1993

A Libel Story: Sullivan Then and Now (reviewing Anthony Lewis, Make No Law: The Sullivan Case and the First Amendment (1991))

Elena Kagan

A Libel Story: *Sullivan* Then and Now

Elena Kagan

ANTHONY LEWIS, *Make No Law: The Sullivan Case and the First Amendment.* New York: Random House, 1991. Pp. 354. $ 25.00.

New York Times v. Sullivan[1] is one of those rare cases—perhaps especially rare in the field of First Amendment law—in which the heroes are heroes, the villains are villains, and everyone can be characterized as one or the other. In *Sullivan*, lofty principle need not wrestle with distasteful fact; the ideal of free speech need not come to terms with base or injurious utterance. There is a beautiful simplicity about the case—a stark clarity—that lends itself to a certain brand of storytelling.

Anthony Lewis, columnist and former Supreme Court reporter for the *New York Times*, ranks by any measure among the premier legal storytellers of our time. Almost three decades ago, his *Gideon's Trumpet* made a folk hero of Earl Gideon and turned *Gideon v. Wainwright* into a metaphor for the wise and just use of law. Now Lewis has focused his sights closer to home, telling the equally significant story of how his newspaper in the *Sullivan* case helped to transform the law of libel and the very meaning of the First Amendment.

Among Lewis's talents is the journalistic gift of knowing a good story when he sees one. *Sullivan*, like *Gideon*, has a power stemming from its simplicity. And again like *Gideon*, it oozes drama. For purposes of narrative, it is hard to better a case that involves the most glamorous part of the

Elena Kagan is assistant professor of law at the University of Chicago.

The author wishes to thank Al Alschuler, Mary Becker, Anne-Marie Burley, Richard Epstein, Stephen Gilles, Abner Greene, Larry Lessig, Michael McConnell, Martha Minow, Geoffrey Stone, Cass Sunstein, and (especially) David Strauss for valuable comments on earlier drafts and the Bernard G. Sang Faculty Fund and the Bernard Meltzer Fund for financial assistance.

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

0897-6546/93/1801-0197$01.00

Constitution, arose from the crucible of the civil rights struggle, and produced a decision of historic proportions. But the storyteller here is as good as the story. Pitching his book to a wide audience, Lewis makes not only *Sullivan* but the whole of First Amendment law come alive in the senses and imagination. Lewis explains legal concepts to the general reader with great facility. And he writes from the heart, communicating material that means much to him with the power and emotion necessary to render the material meaningful to others.

Make No Law is in part simple narration, but its recitation of facts is virtue, not vice. In telling the story of *Sullivan*, Lewis performs the signal task of demonstrating how much facts matter, of showing the extent to which a legal decision may (and should) be dependent on context and circumstance. Lewis's narrative, including his account of the Supreme Court's deliberations (an account based largely on Justice Brennan's private papers), serves to highlight the role of anecdote in law. In deciding *Sullivan*, the Court was in large part responding to a story—the selfsame story Lewis tells with a journalist's eye for vignette and detail.

Lewis, however, is not content to give just the facts; he spins stories with morals. Juxtaposed against Lewis's immersion in context is a tendency to generalize broadly from his subject matter. On one page, Lewis revels in the particular facts of *Sullivan*; on another, he uses these facts as springboard to justify principles of libel law and First Amendment law applicable to a much wider range of cases. This method, of course, is not itself mistaken. Stories often teach general lessons, and the drawing of morals may be especially appropriate in legal stories because the technique mirrors the way law naturally (perhaps inevitably) develops. Indeed, the Supreme Court has done exactly what Lewis favors, extending the rules articulated in *Sullivan* to a broader set of libel cases and using *Sullivan* as authority for some sweeping First Amendment principles.

The real question is not whether to go beyond the original context of a case but how best to do so. The drawing of morals from a story may be more or less apt; so, too, may be the creation of legal rule and principle. Thus, the question, put more precisely, is whether Lewis—or, more important, the Court—has generalized appropriately from *Sullivan*, has seen what the case was truly about and has used this understanding to denote where the case has relevance.

The answer to this question, I think, is mixed, and in much of the rest of this review I offer some thoughts about how and why this is so. After reviewing Lewis's account of *Sullivan*, I discuss aspects of the decision that raise greater problems than Lewis concedes. I then address two different levels of generality on which the *Sullivan* decision may operate. On the first level, *Sullivan* generates special rules of defamation law; on the second level, discussed more briefly, *Sullivan* stands for broader First Amendment

principles. The use of *Sullivan*, by Lewis and the Court, to support a corpus of defamation law strikes me as troubling: as an effort to fit the square pegs of many defamation cases into the round holes of *Sullivan*. Lewis and the Court, I think, do far better when invoking *Sullivan* on the broader level of First Amendment principle. It is there that the *Sullivan* case resounds most deeply.

I. THE CASE AND THE RULING

To evaluate when and where the *Sullivan* decision has meaning, the place to start is with the case decided. Lewis provides a vivid account of the underlying controversy as well as its treatment in the courts. This account provides a basis for reflecting on the central concerns of the decision. But what seems to emerge is something different from what Lewis (or any other proponent of expanded protection for libel defendants) might have intended. The context of the case and the Supreme Court's own deliberations suggest that *Sullivan* was only secondarily—almost accidentally—a decision about the law of defamation. The Court's decision—including the puzzling adoption of the actual malice standard—responded primarily to the core First Amendment problem of the abuse of power to stifle expression on public issues, a problem only contingently related to the law of defamation.

A. The Case

The basic facts of *Sullivan* are familiar, although perhaps more so to readers of this journal than to readers of Lewis's book. On 29 March 1960 an advertisement sponsored by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South appeared in the *New York Times*. The ad, headlined "Heed Their Rising Voices," contained ten paragraphs of text detailing efforts by "Southern violators of the Constitution," including police officers, to derail the civil rights struggle through acts of governmental abuse and violence. L. B. Sullivan, a Commissioner of the City of Montgomery, Alabama, in charge of supervising the city's police, brought a libel suit based on the ad against the *New York Times*. Sullivan's name never appeared in the ad, but he claimed that statements about the Montgomery police and southern law violators had been read to refer to him. Sullivan further claimed that several admitted—though mostly minor—inaccuracies in the ad had harmed his reputation. An Alabama jury returned a verdict for Sullivan in the full amount demanded—a half-million dollars—and the Alabama Supreme Court affirmed. So much is found in the U.S. Supreme Court's majority opinion.

