate case.

198. See, e.g., Grossi, *supra* note 112 (suggesting transparency).

199. I do not discuss the precise extent of the required disclosure beyond the fact of the funding and the identity of the funder. See Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?*, 63 DEPAUL L. REV. 305, 372–73 (2014). For another recent article suggesting disclosure as a first step in legitimating and regulating third-party litigation funding, see Goral, *supra* note 5, at 107–08. Attempting to impose disclosure requirements on the funders themselves, rather than the plaintiffs, is not worth the candle. See *supra* note 180. Third-party litigation funders whose purpose is to cripple the press (or at least some elements thereof) doubtless desire to work from the shadows for practical and strategic reasons and would rely on multiple constitutional arguments to resist disclosure requirements aimed at them. Specifically, they could make non-trivial arguments based on several First Amendment protections. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (anonymous political speech); *Wooley vs. Maynard*, 430 U.S. 705, 717 (1977) (freedom from compelled speech); *NAACP v. Alabama*, 377 U.S. 288, 309 (1964) (rights of association); *W. Va. St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 641–42 (1943) (freedom from compelled speech).

Of course, courts might not apply such protections to concealed and censorship-seeking litigation funding in media cases. For example, protection of anonymous speech has never been absolute and has been primarily geared toward protecting the

information would not likely be admissible for jury deliberation, disclosure of third-party funding would still be very useful.²⁰⁰

From the point of view of the judge, such disclosure would enable her to rule out possible conflicts,²⁰¹ to be aware of potentials for abuse,²⁰² to have increased sensitivity to the broader issues that might be at stake in the action,²⁰³ and to rule in a fully informed fashion on motions to shift discovery costs or sanctions.²⁰⁴ From the point of view of the defendant, such disclosure could also affect the defense's trial and settlement strategy.²⁰⁵ It could help correct any

unpopular political speech of vulnerable speakers. See C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 964 n.37 (2007) [hereinafter Baker, *Press Clause*]; Goodman, *supra* note 150, at 133–34; Helen Norton, *Setting the Tipping Point for Disclosing the Identity of Anonymous Online Speakers: Lessons from Other Disclosure Contexts*, 49 WAKE FOREST L. REV. 565, 565 (2014). Mandated media speech requiring disclosure of paid content has passed constitutional muster. See, e.g., Baker, *Press Clause*, *supra*, at 964 (discussing prior treatment of mandated disclosure); Levi, *A "Faustian Pact"?*, *supra* note 150, at 680–81. Similarly, the constitutional interest in the concealment of litigation funding is far more attenuated than the interests that the compelled speech doctrine is designed to protect. See Goodman, *supra* note 150, at 135. Still, even if third-party funders' First Amendment arguments would not ultimately foil disclosure rules, focusing disclosure requirements on plaintiffs would likely avoid complex and inevitably uncertain constitutional litigation.

200. Needless to say, disclosure approaches are open to gaming. The ideological litigation funder can simply hide himself behind some sort of anodyne-sounding institutional name, for example. While the true identity of the funder might add information, it is not absolutely necessary, however, so long as the existence of outside financial support is known. In any event, this approach is not particularly more open to gaming and manipulation than any other kind of disclosure system that allows people to participate through institutional parties.

201. See Sahani, *supra* note 111, at 424; Jennifer A. Trusz, Note, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 GEO. L.J. 1649, 1650–51 (2013).

202. See Grossi, *supra* note 112.

203. See Shafer, *supra* note 73.

204. See Sahani, *supra* note 111, at 403.

205. They might also argue for disclosure to the jury as well, on the ground that it might well affect the way the jury would see the true issues at stake in the case—including whether it is an attack on the freedom of the press. Despite a surface appeal, however, this degree of transparency is not a doctrinally realistic possibility. Simply put, both federal and state rules of evidence would not allow such funding information to be admissible in evidence and made available to the jury.

Of course, the likelihood that funding information would not be permitted in evidence is not necessarily a negative, even from the point of view of press protection, however. Simply put, disclosure to the jury might in fact have the opposite result than that sought by funding opponents. If, for example, the jury dislikes the press, then revelation of third-party funding would not lead to downward

misapprehension by the defense regarding the plaintiff's funding and thereby align the defense's strategy to the realities of the plaintiff's likely goals and incentives. This would thus neutralize any tactical advantages gained by the plaintiff in the litigation as a result of the defense's misapprehensions.²⁰⁶

Equally importantly, disclosure of third-party funding might be very important for the court of public opinion. To the extent that the disclosure is not privileged, the third-party funding could be communicated to the public. Indeed, the availability of such information could create incentives for the development of accountability bodies keeping track of, and publicizing, attempts to harm press institutions. This would give the public, through such accountability intermediaries, the information that would help it understand the extent of the threat posed to the function of the press.

On the basis of these arguments, one might think that disclosure would be an obvious solution. But the argument is not so easy. The principal objections to third-party-funding disclosure recommendations are procedural. The Federal Rules of Civil Procedure (FRCP) do not specifically address third-party funding or require its disclosure. Should third-party funding still be considered relevant and therefore discoverable under FRCP 26²⁰⁷ (or parallel state

adjustments in damage awards for a winning plaintiff. Moreover, juries, when apprised that a third-party funder is bankrolling the litigation against the press organ, might infer from such support that the plaintiff's claims had been assessed by the third-party funder and found to be substantively meritorious. Perhaps the funder's perceived confidence in the case would subconsciously persuade the triers of fact to lean toward the plaintiff.

206. Professor Sahani rejects disclosure to anyone other than the judge, deeming conflict-discovery the only permissible goal of third-party funding disclosure. Sahani, *supra* note 111, at 405, 426 (asserting that tactical advantages do not justify disclosing funding to the other side because “[p]arties have all sorts of tactical advantages in litigation for which disclosure is not required simply in the name of leveling the playing field. The source of funding . . . is not discoverable information because the participation of the funder is not relevant or material to the merits of the case”). But this argument assumes its conclusion with respect to relevance, and there are surely differences in the degree of tactical advantages as to which disclosure is not required to reveal in the litigation system.

207. Under FRCP 26(b)(1), parties may “obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense.” FED. R. CIV. P. 26(b)(1).

I focus on the Federal Rules of Civil Procedure regarding discovery because of a trend for state rules to follow the federal model. See Sahani, *supra* note 111, at 391 n.8.

discovery rules)? Are there other procedural rules that could be construed to permit judges to require third-party funding disclosure?²⁰⁸

Although the Advisory Committee for the FRCP recently decided to postpone a proposed amendment to Rule 26(a)(1)(A) “to require automatic initial disclosure of third-party litigation financing agreements” on the ground that such a change would be premature, it also stated its view that judges already have the power to obtain third-party information under current rules.²⁰⁹ Some scholars, however, argue that the current rules preclude disclosure obligations to parties in the litigation.²¹⁰

208. For example, FRCP 7.1 requires a party to disclose its corporate parents and all its publicly held affiliates holding a stake of at least ten percent in the corporate litigant. FED. R. CIV. P. 7.1. Rule 17(a) provides that “[a]n action must be prosecuted in the name of the real party in interest.” FED. R. CIV. P. 17(a)(1). Most generally, Rule 1 states that the rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1. But see *infra* note 210 for arguments that these provisions are unlikely to serve.

209. See MEMORANDUM FROM DAVID G. CAMPBELL ON THE REPORT OF ADVISORY COMMITTEE ON CIVIL RULES at 3–4 (Dec. 2, 2014), <http://www.uscourts.gov/file/17932/download>. The Committee, however, did not specify how judges should obtain third-party funding information.

