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This is the 50th anniversary of a watershed year in the history of the civil rights movement. During that year, the Southern Christian Leadership Conference mounted its anti-segregation campaign in Alabama; Commissioner “Bull” Connor turned dogs and fire hoses on demonstrators; activists were attacked; riots flared; George Wallace blocked the doors of a public university to keep black students out; President Kennedy dispatched troops to Alabama and called for the passage of a civil rights bill; Medgar Evers was murdered; the then-largest human rights demonstration in U.S. history converged on Washington; Martin Luther King Jr. gave his historic speech at the Lincoln Memorial; four black schoolgirls died when a Birmingham church was bombed; and Lyndon Johnson took up the cause of civil rights legislation after Kennedy’s assassination on November 22.

Hard on the heels of these events, the Supreme Court decided one of its most celebrated and significant cases: New York Times Co. v. Sullivan. In a sense, Sullivan participated in and advanced the civil rights movement, vindicating the free speech rights of some of that movement’s leaders. But, beyond this specific context, Sullivan had a profound effect on the shape of American jurisprudence. It changed constitutional law, extending the First Amendment to encompass speech long viewed as unprotected. It changed tort law, unsettling principles of defamation that had been entrenched for centuries. It changed our discourse around freedom of expression, using muscular language that has come to permeate First Amendment scholarship and case law. Alexander Meiklejohn told Harry Kalven that he thought the decision was “an occasion for dancing in the streets” and many would agree.

Our admiration for Justice Brennan’s majority opinion in the case should not, however, prevent us from casting a critical eye toward its puzzling dimensions. In this article, I will focus on three aspects of the opinion that I believe offer important insights into the Court’s thinking and, more broadly, into the mysterious enterprises of creating constitutional doctrine and doing justice. They are insights worth remembering during this 50th anniversary of a critical year in the civil rights movement and also on the cusp of the 50th anniversary of this landmark decision.

What Happened?

On March 29, 1960, the New York Times published an advertisement entitled “Heed Their Rising Voices.” The ad described how student demonstrators and Dr. King had been met with a “wave of terror” by “truckloads of police” and unnamed “Southern violators.” The ad, which included some minor factual errors, concluded with an appeal for funds to support the student movement, the right to vote, and the legal defense of Dr. King against a pending indictment. The text appeared over the endorsement of individuals and an organization.

L.B. Sullivan—one of three elected commissioners of the City of Montgomery, Alabama—brought a libel action against The New York Times Company and several clergymen who endorsed the advertisement. Although the advertisement did not include his name, Sullivan alleged that it had defamed him because his duties as Commissioner of Public Affairs included supervision of the police department. A jury found for Sullivan and awarded him damages of $500,000—the full amount claimed—and the Supreme Court of Alabama affirmed. The U.S. Supreme Court granted certiorari and issued a unanimous decision on March 9, 1964.

The Court reversed the decision below, finding that “the rule of law applied by the Alabama courts [was] constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments.” The Court held that these constitutional provisions require “a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

The Court concluded that, because Sullivan had failed to prove that the defendants had acted with actual malice, the jury verdict could not stand.

As Harry Kalven observed, the Court clearly “had to do something about the case.” The advertisement did not refer to Sullivan; the mistakes of fact were “miniscule”; the likelihood that Sullivan’s reputation suffered was nonexistent; and the damages were “extravagant.” As Kalven quipped, “On its facts, the Times case seems to have been put together by the Devil himself in order to embarrassed the legal system.”

The reversal of the jury verdict below thus helps make Sullivan important—but that is not what makes it interesting. Rather, the interest lies in the rule the Court

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announced, the reasoning it followed, and the lines of analysis it chose not to pursue. That is where the puzzles of Sullivan reside—and the lessons of Sullivan along with them.

With this background in mind, let’s turn to our three curious aspects of the Sullivan decision.

One: Sullivan Adopted an Overly Broad Rule

One of the conspicuous and often-noted oddities in Sullivan is that the Court did not rule on narrower grounds. Probably the most obvious such ground is that the advertisement did not say anything about Sullivan. It did not mention him by name or title; it did not even vaguely allude to the official who had ultimate responsibility for the police. Indeed, the New York Times responded to Sullivan’s demand for a retraction by asking why he believed “the statements in the advertisements in any way reflect[ed] on [him].” Sullivan replied by suing.

At trial, Sullivan argued that his claim satisfied the “of and concerning” requirement of libel law because any reference to police activities reflected on him as the commissioner who oversaw the department. The Court noted that Alabama law lent some support to his theory: “where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge.” Several witnesses similarly testified at trial that they associated statements in the advertisement with Sullivan.