To this factual core, Lewis adds a wealth of detail about the case and its treatment in the Alabama trial court. The advertisement quickly became notorious in Montgomery, even though only about 400 copies of the *New York Times* were circulated in all of Alabama. The Montgomery *Advertiser*, the morning newspaper in the city, brought the ad to the city's attention with an editorial charging "crude slanders against Montgomery" by "voluntary" and "involuntary liars" (at 11); and by the time the *New York Times* went searching for local counsel, not a single Montgomery lawyer would take the case (at 24). (The *Times* found a Birmingham lawyer, who booked hotel reservations for the primary *Times* counsel, Lewis Loeb, under an assumed name (at 24).) The trial judge, Walter Burgwyn Jones, publicly had proclaimed his belief in "white man's justice" and had authored a tract entitled *The Confederate Creed*; on the 100th anniversary of the founding of the confederacy, he had participated in a reenactment of the swearing in of Jefferson Davis (adminstering the oath of office) and then retired to his courtroom to preside over a trial in which jurors wore confederate uniforms (at 25–26). Lewis conjectures that Jones may even have helped to plan Sullivan's libel suit, although (as Lewis admits) there is little in the way of proof to back up this surmise (at 27). In any event, Jones presided over the trial (in a racially segregated courtroom) and found in favor of the plaintiff on every significant ruling; the all-white jury, instructed that the advertisement was libelous, false, and injurious as a matter of law, took about two hours to decide that the advertisement was "of and concerning" Sullivan and that he should receive $500,000 (at 32–33).

Lewis shows that the *Sullivan* trial was merely the first salvo in a concerted campaign against the northern establishment press by southern public officials and opinion makers—a campaign which intended to curtail media coverage of the civil rights struggle and threatened to succeed in this design. The *Sullivan* case was the first of five suits brought by public officials based on the "Heed Our Rising Voices" advertisement; each of the other suits also claimed damages of $500,000 (at 35). Two stories by *New York Times* reporter Harrison Salisbury prompted another round of libel suits, asking for total damages of $3,150,000 against the *Times* and $1,500,000 against Salisbury (at 22). Nor was the *Times* the only target; by the time the Supreme Court decided *Sullivan* in 1964, southern officials had brought nearly $300 million in libel actions against the press (at 36). The Montgomery *Advertiser* candidly headlined a story about the libel cases: "State Finds Formidable Legal Club to Swing at Out-of-State Press" (at 35). The *Alabama Journal*, Montgomery's evening paper, noted that the suits "could have the effect of causing reckless publishers of the North . . . to make a re-survey of their habit of permitting anything detrimental to the South and its people to appear in their columns" (at 34). And the suits indeed could have had great effect. The *Times* withdrew all of its reporters

from Alabama for a year in order to maintain a personal jurisdiction argument (at 43). There was some danger that the newspaper, then struggling with labor disputes and making minuscule profits, would not survive (at 35). CBS, according to one of its attorneys, would have ceased doing programs on the southern civil rights movement had the *Sullivan* verdict not been reversed (at 245).

Lewis leaves little doubt that the particular facts of *Sullivan*, as well as the surrounding libel suit campaign, powerfully affected the Court. Suppose, Lewis asks the reader to consider, Sullivan had had the modesty (or foresight) to strike a zero from his damage claim (at 161). Would the Court then have decided to review the case? Would the *Times* even have filed a cert petition?[2] Or suppose that the *Times* advertisement really had defamed Sullivan, referring to him by name in a manner that unjustly harmed his reputation.[3] Or suppose that the *Sullivan* suit had not instigated a flood of other libel cases by southern officials—cases specifically noted in both the majority opinion and Justice Black's concurrence. Lewis, as well as all of the attorneys involved in the case, believe that the Court would have let the *Sullivan* verdict stand in the absence of this special set of circumstances (at 161): what galled the Court was something much more than that a single public official had recovered a libel judgment for an innocent defamatory statement.

B. The Ruling

One clue to understanding what concerned the Court in *Sullivan* may lie in an arresting quiet at the center of the case—specifically, in the Justices' failure during deliberations to criticize, debate, or question the majority opinion's adoption of the actual malice standard.[4] Although Lewis

2. Lewis notes that soon after the *Times*'s general counsel requested Herbert Wechsler to draft a petition for certiorari, *Times* editors summoned Wechsler to a meeting to defend the decision to seek review of the verdict. Wechsler told Lewis: "I was being asked to show cause why I should file a petition for certiorari. I found myself defending the legal position I was advancing in defense of the *Times*—that the First Amendment applied to libel cases. . . . People were asking why it wasn't enough for the *Times* to 'stick to our established position that we never settle libel cases, we publish the truth, if there's an occasional error we lose and that's one of the vicissitudes of life'—that at a time when I was told the paper was barely making a profit and these judgments were mounting up" (at 107). The anecdote reveals how greatly the attitudes and expectations of the American press have changed since *Sullivan*—perhaps due to *Sullivan* itself. See *infra* at pt. II.A. pp. 711–12.

3. Justice Black's concurring opinion in *Sullivan* wryly noted that the "record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the *Times*' publication." 376 U.S. at 294.

4. Under the actual malice rule, a libel plaintiff must show that the defendant published the challenged statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. A defendant acts with "reckless disregard" when he "in fact entertain[s] serious doubts as to the truth of his publication." St. Amant v.

fails to highlight the point, his description of Justice Brennan's papers (which include all the Justices' notes to each other, as well as a memorandum written by a law clerk detailing the Court's deliberations) makes this lack of controversy immediately apparent. Throughout the Court's lengthy and active consideration of the case,[5] the actual malice standard—in hindsight, by far the most significant aspect of the opinion—occasioned almost no debate, even though the Court at conference had agreed to decide the case on the narrower ground that the Constitution required clear and convincing proof of every traditional element of a libel action in a case involving a public official (at 165–66). Justices Douglas, Black, and Goldberg sent notes to Justice Brennan explaining that they favored absolute immunity from libel suits brought by public officials about official conduct (at 171), and they eventually filed concurring opinions taking this position. But none of the Justices who ultimately signed on to Justice Brennan's opinion raised any questions about the actual malice standard: Was it too strict? Was it necessary? Where did it come from? How would it work? On these critical issues, silence reigned.

