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REFINING THE DOCTRINE OF *NEW YORK TIMES v. SULLIVAN*

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In *New York Times v. Sullivan,* the Supreme Court dramatically changed the complexion of American libel law. After observing that "uninhibited robust" debate on controversial issues inevitably produces occasional erroneous statements, the Court concluded that the First Amendment's protection of such debate required that the press be accorded reasonable breathing space to make such errors, even when their carelessness damaged the reputations of public officials.[1] As long as defamatory material is not disseminated with malice,[2] the Court held that any damage that material causes to public officials is part of the cost of a vigorous marketplace of ideas.[3] With this landmark ruling, the Supreme Court sought to alleviate the "chilling" effect of libel law on public debate.[4]

With such protection against even those damages caused by negligent press conduct, a privilege unique among democratic nations,[5] the American press would be expected to be free from most of the burdensome costs of libel. Ironically, however, *Sullivan* appears to have increased libel costs by indulging the instinct of the press to engage in behavior which antagonizes potential plaintiffs, thereby encouraging them to sue and thus to increase the cost of resolving libel complaints. Hence, despite the apparent significant decrease in libel damage awards since *Sullivan,* the increase in litigation which it has indirectly encouraged has raised total litigation costs and thereby the cost of libel insurance. These increases appear to have discouraged robust debate to a greater degree than damage awards ever did.[6]

Suggestions have been offered about how members of the press could drastically reduce such costs by voluntarily improving their procedures for handling libel complaints. Yet there is reason to doubt that the press will heed these informal requests. Few in the press were willing to provide adequate financial support or editorial respect to the National News Council and, only about forty newspapers employ ombudsmen despite their apparent value. Some in the press are even said to ridicule *The New York Times* for its policy of prominently featuring a corrections column.[7]

This article discusses a more formal remedy: how the law of libel

could be reformed to achieve such ends by refining the *Sullivan* doctrine in two respects. The first would require the press to concede error or at least some degree of uncertainty when replying to a libel complaint concerning any statements for which *Sullivan* protection was going to be asserted. The second would permit the press to recover reasonable attorneys' fees when a libel plaintiff could not prove that an uncorrected alleged defamation was false.

While the first refinement, in isolation, might well abridge the wide First Amendment protection articulated in *Sullivan,* the combination of both changes would provide greater protection for the press and of vigorous debate than the status quo. If a legislative body believed that to be so—that the pair served to decrease the total cost of resolving libel complaints without chilling the press—and the Supreme Court accepted that conclusion then a statute embodying the pair would not be unconstitutional for it would not represent an abridgement of the freedom of the press. Freedom would in fact be expanded.

I. UNEXPECTED EFFECTS OF THE *SULLIVAN* DOCTRINE

Although the *Sullivan* doctrine is intended to discourage public figures[8] from waging lawsuits by substantially diminishing their chances of success, other effects of the ruling appear to have more than neutralized that disincentive. By giving the press stronger legal protection against damage awards it has reinforced the instincts of those in the press to stand firm on questionable stories and deal rather unsympathetically, if not arrogantly, with potential plaintiffs.

As Gil Cranberg, co-author of a University of Iowa libel study has noted, defensiveness in the face of criticism is part of the human condition, but it is particularly exaggerated within the news media. News media are organizations "conditioned to resist pressure," Cranberg observes and thus a "siege mentality develops in which demands for retraction or other vindication can be regarded as forms of pressure, signals to circle the wagons."[9] To build morale among reporters, editors, and producers, media owners may often stand behind their editorial staff even when the staff has refused to publish a correction of an apparent error. The legal protection afforded by *Sullivan* has bolstered the ability of media owners to display this destructive attitude.

