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## Fair Comment and Fair Mistake--Extension of the Sullivan Precedent to Other Matters of Public Interest

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are thinking of the end which the law serves, and fitting its rules to the task of service.<sup>73</sup>

The trend of judicial interpretation of the California automobile guest statute has followed this pattern. The courts, through the process of broadening the definition of wilful misconduct, have nearly rendered nugatory the 1931 amendment to the guest statute, which eliminated gross negligence as a basis of recovery. This would seem to be a desirable result. Since guest statutes are in derogation of a common law right, it would seem more proper that the derogation, rather than merely the terminology of the statute, be strictly construed. On the other hand there is the problem of whether courts in a democratic society have the right to construe a statute so strictly as to emasculate it. The "correct" solution to this dilemma depends upon the philosophy of law adhered to by the critic.<sup>74</sup>

Richard S. Berger\*

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<sup>73</sup> CARDOZO, *op. cit. supra* note 54, at 149.

<sup>74</sup> *Id.* at 153-55 and 165-66 n.25.

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## FAIR COMMENT AND FAIR MISTAKE—EXTENSION OF THE SULLIVAN PRECEDENT TO OTHER MATTERS OF PUBLIC INTEREST

In 1964 the United States Supreme Court ruled that the privilege of commenting upon the activities of public officials includes the privilege of making an honest misstatement of fact. Since *New York Times Co. v. Sullivan*<sup>1</sup> was handed down, state and federal courts have attempted to define the scope of this privilege. Inasmuch as liberal interpretations of *Sullivan* might affect significant changes in the law of defamation it is appropriate at this time to review the cases which have construed *Sullivan*, examine the present limitations of the privilege of fair comment in other matters of public concern, and consider the possible extensions of *Sullivan* to comment upon the works and public activities of authors, entertainers, and public figures who do not hold public office and to other matter affected with a public interest.

### *Sullivan*

In the *Sullivan* case the Court reversed a judgment in favor of the Commissioner of Public Affairs of Montgomery, Alabama for the publication of an advertisement<sup>2</sup> in the *New York Times* which allegedly defamed Sullivan in his official

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<sup>1</sup> 376 U.S. 254 (1964).

<sup>2</sup> A copy of the advertisement is printed in an appendix to the decision, 376 U.S. at 292.

capacity.<sup>3</sup> The Court based its decision upon the need to encourage free political discussion<sup>4</sup> and stated that, as "erroneous statement is inevitable in free debate," it too "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'"<sup>5</sup> The Court limited its decision to a restriction of a state's power to award damages for libel in actions brought by public officials against critics of their official conduct.<sup>6</sup>

Prior to *Sullivan*, the prevailing state rule had been that the privilege of commenting upon the activities of public officials in their official capacity did not extend to a false statement of fact.<sup>7</sup> A minority of states had extended the privilege to cover false statements of fact<sup>8</sup> on the ground that the public interest is best served by protecting "honest," false statements in order that those who would expose information of public interest not be deterred by fear of suit.<sup>9</sup> In vindicating the minority rule the *Sullivan* Court relied upon a variety of sources of authority. Numerous prior Supreme Court decisions were cited,<sup>10</sup> as were the decisions of some of the state courts which had earlier extended the privilege to include false assertions of fact.<sup>11</sup> It was also noted by the Court that the consensus of scholarly opinion apparently favors the rule which it was adopting.<sup>12</sup>

While the *Sullivan* holding was restricted solely to the safeguards constitutionally required "in a libel action brought by a *public official* against critics of his

<sup>3</sup> *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962).

<sup>4</sup> 376 U.S. at 269.

<sup>5</sup> *Id.* at 272.

<sup>6</sup> *Id.* at 283. (Emphasis added.)

<sup>7</sup> *Lawrence v. Fox*, 357 Mich. 134, 97 N.W.2d 719 (1959); *Moore v. Booth Pub. Co.*, 216 Mich. 653, 185 N.W. 780 (1921) (mayor); *Kenna v. Daily Mirror, Inc.*, 250 App. Div. 625, 295 N.Y. Supp. 219 (1937) (policeman); *Westbrook v. Houston Chronicle Pub. Co.*, 129 Tex. 95, 102 S.W.2d 197 (1937) (state legislator); *Bailey v. Charleston Mail Ass'n*, 126 W.Va. 292, 27 S.E.2d 837 (1943) (road commissioner). See also *Boyer, Fair Comment*, 15 OHIO ST. L.J. 280 (1954); *Hallen, Fair Comment*, 8 TEXAS L. REV. 41 (1929); *Noel, Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949).

<sup>8</sup> See generally, 1 HARPER & JAMES, TORTS § 5.26 (1956); PROSSER, TORTS § 110 (3d ed. 1964); *Noel, supra* note 7, at 896-900. *Snively v. Record Pub. Co.*, 185 Cal. 565, 198 Pac. 1 (1921) apparently established the minority rule in California; *but cf. Eva v. Smith*, 89 Cal. App. 324, 264 Pac. 803 (1928).

<sup>9</sup> *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955); *Salinger v. Cowles*, 195 Iowa 873, 191 N.W. 167 (1922); *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908); *Lafferty v. Houlihan*, 81 N.H. 67, 121 Atl. 92 (1923).

