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REFLECTIONS ON NEW YORK TIMES CO. V. SULLIVAN, 50 YEARS LATER

ASHLEY MESSENGER*

The task before us today is to reflect on the U.S. Supreme Court’s decision in New York Times Co. v. Sullivan.1 But before we reflect on Sullivan, let us take a moment to reflect on journalism. Journalists, for the most part, consider themselves the “Fourth Estate.”2 They believe that they serve as a watchdog on those in power and are an indispensable part of the system of checks and balances in American democracy. They aspire to tell us the “truth,” although most reporters are savvy enough to understand that “truth” is a messy concept that sometimes simply means “accuracy.” A reporter can accurately convey what a politician said, even if the politician is lying. The reporter may be able to show the politician is lying and explain the underlying dispute or facts, but an accurate report of events would necessarily include a repetition of the lie. And although news reports strive to be precisely accurate, there are occasions in which it is considered perfectly acceptable to dance around accuracy for the sake of conveying a larger truth.3

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3. See, e.g., JOHN D’AGATA & JIM FINGAL, THE LIFESPAN OF A FACT (2012). This principle is also reflected in some of the hyperbole cases, such as Greenbelt Coop. Publ’g Ass’n v. Bresler, 398 U.S. 6 (1970). In Greenbelt, the Court acknowledged that the newspaper accurately reported that Bresler was accused of “blackmail” at a city council meeting. Id. at 13. The Court also noted that it would not be accurate to use the term “blackmail” in the literal sense of the word, but in context it was clear that the term was used to express the viewpoint or mindset of those who “considered Bresler’s negotiating position extremely unreasonable.” Id. at
It is often argued that the First Amendment should provide broad protection to journalism because of the great importance of learning the truth. Despite the occasional falsehood, it is important to protect journalists because the need for the overall truth is greater than the harm caused by a relatively minuscule falsity. Accordingly, journalists should not be exposed to aggressive libel judgments that could bankrupt otherwise well-meaning and professional members of the press, or cause them to censure newsworthy information out of fear of suit.

Courts, however, struggle with what the First Amendment should mean and its relationship to truth. Commentators have developed various “theories” of the First Amendment to explain why we should or should not protect speech in various circumstances, some of which emphasize “truth” in some form or another, and others that do not. This article compares the various theories of the First Amendment to what the Court did in Sullivan and to what journalists actually do, and it concludes that while Sullivan helped the news media in some regard, it failed to establish constitutional protection that is truly consistent with the interests of high quality journalism.

Part I summarizes some of the theories of the First Amendment. Part II outlines what the Court did in Sullivan and what the practical impact was. Part III explains why the rule adopted in Sullivan and influenced by the “marketplace of ideas” theory has proven to be problematic for news organizations; it also argues that a speech act theory is more suitable for understanding libel cases. Finally, Part IV summarizes the impact of Sullivan on modern media and concludes with an argument that it is time to reflect on why we protect speech so that we may consider theories and adopt rules that better serve our communicative goals in civil society.

I. THEORIES OF THE FIRST AMENDMENT

There are several theories that courts, scholars, and commentators use to explain or justify why the First Amendment should or should not protect various kinds of speech. One of the most well-known theories is known as the “marketplace of ideas.” This theory

14. Thus, while the statement was not literally true, it expressed a “truth” about how Bresler was viewed by the speaker.
asserts that the truth will eventually prevail as a result of uninhibited public discourse. Accordingly, ideas should be aired freely so as to allow the public to effectively compare competing viewpoints. The notion is well-established in First Amendment jurisprudence and is often attributed to Justice Holmes’ dissent in Abrams v. United States, in which he said, “the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”

The marketplace theory actually takes two forms. In one version, described above, the goal is to serve a truth-seeking function. Free expression aids in the search for truth because it allows truth and falsity to “compete,” and, presumably, truth will prevail. In the other form, the goal is not necessarily to search for truth, but simply to have a diversity of ideas available to the public. In either case, the premise is that any “truths” should not be handed down from authorities, but people should be free to evaluate ideas on their own merits.

Another well-known theory, attributed to the writings of Alexander Meiklejohn is that we should allow speech that helps people engage in democracy and self-governance. This theory gives great leeway to speech on political issues, but leaves open the possibility of censoring speech that is not helpful to democracy. Moreover, Meiklejohn takes a dismissive view towards the marketplace theory and the permissiveness it grants to a citizen to “believe whatever will serve his own private interests.” Meiklejohn does not believe that the First

5. Id. at 630 (Holmes, J., dissenting).
Amendment is “a device for the winning of new truth . . . . It is a device for the sharing of whatever truth has been won.”

Another theory is that freedom of speech is justified as a matter of individual autonomy; that freedom of speech is a natural right and a basic liberty of civil society. In this view, no further justification is needed. It is the government that must overcome a strong presumption in favor of freedom if it seeks to restrict speech.

The “checking value” theory is yet another justification that is offered to support First Amendment rights, especially the principles of a free press. The theory is that freedom of expression has value, at least in part, because of the function it performs in checking the abuse of official power. The founding fathers were extremely distrustful of government power and wanted to ensure that citizens had a mechanism for keeping the government in check; therefore, the First Amendment expressly reserves the right of the people to speak out against government abuse. One question is whether the “checking value” theory applies when the speech at issue relates to private power rather than government power. Although its origins may have been in the desire to check government power, citizens also have a valid interest in ensuring that private actors do not abuse power, and it may be that the checking function can be applied to any situation in which there is an interest in countering abuse.

