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Behind the U.S. Reports: Justice Brennan's Unpublished Opinions and Memoranda in New York Times v. Sullivan and Its Progeny

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BEHIND THE *U.S. REPORTS:* JUSTICE BRENNAN'S UNPUBLISHED OPINIONS AND MEMORANDA IN *NEW YORK TIMES V. SULLIVAN* AND ITS PROGENY

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The contributions Justice William J. Brennan Jr. made to free expression in general and the law of libel in particular are unquestioned. His opinion in New York Times Co. v. Sullivan *and cases that followed established sturdy protection for critics of public officials and helped further the marketplace of ideas that is so important for public discourse. Justice Brennan wrote thousands of words about* Sullivan *and its impact that never appeared in published opinions, however. Often he was required to alter his writings to accommodate the views of other justices needed for a majority. Those unpublished opinions – and memoranda he wrote – may more accurately reflect his real vision of the First Amendment than what appeared in his published opinions. This essay examines those unpublished writings in an effort to determine that vision.*

During a debate in Congress in 1794, James Madison summed up the novel concept that was at the heart of the First Amendment[1] – that it

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[1]U.S. CONST. amend. I.

is the right of the people to speak freely about their government. "If we advert to the nature of Republican Government," Madison said, "we shall find that the censorial power is in the people over the Government, and not in the Government over the people."[2]

Beginning with *New York Times Co. v. Sullivan*[3] in 1964 and until his retirement in 1990, Justice William J. Brennan Jr. worked tirelessly to make Madison's vision a jurisprudential reality in the decisions of the Supreme Court of the United States. As the *New York Times* columnist Tom Wicker noted in a tribute to Brennan published in 1997, the Madisonian view of the First Amendment's meaning lay largely dormant until Justice Brennan breathed life into it in *Sullivan*.[4] Wicker wrote that "no one was more instrumental in its reassertion, no one gave it more persuasive voice" than Brennan.[5]

Wicker was not alone in his recognition of Justice Brennan's role. Many scholars have credited – or faulted – Brennan for the modern vitality of constitutional doctrine protecting free speech and a vigorous free press. Among them, another *New York Times* columnist, Anthony Lewis, widely regarded as a First Amendment scholar in his own right, once wrote that "[w]ith the decision in *New York Times v. Sullivan*, a sea change began in the law of the First Amendment. The Supreme Court increasingly gave the amendment's bold words their full meaning."[6]

It is interesting to consider, then, that in his three-plus decades of Supreme Court service, Justice Brennan wrote thousands of words about *Sullivan* and its impact that never made it into the *United States Reports*.[7] In *Sullivan* and in other important libel decisions, Brennan wrote several draft opinions that never saw the light of day because he had to make changes to them in order to accommodate the views of other justices and thereby secure a majority. Often those unpublished draft opinions took a somewhat different approach and sometimes went substantially beyond the Court's final product in protecting free speech and a free press. In that sense, the unpublished drafts may more accurately reflect Justice Brennan's real vision of the First Amendment than what appears in the *United States Reports* and show even more clearly the degree to which he sought to carry forward Madison's vision.

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[2]4 ANNALS OF CONG. 934 (1794), *cited in* New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964).

[3]376 U.S. 254 (1964).

[4]Tom Wicker, *Speech: Uninhibited, Robust and Wide-Open*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE (E.J. Rosenkranz & B. Schwartz eds., 1997).

[5]*Id.* at 52.

[6]ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 235 (1991).

[7]The *United States Reports* are the official published accounts of the decisions of the Supreme Court of the United States.

There is another source of insight into Justice Brennan's conception of the reach of the First Amendment. Beginning in the early 1980s, as he entered his final decade on the Court and advanced in age into his early 80s, Brennan began attending the Court's closed-door conferences armed with prepared, written statements of his views.[8] Written by his law clerks in consultation with the justice, these conference memoranda provided Brennan with a document to read to his colleagues so that they would know his position in a case precisely. A switch from the typical and previous practice by justices of speaking extemporaneously at conference, these written statements provide a concrete articulation of Brennan's views in numerous cases in which he never wrote a published opinion, either in his own name or on behalf of the Court.

This essay explores some of those unpublished draft opinions and conference memoranda in defamation and related cases and what they reveal about where Justice Brennan would have taken the First Amendment if his opportunities to sit in the driver's seat had not required him to navigate the twists and turns required to secure four additional votes.[9] Brennan's First Amendment decisions were not limited to these cases, of course, but in this essay, marking the fiftieth anniversary of *New York Times Co. v. Sullivan,*[10] we examine only that subset of his First Amendment jurisprudence.

What emerges from this review is Justice Brennan's strongly held belief that free speech as well as public inquiry and criticism by the press are essential to the functioning of a democratic society, and that the courts have a vital role to play in assuring that this system of free expression works as Madison envisioned it would. In big picture terms, Brennan's approach is well known, but his draft opinions and conference memoranda provide a richer and more detailed understanding of how and why he came to believe both that unfettered public discourse is essential to self-governance and that the courts must necessarily be empowered to police potential interference with that process.

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[8]The Court's conferences are attended only by the nine justices and are the occasions at which they decide which cases to review and how they will decide argued cases on their merits. Traditionally, the chief justice speaks first at conference and then each justice states his or her view of the case in order of seniority. At conference, justices often refer to briefs or notes or speak from memory, but as a matter of custom and tradition, it was highly unusual when Justice Brennan began to read prepared statements to his colleagues at conference.

[9]The draft opinions and conference memoranda were examined from the case files of Justice Brennan housed in the Manuscript Division of the Library of Congress in Washington, D.C. The drafts were collected as part of the research for LEE LEVINE & STEPHEN WERMIEL, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* (2014).

[10]376 U.S. 254 (1964). Justice Brennan announced the Court's decision Mar. 9, 1964.

Justice Brennan had what may have been an eternal optimism about the power of free expression, which he described so eloquently in *Sullivan* as "our profound national commitment" to "uninhibited, robust and wide-open" debate as the touchstone of a working democracy.[11] Anthony Lewis, discussing Madison, may have best captured this aspect of Brennan's perspective:

> Madison had to be an optimist to believe that democracy would work in a sprawling new federation if only the people had "the right of freely examining public characters and measures. . . . " Optimism had to be the unstated premise when the Supreme Court looked to Madison's vision to resolve the case of *New York Times v. Sullivan*.[12]

Before turning to the documents to explore further the source and contours of Justice Brennan's constitutional optimism, some brief background about its Madisonian underpinnings is in order. Although the First Amendment was ratified as part of the Bill of Rights in 1791, it was rarely invoked for much of the nation's early history. Contemporary understanding of the meaning of freedom of expression was sufficiently divided near the end of the century that Congress could pass the Sedition Act of 1798,[13] which permitted the prosecution and conviction, complete with jail terms and fines, of those who criticized the president or Congress and brought ridicule or disrepute on the government. Madison adamantly opposed the new law. Thomas Jefferson did as well, although his criticism was aimed in part at the notion, reinforced in the words of the First Amendment,[14] that it protected only against encroachments on speech by Congress, leaving the states free to regulate and, presumably, to combat sedition.[15]

After Jefferson's election as president, he pardoned those who had been convicted, and the Sedition Act expired in 1801. As a result, the validity of the law as a First Amendment matter did not reach the Supreme Court for another century-and-a-half when Justice Brennan, in *Sullivan*, asserted that the notion of punishing government critics embodied in the Sedition Act, a doctrine long embodied in the laws of England, is not acceptable practice in the United States because such criticism, and the debate about public affairs of which it is an essential

[11]*Id.* at 270.

[12]LEWIS, *supra* note 6, at 247–48 (citations omitted).

[13]Act of June 18, 1798, 1 Stat. 596 (Sedition Act).

[14]U.S. CONST. amend. I ("Congress shall make no law. . . . ").

[15]Jefferson's opposition was also driven, no doubt, by the fact those prosecuted under the law tended to be his own supporters who were jailed and/or fined by the administration of his predecessor, President John Adams.

part, is at the heart of our system of democratic self-governance. In *Sullivan*, Brennan wrote of "a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[16]

Throughout the nineteenth century – even after ratification of the Fourteenth Amendment in 1868, with its potential "incorporation" of various aspects of the Bill of Rights as part of the "liberty" the states could not deny without due process of law – the First and Fourteenth Amendments were little used to challenge government regulation or curtailment of speech, state or federal. It was not until the 1920s that the Supreme Court began actively to consider the meaning of the freedom of expression guaranteed by the First Amendment. During this period, opinions by Justices Oliver Wendell Holmes and Louis D. Brandeis first explored seriously the value of free speech.[17] Nevertheless, the cases in which they wrote, largely in dissent, typically resulted in Supreme Court affirmation of convictions of anarchists, anti-war activists, socialists and other dissidents.[18]

Some of this began to change in the 1940s. The Supreme Court recognized, for example, that Jehovah's Witnesses could not be compelled to recite the Pledge of Allegiance because it required them to profess a belief in ideas with which they did not agree.[19] However, after World War II and into the early 1950s, the earlier pattern reemerged with the successful prosecution, in the face of First Amendment based challenges brought before the Supreme Court, of persons purportedly associated with the communist party.[20] It was not until 1957 that the Supreme Court reversed such a conviction, although even then its decision was largely not based on the First Amendment.[21]

The advent of the civil rights movement and the protests supporting desegregation that characterized it after the Court's ruling in *Brown v. Board of Education*,[22] however, proved to be a game changer that set the

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[16]376 U.S. at 276.

