A Consequentialist Approach to Free Speech[1]

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Abstract:

This Essay offers a consequentialist critique of free speech jurisprudence, using information economics to provide a novel view into how markets propagate false speech. This shift in perspective has two advantages.

The first is a more precise test for intervention, not based on falsity, but on value in a manner that protects irony and gives the press breathing space. Bridging Mill's libertarianism and information economics supports a right of expression, a capability, manifest in *decision change*. Succinctly, it is the right of any individual to influence or change decisions that affect them. To highlight its efficacy, the Essay then applies the decision change test to seminal cases – *Alvarez*, *N.Y. Times v. Sullivan*, *Brandenburg* – to show it exhibits fewer false positives and fewer false negatives that tests of categories, truth, imminence, or intent.

The second advantage is to cut through the "endless maze" of walls thrown up by the courts' use of categories to protect speech. Hewing to the use of categories leads, in the extreme, to paradoxes including one of implementation and two of logic whereby observed outcomes undermine professed goals. The first *Free Speech Market Paradox* closely resembles Bork's *Antitrust Paradox*. Courts have protected speakers at the expense of speech as they formerly protected competitors at the expense of competition. This repeats their antitrust mistake in the context of speech, leaving markets unable to clear inferior claims as they once failed to clear inferior products. The second *Paradox of Individual Liberty* allows one person's volume to cancel another person's voice. "Signal jamming," in the context of speech, prevents disadvantaged groups from being heard and influencing the decisions that affect them. Finally, the *Paradox of Preventing Government Tyranny* tolerates the intolerant to the point where subgroups undermine the very system of governance that protects speakers' rights. This Essay then shows how the consequentialist approach can either avoid these harms or reduce them.

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This is the second of two essays addressing the challenge of false claims in free speech. It focuses on decision errors. The first essay, *Free Speech and the Fake News Problem*, focuses on externalities.

[1] The latest draft is available at http://ssrn.com/abstract=4414249

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I. Introduction

Separating fact from fiction has rarely been harder.[2] False or illicit information has been implicated in lynching, vaccine hesitancy, polarization, insurrection, genocide, sex trafficking, drug trafficking, cancer misdiagnosis, teenage depression, judicial interference, and belief that a sitting president stole an election.[3] Faith in government is near its nadir.[4] Faith in media has never been lower.[5] Richard Posner, a proponent of economic analysis of law, argued that information economics should be a valuable tool for analyzing free speech.[6] Principles of information asymmetry might explain failures in the marketplace of ideas, while signals and screens might separate fact from fiction. Yet, "while the [law and economics] movement has flourished, economic analysis of free speech has lagged."[7] To make progress against the challenges posed by false claims in free speech, this Essay seeks to bridge free speech law and information economics.

Bridging these schools of thought has distinct benefits. The first benefit follows from a reexamination of the deontological free speech path that has led fake news to flourish in order to chart a different utilitarian path where individual integrity might flourish. For more than half a century, scholars have critiqued free speech jurisprudence for its lack of unifying

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[2] Since the rise of social media, formal organizations have spent more than half a billion dollars on psychological operations and media manipulation across forty-eight known countries. KATE JONES, ONLINE DISINFORMATION AND POLITICAL DISCOURSE: APPLYING A HUMAN RIGHTS Framework 9 (2019), https://www.chathamhouse.org/sites/default/files/2019-11-05-Online-Disinformation-Human-Rights.pdf.

[3] *See, e.g.,* H.R. REP. NO. 117-663 (2022); Elyse Samuels, *How Misinformation on WhatsApp Led to a Mob Killing in India*, WASH. POST (Feb. 21, 2020), https://www.washingtonpost.com/politics/2020/02/21/how-misinformation-whatsapp-led-deathly-mob-lynching-india/; Renee Garret & Sean D. Young, *Online Misinformation and Vaccine Hesitancy*, 11 TRANSLATIONAL BEHAV. MED. 2194, 2199 (2021); Stuart A. Thompson, *Election Falsehoods Surged on Podcasts Before Capital Riots, Researchers Find*, N.Y. TIMES (Jan. 4, 2022), https://www.nytimes.com/2022/01/04/technology/apple-google-spotify-podcast-election-misinformation.html; Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html; Anne Milgram, Opinion, *As Illegal Drug Trade Goes from the Corner to the Web, Rising Deadly Threat of Fake Pills*, USATODAY (Oct. 31, 2021), https://www.usatoday.com/story/opinion/policing/2021/10/31/illegal-drug-trade-deadly-pills-online/8540733002/?gnt-cfr=1; Karen Feldscher, *How Social Media's Toxic Content Sends Teens into a 'Dangerous Spiral,'* HARV. T.H. CHAN SCH. PUB. HEALTH (Oct. 8, 2021), https://www.hsph.harvard.edu/news/features/how-social-medias-toxic-content-sends-teens-into-a-dangerous-spiral/;.

[4] *Public Trust in Government: 1958-2022*, PEW RSCH. CTR. (June 6, 2022), https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/.

[5] KATHERINE M. GEHL & MICHAEL E. PORTER, WHY COMPETITION IN THE POLITICS INDUSTRY IS FAILING AMERICA 25 (Sept. 2017), https://www.hbs.edu/competitiveness/Documents/why-competition-in-the-politics-industry-is-failing-america.pdf.

[6] Richard A. Posner, *Free Speech in an Economic Perspective*, 20 *Suffolk Univ. L. Rev.*1, 2-3 (1986).

[7] J.D. Hemel, *Economic Perspectives on Free Speech*, *in* OXFORD HANDBOOK OF FREEDOM OF SPEECH 118, 119 (Frederick Schauer & Adrienne Stone eds., 2021).

theory.[8] By contrast, bridging Mill's libertarianism and information economics supports a right of expression, a capability,[9] manifest in *decision change*. Succinctly, it is the right of any individual to influence or change decisions that affect them. This test of decision change introduces a welfare criterion that allows comparison of interventions on expression. To highlight its efficacy, this Essay then applies the decision change test to seminal cases – *Alvarez*, *N.Y. Times v. Sullivan*, *Brandenburg* – to show it exhibits fewer false positives and fewer false negatives than tests of categories, truth, imminence, or intent. Indeed, it protects irony, parody, viewpoints, and even half-truths that do not change decisions.

A second benefit is to use these tools to identify when intervention in free expression is ever warranted at all. Unless a paradox arises through exercise of expressive rights, markets should be capable of clearing themselves of free speech harms using the test of decision change. The test provides means of measuring harms, yielding recourse to negotiated remedies so long as the system of justice works properly. By contrast, when free speech paradoxes do arise, neither side of two opposing principles prevails. One must step outside the contradiction for hope of a resolution if that is even feasible. This Essay identifies only three such paradoxes. Resolving the first avoids speech intervention entirely. Resolving the second avoids content intervention entirely. Resolving the third requires content moderation yet is proscribed and narrow. Intervention is then quite limited.

These benefits flow from three ideas. The first provides a value criterion, the test of decision change, by which we can measure the effects of expression. This tool gives participants in the marketplace of ideas the means to trade on the consequences of expression. Accountability hides no information. Instead, it facilitates resolution and not merely contestation among diverse and antagonistic information sources so that assessment might fairly be made. The second is to embrace the Supreme Court's First Amendment ideals while dispensing with its categorical methods. Equal expressive benefits can be achieved at lower social cost. The third idea is to identify cases where, like antitrust jurisprudence, free speech jurisprudence is a "policy at war with itself."[12] The consequentialist tools of information economics then help avoid the war yet promote the human welfare that speech so richly provides.

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[8] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971) ("[C]ourts are without effective criteria, and, therefore we have come to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court Changes."); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 9, 13 (Harv. Univ. Press 1990). (arguing the Court's decisions are an "endless maze" with "no general framework").

[9] Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33 (2003).

[10] Shelly Kagan, *Kantianism for Consequentialists*, *in* IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 111, 142-43 (Allen W. Wood ed., Allen W. Wood trans., Yale University Press 2002) (1785).

[11] *See id.*

[12] *See generally* ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

II. The Value of Free Expression & The Value of Information

A. Goals

Judging performance of judging speech requires a performance criterion, an optimization metric that has proven elusive in the context of free expression. One natural starting point, free speech jurisprudence, has yet to settle on a single goal or metric. Free speech scholars describe court decisions as "having no coherent theory of free expression."[13] Rulings show "a pattern of aborted doctrines, shifting rationales, and frequent changes of position"[14] as if they were "an endless maze" with "no general framework."[15] Rather, a "deplorable" absence of a unifying goal or theory has left the nature of the Constitution subject to change, often dramatically, as the personnel of the Supreme Court change.[16]

Tellingly, adjacent to this 1971 critique, the Supreme Court had just changed the standard for state intervention from "clear and present danger"[17] to "imminent lawless action,"[18] overruling both the tendency to cause sedition or lawlessness[19] as well as the test for seditious speech without prospect of imminent action.[20] Since that time, the Supreme Court has further moved to shrink state power to regulate false speech[21] and to expand corporate power to use money as speech.[22]

The problem of defining a free speech performance metric is hard as it must balance not one goal but many. Enumerated goals include: (1) seeking truth (2) supporting free expression (3) participating in government, and (4) stable change in society.[23] Seeking truth, the first goal, confronts the problem that knowledge is subject to continuous improvement as even widely acknowledged truths – a flat earth or geocentric universe – have proven false.[24] Freedom to speak and hear truths is essential to other freedoms. Persons with private or unique information must be permitted to disclose what they know, which promotes growth and spread of knowledge,[25] a tatonnement to truth, and prevention of stagnation and error. Freedom of expression, the second goal, allows people to communicate their needs, wants, and preferences. In juxtaposition with the views of others, free expression offers exploration and affirmation of self, which shapes culture, which in turn shapes self. Redish

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[13] Martin Redish, *The Value of Free Speech*, 130 U. PENN. L.R. 591, (1982).
[14] Vincent Blasi, The Checking Value in First Amendment Theory, 2 Am. Bar Found. Rsch. J. 521, 526.
[15] SHIFFRIN *supra* note 8. See also Steven H. Shiffrin, WHAT'S WRONG WITH THE FIRST AMENDMENT (2016).
[16] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).
[17] Schenck v. United States, 249 U.S. 47 (1919).
[18] Brandenburg v. Ohio, 395 U.S. 444 (1969).
[19] *See* Whitney v. California, 274 U.S. 357 (1927).
[20] Dennis v. United States, 341 U.S. 494 (1951).
[21] *See* United States v. Alvarez, 567 U.S. 709 (2012).
[22] *See* Citizens United v. FEC, 558 U.S. 310 (2010).
[23] Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L. J. 877, 878-79 (1963).
[24] For a discussion of the instrumental and intrinsic value of truth-seeking, see Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 476-77 (2019) (referring to Lockean argument that process of seeking and justifying truth is itself valuable and highlighting Locke's influence on Framers of the Constitution).
[25] Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH. L. 71 (2021).

extends Emerson's notion of self-expression to "self-realization," allowing individuals to reach their full potential or control their own destiny.[26] Participatory governance, the third goal, requires that people have means of protecting their liberties and driving decisions that affect them. "Once one accepts the premise … that governments derive 'their just powers from the consent of the governed,' it follows that the governed must … have full freedom [to exercise their right of consent]."[27] Participatory expression then offers an important safety valve, supporting the fourth goal, stable social change. Suppressing dissent drives dissenters underground where extra-legal forms of protest become more likely.[28] Free expression is a leavening agent fostering political change.

These four different cases suggest different categorical tests rather than a single organizing principle. Indeed, "effective reasoning by example requires the creation and use of categories through which the lessons of the past can be channeled into service as precedent for the future… Without categories, there can be no rules."[29] The current use of categories is deontological and not utilitarian.[30] US courts do not balance costs and benefits to decide whether speech is protected, a utilitarian approach. Instead, they examine its case or category to decide a level of protection then, rule to protect it according to that level, a deontological approach.[31] Operation of categorical rules that avoid determining person specific value, avoid outcomes unsuitable for general rules.[32] They must operate for all persons equally, as if behind a veil of ignorance, in order that they favor no one specifically. This also has the virtue of blocking government intrusion upon the decision process as such rules are automatic, enjoining state intervention in cases of strictest scrutiny. The imbalance of state power over the individual relative to individual power over the state is such that only by drawing sharp lines around state power to regulate speech can citizens safely balance freedom and authority.[33] Opening the decision process to cost-benefit analysis would only deepen the challenge by adding two further problems: who should decide and on what principled basis? For many, including justices of the Supreme Court, difficulty

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[26] Redish, *supra* note 13, at 593.

[27] Emerson, *supra* note 23, at 883.

[28] *See id.* ("Only a government that consistently fails to relieve grievances need fear [political upheaval]."). Moreover, belief-making, even if the beliefs are "truthful," risks substantial political backlash due to a coercive process by which the beliefs are made. *See* Eugene Volokh, When Are Lies Constitutionally Protected? 8 (2022) (on file with author); *see also* Blocher, *supra* note 24, at 442 ("When people act on outlandish but truly held beliefs, they often demonstrate a strong—even perversely courageous—commitment to what they believe to be factual truths.").

[29] Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981).