210. See Sahani, *supra* note 111, at 403–05 (noting the Advisory Committee postponement, suggesting that disclosure of third-party funding would not be required under the discovery rules, and arguing for procedural revisions requiring plaintiffs to disclose third-party funding to courts). Rule 7.1 has been narrowly construed, and might not be helpful. See Goral, *supra* note 5, at 108 (noting it was intended to help identify a judge’s financial conflicts). As for the “real party in interest” argument, it is mostly a metaphor in third-party funding cases. See *Miller U.K. Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 724 (N.D. Ill. 2014) (rejecting the argument in a third-party funding disclosure case). The rules do not define whether the “interest” to be identified is the interest in the recovery, or the interest in the substantive right to be claimed in the action. In the state context, however, Florida courts have sometimes held nonparty litigation funders of vexatious litigation to be parties for purposes of liability for costs and attorneys’ fees. See, e.g., *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 694 (Fla. Dist. Ct. App. 2009). Florida’s Third District Court of Appeal has recently made it clear that such third-party status as a party is solely for fees and does not mean that a third party to a litigation can be liable for tort judgments against someone else. See *Miccosukee Tribe of Indians of S. Fla. v. Bermudez*, 145 So. 3d 157, 159–60 (Fla. Dist. Ct. App. 2014) (explaining that extending liability could punish the third parties for helping others defend themselves in court). Nevertheless, if a funder is entitled to part of any recovery and has the authority to influence key lawsuit decisions and is therefore possibly a party for costs and attorneys’ fees purposes, query whether that can be deemed sufficient as a hook for disclosure. After all, it is the third-party-funding contract that would determine the degree of control and possible funder liability in the particular case.

The legal landscape is mixed overall. Some federal courts have adopted local court rules requiring disclosure to the court of all parties with a financial interest in the litigation.²¹¹ In terms of judicial decisions on relevance for discovery purposes, the cases are few and not entirely consistent. Some courts have ordered disclosure of third-party funding in discovery, albeit without much discussion.²¹² One trial court considered relevant the existence and terms of a funding agreement because such an agreement could reveal “bias” generated by an outside funder’s “additional ‘agenda.’”²¹³ Some cases assume

See Goral, *supra* note 5, at 110 & n.58 (reporting third-party funder liability for costs in a recent English case).

211. See, e.g., N.D. CAL. CIVIL L.R. 3-15(b)(1) (2015) (requiring all parties to a civil proceeding to file certificates of interested entities or persons, including anyone with a financial interest in the action or non-financial interest that could be substantially affected by the outcome of the case); see also Goral, *supra* note 5, at 108 n.47 (indicating that many district courts have begun requiring corporate disclosures).

212. See, e.g., *Abrams v. First Tenn. Bank Nat’l Ass’n*, No. 3:03-CV-428, 2007 WL 320966, at *2 (E.D. Tenn. Jan. 30, 2007). It should be noted that the court in *Miller U.K. Ltd. v. Caterpillar, Inc.* explicitly declined to follow *Abrams* because it lacked “explanation or analysis.” 17 F. Supp. 3d at 723. It is also reported that third-party funding was disclosed in *Armstrong v. Simon & Shuster*. See *supra* Section I.B.

213. *Conlon v. Rosa*, Nos. 295907, 295932, 2004 WL 1627337, at *2–3 n.6 (Mass. Land Ct. July 21, 2004). The court found relevant, for discovery purposes, the possibility that a zoning-related lawsuit was being funded by a third party as an anti-competitive act directed at the beneficiary of a zoning board decision. *Id.* at *3. It noted the significance of a competitor funding the plaintiff’s lawsuit, and stated that “[h]e who pays the piper may not always call the tune, but he’ll likely have an influence on the playlist.” *Id.* at *2. The court feared that “hidden funding” could “introduce a dynamic into a plaintiff’s case—an agenda unrelated to its merits, a resistance to compromise—that otherwise might not be present and, unless known, cannot be managed or evaluated.” *Id.* The *Conlon* court cited to cases allowing discovery when plaintiff’s lawsuits were secretly funded by commercial competitors of the defendant. *Id.*; see also *Avondale Mills Inc. v. Norfolk S. Corp.*, No. 1:05-2817-MBS, 2008 WL 6953958, at *1 (D.S.C. Jan. 16, 2008) (denying a motion to exclude evidence relating to payment of legal expenses on the ground that they would be relevant to show bias).

Recently, in *United States v. Homeward Residential Inc.*, No. 4:12-CV-461, 2016 WL 1031154, at *5 (E.D. Tex. Mar. 15, 2016), the court interpreted a local court rule to require identification of third-party funders. The defendants had alleged that the evidence would be relevant to whether the plaintiff had financial incentives to make unfounded allegations, and the court required discovery of the identity of the plaintiff’s actual or potential investors. *Id.* at *4–5. While the court did not identify which aspect of the local court rule made this information relevant, there are three possibilities based on the rule: the likelihood that the information “would be likely to have an influence on or affect the outcome of a claim or defense,” that it was “information that deserves to be considered in the preparation, evaluation or trial of a claim or defense,” and that it was “information that reasonable and competent

relevance where the funder could be called as a witness.²¹⁴ In jurisdictions that follow the doctrines of champerty and maintenance, the availability of such defenses would in all likelihood make third-party funding relevant in the meaning of the procedure rules.²¹⁵ Even in jurisdictions that have abandoned the doctrines of champerty and maintenance, courts have specifically recognized the need for vigilance in protecting against abuses in litigation funding.²¹⁶ Discovery regarding third-party funding would be a practical way in which to be vigilant.²¹⁷

counsel would consider reasonably necessary to prepare, evaluate, or try a claim or defense.” *Id.* at *5 (quoting a local court rule).

Alternatively, it can be argued in some cases that third-party funding is relevant to the assessment of the strength of the case. *See* DeStefano, *supra* note 199, at 307, 337 n.145 (noting that third-party funders’ custom of extensively evaluating each case prior to funding can persuade some observers to interpret funding decisions as proxies for substantive merit). There are, of course, always questions about both the incentives and ability of third-party funders to value claims accurately. *See, e.g.,* Abramowicz, *supra* note 111, at 211.

Another possibility is analogous to the federal rules’ recently adopted requirement that insurance contracts be disclosed. *See* FED. R. CIV. P. 26(a)(1)(iv) (2016). Arguably, if disclosure of insurance information is required, an argument by analogy can be made for third-party funding. *See* Goral, *supra* note 5, at 108 (explaining that the insurance disclosure helps both sides properly appraise the case because insurers often have control over the litigation). *But see* Sahani, *supra* note 111, at 414 (arguing that FRCP 26(a)(1)(A)(iv) does not require the disclosure of third-party funding because such funding is not analogous to liability insurance coverage since third-party funders typically only pay legal costs, not any final judgment, and third-party funders do not “control[] the litigation”).

214. *See, e.g.,* Berger v. Seyfarth Shaw LLP, No. C 07-05279 JSW (MEJ), 2008 WL 4681834, at *1, *3 (N.D. Cal. Oct. 22, 2008) (requiring disclosure of documents regarding a nonparty’s assistance to plaintiffs).

215. *See supra* note 208. *But see* Miller, 17 F. Supp. 3d at 724 (rejecting a relevance argument for discovery when requirements of champerty and maintenance claims by the defendant were not deemed met).

216. *See, e.g.,* Saladini v. Righellis, 687 N.E.2d 1224, 1227 (Mass. 1997) (emphasizing courts’ obligation to review funding agreements carefully); Conlon, 2004 WL 1627337, at *2 (explaining that after Massachusetts abolished the doctrine of champerty, the Supreme Judicial Court nevertheless gave “express direction to the trial courts to closely monitor and supervise cases financed by others”); Brown v. Bigne, 28 P. 11, 12–13 (Or. 1891) (stating that courts will look to whether the interest in the litigation is legitimate or made for the purpose of harassing others). *See generally* Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 FORDHAM L. REV. 2939, 2939 (2014) [hereinafter Sebok, *Talk About Control*], (asserting that plaintiffs’ attorneys have begun viewing litigation as an investment, thus resulting in an increase of frivolous lawsuits).

