A BIPARTISAN CASE AGAINST *NEW YORK TIMES V. SULLIVAN*

David McGowan[*] — Dec. 6, 2021 draft

The actual malice rule of *New York Times Co. v. Sullivan*[1] is iconic because of its beneficiaries, not its reasoning. The immediate beneficiaries of that rule were civil rights advocates and their movement; the general beneficiaries were established media firms. Benefits to civil rights advocates, and the intolerable prospect that libel laws could be used to suppress reporting of Southern racism, give the case its moral force. Benefits to established media firms account for the expansion of the holding and its entrenched status. But the reasoning itself is a pastiche of history and topical concerns held together by a plausible assumption about the economic incentives of publishers and an unstated assumption about the cost structure of publishing. The cost structure assumption no longer holds, and the reasoning alone is insufficient to justify the actual malice rule. Apart from respect for precedent as such, therefore, the case for retaining that rule is weak. Current calls to revisit the case are more pronounced on the Right, but there is good reason to rethink the actual malice rule regardless of one's political views. Corollary doctrines—that a

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[1] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

defamation plaintiff must prove falsity and, in cases involving matters of public concern, damages, and that factual findings receive *de novo* review, should remain.

I. THE *SULLIVAN* STORY

Sullivan presented the Court with official misuse of common law doctrine to deter media coverage of thuggish police action in support of segregation.[2] At issue was a full-page ad, *Heed Their Rising Voices*, that described alleged police misconduct in Montgomery, Alabama. The ad included mistakes of fact. For example, it claimed that certain students at Alabama State College had been expelled after singing "My Country 'Tis of Thee" on the State Capitol steps; in fact they sang the National Anthem and were expelled for demanding service at a courthouse lunch counter on a different day.[3] The ad claimed "the entire student body" of the Alabama State College declined to re-register in protest, causing the dining hall to be padlocked "in an attempt to starve them into submission."[4] Not so. The names of prominent civil rights advocates were appended to the ad.

The ad did not accuse specific persons of misconduct, but Sullivan, the Commissioner of Public Affairs, wrote a letter to the *Times* asserting that he had been libeled and demanding a retraction. The *Times* wrote back, said it was investigating the factual assertions, found them substantially true (except for the padlocking of the dining hall), and asked Sullivan to explain how Sullivan thought the ad related to him. Sullivan did not reply, but shortly thereafter he sued the *Times* and four Alabama ministers.[5] Alabama's governor, John Patterson, then wrote a similar demand letter to the *Times*. The paper published a retraction of two paragraphs cited by the governor, but the text of the retraction pertained only to him, not to Sullivan.[6] Patterson sued two weeks later. Sullivan sought $500,000 in damages; Patterson sought $1 million.[7] Three other Montgomery County commissioners also sued, each asking $500,000, bringing the total damages claimed to $3 million. The *Times*

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[2] *See generally* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991).

[3] *Sullivan*, 376 U.S. at 259.

[4] *Id.*

[5] LEWIS, *supra* note 2, at 12 (the ministers were Ralph Abernathy, S.S. Seay, Fred L. Shuttlesworth, and J.E. Lowery).

[6] *Id.* at 13.

[7] *Id.* at 12–13.

made $4,800 from the ad.[8]

Sullivan's case was tried before the Hon. Walter Burgwyn Jones who, Anthony Lewis reported in his history of the case, was a devotee of the Confederacy—he administered the oath of office in a re-enactment of the investiture of Jefferson Davis, for example. Jones enforced segregation during trial, stating that Alabama law, not the 14th Amendment, governed.[9] The venire included 36 potential jurors, of whom two were Black. Sullivan's lawyer challenged them. The *Alabama Journal* published the names of the 12 seated jurors and printed a picture of them.[10]

Sullivan's witnesses testified that they thought statements in the ad related to Sullivan, and that their opinion of him would have been lower if they had believed the statements to be true, which they did not.[11] The *Times* defended on the theory that the ad was substantially true and could not reasonably be read to refer to Sullivan, and that the one unquestionably false statement—the padlocking of the dining hall—had nothing to do with him. The *Times* also challenged Sullivan's damages claim.

Judge Jones instructed the jury that the statements were libelous per se and that under Alabama law such statements were presumed to be false and presumed to cause damage. It was up to the *Times* to prove the truth of the statements "in all their particulars"[12] against this presumption. Undisputed testimony showed that the four ministers were not asked to consent to the use of their names and did not consent. They should have received a directed verdict in their favor, but the jury found them liable, too.[13] The jury awarded the full $500,000 demanded.

The Alabama Supreme Court rejected the *Times* appeal on the ground that ordinary usage could lead a reader to interpret a reference to "police" as referring to the person in charge of the police—Sullivan:

> We think it common knowledge that the average person knows that municipal agents, such as police and firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single

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[8] *Sullivan*, 376 U.S. at 260.

[9] LEWIS, *supra* note 2, at 25–26.

[10] *Id.* at 27.

[11] *Id.* at 27–31.

[12] 376 U.S. at 267.

[13] LEWIS, *supra* note 2, at 32.

> commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body.[14]

The Alabama Supreme Court's logic was defensible in the abstract. There are some groups discrete enough that to refer to the group is to refer to specific persons. A report that "the arresting officers" hit an arrestee so hard that they broke a baton on his head might well be actionable as referring to a small number of people.[15] But "the police" is not a small group, even in Montgomery, and the practical implications of the Court's application of this principle were intolerable. To generalize across the South, had the verdict been affirmed then unnamed officers beating protesters, setting dogs on them, or knocking them down with fire hoses—to say nothing of releasing prisoners into the hands of the Klan—could not be referred to as "the police" without risk of a libel suit by the official in charge of police, who could presumably testify that he, personally, did not harm anyone. The Alabama Supreme Court justices no doubt understood this point.

With respect to damages, the Alabama Supreme Court cited a prior ruling that "[b]ecause damages are presumed from the circulation of a publication which is libelous per se, it is not necessary that there be any correlation between the actual and punitive damages."[16] The Court held that the record contained sufficient evidence for jurors to infer malice sufficient to justify punitive damages:

> In the present case the evidence shows that the advertisement in question was first written by a professional organizer of drives, and rewritten, or "revved up" to make it more "appealing." The Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement. Upon demand by the Governor of Alabama, The Times published a retraction of the advertisement insofar as the Governor of Alabama was concerned. Upon receipt of the letter from the plaintiff demanding a retraction of the allegations in the advertisement, The Times had investigations made by a staff correspondent, and by its "string" correspondent. Both made a report demonstrating the falsity of the allegations. Even in the face of these reports, The Times adamantly refused to right the wrong it knew it had done the plaintiff. In the trial below none of the defendants questioned the falsity

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[14] N.Y. Times Co. v. Sullivan, 273 Ala. 656, 674–75 (1962), *rev'd*, 376 U.S. 254 (1964).

