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## The Sullivan Decision

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***The Sullivan Decision\****

Anthony Lewis\*\*

Professor Stephens,<sup>124</sup> ladies and gentlemen, thank you for letting me join in this great celebration of a great case. *New York Times Co. v. Sullivan*<sup>125</sup> was, and remains, one of the most remarkable judicial decisions of my lifetime. In commenting on it, I must begin with a confession. I watched the case from its beginnings. I worked for *The New York Times* when the libel action was brought, and I covered the case in the Supreme Court. Professor Herbert Wechsler, who briefed and argued the case, was a revered teacher of mine. In the forty years since the case was decided, I have written and talked about it innumerable times.

But – now the confession – over those years I have found, again and again, that I did not altogether understand the decision. That has been true from the beginning. Recently, I had occasion to look back at the story I wrote on March 9, 1964, which appeared on the front page of *The Times* the next morning. To my chagrin, I found that in significant part I had gotten it wrong. It was only much

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\* Keynote Address, "Head Their Rising Voices: *New York Times v. Sullivan*—40 Years Later," The University of Tennessee College of Law, February 27, 2004.

\*\* Mr. Lewis is a Pulitzer Prize winning author and columnist. He reported on the *Sullivan* case for *The New York Times* and later wrote *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991), which Judge Alex Kozinski called a "tour de force" that "no responsible journalist will be without."

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<sup>125</sup> 376 U.S. 254 (1964).

later in teaching the case that I began to penetrate its mysteries.

The *Sullivan* decision had diverse, far-reaching consequences. It revolutionized the law of libel in the United States. It gave new meaning – broader meaning – to the constitutional protections of freedom of speech and freedom of the press, and it removed a serious threat to the civil rights movement, whose success in the 1960s so greatly changed this country.

The sweeping character of Justice Brennan's opinion of the Court is signaled by its opening words. "We are required in this case," it begins, "to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."<sup>126</sup> Of course, no one can require the Supreme Court to decide anything. That opening declaration is a bit like that of another revolutionary decision, *Erie Railroad v. Tompkins*,<sup>127</sup> which in 1938 stripped the federal courts of their power to make common law on state questions. Justice Brandeis's opinion began: "[t]he question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."<sup>128</sup> This, however, was not the question presented by the parties. It was the question that the Justices, especially Justice Brandeis, wanted to decide.

Please forgive the digression. I want only to point out that the scope of what the Supreme Court decided in *New York Times v. Sullivan* – the grand scale, the grand style – was a choice made by the Justices, and very much by the author of the Court's opinion, Justice Brennan.

To appreciate how great an impact the case had on American law and American society, we have to take

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<sup>126</sup> *Id.* at 256.

<sup>127</sup> 304 U.S. 64 (1938).

<sup>128</sup> *Id.* at 82.

ourselves back to the year when the libel action started, 1960. We have to understand two things about that time: what the state of race relations was, and what limits the United States Constitution put on libel judgments. The events of 1960 came six years after the Supreme Court, in *Brown v. Board of Education*,<sup>129</sup> had held racial segregation to be unlawful in public education. Yet, in that year not a single black child attended a public school with white children in Alabama, Georgia, Mississippi, Louisiana, or South Carolina. The state universities remained segregated in those same states. Blacks were prevented from voting in large parts of the Deep South by force or trick. In 1960, only four percent of black citizens of voting age had managed to register to vote in Mississippi, and only 14 percent in Alabama.

Those were the realities that Martin Luther King, Jr. and his colleagues were trying to change, along with segregation in the rest of life, in hospitals and cemeteries and department stores. Dr. King had an idea, an optimistic one. He thought that most Americans, if confronted with the ugliness and brutality of racism, would disapprove. It was true that most Americans at that time were actually unfamiliar with the realities of racism. Dr. King set out to confront them with those realities. The press, both print and broadcast, had an essential part to play if Dr. King's optimistic strategy was to work. It was the media that would show Americans the ugly reactions to the civil rights movement: the snarling police dogs, the assaults on black and white passengers on interstate buses when they reached terminals in Alabama, the sheriffs who threatened would-be black voters. Newspapers and magazines did a good job of reporting those episodes, and television had an even greater impact.

