

## WECHSLER'S TRIUMPH

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The constitutional landmark called *New York Times v. Sullivan*<sup>1</sup> was the result of what Paul Horwitz calls a “concatenation of circumstances.”<sup>2</sup> One of those was the momentum of the civil rights movement, which was at its height when the case was decided. Montgomery, Alabama, was the site of the bus boycott that launched the movement and the career of Dr. Martin Luther King.<sup>3</sup> The Freedom Riders of 1961 and lunch-counter sit-ins of 1963 had heightened Northern awareness of the movement. Photos of marchers being attacked by police with fire hoses and dogs in Birmingham in 1963 shocked the nation. The case arose from an ad which invoked names of celebrities in an appeal for contributions to support Dr. King’s organization.<sup>4</sup> It was decided by a Supreme Court that had already played a large role in the struggle against segregation in the South, beginning in 1954 with the case ordering desegregation of schools,<sup>5</sup> and continuing with such cases as the Little Rock school desegregation case in 1958<sup>6</sup> and the sit-in cases starting in 1961.<sup>7</sup>

The main defendant was the most influential newspaper in America, with a long history of leadership on matters of racial justice.<sup>8</sup> Its extensive coverage of racial incidents in the South in the early 1960s had angered many white Southerners. The plaintiff, Montgomery Commissioner L. B. Sullivan, was to many a symbol of racism. He was a member of the Ku

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

2. Paul Horwitz, *Institutional Actors in New York Times v. Sullivan*, 49 GA. L. REV. (forthcoming 2014) (manuscript at 26) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2375281](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375281)).

3. See Jonathan L. Entin, Book Review, 48 J. LEGAL EDUC. 153, 153 (1998) (reviewing FRED D. GREY, *BUS RIDE TO JUSTICE: CHANGING THE SYSTEM: THE LIFE & WORKS OF FRED GREY, PREACHER, ATTORNEY, POLITICIAN* (1995)).

4. Brief for the Petitioner at 4, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39), 1963 WL 66441, at \*4.

5. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

6. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

7. See *Garner v. Louisiana*, 368 U.S. 157 (1961).

8. See David R. Davies, *An Industry in Transition: Major Trends in American Daily Newspapers, 1945-1965*, ch. 6 (1997) (unpublished Ph.D. dissertation, University of Alabama), available at <http://ocean.otr.usm.edu/~w304644/ch6.html>.

Klux Klan<sup>9</sup> and was in charge of police who failed to intervene when blacks were beaten by white vigilantes.<sup>10</sup> His lawsuit appeared to have little to do with redressing harm to his reputation and much to do with discouraging civil rights protesters.

The Alabama courts' cavalier treatment of the free speech issues and the defendants obviated any instinct the Court might have had to accord some deference to their decisions. Those courts had refused to consider the First Amendment issue raised by the case<sup>11</sup> and had not bothered to conceal their hostility to the black defendants.<sup>12</sup>

All these facts played a role in the case, but the most important force was the vision of Herbert Wechsler, the lawyer who argued the case for the *Times* in the Supreme Court. He broadened the issues beyond the necessities of the case to achieve his vision of what the law ought to be. He wanted to do more than win the case; he wanted to remake the law of libel. In doing so, he showed how much a committed, learned, and skilled advocate can achieve.

## I.

Few cases in the Supreme Court's history have been more enthusiastically celebrated or more thoroughly reprised. Each anniversary of the decision brings forth a new round of conferences, articles, and books.<sup>13</sup> Having attended and read a large number of those (but by no means all), I am aware of few aspects of the case that have been insufficiently remarked. One of those is the transformative advocacy of Herbert Wechsler.

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9. See KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 12 (2011).

10. *Id.* at 14.

11. ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 45 (1991).

12. See HALL & UROFSKY, *supra* note 9, at 52 (reporting that while Sullivan's lawyers were called "Mr." in the courtroom, lawyers for the ministers were called "Lawyer Gray" or "Lawyer Crawford").

13. *E.g.*, RICHARD N. WINFIELD, *PRACTISING LAW INST., NEW YORK TIMES V. SULLIVAN: THE NEXT TWENTY YEARS* (1984) (a collection of papers prepared for a conference sponsored by the Practising Law Institute on the 20th anniversary of the decision); David Kohler, *Forty Years After New York Times v. Sullivan: The Good, the Bad, and the Ugly*, 83 OR. L. REV. 1203 (2004). For a recent extended treatment of the case and its subsequent history, see LEE LEVINE & STEPHEN WERMIEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN* (2014) [hereinafter LEVINE & WERMIEL].

## A.

When Wechsler, a professor at Columbia Law School, was hired to represent the *Times* in the U.S. Supreme Court,<sup>14</sup> he was probably the most influential academic lawyer in America. Another law professor once wrote, “[I]f I could pick a professor to be the subject of a biography it would be Herbert Wechsler.”<sup>15</sup> Like many of the most distinguished legal academics of his time, he was more engaged with the bench and bar than with the rest of academia. He had been the principal assistant to the American judges at the Nuremberg trials.<sup>16</sup> He drafted the Model Penal Code, which became the template for modernization of the criminal law in virtually all of the states. With Henry Hart, he wrote the casebook that first made sense of the many fragmented rules of federal jurisdiction. For twenty-one years he was executive director of the American Law Institute, and under his leadership the ALI promulgated the most influential of its restatements of the law, the Second Restatement of Torts and the Second Restatement of Contracts. He had argued numerous cases in the Supreme Court<sup>17</sup> and was a respected authority on constitutional law and federalism.

His long career also had its less-admired moments. As an assistant attorney general in the Justice Department during World War II, he argued *Korematsu v. United States*,<sup>18</sup> which upheld the internment of Americans of Japanese ancestry. He continued to defend that decision long after most scholars condemned it.<sup>19</sup> He wrote a law review article entitled *Toward Neutral Principles of Constitutional Law*, which reached the controversial conclusion that the Supreme Court's school desegregation decisions did not rest on neutral principles.<sup>20</sup>

Wechsler had little knowledge of libel law,<sup>21</sup> but that ignorance turned out to be an advantage. Had he been an experienced libel lawyer, the arcane doctrines that had accumulated over 400 years of libel law might have

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14. He had played a minor role in the appeal to the Alabama Supreme Court, advising the local lawyer on jurisdictional issues. See HALL & UROFSKY, *supra* note 9, at 100.

15. Orin Kerr, *Herbert Wechsler*, THE VOLOKH CONSPIRACY (Dec. 19, 2010, 10:20 PM), <http://www.volokh.com/2010/12/19/herbert-wechsler/>.

16. All of the achievements described in this paragraph were noted in Wechsler's obituary in the *New York Times*. See Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead at 90*, N.Y. TIMES, Apr. 28, 2000, <http://www.nytimes.com/2000/04/28/us/herbert-wechsler-legal-giant-is-dead-at-90.html>.

17. Lewis says Wechsler had argued about a dozen Supreme Court cases. LEWIS, *supra* note 11, at 104.

18. 323 U.S. 214 (1944).

19. See Malick W. Ghachem & Daniel Gordon, *From Emergency Law to Legal Process: Herbert Wechsler and the Second World War*, 40 SUFFOLK U. L. REV. 333 (2007).

20. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

21. See LEWIS, *supra* note 11, at 106 (noting that Wechsler knew little about libel law prior to the case).

offended him less. Coming to the subject without that burden, he brought a fresh perspective. He was surprised to learn that the principles of common law that had allowed Sullivan to recover were not an aberration of Alabama law, but were similar to those of other states.<sup>22</sup> “I remember it came as a shock to me in doing the background reading to realize the nature of the burden put on the defendant.”<sup>23</sup>

### B.

*New York Times v. Sullivan* was not an easy case. Now that we’ve had fifty years to become accustomed to the world of journalism and politics that the decision created, it may seem obvious that L.B. Sullivan could not recover for the things said about him in the ad published by the *Times*. But looking at the case as it came to Wechsler in 1962, it was a challenging assignment. The *Times* could have lost; more likely, it could have won on grounds that broke little new ground.

Wechsler had bad facts and bad law. The ad contained some serious factual errors.<sup>24</sup> The Supreme Court had been saying for 170 years that libelous utterances were not within the protection of the First Amendment, and it had repeated that only twelve years earlier.<sup>25</sup>

Wechsler was undaunted; he believed the Court’s treatment of libel was out of step with the trend of First Amendment decisions over the previous thirty years. In those cases, the Court had extended protection to previously unprotected types of speech, such as contempt.<sup>26</sup> Because he saw libel in the broader sweep of evolving constitutional law, he was not intimidated by the long line of negative precedents.

### C.

Wechsler’s first task was to persuade the Court to take the case. Elevating dissatisfaction with the common law of libel into a constitutional issue was no easy matter. Wechsler found a partial solution in the history of seditious libel.<sup>27</sup> Apparently, that idea was not his, but that of his colleague

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22. See *id.* (describing Wechsler’s dismay that other states also presumed falsity and damages in libel actions, just as in Alabama).

23. *Id.*

24. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 258–59 (1964) (indicating that the ad contained statements that inaccurately described some of the events which occurred in Montgomery).

25. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

26. See *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

27. See LEWIS, *supra* note 11, at 115 (illustrating Wechsler’s decision to build on the history of the Sedition Act of 1978).

and former student at Columbia, Marvin Frankel.<sup>28</sup> Wechsler had asked Frankel to work on the problem of convincing the Court that a common law tort case posed a constitutional issue.

Frankel wrote a memo arguing that Alabama had revived a variation of seditious libel. In England for several hundred years, and to a lesser extent in colonial America, the common law made it a crime to criticize government.<sup>29</sup> In 1798 Congress passed the Sedition Act, which made it a crime to publish “false, scandalous and malicious” accusations against the federal government, the president, or Congress.<sup>30</sup> The statute was an attempt to silence editors who were likely to support Jefferson in the election of 1800; it expired by its terms in 1801 and it has been roundly condemned as unconstitutional ever since. Frankel argued that permitting Sullivan to recover on the theory that he was personally defamed by impersonal criticism of the police was impermissibly close to liability for criticizing government.<sup>31</sup>

This argument was close to irrefutable. Sullivan contended that even though he was not identified, readers would attribute police misconduct to him since he was the official in charge of the police. By that reasoning, it would be unnecessary for the government itself to sue to silence its critics: a defamatory charge about a governmental entity would be actionable as personal defamation of the person in charge. That would be seditious libel in all but name.

Legally, this was the heart of the certiorari petition. If Sullivan's case was a form of seditious libel, it posed a serious threat to modern ideas about freedom of expression, and it provided an occasion to decide a constitutional question that had been touched upon, but never decided, for a century and a half. Both were persuasive reasons for the Court to take the case. Six Justices voted to grant certiorari.<sup>32</sup>

## II.

### A.

Wechsler's experience and mature judgment are apparent in the brief he filed for the *Times*. The brief contains no histrionics, no figurative arm-

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28. *See id.* at 106.

29. *See* David A. Anderson, *The Origins of the Press Clause*, 30 *UCLA L. REV.* 455 (1983).

30. Sedition Act, ch. 74, 1 Stat. 596, 596–97 (1798) (expired 1801).

31. *See* LEWIS, *supra* note 11, at 106 (describing Frankel's memo to Wechsler).

32. *See* BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 532 (1983) (noting that Justices Warren, Black, Douglas, Clark, Harlan, and Brennan voted to grant certiorari).

waving or table-pounding. It is scholarly, but quietly insistent. Wechsler forthrightly acknowledged the falsehoods in the ad.<sup>33</sup> He admitted that it was not true that students were expelled from Alabama State College for singing the national anthem on the steps of the state capitol, or that the entire student body refused to re-register in protest, or that truckloads of police armed with shotguns and tear gas ringed the campus.<sup>34</sup> “There was, moreover, no foundation for the charge that the dining hall was padlocked in an effort to starve the students into submission . . . .”<sup>35</sup> He acknowledged that this false allegation “especially aroused resentment in Montgomery.”<sup>36</sup>

He argued that nothing in the ad tied these events to Sullivan.<sup>37</sup> He was not identified by name or position; the bombings of King’s home and the alleged assault on his person occurred before Sullivan was the commissioner; and expulsion of students from the college was the province of the board of education, not the police. There was no logical basis for the claim that these charges implicated Sullivan. More troublesome was the assertion that police ringed the campus; such a massive police action could hardly have occurred without the commissioner’s knowledge and consent, if not on his orders. But there was little in the record to show that anyone attributed any of the actions to Sullivan.

It is sometimes said that Sullivan should have lost on the simple ground that the ad did not harm his reputation in segregated Alabama.<sup>38</sup> That view betrays an inadequate understanding of Southern culture and politics, as well as libel law. Segregationists in Montgomery in 1960 came in many stripes, and Sullivan’s history was complex, as Hall and Urofsky have shown.<sup>39</sup> He first won office by defeating an ardent segregationist, and his reforms aimed at curbing police brutality won praise from blacks.<sup>40</sup> But he was also a member of the Ku Klux Klan and his moderate impulses seemed to vanish as the civil rights movement became more aggressive.<sup>41</sup>

Moreover, libel law doesn’t require proof that everyone, or even most people, would think less highly of the plaintiff. Under the common law, a statement can be defamatory if it tends to “induce an evil or unsavory opinion of him in the minds of a substantial number of the

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33. Brief for the Petitioner, *supra* note 4, at 8–9.

34. *Id.* at 8.

35. *Id.* at 8–9.

36. *Id.* at 9 (internal citations omitted).

37. *Id.* at 60.

38. HALL & UROFSKY, *supra* note 9, at 42, 113.

39. *See id.* at 11–14.

40. *See id.* at 12–13.

41. *See id.* at 14 (reporting that Sullivan in 1960 failed to seek arrests of Klansmen who attacked black students with baseball bats, for example).

community . . . .”<sup>42</sup> Thus, even if he was harmed only in the eyes of some subset of the Montgomery population, that would be enough to permit the conclusion that the statements were defamatory. Once that was established, under the common law, harm would be presumed. Evidence refuting the presumption would be admissible, but none was in the record.

Wechsler approached the no-harm argument warily. Quoting the Court's statement in *NAACP v. Button* that “the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community,”<sup>43</sup> he noted that the ad was in support of that movement and concluded, “[t]hat such a statement could have jeopardized respondent's reputation anywhere he was known as an official must be regarded as a sheer illusion . . . .”<sup>44</sup> He made no further mention of the issue.