[17]For one discussion of the roles of Justices Holmes and Brandeis, *see* Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451 (1988).

[18]*See, e.g.,* Whitney v. California, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); Schaefer v. United States, 251 U.S. 466, 482–95 (1920) (Brandeis, J., dissenting); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

[19]*See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (o'ruling Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940)).

[20]*See, e.g.,* Dennis v. United States, 341 U.S. 494 (1951).

[21]*See* Yates v. United States, 354 U.S. 298 (1957) (reversing convictions on narrow interpretation of Smith Act to prohibit only active advocacy of government overthrow rather than mere belief in principles of Communism).

[22]347 U.S. 483 (1954).

stage directly for *Sullivan*. In its final form, *Sullivan* is significant in numerous ways. It is unquestionably a civil rights landmark because, by imposing new constitutional restrictions on libel suits brought by public officials, it effectively thwarted the campaign by southern segregationists to drive the news media out of the South and away from reporting about civil rights issues.[23] Apart from the civil rights context, *Sullivan* is also a landmark development in libel law because it interposed First Amendment limitations on the laws of all fifty states, requiring that public officials who sue for defamation show that a defamatory falsehood was published with "actual malice," meaning with knowledge of its falsity or reckless disregard for the truth.[24]

In a larger sense, *Sullivan* is the foundation from which the Supreme Court built on its recognition that criticism of government and debate about public officials is not simply an evil that must be accepted in a free and democratic society but a value to be encouraged and embraced. Much, but by no means all, of the Court's resulting construction of the First Amendment came in cases that, like *Sullivan* itself, arose in the context of defamation and related claims.[25] During his Supreme Court tenure and following *Sullivan*, therefore, Justice Brennan had many more opportunities to address both the scope and meaning of the First Amendment and his unpublished draft opinions and conference memoranda shed additional light on his views, beyond what can be gleaned from the opinions he wrote – both for the Court and in his own name – for publication in the *United States Reports*.

THE EARLY YEARS: *SULLIVAN* AND *GARRISON*

Beginning with *Sullivan*, and for several years thereafter, Chief Justice Earl Warren regularly called on Justice Brennan, his friend and confidant, to craft the Court's majority opinions in cases exploring the role of the First Amendment in limiting the reach of state law in defamation and related cases.[26] As a result, in these early cases in which Brennan held the Court's pen, his views not only typically became the governing law, but his explication of them survived largely intact in the opinions he wrote on behalf of the Court. Even then, however, from time to time

[23]This aspect of the case is well-chronicled in LEWIS, *supra* note 6. *See also* Melvin Urofsky, New York Times Co. v. Sullivan *as a Civil Rights Case,* 19 COMM. L. & POL'Y 86–149 (2014),

[24]376 U.S. 254, 280 (1964).

[25]For cases outside the defamation context building on this facet of *Sullivan*, *see, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971), and *Texas v. Johnson*, 491 U.S. 397 (1989).

[26]In addition to *Times v. Sullivan*, *see, e.g., Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

Brennan would endeavor to take the constitutional law of defamation in a direction in which either a majority of his colleagues were not prepared to go or where, in the end, he was not willing to lead them. In two of those instances, in *Sullivan* itself and in *Garrison v. Louisiana*, decided in the term that immediately followed it, Brennan authored opinions which, though ultimately discarded, purported to set constitutional rules that would have had tangible consequences for the law and its development.

New York Times Co. v. Sullivan

The process through which Justice Brennan and the Court produced its decision in *Sullivan* has been well chronicled. In all, Brennan and his clerks generated eight drafts of what became the Court's opinion in the less than two months that passed between the argument and the decision's announcement.[27] For the first of those drafts, Brennan abandoned his usual practice of having one of his law clerks sketch out his opinion after they talked through what he wanted. Instead, he opted to write it out himself.[28] That initial draft, which was never circulated outside Brennan's chambers, contains the gist of the substantive liability standard for which the case would become best known – the requirement, imposed in the name of the First Amendment, that public officials seeking to prevail in defamation actions prove that the defendant harbored "actual malice," defined as knowledge or a reckless disregard of the publication's falsity.[29]

In that initial draft, however, Justice Brennan went further. In addition to jettisoning the common law rule of strict liability in defamation actions brought by public officials for published criticism of their official conduct, Brennan injected other elements of the tort with a constitutionally charged formula. Specifically, his first draft concluded that, apart from the absence of actual malice, the jury verdict *Sullivan* had secured could not be squared with the First Amendment because he had failed to prove that the allegedly false statements contained in the advertisement the newspaper had published were defamatory in the first instance.[30]

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[27]*See* LEVINE & WERMIEL, *supra* note 9, at 1–31; LEWIS, *supra* note 6, at 164–82; SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 220–28 (2010); W. Wat Hopkins, *Justice Brennan, Justice Harlan and* New York Times v. Sullivan: *A Case Study in Supreme Court Decision Making,* 1 COMM. L & POL'Y 469 (1996).

[28]*See* LEVINE & WERMIEL, *supra* note 9, at 18; STERN & WERMIEL, *supra* note 27, at 224.

[29]*See* LEWIS, *supra* note 6, App. 1 at 24 (reprinting Brennan's first draft).

[30]*Id.* at 20–21.

This alternative ground for decision mysteriously disappeared when Justice Brennan and his clerks revised his initial draft for circulation to the entire Court and did not reappear in any of the multiple drafts he circulated thereafter.[31] There is no explanation for this omission in Brennan's files, and it appears that, as subsequent drafts shifted the Court's attention to other issues the justices found to be more difficult (such as whether Sullivan was entitled to a new trial at which he could attempt to prove actual malice[32]), Brennan simply neglected to reintroduce it. Still, this forgotten aspect of Brennan's initial draft, if it had survived, would surely have had substantial ramifications for the constitutional law of defamation.

In the relevant portion of his first draft, Justice Brennan announced that the "threshold question" before the Court was "whether the statements in the advertisement complained of can be reasonably said to be capable of a defamatory meaning."[33] After acknowledging that the Alabama Supreme Court had "sustained the trial court's holding that the statements were defamatory," and dismissing the significance of that conclusion on the ground that the state courts had failed "to distinguish between public officials and private individuals" in reaching it, Brennan explained that, because "that distinction has constitutional significance," the Court was obliged to formulate its "own judgment whether the statements complained of . . . are capable of bearing a defamatory meaning."[34]

Having thus infused the common law search for defamatory meaning with "constitutional significance," Justice Brennan's draft proceeded to examine what he described as "the context of the entire advertisement" at significant length.[35] Following that examination, Brennan asserted that, in determining whether the challenged advertisement possessed a sufficiently defamatory meaning to satisfy the First Amendment, the justices could not "close our eyes to the . . . situation in Alabama."[36] As Brennan put it:

> We hold that the statements complained of by respondent are not capable of bearing a defamatory meaning either on their face or when read in the light of the proofs. The statements as part of the advertisement fall well

[31] *See* LEVINE & WERMIEL, *supra* note 9, at 18–27.
[32] *See id.*
[33] LEWIS, *supra* note 6, App. 1 at 20.
[34] *Id.* at 20–21.
[35] *Id.* at 21–22.
[36] *Id.* at 22.

> within constitutionally protected commentary upon a serious contemporary domestic problem.[37]

In this portion of his draft, Justice Brennan unmistakably performed the sort of contextual analysis that lower courts would begin to embrace decades later in cases like *Ollman v. Evans*.[38] That later inquiry, however, was grounded not directly in *Sullivan* (nor could it have been since the relevant portion of Brennan's analysis did not survive his first draft), but rather in an introductory passage in Justice Lewis Powell's opinion for the Court in *Gertz v. Robert Welch, Inc.*[39] Those *dicta*, in which Powell asserted that "under the First Amendment, there is no such thing as a false idea," with the necessary consequence that even the most "pernicious" opinions must enjoy constitutional protection,[40] had been construed by the lower courts as a mandate that they undertake a threshold inquiry in each defamation action for the purpose of separating potentially actionable false statements of fact from expressions of "opinion" protected by the First Amendment.[41] The intense hostility of several justices – most notably Chief Justice William Rehnquist – with respect to the provenance and ostensible purpose of the kind of contextual inquiry undertaken in cases like *Ollman* – caused the Court, in an opinion by the chief justice, to purport to reject it, at least as so formulated, in *Milkovich v. Lorain Journal Co.*, the last defamation case on which Brennan would sit as a member of the Court.[42]

As Justice Brennan hoped when *Milkovich* was decided, the *Ollman* inquiry has nevertheless survived that decision relatively unscathed.[43] In the years that have followed it, lower courts have either ignored *Milkovich* entirely or recalibrated its purpose, from a search for constitutionally protected expressions of opinion (as in *Ollman*) to an analysis of whether the allegedly defamatory statements at issue in a given case are reasonably capable of being proven false.[44] As some commentators have noted, however, even that reformulation does not accurately capture either what the lower courts are in fact doing or what, reasonably

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[37]*Id.* at 23.