Finally, there is an esoteric but, I think, extremely valuable theory that relies on the philosophy of language (particularly “speech act” theory) and an understanding about the essence of human communication. This theory recognizes that humans communicate in

10. Id. at 561.
11. See id. at 544; Rehnquist, supra note 8, at 6–7.
12. See Blasi, supra note 7, at 523. See also David A. Anderson, The Origins of the Press Clause, 30 UCLA L. REV. 455, 493 (1983) (explaining that the legislative history of the press clause supports Blasi’s view that the checking function of the press was an important value to the founders).
13. See Anderson, supra note 12, at 491 (arguing that the press clause was necessary because “it was universally assumed that the press would indeed provide such a check and that government therefore would seek to suppress it”).
14. See Blasi, supra note 7, at 539–41 (arguing that the abuse of government power is worse than the abuse of private power).
many different ways and for many different reasons. A speaker will engage in a "speech act," and there is some burden upon the audience to determine the "meaning" of the statement that was made. The speaker and the audience may engage in a dialogue to determine what was meant, and the audience may have to sift through statements to determine what is credible and what can reasonably be drawn from speech. In this view, there is little reason to censor speech, and in fact, there is great reason to encourage more speech to facilitate interpersonal understanding. I have called this the "speech act model" of the First Amendment and have criticized modern libel law on these grounds.

If you ask journalists what they do and which theory best fits their notion of their role in society, I suspect that many would relate best to the "checking value" theory. Journalists see themselves as the "Fourth Estate;" they "comfort the afflicted and afflict the comfortable." If they do anything, journalists provide a check on abuses of power, and the checking value theory is, rightfully, often used to justify strong protection for the press.

Journalists might also relate to the Mieklejohnian theory, at least insofar as it protects speech on political issues. However, they might object to the censorial power of the theory with respect to statements that are deemed "unhelpful" to democracy. Journalists may also like the notion of individual autonomy, and the libertarian model certainly would offer broad protection for free speech.

The marketplace of ideas theory presents an interesting problem. In general, we tend to think that the theory rejects an authoritarian imposition of "truth," allowing citizens to sift among the ideas in the marketplace. This theory should offer broad protections for speech, one would think. However, because of the assumption that there is an underlying truth-seeking function involved, it has manifested in such a way as to limit speech. In Sullivan, the Court adhered to the marketplace communicative action, which is based on speech act theory, can be used to understand the structure of the First Amendment).

16. See Chevigny, supra note 6, at 161–76.
18. This quote is attributed to Finley Peter Dunne, a 19th century writer. FINLEY PETER DUNNE, OBSERVATIONS BY MR. DOOLEY 240 (1902).
of ideas theory and developed a rule\textsuperscript{19} that does not necessarily serve well the interests of journalism or of an informed public.

II. WHAT SULLIVAN DID

A. The Court's Decision

In Sullivan, the Supreme Court did a great thing in granting constitutional protection to speech in libel cases. In many states, libel was essentially a strict liability claim; if a plaintiff could prove that a defamatory statement had been published by the defendant, then the defendant would typically be liable unless he could prove it was true (often difficult to do, even if the statement were in fact true) or that some other privilege (such as "fair comment") applied.\textsuperscript{20} Mistakes, however, were not granted any protection at all.

It is important to acknowledge that the facts of Sullivan were inflammatory at the time, insofar as the statements at issue were related to the civil rights movement, a matter of great public concern about which citizens held strong and divisive views. A political advertisement ran in the New York Times that criticized the conduct of the police officers who treated civil rights demonstrators badly.\textsuperscript{21} L.B. Sullivan, the Montgomery, Alabama Public Safety Commissioner, sued for libel, arguing that it defamed him in his role overseeing police conduct.\textsuperscript{22}

As has been previously noted by others, the Court could have ignored the larger constitutional issues and decided the case on simpler, narrower grounds; for example, it could have found that Sullivan was not truly the subject of the statements, as he was never named in the ad.\textsuperscript{23} But instead, the Court took the opportunity to rule that elected officials cannot prevail in a libel action unless they can prove that the defendant

\begin{footnotes}
\item[20] See id. at 267, 279 (explaining the privilege of "fair comment" and noting the difficulty of proving truth or privilege under a common law rule).
\item[21] Id. at 256.
\item[22] Id. at 256–57.
\end{footnotes}
acted with "actual malice," defined as knowledge of falsity or reckless disregard of the truth.\footnote{See Sullivan, 376 U.S. at 280.}

Sullivan is notable for another reason: it is not a case about "journalism." Although the defendant is a prototypical media company, the statement at issue was not from a news report, but rather, from a paid political advertisement.\footnote{Id. at 256.} The point was not to convey facts in a reasonable or objective matter, but to comment on contentious social issues. The Court's now-famous quote that "we consider this case against the background of 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\footnote{Id. at 270.} must be understood in the context of supporting political debate, which is not necessarily expected to be fair, neutral, factual, or reasonable. Politics is often not about "truth" in a limited, purely factual sense as much as it is about "truth" in the much larger sense of expressing values.