[15] A modified version of an example cited in Anthony Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 618 (1983) ("a story on the Philadelphia police . . . in which policemen had beaten a black man, 'breaking nightsticks on his head and shoulders'").

[16] *Sullivan*, 273 Ala. at 685.

> of the allegations in the advertisement. . . . On the other hand, during his testimony it was the contention of the Secretary of The Times that the advertisement was "substantially correct." In the face of this cavalier ignoring of the falsity of the advertisement, the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom.[17]

As the U.S. Supreme Court read Alabama law, "[g]ood motives and belief in truth do not negate an inference of malice, but are relevant only in mitigation of punitive damages if the jury chooses to accord them weight."[18]

Media coverage of Southern racism was important to the success of the civil rights movement. The U.S. Supreme Court worried openly that if the verdicts against the *Times* stood then the civil rights movement would suffer:

> And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished. The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.[19]

The Supreme Court reversed, imposing as a constitutional requirement "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[20] The jury had returned a general verdict, and had been instructed that general damages were presumed, so imposition of this rule entailed reversal.

But remand was not in the cards. The proceedings to date were not a testament to impartiality, and the Court presumably was realistic enough to understand that remand would likely reproduce the same verdict, particularly in view of the Alabama Supreme Court's assertion that substantial evidence existed to support a finding of malice. The Court therefore found the record insufficient as a matter of law to support such a finding—a conclusion indisputable as to the individual defendants—and separately ruled that the evidence was insufficient to show that the

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[17] *Id.* at 686.

[18] *Sullivan*, 376 U.S. at 267.

[19] *Id.* at 300–01.

[20] *Id*. at 280.

statements were made "of and concerning" Sullivan.[21]

Sullivan tempered if not eliminated the risk that biased juries would use the ostensibly neutral law of defamation to deter coverage of Southern racism. *Sullivan* thus carries the moral force of cases such as *NAACP v. Patterson*[22] and *NAACP v. Button*,[23] in which the Court recognized that the real-world stakes dwarfed the nominal dispute presented. It is hard to fault the opinion from a pragmatic point of view, given the social facts the Court was dealt. *Sullivan* is therefore a civil rights case as much as, and probably more than, a free speech case. Richard Epstein rightly perceived that "[t]he desire to reach the right result in *New York Times* had as much to do with the clear and overpowering sense of equities arising from the confrontation over racial questions as it did with any strong sense of the fine points of the law of defamation."[24]

Some have questioned whether the Court needed to go as far as it did. Professor Epstein has suggested that the Court could have tinkered with common law rules, such as by reading the "of and concerning" requirement strictly, as the Court did. This secondary holding would have sufficed for cases based on the ad, but it would not have covered cases in which mistakes were made in stories that named names. The Court's actual malice rule reached farther.

Professor Epstein also suggested that the Court might have required defamation plaintiffs to prove falsity, as the Court eventually did,[25] but portions of the ad were false, and the common law required proof of truth in all particulars.[26] The Court would have had to adopt a more diffuse rule based on the "gist" of the ad for that move to end the case.

A requirement that general damages be proved (subject to *de novo* review)

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[21] *Id.*

[22] NAACP v. Patterson, 357 U.S. 449 (1958) (reversing contempt order for failure to produce NAACP membership lists).

[23] NAACP v. Button, 371 U.S. 415 (1963) (holding application of laws against barratry unconstitutional as applied to NAACP).

[24] Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong*?, 53 U. CHI. L. REV. 782, 787 (1986).

[25] Phila. Newspapers v. Hepps, 475 U.S. 767 (1986).

[26] Epstein, *supra* note 24, at 794 (discussing how at common law "any statement that is wrong on matters of inessential details is treated as though it were false altogether").

rather than presumed would be a narrower approach, and the Court eventually got there, too,[27] but that rule alone would not address the Alabama Supreme Court's holding that the record would support an inference of malice. Even then, however, an additional rule addressing punitive damages would be required. As the Alabama Supreme Court perceived and ensured, the case could become a hard one to wrangle, though its contrivance and injustice were clear.[28] Justice Hugo Black, an Alabama trial lawyer, captured the point nicely in arguing for absolute immunity from suit for criticism of public officials.[29]

II. The Conservative Critique

The principal beneficiaries of the actual malice rule were established media institutions. The prospect of paying $3 million for an advertisement that earned around $4,800 constituted the "chilling effect," that the Court thought justified its rule. This effect is no more than a rational actor assumption tied to a further assumption that established media firms are to some extent risk averse. These assumptions entail that publishers will truncate expression to limit the expected cost of defamation suits. The difference between what could be published in a world of perfect information (including adjudication) and what would be published in a real world where mistakes happen, and management is averse to risk, constitutes the area of "chill."

The Court's assumption is crude in two respects. First, as noted above, some work could have been done to reduce the expected cost of defamation suits by strict policing of the "of and concerning" requirement and with strict rules governing damages. Neither approach would cover all cases, but each could lower expected costs without immunizing falsity published with an empty head but a pure heart. Second, the Court's rule creates costs it did not acknowledge by immunizing some false expression that could taint individual reputations and public discourse more generally.

Sullivan was a public official, and the actual malice rule initially was grounded in the defensible argument that criticism of public officials' discharge of public duties is criticism of government itself, which in turn must be protected in any government aspiring to democracy. The actual malice rule has expanded, however. It

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[27] Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 763 (1985).

[28] Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & Soc. Inquiry 197 (1993).

[29] *Sullivan*, 376 U.S. at 294–95.

extends to public figures, not just public officials,[30] "limited purpose" public figures, who are people in the public eye with respect to a specific subject,[31] and, in some cases, "involuntary" public figures, who are people thrust into the public eye even if they would rather have avoided it.[32] The extension altered the effects of the rule to protect expression that was not plausibly criticism of government itself. It is one thing to protect coverage of Southern racism against racist misuse of the common law; it is quite another to declare open season on the Muslim father of a son whose homemade alarm clock was confiscated by a teacher who thought it might be a bomb, even if the father fought back against his son's arrest by granting interviews.[33] And the idea that a restaurant is a public figure for purposes of reporting on its business because it advertises and is deemed a public accommodation bears no real relationship to the compelling facts of Sullivan.[34]

The expansion of the actual malice rule coincided with two other forces that began to erode support for the rule on the political Right. The first force was the Right's increasing adoption of the politics of grievance from, say, the mid-1990s onward, and the deep conviction among many conservatives that large media companies are biased against conservative views.[35] Because those media companies benefit from the actual malice rule, the rule became a candidate for expression of conservative grievance.

The second force was the democratization of expression. "Democratization" here means, as Eugene Volokh put it years ago, "cheap speech."[36] It refers to technology that allows inexpensive creation and distribution of content. Cheap digital cameras may lead to routine recording of images as a by-product of some activity, as with body camera images of police work, or opportunistic recording by non-professionals, as with phone videos of police work. Once created, content is cheap

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[30] Curtis Publ'g Co. v. Butts, 388 U.S. 130, 134 (1967).