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<sup>129</sup> 347 U.S. 483 (1954).

Professor Alexander Bickel of the Yale Law School, after the confrontations over school desegregation in New Orleans and Little Rock, wrote that racial segregation had been an abstraction to most Americans. The riots, he said, “showed what it means concretely. Here were grown men and women furiously confronting their enemy: two, three, a half dozen scrubbed, starched, scared and incredibly brave colored children. The moral bankruptcy, the shame of the thing, was evident.”<sup>130</sup>

I need not go into the advertisement in the *Times*, or Commissioner Sullivan’s claim that he was libeled by it, although it did not mention his name when it denounced “Southern violators” of the Constitution. This audience knows all about that. I simply do what Justice Holmes once said was necessary: elucidate the obvious. The purpose of that libel action, and of others that were brought soon after, was to frighten the national press out of covering the civil rights movement in the South.

It was a serious threat. An all-white jury awarded Commissioner Sullivan all the damages he claimed \$500,000. Another jury returned a verdict for the same amount in another official’s libel action over the advertisement. Altogether, *The Times* was going to owe over \$2,500,000 in libel damages from the ad – and no doubt more in suits over new stories in the paper. It was enough to put the paper out of business in those days.

Other lawsuits targeted magazine and broadcast entities. After the judgment for Commissioner Sullivan, the *Montgomery Advertiser* headlined a story: “State Finds Formidable Legal Club to Swing at Out-of-State Press.”<sup>131</sup> That brings me to the second thing that has to be understood about the year 1960: the state of libel law.

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<sup>130</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

<sup>131</sup> Rex Thomas, *State Finds Formidable Legal Club To Swing At Out-Of-State Press*, MONTGOMERY ADVERTISER, Sept. 25, 1960, at A1.

There were no constitutional constraints then – none – on libel judgments. Libel was entirely a matter of state law, regarded from the beginning as being outside the First Amendment. No libel award, however outlandish, had ever been found to violate the Federal Constitution. An associate at the law firm that for years had represented *The New York Times* wrote an article for the paper's house organ, *Times Talk*, about how the lawyers planned to appeal the judgment for Commissioner Sullivan. He did not mention the First Amendment.

In hindsight, it all looks so obvious. Here was a lawsuit aimed at cutting off publication of a comment on a central political issue. How could it more directly engage the First Amendment? But that perspective is plain only in hindsight. At the time, Commissioner Sullivan's lawyer, Roland Nachman, thought the First Amendment was a March hare, not worth pursuing. The Alabama Supreme Court dismissed it in a sentence. When Professor Wechsler raised the idea of a First Amendment argument with *Times* executives, some of them were wary of such a novel idea. But Professor Wechsler boldly told the Supreme Court in his brief that this was a classic test of First Amendment values. "This is not a time," he said, "there never is a time – when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the tensest issues that confront the country . . . ." <sup>132</sup>

The challenge to Professor Wechsler was the long history of universal acceptance that libel fell outside the reach of the First Amendment. He answered that history with another history, the history of the struggle against the Sedition Act of 1798, which made it a crime to criticize the President. "Though the Sedition Act was never passed on by this Court," Wechsler wrote, "the verdict of history

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<sup>132</sup> Herbert Wechsler, Brief for the Petitioner, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) ((Nos. 39, 40) available at 1963 WL 66441,\*68).

surely sustains the view that it was inconsistent with the First Amendment.”<sup>133</sup>

Justice Brennan put that history at the heart of his opinion. “Although the Sedition Act was never tested in this Court,” he wrote, “the attack upon its validity has carried the day in the court of history.”<sup>134</sup> With that, he and the Court in effect held unconstitutional a statute that had expired 163 years earlier, in 1801. It was the great controversy over the Sedition Act, Justice Brennan said, with James Madison leading the attack, that “first crystallized a national awareness of the central meaning of the First Amendment,”<sup>135</sup> that is, the right of Americans to criticize officials whom they choose to govern them.