And yet, despite the context, the Court chose to implement a rule that relies crucially on some notion of a statement being "true" or "false" in a factual sense and the degree to which that distinction was known to the defendant.\footnote{In many cases, this rule doesn't make sense. See, e.g., David Kohler, Forty Years After New York Times v. Sullivan: The Good, the Bad, and the Ugly, 83 OR. L. REV. 1203, 1210 (2004) (noting that "Westmoreland v. CBS has often been cited as an example of the inadequacies of the Sullivan rule" because the case was based on allegations "about which our own government could not even agree . . . and which in all likelihood was not subject to definitive proof either way"); see also Messenger, supra note 17, at 180-89 (noting the failure of Sullivan to distinguish among various reasons why false statements may be disseminated, including some legitimate reasons that society should want to protect).} In doing so, the Court adopted the "marketplace of ideas" theory, stating that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.\footnote{Sullivan, 376 U.S. at 270 (quoting United States v. Assoc. Press, 52 F. Supp. 362, 372 (S.D.N. Y. 1943)). To be fair, the Court referenced ideas that could have been related to other theories of the First Amendment. The Court noted that criticism of government officials is an important part of the democratic process. Id.} We can draw
from the Court’s opinion that it placed a high value on the truth-seeking function of speech and apparently concluded that there was no value in statements that were known to be false. To continue the marketplace analogy, the Court’s rule suggests that any idea can be “sold” in the marketplace as long as one does not know it to be “defective,” so to speak. In fact, the Court was willing to allow for “defects,” noting that errors are inevitable. Falsity is not the problem; the problem is knowing a statement to be false. Conveying a known or probable falsity was assumed to be contrary to the goal of getting to truth.

Thus, the Court freed defendants from liability in cases where they did not know an allegation about public officials to be false, which was a great departure from the common law rule and which would give much greater latitude to speech involving public affairs. The rule has turned out to be quite effective at accomplishing the narrow task to which it was directed, but the real impact has been both spotty and narrow.

B. The Immediate Impact

What has been the impact of New York Times Co. v. Sullivan on the media? A lot, and yet, not much.

The rule that public officials (and public figures) must prove “actual malice” in order to prevail in libel cases has been the law my entire life. I have no personal knowledge of what it was like to work for or counsel a media company in the absence of such a rule (at least in the United States—more on that thought later).
Although I can imagine what it must have been like without any form of constitutional protection in libel cases, I thought it would be prudent to ask someone who does, in fact, have personal knowledge of what it was like to practice law and represent media companies before *Sullivan* was decided.

James Goodale was the in-house lawyer for the New York Times at the time of *Sullivan*. (He now works for Debevoise & Plimpton in New York.) He graciously spoke with me to answer my questions about what it was like pre-*Sullivan* and in its immediate aftermath. As I expected, and as the lore goes, he felt that *Sullivan* did, indeed, have a great impact on the media and may have saved the New York Times from bankruptcy.

He said that before *Sullivan* was decided, there were stories that simply did not run because the paper couldn’t prove that the story was true. Even if the reporter had several reliable sources, reliance on a source, alone, was not enough to save the press from liability. The burden would be on the paper to prove that the statements or allegations were true. Sometimes, reporters could find creative ways to show that allegations were true, but sometimes, stories did not run because even though the allegations were credible and newsworthy, they could not be proven true.

The rule announced in *Sullivan* was simple: when a public official sues a newspaper for libel, the newspaper cannot be required to prove truth in order to defeat the suit; rather, the public official bears the burden of establishing the newspaper knew the statement was false (or acted in reckless disregard of the truth). Yet, *Sullivan* proved to be a great blessing because it gave the press a bit more leeway to publish credible and newsworthy allegations related to public officials. Thus, even though *Sullivan* was about political speech as opposed to “journalism,” it did eventually provide some benefit to the news media insofar as the rule protected the media from a narrow set of claims.

Interestingly, Goodale said that the paper did not change its practices much in the years immediately following *Sullivan*; the paper was still quite cautious. It realized that plaintiff-side libel lawyers were not swayed from filing suits, and the paper would still incur the expense of litigation even if the paper could prevail in the end. But through the 1970s, there were a slew of cases decided in favor of libel defendants, and plaintiff-side lawyers began to realize how difficult it would be to
win a libel case. By the 1980s, libel cases began to taper off, and the protections of *Sullivan* began to have a practical impact.32

The case has been widely praised for changing constitutional law and expanding free speech. All of this is wonderful. But in retrospect, it is important to note that *Sullivan* did not establish adequate constitutional protection for speakers in libel cases. As I have previously argued, the weakness of *Sullivan* is its reliance on a false premise: that there is no constitutional value in a knowingly false statement.33 But that false premise itself is most likely based on another false assumption about the relationship between statements and “truth.” Theories of the First Amendment that emphasize “truth” are problematic if “truth” is narrowly defined to refer to whether statements are true based solely on the syntax of the statement. There are times when a statement is false on its face but nevertheless can be used in a context that conveys valuable information. In such cases, we have to look to other First Amendment principles, such as the checking value of the press, or find a theory that better fits the nature of human communication, such as speech act theory.

III. WHY SPEECH ACT THEORY FITS BETTER IN LIBEL CASES

A. The Problem with Assessing “Truth”

We like to believe that truth is out there and that it is easy to discern. “Truth” can compete with “falsity” in the marketplace of ideas, and “truth” will prevail. We tend to think that truth and falsity come in the form of statements.