217. It is instructive that disclosure of litigation funding appears to be required in some jurisdictions in Australia, a country that broadly allows third-party funding. *See, e.g.,* Tom McDonald, *The Court Steps in: Recent Developments in the Regulation of Litigation Funding in Australia*, VANNIN CAP.: FUNDING IN FOCUS, July 2016, at 22, 22–23.

Nevertheless, at least one recent case has asserted that absent champerty or maintenance claims, documents regarding third-party funding arrangements would have no relevance for discovery purposes.²¹⁸

This doctrinal background suggests that while the current rules do not explicitly require disclosure of third-party-funder identities and information, nothing in the FRCP explicitly precludes judicial discretion to decide, in the appropriate context, that third-party-funding disclosure would be appropriate. This discretion is particularly important in circumstances where a third-party funder appears to be weaponizing litigation to target journalism. In the final analysis, judicial attitudes toward both the appropriate breadth of discovery and third-party funding in context²¹⁹ are likely to be

218. *Miller*, 17 F. Supp. 3d at 721–23 (rejecting a broad interpretation of relevance of third-party deal documents for discovery purposes and insisting on clear showings of relevance to claims or defenses in the action).

How broadly *Miller* should itself be interpreted as relates to third-party disclosure arguments in media cases is itself a question. For one thing, the defendants in *Miller* sought disclosure of all “deal documents,” not just disclosure of the fact of third-party funding and/or the identity of the funder. *Id.* at 721. For another, for its argument that relevance rules should be “firmly applied” and that “district courts should not neglect their power to restrict discovery where necessary,” *Miller* ironically relies on *Herbert v. Lando*, 441 U.S. 153 (1979), a press case. *Miller*, 17 F. Supp. 3d at 721. What the *Miller* court does not mention, however, is that *Herbert* was a defamation case in which the Supreme Court rejected the press defendant’s argument for immunity from discovery of editorial materials, but it assured the defendant that the judicial power to control and restrict discovery would suffice to protect the press against abuse. *Herbert*, 441 U.S. at 176–77. Moreover, the *Miller* court’s opinion is practically bristling with outrage at what it seems to consider misleading case descriptions by the party seeking funding-related discovery. *See* 17 F. Supp. 3d at 722–28.

Some courts other than that in *Miller* appear to have permitted some discovery of third-party funding in politically-motivated lawsuits, but apparently not regarding individual donors, for fear of “chill[ing] expressive activity.” Carol Rice Andrews, *Jones v. Clinton: A Study in Politically Motivated Suits, Rule 11, and the First Amendment*, 2001 BYU L. REV. 1, 58 n.258 (2001) [hereinafter Andrews, *Jones v. Clinton*]; *accord* *Matthews v. City of Maitland*, 923 So. 2d 591, 595 (Fla. Dist. Ct. App. 2006) (and cases cited therein). There were rumors in the press about conservative, anti-Clinton funders helping shoulder Jones’s legal fees in her sexual harassment action, but the parties did not confirm those rumors. *See* Murray Waas, *The Men Who Kept Paula Jones’ Lawsuit Going*, SALON (Apr. 2, 1998), <http://www.waasinfo.com/clients/waas/geo/salon/lawsuit.html>.

219. Even the *Miller* court emphasized that relevance cannot be determined “in the air” or on the basis of prior precedent—and must be decided case-by-case. 17 F. Supp. 3d at 722. More importantly, the *Miller* court saw itself as promoting an important public policy by rejecting champerty as a defense in the case because doing so “would effectively endorse the alleged misappropriation of trade secrets” and “encourage future commercial dishonesty.” *Id.* at 727. The balance to be

determinative. In conducting that analysis, three factors are notable. First, in many of the cases in which defendants seek third-party funder identities and information, courts seem to believe the defendants do so for their own strategic reasons and perhaps to distort the litigation process.²²⁰ Second, in many of the cases rejecting discovery of third-party funding information, the documents sought were already privileged in any event.²²¹ Finally, and most importantly, none of the cases addressing the scope of discovery in third-party funding cases involved the media. Judges should be particularly sensitive to the issue of third-party funding disclosure where threats to our constitutional system are potentially at stake. When important First Amendment values are in the balance, courts should interpret the relevant procedural rules in their full context and apply them to promote the degree of transparency that would help the media withstand attempts to shut down press organs. In sum, reasonably press-sensitive interpretations of existing procedural rules are available and not precluded by the rules and design of the federal discovery scheme.

Some would claim that even under a narrow reading of the current rules, it is still possible to argue for rule changes responsive to the concerns discussed above.²²² The only practical question there is whether rule amendments of this sort would likely be adopted. The politics of such an effort are likely to be contested, complicated, and unpredictable.²²³ For now, a case-by-case, jurisdiction-by-jurisdiction approach is the most realistic option available.²²⁴

addressed in cases that pit tortious conduct by the press against litigation funding designed to bankrupt the defendant is far different.

220. For example, defendants seeking all documents regarding actual and potential third-party funders may well wish to obtain third-party funders' assessments of the viability of the actions for purposes of forcing settlement. These sorts of concerns may underlie some judicial reluctance to order discovery.

221. See generally Grace M. Giesel, *Alternative Litigation Finance and the Attorney-Client Privilege*, 92 DENV. U. L. REV. 95, 101 (2014) (exploring whether traditional attorney-client privilege protects communications involving a third-party funder).

222. See Sahani, *supra* note 111, at 410 (proposing various rule revisions and reinterpretations). For example, the U.S. Chamber of Commerce, an outspoken foe of third-party litigation funding, has recommended an amendment to FRCP 26 specifically requiring the disclosure of third-party funding. See Goral, *supra* note 5, at 109 n.50. Although it was postponed, it was not rejected out of hand.

223. Recently, the scope of discovery has been narrowed, and the Advisory Committee's recommendations have been criticized by scholars as tilting too far in favor of defendants. See, e.g., Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1085 (2015). This tendency

2. *Limits on procedural rules that effectively foreclose the appellate process*

The particular circumstances of the Hogan-Gawker dispute are a perfect example of the need to ensure that courts do not automatically apply procedural rules—whose application in the ordinary case would be unexceptionable—in cases that implicate First Amendment values. As noted above, Florida procedural rules allow courts automatically to grant a stay of a final damages judgment pending appeal, but require the party wishing to appeal the judgment to file a supersedeas bond.²²⁵ Although the original rule required that the bond equal the principal amount of the judgment with interest, the Florida legislature adopted a cap of \$50 million for such supersedeas bonds.²²⁶ Even as capped, however, the required

might, but would not be guaranteed to, increase support for funder disclosure amendments of some kind.

224. Of course, one of the remaining questions is whether the required discovery disclosure should be limited to the fact of third-party funding, or include the identity of the funder(s), or a summary of the funding deal, or the funding contract in toto. Some courts insist that the question must be resolved case-by-case and not in the abstract. *See, e.g., Miller*, 17 F. Supp. 3d at 722. Indeed, the result in *Miller* might have been, at least in part, a response to the breadth of the third-party-funding deal discovery sought. There is much to be said about leaving this determination for courts to address on a case-by-case basis. The revelation of the funding contract might generate attorney-client privilege arguments by funders wishing to keep the details secret, for example. *Id.* at 732–33. For discussions of privilege issues in the third-party-funding context, see generally DeStefano, *supra* note 199; Giesel, *supra* note 221.

