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I. INTRODUCTION

The Supreme Court's decision in *New York Times Co. v. Sullivan*[1] was met with acclamation perhaps almost as widespread among scholars as journalists.[2] For the first time, the Court accorded constitutional recognition to defamatory speech.[3] In particular, the ruling's newly minted "actual malice" standard barred public officials from recovering damages for a defamatory falsehood relating to their official conduct unless they showed that the defendant either knew the statement was false or acted with reckless disregard of whether it was false.[4] Further stiffening this formidable evidentiary obstacle was the requirement that an official establish actual malice with "convincing

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1. 376 U.S. 254 (1964).

2. Harry Kalven famously quoted Alexander Meiklejohn as pronouncing the decision "an occasion for dancing in the streets." Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125.

3. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (repudiating the proposition that libel enjoys "talismanic immunity from constitutional limitations"). Before *Sullivan*, the Supreme Court had regarded defamation as unworthy of First Amendment protection. For the first time, the Court accorded constitutional recognition to defamatory speech. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250, 256–57 (1952) (stating in dictum that libelous statements "are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

4. *Sullivan*, 376 U.S. at 279–80.

clarity" rather than by mere preponderance of the evidence.[5] However daunting this requirement, it is consonant with the "central meaning of the First Amendment"[6] that *Sullivan* conferred this potent safeguard on speech at the heart of democratic self-government.[7] Such a robust hurdle to recovery encouraged citizens to criticize government authorities without fear of repercussion,[8] and was congruent with the privilege enjoyed by public officials against whom private citizens brought suit.[9]

In the years after *Sullivan*, however, the Court extended the actual malice standard to areas that—with one exception[10]—did not directly implicate either of these rationales, i.e., the need to insulate government critics from retaliation or the symmetry of speech rights between public officials and citizens. This Article discusses instances of this phenomenon, highlighting in each case how the Court was not necessarily compelled to import the actual malice standard into a different context. While the requirement's spread to new settings is now established, it was not inevitable. Given the existence of plausible alternatives, this Article considers what dangers may lurk in the repeated transplantation of this nearly insuperable evidentiary barrier[11] to scenarios detached from its origin in *Sullivan*.

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5. *Id.* at 285–86.

6. *Id.* at 273.

7. *See id.* at 270 (declaring "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *see also* Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion."); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970) (including provision for participation in decision-making by all members of society among principal functions of First Amendment).

8. *Sullivan*, 376 U.S. at 279 (internal quotation marks omitted) ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions–and to do so on pain of libel judgments virtually unlimited in amount–leads to . . . self-censorship.").

9. *Id.* at 282.

10. *See* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (requiring demonstration of actual malice in defamation actions seeking criminal sanction).

11. *See* 33 A.L.R.4th 212 (1984) ("[I]t is obviously extremely difficult for the private individual suing in defamation to establish actual malice, as can be seen from the general lack of success of defamation actions in cases where the actual malice standard is imposed on private individuals suing media defendants."); David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 509–10 (2001) (reporting study of defamation and related

II. BEYOND PUBLIC OFFICIALS: THE VARIED DEPLOYMENT OF THE ACTUAL MALICE REQUIREMENT

A review of cases adopting the *Sullivan* standard suggests the appeal of a powerful and increasingly familiar concept. To some extent, actual malice apparently becomes convenient shorthand for the impulse to protect a particular type of speech. Though the impulse is generally laudable, one can question whether this particular requirement was finely tailored to the balance of constitutional and governmental interests at stake in each instance. It seems doubtful that if the actual malice standard had not already existed, the Court would have devised that precise test to serve the First Amendment values implicated in each case.

A. Extending the Actual Malice Shield to Other Libel Defendants

The Court's willingness to stretch *Sullivan*'s protection to situations well beyond the circumstances of that case became manifest just three years after *Sullivan*. In *Curtis Publishing Co. v. Butts*,[12] the Court extended the actual malice rule to speech pertaining to nongovernmental plaintiffs who qualified as "public figures."[13] In his decisive concurrence,[14] Chief Justice Earl Warren declared artificial a stark dichotomy between public officials and private individuals, since many persons outside of government exercise power and influence comparable to that of officeholders.[15] Thus, *Sullivan*'s standard should apply as well to people who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[16] Application of the actual malice

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claims filed against "media defendants" finding that claims brought by plaintiffs who were public figures or public officials incurred pretrial dismissal rate of 85%, compared to 68% for private figures).