We often identify statements as “true” or “false,” and libel law presupposes that statements can be parsed this way. But consider these statements:34

32. Indeed, libel cases have changed quite a bit in the last 20 years. There are fewer cases against mass media companies and more cases against individuals; there has also been an increase in claims by private persons, as opposed to public officials or public figures. See David S. Ardia, *Freedom of Speech, Defamation and Injunctions*, 55 WM. & MARY L. REV. 1, 10–14 (2013).

33. See Messenger, *supra* note 17, at 180–81 (arguing that the actual malice rule fails to account for the myriad ways humans use speech, including the use of a false statement for purposes other than trying to persuade someone of its truth).

34. This example is an elaboration on the example I use in my prior article, *supra* note 17. The underlying point was that some members of the electorate hold
(1) President Obama is secretly a Muslim who wants to harm America.

(2) John says that President Obama is secretly a Muslim who wants to harm America.

These statements contain the same idea—that President Obama is secretly a Muslim who wants to harm America—but they have different “truth conditions.” Statement (1) is true if and only if President Obama actually is hiding the fact that he is a Muslim and wants to harm America. Statement (2) is true if and only if John says that he is. It is possible, even likely, that Statement (1) is false, but Statement (2) is true. And yet libel law does not make a distinction between these two statements. In either case, President Obama could, in theory, bring a libel claim, arguing that each statement conveys a false fact (that he is secretly a Muslim who wants to harm America) and that the speaker (the person reporting these statements) knows the underlying assertion is false. The law does not account for the different purposes these statements may have, nor does it (officially) account for the reasons why the statements may be repeated, such as to explain why a portion of the electorate claims it would not vote for President Obama. Given the common law republication rule and the constitutional protection of the actual malice rule, a reporter is arguably not protected if he repeats the statements and knows they are false, even though there may be a perfectly rational, newsworthy justification in explaining the mindset of the electorate, and even though no one is deceived into believing any false facts.

This is where the goal of “truth” creates problems. The principle is valid most of the time, but not always. There are times when one knows a statement to be false, but the statement is not being made to prove the truth of the matter asserted; the statement deserves repetition because it conveys some other relevant information, such as to show the mindset or motive of a person. The notion that President Obama is a Muslim falls into this category. When reporters convey the false belief

false beliefs about President Obama, and even though their underlying beliefs are false, the fact that people hold those beliefs is true and also an important fact to know to understand the world. Thus, if we really want to protect the search for truth, the goal need not be to ensure that each individual statement is true on its face; but rather, we need to allow for false statements when they convey some other useful information about the world—such as the fact that people hold false beliefs.

35. For the purposes of this article, I assume the statement is false.
held by a segment of the electorate, they are not trying to persuade the
audience that President Obama is a Muslim or to perpetuate that notion.
Instead, the reporters are generally trying to explain that some citizens
hold this view, whether it is right or wrong, and that such a belief is
affecting the outcome of the election. This kind of information is helpful
to our understanding of our society and our world, it has informational
and expressive value, it conveys a broad truth about the world (the fact
that people believe false things), and it should be exactly the kind of
statement the First Amendment should protect. And yet the rule in
Sullivan would offer a reporter no protection for making this statement.
This is one reason why we should abandon the emphasis on the technical
truth or falsity of a statement and instead focus on the speech act at issue.

There is a second problem, though, which is a bit subtler and a
lot trickier. Speakers, and journalists in particular, are not magical,
omniscient creatures. They are human beings with some knowledge and
some strengths and some weaknesses. We ask too much when we ask
journalists to provide us with “truth.” What we can reasonably ask is that
the journalist provide us with information—and provide enough context
and sourcing so that we, the audience, can fairly assess the credibility of
that information in a coherent manner. It is up to us, the audience, to
determine “truth,” individually and then collectively. It is not the duty of
journalists to cohere all the data in the universe and deliver the “truth” to
us, neatly packaged and ready for consumption. The bias of modern libel
law leaves the audience out of the equation and ignores the process that
truly underlies the “marketplace of ideas” theory, which should be seen
more as a rejection of claims of authority than as an obligation to seek or
deliver truth.\footnote{It has been argued that Sullivan actually got it right in this regard, but that
later cases abandoned the notion that the audience has an epistemic duty to evaluate
statements. See generally Richard H. Weisberg, The First Amendment Degraded:
Milkovich v. Lorain and a Continuing Sense of Loss on Its 20th Birthday, 62 S.C. L.
REV. 157 (2010) (arguing that Sullivan and the later “hyperbole” cases properly
acknowledged the interpretive role of the audience, but the Court later moved toward
“fact policing” in Milkovich).}

It is too easy to believe that a statement is either “true” or
“false.” But courts have noted again and again that there are many
statements for which that kind of assessment is difficult if not
impossible.\textsuperscript{37} We can easily see that value statements ("broccoli is delicious") are not susceptible to categorization as true or false because they reflect only the view of the speaker. And yet, when it comes to other kinds of statements, we forget that the statement reflects the view or mindset of the speaker, and we tend to impose some authority to the statement simply because it was made. The assumption that statements have authority merely because they exist is foolish at best, and delusional at worst. Statements must be judged on their credibility, which includes an evaluation of their source, the source’s source, the basis upon which any knowledge is claimed, and the relationship of that information to all other relevant evidence. To illustrate this concept, consider a simple statement, "The dog is inside the house."