Of course, the flaws in so expansive a theory are plain. First, a principle like this admits of no clear definitions and could lead to nonsensical results. Under this line of reasoning, a statement critical of an elementary school janitor would impugn the reputation of a governor who makes appointments to the department that oversees the district that manages the school that hires the custodial staff.

Second, and as the Court recognized, Sullivan’s argument would “transmute[ ] criticism of government, however impersonal it may seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed.” The Court went on to hold that “such a proposition may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations.” The Court therefore concluded that such evidence—the only kind relied upon by Sullivan—was “constitutionally insufficient to support a finding that the statement referred to [him].”

It would be strange if the Court had ignored this narrower reasoning in deciding the case. After all, that the advertisement says nothing about Sullivan is one of the most glaring infirmities in his claim. But it may seem stranger still that, having acknowledged this conceptual obstacle—and having explained why the oddities of Alabama law that allowed Sullivan to steer around it were constitutionally intolerable—the Court nevertheless elected to embark on the ambitious project of developing the actual malice doctrine.

While a judge on the District of Columbia Circuit, Chief Justice Roberts famously observed that “if it is not necessary to decide more, it is necessary not to decide more.” Sullivan’s magnificent digression into actual malice seems to violate any such principle of restraint—if not to engage in a cheerful disregard of it. A close analysis of Sullivan reveals why such a departure was justified there. More importantly, though, Sullivan highlights the theoretical and practical difficulties with applying such a rule in most cases decided by the Court.

With respect to theory, it matters that necessity is not self-defining in this context. Necessity could mean that the Court should decide only as much as the specific case before it demands. But this would be inconsistent with the role of the Court in helping to shape the contours of American democracy and, for that matter, with the Court’s own philosophy about which cases it should review.

Once necessity drifts away from the specific case and toward broader legal and policy considerations, though, it tends to lose its meaning. Thus, when Justice Stevens, dissenting in the Citizens United case, confronted Chief Justice Roberts with his own apparent departure from this rule, the chief justice replied: well, “sometimes it is necessary to decide more.” At this point, the drift takes a hard turn and the necessity principle becomes circular: it is necessary for the Court to decide whatever the Court thinks is necessary to decide.

Sullivan perfectly demonstrates the theoretical dilemma. As I will discuss later, three justices thought it was necessary to decide the case more broadly than did the other six. Who is right? Without a meaningful concept of necessity, we don’t know.

Furthermore, a case-specific version of the necessity principle fails to make practical sense in many cases that come before the Court. Again, Sullivan demonstrates the point. Deciding the case on the of-and-concerning basis alone would have disposed of the dispute before the Court—but not of the threat to free expression about the civil rights movement. Consider: “by early June 1960, the New York Times and the four ministers faced suits amounting to $3,000,000 in Montgomery. In addition, the Times had another $3,150,000 in damages in Birmingham.” The infirmities in Alabama’s of-and-concerning doctrine sufficed to reverse the jury verdict. But if the Court wanted to reverse a perilous trend in state court libel litigation, then—pardon the expression—it was necessary to decide more.

Two: Sullivan Adopted an Excessively Narrow Rule

If Sullivan can be characterized as overbroad, then it can also be characterized as excessively—and puzzlingly—narrow. The narrowness problem results from the breadth of the reasoning that the Court used to justify the actual malice standard. In sum, that reasoning went like this: (a) “debate on public issues should be uninhibited, robust, and wide open”; (b) error in this kind of debate is inevitable; (c) injury to the reputations of public officials in this context is similarly inevitable; (d) punishing false and defamatory statements made about the official acts of public employees is akin to enforcing the Sedition Act, which the judgment of history has condemned; and (e) therefore, the common law of libel conflicts with the values of the First Amendment.
This argument has broad implications, and the conclusion that follows from it has little to do with tweaking the fault element of a defamation claim. Rather, the conclusion compelled by this argument would seem to be that citizens and the press enjoy "an absolute, unconditional privilege to criticize official conduct." So said Justices Black, Goldberg, and Douglas, who filed opinions concurring in the result but who struggled to understand why the Court, "writing on a clean slate," endorsed a half measure like the actual malice standard. Some critics have agreed with them.

In a sense, Sullivan participated in and advanced the civil rights movement, vindicating the free speech rights of some of that movement's leaders.

Indeed, the concurring justices thought that the majority decision was not just strangely narrow, but dangerously so. As Justice Goldberg observed, the "real issue" presented was whether juries should be trusted to decide which speakers on public issues should be punished. Shifting the jury's focus away from issues like falsity and defamatory meaning and toward an "evaluation of the speaker's state of mind" did not address the source of constitutional anxiety.