[38]750 F.2d 970 (D.C. Cir. 1984) (en banc).

[39]418 U.S. 323 (1974).

[40]*Id.* at 339–40.

[41]*See, e.g.*, Potomac Valve & Fitting Co. v. Crawford Fitting Co., 829 F.2d 1280 (4th Cir. 1987); Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc).

[42]497 U.S. 1 (1990). *See also* LEVINE & WERMIEL, *supra* note 9, at 329–40 (describing the Court's internal deliberations in *Milkovich*).

[43]*See* LEVINE & WERMIEL, *supra* note 9, at 336–37.

[44]*See, e.g.*, Partington v. Bugliosi, 56 F.3d 1147 (9th Cir. 1995); Moldea v. New York Times Co., 22 F.3d 310 (D.C. Cir. 1994); Phantom Touring, Inc. v. Affiliated Publ'ns, 953 F.2d 724 (1st Cir. 1992).

construed, the First Amendment ought to be construed to require.[45] Indeed, the analysis these courts are actually performing is precisely what Brennan called for in the initial draft of his opinion in *Sullivan* – a review of the statements placed at issue in a given case, in the context in which they were disseminated, to determine whether, so viewed, they can reasonably be construed to impart the defamatory meaning the plaintiff would attribute to them in a manner that can be reconciled with the First Amendment.[46] This, Judge Robert Bork observed in his own concurring opinion in *Ollman*, is not only the real focus of the threshold inquiry the *Ollman* majority had undertaken in the ostensible cause of separating "fact" from "opinion," it is part and parcel of the constitutional obligation imposed on judges by the First Amendment itself to protect the free flow of expression about public matters.[47]

As Judge Bork put it in *Ollman*, in an analysis that proved both prophetic and prescient, even in the absence of the alternative ground for decision contained in Justice Brennan's first draft, the "central meaning of the First Amendment" articulated in *Sullivan* necessarily contemplates "close judicial scrutiny" of defamation actions brought by public officials and public figures for the purpose of ensuring that "cases about types of speech and writing essential to a vigorous first amendment do not reach the jury."[48] Reacting to the multi-factor test for protected "opinion" that his colleagues on the D.C. Circuit had constructed in *Ollman*, Bork asserted that a court's obligation is to undertake, not a search for "simple categories, semantically defined," but rather a threshold "consideration of the totality of the circumstances that provide the context in which the [allegedly defamatory] statement occurs and which determine both its meaning and the extent to which making it actionable would burden freedom of speech or press."[49]

Bork's formulation, rejected by the D.C. Circuit majority in *Ollman*, bears an uncanny resemblance to the analysis that Justice Brennan himself performed in his unpublished first draft in *Sullivan.* Five decades later, the Supreme Court has still not expressly empowered judges to undertake the kind of threshold, contextual inquiry into an allegedly defamatory publication's meaning that Bork advocated in *Ollman*. Indeed, the lower courts have only occasionally hinted that their various analyses of meaning in this context are properly grounded in

[45]*See, e.g.,* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 273–303 (1993).

[46]*See* note 44 *supra* (citing cases).

[47]720 F.2d 970, 997 (D.C. Cir. 1984) (Bork, J., concurring).

[48]*Id.* (Bork, J., concurring).

[49]*Id.* at 994, 997 (Bork, J., concurring).

the First Amendment, as opposed to the common law of a given state.[50] If Brennan had retained this aspect of his initial draft in *Sullivan*, there is little doubt that, at the very least, there would be no such judicial reticence, that the law would have been spared a decades-long sideshow over the relevance of Justice Powell's *dicta* about "false ideas" in *Gertz*, and a host of meritless defamation actions would likely have been terminated on the pleadings and well before the burden and expense typically associated with amassing a factual record sufficient to demonstrate that a defamation plaintiff could not carry its burden of proving actual malice.[51] In this sense, Brennan's ultimate judgment call in *Sullivan* – to put almost all of his First Amendment eggs in the "actual malice" basket and none of them in a constitutionally mandated inquiry into meaning – whether conscious or not, has resulted in a regime of constitutional protection that, on its face, makes the vindication of First Amendment rights a very costly proposition and, in reality, has obliged both defendants and courts to jerry rig alternative formulations, such as the so-called "opinion" doctrine, that afford meaningful relief from defamation claims in a more efficient and less punitive manner.[52]

Garrison v. Louisiana

It is well known that, in Part II of his opinion for the Court in *Sullivan*, Justice Brennan grounded the "central meaning of the First Amendment" in the proposition that the "freedom of speech or of the press" deprives government of the power to enact laws punishing seditious libel.[53] Not surprisingly, therefore, when Chief Justice Warren assigned Brennan to write the Court's opinion assessing the constitutionality of the conviction of New Orleans District Attorney Jim Garrison under Louisiana's criminal defamation statute in *Garrison v. Louisiana*[54] for statements he had made criticizing judges of the local criminal court, Brennan chose to attack the law as one punishing seditious libel.[55] In *Sullivan*, after all, Brennan had powerfully articulated, for a unanimous Court in this portion of his opinion, the "broad consensus" that

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[50]*See, e.g.*, Chapin v. Knight Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993); White v. Fraternal Order of Police, 900 F.2d 512 (D.C. Cir. 1990); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986) (en banc).

[51]*See, e.g.*, Dienes & Levine, *supra* note 45, at 283–91. *See also* Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 24–28 (1985) (discussing burden and expense of litigating actual malice issue in defamation actions).

[52]See Dienes & Levine, *supra* note 45, at 284–86; Levine, *supra* note 51, at 24–28.

[53]376 U.S. 254, 273 (1964).

[54]379 U.S. 64 (1964).

[55]*See* LEVINE & WERMIEL, *supra* note 9, at 35–37.

the Sedition Act of 1798, "because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."[56] Citing liberally to his handiwork in *Sullivan*, the draft opinion Brennan initially circulated to his colleagues in *Garrison* reminded them that the Court had "only recently reviewed the history of the great controversy" over the Sedition Act, and proceeded to assert that "the similarity between expressions prosecuted under that Act and the statements for which appellant was prosecuted here is significant and should be noted."[57] Proceeding from this premise, Brennan continued:

> Of course, any criticism of the manner in which a public official goes about his duties will tend to affect his reputation, but to the extent that the Louisiana statute is applied to punish statements made about the official conduct of public officials, it must be said to fall within the category of "seditious libel" statutes — which Madison said were "acts forbidding every publication that might bring the constituted agents [of government] into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures."[58]

Recalling in this manner the history lesson that had been the centerpiece of his opinion for the Court in *Sullivan*, Justice Brennan concluded that "[p]rosecutions for seditious libel have not found favor in this country."[59] Moreover, he rejected the Louisiana Supreme Court's view that Garrison had not merely criticized the work of the criminal court, but had impugned the personal integrity of the judges as well.[60] At bottom, Brennan wrote, Garrison's criticism of the judges was directed at their administration of court business. And, he declared unequivocally, "Our Constitution flatly bars criminal prosecutions based on the mere criticism of public men for their public conduct."[61]

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[56]376 U.S. at 276.

[57]Justice Brennan, Draft Opinion One 10 (Garrison v. Louisiana) (1964), *reprinted in* Justice Brennan, 1964 Term Histories 57 (on file with the Brennan Papers, Library of Congress Manuscript Division). Beginning in about 1960 and continuing until he retired in 1990, Justice Brennan had his law clerks prepare narrative accounts of what took place inside the Court in most of the major cases each term. These came to be known as "Term Histories," and often include substantial amounts of detail about the interactions of the justices that is not recorded in any other archival materials.

[58]*Id.* at 7–8, *reprinted in* Justice Brennan, 1964 Term Histories 51–53 (quoting Reports on the Virginia Resolutions, 4 Elliot's Debates 570).

[59]Justice Brennan, Draft Opinion One, *supra* note 57, at 8, *reprinted in* Justice Brennan, 1964 Term Histories 53.

[60]*Id.*

[61]*Id.* at 16, *reprinted in* Justice Brennan, 1964 Term Histories 69.

This was a bold step. Justice Brennan was pushing the Court to go beyond *Sullivan* and hold that the several states were powerless to declare even the "calculated falsehood" about a public official a violation of their criminal laws. To explain this dichotomy, Brennan had to formulate a theory that would meaningfully distinguish civil from criminal libel.[62] Thus, his draft opinion argued that, in a civil libel suit brought by a public official, the government serves as little more than an "impartial umpire," providing the remedy of a lawsuit for private litigants to sort out legal responsibility for injury to a public official's reputation.[63] In a criminal prosecution, however, the government "predominantly serves not the interest of the official but the impermissible interest of the government itself in protecting itself against criticism."[64] As Brennan explained it:

> This historical judgment embodies appreciation of a crucial distinction between civil and criminal libel laws in their application to defamatory criticism of the official conduct of public officials. The civil remedy recognizes the interest of the individual official in the integrity of his reputation; but the overriding interest of the people in free discussion of public affairs secured by the First Amendment limits the remedy to damages for defamatory statements made with actual malice. In contrast, the constitutional consensus since the time of the Sedition Act has been that in light of the importance of the protection for free discussion of public affairs, government itself has no legitimate interest which justifies criminal laws inhibiting mere discussion of it or of its officials.[65]

The distinction between civil and criminal defamation that Justice Brennan advocated in his initial draft in *Garrison* would not, however, command a majority of his colleagues. In fact, most of them promptly made their refusal to endorse it explicit.[66] In all, six justices either authored or joined separate opinions that rejected Brennan's analysis, and not a single one of them purported to join his opinion without qualification.[67] As a result, the case was held over for reargument the following term, after which Brennan abandoned the civil/criminal distinction himself, writing what ultimately became the Court's opinion reversing Garrison's conviction on the ground that the Louisiana statute did not require a finding of "actual malice" as that phrase had been defined in

[62]*Id.* at 14, *reprinted in* Justice Brennan, 1964 Term Histories 65.
[63]*Id.*
[64]*Id.*
[65]*Id.* at 10, *reprinted in* Justice Brennan, 1964 Term Histories 57.
[66]*See* LEVINE & WERMIEL, *supra* note 9, at 37–39.
[67]*See id.*

Sullivan.[68] Implicit in Brennan's opinion was the conclusion that criticism of public officials disseminated with actual malice could indeed be subject to both civil and criminal sanctions without offending the First Amendment.