If the speaker is on the phone with you, and he is inside the house with the dog and is telling you that the dog is inside the house because he is there, in person, and can see the fact that the dog is inside the house contemporaneously with his statement, then, assuming the speaker does not have a track record of lying nor a motive to do so, the statement is credible evidence that the dog is, in fact, inside the house. The audience would be well-justified in believing the statement to be "true." It is possible, however, that the speaker is lying, but you, the audience, would have no way to know that until additional facts are acquired, such as coming home to find the dog missing and a security camera showing the dog running away early that morning. If that were to occur, you would be well-justified in doubting the credibility of the speaker on future occasions. \textit{The speaker's statement always reflects his own credibility, but does not always reflect the actual facts.}

If the speaker is with you, at another location, and you ask, "Where is the dog?", and he responds, "The dog is in the house," then it would be fair for you to ask, "How do you know?" The answer may be that the dog was in the house when he left this morning, the doors and windows were closed and locked, and therefore, it is reasonable to conclude that the dog is still in the house. The statement that the dog is in

\textsuperscript{37} Courts have struggled in particular with determining whether statements are "factual assertions" that could be proven true or false, or "opinion," which should be protected by the First Amendment. See, e.g., Levin v. McPhee, 119 F.3d 189, 196 (2d Cir. 1997) ("No area of modern libel law can be murkier than the cavernous depths of this inquiry." (quoting Sanford, \textit{Libel and Privacy}, § 5.1 (Supp. 1997))).
the house expresses his *belief* that the dog is in the house, not contemporaneous personal knowledge. Nevertheless, the belief is very reasonable. Absent some unusual circumstance, the dog is most likely still in the house. Nevertheless, *it is incumbent upon you, the audience, to ask for the basis of the speaker’s claim in order to have a justified belief that it is true.*

Alternately, the speaker might tell you the dog is in the house, but, in fact, the doors and windows are wide open, the dog has a habit of escaping, and the speaker has not been home in a few days. You might know all these circumstances, or you might not. If you know all that information and you believe that the dog is in the house simply because the speaker said it, even though he has no personal knowledge of the facts and there are many reasons why the statement might not be true, then your belief is not well-justified. This is a separate issue from whether the fact is true. The dog might or might not be in the house (the issue of whether the statement is true), but you lack a well-justified belief in asserting the statement to be true or false. Nevertheless, you might assert it anyway. *People believe things without having adequate justification all the time, and they assert these things simply because they believe them, because they are human and humans do that.*

If you do not know all the extenuating circumstances and believe that the dog is in the house simply because the speaker told you that, then the issue is a bit more complicated. Is the speaker generally credible? Do you know? Perhaps you just met this person. Or, perhaps you have known him a long time but he has not lied before. Unless you know that the speaker has a tendency to lie, or at least to make statements without any basis for them, then you might be inclined to trust the speaker. This is another thing humans do: we tend to trust each other in the absence of evidence that we should not. (And even sometimes then we still trust, albeit unwisely.) The rational response to the assertion that the dog is in the house would be to ask, “How do you know?” *The audience bears some responsibility in assessing the credibility of the information conveyed, and that requires having some information about the source of the information and the ability to assess the credibility of the source.* Moreover, the audience bears some responsibility in assessing the credibility of the speaker’s statement without regard to whether the topic is the location of the dog, a politician’s sexual proclivities, the situation
in the Middle East, a declaration of love, the quality of food at the new restaurant in town, or anything else.38

What does this have to do with news reporting and media? Journalists are no different from any other person when it comes to speaking and hearing information, except that they are, quite explicitly, a medium. We all play this role sometimes, in some capacity, but those who claim to be journalists are claiming this role professionally. What we can reasonably expect is not that they will deliver us “the truth” in a convenient bite-sized package, but that they will adhere to the norms of reporting. The norms of reporting first and foremost require journalists to faithfully convey what was said. Second, norms require a journalist to convey the basis for the statement, assuming it is known. Journalists can reasonably be expected to ask “how do you know?” and to convey the source of information or the lack thereof. But the troubling reality is that, in many cases involving newsworthy issues, speakers do not have the kind of personal knowledge of the facts that we hope for. In many cases, a person is expressing belief, and that belief may be well-justified or poorly justified. In some cases, sources outright lie. The journalist must do his best to assess the credibility of the speaker and the validity of the basis for statements. This places journalists in a difficult position: either convey the statement with as much contextual information as possible so that the new audience can assess the facts for itself, or make an assessment about the credibility of various speakers and only convey that which one finds credible. In the first case, journalists are criticized for “repeating” false statements or statements that are not credible. In the latter case, journalists are criticized for failing to provide the “whole story” and letting the audience decide for itself. Which is the better course of action has been a long-standing debate in the field of journalism ethics,39 and the practical reality is that journalists will be criticized regardless of which option they choose. Worse, the law will not always protect the journalist because Sullivan imposed a rule that

38. Other scholars have noted the importance of considering the role of an active, interpreting audience in libel cases. See, e.g., Weisberg, supra note 33.

privileges the literal truth of a statement over the purpose for or context in which a statement is conveyed.

