PRESS & TELEVISION

Second Thoughts About Sullivan?

"*New York Times* v. *Sullivan* Reconsidered: Time to Return to 'The Central Meaning of the First Amendment'" by Anthony Lewis, in the *Columbia Law Review* (April 1983), 435 West 116th St., New York, N.Y. 10027.

Journalists long regarded the U.S. Supreme Court's 1964 *New York Times* v. *Sullivan* decision, which sharply restricted the right of "public figures" to sue for libel, as a landmark victory for press freedom.

But the decision has proved increasingly costly to the press, says Lewis, a *Times* columnist and specialist on the law.

To sue for libel, the Court said, a "public figure," whether a government official or a movie star, had to prove not only that a news organization's statements about him were defamatory and false, as other plaintiffs must, but also that they had been published with "actual malice"—that is, with knowledge that they were false. But that opened the door to new problems.

In 1979, the Court ruled in *Herbert* v. *Lando*, a libel suit against CBS, that plaintiffs must be given the right to question newsmen and to inspect their files in the search for "actual malice." It returned the case to a lower court for trial. So far, the "discovery" process has cost CBS $3–4 million in legal fees. Other libel suits will take a similar toll.

Meanwhile, says Lewis, juries often misconstrue the *Sullivan* rule. In 1982, for example, Mobil Oil president William Tavoulareas won more

A 1978 comment on newsmen's First Amendment fears: "I can't take this kind of life anymore, Harry . . . always hidin' out from the cops . . . harassed by judges . . . please, Harry, quit . . . quit the New York Times."

than $2 million in a libel suit against the *Washington Post*, which had published a story claiming that he had set up his son in a business that had contracts with Mobil. But interviews with five of the six jurors after the trial revealed that none thought the story false. They faulted the original story for failing to *prove* it was true.

Juries also think "media giants can afford hefty damages and might as well pay," according to Lewis. Indeed, a 1982 study shows that media defendants win only 11 percent of the cases decided by juries, but 75 percent of those decided by judges. Such odds scare off journalists contemplating controversial stories about government.

Lewis suggests a remedy. "Public figures," whether officials or private citizens, could sue for libel only when a story did *not* concern government business. Otherwise, libel suits would be barred. Public officials' performance, in particular, should be fair game for press criticism, even inaccurate criticism. "Their recourse is not litigation but rebuttal," Lewis says. Without stronger curbs on officials' right to sue, *Sullivan* risks gagging the press with its own pocketbook.

RELIGION & PHILOSOPHY

Painful Choices For Doctors

"The Calculus of Suffering in Nineteenth-Century Surgery" by Martin S. Pernick, in *The Hastings Center Report* (April 1983), 360 Broadway, Hastings-on-Hudson, N.Y. 10706.

Today's physicians often face an ethical dilemma: whether to prolong life or to spare pain when treating terminal cancer victims and other incurable patients. According to Pernick, a University of Michigan historian, doctors confronted a similar issue 130 years ago.

Until the mid-19th century, practitioners of medicine, lacking anesthesia, often had no choice but to inflict agony to save their patients' lives. Early 19th-century American doctors and surgeons, like their predecessors, steeled themselves to the suffering they caused because they knew it was necessary. An 1824 medical text backed them up: "Severe pain should never be an obstacle in the fight to preserve life."

Then, in 1846, William Morton, a Boston dentist, demonstrated that ether anesthesia made possible painless surgery. But the vapor of diethyl ether posed, then as now, a very real risk to life. Initial reactions to the dilemma were unambiguous. A physician's duty, one M.D. declared, was to preserve life, not endanger it, especially not in order to relieve "mere anguish."

But the profession's attitude toward pain soon changed. By 1850, ether and chloroform were in general use in major medical institutions. In 1855, a Philadelphia surgeon advocated that surgery, with its attendant risks, be used not only to save lives, but to ease pain from incura-