<sup>10</sup> E.g., *NAACP v. Button*, 371 U.S. 415 (1963); *Barr v. Matteo*, 360 U.S. 564 (1959); *Roth v. United States*, 354 U.S. 476 (1957); *Bridges v. California*, 314 U.S. 252 (1941); *Stromberg v. California*, 283 U.S. 359 (1931). *Barr v. Matteo, supra*, held that the utterance of a federal officer is absolutely privileged if made "within the outer perimeter" of his duties, and was cited to show that it would give public servants an unjustified preference over the public they serve if critics of official conduct did not have an immunity equivalent to that of officials themselves.

<sup>11</sup> 376 U.S. at 280 n.20. The Supreme Court quoted at length from the leading case for the minority view, *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908).

<sup>12</sup> 376 U.S. at 280 n.20.

official conduct,"<sup>13</sup> the language of the opinion was much broader. The Court asserted that "freedom of expression upon *public questions* is secured by the First Amendment"<sup>14</sup> and quoted the broad language of *Bridges v. California*<sup>15</sup> that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all *public institutions*."<sup>16</sup>

### Concurring Opinions

In his concurring opinion, Mr. Justice Black,<sup>17</sup> with whom Mr. Justice Douglas joined, argued that the *Times* and the individual defendant had an unconditional constitutional right to publish their criticism of Montgomery agencies and officials<sup>18</sup> and that the federal constitution protects the press "by granting the press an absolute immunity for criticism of the way public officials do their duty."<sup>19</sup> Further, Mr. Justice Black writes that "at the very least"<sup>20</sup> the first amendment guarantees to the people and the press the right to criticize officials and discuss public affairs with impunity. Thus he apparently advocates not only an enlargement of the privilege but also an extension of that privilege beyond the discussion of the public official.

The second concurring opinion, that of Mr. Justice Goldberg,<sup>21</sup> also argues that the Constitution affords greater protection for the citizens and press who exercise their right of public criticism than that provided by the *Sullivan* ruling. Mr. Justice Goldberg objected to the retention as unprivileged commentary made with actual malice or reckless disregard of the truth,<sup>22</sup> and argued that the American right of free expression about public officials and *affairs* should not depend upon a probing by a jury of the motivation of the citizen or press.<sup>23</sup> While Mr. Justice Goldberg generally speaks only of the criticism of public officials, he quotes from Mr. Justice Douglas' book, *The Right of the People*:<sup>24</sup> "The imposition of liability for private defamation does not abridge the freedom of speech. Thus of course cannot be said 'where public officials are concerned or where public matters are

<sup>13</sup> *Id.* at 264. (Emphasis added.) "We hold that the rule of law applied by the Alabama courts is constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct." *Ibid.*

<sup>14</sup> *Id.* at 269. (Emphasis added.)

<sup>15</sup> 314 U.S. 252 (1941).

<sup>16</sup> *Id.* at 270. (Emphasis added.) In *Sullivan* the Court nowhere stated that the Constitution precludes the extension of the privilege to matters other than criticism of the official conduct of a public official.

<sup>17</sup> 376 U.S. at 293.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Id.* at 295.

<sup>20</sup> *Id.* at 296.

<sup>21</sup> Mr. Justice Douglas also joined in this opinion.

<sup>22</sup> 376 U.S. at 298.

<sup>23</sup> At this point Mr. Justice Goldberg states in a footnote that "the requirement of proving actual malice or reckless disregard may, in the mind of the jury, add little to the requirement of proving falsity, a requirement which the Court recognizes not to be an adequate safeguard." 376 U.S. at 298 n.2.

<sup>24</sup> Mr. Justice Goldberg's concurring opinion also includes this statement from the same book: "Where public matters are involved, the doubts should be resolved in favor of freedom of expression rather than against it." 376 U.S. at 301-02.

involved.'” This poses a question as to what “public matters” might be protected by expansion of the *Sullivan* precedent.

### *Fair Comment*

It is agreed that there is a right or privilege of comment and criticism in matters of public interest and general concern.<sup>25</sup> In addition to the official activities of public officers,<sup>26</sup> the protection of the “fair comment” doctrine extends to public performances and exhibitions,<sup>27</sup> or to anything else inviting public attention, such as books<sup>28</sup> or articles.<sup>29</sup> The privilege of fair comment actually seems to be divided into two different and distinct privileges.<sup>30</sup> One, dealing with comment upon the official conduct of public officers, public institutions and related affairs of a political nature, might be called the “public interest” privilege. The other, dealing with comment upon books, works of art and like matter inviting attention and approval of the public, might be called the “critic’s privilege.” The rationale for the “public interest” privilege, as noted above, is the need to encourage public discussion upon these subjects.<sup>31</sup> The rationale commonly given for the “critic’s privilege” is that

<sup>25</sup> Hallen, *supra* note 7; 1 HARPER & JAMES, *op. cit. supra* note 8, § 5.28; PROSSER, *op. cit. supra* note 8, § 110.