12. 389 U.S. 28 (1967). The Court issued a similar decision in a companion case, Associated Press v. Walker, 388 U.S. 130 (1967).

13. *Id.* at 164–65 (Warren, C.J., concurring).

14. The holding in *Butts* rested on a somewhat complex set of alignments. For a description, see Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill, Butts, *and* Walker, 1967 SUP. CT. REV. 267, 275–78.

15. *See Butts*, 388 U.S. at 163–64 (Warren, C.J., concurring in the result).

16. *Id.* at 163–64.

rule to such individuals, he reasoned, would serve to safeguard the public's right to "be informed on matters of legitimate interest."[17]

Though grounded in reasonable observation, Warren's conception of public figures subject to the same scrutiny as public officials was not the only way to address the outsized influence wielded by nominally private individuals. The Court could have adhered to *Sullivan*'s overriding focus on unimpeded criticism of public officials as crucial to sustaining democratic self-government. A standard constructed from this perspective would not have fully equated libel of public figures with false statements about the performance of a public official. After all, while a well-known actor[18] or famous professional athlete[19] may qualify as a public figure, the basis for that designation has little relation to democratic accountability. Thus, for example, a more calibrated approach could have recognized public figures as a category warranting a heightened evidentiary standard without raising the plaintiff's burden to the forbidding actual malice requirement.[20] Conversely, the Court might have allowed public figures to prevail on a showing of negligence like other formally private individuals, but placed special limitations on the damages to which they are entitled.

A few years after *Butts*, the Court—for a time[21]—greatly expanded the reach of the *Sullivan* standard by untethering the actual malice rule from the identity of the plaintiff. In *Rosenbloom v. Metromedia, Inc.*,[22] Justice Brennan's plurality opinion[23] extended the rule's application to encompass all defamatory falsehoods concerning

17. *Id.* at 164–65.

18. *See* Solano v. Playgirl, Inc., 292 F.3d 1078, 1084 (9th Cir. 2002).

19. *See* Pippen v. NBC Universal Media, LLC, 734 F.3d 610, 614 (7th Cir. 2013).

20. *See Butts*, 388 U.S. at 155 (Harlan, J., plurality) (proposing that public figures be required to show "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers").

21. *See infra* notes 30–34 and accompanying text.

22. 403 U.S. 29 (1971).

23. *See id.* at 31–32 (Brennan, J., plurality) (affirming lower court decision that the *New York Times* actual malice standard applies to private individuals involved in a public event). As in *Butts*, *Rosenbloom*'s holding comprised an overlap of differing opinions.

"matters of public or general concern"[24] without regard to the plaintiff's status.[25] In practice, the criterion that libelous speech be of public or general concern or "interest"[26] proved almost redundant when news reports were at issue; lower courts overwhelmingly found matters receiving media coverage to constitute this type of expression.[27] This regime strayed even further from *Sullivan*'s roots in solicitude for criticism of public authorities than *Butts*. Attempting to equate their ruling to *Sullivan*, Warren and other Justices in *Butts* analogized the impact of public figures to that of public authorities.[28] Under *Rosenbloom*, plaintiffs might face the usually impossible task of showing actual malice simply because they happened to be involved in a matter that the media found newsworthy.[29] The adoption of the actual malice standard so far from its base and so sweeping in scope virtually invited reconsideration by the Court.

When that moment arrived in *Gertz v. Robert Welch, Inc.*,[30] the Court overturned the *Rosenbloom* plurality's expansive standard[31] and restored a status-based approach to defamatory falsehoods. With *Gertz*,

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24. *Id.* at 44.

25. *See id.* (stating that the protection applies to both famous and anonymous persons).

26. *Id.* at 42–43.

27. *See* David W. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 206 & n.50 (1976) (finding that only 6 of over 100 reported decisions making this determination clearly concluded that the alleged defamatory publication or broadcast did not address matters of public interest).

28. *See supra* notes 15–17 and accompanying text; *see also Butts*, 388 U.S. at 155 (Harlan, J., plurality) (indicating that libel plaintiffs could be characterized as public figures either because they had attained a position that inherently commands public interest, or because they had thrust their personality "into the 'vortex' of an important public controversy") (citation omitted).

29. *See, e.g.*, *Rosenbloom*, 403 U.S. at 43 (Brennan, J., plurality) ("If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."); Gospel Spreading Church v. Johnson Publ'g Co., 454 F.2d 1050, 1051 (D.C. Cir. 1971) (requiring plaintiff church to meet actual malice standard because church's activities in real estate and religious tax exemption field were of "'public or general concern'" (quoting *Rosenbloom*, 403 U.S. at 44–45 (Brennan, J., plurality))).