That is one constitutional theme in the *Sullivan* opinion. It is buttressed by pages of quotation from some of the great free speech opinions in American law. They show, Justice Brennan said, “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”<sup>136</sup>

To this Justice Brennan added a second ground, not so often noticed, but I think extremely important. Officials have a privilege not to be sued over statements made in the course of their duties. An analogous privilege is needed by “the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer.”<sup>137</sup> The idea comes straight from Justice Brandeis, who once said the most important office in a democracy was the office of citizen.

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<sup>133</sup> *Id.* at 47.

<sup>134</sup> 376 U.S. at 276.

<sup>135</sup> *Id.* at 273.

<sup>136</sup> *Id.* at 270.

<sup>137</sup> *Id.* at 282.



From today's standpoint, again, the enshrining of the right to criticize government as a central meaning of the First Amendment seems unchallengeably correct. But we think that in good part because of *New York Times v. Sullivan*. It was the first opinion for a majority of the Supreme Court that so broadly spread the mantle of free expression. Many of the ringing words about freedom that we remember by, for example, Justices Holmes and Brandeis, appeared in dissenting and concurring opinions. It was Holmes in dissent who said, "we should be eternally vigilant against attempts to check the expression of opinion that we loathe and believe to be fraught with death . . ." <sup>138</sup>

Notice also that Holmes spoke of freedom for "opinion." The *Sullivan* case involved something very different: facts. False facts, because *The Times* admitted and the Court found that there were errors in the advertisement that was the subject of this libel action. Justice Brennan said the lesson to be drawn from the Sedition Act controversy was that "neither factual error nor defamatory content," nor a combination of the two, "suffices to remove the constitutional shield from the criticism of official conduct. . . ." <sup>139</sup>

Now, ladies and gentlemen, we have to confront one of the mysteries of the Court's opinion in *New York Times v. Sullivan*. Through all of the discussion about the Sedition Act, the quotations from Madison and Brandeis, Justice Brennan seemed to be taking an absolute view of the right to criticize government. Madison certainly did, saying that "abuse" by the press must be accepted as part of the price of freedom. <sup>140</sup> Indeed, at the oral argument of the case, Justice Brennan asked whether there were "any limits whatever" to the right to criticize officials. Professor

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<sup>138</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

<sup>139</sup> *Id.* at 273.

<sup>140</sup> *Id.* at 271.

Wechsler answered that, “if I take my instruction from James Madison” there were none. Justice Brennan said: “You say, then, the First Amendment gives, in effect, an absolute privilege to criticize....”<sup>141</sup>

But that is not the holding of the *Sullivan* case. Justices Black, Douglas, and Goldberg urged that outcome, calling for absolute immunity for attacks on officials. The opinion of the Court, however, stopped well short of absolute immunity. It held that a public official could not recover damages for a defamatory falsehood “unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>142</sup> That is the famous *Sullivan* formula, allowing the libel plaintiff to recover damages if he can show that he was defamed by a falsehood that was deliberate – a knowing lie – or reckless.

Why did Justice Brennan and the Court stop short of total freedom to criticize? Why did they leave a loophole for official libel actions that has led to much litigation about what kind of falsehood is “reckless?” (The Court in time said it was a statement published despite subjective awareness of probable falsity.)

Some have speculated that Justice Brennan really preferred the absolute Madisonian position but drew back in order to carry a majority of his colleagues with him. I am sure that was not the case. In the draft opinion he showed to his law clerks a few weeks after argument – the first of eight drafts – he noted Wechsler’s argument that Madison would have:

barred sanctions against defamatory criticism of  
public officials reflecting upon their official

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<sup>141</sup> Audio tape: Oral Argument of *N.Y. Times v. Sullivan*, U.S. Supreme Court (Jan. 6, 1964), at

<http://www.oyez.org/oyez/resource/case/277/audioresources>.