Indeed, critics have pointed out that the actual malice standard leaves the speaker with the costs and distractions of a protracted discovery process, with the vagaries of unpredictable jury decision making, with the specter of crushing punitive damages, and with the cold comfort of a (potentially) better audience on appeal. If this is true, then Sullivan seems less grand revolution than bland evolution, less cause for dancing in the streets than cause for setting higher litigation reserves. As Richard Epstein wryly noted, "A generation has now passed, and the dancing has stopped."

Justice Brennan did not explain why the majority decision stopped short of the result proposed by Black, Goldberg, and Douglas. Instead, he simply articulated a rule that seems narrow given its premises—and he did so in a manner that borders on hesitancy: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Despite Sullivan's otherwise grand language, the key holding in the case does not sing or inspire.

The reason typically offered for the narrowness of Justice Brennan's opinion is this: the opinion was a compromise, negotiated by one of the most effective vote-aggregators in the history of the Court. There is probably some merit to this argument. I hope there is because I've been making it for about 30 years.

The problem with the argument, however, is that in its most extreme versions it reduces Justice Brennan to an amiable and crafty horse trader. I have come to worry that this does Justice Brennan a grave—perhaps even an ethnically stereotyped—injustice. I fear that the image of the loveable Irish politician working his influence in the smoky back rooms may have overtaken our understanding of how one of the Court's greatest jurists went about his work.

What is important to remember about Sullivan is that the paradigm change it effected was to transform a common law tort into a matter of constitutional significance. As Harry Kalven charmingly observed, "From the point of view of an old teacher of the law of defamation, the case is especially fascinating and goes a long way toward giving us special status by turnover defamation into a branch of constitutional law." Sullivan effected that critical structural change—the one that matters most for our purposes—in a way that was absolute, unqualified, and uncompromising.

Granted, many questions were left unanswered by Sullivan and we can reasonably question whether the Court went on to answer them in satisfactory ways. But, in the process, we should not lose sight of the fact that the dramatic paradigm shift made in Sullivan was, and appears to remain, absolute: tort claims based upon speech implicate First Amendment concerns—period. Or, as we might say after Hustler v. Falwell—exclamation point.

Three: Sullivan Engages in Some Puzzling Reasoning

Sullivan may puzzle us not just because it reaches a result that is too broad or too narrow—or even because it somehow manages to do both. It is also puzzling because some of the moves it makes to get to that result may leave us scratching our heads. To quote Alice, who knew about strange jurisprudence: "curiouser and curiouser."

Consider, for example, Justice Brennan's puzzling math. Having explained that mistakes and reputational injury are inevitable in public debate, he goes on to state: "If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of those two elements is no less inadequate." This observation serves as a launch pad for the discussion of the Sedition Act, the need for citizens to feel free to criticize their government, and the benefits of the actual malice standard.

If we pause over Justice Brennan's statement, however, we may find ourselves wondering what to make of it. We might try to express what Justice Brennan is getting at by reference to a simple equation: $0 + 0 = 0$; if both factual error and defamatory content are zero (because neither of them is constitutionally sufficient to establish liability), then the combination of them remains zero. But if that is his point, then it does not survive close scrutiny.

If Justice Brennan means to say that neither of these elements of the tort, taken individually, provides adequate protection to speech, then the same point holds true with respect to actual malice. Assume, for example, that I make the statement—knowing it to be false—that President Obama does not enjoy broccoli. The actual malice element is fulfilled, but President Obama still has no cause of
action against me because the statement is not defamatory. In this sense, actual malice is also a zero because it, too, fails on its own strength to "remove the constitutional shield." Under this line of reasoning, Justice Brennan could just as well have written: "If neither factual error nor defamatory content nor actual malice suffices to remove the constitutional shield from criticism of official conduct, then the combination of those three elements is no less inadequate." But, of course, that's wrong; Sullivan itself says so.

Justice Brennan here fails to describe accurately how tort elements work in combination. Each element has some tendency to prove the claim (i.e., is greater than zero) even though none suffices if taken individually. In this sense, the proper mathematical analog for these tort elements is not $0 + 0 = 0$, but $1 + 1 + 1 = 3$. This is just what Sullivan holds: proof of falsity plus proof of defamatory content plus proof of actual malice can, consistent with constitutional limitations, result in liability for defamation.