### B.

Convincing the Court that Sullivan's suit was a species of seditious libel was only half the battle. Seditious libel had been in disrepute for 150 years, but there was no authoritative decision holding it unconstitutional.<sup>45</sup> Wechsler's brief appealed to the authority of history: President Jefferson pardoned editors who had been convicted under the Sedition Act, Congress voted to repay fines, and scholars had long been in general agreement that seditious libel was unconstitutional.<sup>46</sup> As it did in many instances, the Court adopted Wechsler's argument almost word for word: “Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”<sup>47</sup>

Wechsler was not content to rest on the narrow seditious libel argument that Frankel had identified—namely that Sullivan was attempting to transmute impersonal criticism of government into personal defamation. He wanted a broader decision: one that protected criticism of the official conduct of a public official—even if it was not couched as impersonal criticism of government, but specifically attacked the official. This required a bit of sleight of hand. He said “the basic lesson of the great assault on the

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42. *Nichols v. Item Publishers, Inc.*, 132 N.E.2d 860, 862 (N.Y. 1956) (quoting *Mencher v. Chelsey*, 75 N.E.2d 257, 259 (N.Y. 1947)) (internal quotation marks omitted).

43. Brief for the Petitioner, *supra* note 4, at 65 (quoting *NAACP v. Button*, 371 U.S. 415, 435 (1963)) (internal quotation marks omitted).

44. *Id.*

45. The closest approximations to Supreme Court authority for that proposition were statements by Justice Holmes in his 1919 dissent in *Abrams* and Justice Jackson in his dissent in *Beauharnais*. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Beauharnais v. Illinois*, 343 U.S. 250, 289 (1952) (Jackson, J., dissenting).

46. Brief for the Petitioner, *supra* note 4, at 47–48.

47. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

short-lived Sedition Act of 1798” was that “criticism of official conduct may not be repressed upon the ground that it is false or that it tends to harm official reputation . . . .”<sup>48</sup> Since that “great assault” was never reduced to a single conception, it is hard to say exactly what its lesson was. Wechsler cited two then-recent scholarly works, one of which attributed to some opponents of the Sedition Act a “belief that political libels had been withdrawn [by adoption of the First Amendment] from the realm of prosecution by either the state or federal government.”<sup>49</sup>

Whatever history’s verdict on the Sedition Act was, it could hardly be said that it precluded liability for false statements that harmed an official’s reputation. Such liability had been imposed numerous times up until the decision in the *Sullivan* case, and even thereafter.<sup>50</sup> In his brief on the merits and in oral argument, Wechsler made clear that he wanted to change that dramatically; he wanted the Court to protect “the ability and willingness of publications to give voice to grievances against the agencies of governmental power”<sup>51</sup> by forbidding all actions by public officials for libels arising from their official conduct. Getting the Court to make such a sweeping decision—instead of deciding the case on narrower grounds—was perhaps his most delicate challenge and greatest achievement.

Of course, Wechsler’s responsibility to his client required that he make the narrower arguments too. Executives of the *Times* were in agreement with his grander objectives, but they would surely have been unhappy if they had lost because he passed up a surer route to victory. It would have been easier for the Court to decide in favor of the *Times* on grounds that would have had little effect on the law of defamation or on First Amendment jurisprudence. But to get the decision he wanted, Wechsler had to prevent the Court from taking the easier routes.

One of the easier courses was eventually adopted by the Court as an alternative ground: there was no evidence that anything said in the ad could be reasonably understood as personal defamation of Sullivan.<sup>52</sup> It would

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48. Brief for the Petitioner, *supra* note 4, at 45.

49. See JAMES MORTON SMITH, FREEDOM’S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 149 (1966), which attributed to some of the Republicans who spoke against the Sedition Act a “belief that political libels had been withdrawn from the realm of prosecution by either the state or federal government.” The other authority Wechsler cited was LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 249 (1960), but that did not support Wechsler’s point; Levy’s conclusion was that critics of the Sedition Act only objected to the exercise of *federal* power over libel but believed the states retained full power to deal with it.

50. See *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 693 (1989) (imposing liability for false statements that harmed a judicial candidate’s reputation).

51. Petition for Writ of Certiorari to the Supreme Court of Alabama at 12, *N.Y. Times Co.*, 376 U.S. 254 (No. 39), 1963 WL 105892, at \*12.

52. *N.Y. Times Co.*, 376 U.S. at 286.

not have been remarkable for the Court to decide the case on that ground alone. Sufficiency of evidence is normally a state law question not open for Supreme Court review, but the Court had long before held that when a constitutional issue turns on the meaning of words on paper, the Court can interpret the document for itself.<sup>53</sup> Thus, whether the evidence showed that Sullivan was personally defamed by an ad that seemed to be impersonal criticism of the police was a constitutional issue that the Court could review, and it was easy to conclude that he was not.

It would have been a slightly greater reach for the Court to hold that the Alabama courts could not exercise personal jurisdiction over the *Times* consistently with First Amendment values.<sup>54</sup> Under conventional notions of long-arm jurisdiction in business cases, the *Times*'s contacts were sufficient to give Alabama jurisdiction.<sup>55</sup> The newspaper had subscribers in the state, sold some ads to Alabama advertisers, and at times had correspondents there. But in this case, the jurisdictional question had a First Amendment dimension: forcing out-of-state publishers to defend in distant and hostile jurisdictions with which they had only minimal contacts posed a serious threat to freedom of the press.<sup>56</sup> Twenty years later the Court rejected that argument,<sup>57</sup> but in 1964 it was still a viable theory, and one that was especially persuasive in the context of Northern newspapers being haled into Southern courts at the height of the civil rights turmoil. Had the Court reversed the judgment in *New York Times* on this ground, it would have created an important precedent, but one that was highly fact-specific and therefore would not have affected the vast majority of libel cases.

In the hands of a less ambitious advocate, one or the other of these theories most likely would have been the ground of decision, and the case would have been a minor event of the Court's 1963 term. The Court went beyond these bases because Wechsler wanted to impose broader limits on the common law of libel. He skillfully urged the narrow grounds without

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53. See *Fiske v. Kansas*, 274 U.S. 380, 385–86 (1927).

54. The Alabama courts had reached the dubious conclusion that the *Times* had waived the personal jurisdiction issue by simultaneously claiming lack of subject matter jurisdiction. If the Court had chosen to view Alabama's assertion of jurisdiction over the *Times* as a constitutional matter, it surely would have held that Alabama's courts could not treat a constitutional objection so cavalierly.

55. See generally *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945) (noting that "presence" for the purposes of conferring jurisdiction "has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given").

56. See *Petition for Writ of Certiorari*, *supra* note 51, at 27–28. The complex of statutes and rules that subjected the *Times* to state court jurisdiction in Alabama is described in Howard M. Wasserman, *A Jurisdictional Perspective on New York Times v. Sullivan*, 107 NW. U. L. REV. 901 (2013).

57. See *Calder v. Jones*, 465 U.S. 783, 790–91 (1984).

distracting the Court from a broader rationale that greatly expanded the freedom to criticize public officials.

