

NOTES

Eat Your Vitamins and Say Your Prayers: *Bollea v. Gawker*, Revenge Litigation Funding, and the Fate of the Fourth Estate

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In August 2016, Gawker.com shut down after 14 years of—more often than not—controversial online publishing. The website was one of several Gawker Media properties crushed under the weight of a \$140 million jury verdict awarded to Terry Bollea (better known as former professional wrestler Hulk Hogan), in a lawsuit financed by eccentric Silicon Valley billionaire Peter Thiel. Thiel’s clandestine legal campaign was part of a vendetta against Gawker Media, a venture he confirms was singularly focused on bankrupting the company through litigation. His success sent shudders through the media world, demonstrating that determined actors with deep pockets could sue the Fourth Estate out of existence.

This Note explores the strategy employed by actors like Thiel, who have weaponized third-party litigation funding as a means of attacking and silencing an already weakened free press. While these

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“revenge litigation funding” schemes are fueled by the same kind of nefarious ends that underlie the rationale of champerty and maintenance—the legal doctrines that historically restricted third-party litigation funding—their protections do not sufficiently address the issue. This Note suggests additional avenues by which this threat might be ameliorated, including the adoption of stronger anti-SLAPP statutes, increased regulation of third-party litigation funding, and amendments to the discovery rules that would more readily unveil the presence of a vengeful funder.

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INTRODUCTION

Third-party litigation funding is most simply defined as a practice through which an external party, who has no other connection with the litigation, funds a litigant’s case.¹ Traditionally banned by the common law doctrines of champerty and maintenance, third-party litigation funding has seen a modern resurgence in Australia, the United Kingdom, and the United States.² While the practice has

¹ See Maya Steinitz, *Whose Claim Is this Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1275–76 (2011).

² *Id.* at 1278–81.

steadily gained prominence in the U.S. among sophisticated investors, it became the subject of intense media scrutiny following the revelation that eccentric Silicon Valley billionaire Peter Thiel had secretly bankrolled several cases against Gawker Media—one of which resulted in the bankruptcy and permanent dismantling of the news site.³

Though litigation funding industry experts have been quick to dismiss the case as an “outlier,”⁴ this Note will examine the implications of allowing third-party litigation funding to be used by vengeful actors targeting news media. This Note will particularly focus on the so-called “chilling effect”⁵ of the *Bollea v. Gawker* award, and the effect the practice could have on the future of the Fourth Estate.

Part I will provide a brief overview of the historical restrictions against third-party litigation funding and the modern manifestation of the practice in foreign jurisdictions and the United States. Part II will recount relevant portions of the *Bollea v. Gawker Media* controversy, including Peter Thiel’s vendetta against Gawker, and the means through which he bankrolled claims against the news site. Part III will examine how Thiel’s model of “revenge litigation funding” is impervious to normal market constraints that typically apply to the threat of meritless claims, the chilling effect he and other actors have had on press coverage, and how the threat to the Fourth Estate might be ameliorated through the protections afforded by the legal rationale underlying traditional doctrines of champerty and maintenance. This Note will conclude with suggestions for other potential regulatory, procedural, and legislative defenses against revenge litigation funding tactics.

³ See Sara Randazzo, *Hulk Hogan Case Stirs Funding-Disclosure Debate*, WALL ST. J. (May 27, 2016, 1:48 PM), <http://www.wsj.com/articles/hulk-hogan-case-stirs-funding-disclosure-debate-1464371324>.

⁴ See *id.*

⁵ See Vivek Wadhwa, *The Chilling Effect Peter Thiel’s Battle with Gawker Could Have on Silicon Valley Journalism*, WASH. POST (May 27, 2016), https://www.washingtonpost.com/news/innovations/wp/2016/05/27/the-chilling-effect-peter-thiels-battle-with-gawker-could-have-on-silicon-valley-journalism/?utm_term=.c54360755951.

I. THIRD-PARTY LITIGATION FUNDING: A LEGACY OF RESTRICTION AND A MODERN REBIRTH

The practice of third-party litigation funding is best understood first by defining the common law doctrines that have traditionally prohibited the practice, and then by exploring the modern manifestations of the practice in the United States and abroad.

Third-party litigation funding refers to funding methods that employ resources from insurance markets, capital markets, or a private fund in lieu of a litigant's own funds. This is distinguished from the analogous (and commonplace) practice of contingency fees, whereby an attorney agrees to accept payment contingent upon the outcome of the case.⁶ This term should also be understood as distinct from "consumer" third-party litigation funding, which traditionally involves an individual plaintiff (often in a personal injury case) who seeks funding for his or her claim, typically in the form of an advance.⁷ A typical third-party funding arrangement would consist of a specialist finance company or hedge fund paying a firm's fees on an interim basis in exchange for a promised percentage of the award, up to an agreed cap.⁸ Typically, the funder will contract directly with the client, though agreements between funder and attorney are also employed.⁹

Revenge litigation funding, on the other hand, should be understood to describe the tactic employed by actors like Thiel, who seek to utilize the vehicle of third-party litigation funding to weaponize

⁶ *Contingent fee*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁷ See Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 63 (2004). These "consumer" lending operations have often engaged in predatory lending schemes, akin to the kind of subprime mortgage lending that led to the recent housing crisis and subsequent recession. *Id.* at 63–64. While they undoubtedly merit academic scrutiny, the practice is beyond the scope of what should be understood as third-party litigation funding within the meaning of this article.

⁸ See Steinitz, *supra* note 1, at 1275–76.

⁹ See *id.* at 1276. The structure of the funding arrangement utilized in the case discussed herein is unknown. See Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES: DEALB%K (May 25, 2016), <http://nyti.ms/1sbe6AU>. Significantly, it is not known whether Peter Thiel was reimbursed for the costs associated with litigation (which are speculated to hover around \$10 million), or if he received an additional percentage of the award recovered. *Id.*

torts against a specific target (in Thiel's case, Gawker Media). Unlike typical third-party litigation funders, revenge litigation funders are not necessarily interested in a return on investment, but instead hope to use the legal system to carry out their own vendettas.¹⁰

A. *Historical Restriction: Champerty and Maintenance*

Put broadly, the definition of maintenance in common law is “an officious intermeddling in a suit which in no way belongs to the intermeddler by maintaining or assisting either party to the action, with money or otherwise, to prosecute or defend it.”¹¹ From the Old French *champart*,¹² champerty is a specific form of maintenance in which an agreement is made to divide the proceeds of litigation between the owner of the claim and an unrelated party who supports the claim.¹³ The concepts of champerty and maintenance have origins in ancient Greek and Roman law,¹⁴ but first appeared in English law in a series of statutes by Edward I, who decreed them criminal offenses.¹⁵ At the time, the prohibition of these practices was primarily intended to prevent the abuse of judicial processes, particularly by feudal lords.¹⁶ Significantly, the doctrine was also introduced to counteract support from disinterested third parties who could encourage or support litigation out of malicious intent towards a rival.¹⁷ These nobles and land barons would often use their titles to intimidate the courts and aggrandize their own estates, typically by lending their names to claims in which they had no legitimate interest, in return for a share of the property recovered.¹⁸ In other words, the development of the doctrine of champerty was motivated

¹⁰ See Sorkin, *supra* note 9. Per Thiel: “[w]ithout going into all the details, we would get in touch with the plaintiffs who otherwise would have accepted a pittance for a settlement, and they were obviously quite happy to have this sort of support . . . I would underscore that I don’t expect to make any money from this. This is not a business venture.” *Id.*

¹¹ 14 AM. JUR. 2D *Champerty, Maintenance, Etc.* § 1 (2017).

¹² See Ari Dobner, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1544 (1996).

¹³ *Champerty*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁴ See Dobner, *supra* note 12, at 1543.

¹⁵ *Modern Views of Champerty and Maintenance*, 18 HARV. L. REV. 222, 222 (1905).

¹⁶ *Id.* at 223.

¹⁷ *Id.*

¹⁸ *Id.*

by an interest in remedying unjust practices by “great men”¹⁹ that preyed upon a vulnerable judicial system.

B. *The Resurgence of Third-Party Litigation Funding*

While many argue that the feudal concerns underlying the development of these doctrines have long since lost their relevance, modern policy rationale in support of restrictions against champerty reflect some of the same preoccupations.²⁰ For example, an oft-cited motivation for laws against these doctrines is a desire to deter frivolous, unnecessary, or speculative litigation.²¹ Likewise, courts have upheld champerty restrictions out of a desire to prevent unfair dealings—particularly in situations where a party in a dominant bargaining position is afforded excessive profits by its ability to purchase another party’s claim.²² These public policy preoccupations have led the majority of common law countries (and states in the United States) to retain and enforce the prohibition of champerty.²³ Nevertheless, the past two decades have seen a few foreign (and some domestic) jurisdictions—predominantly, Australia and the United Kingdom—abandon or relax these restrictions, allowing for the development of third-party litigation funding markets.²⁴

In Australia, both the courts and the legislature have taken strides to relax champerty restrictions.²⁵ In the landmark case on this issue, *Campbells Cash and Carry Pty. Ltd. v. Fostif Pty Ltd.*, the Australian high court permitted a third-party funding agreement, even though the funder had broad control over the course of litigation.²⁶ In that case, the funder sought out small tobacco retailers as plaintiffs in a case that would seek the recovery of license fees from tobacco wholesalers.²⁷ The funding agreement gave the funder con-

¹⁹ See *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 644 (N.Y. Sup. Ct. 1824).

²⁰ See *Steinitz*, *supra* note 1, at 1288.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1289.

²⁴ See *id.* at 1278.

²⁵ See Lee Aitken, *Before the High Court: ‘Litigation Lending’ After Fostif*, 28 SYDNEY L. REV. 171, 180 (2006).

²⁶ (2006) 229 CLR 386, 388 (Austl.).

²⁷ See *id.*

trol over the choice of counsel and the right to settle with the defendants for up to 75% of the amount to be claimed.²⁸ The funder received 33% of the award in exchange for paying all of the costs of litigation.²⁹

The High Court of Australia considered the practical and ethical concerns in question, reasoning that the presence of the funder afforded access to justice for the small retailers, who otherwise could not afford a lawsuit against the wholesalers.³⁰ The court also employed freedom-to-contract rationale, noting that the plaintiff has a right to enter into a funding agreement, even where it equated to relinquishing “control” over the claim.³¹ Since the decision in *Fostif*, the High Court of Australia has interpreted the case as a ban on any rule that would prohibit the funding of litigation in return for an award, essentially declaring the end of restrictions on champerty and maintenance.³²

In England, the Criminal Law Act of 1967 abolished any criminal or civil liability for champerty, but did not go so far as to affect rules that would allow for the treatment of contracts as illegal or contrary to public policy.³³ This legislative posture allowed for a great deal of discretion in the English courts, which tended to carry forward a relaxed approach to champerty law.³⁴ However, this progressive attitude had its limits. In 2005, the English Court of Appeal held that while third-party litigation funding agreements are acceptable, the funder should *not* have control over the management of litigation.³⁵

Despite this tempered approach, the English Court of Appeal’s declaration that third-party litigation funding was permissible (and even a desirable method of improving access to justice) created “competitive pressures” on law firms based in the United States.³⁶ These pressures, coupled with the effects of the global economic

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Steinitz, *supra* note 1, at 1280.