[30] Stanley Fish, *What Is the First Amendment for?*, N.Y. TIMES, https://archive.nytimes.com/opinionator.blogs.nytimes.com/2010/02/01/what-is-the-first-amendment-for/ (Feb. 1, 2010).

[31] *See* U.S. v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.").

[32] STANLEY FISH, THE TROUBLE WITH PRINCIPLE (1999).

[33] Emerson, *supra* note 23.

answering these questions presumptively terminates the utilitarian branch of analysis.[34] Courts eschew valuing free expression, choosing instead to classify content in order to assign category in order to assign protection.

As well justified as these arguments appear, they are nonetheless flawed. The criteria for government intervention since Schenk have narrowed and tightened until, as a categorical approach, they have reached a limit. The *Brandenburg* test further enjoined government action for abstractly advocating lawless action. It restricts intervention to speech directed at inciting imminent lawless action *and* a likelihood of producing such action. Despite arriving at an ever-tighter boundary, this test still exhibits false positives and false negatives. As judged by limiting violence, it proscribes too much.[35] As judged by freeing expression, it permits too little.[36] Expressed in their own terms, paradoxically, these arguments undermine their own goals. A utilitarian approach, grounded in resolving decision errors and externalities, however, addresses these cases.

B. Value of Information

Turning from the value of expression to the value of information arising from expression, decision theory provides a welcome analytic precision. Information's value is defined as the payoff from an informed decision net of the value of an uninformed decision.[37]

$$Value\ of\ Information\ =\ Payoff(Decision|Informed)\ -\ Payoff(Decision|Uninformed)$$

On learning new information, a recipient updates beliefs and chooses to act or not act according to that choice of action yielding the greatest return. Truth and falsity, goodness and badness, play predictable roles in the outcome. To a recipient, the value of complete and accurate information is always non-negative.[38] It can be zero or greater but never negative. Even bad news allows the recipient to make better informed decisions. If the value is negative, then either it was incomplete or false.

		Changes Decision?	
		No	*Yes*
News	*Good*	**A: Value = 0**	**B: Value > 0**
	Bad	**C: Value = 0**	**D: Value > 0**

Table 1 – The value of complete and true information is always non-negative to recipients. Its value is positive if it changes the default decision.

Information has positive value if and only if it *changes* the default decision. If it represents good news that increases the benefit of a choice one planned to make anyway, then one would have received a windfall benefit whether informed or not. Similarly, if it represents

[34] FISH, *supra* note 32.
[35] *See infra* Section III.D.3.
[36] *See infra* Section IV.B.
[37] David Blackwell, *Equivalent Comparisons of Experiments*, 24 Annals of Mathematical Stat. 265 (1953).
[38] Id.

bad news that worsens the outcome of a choice one planned to avoid, then one is no worse off than before. Bad news that a recipient has cancer or that the planet is warming, while unfortunate, nonetheless allow the taking of corrective action to mitigate the damage. Information has value only when it causes the recipient to capture an opportunity that would have been missed or avoid a loss that would have been captured.

Bad news, if it is accurate and complete, has positive value. By contrast, misinformation, because it is inaccurate or incomplete, causes decision error, which produces negative value.

Although complete and true information always has positive *recipient* value, it can have negative *speaker* value. Full information can give the recipient the option to place burdens upon the speaker, or it can grant power to make demands of the speaker.[39] Thus, for the speaker, avoiding other people's demands or convincing them to exercise their options so as to benefit the speaker are principal reasons for speaking half-truths and lies.

Current jurisprudence focuses on the action or the outcome, separating it from belief on the basis that government either cannot or should not regulate belief but only regulate action. The premise is fair, based on the property that no governance mechanism is infallible in its own beliefs and thus has no basis for imposing its beliefs on others.[40] Intervention is warranted only for actions and then only when one party's actions cause another party's harms.

While the premise is just, its effect on enforcement can be unjust due to a false comparison between the pre *action* and post *action* state as distinct from a comparison between the pre *information* and post *information* state. New information *changes* the pre action and post action payoffs such that the former test condition for harm fails where the latter succeeds.

Consider a portfolio of assets controlled by a fiduciary who receives bad news of a steady and permanent decline. Selling at the earliest opportunity locks in a loss yet prevents a far greater loss. Comparing pre action to post action states shows negative value, the loss, where comparing the decision based on pre informed and post informed states shows positive value, the avoided bigger loss. The informed decision to sell compared to the uninformed decision to hold clearly provides advantage. The opposite condition also holds. Had the news been good, a steady and permanent increase, then a prompt sale appears to lock in a gain when it misses a far greater opportunity. Comparing states shows positive value where comparing decisions shows negative value. Setting aside externalities, true and complete information *always* produces non-negative value for its recipient. Speech that implicates

[39] The former is the equivalent of a 'put' option and the latter the equivalent of a 'call' option. A full information option always creates recipient value because the recipient can always choose not to exercise it and thus avoid any downside. Fischer Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. ECON. 637 (1973). Robert Merton, *Theory of Rational Option Pricing*, 4 BELL J. ECON. & MGMT. SCI. 141 (1973).

[40] JOHN S. MILL, ON LIBERTY (Batoche Books Kitchener 2001) (1869); *see also* Emerson, *supra* note 23.

decisions must therefore focus on the pre and post *information* states and not the pre and post *action* states. A judiciary that regulates speech based on comparing pre and post action states is a fiduciary that destroys value.

III. *Decision Rights Doctrine*

If our task is to clear communications of dysfunctional information, we need a measure of how well the task is done. Doing it badly is the present cause for concern. Thus, the purpose of the present articulation is to identify a goal by which we can measure the success of protecting speech.

A. Definition

Decision Rights (DR) Doctrine is a grant to all persons of such an expansive right of free expression as allows each to move others' decisions in that person's favor. Put simply, everyone has a speaker's right to influence decisions that affect them. Simultaneously, each person has a listener or seeker's right to gather information from sources of their own choosing to improve their own decisions. Whether speaker or listener, the unit of analysis is the decision that one wishes oneself to make or the decision one wishes others to make. This right of expression is subject only to an equal right manifest in others and responsibility for decision errors, on best available information, that one's free expression induces in others.[41]

The "best available information" condition serves to restrict attention to a time and place rather than allow change without limit.[42] These joint and bounded decisions, of speakers and of audiences, thus adhere to the harm principle outlined by John Stuart Mill "that the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others."[43] To apply *DR Doctrine* is to ask 'Does expression enable more or better decisions?', 'Do decisions favor that person's welfare?'.

The point of *Decision Rights Doctrine* is to increase human capacity. *DR Doctrine* represents not a state of being, like utility, but rather a capability.[44] It allows a speaker the chance i) to

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[41] One critique of standard cost-benefit analysis is that a utilitarian agent is too self-focused, which justifies lying too often. *See* CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION (2021). *DR Doctrine* differs from pure ego centric cost-benefit analysis in one important aspect. If one becomes accountable for decision errors induced in others, then social costs are better internalized, so a utilitarian makes a choice closer to the social optimum, rather than one's own optimum alone. The next Section articulates caveats on this accountability.

[42] Schauer critiques absolutists: "we simply do not know what all [future] exceptions and qualifications might be." Schauer, *supra* note 29 at 277. Time restrictions seek to address this. See also *Entscheidungsproblem* in Marshall Van Alstyne, Free Speech, Platforms & the Fake News Problem (Dec. 31, 2021) (available at http://ssrn.com/abstract=3997980).

[43] MILL, *supra* note 40.

[44] Martha C. Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 Feminist Econ. 33 (2007).

move the production possibilities frontier, i.e. to create decision options, and ii) to claim value from that frontier, i.e. to create decision outcomes. This expanded opportunity set might then serve as the measure of comparing value for free speech jurisprudence in the manner that consumer welfare serves as that comparison for antitrust jurisprudence.[45] Expressive acts that expand the frontier are to be encouraged just as those that contract the frontier are to be discouraged. Likewise, those acts that transfer value voluntarily are to be encouraged while those that transfer value by deceit are to be discouraged.

Critically, the unit of analysis is the set of *decisions*, if any, attending an expressive act as distinct from the content of the expression per se.[46] What decisions does expression potentiate and how do they change? Only when decisions change, either to act or to not act, does speech produce objective differences in value. Identical content can change category, from art to pornography or from copyrighted to public domain or from terrorist propaganda to court evidence, based on context. But if changing context does not change any decision, neither increase nor decrease in value has occurred. By contrast, speech that changes decisions, despite no change in context, will produce measurable value change. A focus on context per se is misplaced.

Likewise, a half-truth that has no effect on a decision neither increments nor decrements its value. A half-truth that changes a decision in the manner of a complete truth has the increase in value of the complete truth. A half-truth that changes a decision in the manner of a complete lie has the decrease in value of the complete lie. The "halfness" is not what matters and a focus on truthfulness per se is misplaced. The decision rather than the content's context or veracity holds the key.

Analysis of expression value must therefore proceed from three questions: What decisions does the expression potentiate? What were the default decisions before the expressive act? How does the expression change payoffs of the informed and uninformed decisions? Knowing these answers yields knowledge of benefits and harms.

Several properties become apparent. Decision theory informs us that true and complete information is always value adding to a recipient.[47] Suppression in any manner extinguishes social value. If information of one party is true but incomplete, then dialectic among those with differing views offers far better means of completing the truth than either silence or discourse among those harboring homogeneous beliefs. Veracity is best achieved by

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[45] Bork, *supra* note 12.

[46] Ironically, critics of using economic models for legal analysis find fault in that "When we recognize . . . decisions . . . are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes . . . then we are ready for the serious business of appraising law and legal institutions in terms of some standard of human values." Darren Bush, *The Marketplace of Ideas: Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1147, (citing Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935)). Thus, our focus on *decisions* here is all the more relevant and consequential.

[47] Blackwell, *supra* note 37.

diversity. Again, since everyone may be possessed of a missing truth, censoring anyone is a cause of extinguished social value.

That dialectic can correct lies and half-truths is reason to give voice to those of different views. Lies and half-truths are not grounds for concern when they cause no decision error. By this principle, irony, parody, and even hateful speech need not merit intervention. In fact, irony or parody that cause listeners to become more thoughtful or skeptical reduce their chances of decision error. Linguistically, ironic falsity is used to thwart error not to cause it.

B. Audience vs. Speaker Responsibility

If decisions are the proper unit of analysis, who then bears responsibility, speaker or listener for decision errors that follow from speech? Speakers can and will express themselves in ways that favor themselves adverse to others. As a rule, both resource economy and individual agency place primary responsibility for decision consequences upon the decision maker. Listeners are accountable for their own decisions as speakers are accountable for theirs. Personal responsibility thus implies that, between speaker and listener, a listener acting on his or her own behalf should hold him or herself accountable. Principal-agency theory has long established that making a person the "residual claimant" on their decision consequences serves to align incentives, improve effort, and raise welfare.[48] Alignment avoids the moral hazard that one might indulge in bad decisions when one can shift bad consequences to others. Ensuing incentives also cause people to invest effort to reasonably inform themselves and gather missing information even when speakers are well-intentioned beyond, and in addition to, gathering countervailing information when speakers are ill-intentioned. When needs, wants and wishes are private information, moving the locus of decisions to the informed party can improve decision accuracy.

Information revelation usefully occurs when speakers counsel decisions for listeners contrary to those they make for themselves. Such speaker hypocrisy contains its own listener decision value. "What you do speaks so loudly that I cannot hear what you say"[49] would aptly describe, for example, the CEO of an energy firm who advised buying shares in the company for which he was a net seller.[50] A fiduciary role, in which the speaker holds a legal or ethical position of trust relative to the listener, offers useful counterpoint. If the speaker is

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[48] *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301 (1983); Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57 (1989); Sanford J. Grossman & Oliver D. Hart, *An Analysis of the Principal-Agent Problem*, *in* FOUNDATIONS OF INSURANCE ECONOMICS 302 (Georges Dionne & Scott E. Harrington eds., 1992).

[49] This quote is often attributed to Ralph Waldo Emerson. *See, e.g., What You Do Speaks So Loudly That I Cannot Hear What You Say*, QUOTE INVESTIGATOR, https://quoteinvestigator.com/2011/01/27/what-you-do-speaks/ (last visited Sept. 12, 2022).

[50] Michael A. Hiltzik & E. Scott Reckard, *Enron Chairman Urged Employees to Buy Stock*, L.A. TIMES (Jan. 19, 2002), https://www.latimes.com/archives/la-xpm-2002-jan-19-mn-23640-story.html.

a fiduciary, then responsibility for decision consequences rests with the speaker. As with doctors, lawyers, and financial planners, a listener must rely on the good faith aid or advice of the fiduciary who is duty bound to avoid conflict of interest and to act in the best interests of the listener.[51] The superior knowledge and expertise of the fiduciary is a principal reason for shifting the locus of decision authority along with culpability to the party in the best position to decide.