Journalists play a distinct role insofar as they are the initial audience for the original speaker, and then they act as a speaker to convey the information obtained to a new audience. In the journalist’s role as “audience,” he takes in the information and should ask questions about the credibility of the speaker and the basis for the statement. Then, in his role as speaker, he takes what he has obtained and his assessment and makes a statement of his own. This statement should be taken on its own merits, and we should look at the motive or mindset of the journalist, just as we would of the original speaker, but the journalist’s speech and intent will often be different from the speech and intent of the original speaker as a matter of course, simply because they are differently situated. On the other hand, there are times when the “journalist” is indeed the initial speaker, as often happens in the case of commentary. If the speaker is relying on documentation from which he draws conclusions, the basis for the statements should be explained, and made available to the extent possible, so that the audience can assess the credibility of the statements for itself. In any event, the journalist’s words should be interpreted in context to see what kind of communication it is.

In sum, it makes sense to consider the type and purpose of expression rather than looking only at the truth or falsity of the statement. This principle is well-illustrated by the cases that followed Sullivan. Those cases also help illustrate why the speech act model is a better theory to explain First Amendment protection in libel cases.


From the time Sullivan was decided in 1964 until Rosenbloom v. Metromedia, Inc.40 in 1971, the Court applied the principles of Sullivan in over a dozen cases.41 After that, however, the Court seemed to lose its

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40. 403 U.S. 29 (1971).
focus on the principle it wanted to enforce—that debates on matters of public concern should be uninhibited, robust, and wide-open. I am of the opinion that the Court's instincts were generally good and that the Court truly wanted to protect valuable, expressive speech, but the Court struggled to articulate clear rules and principles in subsequent libel cases because it had adopted a rule based on the technical truth or falsity of the syntax of a statement instead of looking at the expressive purpose of the speech. The conflict can be seen most clearly by contrasting Rosenbloom with Gertz v. Robert Welch, Inc., the two cases in which the Court struggled to articulate a rule for evaluating liability in libel cases when the person defamed was a "private figure," as opposed to a "public figure" or "public official."

In Rosenbloom, the Court extended the protections of Sullivan to statements made about private figures if the matter at issue is one of public concern. The news reports in Rosenbloom involved allegations that George Rosenbloom was distributing "obscene material[s]." The Court quoted two of the news reports at issue. The first stated:

City Cracks Down on Smut Merchants
The Special Investigations Squad raided the home of George Rosenbloom in the 1800 block of Vesta Street this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom's home and arrested him on charges of possession of obscene literature. The Special Investigations Squad also raided a barn in the 20 Hundred block of Welsh Road near Bustleton Avenue and confiscated 3,000 obscene books. Capt. Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia.

The second stated:

42. 418 U.S. 323 (1974).
43. Rosenbloom, 403 U.S. at 32.
44. Id. at 33.
Federal District Judge Lord, will hear arguments today from two publishers and a distributor all seeking an injunction against Philadelphia Police Commissioner Howard Leary . . . District Attorney James C. Crumlish . . . a local television station and a newspaper . . . ordering them to lay off the smut literature racket.

The girlie-book peddlers say the police crackdown and continued reference to their borderline literature as smut or filth is hurting their business. Judge Lord refused to issue a temporary injunction when he was first approached. Today he’ll decide the issue. It will set a precedent . . . and if the injunction is not granted . . . it could signal an even more intense effort to rid the city of pornography.45

The Justices issued five separate opinions, with a plurality agreeing that the statements should be protected, although on different grounds. Justice Brennan, who wrote the Sulllivan opinion, recognized that the issues reported were matters of public concern and noted that they do not become less so merely because the accused is a private person rather than a public figure.46 He then presciently notes:

Further reflection over the years since New York Times was decided persuades us that the view of the “public official” or “public figure” as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. We have recognized that “[e]xposure of the self to others in varying degrees is a concomitant of life in a civilized community.” Voluntarily or not, we are all “public” men to some degree. Conversely, some

45. Id. at 34–35.
46. Id. at 43.
aspects of the lives of even the most public men fall outside the area of matters of public or general concern. Thus, the idea that certain "public" figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general concern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of "public figures" that are not in the area of public or general concern.\textsuperscript{47}

The Court therefore concluded that the actual malice test should have been applied, and the plaintiff cannot prevail absent clear and convincing evidence that the defendant acted with actual malice.\textsuperscript{48}

A couple of years later, in \textit{Gertz}, the Court took a completely different approach. In that case, a magazine, \textit{American Opinion}, published an article that claimed there was a conspiracy to frame a police officer that had shot and killed a boy.\textsuperscript{49} Elmer Gertz, who was not involved in the criminal trial of the officer but who was the lawyer for the boy's family, was a target of the article. It claimed that Gertz had a police file that took "a big, Irish cop to lift"; that he was an official of the Marxist League for Industrial Democracy; and that he was a "Leninist" and a "Communist-fronter."\textsuperscript{50} In fact, Gertz had no criminal record, he had never been a member of the Marxist League, and there was no basis for the charge that he was a "Leninist" or a "Communist-fronter."