30. 418 U.S. 323 (1974).

31. *Id.* at 345–46.

the actual malice requirement for any liability was again limited to public officials and public figures; plaintiffs deemed private figures would not have to demonstrate actual malice to recover actual damages.[32] This ruling sharply contracted the actual malice rule's protective cloak, for private figure designation became the default status, i.e., all plaintiffs except those who were classified as public officials or public figures.[33] States were now authorized to allow these individuals to obtain damages for harm inflicted by defamatory falsehood simply upon a showing of negligence.[34] Even as the Court reduced First Amendment protection for defamatory expression, however, it declined to abandon the actual malice standard as a tool for adjusting the competing interests at stake. Rather, *Gertz* held that proof of negligence could secure only actual damages; a showing of actual malice was still required for awards of presumed or punitive damages.[35]

Even when the Court later sought to refine defamation doctrine with greater regard to *Sullivan*'s underlying theme, and thereby further diminish protection for libel, it retained a substantial place for the actual malice rule. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[36] the Court announced that *Gertz*'s framework applied only to defamation of private individuals on matters of public concern.[37] In the absence of a public concern, Justice Powell's plurality opinion explained that the comparative weight of the interests involved required a different standard.[38] In discussing the importance and meaning of speech involving a public concern, Justice Powell repeatedly invoked *Sullivan*. For example, he recalled *Sullivan*'s emphasis that "'debate *on public*

32. *Id.* at 347.

33. The *Gertz* Court described two alternative bases for treating a libel plaintiff as a public figure: "achiev[ing] such pervasive fame or notoriety that [the individual] becomes a public figure for all purposes and in all contexts," or injecting oneself or becoming drawn into "a particular public controversy" such that the individual "becomes a public figure for a limited range of issues." *Id.* at 351.

34. *Id.* at 347.

35. *Id.* at 349.

36. 472 U.S. 749 (1985).

37. *Id.* at 751, 756 (Powell, J., plurality). In yet another splintered decision, Justices Rehnquist and O'Connor joined Justice Powell's opinion, while Chief Justice Burger and Justice White concurred in the judgment. The concurring Justices agreed with Justice Powell's characterization of *Gertz*'s application. *Id.* at 764, 774.

38. *Id.* at 756–61 (Powell, J., plurality).

issues should be uninhibited, robust, and wide-open,'"[39] and cited *Sullivan*'s pronouncement that that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[40] Where this core purpose was not implicated, states could license private figures to recover presumed and punitive damages upon a showing of negligence.[41] Thus, the *Dun & Bradstreet* decision shrank the reach of the actual malice rule, but left intact its operation in suits involving public officials, public figures, and private figures seeking presumed or punitive damages.

B. Actual Malice's Impact Outside of Libel

Defamation is not the only common law tort whose force has been eroded by the constraint of the actual malice rule. The Court has also found the *Sullivan* standard relevant to defenses against false light claims[42] and actions for intentional infliction of emotional distress.[43] In neither instance did the case that occasioned expanded First Amendment protection directly or indirectly involve a public official.

The Court's decision in *Time, Inc. v. Hill*[44] contributed to the long decline of false light doctrine.[45] The case arose from a magazine article about a play that drew on the ordeal of plaintiff Hill and his family as hostages of escaped convicts.[46] Though the play had altered significant aspects of the incident,[47] the magazine's account "'portrayed [the play]

39. *Id.* at 755 (quoting *Sullivan*, 376 U.S. at 270) (emphasis added by Powell, J.).

40. *Id.* at 759 (quoting *Sullivan*, 376 U.S. at 269) (inner citation and quotation marks omitted).

41. *See id.* at 763.

42. Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

43. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988).

44. 385 U.S. 374 (1967).

45. *See generally* J. Clark Kelso, *False Light Privacy: A Requiem*, 32 SANTA CLARA L. REV. 783 (1992); Diane Leenheer Zimmerman, *False Light Invasion of Privacy: The Light that Failed*, 64 N.Y.U. L. REV. 364 (1989).

46. *Time, Inc.*, 385 U.S. at 377.