225. FLA. R. APP. P. 9.310 (a) (1), http://www.floridasupremecourt.org/clerk/comments/2007/07-299_Appendix%20A%203-2-07.pdf (allowing an automatic stay of execution of final judgments of money damages pending appeal if the party posts “a good and sufficient bond equal to the principal amount of the judgment plus twice the statutory rate of interest”); *see supra* text accompanying note 41. In the federal courts, FRCP 62(d) provides that “[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond” to be approved by the court. FED. R. CIV. P. 62(d). The federal courts will reduce such bonds on showings of good cause. *See Fed. Pres. Serv. v. Am. Pharm. Ass’n*, 636 F.2d 755, 757–59 (D.C. Cir. 1980) (seminal case reading the federal rule to allow courts discretion vis-à-vis the supersedeas bond requirement); *see also Morgan Guar. Tr. Co. v. Republic of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y. 1988) (listing four factors, including the public interest, to be considered by courts in deciding whether to stay an appeal when the defendant cannot post a bond); Doug Rendleman, *A Cap on the Defendant’s Appeal Bond? Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1100 (2006).

The appeal bond requirement is designed to balance two interests: the interest in appellate review of jury decisions and the interest in “providing security for the plaintiff’s collection efforts” if he ultimately wins the appeal. Rendleman, *supra*, at 1092.

226. This upward limit of \$50 million for such supersedeas bonds was enacted in 2006. FLA. STAT. § 45.045 (2016) (providing that the amount be adjusted annually in connection to the U.S. Department of Labor’s Consumer Price Index); *see also* Jesse Wenger, Comment, *The Applicability of State Appeal Bond Caps in Suits Brought in Federal*

bond amount could be too high—particularly for economically stressed news organizations. As a result, the bond requirement could often serve as a de facto roadblock to an appeal.²²⁷ The important First Amendment values at stake in tort cases against the press require that otherwise desirable procedural requirements not be applied to block the press defendant's realistic ability to appeal crippling judgments.²²⁸ Of course, we cannot say with certainty at this point

Courts Pursuant to Diversity Jurisdiction, 162 U. PA. L. REV. 979, 980 (2014) (noting that since 2000, forty-one states have adopted appeal bond reform statutes pursuant to which supersedeas bonds would be capped).

227. By contrast to the discretion read into FRCP 62(d) by the federal courts, some states do not permit lower courts any discretion to reduce bond amounts. *See, e.g.*, *Tauber v. Commonwealth ex rel. Kilgore*, 562 S.E.2d 118, 131–32 (Va. 2002) (Virginia law).

228. This is not to say that supersedeas bonds that impose costs on appeal are unconstitutional. There is a long history of Supreme Court language cutting against such a claim. *See, e.g.*, *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 17–18 (1987) (declining to find that the Texas rules permitting courts to impose substantial appeal bond requirements violated the Fourteenth Amendment); *Louisville & Nashville R.R. v. Stewart*, 241 U.S. 261, 263 (1916) (stating, in a unanimous opinion by Justice Holmes, that even if a state provides an appellate process, “[t]here [is] no obligation upon the State to provide for a suspension of the judgment”); *McKane v. Durston*, 153 U.S. 684, 687 (1894) (“An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. . . . It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary. . . . [W]hether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself.”). *See generally* Elaine Carlson, *Mandatory Supersedeas Bond Requirements—A Denial of Due Process Rights?*, 39 BAYLOR L. REV. 29 (1987) (addressing the *Pennzoil v. Texaco* case); Rendleman, *supra* note 225 (referring to relevant Supreme Court cases). To be sure, the Court in *Lindsey v. Normet*, 405 U.S. 56 (1972), made it clear that the opportunity for appeal “cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause[.]” while nevertheless reaffirming that “if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review.” *Id.* at 77.

Rather than a constitutional claim, the argument here is a prudential one. Appellate bonds tailored to what media organizations can realistically afford would adequately balance the interests of the judgment creditor in getting paid and the judgment debtor in an appeal. The courts could ensure that the judgment debtor accurately represented its available assets for a bond, without hiding or transferring assets or strategically delaying. We can point to the specific importance of protecting the press from censorship via excessive and untestable jury verdicts without opining on a poverty exception in general. *See* Douglas Laycock, *The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds and Abstention*, 9 REV. LITIG. 473, 510–11 (1990). When an outsize jury verdict like Hogan's is likely to push a media organ into bankruptcy, much is lost for the press as

that the \$140 million verdict in *Bollea v. Gawker* would necessarily have been struck or significantly reduced on appeal, although experts suggest that is likely.²²⁹ This Article recommends specifically that courts lower or waive supersedeas bond requirements, such as the one applicable in the Hogan case, as appropriate, in media cases because of the underlying First Amendment values at stake.²³⁰

3. *Counter-funding strategies*

The third prong of the recommendations in this Article turns away from legal doctrine to recommend that the private sector mobilize to help provide balance and an appropriate level of press protection in third-party funding of cases against the media. This could be done in two ways—generating media defense funds and supporting private watchdogs.

a whole if an appeal for clarification of constitutional issues is effectively foreclosed. Without press-protective appeal bond rulings by judges, aggressive plaintiffs' lawyers in ideological third-party funding cases who knew that a press outlet would not have the money to post the required bond would have incentives to present "exotic legal theories" and introduce "inflammatory evidence" in the underlying trial. Rendleman, *supra* note 225, at 1127 (quoting Glenn G. Lammi & Justin P. Hauke, *State Appeal Bond Reforms Protect Defendants' Due Process Rights*, LEGAL BACKGROUNDER, Nov. 12, 2004, at 3).

One might wonder, naturally, whether any media organization would find it impossible to borrow the funds to pay a \$50 million bond. That is, of course, an empirical question that would depend, *inter alia*, on the nature of the claim, the degree to which the law was settled, the particular financial circumstances of the defendant, and the bond premium required by a lender. It should be noted, though, that federal courts have rejected defendants' attempts to file for Chapter 11 protection solely for tactical litigation advantage such as avoiding appeals bonds. *Id.* at 1106–07 (and cases cited therein). This is unlikely to have escaped the notice of Gawker's counsel.

It should also be noted that Gawker asserted its intention to appeal and its likelihood of success in its proposed bankruptcy plan. *In re* Gawker Disclosure Statement, *supra* note 43. The filing requested that \$5.5 million be set aside to litigate the Hogan appeal. See Tom Corrigan, *Gawker Says It Expects to Win Legal Battle with Hulk Hogan*, WALL ST. J. (Oct. 4, 2016, 3:04 PM), <http://www.wsj.com/articles/gawker-says-it-expects-to-win-legal-battle-with-hulk-hogan-1475529903>. (Both the creditors and the bankruptcy court have a say in whether the debtor's proposed plan will be accepted.) Ultimately, the case was settled. See *supra* text accompanying note 72.

229. Erik Eckholm, *Legal Experts See Little Effect on Media from Hulk Hogan Verdict*, N.Y. TIMES (Mar. 19, 2016), <http://www.nytimes.com/2016/03/20/business/media/legal-experts-see-little-effect-on-news-media-from-hulk-hogan-verdict.html>; Erik Sass, "Gawker" Says It Will Prevail in Hogan Case, PUBLISHERS DAILY: DAILY BLOG (Oct. 4, 2016, 12:07 PM), <http://www.mediapost.com/publications/article/286121/gawker-says-it-will-prevail-in-hogan-case.html>; see also Wasserman, *Litigation Financing*, *supra* note 112.

230. A close review of other procedural rules to determine whether they are susceptible to similar appeal-constraining effects would be warranted as well.

a. Money

Super-wealthy individuals' use of coordinated, ideologically motivated litigation tactics to shut down media outlets with contrary viewpoints is a disturbing possibility, but empowering courts to prohibit such tactics on ideological grounds is also constitutionally problematic. An obvious response to this problem is to explore the possibility of harnessing alternative private-party financial support for threatened media. Those wishing to protect the press should explore how to operationalize counter-funding strategies. Jeff Bezos, the immensely wealthy Amazon founder and owner of the *Washington Post*, publicly criticized Thiel for his funding of the Hogan action.²³¹ If third-party funding of cases designed to bankrupt press entities becomes more prevalent, it may be time for Bezos and other like-minded billionaires to engage in counter-funding—supporting at-risk press entities' defense of litigations brought to censor them.