Apart from the fiduciary role, *DR Doctrine* offers at least five forms of affirmative defense against holding speakers accountable for listeners' decisions. First, the stated claims are true, or were so, at that time on best available information. Such assertions need not be true at all times and in all ways, only that the speaker had reason to believe they were true when making them. Second, either the truth of the claims or their decision consequences are ambiguous. To protect the freest possible expression, the widest possible latitude must be allowed. Different societies will set the dials on certainty at different points, but a default must be a presumption of speaker innocence even when shadowed by the darker shades of doubt. The third is a simple prolepsis: the speaker offers a balanced view. Any advocate can present both sides of an argument when taking a stand. Presenting counterpoint respects the decision process. It alerts listeners to other perspectives, letting them know where to look for more information, and putting responsibility squarely on listeners to make their own decisions. A fourth defense is the absence of undue influence. Freed of pressure, coercion, browbeating, harassment, intimidation, repetition, indoctrination and threats, a listener decides without interference. Only when influence rises to the level of interference may responsibility shift. Finally, a fifth affirmative defense is to show that any misinformation, even disinformation, was without consequence. Either no harm occurred or if it did, then claims did not alter the listener's default decision. A bad choice that would have been made independent of a speaker's misdirection exhibits no information value and thus responsibility for that decision remains with the decision maker.[52] Any single defense is dispositive as it breaks the chain of causal responsibility. Taken together, however, the combination of falsity, without alternatives, with undue influence, changing a decision, causing harm, beyond all reasonable doubt is cause for concern and a shift of responsibility.

C. Benefits

Why would *DR Doctrine*, as it bears on decisions, be an appropriate standard of care? Three properties support useful benefits.

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[51] Balkin has proposed treating social media platforms as "information fiduciaries" to ensure a duty of care, loyalty, and trust. He argues these obligations should arise because (1) information asymmetry gives platforms power over users, (2) users cannot easily verify platform representations of data safety or manipulation, (3) users are challenged to understand how platform data manipulation affects their interests, and (4) even if they understood, monitoring is almost impossible. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVID L. REV. 1183, 1227 (2015).

[52] A mnemonic summarizing a test of transfer might be Truth, Ambiguity, Balance, Influence, Change (TABIC).

The first property is that *Decision Rights Doctrine* is consistent with Mill's articulation of individual liberty.[53] It is utilitarian. It provides for the maximum prospect of self-expression consistent with that same liberty for others and confined only by the principle of harm. The only justification for imposing the will of society on that of the individual is to prevent harm to others. In all but two exceptions,[54] this will provide no *ex-ante* restraint to expression instead providing *ex-post* remedy. In this, the standard is also content free. No thought or expression is proscribed. Rather it is errors in decisions, adverse to others, that merit scrutiny.

The second property is also utilitarian but from a different perspective. It is consistent with maximum economic value. Each person acting to optimize decisions that affect them resembles the problem of each person acting to optimize consumption that supports them. The *First Fundamental Welfare Theorem* of economics holds that buyers and sellers acting in their own self-interest under complete pricing information will compete their way to a Pareto optimum. Everyone will be as well off as possible such that no one can be made better off without making someone else worse off. It requires only knowledge of one's own preferences and posted prices to make one's own selling and consumption decisions. It does not require knowledge of others' preferences as these will be revealed by choices that cause prices of scarce resources to rise and those of surplus resources to fall. Each person's decisions contribute to completing the information that becomes an equilibrium. The insight dates to Adam Smith's "invisible hand" (1776), was expanded by von Hayek (1945), with different versions proven formally by a series of economists dating from Pareto (1906) to Arrow (1951) and Debreu (1951). Exceptions to Pareto efficiency occur when there is information asymmetry, externality, or monopoly.[55] Without irony, these exceptions are precisely the categories indicted by dysfunctional information in the task at hand – clearing a communication channel of information causing decision errors, externalities, and monopolies.

The third property is that *Decision Rights Doctrine* is consistent with Emerson's four goals for free speech – truth seeking, self-expression, participatory governance, and stable social change. Either the provision or the seeking of a more complete truth, the first category, necessarily increases value to the recipient. It fosters better decisions, and it fosters better science. *DR Doctrine* also endorses a maximum of free expression, the second category. It curbs no idea or content at all *ex-ante* but rather seeks to limit harms *ex-post*.[56] The capacity to create new and better decision options for oneself fulfills the criterion of self-realization while the capacity to influence others' decisions allows control of one's own destiny.[57] In terms of governance, the third category, *DR Doctrine* facilitates influencing *all* decisions

[53] MILL, *supra* note 40.
[54] See Sections IV.B and IV.C.
[55] For a discussion of how *DR Doctrine* supports a Coasian market for trading information externalities, see Marshall Van Alstyne, *supra* note 42.
[56] Only two exceptions to curbs on *ex-ante* expression, as distinct from *ex-post* correction, will arise from problems of individual liberty and of government tyranny in Sections IV.B and IV.C.
[57] Redish, *supra* note 26.

that affect one's interests, not just those made by a state. Regardless of whether the audience is a legislature, a judiciary, an executive, a bartender, or a spouse, the principle offers means of providing input to the decisions of others that affect a speaker. Participation in government decisions specifically then provides the safety valve important to the fourth category, stable social change. The rule invites dissent, rather than suppressing it, allowing for redress of grievances, and salving the ache that might lead to extra-legal forms of protest. If the purpose of expression is to strengthen not merely current liberty but also future liberty, then *DR Doctrine* can help. [58]

While consistent with these three utilitarian advantages, one inconsistency is that *Decision Rights Doctrine* falls short of a deontological ideal. As expressed by Kant, the *Categorical Imperative* would be to "act only according to that maxim whereby you can at the same time will that it should become a universal law without contradiction."[59] Extending his analysis, one treats the interests of all other persons as ends in themselves, thwarting one's own self-love and seeking ends that are equal for all persons.[60] Rather, the imperative to "act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end but always at the same time as an end"[61] is a role like that of the fiduciary. That ideal sets a higher bar.

A *Categorical Imperative of Decisions* would have people express such true and complete information as would allow others to decide what is best for themselves. The reduction in information asymmetry, eliminating lemons markets and costly investments in signals and screens, would yield both more and better matches in all forms of exchange. As an ideal, it is an impractical though useful aspiration. It would have each person act as a fiduciary for all other persons even when disclosure is privately costly.

DR Doctrine sidesteps the information asymmetry problem that an expressionist does not know, and audience members can misrepresent, the true nature of an audience member's own private interests. Like the *First Fundamental Welfare Theorem*, which does not require knowledge of others' costs or preferences, a Pareto efficient outcome can be achieved through the decentralized decisions of all. It is not a perfect outcome, but it offers a useful standard for what mechanism design can achieve.

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[58] Gregory Mitchell, *Libertarian Paternalism Is an Oxymoron*, 99 NW. U. L. REV. 1245, 1262 (2004).

[59] Immanuel Kant, *Second Section: Transition from Popular Moral Philosophy to the Metaphysics of Morals, in* IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 22, 37 (Allen W. Wood ed., Allen W. Wood trans., Yale University Press 2002) (1785).

[60] IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF MORALS 23 (Thomas Kingsmill Abbot trans., 10th ed. 2018) (1785).

[61] *Id.*; *see also Kantian Duty Based (Deontological) Ethics*, SEVEN PILLARS INST. (Jan. 29, 2013), https://sevenpillarsinstitute.org/kantian-duty-based-deontological-ethics/.

D. Applying *Decision Rights Doctrine*

How does one apply *DR Doctrine*? To the extent its use is vague, analysis of three seminal cases shows how categorical and utilitarian approaches compare. Always, the *DR* test is whether decisions *change*, not which category applies. Our goal is to maximize welfare, while reducing harms caused by decision errors and externalities. The decision change test produces fewer false positives and fewer false negatives than tests of intent, of truth, of imminence, and of categories representing "limited classes of [unprotected] speech".[62]

1. U.S. v. Alvarez 567 U.S. 709 (2012)

Xavier Alvarez made liars' history on July 23, 2007. At a public hearing of the Walnut Valley Water District Board, Alvarez introduced himself as a retired marine, wounded many times, who had received the Congressional Medal of Honor for bravery. An inveterate liar, he had no such honor.[63] He had never served in the military. A US district court convicted Alvarez for violating the 2005 Stolen Valor Act, which prohibited false claims of having received military honors. A recording of the event left no room for ambiguity. His claims were false. The speaker was knowing.

The outcome of this case was not obvious. The Ninth Circuit appeals court reversed the lower court in a 2-to-1vote, declaring the Stolen Valor Act unconstitutional. If the government could ban statements merely for falsity, "there would be no constitutional bar to criminalizing lying about one's height, weight, age or financial status on [social media] or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed liming while driving on the freeway."[64] The Tenth Circuit increased confusion by finding the Stolen Valor Act constitutional in an unrelated case.[65] The Government appealed the Ninth Circuit decision and lost in a 6-to-3 decision of the Supreme Court.

Different issues weighed in the deliberations of different judges as the Alvarez claims fit no obvious category. Justices of the Supreme Court grappled with the problem that the government could identify neither a specific injury nor an injured party. Absent harm to any person, Alvarez's lie did not qualify as defamation. Not given under oath, it did not qualify as perjury. Dissenting Justice Alito objected that lies proscribed by the Stolen Valor Act legitimately avoided harms such as the award of contracts. False claims had, in fact, defrauded the Department of Veterans Affairs of more than $1.4 million in stolen veteran's benefits.[66] Alvarez, however, had not sought personal gain and thus his claim could not be marked as fraud. In the end, a court majority found that tests of falsity and of scienter

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[62] United States v. Stevens, 559 U.S. 460, 469 (2010) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).
[63] Unrelated lies included having played professional hockey and having once married a starlet from Mexico. United States v. Alvarez, 567 U.S. 709, 713 (2012).
[64] United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012).
[65] United States v. Strandlof, 667 F.3rd 1146, 1170 (2012).
[66] *Alvarez*, 617 F.3d at 743 (Alito, J., dissenting).

produced false positives, claims that would be punished but should not be punished. Criminalizing false statements of fact would allow the government to create lists of topics that punished inconsequential lying, extending government power with no clear limiting principle. Deliberate lies can even raise social value.[67] The villagers of Vivarais-Lignon, who lied to protect Jewish refugees from the holocaust, proved it.[68]

How would one apply a test of harms from decision errors to Alvarez? What decisions changed due to his expression? Three settings prove instructive, one regarding Justice Kennedy's view of Alvarez's introduction, one regarding Justice Sotomayor's interjection of politics, and one regarding Justice Alito's concern for fraud. To proceed, we ask 'what decision is implicated?'. How do defaults change? Do changes cause harm through errors or externalities?

Justice Kennedy held that Alvarez's self-introduction was nothing more than an act of personal expression: "For all the record shows, [his] statements were but a pathetic attempt to gain respect that eluded him. The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal."[69] In this context, his self-introduction did not implicate any specific decision. Having spoken, Alvarez sat down and did not speak again for the remainder of the meeting.[70] His remarks did not bear on any subsequent issue before the water board.[71] Under these circumstances, there is no evidence of a change in *any* decision, not to a vote, not to a payment, not to a contract, nor even to a point of view. Absent a change in decision, the communication was without consequence. Testing for decision harms, intervention is unwarranted. This test result concurs with the Court's decision.

Justice Sotomayor, who voted with the majority, interjected with a contrasting condition during testimony:

> *During the Vietnam War, a protester holds up a sign that says, "I won a Purple Heart – for killing babies." Knowing statement: He didn't win the Purple Heart. As a reader, I can't be sure whether he did and is a combat veteran who opposes the war, or whether he's a citizen protesting the war. Is that [citizen protester]… liable under this act?*[72]

The first condition, a veteran who opposes the war, offers a truthful statement. The second condition, a citizen protesting the war, offers an ironic falsehood. Importantly, *both*

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[67] *See* Van Alstyne, *supra* note 42 (manuscript at 9).
[68] *Id.*
[69] *Id.* at 714.
[70] USA v. Alvarez, Docket No. 2:07-cr-01035 FBI Report Exhibit B.
[71] The public agenda covered commentary on public health goals, approval of minutes, a community relations report, operations report, expense report, legal report, and miscellaneous topics none of which involved Alvarez. *See Regular Board Meeting Agenda for Walnut Valley Water District* (July 23, 2007).
[72] Bob Collins, *Weighing the Freedom to Lie*, MINN. PUB. RADIO (Feb. 22, 2012), https://newscut.mprnews.org/2012/02/weighing_the_freedom_to_lie/.

conditions implicate the same decision: whether to oppose the war. Falsity in the ironic condition does not hide behind deceit but rather draws attention to itself to improve the decision outcome. Neither condition produces harm from decision error and the ironic condition might even prove more persuasive. In the absence of error and externality, intervention is again unwarranted.