In fact, *Sullivan* may even encourage such behavior by presenting a curious choice to media firms that have made such defamatory errors. *Sullivan* makes it easier for a media firm to seek a courtroom victory rather than risking public embarrassment by conceding such errors. The

likely result is that such a victory will be misunderstood by the majority of its audience as a vindication of the firm's reputation, since they will view it as a confirmation of the original story.[10]

Obviously this was not the *Sullivan* Court's intent. While the decision was designed to protect the pocketbooks of those firms, it was not intended to encourage them to ignore completely their responsibility to clarify or correct errors or misleading statements which had damaged the reputations of others as well as misinformed the public.

The reactions of injured parties to the tactics of the press is not surprising. As John Soloski, another co-author of the Iowa study explains, many libel plaintiffs do not sue to collect damages, but merely to elicit a concession of error.[11] When these parties complain to the media firms, and those firms, armed with *Sullivan* protection, give only a cold shoulder, the injured parties are often further antagonized. This is why Randall Bezanson, the third co-author of the Iowa study, observes that many plaintiffs feel compelled to retaliate formally by bringing a lawsuit against their accuser: plaintiffs feel that they win by suing.[12]

Meanwhile, evidence that media firms stubbornly refuse to correct negligent errors or misleading statements, in reliance on *Sullivan,* may well encourage juries to make excessive damage awards and force media firms to spend more time and money appealing such awards to appellete courts, albeit with great success.[13] It is likely that *Sullivan*'s aberration from general principles of tort law, which require a negligent actor to pay for the damages he or she causes to innocent victims, does not sit well with juries.[14] Understandably, it must be hard for them to accept a rule that permits the sloppy work of a powerful media firm to damage the reputation of a public figure while permitting the firm to escape scot-free without even apologizing for the harm done.

As a consequence of this situation, massive litigation expenses are incurred before and during the trial, and on appeals, and these are rarely recovered.[15] Thus while *Sullivan* has protected the press against numerous damage awards, it is not very much help with litigation costs, which greatly dwarf the cost of damage awards. In fact, it has been estimated that approximately 80 percent of the cost of libel lawsuits is the cost of litigation,[16] including the cost of answering the question of whether there was malice, although neither side may really care.

In summary then, the problem with the law of libel today is that *Sullivan* has reinforced the tendency of the media to stand firm and antagonize those who accuse them of errors. This increases the likelihood that plaintiffs will feel compelled to sue in retaliation. By encouraging formal adversarial confrontation, *Sullivan* has produced a situation where plaintiffs feel that they win by suing, while libel defendants,

because of the cost of litigation, lose even when winning. *Sullivan* protects the press against the chill of large damage awards, but it does not provide effective protection against large and wasteful legal costs.

Time magazine's defense of former Israeli Defense Minister Ariel Sharon's libel suit is a good example. Rather than immediately conceding that it had made a factual error in its report, or at least conceding uncertainty in the face of apparently negligent journalism, *Sullivan* gave *Time* the opportunity to try to vindicate itself in court. The structure of *Sullivan* encouraged *Time* to spend $5 million to try to win the case by proving that it lacked malice—an issue of no particular interest to Sharon or society—rather than making the concession which it eventually made anyhow.[17] Substantial expenses would have been saved if there had been greater pressure on *Time* to negotiate the substance of its admission rather than using the *Sullivan* defense to try to vindicate itself in court.

CBS appears to have had a much better reason for seeking to defend itself against General William Westmoreland's recent libel suit. Although its own internal investigation of the alleged libelous story found that the network had failed to satisfy its own journalistic standards, CBS still felt that the thesis of its documentary program—that there had been a high level conspiracy to distort information about North Vietnamese troop strength—was accurate. Nevertheless, the opportunity to use the *Sullivan* defense appears to have encouraged it to waste $6 million and vast human resources on litigation, rather than being pressured to take the much less expensive route of conceding that its thesis was its own informed opinion, but not clear fact.[18]

II. THE BENEFITS OF CONCEDING ERRORS

Some justify the tactics discussed above by claiming that they protect journalistic freedom and integrity,[19] but this seems to be mere rationalization. Such behavior is wasteful of resources and does not help the public get access to the best information. *Sullivan* should not protect such behavior, but rather *Sullivan* should be modified so that, while it continues to protect the press against damage claims for the inevitable errors that will be made, it also discourages the press from acting in a manner that encourages litigation. It should encourage the press to concede error or admit uncertainty when mistakes or distortions have occurred.