[31] Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974).

[32] *Id.* at 345. *See also* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (establishing the category of involuntary public figure by holding that not all litigants became public figures for purposes of the relevant litigation).

[33] Mohamed v. Ctr. for Sec. Pol'y, 554 S.W.3d 767, 775 (Tex. App. 2018).

[34] Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 720–21 (2002).

[35] I take no view on whether the perceived bias exists. I contend only that the belief itself may be documented as an empirical fact.

[36] *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

to disseminate through websites or "social media" platforms. In 1960 it cost $4,800 to run an ad in a hard-copy newspaper that sold fewer than 1,000 copies in Alabama. The incremental cost of filming and distributing images of, say, the homicide of George Floyd, is radically lower.[37]

The *Sullivan* Court rightly worried that, given the technology of the time, "the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes [would] be greatly diminished"[38] if newspapers were subjected to liability such as Sullivan sought to impose. That is much less true today. It is not enough to go after a few Northern media outlets with high fixed costs and hope to scare the others. Anyone with a phone can be a reporter, and most people have a phone. Conservative opinion has tracked this development, for in addition to established media firms the Right maintains an equal conviction that "big tech" is biased against conservatives.

Both elements of this belief are on display in an opinion by the Hon. Laurence Silberman, of the D.C. Circuit. Dissenting in *Tah v. Global Witness Publishing, Inc.*,[39] Judge Silberman argued that *Sullivan* had "*no relation* to the text, history, or structure of the Constitution, and it baldly constitutionalized an area of law refined over centuries of common law adjudication."[40] "No relation" is a bit strong—the speech clause is text and to declare the common law exempt from its reach would pose at least a textual question—but the tendency of the comment is fair.

From there, however, the opinion veers overtly into ideological grievance. Judge Silberman writes that "[t]he increased power of the press is so dangerous today because we are very close to one-party control of these institutions" and contends that "ideological consolidation of the press (helped along by economic consolidation) is the far greater threat" than mere economic consolidation.[41] Lest there be any doubt, he maintains that "the bias against the Republican Party—not just

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[37] I refer to the economic cost. The presence of mind to film the encounter, and to do so consistently in the face of exceptional circumstances, was remarkable.

[38] *Sullivan*, 376 U.S. at 300.

[39] Tah v. Glob. Witness Publ'g, 991 F.3d 231 (D.C. Cir. 2021).

[40] *Id.* at 251 (Silberman, J., dissenting) (emphasis in original). To his credit, Judge Silberman surveys well the real-world stakes in *Sullivan*, and how the case was a potential vehicle to perpetuate Southern racism by deterring media coverage. The tension between the benefits of the case on that score and the costs he identifies remains unresolved in his dissent.

[41] *Id.* at 254.

controversial individuals—is rather shocking today, this is not new; it is a long-term, secular trend going back at least to the '70s."[42]

Judge Silberman thought "big tech" no better: "Silicon Valley also has an enormous influence over the distribution of news. And it similarly filters news delivery in ways favorable to the Democratic Party."[43] The opinion relates these views to *Sullivan* through the argument that the First Amendment "guarantees a free press to foster a vibrant trade in ideas. But a biased press can distort the marketplace. And when the media has proven its willingness—if not eagerness—to so distort, it is a profound mistake to stand by unjustified legal rules that serve only to enhance the press' power."[44] Dicta is probably too mild a word for these observations—one would have preferred they be in a speech or article—but they distill nicely a view held both widely and sincerely on the Right.

Justice Gorsuch added to this critique more recently in a dissent from denial of a writ of certiorari in *Berisha v. Lawson*.[45] Citing Professor David A. Logan's work,[46] Justice Gorsuch noted changes in the economic costs of creating and distributing content and questioned whether *Sullivan*'s reasoning applies to "a world in which everyone carries a soapbox in their hands."[47] The question is apt, and the answer, elaborated in Part IV, is that it does not.

III. THE LIBERAL CRITIQUE

Liberals do not attack *Sullivan* overtly. Recently, however, they worry a lot about some types of falsity. A March 2021 memorandum from House Energy and Commerce Committee chair Frank Pallone, scheduling a hearing modestly titled "Disinformation Nation: Social Media's Role in Promoting Extremism and Disinformation,"[48] stated that "Facebook, Google, and Twitter" use algorithms that

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[42] *Id.* at 255.

[43] *Id.*

[44] *Id.* at 256.

[45] Berisha v. Lawson, 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting).

[46] David Andrew Logan, *Rescuing our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759 (2020).

[47] *Berisha,* 141 S. Ct. at 2427 (Gorsuch, J., dissenting) (citing Logan, *supra* note 46, at 794).

[48] STAFF OF H. COMM. ON ENERGY & COM., 117TH CONG., HEARING ON "DISINFORMATION NATION: SOCIAL MEDIA'S ROLE IN PROMOTING EXTREMISM AND DISINFORMATION" (2021), https://perma.cc/RH8G-JBAU.

"often elevate or amplify disinformation and extremist content."[49] Chair Pallone's opening statement took a more pointed approach:

> It is now painfully clear that neither the market nor public pressure will force these social media companies to take the aggressive action they need to take to eliminate disinformation and extremism from their platforms. And, therefore, it is time for Congress and this Committee to legislate and realign these companies' incentives to effectively deal with disinformation and extremism . . . . That is why you are here today, Mr. Zuckerberg, Mr. Pichai, and Mr. Dorsey. You have failed to meaningfully change after your platforms played a role in fomenting insurrection, in abetting the spread of COVID-19, and trampling Americans civil rights . . . . The time for self-regulation is over. It is time we legislate to hold you accountable.[50]

In 2019, Representative Alexandra Ocasio-Cortez gained notoriety for questioning Facebook's Mark Zuckerberg about whether Facebook would remove political ads—core protected speech—that made false statements about a candidate:

> **REP. ALEXANDRIA OCASIO-CORTEZ:** Would I be able to run advertisements on Facebook targeting Republicans in primaries, saying that they voted for the Green New Deal? I mean, if you're not fact-checking political advertisements, I'm just trying to understand the bounds here, what's fair game . . . .
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> **MARK ZUCKERBERG:** I think probably.
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> **REP. ALEXANDRIA OCASIO-CORTEZ:** Do you see a potential problem here with a complete lack of fact-checking on political advertisements?
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> **MARK ZUCKERBERG:** Well, Congresswoman, I think lying is bad. And I think if you were to run an ad that had a lie, that would be bad. That's different from it being — from — in our position, the right thing to do to prevent your constituents or people in an election from seeing that you had lied.[51]

No doubt unintentionally, Representative Ocasio-Cortez echoed Sullivan's argument that the *Times* had in its files reports sufficient to falsify some statements in the *Heed Their Rising Voices* ad, and that it was therefore fair to hold the *Times* accountable. Facebook would be less likely to have access to trusted (internal)

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[49] *Id.* at 1.