By contrast, Justice Alito highlights a third condition implicating fraud. The decision in the context of employment or financial benefit or privilege is whether to grant a benefit based on a lie. If the lie *changes* the default of a benefit denied, then the employer or bank or Veteran's Administration would have a cause of action against Alvarez for fraud. By extension, if Alvarez had displaced an actual Medal recipient by swaying an employer's decision, the externality reflected in the lost job opportunity might also justify a cause of action by the honest veteran. Across these conditions, harm has accrued either in the transfer of an asset to Alvarez or the denial of a benefit to the veteran. The test shows intervention is warranted. Importantly, again, defaults matter. Although Alvarez might have lied in gaining employment, did his lie *change* the decision? What if he were the only person to apply? If the decision rule is to hire the best person and only one applies, then the best is also the worst. Assuming hiring someone is better than hiring no one then the decision defaults to hiring Alvarez. His use of the lie was immaterial. The lie had no consequence at all. The test of decision change exhibits neither false positives nor false negatives across all three sets of deliberations.[73]

2. N.Y. Times v. Sullivan 376 U.S. 254, 280 (1964)

The scienter requirement, whether a false claim is knowingly reckless, has become one of the defining tests for whether political speech is actionable. Arising from the Sullivan case, it became "iconic because of its beneficiaries not its reasoning," suggesting the context and consequences of the "actual malice" standard merit scrutiny compared to alternate tests. [74]

On March 29, 1960, the Committee to Defend Martin Luther King, Jr. took out a full-page ad in The New York Times that prompted the Sullivan suit.[75] Dr. King had led a successful boycott of segregated bussing after police arrested Rosa Parks for refusing to give up her seat to a white man. Segregationists in Alabama's state government responded by seeking to silence civil rights advocates through state apparatus. Officials broke up protests, closed Alabama State College for Negros, and filed sham charges. The most recent attempt charged Dr. King with felony tax evasion and perjury for failure to report charitable civil rights contributions on his personal tax returns.[76] The Committee placed the Times ad to solicit

[73] A subsequence case resulted in conviction when a defendant lied about his status as a veteran and a Purple Heart recipient to join and defraud the American Legion. *See* Commonwealth v. Crawford, 254 A.3d 769 (Pa. Super. Ct. 2021). Again, the decision change test concurs.
[74] David McGowan, *A Bipartisan Case Against* New York Times v. Sullivan, 1 J. FREE SPEECH L. 509 (2022).
[75] New York Times Co. v. Sullivan, 376 U.S. 254, 256 (1964).
[76] *See* ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT (1992); *see also* AIMEE EDMONDSON, IN *SULLIVAN*'S SHADOW: THE USE AND ABUSE OF LIBEL LAW DURING THE LONG CIVIL RIGHTS STRUGGLE (2019).

funds for Dr. King's legal bills and to support the civil rights movement.[77] Intended as an emotional appeal, the ad contained several inaccuracies (see Table 2). Times' editors, relying on the character of those placing the ad, never checked its claims or they would have discovered discrepancies with their own reporting.[78] These errors provided opening for L. B. Sullivan, Commissioner of Police, to sue for defamation even though the ad never mentioned him directly.[79] Decided by an all-white jury, under supervision of a judge who had authored segregationist columns for the local paper,[80] the verdict ruled in Sullivan's favor awarding $500,000 in damages from the Times. The Alabama Supreme Court affirmed.

Table 2 – Comparison of false claims in "Heed Their Rising Voices" and historical events.

False Claim	**Historical Facts**[81]
Sang My Country 'tis of Thee	Sang National Anthem
Martin Luther King arrested 7x	MLK arrested 4x (charges: loitering, speeding, perjury, and interference with commerce for organizing Montgomery bus boycott[82])
9 students expelled for leading demonstration at capitol	9 students expelled for demanding service at a lunch counter
Students protested expulsion by refusing to register	Students protested expulsion by boycotting class
Truckloads of police ringed campus armed with tear gas and shotguns	Police deployed near campus in large force 3x
Dining hall padlocked to starve students	Unregistered students denied meal tickets

The civil rights issues dwarfed the specifics of the civil suit.[83] Government itself was denying African Americans their civil rights and suppressing press exposure of its efforts. Any remand to the lower courts risked returning equivalent results from the same biased processes that had produced the original verdicts. Any decisions based on technicalities would not clear hundreds of millions of dollars in similar libel lawsuits. The options at hand seemed inadequate.

What of a test of truth? Factual errors were present, including claims of disgraceful conduct that had not occurred. The common law required truth in all particulars and that standard had not been met.[84] What of a test of negligence? The Times had failed to check the ad

[77] *Id.; see also* Mckee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring).
[78] Sullivan, 376 U.S. at 287.
[79] *Id.* at 771.
[80] Kermit L. Hall, *Dignity, Honor, and Civility:* New York Times: v. Sullivan, 9 OAH MAG. HIST. 33 (1995).
[81] All facts sourced from N.*Y. Times v. Sullivan*, 376 U.S. 254 (1964) unless otherwise noted.]
[82] State of Alabama v. King, No. 7399. Cir. Ct. Montgomery County, Ala. (Mar. 1956).
[83] *Id.*
[84] Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

against its own reporting, a step that would have caught the principal errors.[85] What of reputation, since any connection "of and concerning" Sullivan was tenuous at best? Dispatching this case did not resolve equivalent cases concerning other state officials who behaved just as badly but were more directly implicated.[86] Governor Patterson, whose libel case was also before the courts, had served on the college board and it was he who had closed the college[87] and initiated the perjury charges when he was state attorney general.[88]

In response, the Supreme Court chose to test intent. Did the press *mean* to publish falsehoods? Was there actual knowledge of or reckless disregard for falsity? Was there "actual malice?" By testing intent, the Court sought to provide "breathing space" for press accounts of official misconduct. Specifically, it held "erroneous statement is inevitable in free debate, and … must be protected if the freedoms of expression are to have the 'breathing space,' [needed] to survive."[89]

This verdict had no precedent. It ended the use of truth as a defense. It reduced political speech chill but enabled repugnant political discourse. Injurious, false and defamatory claims made with intent to harm but without actual subjective knowledge of falsity or reckless disregard stopped rising to constitutional malice.[90] The Supreme Court ruling in Sullivan "overturned centuries of common law handed down from English courts to extend a right unique to the United States, constitutional protection of speech critical of government, even speech that is false."[91] As of 2020, the U.S. has adopted a test that no other country has chosen to adopt.[92]

In the process of clearing the defamation suit backlog, the actual malice standard introduced its own problem: Proving subjective knowledge of falsity or recklessness beyond negligence is exceedingly hard, bordering on impossible.[93] Often protecting false claims that do not deserve protection, the test is rife with intervention false negatives. Supreme Court Justice Clarence Thomas describes it as policy masquerading as law. He argues the reasoning is invalid, the history is unprecedented, and the false narratives it allows against public figures damage democracy. Lies aimed at democrats, characterizing them as a Satanic child abuse cult, led to a pizza parlor shooting.[94] Supreme Court Justice Gorsuch allows that the verdict might have made sense in 1964 when editors checked facts prior to print but the test no longer makes sense when fact checking plays no role in claims amplified by social media,

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[85] *See* LEWIS, *supra* note 76.
[86] *Id.*
[87] Kermit Hall, *L.B. Sullivan*, *in* 100 AMERICANS MAKING CONSTITUTIONAL HISTORY 189, 189-91 (Melvin I. Urofsky ed., 2004).
[88] *See* LEWIS, *supra* note 76.
[89] New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (citing NAACP v. Button 371 U.S. 415 (1963)).
[90] *See* Hall, *supra* note 87.
[91] EDMONDSON, *supra* note 76.
[92] David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L.J. 759 (2020).
[93] *Id.*
[94] McKee, 139 S. Ct. 675 (2019) (Thomas, J., concurring).

who are themselves unaccountable.[95] "Those exercising freedom of the press had a responsibility … to get facts right or, like anyone else, answer in tort for the injuries they caused."[96] The actual malice standard has become "effective immunity from liability."[97] Compounding damage from lack of accountability, the actual malice standard reverses journalists' incentives for integrity. The optimal legal strategy is to publish without investigative fact-checking in order to avoid the scienter requirement.[98] Editors of The New York Times themselves recognized this problem even as they celebrated victory: "we may be opening the way to complete irresponsibility in journalism."[99] Before she joined the Supreme Court, professor Elana Kagan wrote that the verdict's effect "may cut against the very values underlying the decision."[100] If the goal is to inform public discourse in an effort to hold government accountable, flooding the market with misinformation can have the opposite effect.[101] The logic is not even internally consistent: "…to the extent that protecting political speech furthers central First Amendment values … protecting speech that … [distorts] voter perceptions … through dissemination of false information seriously endangers [those values]."[102] Damage, however, does not stop there. If one can impugn the character of public officials without consequence, citizens of lesser character will serve in offices where citizens of better character decline to do so.[103]

From a mechanism design perspective, the effect is the opposite of providing a market of ideas with accurate information. Invariably, in any conflict, the best informed parties are the accuser and the accused. Making accusers unaccountable gives them reason to contrive such accusations as might expand their opportunities at the expense of the accused. They do not internalize costs. They provide more corrupted information. At the same time, the accused are less able to hold accusers to account. The polity loses a credible signal from one who knows the claim is false. Without legal recourse, nothing but hearsay separates the innocent from the guilty. In one stroke, Sullivan created the saint's burden and the liar's dividend.[104] The honest politician cannot shed the false accusation. The dishonest politician can hide from the honest accusation.

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[95] Berisha v. Lawson, 141 S. Ct. 2424, 2426 (Gorsuch, J., dissenting).
[96] *Id.*
[97] *Id.* at 2428.
[98] *Id.*
[99] LEWIS, *supra* note 76, at 219.
[100] Elena Kagan, *A Libel Story:* Sullivan *Then and Now (Reviewing Anthony Lewis,* Make No Law: The *Sullivan* Case and the First Amendment (1991)), 18 L. & SOC. INQUIRY 207 (1993).
[101] *See* Epstein, *supra* note 84; Logan, *supra* note 92; McGowan, *supra* note 74.
[102] Martin H. Redish & Julio Pereyra, *Resolving The First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 454 (2020).
[103] *See* Hall, *supra* note 87.
[104] Deepfakes create an analogous problem. They provide plausible deniability, allowing the liar to avoid accountability for misdeeds they have done. *See* Robert Chesney & Danielle K. Citron, *Deepfakes and the New Disinformation War*, FOREIGN AFF., https://www.foreignaffairs.com/articles/world/2018-12-11/deepfakes-and-new-disinformation-war (last visited Sept. 12, 2022).

Defamation involves third parties: the accuser, the accused, and those who would interact with the accused.[105] Absent controls, falsity involves externalities that yield overproduction of damage. The effect of the actual malice standard is both an increase in misinformation and a decrease in tools to clear it. A better solution separates adjudication from remediation. Low cost adjudication makes identification of falsehood simpler and thus the supply of falsehood less valuable. Low cost adjudication also makes signals of falsity credible and thus consumption of falsehood less palatable. Independent of adjudication, courts can adjust remediation for false accusations in accord with a society's desires for warming or chilling speech.[106]

How might low cost adjudication proceed? Put differently, could a different test yield fewer false positives and false negatives? Could a test of *decision-change* perform better than a test of truth, negligence, reputation, or intent? The answer is yes.

The Times' ad implicated two decisions: (1) Should a reader contribute to the Martin Luther King, Jr. defense fund specifically and help advance civil rights generally? (2) Should a reader not enter into or maintain an advantageous relationship with Sullivan? In a *Decision Rights Doctrine* sense, based on a reader's decision, the former might expand a speaker's opportunity while the latter might shrink a third party's opportunity. The Sullivan trial focuses on decision two. Table 3 presents a more complete set of facts concerning these decisions.

Table 3 – Historical context at the time of ad placement

Date	Historical Events
Jan 30, 1956	MLK home firebombed with wife, a fellow parishioner, and baby daughter inside[107]
1956	Attorney general Patterson (later governor) secures a court order barring NAACP activity in Alabama and fining organizations $100,000 for failing to turn over member names.[108]
Dec 17, 1956	Segregated bussing ruled unconstitutional in *Browder v. Gayle, 352 U.S. 903*. Organizing the boycott of segregated busses, interfering with commerce, is the charge for which MLK was convicted in *State of Alabama v. M. L. King, Jr. No. 7399*
1959	Sullivan, himself a member of the Ku Klux Klan, defeats an incumbent segregationist to become police commissioner. Expands police civil reserve loaded with Klansmen.[109]
May, 1960	Alabama attorney general Patterson (later governor) charges MLK with felony tax evasion and has him extradited from Georgia.[110]

[105] *See* Epstein, *supra* note 84.
[106] *See* McGowan, *supra* note 74.
[107] DeNeen L. Brown, *After MLK's Home Was Bombed, He Refused to Back Down: 'This Movement Will Not Stop,'* WASH. POST (Jan. 18, 2021), https://www.washingtonpost.com/history/2021/01/18/mlk-house-bombed-montgomery-bus-boycott/
[108] EDMONDSON, *supra* note 76.
[109] Hall, *supra* note 87.
[110] *Id.*

Feb 28, 1960	Bat-wielding KKK members assault student protestors while state and Montgomery police stand by[111]
Mar 5, 1960	Sullivan issues public statement of intent to use police to "take whatever action might be necessary to disperse [negro troublemakers]" gathering and demonstrating at the state capitol to secure their civil rights[112]
Mar 9, 1960	Sullivan persuades Alabama Governor Patterson to close Alabama State College for Negros then uses force to break their lunch counter protest[113]
Mar 29, 1960	**– Committee to Defend MLK places "Heed Their Rising Voices" ad in N.Y. Times –**
Apr 19, 1960	**– Lester Bruce Sullivan files libel suit in Montgomery AL[114] –** **– Trial begins Nov. 1, 1960 –**
May 28, 1960	MLK acquitted of perjury by all white Alabama jury[115]
May 20, 1961	White mob attacks civil rights protesters for 10 minutes with clubs and chains before police arrive. Sullivan had conspired with the mob leader to give time for the siege.[116]

Complete and accurate information concerning Sullivan's conduct establishes worse conditions than any of the ad's misstatements indirectly impugning him. He was a confirmed segregationist and member of the KKK, who used members of the KKK as an extension of police authority. He convinced the Alabama state governor to close the Alabama State College for Negros. His officers stood by while bat-wielding Klansmen assaulted student protesters. By his own hand, he published a document stating intent to suppress free speech, freedom of assembly, and petitioning for redress of grievances by civil rights workers marching on the state capital. He would take "whatever action might be necessary to disperse [negro troublemakers]." If Sullivan's reputation was tarnished, it was not by the motes of dirt from an advertisement but by the blackening of his own behavior.