I think that Justice Brennan was simply trying too hard to make the case that existing defamation standards did not adequately protect speech. This has some irony to it because the best evidence in support of that proposition was easy to find. Consider, for example, the sort of whimsical state defamation laws that would allow a public official to secure a half-million-dollar libel verdict against individuals and institutions that had not said anything false or defamatory about him.

There are other puzzles as well. For example, the Court developed the new rule required under the First Amendment by invoking some unexpected authority: Coleman v. MacLennan—a 1908 case from the State of Kansas. This gives rise to two problems.

The first is that the holding of Coleman does not align well with the actual malice rule described in Sullivan. The Coleman court opined that the malice standard required proof of "actual evilmindedness," which could be made out by "an interpretation of the writing, its malignity or intemperance by showing recklessness in making the charge, pernicious activity by circulating or repeating it, its falsity, the situation and relations of the parties, the facts and circumstances surrounding the publication, and by other evidence appropriate to a charge of bad motive as in other cases." Coleman and Sullivan thus did not define actual malice in precisely the same way, which becomes even clearer in later Supreme Court opinions.

The second problem is that it is not clear why the invocation of this state court precedent is appropriate in this context. It is not as though Coleman told the Court anything about the text or history of the First Amendment or the Court's own prior jurisprudence. Thus, even if we assume that Coleman recognized an actual malice standard similar to the one endorsed in Sullivan, the Court's reach in that direction might strike us as surprising.

Or it might not. We might think that such surprise could arise only from a naïve textualism that views the Court's project as an effort to unearth a fixed meaning embedded in phrases like "Congress shall make no law" and "abridging the freedom of speech or of the press." We might entertain, along with Laurence Tribe, the notion that the First Amendment is instead a broad statement of abstract principle(s). We might expect, indeed urge, the Court to look to unexpected sources in its quest for an understanding of how to achieve the provision's underlying aspirations. We might see the Court's use of Coleman as less of a desperate grab toward the common law for help and as more of a legitimate hermeneutic effort to lend determinacy and stability to a highly indeterminate and unstable text. In sum, we might think that some of Sullivan's most puzzling reasoning is also its most important and informative.

Conclusion

Justice Brennan's opinion is a masterpiece—puzzles and all—but of a particular sort. Indeed, this becomes even clearer if we compare Sullivan to another case decided by the Supreme Court—a case that celebrates its 60th anniversary the same year when Sullivan will celebrate its 50th: Brown v. Board of Education.

All of the puzzles I have identified in Sullivan are, in a sense, present in Brown, too. Brown probably decided more than it needed to: after all, few if any segregated schools would have survived the "separate but equal" doctrine given the unlikelihood that the facilities assigned to racial minorities would be truly "equal." But Brown also decided less than it needed to: indeed, Brown left one of the most nettlesome questions presented by the case—the appropriate remedy—to another day. And Brown relied on nontraditional precedent: in its famous footnote 11, the Court supported its analysis and disposed of Plessy by reference to a handful of social science studies.

Both Sullivan and Brown left many questions open and some critics dissatisfied. Both cast off whole bodies of stultifying jurisprudence. Both changed longstanding paradigms. Both reflected their times—and, in turn, shaped their times.

Like Earl Warren's opinion in Brown, William Brennan's opinion in Sullivan has much to teach us. And its lessons go well beyond the First Amendment and the law of defamation. Rather, Sullivan, like Brown, invites us into a conversation about how the Supreme Court works fundamental changes in law; how it clears the slate so it can write on a clean one; how it marshals arguments to support the values it finds implicit in the Bill of Rights; how it strikes compromises even in the midst of declaring absolutes and declares absolutes even while entering into compromises; and why we believe that the Court's methods in these respects reflect a disciplined, appropriate, informed, and coherent jurisprudence rather than simply a results-driven free-for-all.

The anniversaries we honor this year and next are a perfect time to renew those conversations. Let them begin. In the spirit of Brown, let them be inclusive of a diversity of voices. And, in the spirit of Sullivan, let them be uninhibited, robust, and wide open.