[50] STAFF OF H. COMM. ON ENERGY & COM., 117TH CONG., OPENING STATEMENT AS PREPARED FOR DELIVERY OF CHAIRMAN FRANK PALLONE, JR. AT THE HEARING ON DISINFORMATION NATION: SOCIAL MEDIA'S ROLE IN PROMOTING EXTREMISM AND MISINFORMATION (2021), https://perma.cc/EB4D-V4XF.

[51] *You Won't Take Down Lies or You Will?: AOC Grills Facebook's Zuckerberg on Lies in Political Ads*, DEMOCRACY NOW! (Oct. 25, 2019), https://perma.cc/MW56-BUAF////// .

content that would allow for such checking, and though it does block some speech[52] it does not exercise the same kind of editorial control as the *Times*. Not coincidentally, it hosts content on a vastly greater array of subjects than the *Times*. If Representative Ocasio-Cortez meant to imply that *ex ante* review by platforms should be required, such a rule would significantly reduce the distribution of user-generated content and would thereby render public discourse less democratic.

Adam Schiff, Democratic Chair of the House Intelligence Committee, has repeatedly pressed Facebook and Amazon with a view to inducing those companies to regulate more strictly information that Schiff deems false regarding COVID vaccines.[53] The same is true of Senator Elizabeth Warren.[54] At first, COVID-related expression might seem a promising topic for speech regulation because scientific principles relating to vaccination may provide a basis sufficient to deem some statements to be false. Whether a particular substance impedes SARS-CoV-2 is presumably a testable claim that could be confirmed or disproved through experiments presently available. If falsity might be regulated as such—which is not the law at present—such a claim, if false, might be sanctioned. And if the claim were both false and had a close relationship with a commercial transaction, it presumably could be regulated with little or no free speech scrutiny.[55]

But there is a difference between a claim as to which such evidence exists and even a notionally factual claim for which conclusive evidence may be lacking, such as the claim that COVID may be traced to a lab in China. In form assertions on that topic are factual because in principle they might be disproved or verified, but the same is true of the question whether Oswald acted alone. If a regulator or plaintiff

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[52] *Facebook Community Standards, Transparency Center*, FACEBOOK, https://perma.cc/7HMW-GMW9.

[53] *E.g.,* David Shepardson & Susan Heavey, *U.S. Congressman Presses Facebook, Amazon on Efforts to Curb Vaccine Misinformation*, REUTERS (Sept. 9, 2021), https://www.reuters.com/business/healthcare-pharmaceuticals/schiff-presses-facebook-amazon-efforts-curb-covid-19-vaccine-misinformation-2021-09-09/.

[54] Letter from Sen. Elizabeth Warren to Andy Jassy, Chief Exec. Officer, Amazon.com Inc., (Sept. 7, 2021), https://perma.cc/N8WN-7MSG.

[55] *See* United States v. Caronia, 703 F.3d 149, 152 (2d Cir. 2012); Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc., 425 U.S. 748, 771–72 (1976) ("The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

bore the burden of proving falsity, then the absence of evidence would protect such claims.

Such statements are in turn different from statements that assert no factual claim, such as the assertion that states have overreacted to the virus and thus needlessly limited human freedom. That is political opinion and core protected speech. The target of Ms. Warren's shot across Amazon's bow is a book that appears to contain each of these claims.[56] Should some falsity—assuming a publication makes some scientific claims that are not true—vitiate the balance of the book? That was the common law defamation rule *Sullivan* sought to counteract with the actual malice standard.[57] Regulation of non-defamatory expression does not implicate *Sullivan*, but the degree to which falsity should be tolerated to avoid chilling opinion is relevant to both cases.

Liberal (or at least not conservative) academics have tended to like *Sullivan*. When the opinion issued, Harry Kalven praised it.[58] He wrote that "the Court was prepared to pay the high price of destroying a considerable part of the common law of defamation," and felt that this price might be justified because it allowed the Court to focus free speech doctrine on what he saw as its core justification—protecting expression from the use of the law to punish seditious libel. Because the verdict was a form of such punishment, it could not stand.[59] Recounting a conversation with Alexander Meiklejohn, Kalven agreed the opinion was "an occasion for dancing in the streets."[60]

But Kalven rightly saw that a flat prohibition on punishment of seditious libel

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[56] *See, e.g.*, Jonathan Jarry, *The Upside-Down Doctor,* McGill Off. for Sci. & Soc'y (June 4, 2021), https://perma.cc/YL65-MA4K.

[57] Depending on the degree to which expression is a commercial advertisement dressed up with some incidental social commentary, one can envision claims for misrepresentation or unfair business practices. The line-drawing problems in such cases may be difficult. For present purposes, I simply assume that some statements are both false and fully protected speech. In the case of scientific expression, one presumably would know whether one had data to back up a claim so, depending on the wording of the claim, scienter might not be a material issue.

[58] Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 Sup. Ct. Rev. 191 (1964).

[59] *Id.* at 205, 209.

[60] *Id.* at 221 n.125.

would immunize even deliberate lies, which *Sullivan* did not do.[61] He thought the result defensible because the Court was already rewriting libel law and there was only so much one opinion can do, and because the rule did not just apply to Southern racists but to criticism of all public officials. He did not explain why that mattered, which left countervailing considerations unexplored (though Kalven did recognize that the actual malice rule was a form of balancing).[62] Kalven also saw that "the invitation to follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art, seems to me to be overwhelming."[63] He was right about the progression, but did not discuss whether or how such an extension could be justified by a prohibition against seditious libel.

As time went on, and the expansion Kalven foresaw became reality, some academic reaction became more tempered. Early in her academic career, Justice Kagan rightly pointed out that "not all [libel] suits look like *Sullivan*, and the use of the actual malice standard in even this limited category of cases often imposes serious costs: to reputation, of course but also, at least potentially, to the nature and quality of public discourse."[64] She posited that *Sullivan* might have contributed to a political economy in which sensationalist journalism thrived,[65] thus connecting the decision to the type of sensationalism the liberal representatives cited above decry, and she wondered whether the decision gave the media as a whole too big a head.[66] On balance, though, then-Professor Kagan concluded that such concerns neither invalidated *Sullivan* when decided nor compelled its reconsideration.[67]

More recently, Professor David Logan rightly pointed out that a rule exempting empty heads from liability so long as they sit atop pure hearts is not the best way to promote diligent fact-checking.[68] He recommended paring *Sullivan* back to the

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[61] *Id.* at 220 (concluding that the concurring opinions for an absolute privilege had the better argument).

[62] *Id.* at 217, 220.

[63] *Id.* at 221.

[64] Kagan, *supra* note 28, at 204–05.