He also avoided a couple of pitfalls that could have led to defeat, or at least thwarted his large ambitions. Sullivan's lawyers urged that even if the First Amendment limited the law of libel as it applied to news, it was inapplicable in this case because the defamation occurred in a paid advertisement.<sup>58</sup> As they correctly pointed out, the Supreme Court had held that advertising enjoyed no First Amendment protection.<sup>59</sup>

This could have been a troublesome issue. Of course the ad was an "editorial" ad, so the Court was probably unlikely to give it as little protection as product advertising. But there was another route that might have tempted the Court. The argument for protecting defamatory falsehoods was that failure to do so would cause newspapers and other speakers to self-censor to avoid the risk of liability. That argument is weaker as applied to advertising—even editorial advertising—than as applied to news or other unpaid content. The publisher has a direct financial incentive to accept risks in advertising that it might not be willing to accept in news coverage. So the Court might not have been swayed by the chilling effect argument if the Justices had focused on the fact that the newspaper had been paid to carry the defamatory material.<sup>60</sup>

The Court might also have held that what the *Times* was complaining about did not raise a constitutional issue. Sullivan argued that a judgment in a civil case was not state action of the sort that would trigger the protections of the Fourteenth Amendment, and the Court therefore had no power to review the case.<sup>61</sup> Wechsler had a ready answer for that argument. He cited a line of then-recent cases holding that judgments of contempt and judgments enforcing racial covenants constituted the requisite state action.<sup>62</sup> But those cases involved specific judicial acts actively exercising state power; a judge committing someone to jail for contempt or ordering enforcement of a restrictive covenant is pretty clearly exercising state power.<sup>63</sup> Wechsler's argument was broader: "[W]e are attacking the

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58. See Brief for the Respondent at 30–31, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (No. 39), 1963 WL 66442, at \*30–31.

59. *Id.* at 30; see *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that the Constitution does not protect purely commercial advertising).

60. This theory, of course, would not apply to those who purchase editorial ads, like the four individual defendants in *Times*. Exposing them to liability in addition to the expense of paying for the ad might have a significant chilling effect on them.

61. See Brief for the Respondent, *supra* note 58, at 29–30.

62. See Brief for the Petitioner, *supra* note 4, at 29–30.

63. Lawyers for the four individual defendants were not content to rely solely on the state action cases that Wechsler cited. They made the additional argument that Sullivan's lawsuit, together with those of the governor and other Alabama officials, was "part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize and seek to change Alabama's

constitutionality of the majority rule as it appears in the black letter law.”<sup>64</sup> Justice Brennan asked if Wechsler was arguing that “a state fashioning of a common law rule may violate the Constitution.” Wechsler said “Certainly.”<sup>65</sup> So it is clear that the Justices understood that Wechsler was making a novel argument, one akin to a facial challenge to a statute, attacking the statute itself and not just its application.<sup>66</sup> The Court might have been concerned that this was too closely akin to giving an advisory opinion about the validity of a rule in different circumstances, and might have insisted that only coercive judicial acts constituted state action. This would have doomed Wechsler's ambition to invalidate the common law rule itself, not just its application to Sullivan.

Wechsler handled these two issues by treating them dismissively. He said the advertising argument was “wholly without merit” because the ad was a recital of grievances rather than a commercial message.<sup>67</sup> He handled the state action problem simply by ignoring the fact that the cases he cited dealt with judicial enforcement of common law rules, rather than attacks on the rules themselves. This strategy may have been a gamble, but in retrospect it looks wise. Had he engaged more fully with the plaintiff's arguments, he would have taken time and attention away from his principal arguments and risked drawing the Court into discussions about unsettled matters that might at least have produced disagreements among the Justices.

### C.

The logical conclusion of the seditious libel argument was an absolutist position. If liability for seditious libel had been condemned by the verdict of history, Wechsler could hardly argue that it was okay under some circumstances. In the brief he avoided the term “absolute privilege,” and instead stayed closer to the seditious libel argument: “[A] publication which is critical of governmental or official action may not be repressed upon the ground that it diminishes the reputation of those officers whose conduct it deplors or of the government of which they are a part.”<sup>68</sup> But

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notorious political system of enforced segregation.” Brief for the Petitioners at 29, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40), 1963 WL 105893, at \*29 (internal citation omitted). Such a concerted program would have been unquestionably state action.

64. HALL & UROFSKY, *supra* note 9, at 151 (citing Oral Argument at 42:18, *N.Y. Times Co.*, 376 U.S. 254 (No. 39), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#argument)).

65. *Id.*

66. As a fallback, Wechsler made the more limited argument that the judgment rested on an invalid application of the rule of liability. See Brief for the Petitioner, *supra* note 4, at 58. But the decision he sought, and the one given by the Court, was the broader one.

67. *Id.* at 57.

68. *Id.* at 29–30.

when pressed about the scope of his argument, he did not blink. At oral argument, Justice Goldberg asked if Wechsler would deny a remedy if a citizen should “state falsely, knowingly, and maliciously that his Mayor, his Governor, had accepted a bribe of one million dollars to commit an official act.”<sup>69</sup> Wechsler replied, “That is right. What he would have to do is to make a speech, using his official privilege as Mayor, to make a speech answering this charge. And that of course is what most Mayors do, and what the political history of the country has produced.”<sup>70</sup> Justice White offered Wechsler another opportunity to retreat to a narrower ground, suggesting that such a broad question wasn’t posed by the case.<sup>71</sup> Wechsler didn’t waver: “Oh, I think it’s posed . . .,” he said.<sup>72</sup>

But Wechsler knew it would be hard to persuade a majority of the Court to go that far. His solution to that conundrum was elegant, if not entirely satisfying logically:

If this submission [on seditious libel] overstates the scope of constitutional protection, it surely does so only in denying that there may be room for the accommodation of the two “conflicting interests” represented by official reputation and the freedom of political expression.<sup>73</sup>

Wechsler suggested two “accommodations” short of absolute immunity. One was to require public officials to prove special damages, or at least economic loss.<sup>74</sup> Sullivan had not attempted to show either, relying instead on the common law rule that harm could be presumed.<sup>75</sup> This was far from merely a technical point; Sullivan would have been hard pressed to show tangible harm of any kind.

The second suggestion was to require the aggrieved official to prove the critic’s malice.<sup>76</sup> To the extent that this led to the Court’s adoption of the actual malice test, it is Wechsler’s least happy contribution to the case. That test is the one aspect of *New York Times* that has proved

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69. HALL & UROFSKY, *supra* note 9, at 152–53 (citing Oral Argument at 54:10, *N.Y. Times Co.*, 376 U.S. 254 (No. 39), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#argument)). When Justice Stewart asked a similar question, Wechsler replied, “[I]n the historic period in which Madison was writing charges of bribery were common and it was this type of press freedom that he saw in the First Amendment.” Oral Argument at 46:24, *N.Y. Times Co.*, 376 U.S. 254 (No. 39), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#argument).

70. HALL & UROFSKY, *supra* note 9, at 152–53.

71. Oral Argument at 46:45, *N.Y. Times Co.*, 376 U.S. 254 (No. 39), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#argument).

72. *Id.* at 46:51.

73. Brief for the Petitioner, *supra* note 4, at 52.

74. *Id.* at 53.