The Justices instead fretted about a part of the opinion that today seems far less important: the application of the new standard to the evidence in the case. All the notes from the Justices concerned the question whether the Court properly could apply the actual malice standard to the evidence below—or could go even further and prevent a new trial at which Sullivan might offer additional evidence (at 172–82).[6] The latter position attracted little support, but the former eventually trumped concerns that the Court would overreach its authority by examining the sufficiency of the evidence under the new standard. Chief Justice Warren noted that without such an examination, "we will merely be going through a meaningless exercise. The case would be remanded [and] another improvisation would be devised" (at 178). And Justice Brennan reminded his colleagues that "there are a number of other libel suits pending in Montgomery and in Birmingham and those concerned should know what to expect in the way of judicial superintendence from this Court" (at 177). Such pragmatic concerns about applying the new rule to prevent recovery by Sullivan and others—about dealing with the particular problem facing the Court—overwhelmed abstract consideration of the rule itself.

But more might be said than that the factual situation before the Court pushed legal questions to the margin: the adoption of the actual

Thompson, 390 U.S. 727, 731 (1968). Under traditional common law rules of libel, the plaintiff need make no such showing: the plaintiff must establish only that the defendant has published a false defamatory statement "of and concerning" the plaintiff.

5. Justice Brennan wrote no fewer than eight drafts of his majority opinion, most of which were circulated to the other members of the Court (at 164).

6. The alternative, of course, was to leave to the state courts the task of applying the new standard to the evidence in the case.

malice rule by Justice Brennan, and the Court's ready and unquestioning acceptance of it, may in fact have *resulted from* the extraordinary circumstances of the case. One of the great puzzles of *Sullivan* concerns why the Court adopted the actual malice rule rather than decide the case on one of numerous available grounds based on common law principles: that the published statements were not "of and concerning" Sullivan; that they were not substantially false; that they did not injure his reputation. Richard Epstein, for example, recently has suggested that the *Sullivan* Court took the wrong tack: that it should have decided the case on the ground that the common law rules of libel represent the constitutional norm in a public official libel case and that the Alabama courts had failed to follow these rules.[7] Justice Brennan's initial rationale for reversing the judgment—that the Constitution requires clear and convincing proof of every traditional element of defamation in actions involving public officials—resembles Epstein's proposed approach: each imports the Constitution into libel cases brought by public officials, but in some manner pegs constitutional requirements to the common law. *Make No Law* does not reveal precisely why Justice Brennan abandoned his intitial rationale and adopted the actual malice rule: Lewis says only that Brennan wrote the initial draft himself and must have changed his mind in the course of composition (at 166). The broader story that Lewis tells, however, may provide the key—and it may do so in either of two related ways.

Most pragmatically, if the dominant concern of the Court was to prevent recovery not only by Sullivan but by the host of other southern officials who had filed libel suits on the basis of articles about the civil rights movement, the actual malice standard may have appeared by far the best approach. Even if the *Sullivan* verdict itself could have been reversed by constitutionalizing common law rules, numerous other libel cases brought by southern officials—some undoubtedly stronger under common law principles—would remain. The Court's decision in *Sullivan* removed the threat of all these cases: Sullivan himself decided not to seek a new trial and the other libel actions brought by southern officials quickly fell away (at 161). It seems doubtful whether Justice Brennan's original rationale or any other similar approach would have sent so strong a message or had such a powerful effect. Without some significant addition to common law requirements, the Court may have felt, the danger confronting speech about the civil rights movement would not dissipate. As Justice Black wrote in a note to Justice Brennan lauding his opinion, "Most inventions even of legal principles come out of urgent needs" (at 175).

On a somewhat deeper level, the adoption of the actual malice standard may have resulted from the Court's understanding that the "ur-

7. See Richard Epstein, "Was *New York Times v. Sullivan* Wrong?" 53 *U. Chi. L. Rev.* 782, 792–93 (1986).

gency" of the situation arose not from charges of defamation per se but from an organized government campaign to stifle public criticism, which happened to take the form of defamation suits. Under this view, *Sullivan* and the other suits brought by southern officeholders were not simple libel cases. The complaints may have charged "defamation," but the underlying reality was of governmental suppression of critical speech. In effect, *Sullivan* resembled the garden-variety libel suit far less than it resembled cases like *Abrams*[8] and *Gitlow*[9] and *Whitney*[10]—cases in which the government had prosecuted expression hostile to and disruptive of official policy. One of the great strengths of *Make No Law* is to bring out this essential connection by interrupting the narrative of *Sullivan* with a 50-page primer on the evolution of free speech principles—especially concerning seditious advocacy—prior to the time of *Sullivan*. Justice Brennan's opinion well understood this connection: his insistence that the "mere label[. . .]" of libel could not foreclose constitutional challenge, his focus on the rights and duties of citizens to criticize government, his discussion of the unconstitutionality of efforts to criminalize sedition—all suggested that he viewed the case before him as having little to do with the mine run of libel actions and much to do with the worst kinds of censorial abuses. No wonder Justice Brennan went further than merely to constitutionalize common law libel requirements; to him, *Sullivan* was something other than—or at least something more than—a libel suit.[11] In essence, the facts of *Sullivan* had compelled the Court to create a new paradigm. Public official libel suits were different: they were not (or not merely) attempts by individuals to redress damage to personal reputation, but rather were attempts by government to shut down criticism of official policy. To treat them simply as libel suits was to miss the point.