³³ Criminal Law Act 1967, c. 58, § 14 (Eng.).

³⁴ See Steinitz, *supra* note 1, at 1280–81.

³⁵ See *id.* at 1281.

³⁶ See *id.* at 1282.

crisis,³⁷ led to a “growing discontent with champerty restrictions” among certain jurisdictions within the United States.³⁸

As a result, the law of champerty in the United States varies by jurisdiction.³⁹ While the majority of states retain and enforce champerty restrictions, a growing minority have relaxed or abandoned them altogether.⁴⁰ The State of New York, for example, has adopted a progressive position towards the doctrine, choosing to enforce it only in cases where an acquisition was made for the express purpose of bringing an action or proceeding.⁴¹ States that have abandoned the doctrine entirely typically do so under the rationale that it is no longer needed to protect against the threats of injustice once feared, citing to ethical rules and procedural safeguards that effectively protect against judicial abuse.⁴² As stated by one of the most prominent third-party litigation funding entities in the world, “the reality as to champerty and its cousins is that modern day litigation has evolved, and concepts such as Rule 11 and a strong independent judiciary have taken their place.”⁴³

Nevertheless, in states that continue to enforce champerty laws, the common law rule is comprised of three essential elements:

- (1) the fee of the person who would seek to enforce the allegedly champertous agreement must come from the recovery in a successful lawsuit, (2) that person must have no independent claim to the recovery fund, and (3) the costs and expenses must be borne by that person with no expectation of reimbursement from the other party to the allegedly champertous agreement.⁴⁴

On its face, the typical third-party funding arrangement described herein would seem to satisfy these elements. And, when

³⁷ *See id.* at 1283.

³⁸ *See id.* at 1290.

³⁹ *See id.* at 1289.

⁴⁰ *See id.*

⁴¹ *Id.* at 1289–90.

⁴² *See id.* at 1290.

⁴³ *Litigation Finance Is Not Champerty, Maintenance or Barratry*, BURFORD CAP. (July 30, 2013), <http://www.burfordcapital.com/blog/litigation-finance-not-champerty-maintenance-barratry/>.

⁴⁴ 7 WILLISTON ON CONTRACTS § 15.1 (4th ed.).

evaluating a potentially champertous agreement, courts that continue to apply the doctrine appear unmoved by the logic of states that are satisfied by the existence of modern alternative safeguards.⁴⁵ For example, in 2004, the Minnesota Court of Appeals dismissed a respondent's appeal raising such arguments, noting that though these alternatives might "alleviate the potential evils associated with champertous agreements," they do not stand as a compelling argument to abandon the champerty doctrine entirely, even if a few states have seen fit to do so.⁴⁶

Though the existence of champerty restrictions in a given jurisdiction may foster hesitation in those seeking to engage in third-party litigation funding agreements, decisions in states that hold fast to the doctrine suggest that the two are not mutually exclusive.⁴⁷ In a recent decision from the Superior Court of Delaware (a state that enforces champerty restrictions⁴⁸), the court held that a third-party litigation funding agreement was not champertous because, among other reasons, the third-party funder had not encouraged the plaintiff "to enforce claims which [it was] not disposed to prosecute."⁴⁹ The court reasoned that because champerty "is based upon the ground that no encouragement should be given to litigation by the introduction of a party to enforce those rights which the owners are *not disposed to prosecute*," to be champertous, the third-party funder would have to encourage the party to the claim to introduce or enforce claims it was not interested in pursuing originally.⁵⁰

Moreover, the Delaware court held that the funder did not qualify as an "officious intermeddler" because the party holding the claim sought out their assistance (rather than the funder seeking out

⁴⁵ See Steinitz, *supra* note 1, at 1289.

⁴⁶ Johnson v. Wright, 628 N.W.2d 671, 680 (Minn. Ct. App. 2004).

⁴⁷ See, e.g., Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co., No. NO7C-12-134-JRJ, 2016 WL 937400, at *1, *4 (Del. Super. Ct. Mar. 9, 2016). The court also noted that the agreement was not champertous because the claim was not assigned to the funder. *Id.*

⁴⁸ See, e.g., Hall v. State, 655 A.2d 827, 830 (Del. Super. Ct. 1994) (emphasis added) (quoting another source); see also Street Search Partners, L.P. v. Ricon Int'l, L.L.C., No. 04C-09-191-PLA, 2006 WL 1313859, at *3 (Del. Super. Ct. May 12, 2006).

⁴⁹ See *Charge Injection Tech., Inc.*, 2016 WL 937400, at *4.

⁵⁰ *Id.*

potential plaintiffs).⁵¹ As the court stressed, the funder's lack of direction or control over the litigation was significant in its decision that the funding agreement did not violate champerty and maintenance doctrines.⁵² Specifically, the court noted that the third-party funder was not an officious intermeddler within the meaning of the maintenance doctrine because they had not "stirred up" litigation and was not "controlling the litigation for the purpose of continuing a frivolous or unwanted lawsuit."⁵³

Conversely, a recent decision in the Superior Court of Pennsylvania has left the fate of third-party litigation funding agreements in that jurisdiction uncertain.⁵⁴ In *WFIC, LLC v. Labarre*, the court held that a complex third-party litigation funding agreement met the definition of champerty.⁵⁵ The case arose when an attorney working on a contingency basis in an underlying matter restructured the contingency fee agreement so that he would receive 33% of the award as his fee, with the provision that repayment of the third-party litigation funder would come from his share.⁵⁶ When the attorney's client lost an appeal for a larger award in the case, the attorney was left without any compensation for his work after litigation funders were paid their portion of the award.⁵⁷ As a result, the attorney sued the funder to recover the fees he believed he was due, arguing that his fee should be considered a lien against the client's recovery and, as such, should have been paid before the investors.⁵⁸ The court disagreed, holding that the funding agreement was champertous and that the attorney was entitled to nothing.⁵⁹

While *LaBarre* is perhaps distinguished by the fact that the underlying agreement was unusually complex, the court's rationale that it was champertous because "[t]he requisite elements of champerty have all clearly been met" is quite broad, providing little guidance as to when and whether the doctrine will apply.⁶⁰ A lawyer who

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at *5.

⁵⁴ *See* *WFIC, LLC v. Labarre*, 148 A.3d 812, 819 (Pa. Super. Ct. 2016).

⁵⁵ *Id.*

⁵⁶ *Id.* at 815.

⁵⁷ *Id.* at 815–16.

⁵⁸ *Id.* at 816.

⁵⁹ *Id.* at 819.

⁶⁰ *Id.*

represented the funder in the case observed that the court seemed “concerned about whether the lawyer had a controlling say in the resolution of the litigation,” but also noted that the implication for third-party litigation funding in Pennsylvania “remains to be seen.”⁶¹

In sum, despite what has been described as a “growing discontent” with the doctrines of champerty and maintenance in jurisdictions across the United States,⁶² the doctrines remain among the greatest obstacles for those who wish to see the expansion of the third-party litigation funding industry.⁶³ However, the patchwork of jurisdictions enforcing these restrictions (and the *mélange* of interpretations of the doctrine in those jurisdictions) creates a great deal of uncertainty regarding their effect on the legality of third-party funding agreements in the United States. These nuanced approaches aside, jurisdictions that enforce champerty and maintenance restrictions appear to be, at the very least, in agreement that courts should not uphold third-party litigation funding arrangements that allow for funders to meddle in the management and strategy of litigation. This specific preoccupation is echoed by the numerous ethics rules that demand an attorney exercise independent professional judgment, free from financial or other considerations.⁶⁴ This apparent united front against third-party meddling will prove significant to the discussion of the implications of *Bollea v. Gawker Media*, particularly as it pertains to the chain of events that led to the realization that a third-party litigation funder was at play in the case.

⁶¹ Alison Frankel, *Pennsylvania Appeals Court Tosses Litigation Funding Deal as Champerty*, REUTERS (Oct. 5, 2016), <http://blogs.reuters.com/alison-frankel/2016/10/05/pennsylvania-appeals-court-tosses-litigation-funding-deal-as-champerty/>.

⁶² See Steinitz, *supra* note 1, at 1290.

⁶³ Other threats to the legality of third-party funding agreements include attorney ethics rules that prohibit fee sharing with non-lawyers. See MODEL RULES OF PROF'L CONDUCT, r. 1.5 (AM. BAR ASS'N 1983).

⁶⁴ See, e.g., MODEL RULES OF PROF'L CONDUCT, r. 5.4(c) (AM. BAR ASS'N 1983) (“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”); see also *id.* at r. 1.8(f) (“A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship . . .”).

II. *BOLLEA V. GAWKER* AND PETER THIEL'S VENDETTA

In early 2012, reports began to surface that a sex tape featuring Terry Bollea, better known as professional wrestler Hulk Hogan, had been offered for sale to Vivid, an adult entertainment company.⁶⁵ The footage, which Hogan claims was taken without his knowledge, captured him *in flagrante delicto* with a woman named Heather Clem—the then-wife of his best friend, radio disc jockey Bubba “the Love Sponge” Clem (“Bubba”).⁶⁶ Bubba, for his part, admits to recording the video and burning it onto a DVD (which he labeled “Hogan”), but denies any involvement in the tape’s release.⁶⁷

Several months after initial reports of the video’s existence, a burned DVD copy of the thirty-minute footage was delivered to Gawker Media through an anonymous source.⁶⁸ The source reportedly asked for no payment or credit for the video.⁶⁹ On October 4, 2012, Gawker published a one-minute clip of the thirty-minute video that included footage of Hogan and Heather Clem engaged in sexually explicit activity.⁷⁰ The abridged video generated five million page views on Gawker’s site and was promptly re-posted on other websites.⁷¹

The following day, David Houston—Hogan’s personal attorney—issued a takedown demand requesting that Gawker immediately remove the video from the site.⁷² Houston added that if Gawker

⁶⁵ *Hulk Hogan Sex Tape Being Shopped*, TMZ: SPORTS (Mar. 7, 2012, 1:00 AM), <http://www.t TMZ.com/2012/03/07/hulk-hogan-sex-tape/>.