75. See Brief for the Respondent, *supra* note 58, at 39.

76. See Brief for the Petitioner, *supra* note 4, at 53–54.

unsatisfactory from almost all points of view.<sup>77</sup> Defendants and plaintiffs alike came to bemoan the extensive litigation that it generated.<sup>78</sup> Brennan himself came to regret at least its articulation.<sup>79</sup>

Wechsler and Brennan both deserve some of the blame for the test. They both ascribed their ideas of actual malice to a line of state cases that extended the common law privilege of fair comment to false statements of fact about public officials as long as the statements were made in good faith.<sup>80</sup> These cases represented a minority view; most states accorded the privilege only to defamatory commentary based on truthful factual statements,<sup>81</sup> but the minority rule had received favorable scholarly comment.<sup>82</sup> The leading case for the minority viewpoint was a Kansas case, *Coleman v. MacLennan*.<sup>83</sup>

Wechsler's brief cited *Coleman v. MacLennan* in a footnote supporting the statement that "[o]ther courts have shown solicitude for the freedom to criticize the conduct of officials."<sup>84</sup> He took a few liberties in characterizing the rule. He interpreted it as requiring proof that the defendant *knew* the accusation was unfounded.<sup>85</sup> This was a standard more demanding than the common law notion of actual malice as a lack of good faith, but one essential to his argument. He said requiring proof of knowledge that the statement was unfounded would make liability turn on a finding of intent similar to that required elsewhere in First Amendment law.<sup>86</sup> This reading

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77. See Mary-Rose Papandrea, *The Story of New York Times Co. v. Sullivan*, in *FIRST AMENDMENT STORIES* 229, 230 (Richard W. Garnett & Andrew Koppelman eds., 2012) (suggesting that "the Court's decision may have been an overreaction to a particularly bad set of facts in a charged political atmosphere"); David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 489 (1991) (arguing that libel law after *New York Times v. Sullivan* "gives plaintiffs delusions of large windfalls, defendants nightmares of intrusive and protracted litigation, and the public little assurance that the law favors truth over falsehood"); Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 818 (1986) (arguing that "the sensible constitutional conclusion is to abandon the actual malice rule" because it inadequately protects reputation); Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983) (contending that the test insufficiently protects speech).

78. See Anderson, *supra* note 77, at 515–16.

79. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 227 (2010).

80. See, e.g., *Ponder v. Cobb*, 126 S.E.2d 67, 78 (N.C. 1962) (stating that qualified privilege exists for communications made in good faith "with reasonable or probable grounds for believing them to be true").

81. See RESTATEMENT (FIRST) OF TORTS § 598 cmt. a (1938). The first Restatement was still in effect in 1964.

82. See, e.g., Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 891–95 (1949). This article and other favorable comments were cited in the *Times* decision. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 n.20 (1964).

83. 98 P. 281 (Kan. 1908).

84. Brief for the Petitioner, *supra* note 4, at 53.

85. *Id.* at 54.

86. *Id.* (citing *Dennis v. United States*, 341 U.S. 494 (1951) and *Smith v. California*, 361 U.S. 147 (1959)).

of the common law rule was important, if not entirely ingenuous, because it enabled Wechsler to suggest a way to make libel law congruent with other areas of recent First Amendment jurisprudence. In the cases Wechsler cited, the Court had held that subversive speech was not actionable unless the defendant intended to bring about overthrow of the government,<sup>87</sup> and a bookseller could not be convicted of obscenity unless he or she knew of the contents of the targeted book.<sup>88</sup> Similarly, Wechsler argued that libel should not be actionable unless the defendant could be charged with intent, inferred from his or her knowledge that the accusation was unfounded.<sup>89</sup>

Actual malice was not mentioned in the oral arguments. In stating the history of the case, Wechsler pointed out that “[t]here’s no qualified privilege in Alabama as there is in some states,”<sup>90</sup> and said “we are attacking the constitutionality of the majority rule . . . .”<sup>91</sup> Toward the end of his argument, Wechsler mentioned that he wished to spend the remainder of his time discussing his narrower grounds for reversal. He got so far as to say “[t]he qualified privilege rule . . . is one way to work out an accommodation,”<sup>92</sup> but there was no further discussion of the privilege because the Justices were more interested in discussing the scope of their power to review the evidence. What came to be “the rule of *New York Times v. Sullivan*” thus was barely mentioned in the briefs or argument.

Brennan’s opinion described the rule in *Coleman v. MacLennan* as “a like rule” to the one envisioned by his actual malice standard.<sup>93</sup> It was actually quite different; Brennan’s actual malice rule required proof of knowledge or reckless disregard of falsity<sup>94</sup>—a standard substantially more demanding than good faith. Whether it was disingenuous or not, his invocation of state cases made the new rule seem less revolutionary, gave it a common law pedigree, and implied that it would do nothing that wasn’t already being done in a number of states.

#### D.

One of the mysteries of the case is why the Justices raised so few questions about the limits of the new constitutional rule. The rule by its terms applied to defamatory falsehoods relating to the *official conduct* of the plaintiff. An obvious question is: “Does the rule cover defamatory

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87. *Dennis*, 341 U.S. at 509.

88. *Smith*, 361 U.S. at 154.

89. Brief for the Petitioner, *supra* note 4, at 54.

90. Oral Argument, *supra* note 71, at 41:50.

91. *Id.* at 42:18.

92. *Id.* at 55:19.

93. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

94. *Id.* at 279–80.

falsehoods about *private conduct* that is arguably relevant to the official's fitness for office?" An affirmative answer (as the Court gave a few years later)<sup>95</sup> might have given some of the Justices pause.

Another obvious question is: "Who counts as a public official?" Justice Harlan did ask that question, saying "I would not want to foreclose a cop, a clerk, or some other minor public official from ordinary libel suits without a great deal more thought."<sup>96</sup> His question was not answered until years later, when the cop,<sup>97</sup> the clerk,<sup>98</sup> and the minor public official<sup>99</sup> were all held to be subject to the rule.

Whether the rule should apply to persons other than public officials was not raised. It proved divisive when it reached the Court only three years after *New York Times v. Sullivan*.<sup>100</sup> The advocate urging the Court to extend the rule to public figures was Herbert Wechsler. Four Justices voted not to extend it; five voted to apply the rule to public figures, but one of those voted to affirm the judgment against Wechsler's client because he believed actual malice had been shown.<sup>101</sup> Although Wechsler lost the case, his position has carried the day; despite the initial difference of opinion, the Court has since then endorsed the application of the actual malice rule to public figures.<sup>102</sup>

The question that most bedeviled courts in the years following *New York Times* was: "How might actual malice be shown?" Most judges understandably thought it had something to do with malice as they understood that term.<sup>103</sup> It took years for the Court to eradicate that misunderstanding and convince judges that actual malice was a term of art having nothing to do with the ordinary meaning of malice and very little to

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95. See *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (applying rule to comments on public or private conduct of candidates for public office).

96. KIM ISAAC EISLER, *A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA* 187–88 (1993).

97. See *Britton v. Koep*, 470 N.W.2d 518 (Minn. 1991) (applying rule to county probation officer).

98. See *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (applying rule to clerk of criminal and circuit courts).

99. See *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (applying rule to county official in charge of ski recreation area).

100. See *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) (discussing application of the actual malice rule to defamation claims brought by private individuals).

101. *Id.* at 162–72 (Warren, C.J., concurring) (Warren also argued that the defendants had waived the constitutional defense, but most of his opinion was devoted to the argument that the actual malice standard was satisfied.)

102. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (stating that "public figures stand in a similar position" to public officials with regard to the need to prove actual malice).