\begin{itemize}
\item \textsuperscript{47} \textit{Id.} at 47–48. This same idea is expressed by Kohler, \textit{supra} note 25, at 1222 (citations omitted) (noting that the public/private distinction makes little sense, especially in journalism, because stories are chosen not always for the prominence of the subject but for the importance of an issue to the audience—and not everyone involved will necessarily be a public figure).
\item \textsuperscript{48} \textit{Rosenbloom}, 403 U.S. at 55.
\item \textsuperscript{49} \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 325 (1974).
\item \textsuperscript{50} \textit{Id.} at 326.
\item \textsuperscript{51} \textit{Id.}
\end{itemize}
There was no source provided for the facts claimed, but the editor's note that accompanied the article said that the author engaged in "extensive research" into the police officer's case.\(^{52}\)

In *Gertz*, the Court declared that there is "no constitutional value in false statements of fact."\(^{53}\) However, the Court also noted that errors are inevitable, and it would not adequately serve First Amendment interests to impose strict liability for errors.\(^{54}\) Thus, the Court required some level of fault, but, in this case, it declined to extend the *Sullivan* rule to statements involving private figures, ruling instead that states may decide for themselves which standard of fault to apply in cases involving private figures, as long as strict liability is not imposed.\(^{55}\) The Court wanted to ensure that reputational interests were adequately protected. Thus, the Court in *Gertz* did the exact opposite of what it did in *Rosenbloom*.

In both cases, *Rosenbloom* and *Gertz*, the Court seems to have struggled to come up with a rule to justify what seemed like intuitively correct outcomes. The Court wanted to allow for the expression of information and ideas about matters of public concern, but it also wanted to avoid unwarranted harm to reputation when the motives of the speaker were inconsistent with First Amendment principles. The Court's dilemma, though, is inextricably linked with its focus on the knowledge of truth or falsity of the statements. If it had looked instead to the speech act at issue, the Court could have reached the same outcomes with less confusion.

In *Rosenbloom*, the statements were reports of police conduct and of a lawsuit. Under a speech act analysis, the statements in the first report should be protected because they are "reporting." They clearly explain what the police have done, and the audience should understand that the fact that police took action does not necessarily mean that the materials are, in fact, "obscene." As long as the statement was a faithful report of what the police claimed, the statement should be protected. There is constitutional value in the information because it shows what police did and said, regardless of whether the underlying facts are "true."

\(^{52}\) *Id.* at 327.

\(^{53}\) *Id.* at 340.

\(^{54}\) *Id.*

\(^{55}\) *Id.* at 347.
In fact, if it turned out not to be true, there is value in knowing that the police acted overzealously.

The statements in the second report (that the publications are "smut") should be protected as an expression of "belief" or a "conclusion" because they reflect a particular viewpoint about which reasonable people can disagree. Even if the audience were to agree that the publications are "smut," the adoption of that view should be based on a subjective agreement that the characterization is apt; it would be unfounded to adopt the view that the publications are smut without additional information about what is actually contained therein. Importantly, with respect to the statements in both reports, the news media never claimed to have seen the materials or have actual knowledge of what was in the publications. It was repeating the claims of police, whose actions are newsworthy regardless of whether they are accurately characterizing the materials. 56

In Gertz, however, the statements could fairly be the basis for a libel claim because they may constitute a "telling." 57 The information is conveyed as factual but without any sourcing or clarification that permits the reader to assess the credibility of the statement. Instead, the article purports to be the product of "extensive research." The author, in essence, is asking the audience to accept the facts stated as facts based on his say-so. He is claiming expertise and denying the audience the contextual information to assess the credibility of the statements. Thus, one could conclude that the speaker's primary purpose was to state facts, represent them as true, claim the credibility to know the truth, and urge the audience to adopt those facts as true on the basis of the speaker's statement. Assuming the author was successful in creating the desired perlocutionary effect in the hearer, the statement constituted a "telling."

56. In many states, modernly, the first report would be protected by "fair report privilege," and the statements in the second report (that the publications are "smut") would most likely be deemed "opinion." As I have noted, courts and states have developed other tests to offer protection for statements that have value. See Messenger, supra note 17, at 189–209.

57. I have argued that libel claims should be permitted only when the speech act at issue constitutes a "telling," which is an effort to persuade an audience to accept a fact as true based solely on the statement of the speaker. See Messenger, supra note 17, at 220.
and the Court could have allowed Gertz to move forward with his claim on that basis.\(^5^8\)

It is not that \textit{Sullivan} was a bad case or that the rule set forth is entirely wrong. In fact, the basic principles of the case—that strict liability and imposing the burden of proving truth on the defendant were contrary to the goals of the First Amendment—were completely valid, and the rule was a much needed change from common law principles. The problem is that the "actual malice" rule is the \textit{only} form of constitutional protection in libel cases, and I am not sure the Court fully thought through the consequences of that rule when \textit{Sullivan} was decided. In relying on the "marketplace of ideas" theory and emphasizing the truth-seeking function, the Court—whether intentionally or inadvertently—created a rule that places too much focus on the syntax of a sentence and whether it is known to be technically true or false.

It is worth noting that Justice Brennan himself, the author of \textit{Sullivan}, later defended the protections of \textit{Sullivan} by noting the problem of seeking "truth." He wrote that the "difficulty of litigating the question of 'truth’” was a serious problem:

Our cases in the two decades since [Sullivan] bear out this perception about the judicial risks of a judicial test of truth. Often the spoken or written word will capture a judgment, inference or interpretation the "truth” of which is not readily susceptible to adjudication. [Bose]. “Truth” will often be a matter of degree or context. [Greenbelt]. Particularly when we debate the unwisdom of a policy or political point of view, our perspective on “truth” will be colored by the shared assumptions of the day . . . . \(^5^9\)

\(^5^8\). Whether \textit{Gertz} should have prevailed or whether other defenses were available are separate issues; I am merely noting the distinction between the kinds of speech at issue in \textit{Gertz} and \textit{Rosenbloom}, and that distinction provides a starting point for determining whether a libel claim should have been permitted to move forward.

