

“Truth matters?” That’s a wrong lesson to learn from Fox’s settlement of Dominion lawsuit!



by Lev Tsitrin

“The truth matters. Lies have consequences.”

I found this profoundly-sounding maxim not in Nietzsche’s *Also sprach Zarathustra* but in the punchline of [New York Times’ scoop](#) on how and why Fox and Dominion decided to settle Dominion’s lawsuit; the quote is from Dominion’s lawyer summing up the lesson of the case.

Which is utter hogwash.

For one, if the lawsuit was about truth, why did Dominion settle? If Fox acted with provable “actual malice” when it aired Trump’s claims that Dominion’s software funneled some of

his votes to Biden, why not prove it to jury (and get twice as much money out of Fox)? That this was not about truth is proven by the terms of settlement in which there was no apology or acknowledgment of wrongdoing on the part of Fox. "We acknowledge the court's rulings finding certain claims about Dominion to be false" does not constitute Fox's acknowledgement that those claims were false – only that Fox read the court's ruling; this is no apology at all. As to "money is accountability," as another Dominion's lawyer put it, implying that by agreeing to pay, Fox' acknowledged that it was in the wrong, this is nonsense – it simply means that Fox decided that getting this over with, and getting on with life was worth the \$787.5 million business write-off; that's all.

In fact, both the *New York Times'* reporters, and Dominion's lawyers know full well that the case was not about "truth" – for a very simple reason that the key legal precedent that was at stake – *New York Times v Sullivan* – is not about not lying, but about how far a press outlet can push its lies (the case declared press' lies to be protected speech, setting a very high bar of proving "actual malice" for would-be litigants like Dominion. This is why mainstream news organizations rooted for Fox – if *New York Times v Sullivan* got overturned as a result of Fox's loss, every news company would have found itself in huge trouble.) Generally, whenever *New York Times v Sullivan* gets invoked, the case is about lies, not about truth – the question always being whether those lies overstepped the invisible line that separates "with actual malice" kind of lies from the lies where "actual malice" cannot be proven, granting a reporter impunity to proceed.

Clearly, "truth matters" has nothing to do with the Fox/Dominion legal dust-off, and cannot be a lesson drawn from it. So what are the actual lessons?

One lesson is, that predisposition of a judge towards one of

the parties matters. Yes, judges are impartial – in the pictures of Lady Justice, and during nomination hearings. There, judges are blindfolded and they “neither pitch nor bat, but call [plaintiff’s and defendant’s] balls and strikes” as Chief Justice Roberts memorably stated during his confirmation. But once safely seated on the bench, judges feel free to operate very differently. “Calling balls and strikes” of judges’ own “pitching and batting” is routine. In my case, two different judges in two different courts did a wholesale rewrite the government’s, and my lawyer’s argument so as to decide against me – and when I sued them for fraud, successfully defended themselves with claiming judges’ self-given (in *Pierson v Ray*) right to act from the bench “maliciously and corruptly.” Clearly, having the peeking-through-the-blindfold judge in your corner is always good.

And the *New York Times*’ report gives every impression that the judge was indeed in Dominion’s corner. Let’s count the ways mentioned in the report: “the court allowed Dominion access to messages from the personal phones and email accounts of Fox employees – including both Murdochs” (I guess the proverbial “taking the Fifth” to avoid self-incrimination did not apply); “Fox kept losing decisions with the judge, including his ruling that Dominion could also sue the larger Fox Corporation in addition to Fox News, opening up the Murdochs to more legal and financial exposure;” “On the legal front, Fox was planning to defend itself with a theory known as the “neutral reporting privilege,” which indemnifies news organizations when publicizing “newsworthy” charges about public figures – even when they are false charges. But courts have not universally recognized that privilege. Judge Davis ruled that Fox could not use it as part of the defense. That gutted a foundational component of Fox’s strategy;” “the judge decided that he would allow Dominion to issue a subpoena compelling Mr. Murdoch to take the stand, presenting the prospect of an hours long grilling of the aged media tycoon – he is 92 – by Dominion’s dogged litigation team.”

So one lesson to be learned from this case is, that political views of the judge matters – a judge more sympathetic to Fox may not have given all those procedural freebies to Dominion – and without “the election company’s lawyers broad access to the private communications of Fox employees,” or the pressure “that Dominion could also sue the larger Fox Corporation” – and with acceptance of the “neutral reporting privilege,” who knows how the case would have gone if a different judge was on the bench?

The other lesson is that journalists do want (and feel that they really need) to be able to lie. That “the Supreme Court has given media organizations considerable latitude to publish even false information,” as the *New York Times*’ report gently summarized the gist of *New York Times v Sullivan* is the saving grace of American journalism. And needless to say, lies come in two varieties: lies of commission (of which Dominion accused Fox) – and lies of omission, which happen when newsworthy evens are not being reported at all.

Those latter are harder to pinpoint, because they are covered in press’ silence. And yet, from my personal experience I know of one piece of news that cries out to be told, but mainstream journalists adamantly refuse to bring it to the public’s attention: the above-mentioned bizarre right to act from the bench “maliciously and corruptly” which judges gave themselves in *Pierson v Ray*. My hundreds of e-mails and calls to journalists go unanswered (including to the *New York Times*’ own William Rashbaum who “focuses on political and municipal corruption, the courts, terrorism and broader law enforcement topics” but who apparently does not feel that “corrupt and malicious” judging falls into this category); nor does Justin Elliott of ProPublica who broke the story of Justice Thomas’ lavish travels at the expense of a billionaire friend think that anything is off with arbitrary, “corrupt and malicious” “judging”; nor – closer to home – does the host of the main political “public” radio show in my town – WNYC’s Brian Lehrer

show; Brian won't put me on air when I call in (as WNYC explained to me, the word "public" in the "New York Public Radio" means not that the public has editorial control over the contents of what is being broadcasted – but that the public pays salaries of those who exercise editorial control). Apparently, judicial fraud is not the subject for polite conversation – which should focus exclusively on the horrors of Trump and Fox News.

The bottom line is, that contrary to the *New York Times* report, the Dominion/Fox brouhaha is not about reporting the truth but about the very vague limits set on reporting lies (and about politically biased judging to boot). And of course, *New York Times* is perfectly comfortable lying – lying by commission and by omission, lying about many things – the "corrupt and malicious" federal judiciary including. Isn't this what the hard-fought landmark case *New York Times v Sullivan* is all about, after all? Having won it way back when, the *New York Times* can lie all it wants, even when (and especially when) it claims to champion the truth, as it did in its Fox/Dominion report. "The truth matters?" "Lies have consequences?" No, not for the likes of the *New York Times*, *ProPublica* and WNYC...

Lev Tsitrin is the author of "[Why Do Judges Act as Lawyers?: A Guide to What's Wrong with American Law](#)"