47. Most notably, both the suffering and heroism of the family in the play exceeded that of the Hills. *Id.* at 377–78.

as a re-enactment of the Hills' experience.'"[48] Nullifying Hill's damage award, the Court ruled that recovery of damages for "false reports of matters of public interest" required proof that the defendant published the report with actual malice.[49] As in *Rosenbloom*, the Court's "public interest"[50] touchstone appeared to cover much formerly actionable speech, now likely to be thwarted by an unfeasible burden of proof. And as in *Rosenbloom*, the subject matter of the suit was quite distant from the criticism of public officials' performance that animated *Sullivan*'s ruling.[51]

Like false light claims, the tort of intentional infliction of emotional distress (IIED) was drained of much potency when the actual malice rule was inserted. In *Hustler Magazine, Inc. v. Falwell*,[52] the Court reviewed an award of damages for IIED to Jerry Falwell, a "nationally known minister who has been active as a commentator on politics and public affairs."[53] The suit was based on an explicitly fictional parody in which the petitioner quoted Falwell as having engaged in "a drunken incestuous rendezvous with his mother in an outhouse."[54] Overturning the award, the Court ruled that a public figure like Falwell[55] could recover for IIED in such circumstances only by demonstrating that the defendant had made a false statement of fact about that figure with actual malice.[56] Thus, the Court not only introduced the actual malice standard to IIED doctrine, but also injected libel's requirement of a false statement of fact into a tort that had not included this element.[57]

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48. *Id.* at 379 (citation omitted).

49. *Id.* at 387–88.

50. *Id.*

51. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 32–35.

52. 485 U.S. 46 (1988).

53. *Id.* at 47.

54. *Id.* at 48.

55. *See id.* at 57 ("[I]t is clear that respondent Falwell is a 'public figure' for purposes of First Amendment law.").

56. *Id.* at 56.

57. *See, e.g.*, Agis v. Howard Johnson Co., 355 N.E.2d 315, 318–19 (Mass. 1976) (stating that a person commits IIED when he or she: (1) intends to inflict emotional distress or knew or should have known that emotional distress was the probable result of such conduct; (2) acts in an "extreme and outrageous" manner, carries out actions that are "beyond all possible bounds of decency," or acts in a manner that is "utterly intolerable in a civilized community;" (3) causes emotional distress to the plaintiff; and (4) the emotional distress is "severe" and of a nature that

Moreover, *Falwell* laid the foundation for *Snyder v. Phelps*,[58] a decision that further cabined the reach of IIED claims. There, the Court overturned a damages award for IIED against individuals who had displayed harsh messages near the funeral of a soldier killed in the line of duty.[59] Crucial to the Court's decision was its determination that the picketing amounted to commentary on matters of public concern[60]—thus echoing *Hill* as well as *Falwell*.

III. UNDERLYING IMPLICATIONS OF THE *SULLIVAN* STANDARD'S DEVIATION FROM ITS SOURCE

A champion of free speech might dismiss doubts about the far-reaching extension of *Sullivan*'s standard as doctrinal quibbling at odds with this fundamental right. Somewhat paradoxically, however, indiscriminate recognition of speech claims may ultimately redound to the disadvantage of expression. Moreover, transplanting a standard like the actual malice rule to settings with attenuated links to the standard's original rationale can promote a kind of First Amendment formalism in which countervailing values are underserved.

One way in which doctrinal overreaching in the protection of speech can threaten expression is by provoking a backlash against the perceived excess. A famous illustration of this dynamic from a separate constitutional realm is the rise and collapse of the *Lochner* era.[61] After decades of overriding legislative social and economic policy under the aegis of substantive due process,[62] the Court abruptly retreated[63] and

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"no reasonable person could be expected to endure it") (citations and internal quotations omitted).

58. __ U.S. __, 131 S. Ct. 1207 (2011).

59. *Id.* at __, 131 S. Ct. at 1220. The signs ascribed the deaths of American soldiers to God's wrath for America's tolerance of homosexuality, especially in the military. *See id* at __, 131 S. Ct. at 1213–14.

60. *See id.* at __, 131 S. Ct. at 1219 ("Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment.").

61. Lochner v. New York, 198 U.S. 45 (1905) (striking down state's limitation on bakers' work hours).

62. For an overview of this period, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001).

effectively "abdicated" serious review of assertions of substantive economic rights.[64] It is not difficult to envision, too, a reaction against the immunity for libel afforded by the actual malice rule to push the pendulum far in the other direction. Indeed, *Gertz* and *Dun & Bradstreet* may eventually represent the first major steps in such a development. The *Gertz* Court objected to the *Rosenbloom* plurality's position that private plaintiffs involved in any matter of public or general concern or interest should be subjected to the actual malice requirement.[65] Imposing this constitutional burden abridged "to a degree that we find unacceptable" states' ability to provide remedies for private figures harmed by defamatory falsehoods.[66] *Dun & Bradstreet* went so far as to retroactively[67] describe *Gertz*'s limitation on presumed and punitive damages as confined to defamatory speech on matters of public concern.[68] Moreover, this characterization of *Gertz* paved the way for still further retrenchment of First Amendment safeguards for libel; if *Gertz*'s ruling applies only to expression on matters of public concern, then perhaps private figures suing over defamation on matters of private concern are not bound by *Gertz*'s requirement of fault.[69]