Similarly, mainstream news organizations should be persuaded even in times of financial scarcity that what happens to the Gawkers will have an impact on them as well. Whether through the auspices of journalist or media trade organizations, Internet-based crowd-funding,²³² or the initiatives of billionaires with an interest in a balanced, well-functioning, and diverse media landscape, private funding could counter-balance any significant skew in the availability of third-party financing in press cases. The media environment as a whole should be subject to balanced mechanisms of accountability. And, if third-party funders knew that deploying their deep pockets would generate corresponding matched funding on the other side, they might hesitate to engage in improper use of the litigation system to censor clandestinely only the press they dislike.

Admittedly, there is some discomfort in proposing a tit-for-tat type of private funding strategy. The question of what happens to the press in this kind of regime inevitably boils down to the comparative wealth and comparative generosity of super-wealthy elites. No guarantees exist that the funds available to one party will be matched and

231. Debbie Emery, *Amazon CEO Jeff Bezos Slams Peter Thiel for Funding Hulk Hogan's Gawker Lawsuit*, WRAP (May 31, 2016, 8:42 PM), <http://www.thewrap.com/amazon-ceo-jeff-bezos-criticizes-peter-thiels-funding-of-hulk-hogan-v-gawker-lawsuit>; see also Dolan, *supra* note 6 (reporting that another billionaire, Pierre Omidyar, the founder of eBay, supported Gawker's appeal).

232. See Orozco, *supra* note 83, at 3 (referring to "legal crowdsourcing techniques" as a way to "achieve strategic legal benefits"); Tara E. Naufel, *Third-Party Litigation Financing: Do We Need It? Is It Worth the Risks?*, 35 AM. BANKR. INST. J. 16, 17 (2016) (describing crowdfunding).

balanced by a funder of the opposition. Nor are there any guarantees that the funders, even if they disagree as to the comparative biases of the liberal or conservative mainstream media, will not agree about the contours of the legitimate media universe. Moreover, third-party funding in the press context may be deployed for anti-competitive purposes in currently unpredictable ways. The remaining worry is that the availability of private counter-funding resources could persuade legal actors that nothing more need be done to counteract the distortive effects of outside funding on the press.

Still, we live in the world of the second best and must make do. If we design the institutions, structures, and processes of counter-funding strategies carefully, we can try to make these sorts of dangers more apparent and, hopefully, less likely to occur.

b. Watchdogs

The second piece of the private response to strategic attempts to control the press indirectly through litigation funding should be developing and creating incentives for additional watchdogs focused on the issue. Whether these watchdogs are groups like those that track campaign funding, or journalism think tanks, or investigative reporters such as the ones who broke the Thiel funding story, the point would be to generate a multiplicity of persons and institutions with the goal of promoting transparency and accountability—both in the media and in the third-party-funding universe. Such watchdogs could keep an eye on the gamut of ideological third-party funding in press cases, promoting public knowledge, third-party funder accountability, and improved press operations. While the degree to which they could successfully do so is an empirical question, attention to such structural solutions is worthwhile.

4. Litigation misuse claims in appropriate media cases

Last but not least is the harder issue of whether, in appropriate circumstances, media defendants in third-party-funded litigations should be able to bring a claim against the third-party funder for misuse of litigation.²³³ The issue is difficult because it concerns the

233. Litigation misuse could be the basis of a separate action or a counterclaim or defense in the underlying litigation. There are costs and benefits to both.

This issue arises in the non-press context as well. Specifically, reports suggest that third-party funding has been used to push politically-motivated lawsuits. *See, e.g.*, Nolan D. McCaskill, *Benghazi Parents File Wrongful Death Suit over Clinton's Email Server*, POLITICO (Aug. 9, 2016, 11:39 AM), <http://www.politico.com/story/2016/08/bengh>

propriety of punishing someone for funding a plaintiff's apparently meritorious claim against a media outlet.²³⁴

a. The tension

On the one hand, it seems intuitively persuasive that whatever the plaintiff's motives, he should not be prevented from bringing a non-frivolous substantive claim. Whether because of its constitutional grounding in the First Amendment's Petition Clause, a sensible desire to avoid inquiry into funders' motivations for bringing suit, or a belief that what is at stake in litigations should only be the substantive claims brought in specific instances before the courts, there are good reasons to conclude that an improper purpose for suit should not prevent the litigation of a meritorious action. Moreover, if an ill-intentioned self-funded plaintiff can sue a newspaper for hundreds of millions in damages, why should the third-party funder's unseemly motives change the equation? In addition, the development of such a litigation misuse claim might have problematic potential consequences for public-interest-group-funded reform litigation in other contexts.²³⁵

On the other hand is the sense that third-party funding in this kind of proxy litigation is problematic because it hijacks the plaintiff's claim and converts the plaintiff, the court, and the jury into tools of the funder, aimed not at achieving redress for the plaintiff's harms, but at eliminating the defendant. Because journalistic error and editorial misjudgment are inevitable, arbitrarily punishing one media organization by funding even a meritorious claim is on this view reminiscent of unfair selective prosecution. This practice is particularly dangerous because of the democratic significance of an independent press. The structure of constitutionalized defamation law recognizes that not every plausible claim of tortious harm against the press can succeed—not because it does not count as harm, but because protecting the press is more important in certain circumstances. When the targeted media organization is part of the

azi-parents-sue-clinton-226818 (reporting that Larry Klayman, the founder of Judicial Watch and Freedom Watch, filed the wrongful death complaint against former Secretary of State Hillary Clinton on behalf of the parents of two Americans killed in the American Consulate in Benghazi, Libya).

234. For the recognition that use of motivation evidence in rejecting intellectual property (IP) claims brought to achieve non-IP goals is complicated and presents significant costs, see Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 HOUSTON L. REV. 549, 590–91 (2015).

235. See *infra* note 257.

arrogant, often digitally native “new media” like Gawker—simultaneously awful, irresponsible, self-righteous, and more willing than mainstream media to challenge orthodoxy—its annihilation in response to critical coverage of the funder sets a terrible precedent for democracy. On this view, the history of *New York Times Co. v. Sullivan* shows that courts should not be blind to the expressive consequences of otherwise neutral-seeming rules.²³⁶ When the effect of a third-party-funded litigation is fundamentally to threaten closure of targeted organs of the press, Petition Clause-based arguments for access to courts should not be read to prevent judges from using their discretion to address those threats.

Cognizant of these contending intuitions, this Article ultimately recommends, albeit tentatively, consideration of a litigation misuse vehicle. It does so because the inquiry into the meritoriousness of a case should consider not only the facts and current substantive law it involves, but also the proportionality and appropriateness of the damages claimed. In situations where the litigation funder’s interest in destroying the media outlet requires the plaintiff to assert mega-damage claims, those claims raise a meritoriousness issue separate from the non-frivolous liability question.²³⁷

Of course, a skeptic might ask why the appropriate solution in those circumstances would not be to cap damages in media tort cases, rather than recognizing a potentially problematic misuse claim. The answer is entirely pragmatic. States are unlikely to adopt a uniform cap on damages for dignitary and privacy torts, and this lack of uniformity invites forum shopping. Moreover, capped damages would potentially increase the moral hazard for a press that is not what it could or should be.²³⁸ Instead of a bright-line cap, an abuse-focused inquiry that would enable courts to sift carefully through the facts of each case might provide more leeway for a balanced approach.

b. The doctrine

Although a litigation misuse approach could be useful, and although courts limit improper uses of litigation in a number of

236. See Russell L. Weaver & David F. Partlett, *Defamation, Free Speech, and Democratic Governance*, 50 N.Y.U. L. REV. 57, 57–58 (2005).