[65] *Id.* at 207.

[66] *Id.* at 208.

[67] *Id.* at 208, 215 ("the very facts that make *Sullivan* an oddity in libel law place it in the mainstream of First Amendment law generally").

[68] Logan, *supra* note 46. I know nothing of Professor Logan's politics; his critique is practical and functional, not based on originalism (even though it is cited by Justice Gorsuch's opinion). As

seditious libel justification the Court started with, and perhaps ending *de novo* review of constitutionally salient facts. He also mentions the possibility of creating causes of action without damages, in which the verdict would be one of falsity, thus presumably benefitting the Plaintiff's reputation.[69]

Judicial reaction from the Left has not been hostile to *Sullivan*. Notwithstanding her academic writing, Justice Kagan joined Justice Breyer's concurrence in *United States v. Alvarez*,[70] which struck down the Stolen Valor Act, a statute imposing criminal liability for lying about receiving a medal. *Alvarez* is the principal case defending at least some false statements as constitutionally protected. The point of the concurrence was to advocate use of proportionality of expected harm to punishment as a metric to evaluate constitutionality, but the opinion posited several benefits of protecting even false statements of fact:

> False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.[71]

Sullivan, quoting John Stuart Mill, was one authority cited for this claim.[72]

From the Left, therefore, support of *Sullivan* sits awkwardly with condemnation of lies. To return to current Congressional debates, even if Representative Ocasio-Cortez had in mind only a regime in which publication would be allowed so long as lies were removed when exposed, any such rule would run afoul of *Alvarez* and would be at odds with *Sullivan* in cases of actual harm to reputation.[73] In

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far as I can tell, he (admirably) has no ideological axe to grind in his piece.

[69] *Id.* at 812–13 (citing the "Libel Reform Project" of the Annenberg Washington Program in Communications Policy Studies of Northwestern University). The first mention of such an idea of which I am aware was Judge Leval's proposal in Pierre N. Leval, *The No-Money, No Fault Libel Suit: Keeping* Sullivan *in Its Place*, 101 HARV. L. REV. 1087 (1988).

[70] United States v. Alvarez, 567 U.S. 709, 730 (2012).

[71] *Id.* at 733.

[72] *Id.*

[73] Such a rule also would have little practical significance. If removal depended on a judicial finding of falsity, an election cycle would likely be over before the finding could be entered. If it did not, then the risk of tactical takedown demands would be high and the potential cost in expression

the next part I argue that this straddle is logically and practical untenable.

IV. WHAT THE CRITIQUES GET RIGHT

Political dissatisfaction is not a reason to overturn precedent. When dissatisfaction exists on both sides of the aisle, however, it may provide an opportunity to look for shared commitments and to examine how they relate to the law. It would be perverse to decry the degradation of public discourse while seeking to avoid discussion of the merits of a rule that plausibly contributes to that degradation. This Part argues that, subject to three qualifications, the present political economy of expression weighs in favor of overruling the actual malice rule.

As a first step, I would dispense with the argument that the actual malice rule has no basis in originalism.[74] If we disregard Robert Bork's defense of *Sullivan*,[75] the point is true but irrelevant. Originalism itself lacks a sound normative foundation and often reduces to the incorrect claim that to call something law intrinsically commits one to, or in some ontological sense entails, originalism as a methodology.[76] The list of well-functioning non-originalist doctrines, from common law rules such as course of performance as a mode of contract interpretation and rejection of dead-hand control in property law, to the made-up constitutional rights such as the right to appointed counsel, to being informed of one's rights when in custody, to freedom of "association," and to the requirement that defamation

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could be high as well—though only if *Alvarez* was modified or overruled.

[74] Berisha v. Lawson, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting).

[75] *E.g.,* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 168–69 (1989). That Judge Bork defended *Sullivan* as consistent with originalism is a measure of how far originalism's formative cluster of practices and arguments has changed as it gained traction in the judiciary through the appointment process. Judge Bork's endorsement stemmed from the fact that he considered protection of political speech to be implicit in constitutional government. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971), taking a position that agreed in part with Professor Kalven's "central meaning" thesis, though not with extensions from that core case.

[76] *Compare* BORK, *supra* note 75, at 173–74 (a relatively candid statement of the point), *with* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION (2013), LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) (providing normative defenses of originalism as against such critiques), *and* David S. Law & David McGowan, *There Is Nothing Pragmatic About Originalism*, NW. U. L. REV. COLLOQUY (2007) (review of the McGinnis and Rappaport argument).

plaintiffs prove falsity (which no originalist is attacking),[77] all prove the point. Originalism is normatively vacuous, inconsistently applied, even less democratic than the common-law methodology it detests, and often not even very good history.[78]

The originalist critique of *Sullivan* is indeed a kind of rhetorical cheat. It condemns the case from the secure position of a world in which coverage of the civil rights movement thrived and contributed indelibly to the nation's understanding of race and discrimination. That coverage was materially furthered—plausibly was conditioned on—the rule of *Sullivan* that originalists now condemn.[79] Perhaps coverage would have been the same had the Supreme Court denied review or affirmed, which is at least a plausible implication of the originalist critique, but that conclusion is not obvious and is to a significant degree counterintuitive.[80] That originalism has a problem with the result in *Sullivan* is yet another problem with originalism, not with *Sullivan*.

Having said that, reciting criticisms of originalism does not constitute a defense of the actual malice rule. It instead threatens to divert discussion of that rule into purely partisan, and thus unproductive, terms. I recite the points here because there are important rules in the *Sullivan* jurisprudence that should survive even if the

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[77] Phila. Newspapers v. Hepps, 475 U.S. 767 (1986).

[78] *See e.g.,* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); Mitchell N. Berman, *Originalism is Bunk,* 84 N.Y.U. L. REV. 1 (2009).

[79] For an analogue of originalism's strenuous efforts to bring *Brown v. Board of Education*, 347 U.S. 483 (1953), into its fold, even though no one involved in the case thought originalism could sustain its result, *see* Michael W. McConnell, *The Originalist Case for* Brown v. Board of Education, 19 HARV. J. OF L. & PUB. POL'Y 457 (1995); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2365 (2002) ("Virtually no one has been persuaded by McConnell's learned account.").