The ramifications of the Court's resistance to Justice Brennan's initial formulation in *Garrison* have been tangible. Since that case was decided, although criminal libel prosecutions have been rare, they have continued. And, not surprisingly, in those cases, lower courts have rejected the very conclusion for which Brennan advocated in his initial draft opinion in *Garrison* – that is, that the "central meaning" of the First Amendment identified in *Sullivan* is incompatible with governmental authority to criminalize criticism of its officials and their conduct. Indeed, as one lower court has subsequently explained, criminal libel prosecutions aimed at published criticism of public officials can coexist with the First Amendment precisely because the actual malice requirement "insures that criminal charges will only be brought when it can be proven that the statement, whether phrased as an opinion or otherwise, is false" and that its author disseminated it with at least a reckless disregard for the probability that it was.[69]

GREENMOSS BUILDERS: PROTECTING NONMEDIA DEFENDANTS AND DEFENDING *SULLIVAN*

By 1984, two decades after *Sullivan* was decided, Justice Brennan had largely lost the ability to speak for the Court in defamation and related cases.[70] In the previous ten years, starting with Justice Lewis Powell's opinion for the Court in *Gertz*, the justices had decided eight such cases on their merits, and Brennan had participated in all but one of them.[71] In those seven, he was typically in the minority and, even when he was not, Chief Justice Warren Burger appeared to take pains to avoid assigning Brennan responsibility for writing on behalf of the Court.[72] In 1984, however, when the Court considered *Dun & Bradstreet, Inc. v.*

[68]Garrison v. Louisiana, 379 U.S.64, 74–75 (1964).

[69]Thomas v. City of Baxter Springs, 369 F. Supp. 2d 1291, 1298 (D. Kan. 2005).

[70]*See generally*, LEVINE & WERMIEL, *supra* note 9, at 126–236 (describing history of assignments in defamation cases over previous decade).

[71]The eight cases were *Herbert v. Lando*, 441 U.S. 153 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978); *Time, Inc. v. Firestone*, 424 U.S. 449 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Justice Brennan did not participate in the Court's deliberations or decision in *Landmark Communications*. *See* LEVINE & WERMIEL, *supra* note 9, at 180.

[72]*See* LEVINE & WERMIEL, *supra* note 9, at 230–31 (discussing assignment process).

Greenmoss Builders, Inc.,[73] it appeared that would change. Following what would be the first of two arguments in the case, with the chief justice undecided and Brennan at that point the Court's senior associate justice and seemingly in command of a majority, Brennan assigned himself to write the Court's opinion reversing the Vermont Supreme Court's decision to limit the reach of the decision in *Gertz* restricting awards of presumed and punitive damages to defamation actions brought against media defendants.[74]

When the case was finally decided some two years later, however, Justice Brennan would find himself in dissent, writing only on behalf of himself and three of his colleagues.[75] Although the Court's five-justice majority could not muster a single opinion explaining its conclusion, it nevertheless affirmed the decision below in favor of a defamation plaintiff against a credit reporting agency that had published a false report that it was bankrupt.[76] During the two Court terms that passed in the interim, however, Brennan produced not only a putative majority opinion that was never issued, but also a detailed defense of *Sullivan* itself that he would, at the request of one of his colleagues, delete with great reluctance from the dissenting opinion he ultimately filed in the public record.

The Unpublished Majority Opinion

Following what would become the first of two arguments in *Greenmoss Builders*, Justice Brennan circulated a draft majority opinion on May 29, 1984.[77] In it, he purported to hold that *Gertz*'s prohibition of "awards of presumed or punitive damages for false and defamatory statements absent a showing of knowing falsity or reckless disregard for the truth" extends to libel suits brought against both media and non-media defendants.[78] In so doing, he revisited the Court's 1971 decision in *Rosenbloom v. Metromedia, Inc.*,[79] the last case in which he had written on behalf of the Court, if only to announce its judgment in favor of the defendant. Although Brennan's own reasoning in *Rosenbloom* – that the

[73]472 U.S. 749 (1985).

[74]*See* LEVINE & WERMIEL, *supra* note 9, at 244. *See also* Lee Levine & Stephen Wermiel, *The Landmark that Wasn't: A First Amendment Play in Five Acts*, 88 WASH. U. L. REV. 1, 23 (2013).

[75]*Dun & Bradstreet*, 472 U.S. at 774 (Brennan, J., dissenting).

[76]*Id.* at 751 (Powell, J., plurality opinion).

[77]Justice Brennan, Draft Opinion One 1 (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.) (May 29, 1984) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[78]*Id.*

[79]403 U.S. 29 (1971) (Brennan, J., plurality opinion).

First Amendment requires that every defamation action arising from a publication about a matter of public concern be governed by the actual malice standard – had attracted the votes of only two of his colleagues and had been expressly rejected by a majority of the Court three years later in *Gertz v. Robert Welch, Inc.*,[80] in his putative majority opinion in *Greenmoss Builders*, Brennan seized the opportunity to explain that, "[d]espite the variety of views on liability" expressed in *Rosenbloom*, the Court's multiple opinions in that case reflected a "clear consensus for the conclusion that, at the very least, the First Amendment limits the availability of punitive damages awards in defamation actions brought by private parties."[81]

Hoping that his words would speak for the Court, Justice Brennan endeavored in his draft opinion in *Greenmoss Builders* to re-explain the relevant holding in *Gertz*, writing that, although the Court in that case "had no occasion to consider" whether "presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment," it did hold that "such damages could not be awarded" absent a showing of actual malice.[82] Building on the multiple reasons that Justice Powell had articulated in *Gertz* for this limitation, Brennan concluded that, "when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are the losers."[83] His opinion then proceeded to reject the notion that there is any relevant distinction to be made between media and nonmedia speakers in this regard, noting that "the fact that petitioner's information is 'specialized' or that its subscribers pay 'substantial fees' hardly distinguishes these reports from articles in many publications to which respondent would presumably attach the label 'media.'"[84]

Justice Brennan then turned to the heart of the matter, explaining why and how the First Amendment simultaneously protects the press and nonmedia speakers: "Recognizing the critical historical role played by the press in gathering and disseminating information for the benefit of the public, we have often emphasized the need for careful judicial scrutiny of government actions that impede the exercise of that function or that single out the press for different treatment."[85] By the same token, Brennan asserted, by "guaranteeing equal liberty of expression, the First Amendment furthers a central object of our constitutional

[80]418 U.S. 323 (1974).
[81]Justice Brennan, *supra* note 77, at 6.
[82]*Id.* at 8.
[83]*Id.* at 10.
[84]*Id.* at 12.
[85]*Id.* at 13.

scheme, to assure every member of society an equal right to dignity, respect, and the opportunity to participate in self-government."[86] As a result, he wrote:

> [T]he constitutional protections afforded speech depend on the nature, context, and function of the expressive activity at issue, not on the status or identity of the speaker. Accordingly, the rights of the institutional press, however defined, are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.[87]

Finally, Justice Brennan's opinion rejected the contention that the "character or content" of the speech at issue — that is, its putative status as "commercial speech" — deprived it of the First Amendment's protections.[88] Here, Brennan reminded his readers that "apart from identifying those limited types of unprotected expression" famously catalogued in *Chaplinksy v. New Hampshire*,[89] the Court had been quite clear that "judges, like other government officials, are not free to decide on the basis of their content which sorts of protected expression are in their judgment less 'valuable' than others."[90] In addition, he rejected the "commercial speech" argument on the ground that "the mere fact that petitioner's speech concerns commerce or business in itself provides no basis for altering the constitutional analysis."[91] As Brennan saw it, the so-called "commercial speech" doctrine, in contrast to the publication at issue in *Greenmoss Builders*, encompasses only expression that, by its terms, purports to "propose" a "commercial transaction" by relating "facts uniquely within the speaker's knowledge."[92]

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[86]*Id.* at 14.

[87]*Id.*

[88]*Id.* at 15.