<sup>26</sup> See cases, *supra* note 7. See also *Cohalan v. New York Tribune*, 172 Misc. 20, 15 N.Y.S.2d 58 (Sup. Ct. 1939) (judge); *Oliveros v. Henderson*, 116 S.C. 77, 106 S.E. 855 (1929) (juror).

<sup>27</sup> *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, *motion for new trial denied*, 242 F. Supp. 390 (N.D. Ga. 1964); *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901); *Hoepfner v. Dunkirk Printing Co.*, 254 N.Y. 95, 172 N.E. 139 (1930); *Adolph Philipp Co. v. New Yorker Staats-Zeitung*, 165 App. Div. 377, 150 N.Y. Supp. 1044 (1914); *Lyon v. Daily Telegraph, Ltd.*, [1943] K.B. 746 (C.A.); *McQuire v. Western Morning News Co.*, [1903] 2 K.B. 100 (C.A.).

<sup>28</sup> *Dowling v. Livingstone*, 108 Mich. 321, 66 N.W. 225 (1896).

<sup>29</sup> *Potts v. Dies*, 132 F.2d 734 (D.C. Cir. 1942). As long ago as 1808, Lord Ellenborough charged an English jury that “every man who publishes a book commits himself to the judgment of the public and any one may comment on his performance.” *Sir John Carr, Knight v. Hood*, Court of King’s Bench at Nisi Prius (1808), discussed in Hallen, *supra* note 7, at 44. See also *Dibdin v. Swan & Bostock*, 1 Esp. 27, 170 Eng. Rep. 269 (1793).

<sup>30</sup> “In point of time, among the subjects which are now recognized as involving legitimate public interest, literary criticism first enjoyed complete liberty.” Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 414 (1910).

<sup>31</sup> *Terminiello v. Chicago*, 337 U.S. 1 (1948). In the opinion Mr. Justice Douglas pointed out that a function of free speech under our system of government is to invite disputes and free speech may best serve its high purpose when it induces a condition of unrest and creates dissatisfaction with conditions as they are.

One of the earliest American cases on candidates is *Commonwealth v. Clap*, 4 Mass. 163 (1808), where the court said:

And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualification for the office. And publications of the truth on this subject, with the honest intention of informing the people are not a libel. For it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offence against their laws.

For the same reason, the publication of falsehood and calumny against

the entertainer or artist or author has invited comment in putting his material before the public and has, in a sense, prospectively consented to whatever criticism should be forthcoming.<sup>32</sup> Division of the fair comment privilege into a "public interest privilege" and a "critics privilege" should prove helpful in considering possible extensions of the *Sullivan* rule.

### *Sullivan Construed*

In *Pauling v. News Syndicate Co.*,<sup>33</sup> a dictum by Judge Friendly gives some indication of the "public interest" matters which might be included in an extension of *Sullivan*. Dr. Linus Pauling, the noted scientist and Nobel Peace Prize winner, brought an action for libel based upon an allegedly defamatory commentary in a *New York Daily News* editorial dealing with Dr. Pauling's reaction to the resumption of atmospheric nuclear testing by the Soviet Union in 1961. The court held that it was not error for the lower court to submit to the jury the question of whether the editorial was defamatory.<sup>34</sup> Judge Friendly saw a possible application of *Sullivan* to the facts of the *Pauling* case and, after noting that the *Sullivan* holding only recognized a privilege of commenting upon official conduct, stated that:

Although the public official is the strongest case for the constitutional compulsion of such a privilege, it is questionable whether in principle the decision can be so limited. A candidate for public office would seem an inevitable candidate for extension. Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line.<sup>35</sup>

A New York decision, *Gilberg v. Goffi*,<sup>36</sup> seems to support Judge Friendly's broad interpretation of the *Sullivan* case. In *Goffi*, a law partner of the mayor of Mount Vernon brought an action alleging that he had been defamed in a speech made by a candidate for the office of alderman. In his speech the candidate had said that there should be an investigation to determine whether the mayor's law firm was practicing in city courts under conditions raising a conflict of interest. The court stated that "the doctrine proclaimed in the *New York Times* case is dispositive of all the legal issues, actual or potential, here presented"<sup>37</sup> and entered summary judgment for the defendant. The court found that the plaintiff had not proved that the speech directly concerned and slandered him by name or by association with the mayor's law firm.<sup>38</sup> In rejecting plaintiff's contention that *Sullivan* does not apply to one who is not a candidate for public office and is outside the political

public officers, or candidates for public offices, is an offence most dangerous to the people, and deserves punishment

*Id.* at 169.

<sup>32</sup> *Dowling v. Livingstone*, 108 Mich. 321, 66 N.W. 225 (1896).

<sup>33</sup> 335 F.2d 659 (2d Cir. 1964).

<sup>34</sup> *Id.* at 671.

<sup>35</sup> *Ibid.* In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court extended the *Sullivan* precedent to a criminal libel prosecution, stating that upon the principles of the *Sullivan* case the Louisiana statute, as applied, was unconstitutional because it directed punishment for a true statement made with actual malice.

<sup>36</sup> 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (1964).

<sup>37</sup> *Id.* at 526, 251 N.Y.S.2d at 831.