Having full information at the time of Sullivan's suit, would any party who had heard the ad's false claims *change* a decision upon learning the ad's claims alone were untrue? Regardless of whether one was a segregationist, a civil rights supporter, or a neutral bystander, one would likely not change a decision to keep an existing relationship with Sullivan or fail to enter a new one based on that alone. The other evidence weighs more heavily. If anything, Sullivan's standing among segregationists improved.[117] Adopting an actual malice standard is unnecessary. The change-of-decision test is unmoved.

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[111] Melvin Urofsky, *New York Times Co. v. Sullivan*, ENCYCLOPEADIA BRITANNICA, https://www.britannica.com/event/New-York-Times-Co-v-Sullivan (last visited June 2, 2022).

[112] Christopher W. Schmidt, *New York Times v.Sullivan and the Legal Attack on the Civil Rights Movement*, 66 Ala. L. Rev. 293, 320 (2014) (Sullivan declared "[i]f the Negroes persist in flaunting their arrogance and defiance by congregating at the Capitol Sunday the police will have no alternative but to take whatever action might be necessary to disperse them.").

[113] Hall, *supra* note 87.

[114] *Id.* In their capacity as affected government officers, Alabama Governor John Patterson and three others filed similar lawsuits against the same New York Times ad.

[115] State of Alabama v. King, No. 9593. Cir. Ct. Montgomery County, Ala. (Mar. 1956). 3

[116] Hall, *supra* note 87.

[117] *Id.* at 190.

Breathing space is not to broaden the boundaries around *intent* to state false claims. Rather, breathing space is consideration of the totality of information in which a specific false claim has no materiality in changing the decision. As with Sotomayor's irony in the Alvarez case, the falsity per se was immaterial.

Subsequent facts add weight to this conclusion. Dr. King was later acquitted of perjury while Mr. Sullivan further conspired with the leader of a white mob to delay police intervention so that the mob might beat civil rights workers with chains. It is worth pausing, however, to note that these events transpired *after* placement of the ad and Sullivan's filing for libel. The change-of-decision test must rest on "best available" information. As this information was not available at the time of filing, it should not be considered no matter how favorable or unfavorable.

Although not raised by Sullivan's lawyers, a fair question may be asked regarding the first decision. Did the ad's false claims rise to a level where charitable giving to the civil rights fund would constitute fraud? More precisely, would a default of not giving change to one of giving, resulting in decision error, based on the false claims alone? As illustration, a claim by a children's cancer charity that 100% of proceeds were spent on hospice care, transport, chemotherapy, and pain medication for children resulted in federal prosecution because less than 3% was spent as promised.[118] There is no evidence that the Committee to Defend Martin Luther King, Jr. spent funds improperly. Nor is there any evidence that any donor provided with full information on civil rights worker beatings, fire bombings, false arrests, and sham prosecutions would have chosen to withdraw their support. The falsity of the ad's claims was immaterial. Relative to best available information, it did not change the outcome in either the primary or secondary decision potentiated by the ad.

The ruling in Sullivan reached the right conclusion for the wrong reason. The malice standard wrongly changes the boundaries around *intervention* when it should rightly change the boundaries around *remediation*. A test of decision change reaches the same conclusion as the Supreme Court in Sullivan but without such a costly increase in false negatives.

As a separate issue, the Sullivan case never examined the deeper question of whether The New York Times should be culpable at all. An ad represents a form of paid third party content for which print publishers are liable according to a 1914 law.[119] An Internet platform that had accepted an identical ad would never have been liable according to a 1996 law.[120] The legal discrepancy between falsehoods in print and online publishing is a problem taken up in Van Alstyne (2023).[121]

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[118] Rebecca Ruiz, *4 Cancer Charities are Accused of Fraud*, N. Y. TIMES (May 19, 2015) https://www.nytimes.com/2015/05/20/business/4-cancer-charities-accused-in-ftc-fraud-case.html.Ruiz.
[119] Fed. Trade Comm'n Act of 1914, 15 U.S.C §53(d).
[120] Communications Decency Act of 1996, 47 U.S.C. § 230. The Communications Decency Act was struck down by the Supreme Court in *Reno v. ACLU*. Only § 230 survived. *See* Reno v. ACLU, 521 U.S. 844 (1997).
[121] Van Alstyne, *supra* note 42

3. Brandenburg v. Ohio, 395 U.S. 444 (1969)

The purpose in revisiting *Brandenburg v. Ohio* is not to relitigate falsity – this case never involved lies. Rather the purpose is to highlight the greater efficacy of a test of decision change relative to a test of categories. The test of decision change protects more speech, avoiding false positives, clarifies when intervention is appropriate, and accords better with moral judgment as measured by social harms.

An Ohio state court initially convicted Clarence Brandenburg, a leader in a local branch of the KKK, for violating a state statue banning the advocacy of "violence or unlawful methods of terrorism" in pursuit of "industrial or political reform."[122] At an armed Klan rally, Brandenburg asserted that "if our President, our Congress, our Supreme Court, continues [sic] to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[123] On appeal, the Supreme Court reversed the lower court's decision, finding the state statute unconstitutional.[124]

The Supreme Court's decision allows prohibition of speech that lies at the intersection of two categories: (1) speech that is "directed at inciting or producing imminent lawless action" *and* (2) speech that is "likely to incite or produce such action."[125] Hypothetical discussion, such as Brandenburg's, fails the second prong of the test. This dual screen narrowed bounds on intervention from the clear and present danger test on the basis that mere abstract endorsement of illegal activity in pursuit of political ends is protected speech so long as it does not cross the line inducing illegal activity.[126]

Had the KKK engaged in open conflict with members of the African American community, a command by Brandenburg shouting "shoot to disable" would pass both halves of the test: It incites *and* is likely to produce imminent lawless violence. If this were Brandenburg's actual remark, the test of decision change would support the same conclusion: the decision change from status quo inaction to committing violent action justifies suppressing speech. Yet, unlike the decision change test, the categorical test produces false positives and false negatives, intervening in speech when it should not and failing to protect speech when it should.

To see this, we transpose the setting to Tulsa, Oklahoma circa June 1921 and reverse the speaker. Seeking to save her family from massacre, an African American woman who shouts to her husband "shoot to disable" reduces atrocities as a white mob seeks to murder

[122] *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (citing OHIO REV. CODE ANN. §2923.13 (1969)).
[123] *Id.* at 446.
[124] *Id.* at 444.
[125] *Id.* at 447.
[126] *Id.* at 454.

hundreds of African Americans and burn dozens of city blocks.[127] At one extreme, status quo inaction results in the murder of an innocent woman and her family. Her speech *changes* a decision and preserves lives. At the other extreme, the exhortation "shoot to kill" would affect who gets killed without avoiding any killing. A speech directive changing the decision to one of disabling then reduces deaths, even of murderous thugs. The categorical test bars her speech.[128] The decision test protects it.

The decision change test, a utilitarian framing, results in the more moral outcome if by "moral" we preserve more life or avoid more misery.

Though hypothetical, this view is practical. Following Russia's illegal invasion of Ukraine in February 2022, Facebook changed its policy on posting violent content. To help Ukrainian citizens defend themselves, Facebook lifted its proscription on posting methods to commit violence as Ukrainians sought ways to deter Russian aggression.[129] At one level Russian soldiers sought to take control of political institutions but at another level they engaged in mass deportations, sexual violence, torture, and deliberate killing of civilians, leading to indictments for multiple war crimes.[130] Facebook met an immoral invasion with a moral change in policy.

This same decision change test can be used across *Alvarez*, *Sullivan*, and *Brandenburg* and in this final case is more permissive of speech.

A test of decision change exhibits another essential virtue: it protects viewpoints. Third party views and immaterial untruths are not "a difference that makes a difference."[131] They do not change decisions in a manner that also shifts responsibility from listener to speaker. When Brandenburg proclaims, as he did, "Personally, I believe the [African Americans] should be returned to Africa, the Jew returned to Israel,"[132] he has not changed any decision. No one has faced threat of deportation. The rendering of an opinion cannot shift the burden of a decision from active-listener to expressive-speaker. Decision makers must take responsibility for their own decisions. They cannot transfer that duty to others. That line is

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[127] Historical data put these numbers at 100-300 African Americans murdered and 36 city blocks burned. *See 1921 Tulsa Race Massacre*, TULSA HIST. SOC'Y & MUSEUM, https://www.tulsahistory.org/exhibit/1921-tulsa-race-massacre/.

[128] That she had a right of self-defense misses the point. It introduces yet another categorical exception. The point of the current exercise is to avoid yet more epicycles in the law's view of the solar system of speech and reframe the problem to avoid such epicycles entirely.

[129] The change in policy did not permit Ukrainian calls for violence against Russian civilians. See Munsif Vengattil & Elizabeth Culliford, *Facebook Allows War Posts Urging Violence Against Russian Invaders*, REUTERS (Mar. 10, 2022) https://www.usnews.com/news/world/articles/2022-03-10/exclusive-facebook-and-instagram-to-temporarily-allow-calls-for-violence-against-russians.

[130] Masha Gessen, *The Prosecution of Russian War Crimes in Ukraine*, THE NEW YORKER (Aug. 1, 2022) https://www.newyorker.com/magazine/2022/08/08/the-prosecution-of-russian-war-crimes-in-ukraine.

[131] GREGORY BATESON, FORM, SUBSTANCE AND DIFFERENCE, ESSENTIAL READINGS IN BIOSEMIOTICS 501 (1970).

[132] *Brandenburg*, 395 U.S. at 447.

not crossed until the speaker's expression involves coercion, exercising undue influence altering the listener's default decision.

"You should kill yourself" said once is an obnoxious but inactionable viewpoint. By contrast, stating it frequently and repeatedly to a mentally ill boyfriend then telling him to get back inside a carbon monoxide filled truck he has just exited establishes causality sufficient to implicate the girlfriend in a suicide when the boyfriend gets back in the truck.[133] These statements pass the undue influence test in transferring decision responsibility from listener to speaker.[134] Based on objective measures of recklessness, would a normal person have recognized the gravity of harm and chosen alternate conduct so as to avoid the harm?

At the same time, a test of decision change easily dispatches one of the chief objections raised by the girlfriend's defense. Her attorneys argued that a guilty verdict would chill speech as doctors and family members might refuse to discuss end-of-life decisions with the terminally ill.[135] But, such an argument presents a false comparison based on the end state, not the change. The proper comparison is between the prospect of a productive life for an eighteen-year-old, for which termination destroys value, versus the end of anguish without prospect of recovery, for which termination can add value. In the end, what policy is most conducive to liberty? What is the best decision for the individual, by the individual, on best available information? Regardless of one's personal views on any given end state, one must weigh endings against their beginnings to know their value.

To reemphasize Section II.B, the end condition alone cannot determine value. In both cases above, the same end state occurs but in one it contrasts with an absence of harm and in the other it contrasts with the presence of harm. Likewise, the true value of a positive outcome is indeterminate for we must contrast it with a default that might have been better or worse. Not decision outcome but decision *change* determines worth.

A final point in favor of testing decision change is that it gives precision to the efficacy of counter speech. If, in a free society, we hold that "the remedy for speech that is false is speech that is true … the response to the unreasoned is the rational; to the uninformed, the enlightened, to the straight-out lie, the simple truth,"[136] then we must know those occasions when simple truths can defeat straight-out lies. The test of decision change identifies two such occasions: (i) when time remains between the contested expression and the potentiated decision, and (ii) when the decision is reversible.[137] The former has been known for most of the past century and justifies exempting offensive but abstract speech that is protected under

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[133] *Commonwealth v. Carter 481 Mass. 352 (2019).*

[134] *Ibid, at 635-636.* Finding "but for" Carter's frequent and repeated statements encouraging her partner with a known mental illness to commit suicide, "the victim would not have" completed suicide. Defendant Carter's statements pass the undue influence test in transferring decision responsibility from listener to speaker.

[135] Ibid, at 636.

[136] *Alvarez*, 617 F.3d at 727.