[80] I say plausible because Justice Thomas's opinions, and Judge Silberman's, focus on the actual malice rule of the case, not on other elements such as the Court's de novo review of the finding that the ad was "of and concerning" *Sullivan*. McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., dissenting). Given the originalist emphasis on defamation as "almost exclusively the business of state courts and legislatures," *id.*, it is not clear to me how an originalist could endorse the *Sullivan* Court's alternative holding, but it is fair to say that originalists have not recently surveyed that holding. Richard Epstein wrote that the *Sullivan* Court "could have constitutionalized the 'of and concerning' requirement," Epstein, *supra* note 24, at 792, a comment I take as implying judicial creativity is at odds with originalism.

actual malice rule does not, and it is important to defend them against an originalist attack. Turning to practical considerations shows legitimate vulnerability in the actual malice rule. That rule creates social costs by protecting falsity and it rests on assumptions that have weakened over time. If it would be socially desirable to weaken the rule, that step should not be rejected just because conservatives would consider it a win.[81]

Professor Logan addresses *Sullivan*'s pragmatic arguments when he points out that *Sullivan* rested on a political economy of public discourse that no longer exists. Back then, there were three licensed television networks, regulated by the FCC, and the news cycles were comparatively long, allowing time for fact-checking with a comparatively lower risk of being "scooped." Ad and subscription revenue paid for it all. Now, however, costs of creating and distributing expression have fallen and ad revenue has shifted away from conventional media firms.[82] Professor Logan decries the erosion of shared understandings of what is fact and what is fiction—a collapse of a common epistemology concerning much of public discourse.[83] He then surveys defamation litigation statistics and concludes that media defendants face little practical threat from such suits.[84] He concludes "[t]he Court's many constitutional protections made sense in the 1960s, when libel judgments threatened hard-hitting reporting done by major news organizations, but there is scant evidence suggesting that that is a risk in the current environment."[85]

I would quibble a bit with this analysis—the low level of risk from defamation suits depends in part on the *Sullivan* web of rules, so the level of risk as such cannot be used to critique those rules. But the points Professor Logan makes are important. Justice Gorsuch cited Professor Logan's work in his dissent from a denial of a petition for writ of *certiorari* in *Berisha v. Lawson*.[86] Justice Gorsuch puts a slightly different emphasis on the changes, however, and in doing so gets to the heart of the

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[81] *Cf.* George Orwell, *Looking Back on the Spanish War, in* THE ORWELL FOUNDATION (Aug. 1942), https://perma.cc/6NQ4-HAD2 ("These things really happened, that is the thing to keep one's eye on. They happened even though Lord Halifax said they happened.").

[82] Logan, *supra* note 46, at 793–805.

[83] *Id.* at 804–07.

[84] *Id.* at 810.

[85] *Id.* at 812.

[86] 141 S. Ct. 2424, 2426 (2021) (Gorsuch, J., dissenting).

matter:

> Since 1964, however, our Nation's media landscape has shifted in ways few could have foreseen. Back then, building printing presses and amassing newspaper distribution networks *demanded significant investment and expertise* . . . . In 1964, the Court may have seen the actual malice standard as necessary "to ensure that dissenting or critical voices are not crowded out of public debate." But if that justification had force in a world with comparatively few platforms for speech, it's less obvious what force it has in a world in which everyone carries a soapbox in their hands.[87]

In this passage, Justice Gorsuch usefully focuses Professor Logan's critique on the costs of creating and distributing expression. In doing so he draws a distinction analogous to the familiar rule that antitrust law seeks to protect competition, not individual competitors.[88] Free speech theory and doctrine is concerned with public discourse, not the economic welfare of individual firms. The *Sullivan* majority thought that individual firms had to be protected because they sustained public discourse, and defamation liability combined with firms' rational risk aversion would therefore harm public discourse. This view depended implicitly on the significant *ex ante* investment such firms required and the revenues they needed to cover significant operating costs.[89] Justice Gorsuch wonders whether that premise holds when expression does not depend on such costs, though his opinion hints that the answer may be evident.

Where the variable costs of expression are negligible and the fixed costs might be incurred without regard to public discourse (a cellphone that would be bought just for personal use but which might be used to film a notable event), or where costs of distribution are not tied to any specific form of expression and may be supported by ad revenue based on use not tied to any specific form of expression (Facebook, Twitter, Google), the premise that firms need economic protection from

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[87] *Id.* at 2427 (Gorsuch, J., dissenting) (emphasis added).

[88] Atl. Richfield Co. v. USA Petrol. Co., 495 U.S. 328, 338 (1990) ("The antitrust laws were enacted for 'the protection of *competition,* not *competitors.*'" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))).

[89] More specifically, like most established firms, the N.Y. Times likely had high fixed costs, (buildings, presses, trucks, some employees, insurance) and variable costs (paper, ink, distribution) noticeably higher than the costs of disseminating digital content. I don't think the *Sullivan* majority thought explicitly in terms of fixed, variable, or average costs, or whether the costs were sunk. My intuition is that the majority's implicit conception of media firms entailed significant fixed costs and, for print, noticeable variable costs.

defamation suits in order to sustain vibrant public discourse is weakened. Provided that Congress retains the rule that intermediary firms are not liable for the content of user-generated content, which I discuss below, then public discourse would not be at significant risk if the actual malice rule were overturned.

Put slightly differently, the chill that worried the *Sullivan* majority was risk aversion informed in part by the fact that the *Times* was a tempting (solvent) target for defamation plaintiffs and by the presumed fact that at a certain point economic rationality would cause it to pare back its coverage. The *Times* had large costs to cover, and it might not have been able to do so had it been bled to death by racist misuse of defamation law. In 1964, suing the *Times* might squelch publication of stories about cops setting dogs on protestors; in 2021, cellphone recordings of the event would be everywhere, and lawsuits would be a poor tool to wield against that reality, which makes it less likely that a *Sullivan*-like campaign of defamation suits would be brought. Absent additional facts, such as doctoring or manipulation, the images themselves would not be false factual assertions, so bystanders filming events would have little to fear doctrinally. And, even if someone wanted to sue, the practical probability is that bystanders with cellphones might be too numerous and, individually, not rich enough to make litigation worth the effort, particularly given that investing money in such a suit would not remove the content from the Internet.

The economics of the actual malice rule announced in *Sullivan* were the tail of the opinion, not the dog. The dog was the moral and political importance of the content of the ad. Rules should not outlive their justifications as a general matter, and certainly not where they create social costs. The actual malice rule fails on both counts. At present, all else being equal, its reasoning does not justify its costs and overruling would be warranted.

This conclusion needs to be qualified in three respects. First, *Sullivan* supports rules that remain useful even if the actual malice rule for public figures is eliminated. The rules that defamation liability requires proof of falsity, and that constitutionally salient factual findings are reviewed *de novo*, should stay. At common law, defamatory statements were presumed false, with truth being a defense.[90] Drawing on *Sullivan*, *Philadelphia Newspapers v. Hepps*[91] changed that rule for public figures. *Hepps* is sound on its own terms. Plaintiffs concerned about their

[90] Logan, *supra* note 46, at 791.

[91] Phila. Newspapers v. Hepps, 475 U.S. 767 (1986).

reputations will typically have good access to the facts about their actions—better than defendants, in many cases—and it is reasonable to require them to plead and prove falsity, which is the fact that would render a statement harmful to public discourse. If the public figure category is eliminated with the actual malice rule, *Hepps* should remain for at least expression related to matters of public concern. The rule in *Hepps* does no systematic harm to public discourse and is an example of breathing space that could usefully enhance it. That originalism would presumably condemn *Hepps* with *Sullivan* is, as noted above, a strike against originalism, not *Hepps*.