<sup>38</sup> *Id.* at 524-25, 251 N.Y.S.2d at 829-30. The mayor and the plaintiff practiced together under the name "Sirignano & Gilberg."

arena, the court said that the plaintiff had "made himself as much a part of the local political campaign as did his law partner, the Mayor"<sup>39</sup> and his right to recover damages was therefore limited by the rule announced in *Sullivan*. The court stated that the plaintiff's personal and individual status had become "inextricably interwoven" with that of the law firm.<sup>40</sup> By thus making the law firm the "thing" defamed the case seems to stand for the proposition that the *Sullivan* privilege will immunize falsehoods defaming private persons where those falsehoods were directed at public officials with whom the private persons were closely associated.

In the New York case of *Spahn v. Julia Messner, Inc.*,<sup>41</sup> a well-known baseball pitcher brought an invasion of privacy action against the author and publisher of an unauthorized biography. The court held that the book violated the right to privacy provisions of the New York Civil Rights Law,<sup>42</sup> awarded damages, and enjoined further distribution of the book. The defendants maintained that, in light of *Sullivan*, freedom of the press is absolute and that the New York statutory right to privacy, if applied to the author or publisher of a biography, is unconstitutional.<sup>43</sup> *Sullivan* was not applied in the *Spahn* case,<sup>44</sup> and it was observed that the Supreme Court explicitly limited its decision in *Sullivan* to actions brought by *public officials* against critics of their *official conduct*.<sup>45</sup> The court stated that "to so classify Freedom of the Press as an unconditionally absolute right would inexorably relegate other rights to a deferred position."<sup>46</sup>

Two months after the *Spahn* case a New York Supreme Court had occasion to consider the scope of *Sullivan* in an action involving another sports figure. In *Dempsey v. Time, Inc.*<sup>47</sup> the former heavyweight boxing champion Jack Dempsey brought an action for libel based upon a story in *Sports Illustrated* which alleged that the boxer had used loaded gloves to win the championship from Jess Willard in 1919. In denying a motion to dismiss, the court took the position that the language of *Sullivan* was limited to the criticism of the official conduct of public officials<sup>48</sup> and, noting the *Pauling* dictum, stated:

It is the opinion of this court that the reaching back 45 years, as was done in the instant case, is not within the purview of even the suggested extension of the *New York Times* case, so as to cloak the described event with a veil of privilege. This court is not prepared to hold that because of the mere fact that one is a public individual, he may be exposed to naked libel, unless the classical factors which serve to abate or mitigate the otherwise tortious act are also present.<sup>49</sup>

In *Canon v. Justice Court*,<sup>50</sup> the California Supreme Court had occasion to comment upon the *Sullivan* case. The opinion dealt with the jurisdiction of a

<sup>39</sup> *Id.* at 526, 251 N.Y.S.2d at 831.

<sup>40</sup> *Ibid.*

<sup>41</sup> 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964).

<sup>42</sup> N.Y. CIV. RIGHTS LAW §§ 50, 51.

<sup>43</sup> 43 Misc. 2d at 223, 250 N.Y.S.2d at 534-35.

<sup>44</sup> *Id.* at 223-24, 250 N.Y.S.2d at 535.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Id.* at 224, 250 N.Y.S.2d at 535.

<sup>47</sup> 43 Misc. 2d 754, 252 N.Y.S.2d 186 (Sup. Ct. 1964).

<sup>48</sup> *Id.* at 756-57, 252 N.Y.S.2d at 188-89.

<sup>49</sup> *Id.* at 756-57, 252 N.Y.S.2d at 189.

<sup>50</sup> 61 Cal. 2d 446, 39 Cal. Rptr. 228, 393 P.2d 428 (1964).

justice court to hear a cause under California Elections Code section 12047, which makes it a misdemeanor to print or distribute anonymous campaign literature.<sup>51</sup> In dictum, the court noted that the right of free expression under the first amendment is not absolute<sup>52</sup> but that there is great value in permitting comment on the official conduct of government officials.<sup>53</sup> The court italicized "official conduct"<sup>54</sup> in commenting upon *Sullivan's* protection of "vehement, caustic and sometimes unpleasantly sharp attacks"<sup>55</sup> and apparently considered the *Sullivan* doctrine to apply only to public officials. A federal court in *Walker v. Courier-Journal and Louisville Times Co.*,<sup>56</sup> relying upon *Sullivan* and its progeny, recently dismissed a libel suit brought by former Major General Edwin A. Walker against two Louisville newspapers and a radio station. Walker charged that the defendants libeled him in recounting his activities at Oxford, Mississippi during the 1962 demonstrations over the admission of a Negro to the university. In dismissing the action the court stated that Walker would have to prove actual malice to recover.<sup>57</sup> Inasmuch as Walker was not a public official at the time of the alleged libel, the ruling is the broadest extension of the *Sullivan* privilege to date. In the *Walker* opinion Judge Gordon stated that in order for *Sullivan* to "have any meaning the protections must be extended to other categories of individuals or persons involved in the area of public debate or who have become involved in matters of public concern."<sup>58</sup> He noted that Walker was a person of "political prominence" who had interwoven his personal status with that of a public one and had thereby become the subject of substantial press, radio and television news comment, thus magnifying the chance that his activities would be erroneously reported. Observing that public debate cannot be "uninhibited, robust and wide-open" if the news media are compelled to stand legally in awe of error in reporting the words and actions of prominent persons who involve themselves in matters of grave public concern, the court concluded that the protective "public official" doctrine of actual malice announced in *Sullivan* well applies to Walker, the "public man."<sup>59</sup>