The public is aware that no one is perfect and that errors are as inevitable in the pursuit of good journalism[20] as they are in any other

endeavor and that opinions are just that, opinions. The public might even admire one with the courage to acknowledge errors and to revise opinions as new facts arose. In addition, when *The Detroit Free Press* and *The Detroit News* assigned full-time editors to oversee corrections and announced those corrections in prominant places in their newspapers, the circulations of those papers increased.[21] Furthermore, controversial assertions made by a media firm that admitted its errors would likely have more credibililty than those made by a firm that never acknowledged mistakes. It is perhaps partially because of its corrections policy that *The New York Times* remains probably the most respected newspaper in the world.

The official correction policy of the *American Lawyer*[22] is another that appears particularly worthy of emulation. That policy is "to publish corrections as soon as possible in a way that is never less prominent . . . than the original mistake . . . [and] never sugarcoated in euphemisms (such as 'clarification')." In addition, since it is also the publication's policy to give credit to the entire editorial staff by placing all their names on the masthead, it promises that it "will likewise often try to tell [its] readers who made the mistake." Presumably, this policy would also require a correction when a reporter's opinion had been presented as if it were a statement of fact.

Yet most alleged errors made by the press are not clear factual errors; rather they concern questions of interpretation or implication, or factual matters whose truth or falsity is very difficult to ascertain.[23] In these cases, however, the press should be willing to qualify its assertions, thereby admitting some doubt. Where a story draws conclusions based on admitted facts, the story should make it clear that those conclusions may be the opinions of experts, but they are not facts. Admittedly, some conclusions follow so obviously from a list of facts that it seems silly to qualify the conclusion, yet those in the press should recognize that in such cases the obvious conclusion will easily be drawn by audiences without any help.

Sullivan's goal of protecting robust debate requires that the press be permitted to make assertions about public figures that might not be convenient to confirm due to constraints on time or resources. Yet, it is unclear how vigorous dialogue would be hampered by a requirement that such assertions be corrected later if they turned out to be false or clarified if they turned out to be misleading, such as phrasing an opinion as if it were a fact. If anything, such a rule would likely improve the free flow of accurate information to the public, one of the primary purposes of freedom of expression.[24]

The primary drawback to such a procedure would be the extra words

that the press would be required to include to clarify stories. Statements that an accused public figure denied all charges of wrongdoing might be considered unnecessary to a member of the press who had faith in credibility of all his or her sources, but since it is impossible to be completely sure of anyone, a good journalist should always remain a bit cautious about what the facts really are, at least until all sides have given their full stories. As for the cost of including the extra words, it has always been true that controversy attracts attention, so giving more attention to a matter of controversy should not do significant harm to the press.

Media firms would not only improve their credibility by conceding errors and uncertainty, but they would also provide the public with more accurate information as well as reducing their libel costs, by removing many plaintiffs' motives to sue.

III. REFINEMENTS TO THE LAW OF DEFAMATION

If many in the media have too much pride to pursue their own best interests in this area then legislation should be passed to limit the *Sullivan* defense to its original purpose. Refinements could be made in the tort law of defamation to discourage the *Sullivan* defense from being used to protect the reputation of an undeserving member of the press and to further discourage firms from pursuing litigation in preference to more constructive negotiation, all without abridging the constitutional dimensions of *Sullivan*.

Legislation could be written to limit the use of the actual malice standard to two situations: cases where media firms faced potentially large damage awards for accidental or negligent defamation of public figures; and cases where media firms believed that they had presented true stories, but found those stories to be too difficult or expensive to prove in court. Such a refinement would not be inconsistent with the spirit of the *Sullivan* decision and its progeny and would appear to be achievable with two refinements of present tort law.