<sup>142</sup> *Id.* at 279-80.

conduct even when tainted with express malice. We do not think that the Amendment reaches so far . . . . The line may surely be drawn to exclude from constitutional protection the statement which is not criticism, or intended as such, but, in the guise of criticism, is deliberate, malevolent and knowing falsity, or utterance reckless of the truth . . . .<sup>143</sup>

This was the age of Senator Joe McCarthy and anti-Communist demagoguery.

In another libel case decided shortly after *Sullivan*, *Garrison v. Louisiana*,<sup>144</sup> Justice Brennan's opinion of the Court explained why absolute immunity for defamatory false statements about officials was an unwise idea:

At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . . [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.<sup>145</sup>

So there we have what is known as the *Sullivan* rule, a substantial but incomplete immunity for unpleasant comments on public officials.

But Justice Brennan did not leave it there. He went on in his opinion to test the facts of the case against the

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<sup>143</sup> See ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (Random House, 1991).

<sup>144</sup> 379 U.S. 64 (1964).

<sup>145</sup> *Id.* at 75.

new rule, and found that the evidence in the record could not constitutionally support a judgment for Commissioner Sullivan. That was a highly unusual step. When laying down a new or reformulated constitutional rule, the Supreme Court would ordinarily remand the case to the lower court to determine the rule's application to the facts of the particular case. The reason for departing from the ordinary is not in doubt. Justice Brennan feared that the Alabama officials who had sued over the *Times* advertisement would demand a new trial and try to show that the statements in the ad were knowingly or recklessly false. Justice Black, who came from Alabama, warned that Sullivan and the others would persuade a jury to find knowing or reckless fabrication. (In fact, Sullivan did not seek a trial.)

In the course of measuring the evidence against the constitutional standard, Justice Brennan did something quite extraordinary. After finding no deliberate or reckless falsehoods on the part of *The Times*, he said: "We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' [Commissioner Sullivan]."<sup>146</sup> In other words, by finding that an ad without his name could be understood to defame Sullivan, the jury and the Alabama courts violated the Constitution.

Think about that. It is an independent ground of decision, unconnected to the whole argument about the Sedition Act and the right to criticize officials. But then the Supreme Court could have rested on that ground without more. It could have decided the case and reversed the judgment against *The New York Times* without taking the bold step of laying down a new constitutional rule for libel. The case would still be meaningful. The Alabama Supreme

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<sup>146</sup> 376 U.S. at 288.

Court had said it was logical to impute criticism of Sullivan from general statements about police wrongdoing in the ad. Justice Brennan's opinion stated that it would allow criticism of government to be transmuted into personal libel, and that this country has no such thing as libel of the government. But it would hardly be the great decision it was.

Why did Justice Brennan and the Court not rest on that narrower ground? I think we have to conclude that the Court thought it was the moment for a decision that would ensure open channels of information about the racial crisis. Justice Brennan did not frame his opinion in terms of Dr. King's hope – the hope of arousing Americans to understand the evils of racism. It is, in fact, a singularly detached opinion. But the Court knew what was at stake.

One profound result of the decision in *New York Times Co. v. Sullivan* was to keep the channels of information about the civil rights movement and its opponents open. Dr. King's statement about how Americans would react to racism when they saw it naked proved to be correct. Americans pressed for federal legislation guaranteeing the right to vote and other rights. By the end of 1966, two years after the *Sullivan* decision, that legislation was on the books. It led to profound changes in American politics and society. I can, perhaps, sum them up with a small story.

Ralph McGill was the great editor of the *Atlanta Constitution*. He fought against racism for years, often in lonely circumstances. Some years after the passage of the civil rights laws, a friend came to his office and asked McGill to come with him. They went to a hall where black elected officials in the South were meeting. Ralph stood in the back of the hall, and tears rolled down his face.

The decision remade the law of libel in this country. Today, virtually every libel action engages the First Amendment in some way. What was once a matter of state

law has become a federal specialty. More broadly, this has become a much freer country in terms of what we can speak and publish.