II. SULLIVAN AND LIBEL LAW

Seen in this light, the revolution worked by *Sullivan* in the treatment of public official libel suits appears justified, correct, even obvious. But not all such suits look like *Sullivan*, and the use of the actual malice standard in even this limited category of cases often imposes serious costs: to reputa-

8. Abrams v. United States, 250 U.S. 616 (1919).

9. Gitlow v. New York, 268 U.S. 652 (1925).

10. Whitney v. California, 274 U.S. 357 (1927).

11. Viewed in this light, the only real question is why Justice Brennan stopped short of adopting the position that absolute immunity is appropriate in cases like *Sullivan*. Lewis aptly notes that much of Justice Brennan's opinion points toward a rule of absolute immunity; only at the last moment did he lurch toward adoption of the actual malice standard (at 146–47). Perhaps this was the moment at which Justice Brennan recognized that even libel actions brought by public officials posit false statements of fact injurious to reputation and therefore are distinguishable—in theory if not necessarily in practice—from more general governmental efforts to suppress hostile comment and criticism.

tion, of course, but also, at least potentially, to the nature and quality of public discourse. The adverse consequences of the actual malice rule do not prove *Sullivan* itself wrong, but they do force consideration of the question whether the Court, in subsequent decisions, has extended the *Sullivan* principle too far. And that question can be answered only by returning to *Sullivan* itself and focusing on what the decision most fundamentally concerned. In such an inquiry, Lewis's book serves an ironic function. No doubt the work was partially designed to justify (indeed, augment) the level of protection currently accorded to defendants in libel cases.[12] But by enhancing our understanding of *Sullivan*, Lewis casts doubt on the broader structure. The paradigmatic case increasingly appears exceptional—or at least far removed from many cases currently equated to it. These cases—and the rules that give rise to them—stand in need of independent justification. Taken alone, the particulars of *Sullivan* seem only to belie the generalities of libel law. The moral does not follow from the story.

A. Unintended Effects

To Lewis, as to most of the press, *Sullivan* is a kind of icon—a thing to be celebrated and adored and never, ever criticized. Lewis opens his book by thanking Justice Brennan: "What Justice Brennan did for all of us when he wrote the opinion in *New York Times v. Sullivan* needs no further comment" (at x). Virtually everything journalists say or write about *Sullivan* echoes this sentiment. But there is reason to think, with the benefit of hindsight, that what Justice Brennan did in *Sullivan* needs much further comment—and that this comment should take forms other than simple homage.

The obvious dark side of the *Sullivan* standard is that it allows grievous reputational injury to occur without monetary compensation or any other effective remedy. Lewis, to his credit, concedes this harm, without attempting to minimize it. He tells, for example, the story of John Goldmark, a member of the Washington State Legislature, who in 1962 became the object of a false and vicious red-baiting campaign and, largely as a consequence, lost his seat (at 227). When Goldmark won a libel judgment two years later, the pre-*Sullivan* press praised the verdict: one major newspaper editorialized that "[a] few more verdicts like th[is] one . . . might restore the nation to the tolerant level where the constitutional freedoms could be exercised as they should be in a free country" (*id.*). But within months *Sullivan* appeared, and Goldmark's judgment was set aside because

12. In *Make No Law*, Lewis urges the Court not merely to retain the actual malice standard in all cases in which it currently applies but also to limit damages in such cases to out-of-pocket losses (at 226).

of failure to prove actual malice. He thus became one of the first victims of the *Sullivan* standard: persons who (unlike Sullivan himself) had suffered real reputational injury and yet were unable to recover for it.

Lewis's response to these cases is the familiar one (implicitly adopted in *Sullivan*) that such personal harm is the unfortunate but necessary consequence of a rule promoting the social good of uninhibited comment concerning public officials. But even if we assume that the actual malice standard in fact encourages speech about public officials—itself a somewhat uncertain proposition[13]—this response begs an important (if almost equally familiar) question: Is uninhibited defamatory comment an unambiguous social good? That is, does it truly enhance public discourse?[14]

This question, never addressed by Lewis, poses a challenge to his and the *Sullivan* Court's view of the effect of the actual malice standard, outside the context of the *Sullivan* case itself, on the quality of public discourse and hence on the democratic process. The ultimate concern of *Sullivan* was to strengthen that process by ensuring that the citizenry receive important information about the conduct and policies of government officials. Certainly, the application of the actual malice standard in *Sullivan* served that function. But the malice standard may not have the same effects when applied more generally. Several commentators have noted that to the extent *Sullivan* decreases the threat of libel litigation, it promotes not only true but also false statements of fact—statements that may themselves distort public debate.[15] Here, too, the *Goldmark* case provides a telling counterexample to *Sullivan*: the false charges of Communist Party associations in that case more likely corrupted than enhanced the realm of public

13. Lewis devotes much attention to whether the actual malice rule actually encourages speech, but his discussion backtracks on itself. On the one hand, Lewis insists that the *Sullivan* rule was responsible for press coverage of some of the most important national stories of the past decades, including Watergate and the Vietnam War (at 158). The part of this claim relating to Vietnam seems wildly overdrawn. If, as Lewis writes, journalists during the Vietnam War began to show less deference to official accounts and judgments than in the earlier years of the Cold War, surely this newfound independence had more to do with changed attitudes toward government players and policies than with changed rules of libel law. Lewis seems on more solid ground when he contends that libel rules affected coverage of the Watergate scandal. Still greater plausibility would attach to a claim that the actual malice rule freed smaller media outlets, whose very existence could be threatened by a libel judgment, to confront powerful local politicians. But Lewis makes a number of observations that place even this scaled-down claim in doubt. He notes that several earlier periods of American history saw savage attacks on political leaders by the press (at 206–7); and he concludes that the "notion that the press was harder on public servants after 1964 is contradicted by history" (at 206). Even more important, Lewis several times asserts (in making the claim for augmented libel protection) what has become a commonplace in press circles: that in practice the actual malice rule has raised the costs and stakes of libel litigation and thereby may have *increased* press inhibitions (at 200–202, 244). In the absence of any empirical data, choosing between such rival assertions becomes a matter of crude intuition.

14. The question is discussed in most expansive form in Lee Bollinger, *Images of a Free Press* 26–39 (Chicago: University of Chicago Press, 1991).

15. See, e.g., *id.* at 26–27, 35–36.

discourse. In this way, the legal standard adopted in *Sullivan* may cut against the very values underlying the decision.

The problem, indeed, may go even deeper: it may involve not merely the promotion of false statements but also a more general tendency to sensationalize political discourse. When the press stops worrying about the accuracy of defamatory statements, it may start covering subject matter not readily amenable to determinations of truth or falsity; that subject matter, whether true or false, often ranks high in sensationalist content. Thus, the *Sullivan* decision, although itself involving core political speech, may have facilitated (which is not to say "caused") both the rise of tabloids and the "tabloidization" of the mainstream press. And arguably, such expression—the obvious example here is speech concerning the private and sexual lives of political figures—distracts from and devalues the kind of discourse *Sullivan* meant to promote. The poverty of such speech does not itself provide a reason for suppression; the First Amendment would mean little if government could restrict speech whenever it were deemed distracting or demeaning or even false. But with respect to libel law, the interest in reputation provides the reason for regulation; the regulation falls only because the benefits of the additional speech outweigh its reputational costs. To the extent that the speech promoted makes little contribution to public dialogue, the relaxation of libel law seems difficult to countenance.