[89]315 U.S. 568 (1942). *See also id.* at 571–72 ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" such as fighting words, obscenity, defamation and incitement, which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

[90]Justice Brennan, *supra* note 77, at 15. Most recently the Court has decided a series of cases endorsing Brennan's views in this regard and rejected invitations that it recognize additional categories of unprotected speech. *See, e.g.,* United States v. Alvarez, 131 S.Ct. 2537 (2012); Brown v. Entm't Merchants Ass'n, 131 S.Ct. 2729 (2011); United States v. Stevens, 130 S.Ct. 1577 (2010).

[91]Justice Brennan, *supra* note 77, at 19.

[92]*Id.*

The opinion was classic Brennan. He used the occasion of having what he thought was a solid five-vote majority to underscore the major values undergirding First Amendment protection in defamation cases and to bolster the foundations of *Sullivan* that had, perhaps, eroded some in *Gertz* and the cases that followed it. Two years shy of his eightieth birthday, Justice Brennan seemed mindful that he would not be on the Court forever and that opportunities to advance important constitutional values should not be missed. As it turned out, however, the opportunity that he thought had presented itself in *Greenmoss Builders* would ultimately be gone.

Defending Sullivan

By the following year, Justice Brennan had lost his grip on the majority he believed he had assembled in *Greenmoss Builders*. The primary reason for this reversal of fortune was that Justice Byron White, who had voted along with Brennan to reverse the judgment below in favor of the plaintiff at conference, had not only changed his mind after the case was reargued the following term, he had drafted a scathing separate opinion in which he announced that he had, during the preceding two decades, "become convinced that the Court struck an improvident balance" in *Sullivan* itself.[93] White's attack on *Sullivan* survived relatively unchanged in the opinion he ultimately published concurring in the Court's judgment in *Greenmoss Builders*.[94] The final version of the dissenting opinion that Brennan submitted does not contain any rebuttal to White's assault.[95] In fact, however, Brennan had prepared just a defense of *Sullivan* in the weeks after he received White's initial draft. In the end, Brennan deleted it at the insistence of Justice John Paul Stevens, who indicated to Brennan that, if it remained, he might have to disassociate himself from it.[96]

Justice Brennan's unpublished rejoinder to Justice White provides significant insights concerning both his ongoing commitment to what he had accomplished in *Sullivan* and his perception of the extent to which that accomplishment had been diminished by actual litigation experience in the two decades since the case was decided. Circulated

[93]Justice White, Draft Dissent One 5 (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.) (Jan. 25, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division). *See generally*, LEVINE & WERMIEL, *supra* note 9, at 19, 64–65.

[94]*See* 472 U.S. 749, 765 (a985) (White, J., concurring in judgment).

[95]*See id.* at 774 (Brennan, J., dissenting).

[96]*See* Levine & Wermiel, *supra* note 74, at 83–84 (citing Letter from Justice Stevens to Justice Brennan 1–2 (Mar. 21, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division)).

to his colleagues on March 20, 1985, Brennan's draft mounted a full-throated defense of *Sullivan*, which emphasized both the difficulty of litigating the issue of truth in a courtroom as well as a self-governing society's fear of designating any branch of government — including the judiciary — as an arbiter of political truth:

> Even if the erroneous assertion were not the inevitable companion of the truthful one in robust discourse, the difficulty of litigating the question of "truth" would, we suggested in *New York Times v. Sullivan*, still stand as a daunting deterrent. Our cases in the two decades since that decision bear out this perception about the judicial risks of a judicial test of truth. Often the spoken or written word will capture a judgment, inference or interpretation the "truth" of which is not readily susceptible to adjudication. "Truth" will often be a matter of degree or context. Particularly when we debate the unwisdom of a policy or political point of view, our perspective on "truth" will be colored by the shared assumptions of the day; often what seems truth is but fashion. . . . The amorphous essence of political "truth" creates the risk of erroneous imposition of liability, and thereby chills debate, even when a jury seeks to discharge its duty in good faith. When the speaker is unpopular and the jury hostile, a rule of law permitting the imposition of liability for mere inaccuracy gives the jury *carte blanche* to oppress.[97]

In this portion of his opinion, Justice Brennan took pains to elaborate the basis for his concern about making the government the final arbiter of truth:

> The aversion to a judicial test of political truth also reflects a related judgment about the propriety of vesting an organ of government with such powers to say what the truth is. . . . When we entrust to courts, to the government, the unfettered power to resolve ambiguous questions about the truth of political expression we cede a measure of our individual liberty and right of self-government and hazard a regime of imposed orthodoxy. . . . Sharp criticism and free trade in political ideas does not guarantee the discovery of political truth, but our Constitution embodies the judgment that it is far better to risk error than suffer tyranny.[98]

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[97]Justice Brennan, Draft Opinion Four 7–8 (Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.) (Mar. 20, 1985) (on file with the Powell Papers, Washington and Lee Law Library), *available at* http://wlu.edu/powellarchives/page.asp?pageid=1355.

[98]*Id.* at 8–9.

Although his draft did not mention or otherwise discuss either case specifically, it seems obvious that Justice Brennan had in mind the trials in *Westmoreland v. CBS, Inc.*[99] and *Sharon v. Time, Inc.*[100] These defamation cases, which had then only recently concluded in New York, had spawned much discussion and criticism of the role of *Sullivan* in those extraordinarily expensive examples of litigation viewed by many as designed to yield a definitive "verdict" on the "truth" of issues such as the propriety of U.S. involvement in Vietnam and the Israeli incursion into Lebanon.[101] It is, indeed, difficult to read Brennan's opinion and not conclude that he was, at the same time, attempting both to rebut Justice White's attack on *Sullivan* and to explain how it had since been misperceived by litigants and misconstrued by courts:

> Nor would a shift in emphasis from proof of defendant's state of mind to proof of the truth of the challenged speech reduce the chilling effect of litigation costs. Allegations of libel will often raise difficult historical or policy questions that can only be answered through complex, and consequently expensive, litigation. The would-be critic will be deterred not only by the cost of his or her own attorney fees but also by the prospect of liability for the other side's fees if the jury verdict is unfavorable. And this approach adds incremental deterrence because it encourages public officials to sue to vindicate their reputations and thereby increases the number of libel suits a would-be critic will be faced with defending. Thus the suggested alternative would result in more suits and more victories for plaintiffs and would not significantly reduce the deterrent potential of damages that could be awarded in these suits.[102]

As noted, because of Justice Stevens' reluctance to join an opinion expressing these views, Justice Brennan would never have an opportunity to share them publicly. If he had, even though he was not purporting to speak for the entire Court, the observations of the author of *Sullivan* on the efficacy of defamation actions such as *Westmoreland* and *Sharon* might well have influenced the lower courts' treatment of other politically charged, high profile cases that have inevitably followed them.

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[99]601 F. Supp. 2d 66 (S.D.N.Y. 1984).

[100]599 F. Supp. 2d 538 (S.D.N.Y. 1984).

[101]*See* Levine & Wermiel, *supra* note 74, at 41 n.225 (citing Michael Massing, *The Libel Chill: How Cold Is It Out There?*, COLUM. JOURNALISM REV., May-June 1985, at 31, 43; ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR THE REFORM OF LIBEL LAW: THE REPORT OF THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM (1988); Rodney Smolla & Michael Gaertner, *The Annenberg Libel Reform Proposal: The Case for Enactment*, 31 WM. & MARY L. REV. 25, 26 (1989)).

[102]Justice Brennan, *supra* note 97, at 11–12.

THE CONFERENCE MEMORANDA

Justice Brennan served on the Court for just six years after it began its consideration of *Greenmoss Builders*, during which the justices decided nine defamation and related cases. As in the preceding decade, Brennan was not assigned to write on behalf of the Court in any of them. Thus, his publicly known views with respect to their merits are revealed only in his votes (he voted with the Court's majority seven times) and in the separate opinions he wrote occasionally in his own name (in all, he authored two concurring opinions and two dissenting opinions during this period).[103]

At about the same time, however, Brennan began a practice of preparing, in advance of each of the Court's conferences at which the justices would consider the cases on which they had heard argument in the preceding days, a written memorandum setting forth his views with respect to each case then under consideration. As he approached his eightieth birthday, Brennan reportedly took to reading these memoranda aloud to his colleagues during their deliberations.[104] From them, we can glean, in Brennan's own words, his take on the issues before the Court in each of these cases.

Keeton v. Hustler Magazine, Inc. *and* Calder v. Jones

During the time that *Greenmoss Builders* was pending before the Court, the first two cases in which Justice Brennan prepared conference memoranda were *Keeton v. Hustler Magazine*[105] and *Calder v. Jones*,[106] two cases that raised the issue of whether the First Amendment, as construed in *Sullivan* and its progeny, limited a state's power to assert personal jurisdiction over a defamation defendant who resided in a different jurisdiction. The memorandum that Brennan had his clerks

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[103]Brennan joined the Court's majority in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Philadelphia Newspapers. Inc. v. Hepps*, 475 U.S. 767 (1986); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); and *Calder v. Jones*, 465 U.S. 783 (1984). He wrote dissenting opinions in *Milkovich v. Lorain Journal Co.*, 474 U.S. 953 (1990), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and separate concurring opinions in *Hepps*, in which he also joined the Court's opinion, and in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), in which he concurred only in the Court's judgment.

[104]*See supra* note 8.

[105]465 U.S. 770 (1984).