⁶⁶ Tasneem Nashrulla & Mary Ann Georgantopoulos, “*I Was Completely Humiliated*”: *Hulk Hogan Testifies About Sex Tape*, BUZZFEED: NEWS (Mar. 7, 2016, 12:12 PM), www.buzzfeed.com/tasneemnashrulla/hulk-hogans-lawyer-says-gawker-posted-his-sex-tape-for-power?utm_term=.gepp4Kz22#.yirvpJ8rr.

⁶⁷ *Id.*

⁶⁸ 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, 2:15 PM), <https://unv.is/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#>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Nick Madigan, *Hulk Hogan Takes Stand in His Sex-Tape Lawsuit Against Gawker*, N.Y. TIMES (Mar. 7, 2016), <http://www.nytimes.com/2016/03/08/business/media/hulk-hogan-sex-tape-gawker-lawsuit.html>.

⁷² Jeffrey Toobin, *Gawker’s Demise and the Trump-era Threat to the First Amendment*, NEW YORKER: ANNALS OF LAW (Dec. 19, 2016), <http://www>.

removed the video, Hogan would consider the matter resolved and would not file suit.⁷³ Nick Denton, founder of Gawker Media, refused to take it down.⁷⁴ With requests for removal falling on deaf ears, Houston reportedly began to search for a way to force Gawker to remove the post.⁷⁵

Enter (notoriously eccentric⁷⁶) Silicon Valley billionaire, Peter Thiel. As a co-founder of PayPal,⁷⁷ and Facebook's first outside investor, Thiel's net worth is estimated at \$3 billion.⁷⁸ Through his venture capital firm, Founders Fund, Thiel also led early investments in platforms like Spotify, Airbnb, Lyft, and Palantir Technologies.⁷⁹

While Thiel's investment prowess is well-documented, his unique—and, at times, polarizing—views are equally storied. Despite the fact that he is a Stanford-educated attorney, Thiel is opposed to higher education and famously established a fellowship that gives promising students \$100,000 to drop out of college.⁸⁰ A radical libertarian, Thiel also funded a project that aims to create an

newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment.

⁷³ Charles Harder, *Hulk Hogan's Lead Lawyer Explains How His Team Beat "Arrogant," "Defiant" Gawker*, HOLLYWOOD REP. (Apr. 5, 2016, 7:55 AM), www.hollywoodreporter.com/thr-esq/how-hulk-hogan-beat-gawker-880687.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Max Chafkin & Lizette Chapman, *The Strange Politics of Peter Thiel, Trump's Most Unlikely Supporter*, BLOOMBERG: BUSINESSWEEK (July 21, 2016, 9:46 AM), www.bloomberg.com/news/articles/2016-07-21/the-strange-politics-of-peter-thiel-trump-s-most-unlikely-supporter.

⁷⁷ *See id.* In fact, Thiel is the perceived "ringleader" of the so-called PayPal Mafia—a cohort of former PayPal colleagues that includes Tesla's Elon Musk and LinkedIn's Reid Hoffman. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* Palantir Technologies is a \$20 billion secretive data-analytics start-up employed by the likes of the National Security Administration, the Central Intelligence Agency, and the Federal Bureau of Investigation. Matt Burns, *Leaked Palantir Doc Reveals Uses, Specific Functions and Key Clients*, TECHCRUNCH (Jan. 11, 2015), <https://techcrunch.com/2015/01/11/leaked-palantir-doc-reveals-uses-specific-functions-and-key-clients/>.

⁸⁰ THE THIEL FELLOWSHIP, <http://thielfellowship.org/> (last visited Sept. 30, 2017).

offshore colony that will be free of any governmental interference.⁸¹ More recently, Thiel has expressed doubts about the merits of a democratic society and the benefits of women's suffrage.⁸² He also famously campaigned for, and contributed to, Donald Trump's candidacy during the 2016 presidential election—a move met with a mixture of befuddlement and damnation from his peers, the media, and the public at large.⁸³

Though Thiel's public views have garnered considerable criticism from the press, his vendetta against Gawker began in 2007⁸⁴ when the website's Vallywag blog "outed" him with an article headlined, "Peter Thiel is totally gay, people."⁸⁵ To hear Thiel tell it, Gawker is a "singularly terrible bully" that "ruined people's lives for no reason."⁸⁶ In fact, Thiel's disdain for Gawker is such that he has gone so far as to call the news outlet the "Silicon Valley equivalent of Al Qaeda."⁸⁷

In the sole interview granted on the subject, Thiel admitted that his contempt for Gawker inspired him to fund a team of lawyers (led by celebrity attorney Charles Harder) to locate and assist other Gawker "victims" in mounting cases against the news site.⁸⁸ As fate would have it, Hogan turned out to be an ideal candidate for Thiel's legal assault against Gawker. While Harder's own account of the

⁸¹ THE SEASTEADING INSTITUTE, <https://www.seasteading.org/> (last visited Sept. 30, 2017).

⁸² Peter Thiel, *The Education of a Libertarian*, CATO UNBOUND (Apr. 13, 2009), www.cato-unbound.org/2009/04/13/peter-thiel/education-libertarian.

⁸³ Chafkin & Chapman, *supra* note 76.

⁸⁴ Sorkin, *supra* note 9.

⁸⁵ Owen Thomas, *Peter Thiel Is Totally Gay, People*, GAWKER: VALLEYWAG (Dec. 19, 2007, 7:05 PM), <http://gawker.com/335894/peter-thiel-is-totally-gay-people>. It is significant to note that Owen Thomas and Gawker Media continue to contend, despite Thiel's protestations to the contrary, that the article did not in fact "out" him. Thiel's family, friends, and many of his colleagues were already aware of his sexual orientation. See Nick Denton, *An Open Letter to Peter Thiel*, GAWKER (May 26, 2016, 4:35 PM), <http://gawker.com/an-open-letter-to-peter-thiel-1778991227>.

⁸⁶ Sorkin, *supra* note 9.

⁸⁷ Connie Loizos, *Peter Thiel on Valleywag; It's the "Silicon Valley Equivalent of Al Qaeda"*, PE HUB (May 18, 2009), <https://www.pehub.com/2009/05/peter-thiel-on-valleywag-its-the-silicon-valley-equivalent-of-al-qaeda/>.

⁸⁸ Sorkin, *supra* note 9.

trial omits any mention of Thiel's involvement,⁸⁹ Thiel ultimately invested a reported \$10 million in the case.⁹⁰

Though details regarding the manner of Harder's initial engagement remain unclear, once retained by Hogan, the attorney (and a legal team that included First Amendment expert David Mirell⁹¹) filed suit in federal court against Gawker Media, its founder Nick Denton, and then editor-in-chief of Gawker and author of the sex tape post, A.J. Daulerio.⁹² Harder filed a second claim in state court against Bubba and Heather Clem, the couple who recorded Hogan, allegedly without his knowledge.⁹³ Hogan would eventually settle his claims against Bubba Clem in exchange for, among other things, control of the copyright for the sex tape.⁹⁴

Hogan's federal suit included claims for invasion of privacy by intrusion upon seclusion, publication of private facts, violation of the Florida common law right of publicity, intentional infliction of

⁸⁹ Harder, *supra* note 73.

⁹⁰ Sorkin, *supra* note 9.

⁹¹ See Drange, *infra* note 112. Ironically, prior to joining forces with Harder, Mirell was best known as a defender of the First Amendment. He was perhaps most famous for arguments against gag orders in the O.J. Simpson trial and as president of the American Civil Liberties Union Foundation of Southern California. *Id.* Since their Hogan victory, Harder Mirell & Abrams have become the premier law firm for celebrities seeking to sue the press, taking on cases for Melania Trump, Roger Ailes, and even disgraced Hollywood mogul, Harvey Weinstein. See Alexander Nazaryan, *Meet Charles Harder, the Gawker Killer Now Working for Melania Trump and Roger Ailes*, NEWSWEEK (Oct. 14, 2016, 11:19 AM), www.newsweek.com/charles-harder-gawker-melania-trump-roger-ailes-people-magazine-509926; see also Dave Simpson, *Harvey Weinstein Taps Glaser Weil Partner After Firing*, LAW360 (Oct. 10, 2017, 10:54 PM), www.law360.com/articles/973163/harvey-weinstein-taps-glaser-weil-partner-after-firing.

⁹² See Harder, *supra* note 73. On June 28, 2017, a New York bankruptcy judge ruled that the Gawker estate could engage in discovery regarding Thiel's communications with Harder leading up to the Hogan trial. See Andrew Strickler, *Gawker's Probe of Thiel Keeps Harsh Light on Legal Funders*, LAW360 (July 7, 2017, 5:16 PM), <https://www.law360.com/articles/941789/gawker-s-probe-of-thiel-keeps-harsh-light-on-legal-funders>. As a result of the order, additional details regarding the specifics of Thiel's arrangement with Hogan may eventually come to light.

⁹³ Harder, *supra* note 73.

⁹⁴ See Toobin, *supra* note 72.

emotional distress, and negligent infliction of emotional distress.⁹⁵ In a press conference held on the day of the filing, Harder announced that Hogan would seek \$100 million in damages, claiming that Gawker's actions "exceeded the bounds of human decency."⁹⁶ A few days later, Hogan's legal team filed a motion for preliminary injunction that would require Gawker to remove the video posted on the site.⁹⁷ A federal district court judge denied Hogan's request, along with a subsequent motion seeking injunctive relief on the basis of a copyright claim.⁹⁸ In his ruling, Judge James D. Whittemore hinted he would give deference to Gawker's argument that the video was newsworthy, writing that:

Plaintiff's public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.⁹⁹

Not to be discouraged, Hogan's legal team voluntarily dismissed the federal case and amended the state court claim, adding Gawker Media, Denton, and Daulerio as defendants, and essentially asserting the same claims as in the federal case.¹⁰⁰ Gawker promptly attempted to remove the case to federal court, but the district court rejected its arguments and remanded the case in favor of Hogan.¹⁰¹

⁹⁵ See *Bollea v. Gawker Media, LLC*, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012).

⁹⁶ See Harder, *supra* note 73; see also Ryan Mac & Matt Drange, *Behind Peter Thiel's Plan to Destroy Gawker*, FORBES: TECH (June 7, 2016, 2:51 PM), <http://www.forbes.com/sites/ryanmac/2016/06/07/behind-peter-thiel-plan-to-destroy-gawker/#35d90c7a5848>.

⁹⁷ See *Bollea*, 913 F. Supp. 2d at 1327.