Make No Law includes copious evidence that the press in pre-*Sullivan* days demonstrated great sensitivity to this range of questions. Lewis, for example, recounts that just after the Court decided *Sullivan*, a principal editor of the *Times* wrote a letter to Herbert Wechsler, author of the *Times*'s winning brief, saying that "we may be opening the way to complete irresponsibility in journalism" and asking whether it was right to erode principles of journalistic responsibility just "because justice is lopsided in one area of the nation" (at 219–20). Similarly, Lewis notes the reluctance of the *Times* even to ask the Supreme Court to review the *Sullivan* case given the newspaper's standard position that "we publish the truth, if there's an occasional error we lose and that's one of the vicissitudes of life" (at 107). And Lewis cites several cases in which the press approved of libel verdicts notwithstanding (or even because of) their inhibition of speech: in one case, the *Times* praised a $3.5 million judgment as likely to have a "healthy effect" on public discourse (at 112).

Today's press engages in far less examination of journalistic standards and their relation to legal rules. Rather than asking whether some kinds of accountability may in the long term benefit journalism, the press reflexively asserts constitutional insulation from any and all norms of conduct. Lewis himself notes this air of exceptionalism and entitlement. He writes that "[p]hrases such as 'freedom of the press' or 'First Amendment rights' " have assumed the aspect of "exclusivist dogma[,]" with "[s]ome

editors and publishers act[ing] as if the . . . First Amendment were designed to protect journalism alone, and to make that protection superior to other rights" (at 208). In this vein, he aptly observes: "When the Supreme Court decides a case against a claimed press interest, editors and publishers too often act as if the Constitution were gone" (at 209). And Lewis discusses as well the unwillingness of the press to confess to error, using as an example of this "stiff-necked press behavior" *Time* magazine's refusal to retract an unsupported assertion about the activities of former Israeli Defense Minister Ariel Sharon (at 208). Yet having said all this, even Lewis stops short of questioning whether current libel law has had any detrimental effects on journalistic practice. What *kinds* of speech has *Sullivan* promoted? Is it related—and, if so, how—to trends in journalism of dubious value? Lewis, unlike the earlier generation of journalists he cites, declines to consider these old (but never more potent) issues.

And this contrast raises a final question about the unintended effects of *Sullivan*: Is it possible that *Sullivan* bears some responsibility for a change in the way the press views itself and its conduct—a change that the general public might describe as increased press arrogance? It is wise to be wary about attributing too much cultural impact to a Supreme Court decision; yet it is hard to believe that those most directly affected by a decision like *Sullivan* are in no way changed by it. At the most basic level, judicial declarations of unaccountability can go to the head. It is hardly unthinkable that increased legal protection may lead to a greater sense of entitlement and self-importance (which in turn may manifest itself in questionable conduct). But the effects of *Sullivan* on the press's conception of itself may go yet deeper. Just as the Court treats the story of *Sullivan* as an archetype, so too may the press: the heroic role of the *Times* in that case helps to define and inform self-understanding. This mythical image may at times serve as model, but it also may blind the press to numerous less attractive aspects of its role and performance.[16] Thus, the self-image of the press becomes semi-delusional, and journalists cease to ask the questions of themselves which they ask of other powerful actors in society.

Questions of this kind in no way prove that the Court decided *Sullivan* incorrectly or that the Court now should reconsider its holding. The story of *Sullivan* rebels against this conclusion, whether that story is framed as a particular tale of how southern public officials attempted to suppress commentary about the civil rights movement (and thus to suppress the

16. In *Images of a Free Press*, Lee Bollinger posits that the image of the press portrayed in *Sullivan* and similar cases may entice the press to conform to norms of quality journalism. See *id.* at 40–61. I agree with Bollinger that the *Sullivan* Court articulated a certain image of the press and that the press largely has absorbed that image. We disagree as to the consequences of this process. Whereas Bollinger believes that the absorption of the *Sullivan* image often uplifts the press, I believe the absorption of that image more often succeeds only in blinding the press to its own shortcomings as well as its capacity to inflict unjust harm.

movement itself) or as a more general tale of how government officials may attempt to stifle criticism of themselves and their policies. But to view *Sullivan* as a kind of icon—a decision about which "nothing more need be said" (at x)—is too easy by half. If nothing else, such a view may distort consideration of the question whether and how *Sullivan* should be extended. This question has occupied the Court from the time of *Sullivan* to this day, and Lewis discusses the Court's responses in detail. But because he fails to acknowledge fully the difficulties associated with the *Sullivan* rule itself, he can accept in the blandest way all further extensions of the principle. He need never confront the question—a question intertwined with the very meaning of *Sullivan*—of the decision's proper limits.

B. Questionable Extensions

In one of the first commentaries on *Sullivan*, Harry Kalven predicted that the Court would not long view the decision as "covering simply one pocket of cases, those dealing with libel of public officials."[17] The Court, Kalven predicted, would accept an "overwhelming . . . invitation to follow a dialectic progression" from the category of public officials to other categories yet further-reaching.[18] And although Kalven mistook the precise steps in the progression,[19] he soon saw confirmed his basic prophecy. In a series of cases succeeding *Sullivan*, the Court extended at least some level of constitutional protection to defendants in nearly all libel cases. This course, however, proved more problematic than Kalven anticipated. In extending *Sullivan*, the Court increasingly lost contact with the case's premises and principles. Even when viewed most broadly, *Sullivan* relied upon two essential predicates: a certain kind of speech and a certain kind of power relationship between the speaker and the speech's target. These attributes of the case, once so vital, became submerged in the Court's subsequent construction of libel doctrine.

The constitutional scheme that today governs libel cases is familiar, the way it operates in practice somewhat less so. Not only public officials, but also so-called public figures must prove actual malice to recover for defamation.[20] Who is a public figure? Although the Supreme Court attempted for some years to impose limits on the category, lower courts have interpreted it expansively.[21] The official definition of a public figure in-

17. Harry Kalven, Jr., "The *New York Times* Case: A Note on 'The Central Meaning of the First Amendment,' " 1964 *S. Ct. Rev.* 191, 221.