Similarly, I differ with Professor Logan with respect to *de novo* review of constitutionally salient facts,[92] a principle that is employed in *Sullivan* and required in federal cases by *Bose Corp. v. Consumers Union of United States, Inc.*[93] He notes that the rule is at odds with common law, which is true, and posits that allowing judges to serve as shadow jurors makes appellate review in defamation cases too complicated and expensive.[94] I doubt that. Reverting to deferential review has no clear relationship to cost reduction or complexity because on appeal both sides will tell the best story they can regardless whether review is *de novo* or for clear error. On the plus side, however, *de novo* review gives more leeway to judges who might be able to counteract the sort of local partisanship that dominated *Sullivan* because they are not immersed in it.[95]

The complaints against the actual malice rule leave open the question whether some level of scienter should be required to prove liability even if actual malice is not. *Gertz v. Robert Welch, Inc.*[96] holds that states may set liability rules for private figures so long as the rules require some showing of fault. I would leave this rule in place. It is true that falsity might harm discourse even when care is taken, but deterrence considerations have no weight where care is taken and alternatives to liability, such as a declaratory judgment action along the lines Judge Leval proposed,[97] could remain available. The concerns raised in *Sullivan* also weigh in favor of

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[92] Falsity of and concerning the plaintiff, and damages.

[93] Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).

[94] Logan, *supra* note 46, at 813.

[95] In other words, a circuit panel is less likely to be comprised of persons subject to the same forces as a trial court, and the Supreme Court still less so.

[96] Gertz v. Robert Welch, Inc., 418 U.S. 323, 347–48 (1974).

[97] Leval, *supra* note 69.

retaining the rule of *Gertz* requiring proof of damages in cases involving expression relating to matters of public concern.[98] The Court's reasoning on this point was sound without regard to the actual malice rule.[99]

Finally, just as one cannot rely on the low risk of defamation liability to reject *Sullivan*, one cannot rely on the reduced cost of disseminating expression without looking at the liability rules that keep that cost low. The intermediaries that disrupted the old-media political economy of expression—Twitter, Instagram, Facebook, Google—have costs, too. They cover those costs in part by publishing user-generated content that attracts users whose attention can be sold to advertisers.[100] User-generated expression has flourished because intermediaries do not impose a stringent *ex ante* filter on content.[101] At present they need not fear liability based on a user's content because Section 230 of the Communication Decency Act[102] deems such intermediaries not to be the publishers of content they do not generate. This provision does not eliminate liability—unlike the actual malice rule it does nothing for the authors of false content—but it does limit potential liability relative to at least some alternative possible rules.[103]

The Right seems to think that criticism of Section 230 is of a piece with criticism against *Sullivan*. It is not. As Justice Gorsuch's opinion illustrates, the functional

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[98] Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 763 (1985), limits this rule to such cases.

[99] 418 U.S. at 349 ("[T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.").

[100] TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016).

[101] *E.g.,* Eric Goldman, *Why Section 230 Is Better Than the First Amendment,* 95 NOTRE DAME L. REV. 33 (2019).

[102] 47 U.S.C. § 230.

[103] *See* Cubby, Inc. v. Compuserve Inc., 776 F. Supp. 135 (S.D.N.Y. 1991) (stating, before Section 230 was enacted, that an intermediary might be liable as a distributor, and thus liable to the extent it distributed content it knew or should have known was false); *see also* Ashutosh Bhagwat, *The Law of Facebook*, 54 U.C. DAVIS L. REV. 2353, 2391 (2021) ("[W]ithout Section 230, defamation liability alone would shut down social media as we know it. Indeed, it was the realization that even traditional media could not perfectly police falsehoods about even public figures that lead the Supreme Court, in the New York Times v. Sullivan case and its progeny.").

case against the actual malice rule rests in part on the liability rules governing platforms. To a platform the incremental value of any particular Tweet, post, or story, is probably low, so even a modest risk of liability could lead platforms to remove unobjectionable expression and could undercut the proliferation of expression that Justice Gorsuch used to question *Sullivan*. Suffice it to say that in the absence of Section 230 the case for some form of legal protection for distributors of user-generated content would remain. Albeit derivatively, the actual malice rule is one such form of protection. In my view it would be better to focus liability on authors rather than intermediaries, and thus to modify the actual malice rule while leaving Section 230 in place. If the Right is intent on tightening rules for platforms, however, that desire tends to erode the practical case for its assault on the actual malice rule.

V. WHAT THE RESPONSES TO THE CRITIQUES GET WRONG

Objections have been made to abolition of the actual malice rule.[104] To me they reduce to the concern that abolishing the rule will make a bad situation worse by deterring expression by solvent and thus suable speakers (the New York Times, Fox News) and by putting such speakers at a disadvantage relative to impecunious speakers who are not worth suing (random people on Twitter), who thus lie with impunity because they face a low expected cost of liability.[105]

Parts of this critique have merit, but they do not coalesce into a compelling case for the actual malice rule. The critique holds that: (i) firms that traditionally incurred high costs of reporting crucial stories are already suffering as advertising

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[104] Professor RonNell Andersen Jones has noted the challenging economic landscape for established media firms, and the proliferation of false content on platforms, and stated that libel law is an imperfect means for addressing problems of falsity in public discourse. *See, e.g.* Adam Liptak, *A First Amendment Precedent,* N.Y. TIMES, Aug. 18, 2005 (quoting Professor Jones as saying that "[t]here is a reason that Donald Trump and other politicians hate the *Sullivan* standard so much," concluding "[i]t would be a massive blow to American-style free speech to lose"); *see also* Mark Walsh, *Will the Supreme Court Reconsider a Landmark Defamation Case?,* ABA J. (July 22, 2021), https://perma.cc/DN48-DUEM (quoting Professor Jones) ("[t]he worry here might be that reconsidering *Sullivan* creates a vulnerability for those entities that are attempting to maintain reputations for responsible newsgathering"). No doubt Professor Jones's views cannot be fully apprehended from quotations in the above news accounts, but reforming the actual malice rule would not affect the requirement to prove falsity or that a statement is of and concerning the plaintiff. And while eliminating the rule would not solve all problems, it does not mean that it would solve none.