[137] Avinash K. Dixit & Robert S. Pindyck, *The Options Approach to Capital Investment*, HARV. BUS. REV. 105 (1995)

both a decision change test and the second prong of the Brandenburg test.[138] The second, however, is less obvious but born of options theory. Decision choices split between reversible and irreversible, defining different mathematical forms for their value.[139] Reversible decisions can be made without perfect information. The option should be exercised quickly. By contrast, irreversible decisions should be made based on best available information. The option should be exercised methodically. For reversible decisions, counter speech can be effective even after the decision has been made, broadening the space where intervention is unwarranted. For irreversible decisions, counter speech has no effect. The decision having been made, cannot be undone.

DR Doctrine gives a person the right to increase his or her own welfare via speech to the maximum extent possible subject only to a welfare reduction in others. Analogous to the Consumer Welfare standard whose metric is surplus born of price change,[140] the welfare metric of *Decision Rights Doctrine* is surplus born of decision change. This has numerous advantages. It protects irony and parody. It gives breathing space to falsehoods that make no difference. It offers viewpoints safe harbor. It defines the boundaries on the efficacy of counter speech. It suffers fewer false positives and false negatives compared to tests of categories.

IV. Utilitarian Solutions to Deontological Problems

Where courts apply deontological rules to speech without regard to consequence, three absolutist paradoxes arise, one in free speech markets, one in individual liberty, and one in preventing government tyranny.

A. The Paradox of Free Speech Markets

A problematic but illustrative case provides realism. The Washington League for Information Transparency and Ethics (WASHLITE) sued Fox News on the basis of propagating false pandemic information on the health effects of precautions such as masking and lockdowns and that COVID-19 warnings were a hoax propagated by political opposition.[141] Despite praising the aims of the case, the court moved to dismiss, citing *U.S. v. Alvarez* that falsity alone is not an unprotected category but must be knowing and reckless (*New York Times v. Sullivan*). Affirming the dismissal, the court of appeals added that Fox News' statements pertained to policies "clearly [implicating] matters of public concern and [receiving] special

[138] *See Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech not enforced silence.")
[139] AVINASH K. DIXIT, & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY (1994).
[140] Tests used in the US and the European Union, for example, include a Small but Significant and Non-transitory Increase in Price (SSNIP) and Upward Pricing Pressure (UPP). *See* Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 BERKELEY ELEC. J. (2010).
[141] *WASHLITE v.Fox News*, No. 20-2-07428-4 SEA (Wash. Supp. Ct. 2020).

First Amendment protections no matter how outrageous," and "… however laudable WASHLITE's intent, it's claim is barred by the First Amendment."

The plaintiff's claim was problematic because it sought principally to bar publication of further misinformation and to issue specific retractions. A further claim, that Fox News violated the Consumer Protection Act, was also found invalid on the basis that cable news did not fall within the ambit of trade, which if applied would still run afoul of First Amendment protections.[142] These two points constitute the currently prevailing analysis. A proposed analysis proceeds by comparing the aims sought in *WASHLITE v.Fox News*, enjoining or retracting speech and applying product liability, to those proffered under *DR Doctrine*, what decisions are implicated and how do defaults change.

Enjoining speech *ex-ante* is not a position supported by *DR Doctrine*, which allows for maximum information seeking and maximum expressiveness. Holding expression accountable *ex-post*, however, is where utilitarian policy diverges from deontology. Clear decisions potentiated by Fox News expressions involved whether to take precautions against the spread of a virus during a pandemic. This may involve subordinate, complementary, or interfering decisions such as whether to wear a mask, whether to honor a lockdown, whether to wash hands, or whether to interact in a socially distant manner. A clear set of default decisions was also provided by authoritative sources such as the Center for Disease Control, National Institute of Health, the U.S. Surgeon General, the head of the Whitehouse Coronavirus Task Force Dr. Anthony Fauci, and the World Health Organization, an international body without partisan ties to the state. Against this largely coherent set of defaults, was Fox News persuasive in changing decisions?

Statistical analysis shows a causal link between COVID-19 mortality and viewing the top rated Fox News program,[143] a causal link between viewing Fox News and non-compliance with social distancing rules,[144] and reduced consumption of hand sanitizer and masks.[145] Subsequent to the case, research also documented a causal link to lower vaccination rates.[146] Notably, Fox News showed no historical effect on prior flu vaccination rates, suggesting its effects were COVID-19 specific.[147] Having earlier run stories on reemergence of Polio due to vaccine hesitancy,[148] Fox News had no history of opposing measles vaccines,

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[142] *Id.*

[143] Leonard Bursztyn, Aakaash Rao, Christopher Roth, & David Yanagizawa-Drott, *Misinformation During a Pandemic*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 2020-44 2020).

[144] Andrey Simonov, Szymon K. Sacher, Jean-Pierre H. Dube, & Shirsho Biswas, *The Persuasive Effect of Fox News: Non-Compliance with Social Distancing During the COVID-19 Pandemic*, (Colum. Bus. Sch. Working Paper No. 27237, 2021)

[145]Elliot Ash, S. Galletta, Dominik Hangartner, Yotam Margalit, & M. Pinna, The Effect of Fox News on Health Behavior During COVID-19 (June 27, 2020) (unpublished).

[146] Matteo Pinna, Léo Picard, & Christoph Goessmann, Cable News and COVID-19 Vaccine Compliance (July 20, 2021) (unpublished manuscript).

[147] *Id.*

[148] *Polio Spread Fueled by Vaccine Taboo*, FOX NEWS, (May 4, 2005) https://www.foxnews.com/story/polio-spread-fueled-by-vaccine-taboo.

polio vaccines, or smallpox vaccines. Under *DR Doctrine*, Fox News would be free to express itself in whatever manner it preferred to attract viewers just as the classes of persons who had lost family members and institutions who had lost employees would be free to hold Fox News accountable for decision errors and externalities based on their advice. Information subsequent to the initial case also reveals that Fox News statements were knowing. Its hypocritical position opposing a government policy mandating either vaccination or testing among employees stands in contrast to its own nearly identical policy mandating vaccination or testing among its employees.[149] The owner of Fox News received the vaccine almost immediately after becoming eligible.[150]

Telling a blind person to step to the right so as to fall over a mountain cliff is unprotected speech.[151] Reflecting an externality, so too is an instruction to tell a sighted person to step into the path of another so as to trip that person over the cliff. The second order mortal externality renders the speech no less unprotected. Persuading an audience to forgo vaccination during a pandemic sets them up at the edge of a precipice without guardrails. That the unvaccinated then cross paths with others sending them over the precipice, without knowledge or consent, would not protect such speech even if it were policy relevant.

A key premise of government non-intervention is using the marketplace of ideas to resolve the merit of conflicting ideas.[152] But, in order for that market to function, it must have means of purging claims without merit. Like bad products artificially protected from competition, false claims have been artificially protected from consequence by the courts, crippling the functioning of and wasting literal lives and resources of free societies. Courts have failed to recognize that they have made the same mistake twice, once in antitrust by protecting inferior products rather than protecting markets for competition,[153] and again in free speech by protecting inferior speakers rather than the market for speech.[154] The solution, in both cases, is to allow the market (not government) to function properly and allow it to remove inferior products and false claims simply by allowing (not requiring) inferior sellers and deceitful speakers to suffer the consequences of their own advice and actions.

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[149] David Bauder, *Fox's Vaccine Criticism Focuses Attention on its Own Policy,* ASSOC. PRESS, (Sept. 16, 2021) https://apnews.com/article/joe-biden-business-health-arts-and-entertainment-fox-corp-26096a8781c7c7f1d6c0ddff98a5fe6d.

[150]Kenneth Li, *Murdoch Receives COVID-19 Vaccine as Fox News Host Casts Suspicion on Campaign*, REUTERS, (Dec. 18, 2020), https://www.reuters.com/article/us-health-coronavirus-murdoch/murdoch-receives-covid-19-vaccine-as-fox-news-host-casts-suspicion-on-campaign-idUSKBN28S2J7.

[151] On a list of twenty such examples, two more relevant cases include successfully encouraging a suicide and raising a false public alarm. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE (1992).

[152] The "marketplace of ideas" has always described "ideas" not "facts," leading the law to treat facts and opinions differently. Facts are not copyrightable. Expressions with a modicum of originality are, implying an absence of a market in facts but the presence of a market for ideas. Blurring this distinction is ahistorical, incorrect, and "complicit in the erosion of the body politic," Ari E. Waldman, *The Marketplace of Fake News*, UNIV. PA. J. CONST. L. 845 (2018).

[153] BORK, *supra* note 12.

[154]Shiffrin calls recent jurisprudence "idolatry," overprotecting speakers at the expense of equality and of democracy. STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT (2016).

1) Free idea market solution: Stop protecting speakers at the expense of citizens and free markets for speech. Allow the market to clear false claims via standard contestation.

Deontologists have not held true to their position. If the reason for government non-intervention is to pass the test of an idea to the market, government should not intervene when the market decides a claim has failed the test. The paradox of antitrust jurisprudence was that legal intervention intended to protect consumers and free trade markets artificially raised prices by protecting inefficient firms from consequences of competition.[155] The paradox of free speech jurisprudence is that intervention intended to protect citizens and free idea markets artificially raises harms by protecting those making false claims from the consequences of acting on those claims.

Where *Consumer Welfare* serves as a useful standard by which to judge price change in the market for products, *DR Doctrine*'s decision change might serve as such a standard to judge expression in the market for ideas. Importantly, it highlights what to protect, i.e. decision options and expression, and what not to protect, i.e. decision errors and harmful externalities.

In their concurrences to Brandenburg v. Ohio, even the staunchest free speech absolutists, Justices Douglas and Black, took pains to defend and carve out the extreme speech exception of falsely shouting fire to cause a panic. The irony here is bitter. A putative news organization falsely shouts "Not Fire!" when there is one, yet the courts defend them while citizens suffer burns.

An obvious rejoinder is what then of personal agency? Would not the listener bear individual responsibility for his or her own choices apart from what the speaker recommends and are there not other sources of information? This has three answers.

First, it is the height of hypocrisy for a speaker to urge a course of action, here knowing the consequences, then assert they did not anticipate the result or that they bear no responsibility. In the present case, the defendant opposed a policy of intervention for others that it embraced for itself. The policy at issue, moreover, was not one of subjective fashion but one of objective science – was the pandemic a hoax or not, does social distancing work or not, are masks effective or not. Deontology in its pure form as expressed by Kant, not as practiced by the courts, not only requires telling the truth but reserves particular scorn for hypocrisy. No hypocrite can set their own actions contrary to those they apply to another and be practicing a universal rule. Hypocrisy lies at the heart of immorality under deontology. It is not defensible under the deontological principles espoused by the courts.

Second, in the context of multiple and conflicting data sources, holding the speaker accountable for population level decisions is challenging but possible. The hypothetical Alvarez case of providing false resume information to an employer is clear and simple.

[155] BORK, *supra* note 12.

There is no competing source of misinformation and one party, the employer (or possibly a displaced worker), has a specific course of action based on the erroneous decision to hire. The case of Fox News misinformation is more challenging in that other news organizations echoed Fox sentiments and that misinformation affects a population not just one entity. It is much harder to assert Fox was decisive for a specific individual's choices. Fortuitously, modern technology brings with it solutions to the problems that modern technology enables. Data on audience choices show evidence, beyond a reasonable doubt, that Fox News broadcasts were causal. Statistical proof is abundant and more persuasive than rhetorical argument. Scientists have used Fox's own audience as a control for competing news broadcasts,[156] mobile phone data to track differences in lockdowns and social distancing among Fox News viewers,[157] and consumer product data to track differences in use of hand sanitizers and masks.[158] Assessment of population level responsibility is not only feasible but practical and more certain at precise levels of accuracy than most courts require. Indeed, such an assessment simply parallels "Market Share Liability" already applied in pharmaceutical cases where apportioning damages is decided by pharmaceutical market shares when precise knowledge of who produced a specific drug is unknown.[159]

The third answer rejects the implied conclusion but embraces, in part, the stated assumption. The implied conclusion is to absolve the speaker of *any* responsibility whereas the assumption is that the listener bears *all* responsibility. How should law apportion blame? Between speaker and audience, members of an audience are usually accountable for their own decisions as outlined in Section III.B. One of Coase's insights, however, is that damage is often a function of choices made by *both* parties.[160] If this damage, a "negative good," can be traded in the market, then assigning property rights can allow a market to trade its way back to efficiency. If, due to transaction costs, the negative good cannot be easily traded, then efficiency requires assigning liability to the lowest cost avoider. The reason is a simple problem of moral hazard that, freed of consequence, the lowest cost avoider has no incentive to reduce the damage. The alternative, in the Fox News case, is to assert that all audience members should first verify all broadcast claims – an absurdity of inefficiency. In this instance, as in the cases of air and water pollution, the lowest cost avoider is the party producing the misinformation and should therefore hold in principle and in principal the liability.

For purposes of epistemological clarity, I note that the *Paradox of Free Idea markets*, like Bork's *Antitrust Paradox*[161] is one of enforcement, not true logical contradiction. In both cases, courts have undermined their stated goals via protectionist intervention. Their enforcement actions have allowed bad products and bad ideas to circulate past expiration dates that competitive forces would have imposed, raising harms, and reducing welfare for

[156] Bursztyn et al., *supra* note 143.
[157] Simonov et al., *supra* at note 144.
[158] Ash et al., *supra* note 145.
[159] *See* Sindell v. Abbott Laboratories, 26 Cal. 3d 588 (1980).
[160] Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. (1960).
[161] Bork, *supra* note 12.

consumers and citizens alike. Deontological rules do, however, create true paradoxes of presence and of absence we must visit next.