\(^5^9\). Lee Levine & Stephen Wermiel, \textit{The Landmark That Wasn’t: A First Amendment Play in Five Acts}, 88 WASH. L. REV. 1, 80 (2013) (discussing how \textit{Sullivan} was almost overruled by the Court in deciding \textit{Dun & Bradstreet v.})
Apparently, Justice Brennan debated whether he should advocate for the position he took in *Rosenbloom* (to focus on whether the issue is a matter of public concern) or to defend *Gertz*. Neither approach, however, fully considers the range of matters that would be applicable in libel cases, which may explain why the Court struggled so mightily to develop satisfactory tests. Perhaps there would be less of a struggle if the Court abandoned the search for “truth” and instead focused on the expressive act of the speech at issue. Placing the emphasis on truth and falsity leaves courts in an uncomfortable role of being an arbiter of “truth,” and imposes unnecessary limits on otherwise expressive speech.

As many commentators have noted, the limits of *Sullivan* are most clear in *Norton v. Glenn*. In *Norton*, a local newspaper published an article that included the rants of a town councilman, who claimed that another councilman was a “queer” and a “child molester.” The statements were obviously nothing more than an angry rant that reflected nothing about the accused, but instead showed the state of mind of the ranting councilman. Yet the Pennsylvania Supreme Court did not extend any First Amendment protection to the statements because the only constitutional protection the United States Supreme Court has offered to speakers is the actual malice rule of *Sullivan*. Thus, if the reporter knew the statements were false (or at least had good reason to doubt they were true), he was not entitled to protection.

Intuitively, though, the Pennsylvania court knew the outcome was wrong. It noted the “visceral appeal” of protecting the speech, but felt it had no grounds to do so.

If the Court had considered various kinds of speech acts, however, the speech in *Norton* would certainly have been protected as a

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60. Id. at 81–82.
61. Justice Brennan also noted that it was dangerous to make the courts the arbiters of truth. When courts are given the power to “resolve ambiguous questions,” citizens give up important freedoms and risk “imposed orthodoxy.” He said, “it is far better to risk error than suffer tyranny.” Id. at 80.
63. Id. at 50.
64. Id. at 57.
65. Id.
type of “reporting” because it shows what was said for a purpose other than trying to persuade the audience that the speech is “true.” Instead, it points to a larger truth about the conduct of government officials, which is valuable information that the First Amendment should protect. 66

IV. THE IMPACT OF SULLIVAN ON MODERN MEDIA

Although Sullivan did indeed give speakers great protection when commenting on public officials and is important for that reason, the underlying logic of the case is somewhat flawed and fails to protect valuable and expressive speech in all cases. The emphasis on truth and falsity and the subsequent public/private figure distinction that flowed from the case has resulted in some skewed outcomes. We can talk with relative impunity about whether a celebrity has a sexually transmitted disease (assuming we do not know the allegation to be false) because celebrities are public figures. However, (assuming all parties involved are private figures) if we were to report that a local businessman is stealing money from his clients based on information provided by the businessman’s accountant, we risk liability—even though the information for the story was provided by a person in the best position to know. We have ignored the role of the audience and relieved them of any burden of having a reasonable, coherent interpretation of the credibility of the statement. We have put journalists in the difficult role of having to deliver “truth,” despite the fact that they are not omniscient and do not have perfect access to information and that sometimes the truth is that people believe false things. And, we fail to protect the one thing that reporters generally agree is a crucial part of their function—to convey what was said. Many statements are important to convey simply because there is value in knowing what a person said, aside from whether the statement is true; the assessment of truth may still be important, but the knowledge of the person’s beliefs may be important, even if the belief is false. In essence, Sullivan and its progeny did not create doctrine that well reflects the realities of the world and the way humans communicate.

66. Protecting the speech at issue in Norton would have been easy to justify applying speech act theory, but also applying a Meiklejohnian analysis or the “checking value” theory.
Moreover, the rule of *Sullivan* has not been adopted widely internationally. Many countries have outright rejected the “actual malice” rule. Media companies that publish internationally are now in a position similar to American publishers prior to *Sullivan*. Several nations take the position that statements are often not protected unless they can be proven true, and that fact must be considered when assessing the risk of publishing statements that might be deemed defamatory overseas. At the same time, although the actual malice rule offers great protection in the United States when reporting on the conduct of public officials, it is a bit ironic that other nations—that are generally less protective of free speech—have nevertheless adopted rules that arguably offer more protection for certain speech acts, such as reporting. I am not suggesting that we set aside the actual malice rule or any other protections, but I am suggesting that we need to look carefully at the skewed outcomes we get given the rules in place today.

We should take the 50th anniversary of *Sullivan* as an opportunity to reflect on how and why we want to protect speech so that going forward the Court can cultivate doctrine that more fairly reflects the principles that truly allow speech to be uninhibited, robust, and wide-open.

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