Endnotes

3. Anthony Lewis argues that Sullivan played an essential role in allowing the story of the civil rights movement to be told. Without the decision, he contends, reporting on the movement might...
have been chilled by the threat of crippling libel verdicts from Southern juries. See Anthony Lewis, New York Times v. Sullivan Reconsidered: Time to Return to the Central Meaning of the First Amendment, 83 COLUM. L. REV. 603, 605 (1983). See also Louis H. Pollack, The Limitless Horizons of Brown v. Board of Education, 61 FORDHAM L. REV. 19, 21 (1992) (arguing that Sullivan cannot be understood without remembering that it involved a defamation claim brought against Ralph Abernathy and three key aides to Dr. King); Geoffrey R. Stone, Justice Brennan and the Freedom of Speech: A First Amendment Odyssey, 139 U. PA. L. REV. 1333, 1344 (1991) (opining that Sullivan was “not only a triumph for free expression; it was a triumph for civil rights and racial equality as well”); Kermit L. Hall & Melvin I. Urofsky, New York Times v. Sullivan: Civil Rights, Libel Law, and the Free Press 70, 84–87 (2011) (discussing the use of this libel case and others to attempt to chill Northern reporting on civil rights issues); Harry Kalven Jr., The Negro and the First Amendment 55 (1965) (observing that “although there was perhaps a technical libel involved, the impression is that the technicality was pounced on and exploited in Southern irritation over Northern interference in the civil rights controversy”).


5. For example, Justice Brennan’s memorable phrase that speech should be “uninhibited, robust, and wide-open,” Sullivan, 376 U.S. at 270, has been quoted in countless cases and has served as the title for several books on the First Amendment. With respect to the language of the majority opinion, Anthony Lewis has suggested that there is a “grandness to the opinion from the opening sentence.” Lewis, supra note 3, at 625.


7. The facts recited here are taken from Sullivan, 376 U.S. at 256–64.

8. The errors are detailed at Sullivan, 376 U.S. at 259.


10. Id. at 280.

11. Id. at 286.


13. Id.

14. Id.

15. Richard Epstein, for example, has criticized the breadth of the Sullivan ruling, observing that “the right Supreme Court strategy should have been to colonize as little as possible of the common law turf in its initial foray.” Richard Epstein, Was New York Times v. Sullivan Wrong?, 53 U. CHI. L. REV. 782, 792 (1986). Epstein points out that the Court had at least two narrower grounds on which to dispose of the case: by constitutionalizing the “of and concerning” requirement or by concluding that the law of damages had been misapplied. Id. at 792–94.


17. Id. at 258.

18. Id. at 267.

19. Id. at 291.

20. Id. at 292.

21. Id.

22. Id.


24. Supreme Court Rule 10 makes clear that the Court will only review “important” questions—the word appears five times—and does not measure importance by reference to situation of the parties but rather by reference to the state of the law.


27. Sullivan, 376 U.S. at 270.

28. Id. at 272.

29. Id. at 273.

30. Id. at 276.

31. Id. at 298 (Goldberg, J., concurring).

32. Id. at 293, 299. In the same vein, the majority opinion observes that it would be oddly asymmetrical if a public official enjoyed immunity when he or she was sued for libel by a private citizen, but the private citizen enjoyed no similar protection when a public official sued him or her. Id. at 282–83. But, as Justice Goldberg observes, the asymmetry remains under the actual malice standard because public officials usually enjoy absolute immunity from such suits. Id. at 302–03.

33. The New York Times had urged the Court to adopt such an absolute rule. The actual malice standard was one of several alternative and lesser protections proposed to the Court. See Lewis, supra note 3, at 607. Lewis writes: “it is no longer possible to escape the realization that, in calling for [absolute immunity, the concurring opinions were] carrying out the logic—the compelling logic—of Justice Brennan’s constitutional analysis.” Id. at 621. See also Lee Bollinger, The End of New York Times v. Sullivan: Reflections on Masson v. New Yorker Magazine, 1991 SUP. CT. REV. 1, 6 (1991) (“Sullivan provided a basic theory for the First Amendment but did not provide a theory for why the particular regulation of speech it upheld was justified when other forms of regulation are not”).

34. Sullivan, 376 U.S. at 299.

35. See, e.g., Kohler, supra note 4, at 1226–31; Lewis, supra note 3, at 614; Epstein, supra note 15, at 783, 808–11.


37. Sullivan, 376 U.S. at 280 (emphasis supplied).

38. Kalven, supra note 3, at 56.


40. Indeed, it can be argued that in this sense Sullivan follows precisely the type of paradigm shift described in Thomas Kuhn’s influential work The Structure of Scientific Revolutions (1970): a moment arrived when so many anomalous results fell outside the explanatory range of the existing paradigm that a new paradigm had to be embraced.

41. Sullivan, 376 U.S. at 273.

42. Id. at 280–81 (citing Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)). Justice Brennan later cited and quoted Coleman again in Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

43. Coleman, 78 Kan. at 741, 98 P. at 292.


45. See, e.g., Garrison v. Louisiana, 379 U.S. 64, 73 (1964) (proof of “hatred” does not show actual malice).


47. 347 U.S. 483 (1954).