103. See *e.g.*, *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82 (1967) (reversing a state court case in which the jury had been instructed that the requirements of *New York Times v. Sullivan* could be satisfied by proof that the defendant had published "with bad or corrupt motive," or "from personal spite, ill will or a desire to injure plaintiff.")

do with the common law meaning of the word. Brennan himself came to view his use of the term as a mistake.<sup>104</sup>

The *Times* opinion defined the term as knowledge or reckless disregard of falsity.<sup>105</sup> “Knowledge of falsity” was clear enough, but “reckless disregard” was more troublesome. In tort law recklessness can be shown by proving disregard of “a high degree of risk or a risk of very serious harm.”<sup>106</sup> But in the constitutional law of defamation it has a different meaning; as the Court eventually made clear, it can only be shown by proving that the defendant “in fact entertained serious doubts as to the truth of his publication”<sup>107</sup> or had a “high degree of awareness of their probable falsity.”<sup>108</sup>

Wechsler in his brief treated the term as a rough equivalent of intent.<sup>109</sup> Much confusion could have been avoided if he and Brennan had used that word instead of actual malice. In tort law, intent can be shown by proving that the defendant knew to a substantial certainty that the harmful consequence would follow from his act.<sup>110</sup> That is not the precise equivalent of the subjective awareness of falsity that the actual malice test requires, but the number of cases that would come out differently under that test is surely miniscule—too small to justify the widespread confusion that flows from the term reckless disregard.

### III.

#### A.

Perhaps because of his own dismay when he learned how little protection the common law of libel gave those who criticize public officials, Wechsler pursued a strategy that maximized the chances of getting a sweeping decision from the Court. Had he followed the usual strategy of asking for the least that would win his case, the result probably would have been a fact-bound decision that the evidence was constitutionally insufficient to show that Sullivan was defamed. He argued forthrightly for an absolute privilege for such criticism, and offered

104. STERN & WERMIEL, *supra* note 79, at 227.

105. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

106. 1 DAN B. DOBBS, *THE LAW OF TORTS* § 27, at 51 (2001).

107. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

108. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

109. Brief for the Petitioner, *supra* note 4, at 54 (asserting that the malice requirement “makes an essential element of liability an intent similar to that which elsewhere has been deemed necessary to sustain a curb on utterance”).

110. See *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955) (intent for battery established when defendant knew with substantial certainty that harmful consequence would result from his act).

narrower grounds for reversal only as a fallback position. By putting the broader argument first in his brief and in his oral argument, he made it harder for the Court to retreat to the easier questions. Instead, he pushed the Court for a decision that limited libel law more broadly—more broadly, probably, than he anticipated at the time.

Although he knew the absolute rule was unlikely to command a majority in the Court,<sup>111</sup> he resisted the temptation to offer the Justices an easier route. He offered some suggested “accommodations,” but left it to the Justices to choose one and flesh it out. Most notably, he did not propose the actual malice rule that the Court adopted. Had he done so, he might have been undone by the kinds of questions the Court spent the next twenty-five years answering: Does failure to investigate show actual malice? Failure to retract? Ill will? Does reckless disregard mean the same thing as recklessness in tort law? Must the plaintiff show subjective awareness of falsity? Does the rule apply to appointed officials? Are minor officials required to prove actual malice? Candidates? Because actual malice was Brennan's creation, Wechsler did not have to answer these questions, and Brennan apparently did not face the skepticism that would have greeted an advocate who proposed a solution that left so many questions unanswered.

*New York Times v. Sullivan* is often treated as Justice Brennan's product, but aside from the actual malice test, the opinion contains few ideas that were not in Wechsler's brief. Brennan seems to have embraced Wechsler's views wholeheartedly, steering his colleagues toward Wechsler's ambitious agenda. When the Justices met in conference four days after the argument, all the Justices favored reversal, but they were sharply divided on the rationale.<sup>112</sup> Douglas, Black, and Goldberg were adamant that the Court should follow Wechsler's seditious libel argument to its logical conclusion: defamation in criticism of the official conduct of public officials could never be imposed consistently with the First Amendment.<sup>113</sup> Chief Justice Warren rejected that position and argued that the Court should say that the ad was fair comment rather than personal defamation of Sullivan.<sup>114</sup> Clark, Stewart, Harlan, and White held the key votes but they were not in agreement on a rationale.<sup>115</sup> This wide disparity of views made Brennan's job harder, but it also may have liberated him; had the other Justices held fully crystalized views, there might have been

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111. LEWIS, *supra* note 11, at 119.

112. The fullest account of the Court's deliberations is in LEVINE & WERMIEL, *supra* note 13, at 17–27. See also SCHWARTZ, *supra* note 32, at 531–33.

113. See SCHWARTZ, *supra* note 32, at 531 (asserting that Wechsler's broadest argument mirrored the absolutist view long urged by Black and Douglas).

114. *Id.* at 532.

115. *Id.* at 534–41.

little room for him to craft a solution different from the ideas of all the others.

Brennan's own summary of the conference consensus was that public officials should have to provide clear and convincing evidence on each element of the common law of libel.<sup>116</sup> When Chief Justice Warren assigned the opinion to him, however, Brennan did not let that consensus confine him. In his first draft, and through five more, he insisted on a much broader rule: public officials should not be able to recover for defamation related to their official conduct unless they can show that the defamer published with reckless disregard for the truth.<sup>117</sup> That Brennan was eventually able to secure a majority for that position and for the rationale supporting it was the result of his well-known skill as a negotiator, but also of his colleagues' respect for his judgment. That respect for Brennan's instincts may help explain the Court's unquestioning acceptance of the actual malice rule and the dubious claim that it was just a constitutionalization of the rule in *Coleman v. MacLennan*.

The three absolutists were never converted, but Brennan was able to get the remaining six votes for his opinion permitting officials to recover only when they could show actual malice by clear and convincing proof. In the back-and-forth among Justices as Brennan was circulating drafts of the opinion, the absolutists insisted that the actual malice standard gave insufficient protection to speech.<sup>118</sup> Justice Black opined that it would not even prevent Sullivan from recovering.<sup>119</sup> But among the six who endorsed the test, there appears to have been no discussion of its meaning or desirability.

Wechsler took another audacious gamble in connection with the disposition of the case. He urged the Court to reverse "with direction to dismiss the action"<sup>120</sup> without suggesting how that could be justified. Denying the state courts an opportunity to retry the case under the appropriate rule was a major intrusion into reserved powers of the state, and the Court might well have refused to do it. Wechsler did point out that there was precedent allowing the Court to make its own appraisal of the evidence on findings "determinative of the existence of the federal right,"<sup>121</sup> but none of the Justices seized on that as sufficient explanation of a summary reversal.

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116. *Id.* at 533.

117. Brennan's drafts and responses from other Justices are discussed in *id.* at 533-41. *See also* STERN & WERMIEL, *supra* note 79, at 224-226; LEVINE & WERMIEL, *supra* note 13, at 17-27.

118. *See* SCHWARTZ, *supra* note 32, at 538-39.

119. *See id.* at 539 (noting Black's disapproval of the actual malice test and his belief that the requirement would allow Sullivan to recover).

120. Brief for the Petitioner, *supra* note 4, at 90.

121. *Id.* at 59.