[106]465 U.S. 783 (1984).

prepare for him for use at conference in *Keeton*[107] – in which a defamation plaintiff who did not reside in New Hampshire sought to litigate a claim there against a nonresident publisher who circulated only a few copies of its national magazine in the jurisdiction – reveals that he told his colleagues that he did "not think that there is any doubt that there is jurisdiction in this case."[108] Not only did "Hustler purposefully distribute[] its product in the forum state," but Brennan thought it was "clear that New Hampshire has an interest in compensating the plaintiff for her New Hampshire damages and in preventing the distribution of a libelous publications [*sic*] within its borders."[109] As Brennan saw it, the publisher's "real argument stems from an objection to the application of New Hampshire's statute of limitations to the damages that were not suffered in New Hampshire."[110] With respect to that, Brennan asserted, "[T]his is a choice of law question that has no place in the analysis of whether due process rights are violated by the exercise of jurisdiction."[111] In addition, Brennan concluded that, the publisher's objections notwithstanding, "I do not think that there is any constitutional prohibition against forum shopping."[112] And, most importantly, Brennan wrote, "I also do not think that first amendment considerations should form a part of [the] due process analysis that is required to determine whether there is jurisdiction. . . . Certainly, the exercise of jurisdiction is not itself a violation of the first amendment."[113]

Similarly, in *Calder*, in which a reporter and editor located in Florida objected to the exercise of personal jurisdiction over them by a California court in a defamation action brought by two California residents, Justice Brennan's written memorandum asserts that

> I have little trouble affirming the California Court of Appeal and finding personal jurisdiction in this case. The state of California's interests in protecting its citizens from defamations, invasions of privacy, and intentional inflictions of emotional distress is quite strong. And the plaintiff's connections to the forum are also quite compelling — she both lives and

[107]Memorandum from Justice Brennan for the Conference, *Keeton v. Hustler Magazine, Inc.* (undated) (on file with the Brennan Papers, Library of Congress Manuscript Division).
[108]*Id.* at 1–2.
[109]*Id.*
[110]*Id.*
[111]*Id.*
[112]*Id.*
[113]*Id.*

> works primarily in California, and the importance of her reputation in that state is self-evident.[114]

Brennan's memorandum noted that he similarly had "little trouble" in finding the individual defendants' "connections with the forum" sufficient for personal jurisdiction:

> The reporter, it was found, made various investigative phone calls into the state, made a specific call to one of the plaintiffs below in which he read the disputed article, and made at least one trip into the state for the purpose of this article. The editor/president was charged with general supervision of the magazine, edited the particular article in question, and later refused to retract the article. Most importantly, both defendants knew that the article would have a substantial impact in California, and thus the foreseeable effect of the article supports California's jurisdiction in this case.[115]

At the conclusion of his memorandum, Brennan added, as he had in the analogous writing he had prepared for *Keeton*, that, "assuming the issue must be reached, I do not believe that the first amendment should require any different analysis of the due process issue."[116]

In all of this, Justice Brennan's analysis dovetailed with the opinions for the Court that he joined. And, they reveal that, at least in the context of assessing personal jurisdiction, Brennan's agreement with those opinions extended beyond the reach of the Fourteenth Amendment's due process clause to include an express rejection of the proposition, advocated by the defendants in *Keeton* and *Calder*, that the First Amendment provides them a measure of protection from having to incur the expense of defending suits in foreign jurisdictions.

Bose Corp. v. Consumers Union

In another case decided that same year, however, Justice Brennan expressed a very different view of the role of the First Amendment in influencing the procedural rules surrounding litigation of the substantive liability standard he had established in *Sullivan.* In a four-page memorandum he prepared for the Court's conference in *Bose Corp. v. Consumers Union*,[117] Brennan explained at some length why he believed

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[114]Memorandum from Justice Brennan for the Conference, *Calder v. Jones* 1 (undated) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[115]*Id.*

[116]*Id.*

[117]466 U.S. 485 (1984).

that Rule 52 of the Federal Rules of Civil Procedure notwithstanding, appellate courts have a constitutional responsibility to undertake an "independent review" of a trial court's finding of actual malice and determine whether such a determination could be squared with the First Amendment.[118] Specifically, Brennan's memorandum asserted that the "answer" to the question presented in *Bose* "is controlled by *New York Times v. Sullivan* and its progeny, which on numerous occasions have recognized that an appellate court must undertake *an independent review of the evidentiary basis* for the lower court's findings of actual malice."[119] According to Brennan, this "consistent practice ... is justified by several interdependent reasons":

> First and most importantly, in cases applying the *New York Times* standard, we have properly imposed a "clear and convincing" burden of proof on the plaintiff. ... "[T]he importance of 'clear, unequivocal, and convincing' proof ... would be lost if the ascertainment by the lower courts whether the exacting standard of proof had been satisfied on the whole record were to be deemed a 'fact' of the same order as all other 'facts,' not open to review here." Whether the proof offered by a plaintiff is sufficient to meet a clear and convincing standard, therefore, is an issue of law subject to review on appeal. Second, the actual malice standard, as well as the knowledge of falsity which is equated with that standard, are issues of ultimate fact (i.e., mixed questions of law and fact) which also deserve heightened scrutiny from appellate courts. ... Finally, when applying the *New York Times* standard, we are concerned with potential infringement of first amendment rights. The solicitude we pay to first amendment values is most evident in the application of the clear and convincing standard, and is another interrelated reason for subjecting the findings made below to careful scrutiny.[120]

In Justice Brennan's view, the *Bose* case, "[B]ecause it combines each of these factors — a clear and convincing burden of proof, the actual malice standard, and review of constitutional facts — is quite simple, and is directly controlled by" *Sullivan.* As a result, Brennan's memorandum concluded:

> I would affirm the First Circuit because it properly undertook an independent review of the evidentiary basis for the finding of actual malice.

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[118]Memorandum from Justice Brennan for the Conference, *Bose Corp. v. Consumers Union* 1–2 (undated) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[119]*Id.* (emphasis in original).

[120]*Id.* (citation omitted).

> In so doing, the court may have misspoke when it stated that a *de novo* review was in order. But it properly noted that, at least to the extent that the independent review mandated by *New York Times* is inconsistent with the "clearly erroneous" standard, then Rule 52 does not apply. Moreover, the court properly recognized that it must pay due regard to credibility determinations made by the trial judge, and that these should control unless they are clearly erroneous.[121]

In a footnote to his memorandum, Justice Brennan took on concerns that had been expressed by Justices White and Rehnquist about the First Circuit's reference to the propriety of *de novo* review of the trial court's finding of actual malice. According to the memorandum:

> If *de novo* review was appropriate, the appellate court would start with the evidence and make its own findings of fact and conclusions of law. Under the "independent review" standard, the appellate court starts with the findings of fact and conclusions of law made by the trial judge, and simply ensures that there is record evidence to support those findings by, in this case, clear and convincing proof. Moreover, when doing independent review, the appellate court must pay due regard to credibility findings unless they are clearly erroneous.[122]

The analysis reflected in Justice Brennan's memorandum is largely consistent with the Court's opinion, which Brennan joined without qualification. Brennan, however, was apparently deprived of the opportunity to speak on behalf of the Court itself by Chief Justice Burger, who – although he ultimately did not join the Court's opinion and concurred, without explanation, only in the judgment – assigned responsibility for drafting the opinion to Justice Stevens.[123] It has been reported that Brennan was less than pleased with this, apparently believing that, as the author of *Sullivan* itself, he ought to have represented the Court in reaffirming a key portion of it – the independent review requirement – on its twentieth anniversary.[124]

Anderson v. Liberty Lobby, Inc.

Whatever affinity Justice Brennan expressed in *Bose* for the role of appellate judges in scrutinizing trial court findings of actual malice did

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[121] *Id.* at 2.
[122] *Id.* at 2 n. 1.
[123] *See* LEVINE & WERMIEL, *supra* note 9, at 230–31.
[124] *Id.*

not carry over to the responsibility of trial judges themselves to make an analogous assessment of the record evidence when considering a defendant's motion for summary judgment in a defamation action. Indeed, Brennan both dissented from Justice White's opinion for the Court in *Anderson v. Liberty Lobby*[125] and wrote an opinion that largely explained the basis for his views.[126] In the separate conference memorandum he prepared in the case, however, Brennan expanded on the reasoning set forth in that published dissent.[127] In his memorandum, Brennan wrote that "a plaintiff defeats a defendant's motion for summary judgment by producing some — i.e., any — evidence of every element which he must prove to win at trial."[128] In Brennan's view, a plaintiff must only "make out a *prima facie* case with admissible evidence" and "is required to do no more." Thus, Brennan wrote:

> The judge does not weigh the evidence produced, for the simple reason that the factfinder is entitled to believe or disbelieve, credit or discredit the witnesses and the evidence as he sees fit. In other words, the jury may believe the admitted perjurer and disbelieve the 100 bishops. Since in my view of summary judgment the weight to be afforded the evidence is not material, the ultimate burden of proof is similarly irrelevant at that stage of the proceeding.[129]

In this, as in his published opinion in *Liberty Lobby*, Brennan appeared to be influenced less by the fact that the issue arose in the context of a defamation action than by his concern that, across the run of civil litigation, summary judgment ought not be employed as a tool to deprive plaintiffs of their day in court. Thus, in his unpublished conference memorandum, Brennan emphasized that, if his "view of summary judgment" did not

> [C]ommand a Court — were we, in other words, to permit or require a judge to assess or weigh the evidence on motion for summary judgment — then, for the sake of consistency, I would think that we *would* require the ultimate burden of proof to be a part of that determination of whether a trial is necessary.[130]

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[125]477 U.S. 242 (1986).