The first statutory refinement would be to require a defendant desiring to use the actual malice defense to concede publicly that it had made an error or was at least uncertain about the statement at issue. If a mutually acceptable concession could not be negotiated, the libel defendant would be required to admit that "Although a story of ours included the following assertions, we are not completely certain of their accuracy," followed by a list of the assertions for which it desired to defend itself on the ground

that it lacked malice. Such a concession would be required to be included in its answer to an initial legal complaint and could refer to the specific assertions for which libel was charged or to the story as a whole and could be subject to liberal amendment at the discretion of the judge.

While media defendants would not be legally obligated to publish or broadcast any concessions, it would be hoped that the more ethical media defendants would do so voluntarily, as would at least some of those competing with the defendant in its market.[25] *Sullivan* would continue to enable good journalists to escape extreme financial penalties for occasional errors, but when they erred or mislabeled an opinion they would be pressed to admit such and so their reputations would suffer, as well they should. Media owners would find it even more expensive to permit those who had erred to avoid their responsibility to correct their errors and presumably the "my country right or wrong" attitude would give way to the increased combined weight of journalistic ethics and financial costs.

Some in the media and many media defenders might regard this refinement to be an unconstitutional abridgement of *Sullivan,* by claiming that the decision was intended to give the press complete protection against any statutory duty concerning stories about public figures written without malice. Yet one may also interpret *Sullivan* as only protecting the press against financial penalties for making careless and damaging errors about public figures, not protecting them against the trivial cost of some form of apology. It should be remembered that *Sullivan* did not completely prohibit libel suits by public officials although many believe that this is what the First Amendment demands.[26]

If the First Amendment permits the press to be punished for malicious errors then it is not clear that it would prohibit rules which strongly pressure the press to admit uncertainty about assertions that it considered difficult to prove in court. Such rules would not seem to chill vigorous dialogue, but rather would supplement caustic debate with clarifications, which permit the public to stay better and more accurately informed.

In addition, as presently interpreted, *Sullivan* has not provided the press with any protection against the substantial litigation costs that have burdened and chilled the press. If a statutory refinement were added to diminish the chill, it is hard to understand why the Supreme Court would necessarily reject it as an abridgement of the First Amendment. It is quite possible that the Court would review the *Sullivan* rule and hold that the constitutional protection provided by the First Amendment went only so far as to protect libel defendants in the two cases mentioned above.

Some might complain that a rule requiring a libel defendant to confess some degree of uncertainty about an alleged libel would severely damage its litigation position. Such an admission would make it next to impossible to convince a jury that the statement was true. Yet when media firms use the actual malice defense they do not face the burden of convincing the judge or jury that their assertions are true; they need prove only that they were not reckless or dishonest in believing the assertions to be true. The plaintiff would retain the burden of proving that the alleged libel was false and that it was asserted with malice.

A more significant drawback in the proposed rule, however, is that it would require a concession from a media firm that felt certain that its story was true, but believed it would be too difficult or expensive to prove it so in court. While the required concession would force the media firm to admit only uncertainty, not actual error, it is arguable that even the slight diminution of reputation caused by such a concession would represent an unacceptable abridgement of the constitutional protection articulated in the *Sullivan* decision.[27]

There are two responses to this point. The first is that any resulting harms, in addition to being minimal, would not likely be permanent. If the original statement were true, then it is likely that sufficient facts would eventually become available so that the truth of the alleged libel could even be proven in court at some later date. At that point, any former libel defendants could restate the reputed libel and discuss their earlier stories and libel case. Presumably they would quickly garner credit for their earlier scoops and thereby restore any former damage to their credibility. If they were sued for libel again they would likely be able to gain a quick dismissal based on the new evidence or take advantage of the second proposed refinement in the law, discussed below. Media firms that had made assertions that were true, but too expensive to prove in court, would also benefit from this protection.