While the *Walker* case extends *Sullivan* to persons not holding public office, a recent ruling by a New York Supreme Court<sup>60</sup> indicates that, within the ranks of public officers, *Sullivan* is not necessarily limited to elected officials or to officials in

<sup>51</sup> The court held the statute to be unconstitutional in that it infringed the right of free speech of individuals other than California voters. *Id.* at 460, 39 Cal. Rptr. at 236, 393 P.2d at 436.

<sup>52</sup> *Id.* at 457, 39 Cal. Rptr. at 234, 393 P.2d at 434.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>56</sup> *Walker v. Courier-Journal & Louisville Times Co.*, 246 F. Supp. 231 (W.D. Ky. 1965).

<sup>57</sup> In finding no actual malice the court called attention to the fact that the information published by the defendants was furnished by national news gathering agencies and was widely printed throughout the country. It was stated that reliance upon such reports was not that reckless disregard for factual accuracy necessary to support an action for libel. It was also noted that promptness and dispatch are important in informing the public and may lead to unintentional error. *Id.* at 235.

<sup>58</sup> *Id.* at 233.

<sup>59</sup> *Id.* at 234.

<sup>60</sup> *Gilligan v. King*, 48 Misc. 2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965).

the upper echelons of public service. Thomas R. Gilligan, a New York City police lieutenant who attained national prominence after he shot and killed a 15-year-old Negro, filed a libel action against civil rights leaders, alleging that he had been falsely accused of murder. Gilligan had been exonerated of criminal charges in both grand jury and departmental investigations. In denying a defense motion to dismiss on the basis of *Sullivan*, Justice N. T. Helman ruled that Gilligan qualifies as a public official because of the prominence of the incident and therefore must prove actual malice in order to recover damages.<sup>61</sup>

### *Potential Extensions*

The portent of the holdings and dicta to date which have attempted to circumscribe the bounds of the *Sullivan* privilege is not altogether clear. Keeping in mind the differences in the public activities of the plaintiffs in these cases and recalling the distinction between a "public interest" privilege and a "critic's privilege," it should be possible to set forth some of the arguments likely to be urged in support of either limitation or extension of *Sullivan*.

The basis for immunity from liability by reason of privilege is that some interest is to be served by according the privilege.<sup>62</sup> It would seem reasonable, then, to say that the import of the interest should determine the scope of the privilege. An illustration may serve to clarify this statement. Both a sports page feature on the "Rookie of the Year" and an editorial commentary on the "Voting Record of Senator X" would attract the interest of many readers of a newspaper. But surely the column on the Senator deals with a subject of greater importance to the citizenry than the column concerning a "Rookie"—or a Spahn or a Dempsey. The Senator is engaged in the making of law and policy which determine the nature of our government and which, in turn, shape our social structure. The vesting of such power in elected representatives creates a corresponding need to inform the electorate of the activities of their representatives. Thus, while the column on the Senator and that concerning the "Rookie" are both "interesting" in the sense that they attract the reader's attention, it must be said that it is functionally more important for the public to be informed about the activities of its elected official than to know of the rookie's batting average or of his off-the-field domestic problems.

This is the *interest* that should be determinative of the scope of the privilege. Suppose the sports writer errs and unintentionally writes that the rookie's batting average is .200 when, in fact, it is .300. The player's reputation is damaged in the minds of those who accept the columnist's figures as the truth, but it is most unlikely that the incident would affect the lives of many members of the public. Certainly the need of the public to know the rookie's batting average is not so predominant that even unintentionally defamatory misstatements must be immunized from suit in order that the public be kept currently and broadly informed on this subject.<sup>63</sup> Conversely, there is a need that the public be kept informed of the activities of Senator X and should a newspaper inadvertently publish the statement that the Senator voted for abolition of a controversial clause in an existing

<sup>61</sup> *Id.* at 216, 264 N.Y.S.2d at 314.

<sup>62</sup> *Walker v. D'Alesandro*, 212 Md. 163, 129 A.2d 148 (1957).

<sup>63</sup> For cases involving sports figures, see *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916 (N.D. Ga. 1964), *motion for new trial denied*, 242 F. Supp. 390 (motion was based on *Sullivan*); *Hoepfner v. Dunkirk Printing Co.*, 254 N.Y. 95, 172 N.E. 139 (1930).

act, while the opposite was the truth, the statement is, under *Sullivan*, presumably not actionable. The *interest* here, the need of the public to know, is of such importance that even the occasional false statement of fact merits protection.

These illustrations show extremes of *interest*. But while the rookie's public activities would come within the "critic's privilege" because it is something done before the public for its approval, it does not follow that any book, play, entertainment or the like is similarly deficient in the sort of *interest* which merits the protection of a privilege such as that announced in *Sullivan*.