⁹⁸ Toobin, *supra* note 72.

⁹⁹ See *Bollea v. Gawker Media, LLC*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012).

¹⁰⁰ Harder, *supra* note 73.

¹⁰¹ See *Bollea v. Clem*, 937 F. Supp. 1344, 1348 (M.D. Fla. 2013).

Hogan's request for a preliminary injunction fared better with the Honorable Pamela A.M. Campbell of the Pinellas County Circuit Court.¹⁰² Judge Campbell—who has been reversed on appeal more times than any of her colleagues in Pinellas County¹⁰³—granted the injunction, but failed to make any findings of fact in the written order to support her decision, or to require Hogan to post a bond for the injunction as required by Florida law.¹⁰⁴ Gawker immediately, and successfully, appealed.¹⁰⁵

Florida's Second District Court of Appeal reversed the injunction, holding that it was an unconstitutional prior restraint under the First Amendment.¹⁰⁶ In an opinion written by Judge Black, the court seemed to echo Judge Whittemore's reasoning, finding that:

Mr. Bollea . . . enjoyed the spotlight as a professional wrestler, and he and his family were depicted in a reality television show detailing their personal lives. Mr. Bollea openly discussed an affair he had while married to Linda Bollea . . . and otherwise discussed his family, marriage, and sex life through various media outlets. Further, prior to the publication at issue in this appeal, there were numerous reports by various media outlets regarding the existence and dissemination of the Sex Tape It is clear that as a result of the public controversy surrounding the affair and the Sex Tape, exacerbated in part by Mr. Bollea himself, the report and the related video excerpts address matters of public concern.¹⁰⁷

¹⁰² 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>.

¹⁰³ Anna M. Phillips, *Trial Judge in Hulk Hogan-Gawker Case Is Most Reversed in Pinellas*, TAMPA BAY TIMES (Mar. 25, 2016, 5:53 PM), www.tampabay.com/news/courts/trial-judge-in-hulk-hogan-gawker-case-is-most-reversed-in-pinellas/2270818.

¹⁰⁴ See *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. 2d DCA 2014).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

As noted by commentators, typically a definitive ruling of this kind would sound the death knell for a case like Hogan's.¹⁰⁸ Two courts had all but declared that Hogan's case lacked merit.¹⁰⁹ As a "single-digit millionaire,"¹¹⁰ he was expected to retreat or, at the very least, settle his claims rather than commit to what was sure to be a lengthy—and expensive—trial against Gawker in state court.¹¹¹

But what Gawker failed to appreciate was that Hogan's legal team planned to go the distance, equipped with a veritable blank check from Thiel, their silent benefactor.¹¹² Denton, however, had begun to suspect that someone was behind the lawsuit.¹¹³ A few things tipped Thiel's hand,¹¹⁴ the most significant being that Hogan dropped his claim of negligent infliction of emotional distress—a tactic that freed Gawker's insurance company from liability in the case and ensured that any award would need to come directly from the news site's own pockets.¹¹⁵

Denton's suspicions aside, the case proceeded to trial in Pinellas County Circuit Court, where it reached new theatrical heights.¹¹⁶ Now in state court, Gawker faced the difficult task of convincing a jury of local citizens that publishing a sexually explicit video featuring Hogan—a hometown hero—served a legitimate and newsworthy purpose.¹¹⁷ Harder and his legal team flexed their home-court

¹⁰⁸ See Toobin, *supra* note 72.

¹⁰⁹ See *id.*

¹¹⁰ Eriq Gardner, *Peter Thiel Explains His Backing of "Single-Digit Millionaire" Hulk Hogan*, HOLLYWOOD REP. (Oct. 31, 2016, 10:15 AM), <http://www.hollywoodreporter.com/thr-esq/peter-thiel-explains-his-backing-single-digit-millionaire-hulk-hogan-942506>. Thiel expressed his concern for Hogan's "plight," stating "[i]f you're a single-digit millionaire like Hulk Hogan, you have no effective access to our legal system . . . It costs too much."

¹¹¹ See Toobin, *supra* note 72.

¹¹² Matt Drange, *Hulk Hogan's Lawyers Have Made Suing Gawker Their 'Bread and Butter'*, FORBES: TECH (May 30, 2016, 1:45 PM), www.forbes.com/sites/mattdrange/2016/05/30/peter-thiel-hulk-hogan-lawyers-charles-harder/#2d53f290108e.

¹¹³ See Mac & Drange, *supra* note 96.

¹¹⁴ See *id.* Hogan had recently been through an expensive divorce and it was doubtful he could afford a high-powered Hollywood attorney like Harder on what seemed to be a bleak case. *Id.* Hogan also refused several offers of settlement. *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Toobin, *supra* note 72.

¹¹⁷ *Id.*

advantage, crafting a narrative that cast Hogan as a local, hardworking man who “made good” only to be torn down by a group of elitist bullies (Gawker).¹¹⁸ Gawker’s lawyers countered by highlighting (as Judge Black and Judge Whittemore had) that Hogan had made his personal life public by bragging about private matters such as his sexual prowess, penis size, and extramarital affairs in his own book and in interviews.¹¹⁹ In response, Hogan, who received special permission from Judge Campbell to wear his trademark bandana in court, testified that disclosures regarding personal aspects of his life, including his sexual escapades, were made when he was in “character” as Hulk Hogan, and were therefore separate from the private details of his life as Terry Bollea.¹²⁰

The six-person jury apparently found credence in this argument.¹²¹ After a ten-day trial and a few hours of deliberation, Hogan was awarded \$115 million in damages,¹²² and an additional \$15 million in punitive damages.¹²³ Gawker filed an appeal in state court, but with its coffers exhausted after several years of litigation, the company also filed for bankruptcy: a shield that would prevent it from having to pay the multi-million-dollar judgment.¹²⁴

In an ironic twist, after more than four years in court and several rejected offers of settlement, on November 2, 2016, Hogan and Gawker Media announced a tentative settlement in the amount of \$31 million.¹²⁵ The settlement, funded by proceeds from Gawker Media’s sale to Univision Communications, also included a stipulation that Gawker would forgo an appeal.¹²⁶ As part of the sale to

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* As some commentators have noted, given his insistence on wearing his trademark bandana, even in the courtroom, and the unrestricted access he granted to his personal life via discussions with the media and a literal reality show about his family, “it seems more logical to assume that [Bollea’s] primary identity is that of Hulk Hogan.” See Fabio Bertoni, *The Stakes in Hulk Hogan’s Gawker Lawsuit*, NEW YORKER (Mar. 23, 2016) <https://www.newyorker.com/culture/cultural-comment/the-stakes-in-hulk-hogans-gawker-lawsuit>.

¹²¹ See Toobin, *supra* note 72.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

Univision, Gawker has been permanently shuttered.¹²⁷ In the wake of the case (and Gawker's ultimate demise), media and legal commentators have pondered what effect the success of Thiel's innovative revenge tactic might have on the future of the "Fourth Estate."¹²⁸

III. THE RISE OF "REVENGE LITIGATION FUNDING" AND THE FATE OF THE FOURTH ESTATE

Bollea v. Gawker and the debate surrounding Thiel's actions unfolded against a backdrop of exceptional vulnerability for the press at large. The past decade has seen unprecedented decline in media revenue, a phenomenon that has left even storied institutions struggling to maintain their ability to produce hard-hitting investigative journalism.¹²⁹ This moment of acute financial weakness is coupled with a decline in American confidence in the press.¹³⁰ According to a recent Gallup survey, only 40% of Americans say they have "a great deal" or even "a fair amount" of "trust and confidence in the mass media to report the news fully, accurately and fairly."¹³¹ While the data reflects that this distrust has grown slowly over the past

¹²⁷ *Id.* It is significant to note that until the *Bollea* verdict, Gawker was one of the largest self-funded media entities in the United States, with annual revenues of \$50 million. See Matthew Ingram, *Why the Death of Gawker Isn't Something to Cheer About*, FORTUNE: TECH (Aug. 18, 2016), fortune.com/2016/08/18/death-of-gawker/.

¹²⁸ See Emily Bazelon, *Billionaires vs. the Press in the Era of Trump*, N.Y. TIMES MAG. (Nov. 22, 2016), <http://nyti.ms/2ghfxJw>; Monika Bauerlein & Clara Jeffery, *Thiel, Trump, and the Billionaires' Attack on the Fourth Estate*, MOTHER JONES (June 15, 2016, 5:54 PM), <http://www.motherjones.com/politics/2016/06/thiel-trump-vandersloot-lawsuit> [hereinafter *Billionaires' Attack*]; see also Amy Gajda, *The Present of Newsworthiness*, 50 NEW ENG. L. REV. 145, 159 (2016).

¹²⁹ See Michael Barthel, *State of the News Media 2016*, PEW RES. CTR.: JOURNALISM & MEDIA (June 15, 2016), <http://www.journalism.org/2016/06/15/newspapers-fact-sheet/>; see also *Billionaires' Attack*, *supra* note 128.

¹³⁰ See Rebecca Riffkin, *Americans' Trust in Media Remains at Historical Low*, GALLUP (Sept. 28, 2015), <http://www.gallup.com/poll/185927/americans-trust-media-remains-historical-low.aspx>.

¹³¹ *Id.*

decade,¹³² recent surveys suggest that, in the wake of the 2016 presidential election, trust in the media continues to rapidly plummet.¹³³

This Part will argue that the unique threat posed by vindictive actors seeking to weaponize the legal system as a means of silencing unwanted criticism is not sufficiently ameliorated by current libel laws, laws intended to prevent abusive litigation tactics that silence critics,¹³⁴ our modern legal system, or attorneys' ethics rules. The importance of laws that protect against this kind of attack on the Fourth Estate will be explored through the American tradition of pro-press free expression, the "chilling effect" of cases like *Bollea v. Gawker*, and the building sentiment of hostility toward the press in the wake of the election of Donald Trump. Particular attention will be given to the argument that the presence of a third-party funder is irrelevant because only claims that have merit pose a threat to media outlets. This Part will conclude with an analysis that demonstrates how the application of traditional views of champerty and maintenance doctrines might be employed (or adopted via regulation) to protect against the kind of revenge litigation funding employed by actors like Thiel.

A. *The "Chilling Effect" and Press Coverage in the Era of Trump*

The American tradition of freedom of the press is reflected not only in the protections granted by the First Amendment, but also in the rigors of American media law. The role of the Fourth Estate as a check on abuses of power (from governmental and private forces alike), coupled with the sanctity of the First Amendment, motivates courts to disfavor actions that "chill" the freedom of the press and

¹³² *Id.*

¹³³ See *As Election Nears, Voters Divided Over Democracy and 'Respect'*, PEW RES. CTR.: U.S. POL. & POL'Y (Oct. 27, 2016), <http://www.people-press.org/2016/10/27/as-election-nears-voters-divided-over-democracy-and-respect/> [hereinafter *Voters Divided*].