Yet even if the first part of the statutory modification would, in isolation, abridge the constitutional protection of expression that does not mean that such a provision would be struck down by the courts if it were combined with another provision so that the pair benefited libel defendants and free speech to a much greater degree than it harmed it. Such a modification in the law of libel would have a good chance of withstanding constitutional scrutiny.

The second statutory refinement in the law of defamation would benefit libel defendants by discouraging potential plaintiffs from initiating groundless libel lawsuits.[28] It would do so by *requiring* a judge to award reasonable attorney's fees to a libel defendant whenever the plaintiff

could not prove, with convincing clarity, that an alleged libel was false and remained uncorrected despite the media firm's receipt of a legal complaint. This would save media firms the costs of defending many of the groundless and harassing lawsuits which they currently face—by discouraging them from being brought in the first place—and thus alleviate a part of the problem of costly litigation never addressed by *Sullivan*.[29]

This problem has arisen because many public figures and officials are able to bring defamation suits at little or no cost to themselves.[30] Attorneys usually take these cases on a contingency fee basis. They receive a portion of the amount collected if they win rather than an hourly fee. Some lawyers seem willing to subsidize the cost of groundless lawsuits rather than risk the alienation and loss of their clients by refusing to sue.[31] Others may take such cases to increase their visibility with free publicity. If the defendant's legal fees might also have to paid, however, most groundless suits would probably be deterred. Attorneys could advise their clients that if they initiated such suits they would risk the demoralizing and likely result of being ordered to pay damages to the subjects of their wrath.

One objection which could be raised to this provision is that, as a practical matter, courts would not give defendants attorney's fees unless plaintiffs could also recover such fees under comparable circumstances. Yet, this complaint ignores two aspects of the attorneys' fee provision. First, the provision would not be phrased to permit a discretionary award to the prevailing party, as most attorneys' fee provisions are,[32] but rather grant attorneys' fees automatically if the plaintiff did not meet its burden of proving the falsity of the uncorrected alleged libel.

Second, the rule would not stack the deck unfairly against plaintiffs, but rather even the stakes involved in the trial. At present, a libel plaintiff who is victorious collects damages and, assuming the standard contingency fee arrangement, ends up way ahead after the legal fees are deducted. A victorious libel defendant, on the other hand, collects nothing, and ends up significantly worse off after paying litigation costs. A one-sided attorney's fee rule therefore would simply balance the stakes.[33]

This provision, meanwhile, would rarely, if ever, harm plaintiffs who had actually been defamed. As they would be in full possession of all the relevant facts concerning the truth of the alleged defamations and how those facts might be proven,[34] it is hard to believe that many actual victims of defamation would not be able to prove falsity, even if the matters of negligence and defamatory effect were unclear. The clear directive of the *Sullivan* doctrine is that public figures should make their responses in public debate, outside the courtroom. It would seem to

follow that they do not belong in costly courtroom litigation unless they can present clear proof of falsity.

The First Amendment should protect the media against even the cost of litigating lawsuits brought by public figures, as long as they are willing to quickly correct or concede uncertainty about all statements that public figures are able to prove to be false.

SUMMARY

The refinements in the *Sullivan* rule of libel law discussed above should benefit both media firms and plaintiffs, with libel attorneys as the only losers. Many groundless libel suits would be eliminated and many of those initiated would produce relatively quick concessions of error.[35] Only when libel plaintiffs sought excessive damages from negligent media firms would costly litigation ensue over the existence of malice. The cost of libel insurance would likely fall significantly. Thus the press would finally enjoy the full promise of *New York Times v. Sullivan*—freedom to pursue America's profound national committment to uninhibited, robust, and wide open debate on public issues, without the fear of heavy financial penalties for accidental errors.