18. *Id.*

19. Kalven believed that in offering constitutional protection from libel suits, the Court should and would move "from public official to government policy to public policy to matters in the public domain." *Id.*

20. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

21. The Supreme Court has ruled on several occasions that libel plaintiffs were not

cludes any individual who has achieved "pervasive fame or notoriety" or who "voluntarily injects himself or is drawn into a particular public controversy."[22] A more informal definition might go something like: Everyone the reader has heard of before and a great many people he hasn't. The vast majority of those likely to attract media attention fall within the category.[23] Even plaintiffs lucky enough to be labeled private figures generally must satisfy a heightened standard of liability: negligence to recover compensatory damages and actual malice to obtain presumed or punitive damages.[24] Given the frequent difficulty of proving actual injury in defamation suits, as well as the economics of litigation, many of these suits are tenable only with evidence of actual malice.[25] In a tiny category of cases, in which a private figure is defamed on a "matter of purely private concern," the actual malice standard disappears, as may all other constitutional requirements.[26] The upshot of the system is that the constitutional standard established in *Sullivan* for a public official bringing a libel suit against critics of his official conduct today governs the bulk of defamation cases, at least against media defendants.[27]

Lewis is generally sanguine toward this result, though he admits now and again to some concern. Tracing the course of post-*Sullivan* libel law, Lewis arrives at the case of entertainer Wayne Newton, who lost a multimillion-dollar libel judgment, arising from an allegation that he associated with a Mafia figure, for failure to prove actual malice (at 197–98). "Philosophically," Lewis concedes, "cases like Wayne Newton's are a long way from the Alabama lawsuit that led the Supreme Court to bring libel within the First Amendment"; had the *Sullivan* case never arisen, the Supreme

public figures. See Wolston v. Reader's Digest, 443 U.S. 157 (1979); Hutchinson v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). For a review of lower court decisions to the opposite effect, see David Anderson, "Is Libel Law Worth Reforming?" 140 *U. Pa. L. Rev.* 487, 500–501 (1991).

22. Gertz v. Robert Welch, Inc., 418 U.S. at 351.

23. See Anderson, 140 *U. Pa. L. Rev.* at 501. Some cases demonstrating the range of the public figure category are: Trotter v. Jack Anderson Enterprises, 818 F.2d 431 (5th Cir. 1987) (president of Guatemalan soft-drink bottling company); McBride v. Merrell Dow & Pharmaceuticals, 800 F.2d 1208 (D.C. Cir. 1986) (expert witness); Dameron v. Washington Magazine, 779 F.2d 736 (D.C. Cir. 1985) (air traffic controller); Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980) (former girlfriend of Elvis Presley), *cert. denied*, 452 U.S. 962 (1981); James v. Gannett Co., 353 N.E.2d 834 (N.Y. 1976) (belly dancer).

24. Gertz v. Robert Welch, Inc., 418 U.S. at 347–49.

25. See Anderson, 140 *U. Pa. L. Rev.* at 502.

26. See Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 759–61 (1985), in which the Court held that in a private figure/private concern case, a showing of actual malice was unnecessary even to obtain presumed and/or punitive damages. The Court left open the question whether any heightened constitutional standards (relating, for example, to burdens of proof) apply in such cases.

27. One study of appellate cases involving media defendants found 75 cases in which the actual malice standard controlled and only 24 in which any lesser standard controlled. See Marc Franklin, "Suing Media for Libel: A Litigation Study," 1981 *A.B.F. Res. J.* 795, 824.

Court surely would have rebuffed a claim by the press that the First Amendment barred Newton's recovery (at 198). But having acknowledged the gulf between the two cases, Lewis minimizes its significance. What took the Court from protecting the "citizen-critic of government" to protecting detractors of an entertainer, Lewis writes, was good constitutional common law decision making. In expanding the reach of the First Amendment over libel actions, the Justices "were guided by their sense of the society: its traditions, its needs, its changing character" (at 198). Indeed, Lewis implies, we should count ourselves fortunate that "a libel case that really did engage the central meaning of the First Amendment had come along" first, so that it could call forth "a transforming Supreme Court decision" which then would "spread to a much larger field" (at 198).

But the mere restatement of this conclusion demonstrates its oddity. Why is the Supreme Court's libel jurisprudence an example of praiseworthy incremental decision making if it extended constitutional protection from cases that "really did engage the central meaning of the First Amendment" to cases that (impliedly) really did not? What does a case concerning criticism of a government official's public conduct have to do with a case concerning comments on a popular entertainer's private associations? The chasm between the two cases noted by Lewis easily could have been even wider. The actual malice standard would have applied in *any* libel suit brought by Newton, simply by virtue of his fame;[28] imagine, for example, a case arising from an allegation not of a Mafia connection but of an adulterous relationship. Or consider the many cases—the recent *Masson v. New Yorker* is an example—in which the actual malice standard applies even though the plaintiff is both unknown beyond a narrow circle and uninvolved in governmental affairs, because of his participation in one of the countless significant and not-so-significant matters that can be deemed a "public controversy."[29] The use of the actual malice standard in this wide range of cases appears to have little connection with the story of *Sullivan*. Viewed from that vantage point, current libel law seems the result not of steady and sensible common law reasoning but of a striking disregard of the doctrine's underpinnings.

28. "Pervasive fame or notoriety" makes a person a public figure for purposes of any statement made about him, regardless of the subject matter. See Gertz v. Robert Welch, Inc., 418 U.S. at 351. Newton, like all "celebrities," thus qualifies as a public figure in any libel suit. Indeed, the district court handling Newton's case imposed sanctions of $55,000 on him for contesting the public-figure issue at all. See Newton v. National Broadcasting Co., 930 F.2d 662, 668 n.6 (9th Cir. 1990).

29. See Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991). Although in one case the Supreme Court held that a widely publicized divorce proceeding was not a public controversy, see Time, Inc. v. Firestone, 424 U.S. 448 (1976), courts generally have shied away from declaring matters reported on by the press to be something other than public controversies. The more usual ground for private-figure status is that the plaintiff insufficiently involved himself in the relevant controversy. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323; Wolston v. Reader's Digest, 443 U.S. 157.