237. Moreover, merit necessarily refers to a broad range, and a claim’s merit for purposes of court access is a low standard—non-frivolousness is sufficient. A minimally non-frivolous claim, however, differs from a claim likely to prevail. When balanced with the goal of protecting the free press, it would be sensible to weigh the former kind of claim less than the latter.

238. See *supra* Section II.B.

analogous areas, the doctrinal background is not dispositive.²³⁹ In federal civil procedure, for example, Rule 11(b)(1) requires that pleadings and motions certify that they are “not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.”²⁴⁰ Yet some argue that limiting a plaintiff’s access to courts for reasons of motive, as Rule 11(b)(1) does, is unconstitutional under the First Amendment’s Petition Clause.²⁴¹ Even so, should the third-party funder’s mere provision of funds for the plaintiff’s lawsuit transform the lawsuit into the funder’s own petition under the First Amendment? How would this fit with settled notions of standing?

There is also the tort of abuse of process, which is said to have been recently “gaining visibility.”²⁴² The Restatement (Second) of Torts describes liability for the tort of abuse of process as follows: “One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.”²⁴³ Even if the legal process is not frivolous, it can still be

239. Cf. Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 525 (2016) (arguing persuasively that the Supreme Court’s doctrine regarding the identification and treatment of forbidden legislative intent in the constitutional context is inconsistent, and recommending that courts invalidate legislation on substantive grounds of validity rather than solely because of the forbidden intention behind passage of the statute); Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. REV. 1366, 1370 (2016) (arguing that purpose tests in First Amendment law are generally unsound).

240. FED. R. CIV. P. 11(b)(1).

241. See Carol Rice Andrews, *Motive Restrictions on Court Access: A First Amendment Challenge*, 61 OHIO ST. L.J. 665, 704–19 (2000); see also Carol Rice Andrews, *After BE & K: The “Difficult Constitutional Question” of Defining the First Amendment Right to Petition Courts*, 39 HOUSTON L. REV. 1299, 1355–56 (2003) [hereinafter Andrews, *After BE & K*]. There are also jurisdictional differences in judicial interpretation and application of the improper purpose element of the rule. See, e.g., Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004); Jerold S. Solovy et al., *Sanctions Under Rule 11: A Cross-Circuit Comparison*, 37 LOY. L.A. L. REV. 727 (2004).

The Petition Clause doctrine is not a model of clarity. On the “difficult constitutional question” of whether the Petition Clause guarantees a right of access only for winning claims, see Andrews, *After BE & K*, *supra*.

242. Philip L. Gordon, *Defeating Abusive Claims and Counterclaims for Abuse of Process*, COLO. LAW., Mar. 2001, at 47.

243. RESTATEMENT (SECOND) OF TORTS § 682 (AM. LAW INST. 1977). In contrast, the tort of malicious prosecution requires a defense victory in the underlying suit, lack of probable cause for the underlying claim, and malice on the part of the plaintiff. See Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218, 1219 (1979); see also Andrews, *Jones v. Clinton*,

deemed misused if it is used “for any purpose other than that which it was designed to accomplish.”²⁴⁴ The problem is that a plaintiff’s spite or bad intention does not in itself make for an illegitimate use of legal process.²⁴⁵ This is a complicated inquiry. Analogy reminds us of the brakes applied by the Supreme Court on the ability to limit access to the courts for those deemed to be acting for anticompetitive motives in violation of antitrust law—a protection known as *Noerr-Pennington* immunity.²⁴⁶ At the same time, should the filing of multiple lawsuits against the same defendant—a pattern of anticompetitive lawsuits, for example—suffice to displace such immunity, as some courts have suggested?²⁴⁷ Scholars have argued that abuse-of-process types of claims are an appropriate way to address “meritorious litigation whose adjudication is likely . . . to interfere with the larger goals of the civil justice system.”²⁴⁸

supra note 218, at 1 (focusing on Rule 11(b)(1)’s requirement of certification of proper purpose).

244. RESTATEMENT (SECOND) OF TORTS § 682 cmt. a. Some courts have broadly allowed abuse of process claims based on abuse of discovery procedures (including for attempts to increase the opponent’s legal fees, to harass the opponent, or to put information in the public domain that would damage the opponent’s reputation). For a list of some of these cases, see Matthew Spohn, *Combating Bad-Faith Litigation Tactics with Claims for Abuse of Process*, COLO. LAW., Dec. 2009, at 31, 33–34. When it applies, the abuse of process tort permits recovery not only of economic damages, but also emotional distress and punitive damages. *Id.* at 34.

245. RESTATEMENT (SECOND) OF TORTS § 682 (and citations in the Reporter’s Note); see Gordon, *supra* note 242, at 48 (“The purpose of the court system is to distinguish between meritorious and meritless claims. Therefore, a litigant who files claims subsequently held to be meritless has used the judicial process for its intended purpose, even if the complaint was filed with an ulterior motive.”).

246. Under the *Noerr-Pennington* doctrine, grounded on the First Amendment’s right to petition, plaintiffs in litigations motivated by anti-competitive aims are protected against antitrust prohibitions. See *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (originating the doctrine); see also James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 66 (1985). There is, however, an exception to that protection in connection with sham litigations. See *Prof’l Real Estate Inv’rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 57 (1993) (instructing that “an objectively reasonable effort to litigate cannot be sham regardless of subjective intent”); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11, 516 (1972) (declining to apply the *Noerr-Pennington* doctrine when a party used the Sherman Act as a pretense to harass a competitor and drive it out of business rather than as a good-faith effort to enforce antitrust laws).

247. See generally HERBERT HOVENKAMP ET AL., § IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW § 11.3 (2016), 2015 WL 9447714 (and cases cited therein).

248. Sebok, *The Inauthentic Claim*, *supra* note 191, at 106–07.

In its recent decision in *Heffernan v. City of Paterson*,²⁴⁹ the Supreme Court held that a § 1983 claim for deprivation of a constitutional right could lie when a police officer was demoted on the mistaken belief that he had engaged in protected political activity. It did so on the ground that the government employer's motive raised constitutional questions, regardless of his factual errors about the employee's behavior.²⁵⁰ Perhaps most interestingly, the majority identified the constitutional harm as inhering in the chilling effect of the plaintiff's demotion on other employees (regardless of whether the demoted employee was himself engaging in protected activity).²⁵¹

Anti-SLAPP statutes—state laws enacted to deter strategic lawsuits against public participation (SLAPPs), or lawsuits that plaintiffs bring principally to chill the valid exercise of First Amendment speech and petition rights²⁵²—can be described as a sub-type of abuse of process-

249. 136 S. Ct. 1412 (2016).

250. *Id.* at 1418 (“When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment [even if the employee had not in fact engaged in constitutionally protected activity]. . .”).

251. *Id.* at 1419 (“The constitutional harm at issue in the ordinary case consists in large part of discouraging employees—both the employees discharged (or demoted) and his or her colleagues—from engaging in protected activities. The discharge of one tells the others that they engage in protected activity at their peril. . . . The employer's factual mistake does not diminish the risk of causing precisely the same harm. . . . The upshot is that a discharge or demotion based upon an employer's belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.”).

Of course, *Heffernan* involved government officials, and the Gawker case did not. Nevertheless, the majority's characterization of the constitutional harm in *Heffernan* as the chilling effect on others who would decline to exercise their First Amendment rights is suggestive for my argument.