A book by a former president on the subject of what our foreign policy should be, or a play which explores a current social question—abortion, the effects of discrimination, or whatever—or a treatise on the preservation of our natural resources, would be of greater import than the rookie, a musical comedy, or a book about gardening. The material on foreign policy, abortion, discrimination, or natural resources will play a part in determining policies or attitudes on these subjects, whereas the other materials primarily serve to entertain or provide diversion. While it would be foolhardy to attempt wholly to enumerate the subjects which are of such *interest* that they might warrant protection such as that afforded the critics of public officials by *Sullivan*, these examples should serve to indicate that these are materials within the area of the "critic's privilege" which clearly fall in the area between the extremes of the senator's activities and those of the rookie and which may be of such interest as to warrant a privilege of the order of *Sullivan*.

### *Protecting the Victim's Interests*

The strongest argument for strictly limiting *Sullivan* would seem to be the possibility that innocent reputations may be severely damaged and the victims may be left without redress for their injuries. The *Sullivan* court clearly indicated that a statement made with knowledge that it was false or with reckless disregard of its veracity is outside the privilege,<sup>64</sup> and it is therefore unlikely that an extension of *Sullivan* to the "critic's privilege" would lead to a reckless or irresponsible press. But it must be remembered that even a negligent statement within an extended privilege could do great damage. Reputations are of value, and the size of jury awards in some defamation actions brought recently would seem to indicate that disparagement of the reputation of another is considered a grave matter entitling the victim to large damage awards and visiting the defamer with the burden of heavy punitive damages.<sup>65</sup> While the size of past awards should not determine the development of future law, the public sentiment evidenced by these awards is apparent. The danger that the reputations of innocent persons might be discredited would appear to be sufficient cause for refusing to extend *Sullivan* into many areas of the "critic's privilege." If the object of criticism is primarily a form of entertain-

<sup>64</sup> 376 U.S. at 280.

<sup>65</sup> See, e.g., *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916 (N.D. Ga. 1964) (jury verdict for \$3,060,000 reduced to \$460,000 as alternative to new trial); *Reynolds v. Pegler*, 123 F. Supp. 36 (S.D.N.Y. 1954), *aff'd*, 223 F.2d 429 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955) (\$1 actual damages, \$175,000 punitive damages); *Chagnon v. Union Leader Corp.*, 103 N.H. 426, 174 A.2d 825 (1961) (\$99,000 award of general damages sustained); *Faulk v. Aware, Inc.*, 19 App. Div. 2d 464, 244 N.Y.S.2d 259 (1963) (award of \$3,500,000 reduced to \$400,000 compensatory damages plus \$150,000 punitive damages). See Annot., 35 A.L.R.2d 218, 237 (1954).

ment—a symphony series, an intercollegiate football match, a book about old coins, or a movie about the animal kingdom—it is manifest that there is not that reference to current social or political questions which would vest in the object an interest meriting optimum protection.

If the “critic’s privilege” of fair comment is narrowed so that it encompasses only materials which are created primarily to entertain or to provide diversion and which do not deal with subjects of pressing social or political importance, the deficiency of a protection-meriting interest and of a corresponding need to protect private reputations would seem to preclude any extension of *Sullivan* in this direction. Materials dealing with social or political questions must properly be classified as materials within a “public interest” privilege. It is to the questions of which matters courts might find to be of such interest as to deserve the larger privilege and of the prospects of extending *Sullivan* to protect “honest mistakes” in those areas that we now turn.

### *Probability of Extensions*

As noted, a privilege of the scope of *Sullivan* must be founded upon an interest common to the general public and not be limited to the personal interest of a few individuals. As indicative of which matters might be affected with this greater interest, consider first this statement from the *Coleman v. MacLennan*<sup>66</sup> decision, a case cited in both the *Walker* and *Sullivan* opinions:

[T]he correct rule, whatever it is, must govern in cases other than those involving candidates for office. It must apply to all officers and agents of government—municipal, state and national; to the management of all public institutions—educational, charitable, and penal; to the conduct of all corporate enterprises affected with a public interest—transportation, banking, insurance; and to innumerable other subjects involving the public welfare.<sup>67</sup>

*Sullivan* also quotes *Coleman* to the effect that the “good faith” privilege “extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office.”<sup>68</sup> While the *Sullivan* holding was narrow, the Court did state, in footnote 23, that “we have no occasion here to specify categories of persons who would or would not be included.” It is submitted that this footnote and these quotations form a foundation upon which a court, as in the *Walker* case, may construct an extension of the *Sullivan* precedent.

The principal argument for extending *Sullivan* is that there are matters of public interest in just as much need of exposure and discussion as the activities of our public governors and that these too merit the larger privilege in order to encourage such comment and discussion.<sup>69</sup> When the activities of a small town mayor

<sup>66</sup> 78 Kan. 711, 98 Pac. 281 (1908).

<sup>67</sup> *Id.* at 734-35, 98 Pac. at 289 (1908).

<sup>68</sup> 376 U.S. 254, 281-82, quoting from *Coleman, supra* note 66, at 723, 98 Pac. at 285.