Apparently, none of them doubted the need to avoid remanding the case for a new trial that Sullivan was likely to win, but how to accomplish that was the subject of major disagreements.<sup>122</sup> It in fact proved to be the major obstacle to securing a majority opinion.<sup>123</sup> Finally, after numerous unsuccessful attempts to come up with satisfactory language, Justice Clark offered, if not a rationale, at least a fig leaf. He proposed the enigmatic explanation that appeared in the Court's opinion: "[C]onsiderations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for [Sullivan]."<sup>124</sup> By that circumlocution, the Court avoided having to say that it did not trust the Alabama courts to apply the Supreme Court's decision faithfully.

### B.

Some have argued that the decision is best understood as a civil rights case.<sup>125</sup> The case arose from the civil rights movement, obviously, and that movement was among its immediate beneficiaries. The Justices cannot have been oblivious to the atrocities that were being committed against civil rights demonstrators in Alabama; only the previous year, the nation had been horrified by the murder of four black children in the bombing of a Birmingham church and angered by images of Bull Connor turning fire hoses and attack dogs on demonstrators in Birmingham.<sup>126</sup> And they were surely aware of difficult cases percolating toward the Court from the sit-ins in the South.<sup>127</sup> To some, this civil rights context made the result inevitable. The late Harry Kalven, Jr., said the Court was "compelled by the political realities of the case to decide it in favor of the *Times* [and] equally compelled to seek high ground in justifying its result."<sup>128</sup> If that is correct, Wechsler won a case he could not lose.

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122. See SCHWARTZ, *supra* note 32, at 533–41.

123. See *id.* at 534–41 (detailing the circulating opinions and discussion regarding factors that might lead to a new trial or reversal).

124. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 284–85 (1964).

125. See, e.g., HALL & UROFSKY, *supra* note 9. See also Paul M. Smith, *Telling the Inside Story of Modern Libel Jurisprudence: Review of the Progeny*, COMM. LAWYER, March 2014, at 19 (asserting that the decision "was a result of the Court's intense interest in 1962 in the civil rights movement").

126. HALL & UROFSKY, *supra* note 9, at 82.

127. See *Cox v. Louisiana*, 379 U.S. 536 (1965); *Barr v. City of Columbia*, 378 U.S. 146 (1964); *Bell v. Maryland*, 378 U.S. 226 (1964); *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

128. Harry Kalven, Jr., *The New York Times Case: A Note on "the Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 193–94; see also, HALL & UROFSKY, *supra* note 9, at 2 ("The Warren Court had no choice but to take *New York Times v. Sullivan* on appeal . . .").

Dangerous as it is to doubt Professor Kalven's judgment, in this instance I believe he was wrong in both conclusions. For one thing, the Court rarely feels "compelled" to take a case; the road to the Supreme Court is littered with the bodies of lawyers who thought the Court "had" to take their case. Indeed, Justices White, Stewart, and Goldberg did not vote to grant certiorari in this case.<sup>129</sup> Unless there was some other explanation (and none has surfaced) this would seem to indicate that they were willing to let the judgments against the *Times* and the individual defendants stand.

Moreover, just the previous term, the Court had refused to grant certiorari in a related case.<sup>130</sup> The four individuals who were co-defendants in *New York Times v. Sullivan* faced immediate seizure of their property unless they posted \$2 million in supersedeas bonds.<sup>131</sup> They asked the Fifth Circuit to prevent that, arguing that the Alabama courts' aggressive use of the power to attach property prior to final judgment in multiple libel cases against them would deter them from exercising their First Amendment rights.<sup>132</sup> The Fifth Circuit refused to do so, and in the opinion that was left standing by the denial of certiorari, repeated the canard that "[l]ibelous utterances or publications are not within the area of constitutionally protected speech and press."<sup>133</sup> The Supreme Court's rejection of that case made it hard to say in 1963 that *New York Times v. Sullivan* was a case the Court was compelled to take.

The political realities Kalven alluded to presumably were that Southern libel judgments like Sullivan's were a threat to the civil rights movement because they would chill press coverage. That was certainly plausible; the movement might have fizzled without sympathetic coverage. The Southern press, for the most part, either ignored the movement or was hostile to it. Favorable coverage from the Northern press and network television is generally credited with swaying public opinion (outside the South) in favor of the demonstrators.<sup>134</sup> Continued coverage in the Northern press was important to the movement because its funding and volunteers came largely from the Northern audiences. Hence the argument that the Court had to reverse the judgment against the *Times* to protect the movement.

Maybe so, but the matter is probably more complex. One theory is that the Court protected the *Times* only because it had to do so in order to protect the four black civil rights leaders who were individual co-

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129. See Schwartz, *supra* note 32.

130. *Abernathy v. Patterson*, 295 F.2d 452 (5th Cir. 1961), *cert. denied*, 368 U.S. 986 (1962).

131. HALL & UROFSKY, *supra* note 9, at 88.

132. *Abernathy*, 295 F.2d at 456.

133. *Id.* at 456.

134. HALL & UROFSKY, *supra* note 9, at 87.

defendants.<sup>135</sup> They were prominent leaders of the movement; without their efforts the campaign for integration might have foundered. Seizure of their bank accounts, cars, and real estate threatened the campaign more directly, and probably just as seriously, as the judgment against the *Times*. The Court might well have felt compelled to reverse the judgment against these leaders, even though it had not felt compelled to give them the interlocutory relief sought in the earlier case described above.<sup>136</sup> But if the Court's principal objective was to protect the civil rights leaders and not the *Times*, it could easily have done so. They had a defense not available to the *Times*: they had nothing to do with the ad and were unaware of it until after publication.<sup>137</sup> As the Court said, the unconstitutionality of holding them liable under those circumstances "require[d] little discussion."<sup>138</sup> The opinion disposed of their case in a single paragraph,<sup>139</sup> and could have done so just as easily whatever the result of the case against the *Times*.

There is a more straightforward argument for the theory that the Court reversed the judgment against the *Times* to protect the civil rights movement: the decision helped that movement by protecting the news coverage that sustained it. In order to do this, the Court had to stretch a bit. The publication at issue was not news coverage, it was an ad. Even if that did not deprive it of First Amendment protection (as the Court held), it should have affected the analysis. Sullivan contended that First Amendment concerns were fully served by the recognition of truth as a defense.<sup>140</sup> The Court's answer was the chilling effect argument: Unless some falsehoods are protected, some truths will be suppressed.<sup>141</sup> Because of the uncertainty and expense of proving truth, critics will "tend to make only statements which 'steer far wider of the unlawful zone.'"<sup>142</sup>

But, as mentioned above, that argument is considerably weaker when applied to advertising than it is when applied to news. The threat of a libel suit can easily dissuade an editor from taking a risk in a news story,

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135. Sullivan's lawyers had included the four individuals (from whom they had little chance of collecting any money) because they were Alabama residents, and that prevented the *Times* from removing the case to federal court on diversity grounds. *See id.* at 30. So if it is true that the Court had to reverse the judgment against the *Times* in order to protect the individual defendants, Sullivan's lawyers may have outsmarted themselves: if protecting the individual defendants was the Court's goal, the tactic that enabled Sullivan to stay out of federal court sealed his doom in the Supreme Court.

136. The seizures described above may not have been totally reversible, but vacating the judgment would have at least entitled the individuals to compensation.

137. HALL & UROFSKY, *supra* note 9, at 17–18.

138. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964).

139. *Id.* at 286 (noting that the situation of the individual clergyman required "little discussion" because they could not be found guilty of actual malice with regard to a publication they were not aware of).