252. See George W. Pring & Penelope Canan, “Strategic Lawsuits Against Public Participation” (“SLAPPs”): *An Introduction for Bench, Bar and Bystanders*, 12 U. BRIDGEPORT L. REV. 937, 939 (1992) (coining the term). In most jurisdictions, SLAPPs are defined as frivolous lawsuits designed to intimidate and silence defendants' constitutionally protected activity. See Lori Potter & W. Cory Haller, *SLAPP 2.0: Second Generation of Issues Related to Strategic Lawsuits Against Public Participation*, 45 ENVTL. L. REP. 10,136, 10,136–37 (2015). Although they vary in their specifics, most such statutes inter alia allow the defendant in a SLAPP suit to seek early dismissal of the action on free speech grounds. See *id.*

As of 2015, twenty-eight states, the District of Columbia, and Guam have enacted anti-SLAPP statutes, and two others have done so via judicial action. Yando Peralta, *State Anti-SLAPPs and Erie: Murky, but Not Chilling*, 26 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 769, 773 (2016); see Bruce E.H. Johnson & Sarah K. Duran, *A View from the*

type claim specifically focused on free speech and petition. In jurisdictions like California with particularly broad anti-SLAPP statutes, defendants may already be able to file an anti-SLAPP motion to strike in cases like Hogan's suit against Gawker.²⁵³ The reason to consider a broader litigation misuse approach is that most jurisdictions' anti-SLAPP statutes only apply if the plaintiff's claim is not meritorious.²⁵⁴

c. The argument applied to Thiel's funding

Arguably, a litigation misuse claim inspired by all these doctrines²⁵⁵ might lie in the Hogan type of case, depending on the specifics of the

First Amendment Trenches: Washington State's New Protections for Public Discourse and Democracy, 87 WASH. L. REV. 495, 501–09 (2012) (describing the various approaches to anti-SLAPP statutes); *State Anti-SLAPP Laws*, PUB. PARTICIPATION PROJECT, <http://www.anti-slapp.org/your-states-free-speech-protection> (last visited Feb. 5, 2017) (listing, by state, anti-SLAPP statutes); Nina Golden, *SLAPP down: The Use (and Abuse) of Anti-SLAPP Motions to Strike*, 12 RUTGERS J.L. & PUB. POL'Y 426, 428 (2015) (discussing goals of anti-SLAPP suits to encourage public interest participation).

253. In California, for example, a motion to strike is available to a defendant in a case brought to quell her exercise of First Amendment rights so long as she was exercising such rights "in connection with a public issue," unless the "probability that the plaintiff will prevail on the claim" has been established. CAL. CODE CIV. PROC. § 425.16, <http://www.casp.net/california-anti-slapp-first-amendment-law-resources/statutes/c-c-p-section-425-16>. Even though Hogan's action against Gawker would likely be seen as meritorious, it would probably not prevail. By contrast to such jurisdictions, however, most anti-SLAPP statutes do not allow motions to strike if the action is not frivolous but could be characterized as meritorious.

254. Steven J. André, *Anti-SLAPP Confabulation and the Government Speech Doctrine*, 44 GOLDEN GATE U. L. REV. 117, 119–20 (2014). One possible complaint about the proposal of a separate litigation misuse action is that it would add to the financial burden on defendant media. The fee-shifting models in numerous anti-SLAPP statutes are worth exploring in response to that complaint. See Potter & Haller, *supra* note 252, at 10,141 (describing fee shifting in anti-SLAPP actions). But see Abramowicz, *supra* note 111, at 195 (proposing a fee-limitation approach, instead of mere fee shifting, as a way to improve litigation finance company funding incentives to fund non-meritorious cases).

255. Other analogous doctrines have also been used in non-press contexts to help deter strategic lawsuits designed to achieve other results than the claims on the face of the complaint. For arguments about the ways in which copyright law is being used for censorship, for example, see M. Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 CHI.-KENT J. INTELL. PROP. 1 (2016); L. Ray Patterson, *The DMCA: A Modern Version of the Licensing Act of 1662*, 10 J. INTELL. PROP. L. 33 (2002); John Tehranian, *The New Censorship*, 101 IOWA L. REV. 245 (2015); Hannibal Travis, *Free Speech Institutions and Fair Use: A New Agenda for Copyright Reform*, 33 CARDOZO ARTS & ENT. L.J. 673 (2015). On the history of copyright as entwined with censorship, see Michael Birnhack, *The Copyright Law and Free Speech Affair: Making-up and Breaking-up*, 43 IDEA: J.L. & TECH. 233, 283–86 (2003).

litigation funding arrangement between the funder and the plaintiff.²⁵⁶ If the third-party funding contract specifies conditions that effectively deprive the plaintiff of his independence in litigation strategy—such as when the agreement dissuades the plaintiff from settlement or influences the substantive claims made—that control advances the third party’s goals rather than the putative plaintiff’s. It does so by replacing the plaintiff’s own litigation choices with those of the funder. In reality, then, when the structure of the participants’

In copyright law, the developing notion of copyright misuse serves as an affirmative defense against infringement. *See, e.g.,* Fromer, *supra* note 234, at 586. Although there is no single definition of copyright misuse, the notion appears to refer to situations in which copyright owners seek to claim more than the copyright law would ordinarily grant them and situations in which copyright owners seek to use copyright to achieve non-copyright ends—what Professor Jeanne Fromer has called “ill-fitting motivations.” *Id.* at 593; *see also* Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2490–94 (2016) (arguing for a constitutional affirmative defense in circumstances where plaintiffs sue for copyright infringement for “copyright-irrelevant harm”); Fromer, *supra* note 234, at 586 (noting that the doctrine of copyright misuse “is becoming more developed, especially in response to ill-fitting motivations”); JuNelle Harris, *Beyond Fair Use: Expanding Copyright Misuse to Protect Digital Free Speech*, 13 TEX. INTELL. PROP. L.J. 83, 113–15 (2004) (encouraging a copyright misuse doctrine based on the public policies underlying copyright law); Edward Lee, *Suspect Assertions of Copyright*, 15 CHL-KENT J. INTELL. PROP. 379, 395–96 (2016) (“[C]opyright misuse may be well-suited to stopping suspect assertions of copyright.”). *See generally* Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMM. L. & POL’Y 565 (2006) (describing development of copyright misuse cases). Ironically, Hogan’s unsuccessful argument in support of his second request for a preliminary injunction was based on a copyright claim, although his intent was surely to achieve other ends than protecting any copyright interest he may have had in his sex tapes. *See Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012). *See generally* Thomas F. Cotter, *Four Questionable Rationales for the Patent Misuse Doctrine*, 12 MINN. J. L. SCI. & TECH. 457 (2011) (discussing and comparing rationales for patent and copyright misuse doctrines); David S. Olson, *First Amendment Based Copyright Misuse*, 52 WM. & MARY L. REV. 537, 544–54 (2010) (discussing the misuse of copyright to chill others’ speech). One of the difficulties with using the copyright misuse doctrine as a parallel here, though, is that the claim that funders are not trying to use tort law to achieve non-tort-law ends; they are seeking to use tort law directly to bankrupt the media defendants.

256. Opponents might respond that Hogan did not abuse the litigation process by suing Gawker. They would note the jury’s finding that Gawker had invaded Hogan’s privacy and caused him emotional distress, and that that claim was precisely what the lawsuit was designed to address. Query, however, whether an abuse of process action could lie against Hogan if it were demonstrated that he brought his action against Gawker not for compensation over the invasion of his privacy, but to ensure that Gawker could be prevented from revealing far more reputationally-damaging information about him. *See supra* note 48.

agreement substitutes the third-party funder's goal of crippling the news organization for the traditional goal of compensating the plaintiff for harm suffered, the plaintiff's lawsuit has been hijacked to advance the interests of the funder.²⁵⁷ In those circumstances, the

257. Could someone argue that public interest lawsuits funded by the liberal American Civil Liberties Union (ACLU) or the conservative Individual Rights Foundation (IRF) might also involve conditions on the individual plaintiffs' litigation choices as a result of the organizations' funding? If so, why could these conditions not also serve as the basis of abuse-of-process claims against the ACLU and IRF on the same kind of argument as that in connection with the media? Cf. Wasserman, *Thiel, Settlement*, *supra* note 112 (addressing why public interest funding of litigation is not easily distinguishable from third-party funding like Thiel's because the "potential for party-funder conflict looms in both").

