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The Ongoing Challenge to Define Free Speech [comments]

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DEFAMATION AND PRIVACY IN THE SOCIAL MEDIA AGE: WHAT WOULD JUSTICE BRENNAN THINK?

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United States Supreme Court Justice William J. Brennan, Jr. never touched a computer keyboard. He never posted on Facebook, never sent a Tweet, never read a text message.[1] When he retired from the Court in 1990,[2] the words "social" and "media" were not yet a recognized couple.

During his Supreme Court tenure of nearly thirty-four years,[3] Brennan was a leading voice to advance broad First Amendment protections for speech and for the news media.[4] As University of Chicago law professor Geoffrey Stone has written:

> At the time of Justice Brennan's retirement . . . the Court's free speech doctrine was far richer, more subtle, and more speech-protective than ever before in our nation's history. Justice Brennan, it is fair to say, was the primary architect of this revolution in our understanding of the freedom of speech.[5]

Yet the realm of communications in cases that Brennan faced was a very different one than today's world. Brennan never had to deal with protection for news reports that could be spread to millions of people worldwide in seconds. He never had to decide whether blogs should be treated the same as newspapers and television news. He never had to confront the impact for First Amendment purposes of endless hours of news talk shows hosting

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[1] This statement is based on the author's own experiences and observations while working on an authorized biography of Justice Brennan between 1986 and 1997.

[2] Brennan retired on July 20, 1990. *See* Andrew Glass, *Brennan resigns from Supreme Court, July 20, 1990*, POLITICO (July 20, 2016, 12:01 AM), https://www.politico.com/story/2016/07/brennan-resigns-from-supreme-court-july-20-1990-225680.

[3] Brennan served from October 15, 1956 to July 20, 1990. *See William J. Brennan, Jr.*, OYEZ, https://www.oyez.org/justices/william_j_brennan_jr (last visited Apr. 26, 2018); Glass, *supra* note 2.

[4] *See* Lee Levine & Stephen Wermiel, THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *NEW YORK TIMES V. SULLIVAN* (ABA Publishing 2014); *see also* Seth Stern & Stephen Wermiel, JUSTICE BRENNAN: LIBERAL CHAMPION (Houghton Mifflin Harcourt 2013).

[5] Geoffrey R. Stone, *Justice Brennan and the Freedom of Speech: A First Amendment Odyssey*, 139 U. PA. L. REV. 1333, 1333 (1991).

highly opinionated, often polemical discussions and commentaries. He never had to face questions of privacy that involved Facebook posts, Snapchat photos, Twitter messages, or YouTube videos.

Would this world of instant social media messaging have changed Brennan's mind? Would he have rethought his commitment to vigorous protection for freedom of speech and freedom of the press, knowing the ease and speed with which false or harmful information can be transmitted and the wide audience that can be reached?

It is impossible, of course, to answer these questions with any certainty, and so this discussion will be brief. Brennan died in 1997. This essay will attempt to extrapolate from Brennan's opinions how he might have approached the world of social media and the digital age.

What was Brennan's vision? Brennan believed that the First Amendment was an essential foundation to democracy, a guarantee that ideas could be freely exchanged, and that citizens could criticize their government without fear of censorship or reprisal. As he famously wrote in *New York Times Co. v. Sullivan*,[6] "[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, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[7]

In that case, Brennan said that the First Amendment protects public and news media criticism of public officials, prohibiting recovery for libel damages unless the official can show that a false statement was made with actual malice, which Brennan described as either knowledge of the falsity or reckless disregard for the truth or falsity.[8] This test would foster the discussion of public affairs, Brennan believed.

Some years later, concluding that burning the American flag was a form of protected expression, Brennan wrote, "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[9]

Brennan did not limit his vision of the importance of freedom of speech and press to politics or speech about public affairs. By the late 1960's, Brennan understood and advanced the idea that freedom of the press included the ability to publish details about social, cultural and other events, even when they bordered on more private matters. He saw a close connection between this type of publishing and the freedom of political speech essential to democracy. His most profound discussion of this view may have come in the case of *Time, Inc. v. Hill*.[10] The case involved a

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[6] 376 U.S. 254 (1964).
[7] *Id.* at 270.
[8] *Id.* at 279-80.
[9] Texas v. Johnson, 491 U.S. 397, 414 (1989).
[10] 385 U.S. 374 (1967).

claim of false light invasion of privacy against Life Magazine.[11] Brennan wrote:

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.[12]

Writing for a five-to-four majority, Brennan wrote that the news media needed protection even when sometimes making mistakes about facts.[13] At his behest, the Court adopted the same test it had used in *New York Times v. Sullivan*,[14] that liability against the news media requires the actual malice showing of either knowing falsity or reckless disregard for truth or falsity.[15] He wrote:

> We create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.
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> In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A

[11] *Time, Inc.*, 385 U.S. at 376-77.
[12] *Id.* at 388.
[13] *Id.* at 397.
[14] 376 U.S. 254 (1964).
[15] *Time, Inc.*, 385 U.S. at 387 (citing New York Times v. Sullivan, 376 U.S. 254 (1964)).