¹³⁴ See generally GEORGE W. PRING & PENELOPE CANAN, *SLAPPS: GETTING SUED FOR SPEAKING OUT* (1996). SLAPP lawsuits are not only lawsuits for libel and defamation, but have also been brought against those exercising First Amendment rights in the form of business interference and conspiracy. *Id.* at 3.

journalists' willingness to exercise free speech rights to satisfy their duty.¹³⁵

This protective stance is most clearly demonstrated in the most important case in American media law, *New York Times Co. v. Sullivan*.¹³⁶ In *Sullivan*, Justice William Brennan wrote that the Constitution prohibits a federal rule that would allow for a public official to recover damages for a defamatory falsehood unless he proves that the statement was made with actual malice.¹³⁷ This high bar, coupled with a trend in libel suits favoring outcomes for the defendant,¹³⁸ created a major deterrent for plaintiffs and their lawyers seeking to harass media outlets with specious claims.¹³⁹

Laws barring attack against First Amendment protected press activity also manifest in the form of anti-SLAPP statutes.¹⁴⁰ A SLAPP (Strategic Lawsuit Against Public Participation) is an action brought not with the goal of litigating the underlying claim, but with the primary purpose of suppressing First Amendment protected activity.¹⁴¹ The statutes that protect the right to comment on and participate in matters of public concern are rooted in First Amendment principles.¹⁴² As seen in Hogan's case,¹⁴³ what constitutes a matter of public concern is not particularly well defined. But generally, a matter qualifies as one of public concern when it is the subject of

¹³⁵ See, e.g., *Multimedia Holdings Corp. v. Circuit Court of Fla.*, 544 U.S. 1301, 1304 (2005) (noting that in the context of criminal statutes "threat of prosecution . . . raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability").

¹³⁶ 376 U.S. 254 (1964).

¹³⁷ *Id.* at 282.

¹³⁸ See Bazelon, *supra* note 128.

¹³⁹ See *id.*

¹⁴⁰ See Pring & Canan, *supra* note 134, at 189.

¹⁴¹ *Id.* at 3.

¹⁴² See *City of San Diego v. Roe*, 543 U.S. 77, 83 (2004).

¹⁴³ See Toobin, *supra* note 72. The salacious nature of the tape left many hesitant to defend Gawker's actions. In fact, Thiel's characterization of the site as a bully is not one that most reputable news sources would disagree with. But despite the potentially offensive or objectionable nature of its reporting, in financing the case that effectively shut Gawker down, leaving hundreds of staffers and journalist out of work, Thiel achieved "the impossible: [he] made us sympathize with Gawker." See Jack Shafer, *Peter Thiel Does the Impossible!*, POLITICO: FOURTH ESTATE (May 25, 2016), <http://www.politico.com/magazine/story/2016/05/gawker-peter-thiel-fourth-estate-213918>.

“great interest and of value and concern to the public”¹⁴⁴ without regard to whether the commentary in question is “inappropriate or controversial.”¹⁴⁵ In considering the outcome of *Bollea*, it is significant to note that it is common for judges to dismiss lawsuits when the plaintiffs themselves have encouraged news interest in the matter they claim is private.¹⁴⁶

The majority of states have enacted anti-SLAPP statutes that shield individuals and the press from attacks by those seeking to silence their critics.¹⁴⁷ Among other things, anti-SLAPP statutes provide procedural protections demanding that those seeking to file a lawsuit satisfy an increased burden to prove that they have a legitimate claim.¹⁴⁸ These statutes provide targets financial relief in the short term through a stay of discovery and in the long term through the recovery of attorney’s fees.¹⁴⁹ Anti-SLAPP statutes also shift the burden onto the party filing the claim to support the claim’s validity at an earlier stage in litigation, putting an early halt to additional financial drain on the target’s resources.¹⁵⁰ Moreover, anti-SLAPP statutes give targets the right of immediate appeal should they fail to successfully litigate their anti-SLAPP claim in the lower court.¹⁵¹

These provisions would seem to provide sufficient protection from vindictive actors like Thiel, seeking to support potentially meritless claims through revenge litigation funding. But anti-SLAPP statutes are not in force in every jurisdiction in the United States; and recently, judicial decisions have eroded these protections by either questioning or prohibiting the application of state anti-SLAPP statutes in federal court.¹⁵² The lack of uniformity in application of

¹⁴⁴ See *Roe*, 543 U.S. at 84.

¹⁴⁵ See *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

¹⁴⁶ See *Bazon*, *supra* note 128. As outlined in Part II, Hogan discussed his private life, including his sex life, extensively, both in interviews and in his own tell-all book.

¹⁴⁷ See Aaron Smith, *SLAPP Fight*, 68 ALA. L. REV. 303, 305 (2016).

¹⁴⁸ *Id.*

¹⁴⁹ See Carson Hilary Barylak, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 OHIO ST. L.J. 845, 852 (2010); see also Smith, *supra* note 147, at 310.

¹⁵⁰ See Smith, *supra* note 147, at 310.

¹⁵¹ *Id.*

¹⁵² *Id.* at 310–11. The First and Ninth Circuits have both granted defendants in federal court the full procedural advantages of anti-SLAPP laws. See, e.g., *Batzel v. Smith*, 333 F.3d 1018, 1024–26 (9th Cir. 2003); *Godin v. Schencks*, 629 F.3d 79, 88 (1st Cir. 2010). However, the D.C. Circuit has ruled that anti-SLAPP

anti-SLAPP protections across jurisdictions leads to forum shopping, where plaintiffs in anti-SLAPP law states can (and have) removed claims from state to federal court, where they have better chances of avoiding protective procedural mechanisms.¹⁵³ While a federal anti-SLAPP statute, like that proposed by a bipartisan group of representatives, would arguably resolve this problem, the likelihood of passing such a statute is unclear.¹⁵⁴

Revenge litigation funding capitalizes on these legal vulnerabilities, while also playing on other, less quantifiable factors. As described herein, a growing discontent and mistrust of the media fuels inflated jury awards like that seen in *Bollea*.¹⁵⁵ In that case, a juror reported that the \$140 million award “wasn’t about punishment of these individuals and Gawker. You had [sic] to do it enough where it makes an example in society and other media organizations.”¹⁵⁶ One public figure in particular has stoked these kinds of negative

motions directly conflict with the lower ‘plausibility’ standards of the Federal Rules of Civil Procedure. See *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015). In *Davide Carbone v. Cable News Network*, a closely watched case in the Eleventh Circuit, the Northern District of Georgia sided with the minority view in an emerging circuit split on this issue. See Corey L. Andrews, *Are Anti-’SLAPP’ Statutes Toothless In Federal Courts?*, FORBES (Feb. 24, 2017, 9:00 AM), <https://www.forbes.com/sites/wlf/2017/02/24/are-anti-slapp-statutes-toothless-in-federal-courts/#60c443cb4a2c>. Siding with the D.C. Circuit view, Judge Orinda Evans held that the standard for dismissal embodied in the federal rules “relate[s] only to how a litigant may bring his claims to court and bear[s] not at all on the substance of those rights or their enforcement.” *Id.* In the view of the court, absent any violation of the Rules Enabling Act, the federal rules governing dismissal are purely procedural and must be applied in federal court, regardless of any additional protections granted by state anti-SLAPP statutes. *Id.*

¹⁵³ See, e.g., Order at 2, *Dean v. NBC Universal*, No. 2011 CA-006055-B (D.C. Super. Ct. June 25, 2012).

¹⁵⁴ SPEAK FREE Act of 2015, H.R. 2304, 114th Cong. (2015). The bill has enjoyed rare bipartisan support and has won praise from Silicon Valley titans and free speech activists alike. See Eric Levitz, *House Republicans Hope to Pass This Bill Before Donald Trump Takes Office*, N.Y. MAG.: DAILY INTELLIGENCER (June 1, 2016), <http://nymag.com/daily/intelligencer/2016/06/gop-hopes-to-pass-this-bill-before-trump-wins.html>. Nevertheless, the fate of the bill remains uncertain in the current political climate. *Id.* As stated by the bill’s sponsor, Republican Congressman Blake Farenthold, “Obama will sign this. I don’t think Trump will.” *Id.*

¹⁵⁵ See Bazelon, *supra* note 128.

¹⁵⁶ *Id.*

attitudes towards the press: President Donald Trump.¹⁵⁷ Trump, who has admitted to using intentionally abusive litigation tactics purely for the sake of harassment,¹⁵⁸ also threatened to “open up our libel laws so when [journalists] write purposely negative and horrible and false articles, we can sue them and win lots of money.”¹⁵⁹ While this threat is not a particularly frightening one when one stops to consider that (a) this is what our libel laws are already designed to protect against, and (b) the president has no direct power to change these rules, Trump’s overt hostility towards the press reflects, and perhaps inspires, the kind of ire that leads to outsized awards from jurors.¹⁶⁰

This litigious attitude and hostility towards the press prompted many journalists to link Trump to their reports regarding the implications of *Bollea*.¹⁶¹ Trump has himself filed libel lawsuits at least

¹⁵⁷ See *Voters Divided*, *supra* note 133.

¹⁵⁸ See Bazelon, *supra* note 128. Trump was specifically quoted speaking about a libel lawsuit he filed against former New York Times reporter Tim O’Brien: “I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make his life miserable, which I’m happy about.” See Paul Farhi, *What Really Gets Under Trump’s Skin? A Reporter Questioning His Net Worth*, WASH. POST (Mar. 8, 2016), https://www.washingtonpost.com/lifestyle/style/that-time-trump-sued-over-the-size-of-hiswallet/2016/03/08/785dee3e-e4c2-11e5-b0fd-073d5930a7b7_story.html?utm_term=.67938ee5601f.

¹⁵⁹ See Nicholas Lemann, *How Peter Thiel’s Gawker Battle Could Open a War Against the Press*, NEW YORKER (May 31, 2016), www.newyorker.com/news/news-desk/how-peter-thiels-gawker-battle-could-open-a-war-against-the-press.