There are important differences, however, between the litigation-as-censorship in media third-party-funding contexts and the relationships between the public interest litigation funders and the plaintiffs in those cases. Public interest organizations like the ACLU or its conservative counterparts do not—or at least are not supposed to—engage in the kind of proxy personal revenge litigation represented by the Thiel case. Moreover, the fundamental goals of all the parties in public interest litigations are likely to be ultimately congruent, at a minimum because such organizations would look for plaintiffs with aligned interests. This is especially true as most organization-funded public interest litigation is principally designed to obtain injunctions. Of course, it is true that attorney's fees are often sought in public interest litigations. Even then, though, the outside funding involvement is transparent to all concerned. Additionally, most organization-funded public interest litigation is unlikely to have, as its ultimate goal, the bankrupting and destruction of the defendant in the suit. Such litigation is in the ordinary case undertaken for reform. Since the funding by these organizations is usually publicly known, any problematic compromises of the plaintiffs' interests would surely become the subject of public discussion—a possibility not likely to escape the organizations' attention. In any event, one could argue that the plaintiffs in most public interest litigations are selected by the funding organizations simply because of standing and other procedural requirements. In those cases, the true plaintiff in any real sense is the funding organization. That seems different from the third-party funding cases like Hogan's against Gawker, where the clandestine funder does not purport to be the true plaintiff.

Of course, Thiel could argue that, like the ACLU in many public interest cases, he was himself prevented from suing Gawker over its Hogan sex tape story because of technical standing problems. He could also remind us that public interest organizations have sometimes engaged in litigation—such as against gun manufacturers and white supremacist organizations—in order to destroy them. See Wasserman, *Thiel, Settlement*, *supra* note 112. Still, should he be permitted to end-run standing rules by the simple expedient of third-party funding, especially if he retained control over important aspects of the litigation? And even if public interest litigation designed to shut down its targets is acceptable, is there no difference between the activities of Gawker and that of white supremacist organizations? In the final analysis, we must remember that the press context is different because of the constitutional status of the press, the role of journalism in democracy, and the particular vulnerabilities facing the media today.

third-party funding fundamentally transforms the plaintiff's litigation into a conduit to punish the press for injuries unrelated to that of the plaintiff and for which the funder might not have been able to obtain relief in a direct lawsuit himself.²⁵⁸

Therefore, it would be problematic if Peter Thiel's funding influenced Hogan's decision not to settle and to drop one of his claims that would have allowed Gawker to rely on its insurance to pay any judgment had been influenced by the interests of Thiel. Had Hogan agreed to negotiate a settlement prior to or even during the trial, he likely would have received compensation for the harms caused by Gawker's actions.²⁵⁹ By choosing to proceed to trial, however, Hogan relinquished that certain compensation in favor of an enormous—but inevitably uncollectable—jury verdict. Perhaps that symbolic monster judgment was Hogan's goal all along. But, if his goal was the compensatory goal we typically attribute to the civil litigant, then Gawker's predictable bankruptcy deprived plaintiff Hogan of any concrete compensation at all while principally satisfying Thiel's ultimate aim of "specific deterrence" against Gawker.²⁶⁰ Depending on the funder's degree of control, and on the plaintiff's own goals in the litigation, this kind of fact pattern might justify the availability of a litigation-misuse action by the bankrupted media defendant.

At the end of the analysis, though, it is fair to ask whether the recommendation of a litigation misuse suit in some circumstances is nothing more than the flip side of the kind of strategic litigation it is designed to combat. Would a litigation misuse argument offer undeserving media defendants the tools to threaten and intimidate third-party litigation funders in the very manner they decry when they are haled into court in third-party-funded suits? Could they use the litigation misuse option as a club to immunize themselves illegitimately from meritorious suits?

258. It is possible for an abuse of process claim to be asserted as a counterclaim or defense in the action claimed to be abusive instead of as a post-suit action. That approach does raise some practical problems, such as making counsel for both sides of the original action into witnesses for purposes of the counterclaim. *See* Gordon, *supra* note 242, at 49. This can lead to motions to sever. *Id.* This Article is otherwise agnostic on the precise procedural posture in which the litigation misuse claim should be made.

259. *See* Mac & Drange, *Behind Peter Thiel's Plan*, *supra* note 4 (noting Gawker's settlement offers). In the end, Hogan reportedly agreed to settle the case for \$31 million. *See supra* text accompanying note 72.

260. *See* Sorkin, *Secret War*, *supra* note 51.

Although such a result is of course possible, there are reasons to expect that it will be unlikely. For one thing, the viability of litigation misuse claims will be case-specific. For another, if media facing third-party-funded tort suits attempt to intimidate plaintiffs by threatening them with litigation misuse claims, such abuse would itself engender unflattering publicity. Most rational media would likely resist the temptation to abuse the litigation misuse type of option. It is also important to note that, unlike the typical SLAPP suit, a finding of litigation misuse in media tort cases would not lead to dismissals of the underlying tort suits as a result. Even though the threat of damages for litigation misuse theoretically could be worrisome for some third-party funders, billionaires with a mission like Thiel are hardly to be counted among that group.

CONCLUSION

In sum, there are certainly social benefits to be gained from allowing people with viable claims against media organizations to access the courts. Such suits, particularly if they do not entail excessive and crippling damage awards, can well serve to chasten those media organizations that compromise their commitments to journalistic standards. Perhaps they can even induce more responsible reporting, which would provide a general social benefit. Still, Thiel-style funding of even meritorious cases against media entities implicates substantive and structural skews that will unduly threaten the often-timorous entities that style themselves the press today.

Why is attention to third-party funded litigation particularly important now? It is a truism that the modern press sector is beset by existential, financial, technological, journalistic, reputational, and audience-based challenges. New media often simultaneously provide the best and worst of journalism, while mainstream media increasingly reflect commercialism and an avoidance of controversy on important public issues. In this climate of scarcity, disaggregation, and declining public trust, we cannot expect press-protectionism either without or even within the media industry. Reputable outlets might well throw the Gawkers to the wolves. Reasonable damage judgments against such “press light” entities are perfectly acceptable when warranted. But the use of strategic litigation not to compensate real victims but simply to use them as pawns in campaigns to shutter such outlets constitutes a major threat to the expressive order. We need to be reminded that third-party funding designed to level the Gawkers will inevitably suppress the journalistic outlets about which we feel far less ambivalent.

Still, third-party funding of tort litigation against the media cannot—and should not—be prohibited. Instead, it should be transparent and accountable. The most practical approach to ensuring that the law considers the valid interests of both the media and those they harm is requiring that the plaintiff in media tort cases disclose third-party funding in discovery. The plaintiff-focused disclosure approach is the least constitutionally questionable and most practically helpful solution to the problem of litigation funding for press censorship. But discovery disclosure of third-party funding is not enough. In addition, procedural rules, such as bond requirements, that make appeals effectively unaffordable should be waived or applied proportionally in cases, like media tort claims, that raise First Amendment issues. In addition to this legal focus, there should also be attention paid to how best to generate counter-funding. Counter-funding strategies would seek private money to balance and equalize the threat to the press from funders with one-sided ideological agendas.²⁶¹ The private sector should also be enlisted in the development of a cadre of independent watchdogs to enhance accountability of both media and litigation funders in the press context. Finally, the availability of an abuse of process-like litigation misuse claim against third-party funders in appropriate circumstances might be useful in helping balance the interests at stake. Such a multivalent approach can help ensure that Thiel's financial support of the Hogan litigation and VanderSloot's Guardian of True Liberty fund become idiosyncratic special cases, rather than the first salvo in successful strategies by immensely wealthy private actors to obtain the upper hand over the democratically fundamental—but already-beleaguered—enterprise of journalism.

261. See Lili Levi, *The Problem of Trans-National Libel*, 60 AM. J. COMP. L. 507, 545–52 (2012) (exploring “self-help” in the context of “libel tourism”).