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NOTES

1. 376 U.S. 254, 271–72 (1964).
2. Malice is defined in this context as actual knowledge that the material was false or a reckless disregard for its truth. Id. at 279–80.
3. Id. at 272–73.
4. Id. at 277–78.
5. See P. Lahav, *Press Law in Modern Democracies* (1985).
6. In a study by the Libel Defense Resource Center (LRDC) the average final award for the successful libel lawsuits in 1954–64, after appeal, was $29,153.89 (or $107,577.85, adjusted for inflation). The corresponding figures for 1964–77 were $18,613.14 (or

$49,510.95, adjusted for inflation). See Kaufman, *supra* ch. 1, which provides statistics showing the increase in libel insurance. See also Baer, "The Party's Over," *The American Lawyer*, (Nov. 1985), at 68; two speeches by Eugene Roberts, Executive Editor of the *Philadelphia Inquirer*, one delivered at the William Allen White Award event at the University of Kansas, Feb. 8, 1986; the other, delivered as the Kenneth Murray Lecture at the University of Michigan, March 28, 1986 recounting a few specific instances where fear of a libel lawsuit led to the suppression of a story.

7. See, e.g., Bezanson, Cranberg & Soloski, "Libel Law and the Press: Setting the Record Straight," 71 *Iowa L. Rev.* 215 (1985). See N. Isaacs, Untended Gates: *The Mismanaged Press*, 113–46 (1986); McIntyre, "Repositioning a Landmark: The Hutchins Commission and Freedom of the Press," 4 *Critical Studies in Mass Communications* 136, 148 (1987); R. Adler, *Reckless Disregard* 152 (1986).

8. The Court quickly expanded the protection afforded by Sullivan to include protection against libel suits brought by any public figures, not just public officials. See, e.g., Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 388 U.S. 130 (1967). See, also, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

9. See Cranberg, "Fanning the Fire: The Media's Role in Libel Litigation," 71 *Iowa L. Rev.* 221, 222–23 (1985).

10. The proposition that the press must win a libel case even though its negligent conduct has severly damaged the reputation of a public official is one that is even difficult for fairminded judges to impart to juries. Still, the press deserves at least some of the blame for failing to educate the public about the intricacies of the *Sullivan* concept.

11. See Soloski, "The Study and the Libel Plaintiff: Who Sues for Libel?" 71 *Iowa L. Rev.* 217, 220 (1985).

12. See Bezanson, "Libel Law and the Realities of Litigation: Setting the Record Straight," *id.* at 226, 229.

13. Reversal rates seem to run at about 90% over the past few years. See Kaufman, ch. 1.

14. See, W. Keeton, et al. *Prosser and Keeton on Torts* (5th ed. 1984).

15. On rare occasions, a media firm will sue a libel plaintiff for the cost of litigation. Steven Brill, publisher of *The American Lawyer*, however, has recovered damages from plaintiffs on three occasions. Comments by Steven Brill, Columbia University conference on libel, Jun. 13, 1986,

16. See, "Lankenau, Living With the Risk of Libel," *Folio Magazine* (Nov. 1985) at 171.

17. The jury found that *Time* was negligent as did many other journalists, see, e.g., Brill," Say It Ain't So, Henry," *The American Lawyer* (Jan./Feb. 1985) at 1. For a short summary of the case closer to *Time's* perspective, see, "Of Meaning and Malice," *Time*, (Jan. 21, 1985) at 58. The decision refusing to grant a summary judgment is Sharon v. Time, 599 F. Supp. 538 (1984). The cost of litigation is estimated by Lankenau, *supra* note 16, at 171. *Time* finally issues a correction in its January 21, 1985 edition, at 59, but still "stands by the substance of the paragraph in question."

18. The investigation, known as the Benjamin report, was released but never published; it is discussed in some detail in Kowett, *A Matter of Honor* 202–24, 266–74, (1984). Kowett also gives a detailed description of the events leading up to the trial. Lankenau, *supra* note 16, discusses the cost of libel litigation. Despite the conclusions of the Benjamin report, CBS News president Van Gordon Sauter decided to "stand by" the broadcast and not to apologize (*see* Kowett, at 220–24) although he could have done both.