¹⁶⁰ Some legal critics have suggested that a cap on damages akin to that employed in the United Kingdom would have prevented the “death” of Gawker. See, e.g., Bazelon, *supra* note 128. There, jurors in libel cases operate under an unofficial damages cap of about £250,000. *Id.* Such a rule not only insulates British publishers from the kind of fallout seen in *Bollea*, but also encourages retractions and apologies by lowering the stakes of a potential libel lawsuit. *Id.* But caps on damage awards in libel cases would not have been particularly effective in *Bollea*, as the claims were brought on privacy grounds. Thiel’s assault on Gawker also included claims related to a class action labor lawsuit for which Harder’s firm was interviewing potential plaintiffs. See Drange, *supra* note 112. Moreover, as discussed herein, even in the absence of a jury award, the cost of legal fees for defending against these claims would have eventually been enough to bankrupt the company. See Denton, *supra* note 85.

¹⁶¹ See, e.g., Katie Rogers & John Herrman, *Thiel-Gawker Fight Raises Concerns About Press Freedom*, N.Y. TIMES: MEDIA (May 26, 2016), <http://nyti.ms/>

seven times, winning only once: when a defendant failed to appear.¹⁶² Lawsuits aside, Trump's ongoing public attacks on the press¹⁶³ have contributed to the "chilling effect"—a phenomenon that prevents journalists and news organizations from reporting on plaintiffs with deep pockets or considerable power for fear of serious reprisal.¹⁶⁴ This threat is not lessened by the fact that the "chilled" speech is accurate, of genuine public concern, or even within the legal limits of libel and defamation. As discussed below, even meritless claims are a threat to the press when funded by vengeful actors.

B. *The Threat of "Meritless" Claims and Death by a Thousand Cuts*

Much of the press coverage regarding Thiel's financial backing of Hogan's case focused on the legality of his actions and the commonplace nature of third-party litigation funding in general.¹⁶⁵ Commentators also tended to posit that this sort of tactic is not a foolproof strategy.¹⁶⁶ To be successful, the underlying claim must have

1WnOTzP; *see also* *Billionaires' Attack*, *supra* note 128; *see also* Bazelon, *supra* note 128.

¹⁶² *See* Bazelon, *supra* note 128.

¹⁶³ Prior to entering public office, Trump famously called CNN "fake news" following completely accurate and factual reports regarding potentially compromising information held by the Russian state. During the same press conference, he referred to news website BuzzFeed as a "failing pile of garbage." *See* Leonard Downie Jr., *Donald Trump's Dangerous Attacks on the Press*, N.Y. TIMES (Jan. 13, 2017), <https://www.nytimes.com/2017/01/13/opinion/donald-trumps-dangerous-attacks-on-the-press.html>. Since taking office, Trump's attacks on the press have escalated to increasingly bizarre threats, culminating with a tweet in which he threatened to "revoke" the broadcasting licenses of news organizations he disfavors. *See* Allison Michaels, *Can President Trump Really Revoke Broadcast Licenses*, WASH. POST (Oct. 13, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/13/can-president-trump-really-revoke-broadcast-licenses/?utm_term=.73a47c2477c4

¹⁶⁴ *See* *Billionaires' Attack*, *supra* note 128.

¹⁶⁵ *See, e.g.*, Mark Joseph Stern, *Peter Thiel Is Wrong About the First Amendment*, SLATE: JURIS. (May 26, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/should_peter_thiel_be_allowed_to_finance_hulk_hogan_s_lawsuit.html. Stern's article notes that third-party litigation funding is not unusual and is commonly employed in civil rights cases. *Id.*

¹⁶⁶ *Id.*; *see also* Eugene Kontorovich, *Peter Thiel's Funding of Hulk Hogan-Gawker Litigation Should Not Raise Concerns*, WALL ST. J.: VOLOKH

merit.¹⁶⁷ One commentator reasoned that “to destroy a media company, it is not enough that litigation be financed. A court must also find the defendant liable, award damages and have it sustained on appeal.”¹⁶⁸ Otherwise, the suits would be dismissed, or, in an extreme situation, an attorney bringing a frivolous claim would be subject to court sanction.¹⁶⁹ These arguments echo the reasoning of those voices championing the abandonment of the doctrines of champerty and maintenance, who believe that the evolution of the legal system and the development of ethical accountability rules have done away with the need for these prohibitive laws.¹⁷⁰

These observations ignore the reality of the current American legal system. Granted, litigating a claim in the United States is more costly than in any other country in the world¹⁷¹ and, all things being equal, normal market forces theoretically prevent meritless claims from wreaking havoc on the system.¹⁷² Because the costs of litigation mount quickly, parties with frivolous claims are hesitant to file costly lawsuits with low probabilities of success.¹⁷³ Attorneys who might litigate cases on a contingency basis are equally unlikely to take on the risk.¹⁷⁴ In an effort to ensure a maximum return, most third-party litigation funders employ vetting mechanisms that evaluate whether claims have a high probability of success.¹⁷⁵ Logically,

CONSPIRACY (May 26, 2016), www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/26/peter-thiels-funding-of-hulk-hogan-gawker-litigation-should-not-raise-concerns/?utm_term=.1c3319353f24.

¹⁶⁷ See Stern, *supra* note 165.

¹⁶⁸ See Kontorovich, *supra* note 166.

¹⁶⁹ See Stern, *supra* note 165.

¹⁷⁰ See BURFORD CAP., *supra* note 43.

¹⁷¹ *U.S. Legal System Is World's Most Costly According to a New Study*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 14, 2013), <http://www.instituteforlegalreform.com/resource/us-legal-system-is-worlds-most-costly-according-to-a-new-study>.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Randazzo, *supra* note 3. Litigation funders typically employ legal experts who analyze claims on the basis of potential success, taking into account both evidentiary and legal elements, including the favorability of the venue and jurisdiction. Some (like the Thiel funded start-up Legalist) have developed their own internal algorithms that calculate the chances of success and even estimate the time it would take to litigate the claim. See Biz Carson, *One of Peter Thiel's Fellows Created a New Startup that Will Fund Your Lawsuit*, BUS. INSIDER: TECH

these kinds of litigation investors are typically uninterested in meritless, or even risky, claims; as such, it stands to reason that funders do not increase the presence of such claims in the legal system.¹⁷⁶ However, as seen in *Bollea v. Gawker*, the introduction of a third-party funder with no interest in pecuniary gain alters the judicial ecosystem.¹⁷⁷

A vengeful party like Thiel who intends to “bankrupt, buy or wound”¹⁷⁸ a media outlet is not constrained by the economic pressures that would prevent the filing of a meritless lawsuit. Notably, our system sees each party covering the costs of its own representation (barring a specific state or federal law that says otherwise). Therefore, the fact that a media outlet like Gawker is required to pay attorney’s fees when attempting to dismiss or even respond to a complaint means that a “successful” claim is not essential to exact revenge.¹⁷⁹ Instead, a funder can employ a strategy of death by a thousand cuts¹⁸⁰—providing litigation funds to any party with a claim against their target, no matter how unlikely it is to succeed. Through this method, success could be had through a cumulative or aggregate effect, rather than the singular blow represented by *Bollea v. Gawker*.

This is precisely the strategy Thiel likely intended to employ.¹⁸¹ While Thiel has not disclosed exactly how many other cases he financed,¹⁸² he admits that Hogan was not the sole beneficiary of his

INSIDER (Aug. 24, 2016, 2:05 PM), <http://www.businessinsider.com/legalist-will-fund-your-lawsuit-if-it-thinks-you-have-a-good-shot-at-winning-2016-8>.

¹⁷⁶ See Carson, *supra* note 175.

¹⁷⁷ See Bazelon, *supra* note 128.

¹⁷⁸ See Denton, *supra* note 85.

¹⁷⁹ See, e.g., Clara Jeffery & Monika Bauerlein, *Why We’re Stuck With \$650,000 in Legal Fees, Despite Beating the Billionaire Who Sued Us*, MOTHER JONES (Oct. 23, 2015, 2:46 PM), <http://www.motherjones.com/mojo/2015/10/why-wont-we-get-our-legal-fees-back> [hereinafter *Why We’re Stuck*].

¹⁸⁰ See Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761, 785 (2017).

¹⁸¹ See Drange, *supra* note 112.

¹⁸² The most Thiel has been willing to disclose is that it is “safe to say [*Bollea v. Gawker*] is not the only one.” *Id.*

vendetta.¹⁸³ Though Thiel's backing of any particular case is unconfirmed, the firm he paid to represent Hogan has sued Gawker at least five times since 2013.¹⁸⁴

Among those lawsuits is a defamation case filed on behalf of Shiva Ayyadurai, an Indian-American scientist who claims to "have invented email."¹⁸⁵ Ayyadurai was the subject of an article by Sam Biddle, who argued that e-mail was developed at least a decade before Ayyadurai claims to have invented it.¹⁸⁶ Even though according to many experts and historians, "[e]lectronic mail predates Ayyadurai's ability to spell, let alone code,"¹⁸⁷ Gawker settled the lawsuit for \$750,000 as part of the settlement with Hogan.¹⁸⁸ Ayyadurai claims to be "unaware of any behind-the-scenes financial arrangements involving [his] attorneys and anyone else."¹⁸⁹

Another claim litigated by Harder and settled alongside Hogan's was that of freelance journalist Ashley Terrill.¹⁹⁰ Terrill sued Gawker and Biddle for defamation after the site published an article detailing her well-documented investigation into the dating application ("app") Tinder and Terrill's belief that she was being harassed

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See* Sam Biddle, *Corruption, Lies, and Death Threats: The Crazy Story of the Man Who Pretended to Invent Email*, GAWKER: GIZMODO (Mar. 5, 2012, 2:50 PM), web.archive.org/web/20120306204240/http://gizmodo.com/5888702/corruption-lies-and-death-threats-the-crazy-story-of-the-man-who-pretended-to-invent-email.

¹⁸⁷ *See* Mario Aguilar, *Internet Pioneers Slam \$750,000 Settlement for the 'Man Who Invented Email'*, GAWKER: GIZMODO (Nov. 4, 2016, 3:20 PM), <http://gizmodo.com/internet-pioneers-slam-750-000-settlement-for-the-man-1788503950>.

¹⁸⁸ *See id.*

¹⁸⁹ *See* Drange, *supra* note 112.