<sup>69</sup> A forceful argument for a privilege of “honest mistake” was made by Justice Cooley in a Michigan Supreme Court case where he dissented, stating, in part:

[T]he beneficial ends to be subserved by public discussion would in large measure be defeated if dishonesty must be handled with delicacy and fraud spoken of with such circumspection and careful and deferential choice of words as to make it appear in the discussion a matter of indifference.

[I]f the author were obliged to justify every statement by evidence of

are contrasted with a national controversy among scientists, statesmen, religious leaders, professors and other public figures upon development of our nuclear capabilities, involvement in foreign military actions, or dissemination of birth control information, the latter are seen to be of greater public interest, not merely in relation to the number of people involved, but also in relation to the social significance of the issues. And yet, even the former has been held privileged. Therefore, if it is the size of the interest which is to determine the scope of the privilege, it seems logical that the *Sullivan* privilege should be extended to other matters of public concern.

To the extent that the *Sullivan* privilege is extended it will abrogate the troublesome need to distinguish between fact and comment in determining liability.<sup>70</sup> Under present law—excepting, of course, the former area of liability immunized by *Sullivan*—a false statement of fact is not entitled to protection because it is not considered to be, in any sense, opinion.<sup>71</sup> This makes it necessary for a court to separate fact from opinion in order to determine whether the defendant has merely made an illogical inference from harmless facts and thereby libeled "himself rather than the subject of his remarks"<sup>72</sup> or has subjected himself to liability by exceeding the privilege.<sup>73</sup> The distinction is normally predicated upon whether ordinary persons exposed to the statement would understand it as an expression of the communicator's opinion or as a direct statement of existing facts, not on whether the communication was actually opinion or fact.<sup>74</sup> While this rule appears workable on paper, it has proven difficult to apply in court.<sup>75</sup> In any case held to come within the *Sullivan* privilege the court need only determine whether the statement was made "honestly" with belief in its veracity or with "knowledge that it was false"

its literal truth, the liberty of public discussion would be unworthy of being named as a privilege of value [R]eputation is best protected when the press is free. Impose shackles upon it and the protection fails when the need is greatest. Who would venture to expose a swindler or a blackmailer, or to give in detail the facts of a bank failure or other corporate defalcation, if every word and sentence must be uttered with judicial calmness and impartiality as between the swindler and his victims, and every fact and every inference be justified by unquestionable legal evidence?

*Atkinson v. Detroit Free Press*, 46 Mich. 341, 382-84, 9 N.W. 501, 523-24 (1881). This case was decided upon questions of pleading and evidence and the majority opinion omitted any discussion of privilege.

There are a few American cases, not involving public officials, where the courts have apparently recognized a privilege of "honest mistake." See *Broking v. Phoenix Newspapers*, 76 Ariz. 334, 264 P.2d 413 (1953); *Bearce v. Bass*, 88 Me. 521, 34 Atl. 411 (1896); *McLean v. Merriman*, 42 S.D. 394, 175 N.W. 878 (1920). *But see Pattangall v. Mooers*, 113 Me. 412, 94 Atl. 561 (1915), apparently limiting *Bearce*.

<sup>70</sup> For a general discussion of this problem see: HARPER, *TORTS* 543 (1933); PROSSER, *TORTS* 815-16 (3d ed. 1964); Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962); Note, 62 HARV. L. REV. 1207 (1949).

<sup>71</sup> HARPER, *op. cit. supra* note 70, at 543.

<sup>72</sup> *Popham v. Pickburn*, 7 H. & N. 891, 898, 158 Eng. Rep. 730, 733 (Ex. 1862).

<sup>73</sup> HARPER, *op. cit. supra* note 70, at 544.

<sup>74</sup> *Id.* at 543; PROSSER, *op. cit. supra* note 70, at 814-15.

<sup>75</sup> See, e.g., *Potts v. Dies*, 132 F.2d 734 (D.C. Cir. 1942); *Hotz v. Alton Telegraph Printing Co.*, 324 Ill. App. 1, 57 N.E.2d 137 (1944); *Eikhoff v. Gilbert*, 124 Mich. 353, 83 N.W. 110 (1900).

or such "reckless disregard of whether it was false or not"<sup>76</sup> as to indicate actual malice.<sup>77</sup> Inasmuch as a defendant accused of "actual malice" would be obliged, as a practical matter, if not as a matter of law, to present some grounds for an "honest belief," it is this writer's opinion that a jury would be more able to determine whether the alleged defamer spoke or wrote "honestly" with a belief in what was stated than to draw fine distinctions in particular instances between fact and opinion—a distinction possibly illusory.<sup>78</sup> Often, under present law, liability hinges only upon this distinction,<sup>79</sup> and any development in the law of defamation which would substitute for that distinction one more practicable would be an improvement.<sup>80</sup>

While the first amendment gives no license to defame,<sup>81</sup> it could be interpreted to give constitutional status to an extension of the *Sullivan* privilege. Much of the case law relied upon by the Supreme Court in its discussion of the first amendment in *Sullivan* appears to be as applicable to statements about non-office-holding public figures as it is to the criticism of public officers.