B. The Paradox of Individual Liberty

Standard models of decision theory overlook an important case where accurate policy information can itself induce decision errors. It is possible for one truth to cancel or obscure another truth. Signal jamming is a third form of dysfunctional information[162] causing harms but it operates on a different principle. Rather than deceiving a decision maker with false news, or affecting third parties via externalities, it forces decision errors by denying access to the news one needs to know. It violates *DR Doctrine* by thwarting information seeking. It is the antithesis of idea diversity; it is noise; it is homogeneity. In terms of the *Fundamental Welfare Theorem* of economics, it implicates a third cause of failure in the market for ideas. After externality, and information asymmetry, it is monopoly.

"What is the cost of lies? It's not that we'll mistake them for the truth. The real danger is that if we hear enough lies, then we no longer recognize the truth at all." – Valery Legasov, 2019 (Chief of the Commission investigating Russia's nuclear power disaster, from the movie Chernobyl)

Information theory gives us the most rigorous proof of this phenomenon. Claude Shannon's channel coding theorem formally shows that correcting errors is impossible once the flow of information exceeds a threshold determined by the noise level.[163] The theorem gives us the means of measuring the information volume present, defines the computer science "bit," and forms the basis of all telecommunications.

A human version of channel capacity forms the basis of Herbert Simon's bounded rationality theory. "What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention, and a need to allocate that attention efficiently among the overabundance of information sources that might consume it."[164] Explaining errors in human judgment that ensue from passing this boundary is one reason Simon received the Nobel Prize in economics. To more accurately explain behavior, he replaced a model of omniscient rational agents with one whose agents'

[162] Another recognizable version is a "Denial of Service Attack" that floods a target with enough traffic to either bring it down or render it incapable of serving others. "Understanding Denial of Service Attacks" U.S. Cybersecurity & Infrastructure Agency. *Security Tips: Understanding Denial-of-Service Attacks*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Nov. 4, 2009), https://www.cisa.gov/uscert/ncas/tips/ST04-015. I thank Brendan Hemingway for this observation.

[163] C.E. Shannon, *A Mathematical Theory of Communication*, 27 *The Bell System Technical J.* 379 (1948).

[164] Herbert A. Simon, *Designing Organizations for an Information-Rich World*, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37 (M. Greenberger ed., 1971).

"capacities for rational action are limited."[165] Other scholars have proven formally that once the volume of information hits the bounded rationality constraint, individuals' information sets can become homogenized and associations of such individuals more polarized.[166] Thus a flood of Internet information can produce a form of cyberbalkanization. Algorithms that filter information to boost engagement and elicit strong emotional responses exacerbate this phenomenon.[167] Highlighting the inability to correct errors faster than they arrive, other scholars find "truth decay" occurs when people, no longer able to separate truth from noise, fall back on opinion and tribal beliefs to determine their choices.[168]

Despite the theory and evidence from bounded rationality and from information theory, the Supreme Court has held steadfast to a policy that more speech is better speech. The landmark case *Buckley v. Valeo* struck down a "restriction on the amount of money a person or group can spend on political communication" because it "reduces the quantity of expression … the number of issues discussed, the depth of their exploration, and the size of the audience reached."[169] *Buckley v. Valeo* committed the Court to a position that more speech is necessarily better, deducing that government cannot therefore restrict volume. The stated, and reiterated, goal was "to secure, 'the widest possible dissemination of information from diverse and antagonistic sources.' "[170] Decades later, the Supreme Court reaffirmed this position in *Citizens United*, writing "there is no such thing as too much speech"[171] and "it is our law and our tradition that more speech, not less, is the governing rule."[172] As Kennedy observed for the majority, any "statute which chills speech can and must be invalidated."[173]

These decisions are of a time and place that predate the manifest consequences of crowdsourced information. *Buckley v. Valeo* set policy in 1976 before the World Wide Web's 1989 emergence, marked by the invention of hypertext.[174] The Supreme Court ruled on *Citizens United* in 2010, just four years after the 2006 founding of Twitter.[175] As of 2020,

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[165] *Press Release: Studies of Decision-Making Lead to Prize in Economics*, THE ROYAL SWEDISH ACA. OF SCI. (Oct. 1978), https://www.nobelprize.org/prizes/economic-sciences/1978/press-release/.

[166] Marshall Van Alstyne & Erik Brynjolfsson, *Global Village or Cyber-Balkans? Modeling and Measuring the Integration of Electronic Communities*, 51 MGMT. SCI. 851.

[167] ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011).

[168] Jennifer Kavanagh & Michael D. Rich, *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life*. RAND CORP. (2018), https://www.rand.org/pubs/research_reports/RR2314.html#:~:text=Over%20the%20past%20two%20decades%2C%20national%20political%20and,trust%20in%20formerly%20respected%20sources%20of%20factual%20information.

[169] Buckley v. Valeo, 424 U.S. 1, 19 (1976) (holding superseded by statute)

[170] *Id.* at 49 (citing *NY Times*, 376 U.S. at 369 (quoting *Associated Press v. United States*, 326 U. S. 1, 20 (1945))).

[171] Citizens United v. FEC, 558 U.S. 310, 384-85 (2010).

[172] *Id.* at 361.

[173] *Id.*

[174] *A Short History of the Web*, CERN, https://home.cern/science/computing/birth-web/short-history-web#:~:text=Tim%20Berners%2DLee%2C%20a%20British,and%20institutes%20around%20the%20world.

[175] *Twitter*, WIKIPEDIA, https://en.wikipedia.org/wiki/Twitter.

no free speech ruling by U.S. courts anticipated that a U.S. president might coax mob action to crowdsource the silencing of critics.[176] Courts have not recognized speech that cancels speech.

Yet, the Supreme Court has not always overlooked capacity constraints. When considering radio broadcast scarcity in 1969, it ruled in *Red Lion v. FCC* that: "No one has a First Amendment right to … monopolize a radio frequency. … It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[177] Monopoly is a problem because the public has a right "to receive suitable access to social, political, esthetic, moral and other ideas."[178] Interpreted through the lens of *DR Doctrine*, an absence of idea diversity thwarts information seeking and limits decision options due to incomplete information. *Red Lion* established the now disused Fairness Doctrine, allowing political speakers broadcast access, on the basis of channel scarcity. The Fairness Doctrine still adheres to the more-is-better rule, creating more diversity by enabling more voices. Importantly, however, every channel has two capacity constraints, one at the transmission end and one at the receiving end. Courts have yet to recognize the latter.

By contrast, totalitarian regimes have recognized constraints at both ends and used both as weapons of censorship. Signal jamming has long been a common and deliberate form of censorship that countries use to prevent broadcast information reaching their citizens from adjacent countries.[179] During war, enemy combatants use signal jamming to prevent communication and coordination of troop divisions on the opposite side.[180] During peace, authoritarians now use signal jamming based on social media. "Rather than shutting down dissenting voices, these leaders have learned to harness the democratizing power of social media for their own purposes — jamming the signals, sowing confusion. They no longer need to silence the dissident shouting in the streets; they can use a megaphone to drown him out. Scholars have a name for this: censorship through noise."[181] Rather than argue with dissent, authoritarians also use secretive operations to "distract the public and change the subject," while using cheerleading to drown critics and solidify their hold on power.[182] U.S. politicians use social media to send censorial mobs after critics whose voices they wish to

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[176] Tim Wu, *Is the First Amendment Obsolete?* 117 MICH. L. REV. 547 (2018).
[177] Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367, 395 (1969).
[178] *Id.*
[179] JEROME S. BERG, BROADCASTING ON THE SHORT WAVES, 1945 TO TODAY (2008).
[180] Radar Jamming and Deception, https://en.wikipedia.org/wiki/Radar_jamming_and_deception.
[181] McKay Coppins, *The Billion-Dollar Disinformation Campaign to Reelect the President*, THE ATLANTIC, (March 2020), https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/.
[182] Gary King, Jennifer Pan, & Margaret E. Roberts, How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument, 111 *AM. POL. SCI. REV.* , 484 (2017).

silence.[183] To implement "reverse censorship," autocrats use "a sufficient volume of information to drown out disfavored speech."[184]

Signal jamming and reverse censorship occur both as the monopoly speech of one voice and as the monopoly of many voices speaking as one. Public squares, print media, TV stations, and radio broadcasts represented the choke points of twentieth century market access. Digital public squares have removed choke points on transmission, only to replace them with choke points on reception.

Courts have not recognized this latter problem. Writing in defense of unlimited speech on the basis that more-is-better, the Supreme Court holds that: "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."[185] No, this allegory is logically flawed, having missed or misunderstood the concept of congestion externalities. To use the judges' own metaphor, what these decisions have unleashed is the capacity to hire tens of thousands of drivers, jamming a city's streets, so that no other driver can deliver messages to their destinations. Congestion jamming *blocks* the widest dissemination of information from diverse sources. They have unleashed the media equivalent of the denial-of-service attack.

The deontological paradox of presence is that unlimited amplification of one message means that no other message can be heard. It is a paradox of individual liberty taken to extreme. In order to protect liberty, the courts unwittingly undercut liberty. The deontological rule is that "protected" speech shall be protected absolutely. In the extreme, such a rule is self-canceling. To invalidate an absolute right, simply create a contradiction by pitting that right against itself in the manner that mathematicians proved there exist systems with no absolute truths. Consider the statement pair: The next sentence is true. The previous sentence is false. The inherent contradiction means the rule is void in at least one application. Not only must a given right balance *competing* rights – life, liberty, happiness – but that right must also balance *itself*. Illustrations prove instructive.

Consider an absolute right to life. Every society recognizes at least one limit on an absolute right to life: A sane person taking a life in the act of self-defense against attempted murder has an honorable expectation of absolution. Self-preservation is its own just end. The right to life is not so absolute that it cannot be taken in self-defense and the life that sought to extinguish another's right to life is the one more justly forfeit if only one survives.[186]

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[183] Rosa Brooks, *And Then the Breitbart Lynch Mob Came for Me* FOREIGN POL'Y (Feb. 6, 2017) https://foreignpolicy.com/2017/02/06/and-then-the-breitbart-lynch-mob-came-for-me-bannon-trolls-trump/.
[184] Wu, *supra* note 176, at 565.
[185] Buckley, 424 U.S. at 19, n. 18.
[186] Marshal W. Van Alstyne, *A Response to Fake News as a Response to Citizens United*, 62 COMMUN'CS OF THE ACM 26 (2019).

Consider an absolute right to anonymity. Suppose a criminal unmasks others' private identities yet seeks to avoid prosecution by using his right to anonymity as a means to hide from his crime. A reasonable conclusion is that the rights of the violator ought to be suspended precisely to protect the rights of everyone else. Failure to suspend the right to anonymity, in order to identify and prosecute the criminal, would be an illogical contradiction that would produce more frequent invasions of privacy. Enforcing the right would negate the reason for granting the right. Lower, not higher, levels of privacy would result.

A gun right that is used to take others' guns, a right to life that is used to snuff others' lives, a speech right that is used to cancel others' speech – these cannot be justified. They are invalid. They are contradictions.

How then should resolution proceed? The nature of the contradiction yields the seeds of its own solution. The first seed grows from observing that signal jamming needs neither truth for fiction, only volume. Intervention can then proceed on the basis of reducing volume, independent of content. Like time, place, and manner restrictions, reducing speech volume, or adding friction to amplification, may proceed under intermediate rather than strict scrutiny.[187] Recognizing the nature of an externality problem, down-sampling a message already copiously repeated at the individual level or adding a progressive ad tax at the expenditure level, might serve to reduce congestion in communication channels. Friction has almost no effect on awareness of a message already monopolizing a market.

The second seed identifies the party that first abuses their right by pitting it against the rights of others as the party whose right merits restriction. Other parties affected by abuse but not instigating conflict should have their rights protected if for no other reason than that the alternative invites abuse. No act is dissuaded if a right cannot be forfeit purely for exercising that right in the extreme. If the stated goal of the deontological view is the greatest preservation of rights, then reason requires that right be restricted, when pitted against itself, precisely for that party who seeks to revoke the rights of others.

DR Doctrine expands an expressive right of reach until it can go no further. What then is the boundary on reach? It is the point where one person's expression prevents that of another.[188] Thus, we have:

2) Individual liberty solution: *Ex-ante*, the only justifiable restrictions on expressive reach are those to safeguard the reach rights of others. Protect individual liberty by checking only monopoly. Add friction to amplification that prevents others from being heard.

[187] Erin Miller, *Amplified Speech*, 42 CARDOZO L. REV. 1 (2021).

[188] This parallels Posner's marginal analysis, which argues for expanding a right to the point where further increments subtract more from one value than they add to another. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 899 (2014).