¹⁹⁰ *See* Peter Sterne, *Here Are All the People Suing Gawker*, POLITICO: MEDIA (June 15, 2016, 8:39 AM), <http://www.politico.com/media/story/2016/06/here-are-all-the-people-suing-gawker-004601>.

by one of the app's co-founders.¹⁹¹ Gawker's offer of settlement to Ms. Terrill amounted to \$500,000.¹⁹²

In a blog reflecting on the outcome of the litigation, Denton wrote that Gawker "expected to prevail" in the lawsuits brought by Ayyadurai and Terrill, and that he was "confident the appeals court would reduce or eliminate the runaway Florida judgment against Gawker."¹⁹³ Citing to Thiel's own public commitment to "support [Hogan] until his final victory" and to "gladly support someone else in the same position,"¹⁹⁴ Denton wrote that the threat of Thiel's relentlessness and his tremendous financial capability motivated a settlement that would prevent "endless litigation."¹⁹⁵

Denton was not alone in his belief that Gawker would succeed in its appeal of Hogan's award.¹⁹⁶ Given the rationale of Judge Whittemore¹⁹⁷ and Judge Black,¹⁹⁸ it would stand to reason that the outsized award in *Bollea v. Gawker* would not survive appellate scrutiny. But the financial reality of facing a foe with practically limitless resources presented a battle that Gawker could simply not afford to continue fighting, no matter how likely its eventual legal vindication.¹⁹⁹ To illustrate, Gawker's legal fees for the Hogan case alone

¹⁹¹ See *id.*; see also Sam Biddle, *Tinder Confidential: The Hookup App's Founders Can't Swipe Away the Past*, GAWKER (Nov. 23, 2015, 11:32 AM), <http://gawker.com/tag/ashley-terrell>.

¹⁹² See Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES: MEDIA (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html>.

¹⁹³ See Nick Denton, *A Hard Peace*, NICKDENTON.ORG (Nov. 2, 2016), <https://nickdenton.org/a-hard-peace-e161e19bfaf#.odd4bp3um> [hereinafter *Hard Peace*].

¹⁹⁴ See Peter Thiel, *Peter Thiel: The Online Privacy Debate Won't End with Gawker*, N.Y. TIMES: OPINION PAGES (Aug. 15, 2016), <https://www.nytimes.com/2016/08/16/opinion/peter-thiel-the-online-privacy-debate-wont-end-with-gawker.html>.

¹⁹⁵ See *Hard Peace*, *supra* note 193.

¹⁹⁶ See, e.g., Toobin, *supra* note 72.

¹⁹⁷ See *Bollea v. Gawker Media, LLC*, No. 8:12-cv-02348-T-27TBM, 2012 WL 5509624, at *3 (M.D. Fla. Nov. 14, 2012).

¹⁹⁸ See *Gawker Media, LLC v. Bollea*, 129 So. 3d 1196, 1199 (Fla. 2d DCA 2014).

¹⁹⁹ See Ember, *supra* note 192; see also L. Gordon Crovitz, *Peter Thiel's Legal Smackdown*, WALL ST. J.: INFO. AGE (June 5, 2016, 5:47 PM), <http://www.wsj.com/articles/peter-thiels-legal-smackdown-1465163232>.

totaled almost \$10 million.²⁰⁰ Even without the breathtaking \$140 million *Bollea* verdict, the site (which would have broken even without paying legal fees) was operating at a loss and initiating layoffs to mitigate the cost of litigating cases, at least one of which was financed by Thiel.²⁰¹ With Thiel showing no signs of abandoning his vendetta against Gawker, and outside financing in the face of the looming award unlikely, the site had little chance of survival. The legal merit of any particular claim Thiel might seek to weaponize against them was inconsequential—so long as Thiel was willing to leverage the legal system as a means of bleeding Gawker’s finances, his eventual victory was certain.

While some have dismissed Thiel’s third-party funded onslaught against Gawker as an isolated incident, at least one other billionaire also adopted Thiel’s so-called “philanthropic”²⁰² approach to combating the press.²⁰³ In 2012, Idaho billionaire and Republican megadonor Frank VanderSloot filed a defamation lawsuit against the magazine *Mother Jones*.²⁰⁴ VanderSloot claimed that *Mother Jones* had defamed him by “falsely stating that Mr. VanderSloot ‘bashed’ and ‘publicly out[ed] a reporter.’”²⁰⁵ VanderSloot, who has an extensive history of anti-gay-rights activism that included running a series of ads attacking a gay journalist,²⁰⁶ has since changed his views on LGBT issues, even writing an op-ed declaring his belief that “gay people should have the same freedoms and rights as any other individual.”²⁰⁷ This evolution aside, the court found *Mother Jones* did not defame VanderSloot, holding that all statements in the article were “non-actionable truth or substantial truth.”²⁰⁸

That fact did not stop VanderSloot from litigating his claim for more than two years, costing *Mother Jones* a reported \$2.5 million

²⁰⁰ See Mac & Drange, *supra* note 96.

²⁰¹ See *id.*

²⁰² See Sorkin, *supra* note 9.

²⁰³ See Bazelon, *supra* note 128.

²⁰⁴ See Clara Jeffery & Monika Bauerlein, *We Were Sued by a Billionaire Political Donor. We Won. Here’s What Happened.*, MOTHER JONES (Oct. 8, 2015, 8:51 PM), www.motherjones.com/media/2015/10/mother-jones-vandersloot-melaleuca-lawsuit.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

in legal fees.²⁰⁹ *Mother Jones*'s insurance did not cover the entire cost, leaving the magazine to pay a tab in excess of \$600,000.²¹⁰ And because Idaho does not have an anti-SLAPP law,²¹¹ *Mother Jones* could not recover its legal fees absent a finding from the judge (who had already specified that VanderSloot's case was not frivolous) that the lawsuit was pursued "frivolously, unreasonably, or without foundation."²¹²

Despite *Mother Jones*'s victory, VanderSloot had effectively succeeded, not only by harassing the magazine and its staff, but also by draining its resources.²¹³ After his defeat, VanderSloot established the "Guardian of True Liberty Fund,"²¹⁴ personally pledging one million dollars to "help individuals who have been unfairly attacked by the liberal media mount a legal defense, the costs of which can be overwhelming."²¹⁵ Where Thiel covertly limited his efforts to toppling a specific site, VanderSloot widened the aperture, actively and publicly shopping for plaintiffs who would bring claims against any and all liberal media outlets.²¹⁶

VanderSloot's own case, and his subsequent open call for would-be plaintiffs, demonstrate that third-party litigation funding, when employed by vindictive actors uninterested in pecuniary gain, does in fact have the potential to weaponize even non-meritorious claims. As such, lawsuits funded by Thiel and VanderSloot expose the ongoing vulnerability and shortcomings of our modern legal system, where a party with the deepest pockets can drag on litigation for years, papering the opposing side to death, no matter how baseless the claim.

The absence of a federal anti-SLAPP statute likewise ensures that those interested in this style of revenge litigation funding are free to forum shop. In other words, these revenge litigation funders

²⁰⁹ See Bazelon, *supra* note 128.

²¹⁰ See *Why We're Stuck*, *supra* note 179.

²¹¹ Anti-SLAPP statutes allow for swift removal of SLAPP cases out of court and in many cases, require the plaintiff to pay a penalty that includes recovery of the legal fees for the defendant. See Smith, *supra* note 147, at 310.

²¹² *Why We're Stuck*, *supra* note 179.

²¹³ *Id.*

²¹⁴ GUARDIAN OF TRUE LIBERTY, <http://melawebsites.com/gftlf/about/> (last visited Sept. 30, 2017).

²¹⁵ *Id.*

²¹⁶ See *id.*

are able to seek out claims in jurisdictions with the weakest protections for the press, where even a plaintiff's loss in court will inflict potentially fatal economic damage to a defendant news organization. Alternately, as in the case of *Bollea v. Gawker*, a plaintiff, perhaps swayed by the motives of his or her silent benefactor, may drop claims typically covered by media insurers in an effort to exact as much financial damage as possible in the event of a large award.²¹⁷ As such, the modern "protections" afforded by the legal system and ethics rules (and advocated by those who no longer see the utility of champerty and maintenance restrictions) are not enough to neutralize the threat—even of non-meritorious claims—to the Fourth Estate.

C. *Champerty and Maintenance to the Rescue?*

Despite the legal protections afforded to the Fourth Estate by virtue of the Constitution and the American tradition of freedom of the press, media organizations remain vulnerable to attack via revenge litigation funding schemes. Claims lobbed at the press and financed by vindictive actors, whether with merit or without, are not constrained by the typical market forces and judicial mechanisms that would eliminate the potential financial peril posed by the threat of persistent litigation. Contrary to the arguments of those who see no practical use for the doctrines of champerty and maintenance, in those jurisdictions that continue to apply the doctrine, there is some hope that it might be used by media organizations to counteract attacks from those who would seek to silence them through these kind of covert (or in the case of VanderSloot, overt) methods of funding.

As noted in Part I, states that apply the doctrines of champerty and maintenance restrict the practice to varying degrees and tend to approach their analysis as to whether an agreement is champertous from a myriad of perspectives. But one thing that all such jurisdictions seem to disdain is the mere suggestion that a third party is behaving as an officious intermeddler. As reasoned by the Superior Court of Delaware, an agreement is more likely to be deemed champertous or in violation of the maintenance doctrine if the third-party "stirred up" litigation" or has a controlling hand in the litigation

²¹⁷ See, e.g., Toobin, *supra* note 72.

strategy.²¹⁸ Moreover, courts are more likely to hold that a party is an officious intermeddler and that an agreement is champertous where the funder seeks out the claimholder (rather than the party holding the claim seeking out the funder).²¹⁹

Under this rationale, in a state with champerty and maintenance restrictions, should a case arise that is funded by VanderSloot's plaintiff-shopping Guardian of True Liberty Fund, the defendant could argue that the claims must be dismissed on the basis that the third-party litigation funding agreement is champertous, and that VanderSloot's fund is operating as an officious intermeddler. These arguments would be supported by the fact that VanderSloot "stirred up" litigation by advertising an interest in suing a specific target: liberal media outlets.

Moreover, a defendant news organization in Gawker's position might argue that a revenge litigation funder is an officious intermeddler if it can show that the funder is interfering in or influencing the course of litigation. In *Bollea*, the moment to file a motion to dismiss on this basis might have arisen at the point that Hogan's legal team dropped the negligent infliction of emotional distress claim—something that Gawker's insurance would have covered.²²⁰

Though Harder would have argued that this was a tactical decision unrelated to any motives Thiel may have had, in a jurisdiction with champerty and maintenance restrictions, Gawker's attorneys could have made the argument that this was evidence of Thiel's actions as an officious intermeddler.²²¹ As noted herein, the most logical inference drawn from elimination of the negligent infliction of

²¹⁸ See *Charge Injection Techs., Inc. v. E.I. Dupont De Nemours & Co.*, No. NO7C-12-134-JRJ, 2016 WL 937400, at *1, *4 (Del. Super. Ct. Mar. 9, 2016).

²¹⁹ See, e.g., *id.*

²²⁰ See *Mac & Drange*, *supra* note 96.