[126]*Id.* at 257 (Brennan, J., dissenting).

[127]Memorandum from Justice Brennan for the Conference, *Anderson v. Liberty Lobby, Inc.* (undated) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[128]*Id.*

[129]*Id.*

[130]*Id.* (emphasis in original).

In that event, Brennan explained, while he did "not think that the First Amendment should get 'special treatment' at the summary judgment phase," it "should also not be penalized." Accordingly, he said, "If we 'put teeth' into summary judgment motions for the benefit of, e.g., anti-trust defendants concerned with strike suits, we ought to let those teeth bite on behalf of the press as well."[131]

Finally, and in this last regard, Brennan sought to remind his colleagues that, in *Calder*, "[A]ll nine of us joined in an opinion which suggested that to grant libel defendants special protections over and above the substantive protections provided by *New York Times, Inc. v. Sullivan* [sic], *Gertz,* etc., would be a form of 'double counting,'" and, in so doing, had "specifically referred to summary judgment. . . . I see no reason at this time to depart from that analysis."[132] Once again, although Brennan never expressed these sentiments in a published opinion, he took pains to emphasize in his conference memorandum, as he had in *Calder* and *Keeton*, his general view that the First Amendment does not provide special "procedural" protections to defamation defendants separate and apart from the substantive liability standard he had crafted in *Sullivan.* The trick, as the next case the Court would consider demonstrated, was ascertaining whether the species of protection claimed in a given case was, as he had apparently concluded in *Bose*, "substantive" or, as he determined in *Keeton*, *Calder* and *Liberty Lobby*, it was properly characterized as "procedural."

Philadelphia Newspapers, Inc. v. Hepps

In the years that followed *Greenmoss Builders*, Justice Brennan did have more than one opportunity to write on the Court's behalf, including in *Philadelphia Newspapers, Inc. v. Hepps*,[133] the next defamation case to come before the justices following *Liberty Lobby.* In *Hepps*, which raised the issue whether the First Amendment requires that a so-called "private" defamation plaintiff (a plaintiff who is neither a public figure nor a public official) assume the burden of proving falsity, Brennan again found himself to be the senior justice in the majority in a case in which the chief justice dissented. Nevertheless, he assigned the Court's opinion to Justice Sandra Day O'Connor, who had changed her vote following the Court's conference and thereby provided Brennan with a slender 5–4 majority for a decision holding that the First Amendment did in fact shift the burden of proof, even when the plaintiff was not

[131] *Id.*
[132] *Id.*
[133] 475 U.S. 767 (1986).

a public person.[134] To maximize the likelihood that O'Connor would stay on board, Brennan relinquished the pen and asked her to write on behalf of the Court. In the end, Brennan joined O'Connor's opinion and submitted only a brief concurrence of his own, emphasizing – despite a footnote in O'Connor's opinion at least suggesting otherwise – his view in *Greenmoss Builders* that the burden would not vary if the defendant had not been a media entity.[135] Once again, however, his more detailed views on the merits of the case are set out in the memorandum he prepared for the Court's conference following argument.[136]

In that memorandum, Brennan invoked Justice Powell's reasoning in *Greenmoss Builders*, beginning his discussion by noting "there is no question that the contested statements were of significant public concern" and, therefore, constituted the kind of expression to which Powell and the plurality on whose behalf he wrote in *Greenmoss Builders* would afford the full array of substantive protections set out in *Sullivan* and *Gertz*.[137] Accordingly, Brennan wrote:

> If the Court were to affirm the Pennsylvania Supreme Court, it would approve a statutory scheme that permits the imposition of substantial liability on the press for publishing some true statements and that doubtlessly deters the press from publishing other true statements, the truth of which may be difficult to prove in court. In my view, the Constitution mandates that the burden of proving the truth or falsity of a defamatory statement be allocated in a way that minimizes the risk that truthful speech regarding matters of public concern will be penalized or chilled. That means that the plaintiff must be required to prove falsity. The common-law rule, codified by the State of Pennsylvania, is constitutionally unacceptable because it causes close cases to be resolved in favor of the falsity of the statement. It thus must result in the penalization of some true speech and certainly must deter far more.[138]

For Brennan, therefore, there seemed no question that the burden of proof was a "substantive" protection that did not constitute the kind of "double counting" against which he had cast his vote in *Calder, Keeton* and *Liberty Lobby.*

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[134]*See* LEVINE & WERMIEL, *supra* note 9, at 295.

[135]475 U.S. at 779 (Brennan, J., concurring).

[136]Memorandum from Justice Brennan for the Conference, *Philadelphia Newspapers, Inc. v. Hepps* (Dec. 6, 1985) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[137]*Id.*

[138]*Id.*

Hustler Magazine, Inc. v. Falwell

Some two years later, following argument in *Hustler Magazine v. Falwell*,[139] Justice Brennan was pleasantly surprised when the Court's new chief justice, William Rehnquist, indicated at conference that the judgment below – awarding damages to the Reverend Jerry Falwell in an action for the intentional infliction of emotional distress he had instituted against *Hustler* magazine despite a jury finding that the advertising parody published in *Hustler* on which it was based was not false – ought to be reversed. Still, the chief justice, at least as of the time of the conference, purported to reach this conclusion without regard to either the reasoning or holding in *Sullivan*.[140] In his conference memorandum, however, Brennan left little doubt that, although he agreed with Rehnquist about the proper result and with much of his reasoning, he differed in one significant respect.[141] As he wrote at the time:

> [T]his case is squarely controlled by *New York Times v. Sullivan*. The point of *New York Times* is that since *false* speech has little value, we will permit libel suits to proceed, but only when the plaintiff can demonstrate that the false speech was made with "actual malice." The speech in question here could not have reasonably been understood to constitute a statement of fact. There is an unappealed jury finding holding as much. The advertisement at issue was, at worst, tasteless hyperbole. I would nevertheless find it protected by the First Amendment. If we allow this suit to proceed, I fear that every political cartoon and every parody could be scrutinized by a jury for a determination of the motive behind it. The chilling effect would be intolerable.[142]

Ultimately, Chief Justice Rehnquist produced an opinion for the Court in *Falwell* that grounded its reversal of the judgment in the reverend's favor squarely in *Sullivan* itself.[143] Justice Brennan joined the Court's opinion enthusiastically and later told his biographer that, for writing what he described as a "remarkable" opinion in *Falwell*, the press "ought to kiss" the new chief justice.[144] In *Falwell*, Brennan said, Rehnquist had "wipe[d] away with one opinion all the reasons for concern that so many

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[139]480 U.S. 945 (1987).

[140]*See* LEVINE & WERMIEL, *supra* note 9, at 305.

[141]Memorandum from Justice Brennan for the Conference, *Hustler Magazine v. Falwell* (Dec. 4, 1987) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[142]*Id.*

[143]480 U.S. at 51.

[144]LEVINE & WERMIEL, *supra* note 9, at 308..

people have had ... about *New York Times* and *Sullivan.*"[145] And, in so doing, he had largely followed the blueprint presented to him by Brennan's conference memorandum.

Harte Hanks Communications, Inc. v. Connaughton

It appears that Justice Brennan again had the opportunity, the term following *Falwell*, to assign himself the majority opinion in *Harte Hanks Communications, Inc. v. Connaughton.*[146] In that case, he voted with a majority of his colleagues at conference to reverse a decision that purported to restrict an appellate court's "independent review" of a jury verdict to the "ultimate" finding of actual malice and to oblige that court to base its review on any facts supporting that conclusion that the jury "could" plausibly have found. In his conference memorandum, Brennan explained:

> Under *New York Times* and *Bose*, the reviewing court must undertake an independent review of the entire record on the question of actual malice. This standard does not bar it from resolving disputed questions of what we have sometimes called "historical fact" in the direction of the jury verdict. But deference to hypothetical findings the jury *could have* made does not constitute the independent review that is required under *New York Times.* I think we must correct [the court of appeals] on this point and remand for application of the correct standard.[147]

Perhaps because the case followed the relatively recently decided *Bose*, Justice Brennan may have determined that it made the most sense to assign the majority opinion to Justice Stevens, the author of the Court's opinion in that case. Whatever the reason, Brennan's decision turned out to have significant consequences. Although Stevens ultimately wrote an opinion that took some pains to distance the Court from the lower court's reliance on hypothetical facts the jury "could" have found, he did not follow Brennan's lead and "remand for application of the correct standard." Rather, based on his own review of the trial testimony, Stevens concluded that the record contained sufficient evidence of actual malice to sustain the jury's verdict and wrote a lengthy opinion explaining why.[148] His analysis of the evidence ultimately

[145]*Id.*

[146]491 U.S. 657 (1989).