C. The Paradox of Preventing Government Tyranny

The forgoing analysis proceeds from an excess in exercise of free expression rather than from rights suppression. Enriching individual liberty, however, is not how the First Amendment works. Instead, it acts as a negative right, not a positive one. It operates not by raising the hands of its citizens but by tying the hands of its government, an absence of power not a presence. Does the forgoing analysis apply when the mechanism operates in reverse? As free expression advocates proclaim, the imbalance in power between state and individual is so great that only by drawing a bright line circumscribing state action can laws balance freedom and authority.[189] Limiting power limits arbitrary use of power. Thus, to prevent state tyranny, with only a handful of exceptions, the deontological rule limits state intervention regardless of consequence. Yet, as before, the paradox of the deontological approach is that taken to extremes it is self-cancelling. In the name of preventing state tyranny, it can result in the onset of that very tyranny.

How might this be so? How might a right denied be pitted against itself so as to render a contradiction? As a conclusion of formal logic, if we have $P \rightarrow Q$, then we must also have $\sim Q \rightarrow \sim P$. Thus, if we can construct a contradiction based on a positive assertion, we ought to be able to construct a contradiction based on a negative assertion. Proceeding as follows, note that a population of N people can form at most 2^N subgroups and therefore 2^N possible governance mechanisms.[190] Call each of these modes of governance a religion or ideology. Let one of these represent a cancerous ideology that seeks to suppress all other 2^N-1 ideologies. Assuming all 2^N-1 others adhere to the absolute non-intervention rule, but the cancerous ideology intervenes, the end result is self-cancellation of the original non-intervention rule for all groups that adhere to it. Enforcing it leads to its revocation and non-enforcement. A deontological approach that holds the rule as absolute over a population is per se an absolute failure. Taken to extreme, it cannot be consistent with itself.

This self-contradiction, based on a right denied, illustrates the irony that tolerance is a virtue up to but not past the point of tolerance of intolerance, where it becomes a vice. To tolerate the spread of intolerance produces the abnegation of tolerance. Derivation of the *Paradox of Preventing Government Tyranny* restates, more formally, Popper's 1945 *Paradox of Tolerance*, which he shows is equally illogical in the extreme:[191]

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[189] Emerson, *supra* note 23.

[190] Mathematicians might assert that one of these subgroups is simply the empty set. Political scientists might then observe that the empty simply implies anarchy.

[191] For nomenclature, I have chosen to retain the *Paradox of Preventing Government Tyranny* in preference to the terminology *Paradox of Tolerance* to focus on the mechanism, governance, that represents the point of intervention. Free speech writing, since at least the time of Mill (1859), has focused on tying the hands of the state in order to prevent tyranny. The question then is specifically when to untie state hands in order that a worse state might be avoided as distinct from when to revoke tolerance in order than intolerance might be avoided.

> *Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.—In this formulation, I do not imply … that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be most unwise. But we should claim the* ***right*** *to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law and we should consider incitement to intolerance and persecution as criminal, in the same way as we should consider incitement to murder, or to kidnapping, or to the revival of the slave trade, as criminal.*[192]

This contradiction brings with it a second false negative in the Brandenburg test, hinging on incitement to imminent lawless action and propensity to do so. The usurpation of legitimate power by tyrannical power fits no previously enumerated category of unprotected speech and has potential to proceed via legal means. The challenge of lawless tyrannical governance is obvious when posed by an enemy state. Although the Supreme Court rendered a different logic, the principle of preserving legitimate governance can fully justify suppressing "publication of the sailing dates of transports or the number and location of troops" during wartime.[193] The challenge of lawful tyrannical governance is less obvious, however, when posed by citizens from within. Elaboration of the potential to proceed to tyranny via legal means is documented by those who have done so:

> *"We enter parliament in order to supply ourselves, in the arsenal of democracy, with its own weapons… If democracy is so stupid as to give us free tickets and salaries for this disservice, that is its affair. ...We do not come as friends, nor even as neutrals. We come as enemies: As the wolf bursts into the flock, so we come."*[194]

What happens when the lie defines what is legal? What happens when those who believe the lie use legal means to appoint those who decide the lie? At which point in time was illegality imminent? At which step in the chain were legal actions illegal?

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[192] KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES, 581 n. 4 (1994).
[193] Near v. Minnesota, 283 U.S. 697 (1931).
[194] Joseph Goebbels, *Der Angriff* (1928).

Neither the action nor the outcome is illegal to one who believes the lie. Its effects are both legal and moral in the eyes of the credulous and if that lie metastasizes, becoming nourished and entrenched by repetition, it infects others still. Their rights being equal to those of others, their beliefs of no lesser weight, the injustice of usurping sovereign authority becomes complete once their decisions bind. Critically, it is not necessary for the credulous to be a majority, only that they hold positions of lawful authority.

How might we know that a lie rises to such a dangerous level? When is there reason to act? One test is whether failure to act invites the very injustice that inaction sought to avoid. As with the *Paradox of Individual Liberty*, the nature of the contradiction is cue to its resolution. The test then is when to untie state hands in order that a worse state might be avoided. This condition establishes necessity to act in order to escape the paradox.

A second test, respecting the right to exercise authority, is that the liar rejects any outcome limiting that authority arrived at via neutral decision processes, accepting only those outcomes it alone has power to certify. It proves its intolerance, rejecting impartial juries and rejecting due process. It seeks to absorb that state function designed for adjudicating fair outcomes behind a veil of ignorance. With this power, the liar may climb from the minor rungs on the ladder of state to the summit of its operation. This mechanism permits the usurpation of authority and with it the usurpation of others' sovereignty. This test seeks to identify partisan certification and rectify it.

A third test invokes *DR Doctrine*. Do the teleological implications of suppressing the claim bind a *successor* government, not those in power, to a condition of at least as many decision rights for citizens as bind the current institution? Have the information seeking and expressive powers of citizens endured or, better, risen? The third condition assures forward progress in improving decisions and implementing just governance. It allows for stable social change, passing from one government to another, adhering to and improving upon a principle of just governance.

What then are the choices, the avenues out of this injustice? The first, and usual default, is inaction. State non-interference is what courts have assumed, allowing events to unfold on the premise that truth has the power "to get itself accepted in the competition of the market".[195] It is paradoxically the tolerance that replaces itself with intolerance when a market has seriously corrupted sellers. A second intervention might seek to change the beliefs of either side. The power to change beliefs, except by reasoned persuasion, would be a dangerous tool in any hands. Any state granted such power could create its own Orwellian reality. A third intervention might be to accept the claim but adjudicate the injustice *ex-post*. The conundrum is that, having usurped power, those who would have power have every reason to maintain it and no reason to admit obtaining it based on a lie. A fourth intervention is violence. Governance mechanisms having failed, extra legal means become the instruments of social change. Despite advocating openness and tolerance, even

[195] Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

Popper allows force as a last resort. Yet, a fifth alternative is to limit the spread of the lie *ex-ante* before it metastasizes.

None of these options are attractive. The point in their enumeration is that the first four all lead to tyranny; only the fifth avoids it. Other options might exist but, no matter their number, the conclusion remains intact so long as alternatives maintain, enable, or simply fail to overturn unjust governance once established.

The implication is that government intervention to chill lies is not only warranted but mandated when the effect of the lie's action is to produce unjust governance. Failure to act reifies the very injustice that inaction sought to avoid.

DR Doctrine expands a right of free expression until it can go no further. What then is the boundary on expression? In the first instance, it is the point where one person's expression violates the rights of another. In the second instance, it is the point where one person's expression violates the governance that protects those rights. Thus, we have:

3) Preventing tyranny solution:[196] *Ex-ante*, the only justifiable restrictions on expression are those to prevent violence to the rights of others or to prevent violence to the system of governance that safeguards those rights. Reject such tyrannical speech as would itself lead to tyranny. For the prevailing government, behind a veil of ignorance, apply the criteria of a non-partisan *successor* government that would grant no lesser liberties than those present.

Across the set of utilitarian responses to deontological problems there have only been three cases and each offers a different prescription for the state's role in free speech. The first, the *Paradox of Free Idea Markets* exhibits no true paradox, only one of enforcement that undermines its own goals. From a government perspective, no *ex-ante* intervention is warranted. Indeed, the solution is to step aside more often in order that the market might clear itself of false claims by internalizing harms. The second, the *Paradox of Individual Liberty*, is a true deontological paradox of presence where the expansion of one party's right eclipses that same right in another. From a government perspective, *ex-ante* intervention is warranted but not content based. Action serves only to turn down the volume on one deafening voice to prevent their suppression of others' voices. The third, the *Paradox of Preventing Government Tyranny*, is a true deontological paradox of absence. Compelling inaction to forestall tyranny enables the actions of those who would install tyranny. From a government perspective, *ex-ante* intervention is warranted yet a principle holds that the content restrictions are so narrow, they serve only to ensure the legitimacy of a successor state.

[196] This intervention has the greatest potential for abuse. A corrupt government in power might argue, falsely, that the entering government would curb citizens' rights. This has three solutions. The first binds the successor government such that a current government invoking this rule must enjoin itself from participation in its successor. The second seeks independent and non-aligned adjudication. The third employs a decentralized market, where no single institution decides (see Solutions Derived from Coase in Van Alstyne, *supra* note 42).

V. Conclusions

The absence of a metric by which to judge free expression has left us no clear signposts out of the "endless maze"[197] of court decisions. No set of categories has yet unified First Amendment theory.[198] The goal of this Essay has been to reshape our understanding of the misinformation problem in order that we might use better tools to cut a clearer path. One step in this process is to shift the framing from a deontological perspective to a utilitarian perspective. Our courts' current use of deontological categories lead, in the extreme, to both paradoxes of implementation and of logic whereby outcomes undermine goals. Three paradoxes arise from absolutist free speech jurisprudence: in protecting markets of ideas, it pollutes them, in protecting individual liberties, it defeats them, and in protecting against government tyrannies, it embraces them.

By contrast, use of a utilitarian perspective allows us to not only escape these paradoxes but also deploy well-sharpened tools from decision theory, information economics, externality economics, and mechanism design. Pragmatism also admits tools from computer science with its more precise models of information, errors in transmission, and limits to comprehension.

This utilitarian response to deontological problems has three implications. First, much false information passing through idea markets can be swept away if courts would but step aside. Repeating their mistake in antitrust in the context of free speech, they have protected speakers at the expense of speech markets as they formerly protected competitors at the expense of competitive markets. This *Free Speech Market Paradox* closely resembles Bork's *Antitrust Paradox*.[199] With the means to measure value comes the means to measure harms and thus the means to hold those who cause harms accountable. In this context, government regulation of content is not only unnecessary but also undesirable. Indeed, state intervention occurs too often, staying due process of law in cases where the decision change test shows material harms have occurred.

A second implication is to introduce a different form of dysfunctional information that has little recognition in current law. Signal jamming arises when so much information floods the marketplace of ideas that decision error necessarily occurs. Either requisite information is missing, having been crowded out, or volume exceeds channel capacity, so error correction is impossible. Decisions suffer due to incomplete information or error introduction. The *Paradox of Individual Liberty* is that one person's volume cancels another person's voice. This leads to idea market monopoly, a rare speech market failure pre-internet platform.[200] In this context, government regulation of content is also unwarranted. Instead,

[197] Shiffrin, *supra* note 15.
[198] Bork, *supra* note 8. Schauer, *supra* note 29.
[199] Bork, *supra* note 12.
[200] Wu, *supra* note 176; Miller, *supra* note 187.

intervention need only reduce volume of the monopolizing voice sufficient to allow a diversity of ideas to emerge or rather to allow error correction rate to match volume flow rate.

The third implication is that government intervention to curb dysfunctional lies *is* warranted when the rule of law is itself at stake. What happens when the system needed to protect speech is itself overthrown by false speech? Current legal practice gives rise to a *Paradox of Preventing Government Tyranny*. Tying the hands of government to prevent abuse of power unties the hands of immoral agents who lie to the credulous, granting them means to seize power. A minority gains authority to control speech. A regime of absolute tolerance of intolerance replaces itself with a regime of intolerance.[201] Then, government regulation of content is warranted but is so narrowly prescribed as to ensure legitimacy of a successor government.

Finally, the utilitarian response to deontological problems offers a useful tool – it gives us a standard by which to measure free speech protection. Manifest in *decision change*, it is the right of any individual to influence or change decisions that affect them. *Decision Rights Doctrine* compares the informed to the uninformed state to ascertain what decision change has occurred. It supports individual liberty, offers properties parallel to those of the *First Fundamental Welfare Theorem* of economics, and is consistent with the free speech goals of seeking truth, autonomy, self-realization, participating in self-governance, and enabling stable social change. Applied to such cases as *Alvarez*,[202] *N.Y. Times v. Sullivan*,[203] and *Brandenburg*,[204] it exhibits fewer false positives and fewer false negatives than tests of categories, truth, imminence, or intent. Grounded in decision theory on the premise of creating decision options that favor speakers, it shifts the focus of performance from protecting categories to protecting value as determined by decisions implicated and decisions changed. On this basis, value created in wise choices and value destroyed through errors and externalities can both be assessed from speaker and listener vantage points.

[201] Popper, *supra* note 192.
[202] *Infra* Section III.D.1.
[203] *Infra* Section III.D.2.
[204] *Infra* Section III.D.3.