The *Sullivan* Court extracted from *Roth v. United States*<sup>82</sup> the statement that the first amendment was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." As indicative of the scope of the freedom of expression, the Court quoted from a 1941 opinion<sup>83</sup> that "it is a prized American privilege to speak one's mind on all public institutions." Reference was also made to a 1927 concurring opinion by Mr. Justice Brandeis which reaffirmed freedom of expression as a fundamental principle of American government.<sup>84</sup> Before specifically discussing the criticism of public officials, the Court observed that there is a profound commitment in this country to the principle that debate on public issues should be "uninhibited, robust, and

<sup>76</sup> 376 U.S. at 280.

<sup>77</sup> Inasmuch as the *Sullivan* Court defined actual malice as being a statement made with knowledge that it was "false or with reckless disregard of whether it was false or not," *ibid.*, it appears that a falsehood might be stated "honestly" (in that the writer or speaker believed it to be true) with some ill will, but without defeating the privilege. This would not be a new direction in the law of defamation. See *Fahr v. Hayes*, 50 N.J.L. 275, 13 Atl. 261 (1898). Cf. *Tanner v. Stevenson*, 138 Ky. 578, 128 S.W. 878 (1910); *Gerlach v. Gruett*, 175 Wis. 354, 185 N.W. 195 (1921). See also RESTATEMENT, TORTS § 603, comment *a* (1938); *Evans, Legal Immunity for Defamation*, 24 MINN. L. REV. 607 (1940).

<sup>78</sup> *Titus, supra* note 68, at 1215-22.

<sup>79</sup> See generally Note, 62 HARV. L. REV. 1212-15.

<sup>80</sup> There is, of course, no immunity for deliberate falsehoods under existing law. See *National Cash Register Co. v. Salling*, 173 Fed. 22 (9th Cir. 1909); *Sinclair Ref. Co. v. Fuller*, 190 Ark. 426, 79 S.W.2d 736 (1935); *Caldwell v. Personal Finance Co. of St. Petersburg*, 46 So. 2d 726 (Fla. 1950); *Lawless v. Muller*, 99 N.J.L. 9, 123 Atl. 104 (1923).

<sup>81</sup> DOUGLAS, *THE RIGHT OF THE PEOPLE* 31 (1958).

<sup>82</sup> 354 U.S. 476, 484 (1957).

<sup>83</sup> *Bridges v. California*, 314 U.S. 252, 270 (1941).

<sup>84</sup> *Whitney v. California*, 274 U.S. 357, 375-76 (1927). The *Sullivan* Court also relied on Judge Learned Hand's statement that the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection." *United States v. Associated Press*, 52 F Supp. 362, 372 (S.D.N.Y. 1943).

wide-open."<sup>85</sup> While the Court's subsequent discussion<sup>86</sup> of the constitutional protection required for factual misstatement dealt only with the criticism of public officers, the language used in its preliminary discussion of the constitutional questions raised by *Sullivan* seems to extend to comment upon any matter of legitimate public concern. It certainly does not appear that an enlargement along *Sullivan* lines of the qualified privilege now afforded those who comment on matters of public interest other than the activities of public officials would be rebuked by the Supreme Court.

### Conclusion

The adoption by the Supreme Court of what had been a minority rule has given constitutional status to a long-debated doctrine. The varied dicta and holdings in the cases which have considered *Sullivan* indicate that courts throughout the country are struggling to define the boundaries of the new privilege.

While the fair comment privilege has historically protected the right of a critic to criticize plays, books, public sporting events and anything else submitted to the public for its approval, it is improbable that the *Sullivan* privilege will be extended to apply to comment upon materials which are designed primarily to entertain or provide diversion, for such comment is not ordinarily fundamental to the continued responsiveness of our social and political institutions and it therefore does not encompass that interest which merits the larger privilege.

However, inasmuch as the purpose of the "honest mistake" rule announced in *Sullivan* is to encourage public discussion and thereby develop public awareness, immunity from liability for publication of an "honest mistake" is in order, at least in theory, where the subject being commented upon is of such social or political importance that an optimum of free discussion is desirable. Therefore if an author, for example, involves himself in controversies about foreign policy or civil rights or some other subject in the "public interest" sphere, the rational basis underlying the *Sullivan* decision would seem to support an extension of the "honest mistake" privilege to commentary upon this material.

An almost certain extension, as noted in the *Pauling* opinion, will be to candidates, whose qualifications would seem to be as much a matter of public interest as those of incumbent officials. Extension to protect comment made upon "public figures"—as in the *Walker* decision in Kentucky and the *Gilligan* ruling in New York—also seems likely, at least to the extent that the public figure is involved in a legitimate matter of public interest.

It cannot be over-emphasized that the *Sullivan* rule applies only to honest misstatements of fact and affords no protection for the deliberate or reckless defamer. Extension of the *Sullivan* privilege will grant to none a license to defame. To extend *Sullivan* is to safeguard the freedoms of expression by taking cognizance of the fact that even the most punctilious of commentators may occasionally err:

[T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion—all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered,

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<sup>85</sup> 376 U.S. at 270.

<sup>86</sup> *Id.* at 271-78.