19. See, Adler, *supra* note 7, at 15.

20. Sullivan, 376 U.S. at 271–72.

21. See Wilkerson, "To Err is Human, but To Correct Sells Papers," *N.Y. Times*, Nov. 21, 1986, at A16.

22. See Memo from Steven Brill to All Am-Law Publishing Corp. editorial people, regarding general rules and guidelines, Mar. 8, 1986, at 1. See also N. Isaacs, *supra* note 7, at 145.

23. See Franklin, *infra* ch. 7.

24. See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

25. This might be a vain hope, however, for, according to Adler, "professional solidarity," which includes "refusing to contradict, or even question anybody else's [story] has virtually eliminated the very diversity that it was the purpose of the framers, in the First Amendment, to protect." Adler, *supra*, note 7 at 18.

26. Among the many who have believed that public officials should not be permitted to sue for libel are Justices Black and Douglas. Sullivan, 276 U.S., at 293 (Black and Douglas, JJ., concurring)

27. In *Sullivan*, 376 U.S. at 279, the Court clearly stated a desire to protect those who might find it too expensive or otherwise too difficult to prove in court the truth of their statements. The addition of an opportunity to collect attorneys' fees would more than compensate them for any psychic loss due to a requirement that they concede their failure to be able to prove the truth of various statements in their story. It is suggested here that a more valuable tool for these defendants would be the right to win attorneys' fees, as discussed below.

28. It has been estimated that such nuisance suits may constitute 50% of all defamation suits. See, Weber, "Editors Surveyed Describe Half of All Libel Suits as 'Nuisance' Cases," *ASNE Bulletin* 38 (Jan. 1986); Franklin, "Good Names and Bad Law: A Critique of Libel Law and a Proposal," 18 *U.S.F.L. Rev.* 1, 6 n.27 (1983).

29. As Steven Brill has noted, "I've written, and I mean it, that I would give away most of my *Times v. Sullivan* freedoms for the simple freedom of being able to have those who sue us at the *American Lawyer* for libel, pay our legal costs after we win." Comments offered at the Columbia University conference on libel, Jun. 13, 1986.

30. See Bezanson, supra note 12, at 228. The use of contingency fee arrangements is standard practice in tort litigation.

31. Clients often have a strong desire to bring such suits out of anger or frustration, whether or not the charges made against them are accurate. Many believe that the mere act of bringing suit lends credibility to their position, regardless of the outcome. *Id.*

32. Most statutes granting attorneys' fees grant them to the prevailing party at the discretion of the court. The best known of such statutes is probably the one that is part of the civil rights act. See 42 U.S.C. sec. 1988 (1986).

33. Since the attorneys' fee provision would only apply to cases involving *Sullivan* and therefore public figures, it would be very likely that such public figures would have significant personal resources for satisfying attorneys' awards.

34. This differentiates plaintiffs in defamation cases from other plaintiffs. Most tort plaintiffs are not sure of all the facts and thus do not know who is at fault and whether they can provide sufficient proof. They do not have certain knowledge of the truth.

35. According to the Iowa Study, those defamed in the media often contact the media before contacting an attorney. Thus the press often has the opportunity to resolve the dispute with a correction, where appropriate, without costly litigation. See Cranberg, *supra* note 9, at 221. Nevertheless, the study found that only about 15% of claims are settled out of court. Bezanson, *supra* note 29.

A requirement that negligence be conceded before the *Sullivan* defense could be invoked would create a stronger incentive to concede error earlier. Presumably this would lead to a settlement rate much closer to the approximately 95% overall rate for tort litigation. See, Priest & Klein, "The Selection of Disputes for Litigation," 13 *J. Legal Stud.* 1, 2 (1983).