> broadly defined freedom of the press assures the maintenance of our political system and an open society.[16]

There is yet one more important facet of Brennan's First Amendment view that is worth noting here. The Supreme Court in the 1960's began to more actively develop and apply public forum analysis,[17] limiting free and open speech on public property to traditional locales like sidewalks and parks, and allowing government to restrict expression on other government property, either to specific purposes or to prohibit it altogether.[18]

Brennan was often in dissent in these cases.[19] His vision of the public forum called for a more open approach, envisioning the forum as facilitating speech rather than restricting it. As Professor Stone has written:

> In Brennan's view, a robust "marketplace of ideas" necessarily presupposes an expansive public forum right that guarantees access to a broad range of nonmainstream means of communication for the expression of unpopular and unorthodox ideas and opinions. As Brennan well understood, such an expansive approach is essential if we are to assure the breadth, diversity, and richness of the system of free expression.[20]

There is much more to Brennan's view of the First Amendment, but these key points provide a working framework to consider how Brennan might approach these issues in the world of instant social media messages.

Discussion of social media has not yet been a substantial preoccupation of the Supreme Court. There are only a few decisions that consider the impact of social media, and the lessons to be drawn from them require caution because the technology changes faster today than the law can.

The most thoughtful and far-reaching consideration of the role of social media is also the Court's most recent pronouncement on the issue, *Packingham v. North Carolina*.[21] The Court struck down a North Carolina law that broadly prohibited convicted sex offenders from accessing social networking sites like Facebook.[22] Writing for the Court, Justice Anthony

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[16] *Time, Inc.*, 385 U.S. at 389.

[17] The public forum doctrine was first developed in Hague v. CIO, 307 U.S. 496, 515-16 (1939).

[18] *See* Adderley v. Florida, 385 U.S. 39 (1966); Greer v. Spock, 424 U.S. 828 (1976).

[19] *See* Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 818 (1984) (Brennan, J., dissenting).

[20] Stone, *supra* note 5, at 1350.

[21] 137 S. Ct. 1730 (2017).

[22] *Id.* at 1733.

Kennedy viewed Facebook and similar social media sites as the contemporary equivalent of the sidewalk public forum of days past.[23] Justice Kennedy wrote, "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace . . . ."[24]

Explaining this view, Kennedy wrote:

> On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. . . In short, social media users employ these websites to engage in a wide array of protected First Amendment activity . . . .[25]

Brennan, it seems fair to infer, would have agreed with Kennedy. This seems apparent from the Brennan decisions quoted above. If Kennedy is correct that social media has become the new sidewalk and public park, the new public forum, then Brennan would have urged that these fora be viewed broadly to vigorously promote speech. This may answer, at least in theory, the question of how Brennan would view cyberspace in terms of forum analysis.

There remains the question of how Brennan would view privacy concerns that may be heightened by the speed and breadth of dissemination of information over various social media. Would his commitment to the spread of information and to open debate be dampened by the potential for greater harm from the scope of information spread over cyberspace?

It seems reasonable to conclude that Brennan would not have changed his views based on the volatile and potent nature of the Internet and social media. Brennan's opinion in *Time, Inc. v. Hill*,[26] written well before the Internet was created, clearly contemplates a world in which there is substantial public exposure of people's lives, not just for public officials but for individuals in various walks of life. Brennan's discussion of this trend in 1967 is robust and contemplates a society in which people accept the reality of public interest in a broad range of social and cultural activities. "The risk of exposure," Brennan said, is an "essential incident" of a society

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[23] *Packingham*, 137 S. Ct. at 1735.
[24] *Id.*
[25] *Id.* at 1735-36.
[26] Time, Inc. v. Hill, 385 U.S. 374 (1967).

committed to the values of freedom of speech and freedom of press.[27] With that approach, Brennan would not likely have been bothered by the ease of the spread of information.

It is also certainly possible, even likely, that, were he alive today, attacks on the news media[28] would have stiffened Brennan's resolve to protect the dissemination of information in the broadest way, certainly by newspaper, television and cable, but also by social media.

Brennan advocated for broad protection for criticism of government. Open discussion of matters of public interest made it safer and easier for individuals to criticize public officials and to discuss celebrities. However, it made it more difficult for individuals to recover damages for libel and invasion of privacy from conventional newspapers and television stations, which operated with traditional daily news cycles that generally included time to verify stories. What would Brennan think today of the same protections when they are applied to bloggers, Tweeters, Facebook users and others who may disseminate information to tens of thousands of people in a split second?

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[27] *Time, Inc.*, 385 U.S. at 388.

[28] *See e.g.*, Peter Baker & Cecilia Kang, *Trump Threatens NBC Over Nuclear Weapons Report*, N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/11/us/politics/trump-nbc-fcc-broadcast-license.html; Ashley Parker, *Trump attacks media in his first post-Thanksgiving tweet*, WASH. POST (Nov. 27, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/11/27/trump-attacks-media-in-his-first-post-thanksgiving-tweet/?utm_term=.7138129d3837.