Of course that freedom was not the sole result of the *Sullivan* case. There has been a gradual trend toward outspokenness, gathering momentum in the last fifty years. It is hard to believe now that the Supreme Court, during and after World War I, upheld criminal convictions for political criticism of the President. I think freedom to say and write what we will is stronger in America now than ever, and greater than in any other country. The *Sullivan* case was a spur to that trend.

Not everyone welcomes the world of uninhibited, caustic, sometimes unpleasantly sharp criticism of public officials. I have debated politicians on the subject, and they can be explosively negative. The dissenting view these politicians hold is that *Sullivan* has become a license for shoddy journalism, transforming it into a profession where legal excuses are sought for falsehood. They argue that the atmosphere of continuous attack and investigation makes political life hard to bear and discourages the thoughtful and sensitive from going to it.

I cannot dismiss that argument out of hand. I think the standards of journalism are less than lofty. We live in a world in which an Internet purveyor of trash can put a totally false rumor about a Presidential candidate on his website, and tabloids around the world pick it up as "news." I doubt, though, that this sensationalism and lack of ethics can be traced to *New York Times v. Sullivan*, or even to the zeal of today's journalists to look for official wrongdoing.

Rather, the main source of that investigative zeal lies in two transforming events: Vietnam and Watergate. The leading columnists, Washington bureau chiefs, and the like used to consider themselves on the same team as high officials. I well remember how chummy my superiors at

the *Times* were with Secretaries of State and the like, and it was not evil. They shared premises, such as the need to win the Cold War, and they respected officials' good faith and superior knowledge.

Vietnam ended all that. Practically all of us in the business came to doubt the superior knowledge of officials about the war. In fact, David Halberstam and Neil Sheehan and other young correspondents there knew more about the war than Presidents did. Good faith? You had to wonder about that, too.

Then came Watergate, with its lies and criminality. It made us forever skeptical about official truth. One can hardly blame that on the *Sullivan* case.

Am I, then, an unambiguous admirer of all that *Sullivan* wrought? No, I am not. I think the Supreme Court made a mistake when it extended the rule of the case – the need to prove knowing or reckless falsification – from public officials to public figures. The Court defined public figures as either people generally well-known, like movie stars, or people who have “thrust themselves into the vortex” of public controversy, as Justice John Marshall Harlan memorably put it.<sup>147</sup>

The first step to enlarge the sphere of the *Sullivan* case was taken by the Supreme Court in 1967, when it decided *Time, Inc. v. Hill*,<sup>148</sup> a privacy case. James Hill and his family lived in a suburb of Philadelphia. Three escaped convicts invaded their home and held the Hills hostage for 19 hours but treated them well. The press covered the story intensely, to the distress of the family and especially of Mrs. Hill, who greatly valued privacy. To escape the glare of publicity, they moved to Connecticut and sought obscurity.

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<sup>147</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 146 (1967).

<sup>148</sup> 385 U.S. 374 (1967).

Two years later, a play entitled “The Desperate Hours” appeared on Broadway. It depicted a reign of terror by convicts who held a family hostage and included brutality and sexual threats. The play was set in Indianapolis. *Life* magazine ran a feature on the opening and photographed the actors in the Hills’ former home near Philadelphia. *Life* described the play, with all its terror, as a reenactment of what had happened to the Hills. The *Life* story devastated the Hill family and caused Mrs. Hill to suffer a psychiatric breakdown. Thereafter, Mr. Hill sued Time, Inc., the publisher of *Life*, under the New York privacy statute, claiming that the article placed his family in a false light. He was awarded a modest \$30,000 in damages by the New York courts, but the Supreme Court reversed. The Court’s opinion, penned by Justice Brennan, said the judgment was constitutionally flawed because Mr. Hill had not been required to prove that *Life*’s falsification had been knowing or reckless.

What did James Hill, a private person, have to do with the reasoning of *New York Times v. Sullivan*, or with the Sedition Act controversy and its lesson that the central meaning of the First Amendment is the right to criticize those who govern us? My answer is—nothing. I think the Court, in *Time, Inc. v. Hill*,<sup>149</sup> applied the compelling logic of *Sullivan* in a situation where it was quite inapposite.