[147]Memorandum from Justice Brennan for the Conference, *Harte-Hanks Commc'ns v. Connaughton* (Mar. 22, 1989) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[148]*See* 491 U.S. at 668–86.

attracted the votes of all of his colleagues, including Brennan. Thus, what had been, following conference, a 5–4 decision reversing the judgment below became a unanimous decision affirming it, albeit on different grounds closer to those advocated by Brennan in his conference memorandum. Whether, if he had assigned himself responsibility for crafting the Court's opinion, Brennan would have stuck to the approach taken in his conference memorandum and simply remanded the case back to the court of appeals to reprise its independent review of the jury's verdict under the proper standard, is largely unknowable. If he had, however, the decision would likely have been viewed more as a strong reaffirmation of the kind of "independent review" Brennan described in his conference memorandum, and less as the Court's first decision affirming a jury finding of actual malice in a defamation case since *Curtis Publishing Co. v. Butts*[149] more than twenty years earlier.

Florida Star v. B.J.F.

Justice Brennan apparently controlled the Court's assignment authority one final time in a *Sullivan*-related case in *Florida Star v. B.J.F.*,[150] an invasion of privacy action based on the publication by a newspaper of the identity of a rape victim gleaned from a document made available to the press by law enforcement officials. At argument, much of the questioning centered on whether the case was governed by *Cox Broadcasting Corp. v. Cohn*,[151] decided some fifteen years earlier, in which the Court had reversed a judgment against a television station for similarly broadcasting the name of the victim of a sexual assault. In his conference memorandum, Brennan acknowledged that *Cohn* "does not completely control the result in this case." Nevertheless, he reasoned that "it comes close to doing so."[152] Thus, Brennan concluded:

> I do not think we need go as far as the newspaper asks, and say that the First Amendment entails that the publication of truthful information can never be forbidden. But I do think we might follow Justice Stewart's concurring opinion in *Landmark Communications, Inc. v. Virginia*, where he said that "though government may deny access to information and punish its theft, government may not prohibit or punish the publication

[149]388 U.S. 130 (1967).

[150]491 U.S. 524 (1989).

[151]420 U.S. 469 (1975). *See also* LEVINE & WERMIEL, *supra* note 9, at 322–25 (describing argument in *Florida Star*).

[152]Memorandum from Justice Brennan for the Conference, *Fla. Star v. B.J.F.* (Mar. 24, 1989) (on file with the Brennan Papers, Library of Congress Manuscript Division).

> of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming."[153]

In his memorandum, Justice Brennan asserted, the Court had come "very near to adopting that test in *Cox*, since we said that it was up to government to protect whatever privacy interests there were to be protected in judicial proceedings, not up to the press."[154] In Brennan's view, "This is a case about who should bear the liability for the harm resulting from the release of personal, embarrassing, possibly dangerous information" and the "First Amendment favors a bright-line rule holding the government accountable and leaving the press free to publish."[155]

Following the conference, with Chief Justice Rehnquist in dissent, Justice Brennan assigned the Court's opinion to Justice Thurgood Marshall, his steady ally and good friend.[156] The opinion that Marshall produced largely mirrored the views that Brennan expressed in his conference memorandum and, not surprisingly, Brennan joined it without qualification or additional comment.[157]

Milkovich v. Lorain Journal Co.

The last defamation action on which Justice Brennan would sit as an associate justice of the Supreme Court was *Milkovich v. Lorain Journal*,[158] the case in which Chief Justice Rehnquist, again writing for the Court as he had in *Falwell*, would reject the lower courts' invocation of Justice Powell's *dicta* in *Gertz* as a basis for exempting "opinions" from defamation liability. Brennan dissented in *Milkovich*,[159] in an opinion in which he attempted (and, as history would later reveal, largely succeeded) to signal lower courts that the kind of threshold analysis of the merits of defamation claims that they had undertaken in cases like *Milkovich* and *Ollman v. Evans* remained both necessary and proper.[160] In the four-page memorandum he prepared for the Court's conference

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[153]*Id.* (quoting Landmark Commc'n, Inc. v. Virginia, 435 U.S. 829, 849 (1978) (Stewart, J., concurring in judgment)).

[154]Memorandum from Justice Brennan, *supra* note 151.

[155]*Id.*

[156]*See* LEVINE & WERMIEL, *supra* note 9, at 327.

[157]*See* 491 U.S. at 533–35.

[158]497 U.S. 1 (1990).

[159]*Id.* at 23 (Brennan, J., dissenting).

[160]*See* LEVINE & WERMIEL, *supra* note 9, at 338–39. *See also supra* note 46 (citing subsequent cases).

following argument,[161] Brennan explained that his "approach to this question is as follows: we have held that it is a constitutional requirement that the plaintiff has to prove a statement false to recover for libel."[162] For Brennan, "That means that 'what the actual statement was' is a fact on which the defendant's constitutional right hinges."[163] As a result, Brennan wrote, "the factors discussed" in cases like *Ollman* "are useful in evaluating what a reasonable reader would think he was reading."[164] And in a passage that mirrored the by then long forgotten first draft of his opinion for the Court in *Sullivan*, Brennan asserted that, "to determine how the reasonable reader would understand" published statements, "it is necessary to consider them in context."[165]

Turning to the facts of the *Milkovich* case, in which a newspaper's sports columnist had at least implied that the plaintiff, a high school wrestling coach, had lied under oath, Justice Brennan concluded that "the reasonable reader would view this column, read as a whole, as saying: 'I wasn't there but I figure Milkovich must have lied in court to get this result.'"[166] Still, Brennan took pains to note, "I agree with those of you who are dismayed by unfounded character assassination. But as long as it's clear to the reader that character assassination rather than solid information is what the reader is being offered, I don't think there is any call to quash public debate."[167]

In the end, none of Justice Brennan's colleagues – other than Justice Marshall – agreed with him about the application of the contextual inquiry that he (and, as it turned out, Chief Justice Rehnquist and the rest of the Court) deemed necessary. Nevertheless, in the last analysis, it appeared that the entire Court had endorsed the view that he had first expressed in the very first draft of an opinion he had ever written in a defamation case more than a quarter century earlier – his assertion in the uncirculated initial draft of his opinion in *Sullivan* itself that the First Amendment requires courts to make a threshold, contextual inquiry and make its "own judgment whether the statements complained of . . . are capable of bearing a defamatory meaning."[168]

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[161]Memorandum from Justice Brennan for the Conference, *Milkovich v. Lorain Journal Co.* (Apr. 27, 1990) (on file with the Brennan Papers, Library of Congress Manuscript Division).

[162]*Id.*

[163]*Id.* (citation omitted).

[164]*Id.*

[165]*Id.*

[166]*Id.*

[167]*Id.*

[168]LEWIS, *supra* note 6, App. 1 at 20–21.

CONCLUSION

There is no doubt that Justice Brennan dramatically altered the face of the law of defamation with what he wrote on the public record in *New York Times Co. v. Sullivan.*[169] Remarkably, the transformation of that body of law, from a field that was entirely the province of the laws of the fifty states to one heavily regulated by the First Amendment, survived the many attempts within the Court spanning the next twenty-five years to undermine or even overrule *Sullivan.*[170] That said, the Brennan-inspired legacy would have been more substantial still if he had been able to prevail in some of the legal theories he advanced in opinions that never became part of the law. As this review of his unpublished opinions and memoranda has shown:

- Justice Brennan dropped a critical element from the first draft of his opinion for the Court in *Sullivan* that would have required a judge to consider whether the publication sued upon in each case was capable of a defamatory meaning that offended the First Amendment. This would have been an important practical step, not to mention a clear signal to judges that they are obliged to conduct a nuanced, contextual analysis of the alleged libel in every case before allowing it to proceed to expensive, time-consuming and often burdensome civil discovery and a trial.
- Justice Brennan was unable to persuade a majority of the Court in *Garrison v. Louisiana*[171] that criticism of government and public officials, even when outlandish, false and defamatory, should not be the basis for a criminal prosecution. Had Brennan prevailed, the protection for criticism of government and public officials would be more deeply entrenched in the meaning of the First Amendment and criminal prosecutions for libels of public officials (and almost certainly public figures as well) would now be extinct.
- In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[172] Justice Brennan lost control of a fragile majority and with it the opportunity to clarify the role and availability of damages in defamation cases and to establish once and for all that First Amendment principles apply equally to media and nonmedia defendants in such lawsuits. In the same case, he was unable to persuade Justice John Paul Stevens to

[169]376 U.S. 254 (1964).
[170]*See, e.g.,* LEVINE & WERMIEL, *supra* note 9, at 237–78.
[171]379 U.S. 64 (1964).
[172]472 U.S. 749 (1985).

agree to publication of a strong defense of *Sullivan*, a chance to underscore the doctrinal underpinnings of the decision and to rebut what was then an avalanche of criticism of its practical consequences.

In these and other cases, Justice Brennan's vision of the First Amendment's guarantees of free speech and a free press went beyond what he was able to convince the Court to embrace. His failure to advance some of these important ideas beyond the pages of unpublished opinions and memoranda leaves the First Amendment at least somewhat less robust than if he had succeeded. Nevertheless, Brennan's role in establishing the vitality of the First Amendment remains one of the most important intellectual contributions in American history to the cause of "uninhibited, robust and wide-open debate" in a democratic society.[173]

[173]*Times v. Sullivan,* 376 U.S. at 270–71.