However unwittingly, *Make No Law* thus supports a claim that the Court accorded *Sullivan* too great a significance—a significance outstripping the case's real meaning—in the development of constitutional rules relating to libel law. In the course of constructing a constitutional regime to govern libel actions, the Court assimilated to *Sullivan* an array of cases divergent in character. Factual situtations posing different concerns, implicating different principles, became as one. In this sense, the development of libel law may be viewed not as a "rich . . . illustrati[on]" of the common law method in First Amendment law (as Lewis would have it (at 183)), but as a deviation from that method, with its characteristic focus on particulars and their relation to established principles.[30]

To say this much, of course, is not to claim that the Court should have declined to extend *Sullivan* at all. If *Sullivan* is not prototypical of libel actions, neither is it likely to be wholly freestanding. *Sullivan* may well have relevance beyond its boundaries, because libel of government officials may share sufficiently important traits with other instances of libel to justify extension of the actual malice rule to the latter. The key is to identify and explain the relevance of those common attributes. In this regard, two complementary possibilities present themselves.

One approach, articulated in various ways by both the Justices and commentators, would apply the actual malice rule to all (but only) those cases involving speech on governmental affairs—or, stated more broadly, speech on matters of public importance—or, stated still more broadly, speech on matters of public concern or interest.[31] This approach emerges from viewing *Sullivan* as primarily a case about the speech necessary for democratic governance. Such a view draws on some of the most notable features of the *Sullivan* opinion—the emphasis on seditious libel, the concern that citizens have access to the information necessary to act in their intended sovereign capacity, the statement of "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[32] Under this approach, a court would consider whether the speech in question is of a kind similar to the speech in *Sullivan*, in the sense that the content of the speech affects or relates to self-

30. For an exploration of this method, focusing on its use in First Amendment cases, see Cass Sunstein, "On Analogical Reasoning," 106 *Harv. L. Rev.* 741 (1993).

31. See Cass Sunstein, "Free Speech Now," 59 *U. Chi. L. Rev.* 255, 311 (1992) ("The test for special protection should be whether the matter bears on democratic governance, not whether the plaintiff is famous"); Frederick Schauer, "Public Figures," 25 *Wm. & Mary L. Rev.* 905 (1984). Justice Brennan appeared to advocate a similar approach when he urged that the actual malice standard apply to all cases involving speech on "matters of public interest." Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971) (Brennan, J.). But for Justice Brennan, this protection may have been meant to enhance, rather than to replace, the protection automatically accorded in public figure cases.

32. 376 U.S. at 270.

government. Comments, for example, about Wayne Newton or other celebrities currently classified as public figures might well flunk this test.

A second approach might focus not (or not only) on the content of the speech but on a concern arguably as essential to the *Sullivan* decision: the respective power of the speaker and the subject and the relation between the two. In *Sullivan*, the press (to the extent it targeted any particular individuals) criticized persons of substantial influence. Those persons derived their power from government positions, but this fact alone may not be of paramount importance. Chief Justice Warren understood *Sullivan* as resting on the simple presence of power—whether governmental or private did not matter—and the fear of its abuse.[33] To him, the principle of *Sullivan* applied with equal clarity to important figures in the "intellectual, governmental, and business worlds," both because individuals in each of these spheres exerted influence over the ordering of society and because they alike had means to counter criticism.[34] The implicit comparison is to cases in which speakers—who themselves may possess enormous influence—target individuals of lesser power and prominence. In such cases, the press may appear in the position of the southern officials of *Sullivan*, the targeted individuals in the position of the *New York Times*.

Under this view, the relevant spectrum in libel law runs between a case like *Sullivan* and a case in which the institutional press defames a relatively powerless individual (regardless whether the person might be viewed as involved in a public controversy). In *Sullivan* itself, the *New York Times* had little circulation and less influence in the relevant community; the ostensible target of its speech, by contrast, controlled vital levers of patronage and power. This situation has little in common with such recent Supreme Court cases as *Masson* or *Milkovich*, the former involving a renowned national magazine which allegedly defamed (by misquoting) the former Projects Director of the Sigmund Freud Archives, the latter involving a local newspaper that accused a high school coach of perjury.[35] Nor does *Sullivan* resemble, with respect to considerations of power, a host of cases that never reach the Supreme Court: for example, *Dameron v. Washington Magazine*, in which a magazine charged an air traffic controller with responsibility for a major accident (and subsequently retracted the state-

33. See Curtis Publishing Co. v. Butts, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring).

34. *Id.* at 163.

35. In Masson v. New Yorker Magazine, 111 S. Ct. 2419 (1991), the plaintiff conceded public-figure status at the beginning of the case; the Supreme Court granted certiorari to consider the question whether and when deliberate misquotation could constitute evidence of actual malice. In Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990), the plaintiff initially was held to be a public figure; only on his second appeal to the Ohio Supreme Court, occurring almost a decade after he brought suit, was this determination reversed. The Supreme Court reviewed the case to determine whether libel defendants are constitutionally entitled to a privilege for statements of opinion.

ment);[36] or *Fitzgerald v. Penthouse International*, in which a magazine accused an expert in "dolphin technology" with having committed espionage.[37] Part of what seems troubling about applying the actual malice rule to these cases arises not so much from the content of the speech (whether it relates to democratic governance) as from the respective societal positions of the speaker and the target. In such cases, the law insulates powerful institutional actors—possessing both a great capacity to harm individuals and a far-reaching influence over society at large—from charges of irresponsibility made by persons with little societal influence and few avenues of self-protection. If part of the point of *Sullivan* was to check the abuse of power and to ensure the accountability of those wielding it, then these cases suggest that the Court's constitutionalization of libel law has gone askew.

Assuming this is so, why has it occurred? The harshest interpretation is that the Court too little probed the foundations of *Sullivan* for clues to its proper application. Under this view, the very rightness of the *Sullivan* result combined with the power of its rhetoric to distract the Court from the (once all-important) context of the decision. The mismatch between *Sullivan* and many current libel cases is due simply to a lack of care and attention in applying the decision.

But a deeper explanation is available, involving the perceived necessity of using categorical rules in libel cases. For reasons having to do with certainty and predictability, the Court often has abjured contextual case-by-case inquiry in First Amendment adjudication, preferring to create rules applicable to broad categories of cases. Once a determination is made to adopt this approach in libel law, the question how to define the categories presents itself. Factors like those I have considered—the connection of speech to self-government or the relationship between the power of a speaker and a subject—resist reduction to simple categorical rules. Even if we were sure that power relations were all that mattered, how could we frame a rule to capture and compartmentalize so elusive a thing as the "power" of a speaker or a subject, let alone the relationship between the two? How could we then incorporate into this rule consideration of the content of the speech and its relation to democratic government—an inquiry which itself appears to demand a kind of fine discrimination in tension with the technique of categorization? However a flat rule is articulated, it may seem inadequate to the task to be accomplished.