²²¹ Evidence of this kind of behavior would also be a violation of multiple ABA ethics rules, resulting in potential sanctions for the attorney. See, e.g., MODEL RULES OF PROF'L CONDUCT, r. 5.4(c) (AM. BAR ASS'N 1983) ("A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services"); see also *id.* at r. 1.8(f) (AM. BAR ASS'N 1983) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship . . .").

emotional distress claim would be that a party wanted to ensure that any judgment would have to come directly from Gawker's own pockets, inflicting the maximum amount of financial damage possible. Bolstering this argument is the fact that Hogan rejected several offers of settlement, only to eventually agree to accept a fraction of the judgment awarded by the court.²²²

However, gathering enough evidence to support this kind of claim would likely prove difficult. Barring discovery of communications between Thiel and Harder or Hogan that laid bare Thiel's meddling, or an explicit provision in the funding agreement that allowed for the funder to dictate legal strategy, it is unlikely that a court would comfortably side with the defendant.

Moreover, decisions like that seen in *Citizens United v. Federal Election Commission*²²³ continue to expand the definition of what qualifies as speech within the meaning of the First Amendment.²²⁴ The kind of corporate political expenditure that was deemed protected in *Citizens United* could potentially be extended to cover the expenses of a private citizen (or fund, in the case of VanderSlot) seeking to support what he or she characterizes as public interest litigation.²²⁵ In fact, Thiel cleverly characterized his funding of *Bollea* as public interest litigation,²²⁶ aligning himself with decisions like *NAACP v. Button*, which protects third-party support of litigation that seeks the "vindication of constitutional rights."²²⁷ The difficulty of drawing the line between a claim like that in *Button* and that of a third-party actor with a personal vendetta would likely be too amorphous for courts to unravel and properly administer. No

²²² See Toobin, *supra* note 72; see also Mac & Drange, *supra* note 96.

²²³ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The case is notable for a ruling that protected unlimited corporate and union expenditures in election campaigns. *Id.*

²²⁴ *Id.*

²²⁵ See Bradley C. Tobias, Note, *Officious Intermeddling or Protected First Amendment Activity? The Constitutionality of Prohibiting Champerty Law After Citizens United*, 22 WM. & MARY BILL RTS. J. 1293, 1318 (2014). In fact, the motivation behind overturning champerty and maintenance restrictions in the majority of southern states during the civil rights movement was the desire to protect the interests of plaintiffs in civil rights lawsuits, whose claims were typically supported by organizations like the NAACP. See Steinitz, *supra* note 1, at 1287–88.

²²⁶ See, e.g., Toobin, *supra* note 72.

²²⁷ *NAACP v. Button*, 371 U.S. 415, 443 (1963).

case has yet to test this theory of revenge litigation funding as speech, but with the ongoing erosion of the champerty and maintenance restrictions as they apply to third-party funding, it is unlikely that an appeal on these grounds will serve targeted media organizations much longer, if at all.²²⁸

What, then, might offer the most effective protection for organizations like Gawker, *Mother Jones*, and other targets of revenge litigation funding? Besides the adoption of strong anti-SLAPP statutes on the state and federal level that could guard against the effectiveness of revenge litigation funding models,²²⁹ news organizations (and the entities that support them)²³⁰ now find themselves in a position to push for increased regulation of third-party litigation funding, and amendments to the rules of discovery and evidence that would allow for the disclosure of the identity of a third-party funder.

Regulations that media organizations should push for would include strict restrictions against funder interference in the attorney-

²²⁸ More importantly, *Bollea* was decided in a Florida state court, a jurisdiction that does not recognize champerty and maintenance restrictions. *See Hardick v. Homol*, 795 So. 2d 1107 (Fla. 5th DCA 2001) (holding that champerty and maintenance are no longer viable causes of action in Florida). As such, an argument on these grounds would be unavailing.

²²⁹ For example, the Florida anti-SLAPP statute only protects against claims arising in the context of a homeowner's association dispute or from a lawsuit by the government against a journalist or private citizen speaking out against its actions. FLA. STAT. § 768.295 (2015). If the Florida statute mirrored that of the Washington D.C. statute, which is expanded to claims of almost any kind, perhaps Hogan's trial would have been halted before it even began. *See* D.C. CODE § 16-5502 (2012).

²³⁰ Ironically, Thiel supported one such non-profit organization, the Committee to Protect Journalists ("CPJ"). COMMITTEE TO PROTECT JOURNALISTS, <https://www.cpj.org/about> (last visited Sept. 30, 2017). The CPJ is "an independent, non-profit organization that promotes press freedom worldwide" and defends "the right of journalists to report the news without fear of reprisal." *Id.* Thiel provided significant financial support to the CPJ from July 2008 to January 2013, but was criticized by its Executive Director, Joel Simon, for "support[ing] efforts to abuse the [legal system] by seeking to punish or bankrupt particular media outlets." *See CPJ Reacts to Reports that Peter Thiel Has Funded Lawsuits Against Gawker*, COMM. TO PROTECT JOURNALISTS (May 25, 2016, 1:09 PM), <https://cpj.org/2016/05/cpj-reacts-to-reports-that-peter-thiel-has-funded-.php>. Other organizations that should join in an effort to defend against revenge litigation funding attacks on the media include the Media Advocacy Group, First Look Media's Press Freedom Litigation Fund, and the Society of Professional Journalists.

client relationship during the course of litigation that mirror the strong protections granted by the ethics rules. In addition, news organizations should propose proportional caps on return on investments in individual cases. This kind of regulatory cap would be most effective in the case of a formal fund that operates under a “replenishment” scheme. In theory, a cap on the amount or proportion of an award that a third-party funder is able to recoup from any given case would temper a funder’s desire to push litigation forward beyond the point where cases could reasonably settle and avoid the risk of losing any return altogether. This theory assumes that a revenge litigation funder operating from a formal fund that relies on external donations (like VanderSloot’s Guardian of True Liberty Fund)²³¹ aims to replenish its funds with a percentage of the award from claims it supports. On the other hand, a cap would prove ineffective where a party is willing to part ways with as much of its resources as necessary to exact revenge.

On the evidentiary front, it would be beneficial to media organizations to lobby for rules of civil procedure that would allow for the discovery and disclosure of the presence of a third-party funder in any given case. The discoverability of a third-party funding agreement would, at the very least, alert the defendant of potential ulterior motives, possibly prompting the ability to file an anti-SLAPP claim that would dispose of the controversy. Ideally, an evidentiary rule that would benefit media organizations under attack from revenge litigation funders would require the disclosure of any previous conflicts the third-party funder had with the defendants. Moreover, should the defendant find an avenue of relevance that would allow for the introduction of the presence of the third-party funder as evidence during the proceeding, jurors would be less likely to fall for the kind of David vs. Goliath narrative crafted by plaintiffs like Hogan. This would, at a minimum, level the playing field for media organizations by unveiling the presence of deep pockets.

²³¹ See GUARDIAN OF TRUE LIBERTY, *supra* note 214.

Appeals to lawmakers to protect the integrity of the press could not come at a more crucial moment. President Trump's general litigious attitude,²³² declaration of "war with the media,"²³³ and habit of disseminating false information²³⁴ make for a precarious combination in an era of skepticism towards the reliability of the press.²³⁵ On the one hand, the contentious political climate is a hotbed of journalistic activity, especially as the presidential administration struggles to keep its internal blunders under wraps.²³⁶ However, legal scholars have noted that "the libel climate is changing" and that public figures are likely to capitalize on this moment, when they "may be more confident that courts and juries will be sympathetic to their claims."²³⁷ If the result of this climate is a weakened Fourth Estate that is hesitant to report the news for fear of backlash from the powerful actors they are called to report on, the real costs will be borne by an uninformed and more easily manipulated American public.

CONCLUSION

From their inception, the doctrines of champerty and maintenance were developed to prevent "great men" from manipulating the

²³² See Bazelon, *supra* note 128; see also Farhi, *supra* note 158.

²³³ See David Bauder, *Trump's "War with the Media" Raises Questions of Trust*, SALON.COM (Jan. 22, 2017, 7:39 PM), <http://www.salon.com/2017/01/23/trumps-war-with-the-media-raises-questions-of-trust/>.

²³⁴ See, e.g., Daniel Politi, *Donald Trump Uses Twitter to Flat Out Lie About "Millions" of Illegal Votes in Election*, SLATE (Nov. 28, 2016, 12:09 AM), http://www.slate.com/blogs/the_slatest/2016/11/28/donald_trump_uses_twitter_to_lie_about_millions_of_illegal_votes_in_election.html.

²³⁵ See Paul Farhi, *Why There's Never Been a Better Time to Sue a Journalist*, WASH. POST (Nov. 5, 2016), https://www.washingtonpost.com/lifestyle/style/why-theres-never-been-a-better-time-to-sue-a-journalist/2016/11/05/2d50dc66-a2c3-11e6-8d63-3e0a660f1f04_story.html?utm_term=.9e2cae881d45.

²³⁶ See Paul Farhi, *The Trump Administration Has Sprung a Leak. Many of Them, in Fact.*, WASH. POST (Feb. 5, 2017), https://www.washingtonpost.com/lifestyle/style/the-trump-administration-has-sprung-a-leak-many-of-them-in-fact/2017/02/05/a13fad24-ebe2-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.1154fe3da9e1. Farhi notes that Trump has already demanded an investigation into who may have leaked a top-secret report about Russian hacking of Democratic officials during the 2016 presidential campaign to NBC News. *Id.*

²³⁷ Farhi, *supra* note 235.

vulnerability of an imperfect legal system to achieve their own nefarious ends and exact revenge on their rivals.²³⁸ The “great men” of today are not feudal lords attempting to game the system with the aim of aggrandizing their own estates or sullyng their rival’s names. Instead, they are vengeful actors, seeking to shield their own reputations and agendas from attack or criticism from the media, no matter how deserved or accurate the coverage might be. Revenge litigation funding affords these vindictive actors a means through which to weaponize torts and inflict tremendous damage upon their targets, even with claims that would not typically survive legal scrutiny.

While the underlying rationale that motivated the creation of these restrictions would seem to align perfectly with the desire to protect news organizations from attack by revenge litigation funders, the difficulties of drawing distinctions between these vengeful claims and the kind of public interest litigation that advanced the civil rights movement means that application or revival of the doctrine would likely be futile. Nevertheless, media organizations would benefit by capitalizing on the lessons learned from the *Bollea v. Gawker/Thiel* controversy and engaging with the third-party litigation funding industry at large to lobby for the implementation of rules and regulations, of the kind outlined herein, to better insulate them from these kinds of abusive litigation tactics in the future.

²³⁸ See Dobner, *supra* note 12, at 1544.