[105] I accept this premise, though I note that even a modest expected cost might represent a greater fraction of such speakers' wealth than would be the case for an established firm.

revenue is siphoned off by social media; (ii) increasing the expected costs of defamation verdicts by abolishing the actual malice rule would deter publication of some expression that would be published under the rule; (iii) impecunious defamers who might blog or Tweet defamatory lies would face a low expected cost of defamation because they are not worth suing; such that (iv) without the actual malice rule the problem of false expression crowding out responsible expression will get worse; ergo (v) the cost of keeping the rule is less than the cost of doing away with it.[106]

If we assume that speakers are at some level averse to risk, the basic rational-actor logic outlined above supports claim (ii). In a world of perfect information and judgment, speakers would not shy away from controversial but non-defamatory expression, but that is not our world. One should therefore expect that lowering the liability hurdle—from actual malice to negligence, for example—will result in some degree of foregone expression by solvent speakers.

But foregone expression is only part of the relevant cost analysis. False speech is costly too. When truth is important the law typically increases the expected cost of falsity, which is why witnesses are sworn. Using the same rational actor assumption, a rule that declines to punish negligently false expression will tend to reduce the credibility of all expression falling within its domain. The reduction in credibility is a cost, too.[107]

In theory one might try to estimate the relative cost of foregone expression and set it against the cost of reduced credibility, but such estimates would be notional and subject to ideological bias. Even if rigorous models to estimate this balance could be constructed, rigorous data to run them would be hard to come by. Even so, it is important to recognize that without the actual malice rule an author's choice is not between publishing a full story or publishing no story. Expression may be tailored to the facts that can be established, so the tradeoff is between what the actual malice rule would protect and some more measured account.

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[106] Thanks to Eric Goldman and Eugene Volokh for pressing me on these points.

[107] *Cf.* George A. Akerlof, *The Market for Lemons: Quality, Uncertainty, and the Market Mechanism,* 84 Q.J. ECON. 488 (1970); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988) (stating that false statements impede the marketplace of ideas). All this ignores error costs to consumers—readers who fail to act even when action would be warranted by true statements they deem suspicious, and readers who act based on falsity they trust too much.

Under the actual malice rule, for example, an author who suspects but is not certain that a corporate executive is running a scam in the form of a blood-testing lab may accuse the executive of corruption so long as the author does not recklessly disregard contrary facts. But under a negligence regime the author might well simply withhold the ultimate allegation of corruption and report verifiable facts uncovered through investigation—persons within the company have expressed objections to its testing, major customers have terminated agreements, agencies are investigating, etc.[108] So long as the rule of *Hepps* is retained, the risk of such reporting would be low.

Nor is it clear that the actual malice rule ameliorates the crowding-out risk. The rule blurs distinctions between established firms and impecunious bloggers by lessening the expected cost of falsity for each of them. An empty head atop a pure heart works in both cases. Assuming differential probabilities of suit based on the defendant's wealth, abolishing the rule would increase the expected cost of falsity for established firms more than for impecunious bloggers, and thus would tend to differentiate between them by providing greater assurance for the veracity of content published by established firms.

In addition, the crowding-out argument seems to assume that consumers are willing to substitute the expression of established firms for lower-cost expression. That assumption makes sense to the extent consumers choose expression for its veracity, but it does not hold if consumers choose expression to achieve some sense of meaning untethered from facts—such as vindication of personal beliefs or shared group identity. Such consumers might distrust content precisely because it comes from established firms—or the "fake news media," as such persons might

[108] Each of these intermediate facts may present their own problems of establishing truth. That is one reason I tend to favor retaining at least a negligence standard for liability. But there is still room to word reports precisely. For example, under a negligence regime a story that says "anonymous sources at customer *X* state that *X* has terminated *Y* as an authorized lab" would not be actionable unless the publisher of the story was at least negligent in republishing the statement. Put slightly differently, the scienter requirement would apply to each accused publisher. At present, a plaintiff alleging defamation based on republication must plead and prove facts showing the republication was made with actual malice. *Cf* Nunes v. Lizza, 12 F.4th 890, 901 (8th Cir. 2021) (applying actual malice standard to motion to dismiss defamation claim based on republication). Under a negligence regime the requirement would be lowered to demand evidence that a republisher failed to exercise reasonable care in assessing the probable veracity of the allegedly defamatory republished statement.

call it—regardless of its content. Preserving the actual malice rule does nothing for consumers who willingly dive into intellectual rabbit holes only to come out the other side to find themselves breaking into the Capitol or assaulting a pizza parlor. As noted above, it makes the problem worse by lowering the cost for expression that turns out to be "fake," thus giving demagogic attacks on established firms a legal foothold they otherwise would lack.

Lastly, claims (iii) and (iv) also embody a bias towards specific competitors in the marketplace of ideas, rather than a bias in favor of competition. To some extent that is understandable. Established firms are the source of a lot of important information for most people. For that reason, one should not ignore the economic health of such speakers, though their health is not, as such, a free speech goal.[109] But even if a subsidy for established firms was desirable, it does not follow that it should take the form of the actual malice rule. Tax breaks would be less costly in terms of the credibility of expression, for example.[110]

On balance, therefore, I have seen no strong case to believe that (v) is true. Absent flat immunity for deliberate lies, some amount of risk aversion will exist, and the fact of risk aversion alone therefore should not determine the liability standard. Persons presumed bold enough to investigate serious wrongdoing should not simultaneously be presumed so timid that they would faint at the prospect of defending a negligence claim. The costs of falsity are more diffuse and thus harder to measure than a verdict against a specific firm, it is true, but it does not follow that the costs of falsity are smaller, either in one case or in general.

None of these claims shows that the Court should stand by its rule that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[111] That claim is not an immutable truth. There is good reason

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[109] I am here assuming that the premise of economic distress is true. One would want rigorous analysis before endorsing that conclusion across a range of established firms that is broad enough to place competition, not just a subset of competitors, at risk.

[110] Although if an established firm paid no taxes, some alternative means would need to be found. *See FedEx Responds to the New York Times Article from Nov. 17, 2019*, FED. EXPRESS (Nov. 17, 2019), https://perma.cc/D6W2-7YAY (claiming that "the New York Times paid *zero* federal income tax in 2017 on earnings of $111 million, and only $30 million in 2018—18% of their pretax book income"). The general point is that there is no logical reason to believe the actual malice rule is an efficient subsidy.

[111] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

to believe that falsity may tend to drain other speech of what it is that matters. To the extent one is persuaded that is the case, the actual malice rule is part of the problem, not the solution.

VI. Time for a Change?

Those, like me, who are not troubled too much by the fact that a decision may depart from some flavor of originalism have little standing to object to changes in even revered precedents. If one accepts that free speech doctrine may change with the times, then the doctrine may change when times change. The best view of the matter is that *Sullivan* was defensible at the time in view of the extraordinary circumstances the Court faced. That view entails acceptance of the idea that free speech doctrine is provisional and rooted in the political economy of public discourse at a given point in time. It follows that *Sullivan*, resting on such grounds, can only be defended on such grounds. At this point, the defense comes up short.

Falsity is bad. It should not be tolerated absent compelling reason. When the reason for a rule expires, the rule should go with it. These should not be controversial propositions. Neither should be the case against *Times v. Sullivan*.