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63. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state's minimum wage for women); Nebbia v. New York, 291 U.S. 502 (1934) (sustaining state mechanism for setting minimum and maximum retail prices for milk).

64. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34, 38; *see, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) ("[C]ourts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.").

65. *See supra* notes 31–34 and accompanying text.

66. Gertz v. Robert Welch, Inc., 418 U.S. 323, 346.

67. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 785, n.11 (Brennan, J., dissenting) ("One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern. *Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale . . . .").

68. *See supra* note 37 and accompanying text.

69. *See* Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 n.1 (1985) (discussing strict liability in such situations after *Dun & Bradstreet*); Don Lewis, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, *and Speech on Matters of Public Concern: New Direction in First Amendment Defamation Law*, 20 IND. L. REV. 767, 774–75 (1987) (also discussing strict liability).

Additionally, extension of the actual malice standard into settings less compelling than that of *Sullivan* risks diminishing the force of the requirement itself. As Vincent Blasi observed nearly three decades ago, the most powerful First Amendment protection should be shaped to cope with those periods when unpopular views are most vulnerable to suppression.[70] In a similar vein, uncritical application of the actual malice rule may foster a conception of the requirement less sturdy than the robust protection contemplated by *Sullivan*.[71] Much as overuse of antibiotics can compromise their effectiveness,[72] the potency of the actual malice standard may be compromised if it is not reserved for conditions where it is most needed to vindicate core First Amendment values.

Finally, the possibility of unduly constraining government when a First Amendment doctrine becomes unmoored from its origins can be discerned in recent Court decisions. A leading example is the holding in *Citizens United v. Federal Election Commission*[73] that because political spending is a form of protected speech, corporations and unions are free to spend money to support individual candidates during elections.[74] A number of scholars have charged that the Court applied the principle of vigorous protection of political speech in an artificial way that undermined democracy rather than advancing it.[75] The Court's decision in *Sorrell v. IMS Health, Inc.*[76] has faced a comparable critique. There, the Court struck down a state law forbidding the sale of "prescriber-identifiable information" by pharmacies to data-mining companies, and

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70. *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

71. The Court has expressed a similar concern with respect to commercial speech. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.").

72. *See* C.A. Hart, *Antibiotics Resistance: An Increasing Problem?*, 316(7140) BRIT. MED. J. 1255, 1255–56 (1998), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1113024/.

73. 558 U.S. 310 (2010).

74. *Id.* at 363–66.

75. *See, e.g.*, Richard Briffault, *On Dejudcializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887 (2011).

76. __ U.S. __, 131 S. Ct. 2653 (2011).

by data-mining companies to pharmaceutical companies, "for marketing or promoting a prescription drug."[77] To critics, the *Sorrell* Court invalidated a legitimate effort to curb dangerous marketing practices, invoking a concept of content discrimination with scant relation to the aim of the Court's foundational commercial speech decision[78] to ensure the free flow of accurate commercial information to consumers.[79] The Court's actual malice project is likewise open to the objection that abstraction of this concept from its source has overly impeded legitimate state interests in protecting citizens' reputations and emotional well-beings.

IV. CONCLUSION

The application of the actual malice standard to settings beyond its rationale in *Sullivan* points to the unavoidable complexity of First Amendment doctrine. For the First Amendment's guarantee of freedom of speech to have substance, the Court must interpose shields against government attempts to stifle expression. At the same time, unless the phrase "no law"[80] is to assume an unworkable literal sense, First Amendment standards must be fashioned in each instance to take proper account of other interests and principles at stake. The varied extension of the actual malice requirement raises the question of whether the Court has employed a familiar but blunt instrument when a more finely adapted tool would have been appropriate.

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77. VT. STAT. ANN. tit. 18, § 4631(d) (2011). The statute provided an exception where prescribers had granted their express consent for such sale of this information. *Id.*

78. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (striking down state's ban on advertising prescription drug prices).

79. *See, e.g.*, Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1 (2012).

80. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.