140. Brief for the Respondent, *supra* note 58, at 54.

141. *See N.Y. Times Co.*, 376 U.S. 254.

142. *Id.* at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

because spiking a story, or deleting a passage that might give offense, involves no financial cost.<sup>143</sup> But by turning down a paid ad,<sup>144</sup> a newspaper forgoes an immediate financial benefit. The opinion ignored this obvious distinction. By uncritically applying the chilling effect argument to advertising, the Court can be said to have gone out of its way to protect news coverage of the civil rights movement.

But there are reasons to doubt that protection of the civil rights movement was the driving force behind the decision. For one thing, the Court did not treat it as a civil rights case, despite strenuous efforts by counsel for the four co-defendants to cast it in that light. The argument in those defendants' separate brief began by placing the case in "[t]he century-long struggle of the Negro people for complete emancipation and full citizenship,"<sup>145</sup> and went on to discuss at length the Court's civil rights decisions. Wechsler's brief for the *Times* said very little about the civil rights context of the case. The Court's opinion ignored the invitation from the individuals' brief and instead took Wechsler's approach: the only mention of any threat to the civil rights movement was a single sentence noting that the ad was "an expression of grievance and protest on one of the major public issues of our time."<sup>146</sup>

When Kalven said the Court was "compelled to seek high ground," he could not have meant that the Court had no alternatives. As mentioned above, there were narrower, more conventional grounds. The Court could easily have justified reversing the judgment against the *Times* on the ground that Alabama lacked personal jurisdiction.<sup>147</sup> The presence of four individual defendants complicates matters; since they were all residents of Alabama<sup>148</sup> there was no doubt they were subject to the state's jurisdiction. So reversal as to the *Times* and not the individuals would have left them liable for the \$500,000 judgment.<sup>149</sup> But as mentioned above, there was no evidence that they had anything to do with the ad,<sup>150</sup> so the Court could

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143. Cautious coverage may have long-term costs if it costs the paper subscribers, but that is a far less impressive threat than a libel suit.

144. The *Times* was paid \$4,552 for publishing the ad. See HALL & UROFSKY, *supra* note 9, at 17.

145. Brief for the Petitioners, *supra* note 63, at 18.

146. *N.Y. Times Co.*, 376 U.S. at 271.

147. See LEWIS, *supra* note 11, at 142 (explaining that the Alabama court's assertion of jurisdiction could have been struck down as lacking "'fair or substantial support' in prior Alabama decisions.>").

148. Brief for the Petitioner, *supra* note 4, at 5.

149. The liability of the *Times* and the individuals was joint and several. *N.Y. Times Co. v. Sullivan*, 144 So. 2d 25, 49 (Ala. 1962).

150. Sullivan relied on the dubious theory that by refusing his demand for retraction, they "ratified" the unconsented use of their names. Brief for the Respondent at 23, *Abernathy v. Sullivan*, 376 U.S. 254 (No. 40), 1963 WL 66447, at \*23.

have ruled in favor of them on that ground and in favor of the *Times* on the personal jurisdiction ground.

Another alternative that would have justified reversal as to all defendants was that the ad did not sufficiently identify Sullivan<sup>151</sup> and therefore was not actionable against anyone. Normally the adequacy of the identification of the plaintiff is a question of state law, but the Court made it a matter of constitutional law.<sup>152</sup> This in fact was an alternative ground for the Court's decision;<sup>153</sup> the opinion could have stopped there.

If the Justices saw *New York Times v. Sullivan* as a civil rights case, Wechsler's genius lay in persuading them not to treat it as one. I vaguely remember<sup>154</sup> that immediately after the decision, some lawyers said it was "just" a civil rights decision and would not dramatically change the application of libel law generally. How wrong they were.

## V.

Intellectually, *New York Times v. Sullivan* is Herbert Wechsler's creation. The structure and ideas of Brennan's opinion are mostly Wechsler's. The opinion tracks the structure of the brief (inverting the usual practice of taking up the jurisdictional issue first), reprising the history of the Sedition Act, comparing Sullivan's case to that statute, and then gradually extrapolating to a far more sweeping result. Approaching the case through the lens of seditious libel was Wechsler's idea.<sup>155</sup> So was attacking the common law of libel generally, rather than just Alabama's application of it. It was he who asked for dismissal rather than remand. It was he who suggested that protecting the citizen's right to defame a public official was analogous to the official's privilege to defame citizens.

Brennan's language is mostly Wechsler's. The phrase with which the Court condemned the Sedition Act—"the attack upon its validity has carried the day in the court of history"<sup>156</sup>—echoed Wechsler's words: "the verdict of history surely sustains the view that it was inconsistent with the First Amendment."<sup>157</sup> After noting that federal officials enjoy a privilege

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151. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964). The common law version of this issue is the requirement that the defamation be "of and concerning" the plaintiff. In making it also a constitutional law issue, the opinion wisely avoided that archaic term.

152. *Id.*

153. *Id.* (holding that an otherwise impersonal attack on a governmental agency's operations does not constitute a libel against the official responsible for the relevant agency).

154. Or maybe I only remember *reading later* what some lawyers were saying in the aftermath of *N.Y. Times Co. v. Sullivan*.

155. With Frankel's help. See *supra* text accompanying notes 28–33.

156. *N.Y. Times Co.*, 376 U.S. at 276.

157. Brief for the Petitioner, *supra* note 4, at 47.

that protects them from defamation actions, Wechsler said, “[t]he States accord the same immunity to statements of their highest officers, though some differentiate their lowlier officials and qualify the privilege they enjoy.”<sup>158</sup> The Court’s opinion tracked that almost verbatim: “The States accord the same immunity to statements of their highest officers, although some differentiate their lesser officials and qualify the privilege they enjoy.”<sup>159</sup>

One of the notable exceptions to Wechsler’s hegemony is the single most memorable passage in the opinion: “[W]e 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 . . . .”<sup>160</sup> That language was neither Brennan’s nor Wechsler’s; it came from one of Brennan’s clerks, Stephen Barnett.<sup>161</sup> The other exception is the language from Justice Clark explaining why the Court was denying Sullivan the opportunity to retry the case.<sup>162</sup> Thus, even the most important non-Wechsler contributions to the opinion did not come from Brennan.

Giving Wechsler his due takes little away from Justice Brennan. Had he not fully embraced Wechsler’s goal of reforming libel law, the decision no doubt would have been narrower. Had he not lent his imprimatur to Wechsler’s ideas, the other Justices might have balked. Without the unanimous result Brennan secured, and without his subsequent successes over the next twenty-five years in defending and extending it, the decision would have had far less power.<sup>163</sup> But Brennan’s contributions to the decision itself were more facilitative than substantive. Wechsler provided the goal, the strategy, the rationale, and the persuasion. To Herbert Wechsler’s long list of achievements should be added one of the most important free speech icons of the 20th century—the Supreme Court’s opinion in *New York Times v. Sullivan*.

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158. *Id.* at 55.

159. *N.Y. Times Co.*, 376 U.S. at 282.

160. *Id.* at 270.

161. See STERN & WERMIEL, *supra* note 79, at 224.

162. *N.Y. Times Co.*, 376 U.S. at 284.

163. Brennan became the decision’s greatest champion for the next twenty-five years. See LEVINE & WERMIEL, *supra* note 13.