As someone who thinks privacy is a crucially important value in our increasingly intrusive society, I also regret the Court’s failure in the *Hill* case to give privacy the weight it deserves. That was brought poignantly home years after the decision. It happens that Richard M. Nixon argued the case for Mr. Hill. His one-time law partner and White House counsel, Leonard Garment, published an article about the case in *The New Yorker* in 1989. He

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<sup>149</sup> *Id.*



disclosed, with James Hill's permission, that in 1971 Mrs. Hill had committed suicide.

Leonard Garment's article followed the disclosure in Professor Bernard Schwartz's book, *The Unpublished Opinions of the Warren Court*,<sup>150</sup> of what went on inside the Supreme Court during its consideration of the *Hill* case. After it was first argued, the Justices voted, 6 to 3, to affirm the New York court's judgment in favor of Mr. Hill. The opinion was assigned to Justice Abe Fortas, who used the occasion for two distinctive purposes: an eloquent definition of privacy, and a savage attack on journalistic ethics. As to the latter, Justice Fortas decried what he called life's "needless, heedless, wanton and deliberate injury."<sup>151</sup> He wrote that "magazine writers and editors are not, by reason of their high office, relieved of the common obligation to avoid inflicting wanton and unnecessary injury."<sup>152</sup> Perhaps his sarcastic language helped to bring about a switch in the Justices' votes; after a second round of oral argument, the Court issued a 5-4 decision in favor of Time, Inc. A compelling dissent by Justice Harlan opined that the "marketplace of ideas" would not function in a case like this because James Hill would have a hard time finding a platform to answer *Life* magazine.<sup>153</sup> The case showed, wrote Justice Harlan, "the dangers of unchallengeable untruth."<sup>154</sup>

The more common extension of the *Sullivan* rule is to libel actions brought by people who, though not officials, are regarded as public figures. The consequences can be curious. Wayne Newton, a Las Vegas entertainer, was deemed a public figure when he sued for libel. Other

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<sup>150</sup> BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* (1985).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> 385 U.S. at 407-08.

<sup>154</sup> *Id.* at 408.

singers and actors have had to meet the *Sullivan* test because they were famous. But what, if anything, did they have to do with government or public affairs? I should, perhaps, add that my question would be different if the actor were Arnold Schwarzenegger. The public figure category would be more logical if it were limited to people who have thrust themselves into the vortex of public controversy. The Supreme Court may have taken an unacknowledged step toward that limitation when it said in 1986 that a public figure who brings a libel action has to meet the *Sullivan* test only if the suit concerns a “public issue.”<sup>155</sup>

Despite my doubts about public figures and privacy, I think the decision in *New York Times v. Sullivan* has been a great liberating force in American law and life. I may feel especially strongly on the subject because I spent nine years of my life in England, where the old common law of libel reigns in good part unchanged. In libel cases, the burden of proof is on the defendant, usually a newspaper, to prove that the challenged statement is true. That can be an impossible burden to meet, so most newspapers give up and settle when sued. Under *Sullivan*, as the Supreme Court made clear in 1986, the burden is on a libel plaintiff to prove falsity.

In Britain the plaintiff does not have to show any fault on the part of the defendant. A newspaper writer and editor may have made strenuous, good-faith efforts to check everything before publishing an article, but if there is an inadvertent error in the published article that defames someone, that person can recover damages. Under *Sullivan*, of course, a public official or public figure has a high degree of fault to prove: knowing or reckless falsification. Under the 1974 Supreme Court decision in

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<sup>155</sup> *Phila Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).

*Gertz v. Welch*,<sup>156</sup> even a purely private plaintiff has to show at least that there was negligence on the part of the defendant in publishing a falsehood. Innocent mistake is not subject to penalty.

Ladies and gentlemen, I said at the start that over the years I realized from time to time that I had not altogether understood the decision in *New York Times v. Sullivan*. No doubt I still have some learning to do. With its grand sweep and its mysterious turnings, Justice Brennan's opinion is a challenge for all time – and what a thrilling challenge it is.

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<sup>156</sup> 418 U.S. 323 (1974).