The failures of the Court's libel law decisions ultimately may derive from just these problems rather than from a simple failure to respect the underpinnings of *Sullivan*. In some sense, the Court's categorical rules reflect an understanding of *Sullivan* as a case concerning both self-government and power relations. The public figure/private figure dichotomy is

36. 779 F.2d 736 (D.C. Cir. 1985).
37. 691 F.2d 666 (4th Cir. 1982).

animated partly by power considerations;[38] and the very definition of a public figure, as well as the bifurcation of the private figure sphere, reflect the view that some kinds of speech are of greater public importance than others.[39] But of necessity a great deal has been lost in the Court's attempt to combine and conflate these highly contextual considerations into a single set of categorical rules, susceptible of ready and predictable application. Because the rules serve only as rough and incomplete proxies for in-depth analysis of the factors relevant to *Sullivan*, the results as often as not fail to comport with the origins of libel law doctrine. In short, what has been lost in the Court's creation of our current highly stylized libel law regime—although perhaps inevitably—is *Sullivan* itself.

III. SULLIVAN AND FIRST AMENDMENT PRINCIPLE

And yet, on a different level, *Sullivan* may be counted (as I think Lewis would count it) the Court's most successful First Amendment decision. *Sullivan* may have proved a problematic foundation for libel law; it may differ too greatly from most (or many) libel cases to provide a sensible doctrinal base. But the very facts that make *Sullvan* an oddity in libel law place it in the mainstream of First Amendment law generally. As Justice Brennan may have recognized in writing the *Sullivan* opinion, the facts of *Sullivan* present in dramatic form the central concern of the First Amendment: the use of power—most notably, though not exclusively, government power—to stifle speech on matters of public import. Thus, *Sullivan* has served as an utterly reliable source not of libel doctrine but of broad First Amendment principle. And it is in making this point, in operating at this highest level of generality, that *Make No Law* truly shines.

The strongest portions of *Make No Law*, aside from the narration of the *Sullivan* story itself, come when Lewis leaves the field of libel law behind him and focuses on the broader wellsprings and offshoots of the decision. Lewis performs the prodigious feat of describing in an accessible but never simplistic way the development of the major principles of First

38. The Court has provided two justifications for treating public figures differently from private figures, one involving the greater self-help remedies available to public figures and the other involving public figures' assumption of risk. See Gertz v. Robert Welch, Inc., 418 U.S. at 344. At least the former justification is related to the power relations concern explicated in the text. Only Chief Justice Warren, however, has discussed explicitly the question of power in libel cases. See Curtis Publishing Co. v. Butts, 388 U.S. at 163–64.

39. Determination of public figure status partly involves the question whether the defamation has arisen from the plaintiff's participation in a "public" controversy, a term which at least suggests an inquiry into the subject matter of the speech. See *supra* text at note 22. Moreover, the private-figure sphere is itself divided into two subcategories by reference to whether the speech concerns public or "purely private" matters. See *supra* text at notes 24–26.

Amendment jurisprudence, in which *Sullivan* played a role central in both chronology and importance. If at times the narration smacks of Whig history, as the Court progresses ever onward toward the most luminous of goals, the material may provide ample justification for the treatment. Thus, Lewis links *Sullivan* on the one end with the great dissenting and concurring opinions of Holmes and Brandeis,[40] as well as with *Near*,[41] *Grosjean*,[42] and *Bridges*,[43] and on the other end with *Bond*,[44] *Brandenburg*,[45] *Cohen*,[46] the Pentagon Papers case,[47] and the flagburning cases.[48] The result is something more than a collection of "greatest First Amendment hits." It is an account of the development of certain core free-speech principles: that the people are sovereign in a democracy; that wide open debate is necessary if the people are to perform their sovereign function; that government regulation of such debate should ever be distrusted. In turn, these principles provide the measure of current First Amendment problems. Thus, Lewis makes a compelling case that the greatest of all obstacles to a flourishing system of freedom of expression is governmental secrecy, especially in matters pertaining to national security (at 241–43). And indeed, this matter resonates with *Sullivan* more strongly than does the run-of-the-mine libel action.

Above all, as Lewis highlights, *Sullivan* is a statement—the Court's strongest statement—of core First Amendment values. In its substance—and also, if the two can be separated, in its rhetoric—the decision speaks of the potential of democracy, the role of free expression in realizing that potential, the corresponding threat such expression may pose to those wielding power. At the same time, the decision speaks *to* the widest possible audience—not to the press, as in so many of the Court's libel cases, but to the American public. It reminds us of the kind of public discourse we should aspire to, as well as of what we must tolerate to attain it. *Sullivan* goes only part of the way toward solving particular cases and problems; in the field where it has been most studiously applied, it has produced a mixed bag of consequences. But at the most general level—as a statement of enduring principle addressed to the American people—it is indeed a marvel.

---

40. Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 374–77 (1927) (Brandeis, J., concurring); United States v. Schwimmer, 279 U.S. 644, 653–55 (1929) (Holmes, J., dissenting).

41. Near v. Minnesota, 283 U.S. 697 (1931).

42. Grosjean v. American Press Co., 297 U.S. 233 (1936).

43. Bridges v. California, 314 U.S. 252 (1941).

44. Bond v. Floyd, 385 U.S. 116 (1966).

45. Brandenburg v. Ohio, 395 U.S. 444 (1968).

46. Cohen v. California, 403 U.S. 15 (1971).

47. New York Times Co. v. United States, 403 U.S. 713 (1971).

48. Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

And here lies the ultimate value of Lewis's work as well. In *Make No Law*, Lewis sometimes fails to discriminate among different kinds of First Amendment problems, to explore as deeply as he might the range of considerations involved in particular free speech controversies. But as an expounder of broad principle, he has few, if any, peers. And perhaps it is more important that the broad audience he is addressing have a deep commitment to the principle than a subtle understanding of the ways it can be applied or a fine appreciation of its limits. Like *Sullivan* itself, Lewis's work bears more than a passing resemblance to a morality play. Which is to say that although neither tells us everything, both instruct us as to what is most important.