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Intersection and Divergence: Some Reflections on the Warren Court, Civil Rights, and the First Amendment

Lillian R. BeVier*

During Chief Justice Warren's tenure, a substantial body of First Amendment law emerged from the struggle to secure racial equality, and in several instances the Court seemed quite self-consciously to shape First Amendment doctrines so that freedom of speech would be an important arrow in the civil rights movement's quiver. Put another way, the Court protected the civil liberties of free speech and association to promote the civil right of racial equality. In 1965, Harry Kalven elucidated this development in his book *The Negro and the First Amendment*.¹ Kalven was an astute and sympathetic observer of both First Amendment doctrine and the civil rights movement, and when his book appeared, its civil rights perspective shed fresh light on, and lent a nice coherence to, the then-developing First Amendment law of libel, anonymity, privacy, freedom of association, trespass, and the public forum. As I reflected on what I might contribute to this Symposium's attempt to assess the Warren Court's jurisprudential legacy, it occurred to me that it might be fruitful to inquire into the progeny of some of the First Amendment cases² that Kalven analyzed in order to study how the First Amendment doctrines played out in contexts other than the civil rights movement. I also believe it is important to observe what has become of the Warren Court's assumption that liberty of speech for all is indispensable to, and indeed is a crucial measure of, the extent to which we have secured civil rights for all. Accordingly, I set for myself the task of trying to discern what has become of the Warren Court's most notable First Amendment case, *New York Times Co. v. Sullivan*,³ and to discover what doctrines emerged from the Court's efforts

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1. HARRY KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (Phoenix ed., Univ. of Chicago Press 1966) (1965).

2. Obviously I could only attend to some of them, as I had not set out to write a sequel to Kalven's book.

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

to protect civil rights demonstrators when they took their protest to streets and lunch counters across the South.⁴

The analysis that follows does not assign full responsibility to Warren Court precedents for the shambles that is today's First Amendment. The Symposium invitation – to assess "the jurisprudential legacy" of the Warren Court – does seem to suggest that a genuine, discernible, but-for causal chain directly links today's First Amendment doctrine to cases from the Warren Court era. And of course a certain sense exists in which, simply by virtue of the commands of *stare decisis* and the nature of precedent, the decisions of earlier cases "cause" outcomes to be what they are in later cases. Later cases "inherit" the earlier ones, and *stare decisis* requires later courts to address the law embodied in precedents set by earlier courts – by adhering to them, by overruling them, or by distinguishing them.⁵ So later cases represent earlier courts' "legacy," willy nilly. But thinking about how to compare later First Amendment cases to those decided by the Warren Court brings to the surface intractable puzzles about the nature and significance of the causal link between the two. The puzzles have to do with the extent to which one can confidently trace current First Amendment doctrine back to the Warren Court. I do not claim to have solved these puzzles. Indeed, having identified them and noted their intractability, I decided to finesse the causal question almost entirely.

Confident causal attributions are problematic because assessing the present in terms of the Warren Court past poses the notoriously indeterminate "nature vs. nurture," or "heredity vs. environment," puzzle. The Warren Court precedents are – of course – part of today's First Amendment's genetic material. But what the First Amendment has become since the Warren Court surely has as much to do with the philosophy of the Justices who have sat on the Court since Chief Justice Warren's time, with the kinds of First Amendment issues they have confronted, and with the nature of the claimants who have sought First Amendment protection for their activities as it does with its precedential inheritance. In his book, Kalven observed with considerable accuracy that "it would not be a bad summary of the last three decades of First Amendment issues in the Court to say simply: Jehovah Witnesses, Communists, Negroes."⁶ He did not observe, but could have with equal accuracy, that most of the First Amendment claimants in those three decades presented claims that

4. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283-85 (1964) (establishing in course of reversing civil damage award to public officials criticized for alleged civil rights violations, new First Amendment doctrine for defamation claims by public officials).

5. See, e.g., Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001) (stating that "path dependence" means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it).

6. KALVEN, *supra* note 1, at 135-36.

went to the core of what the First Amendment was about.⁷ Between 1968, when Chief Justice Warren retired, and 2002, the cast of characters became much more diverse, and their claims to First Amendment vindication have often – though of course not always – invoked peripheral rather than core values.⁸ The cast of characters now includes, among others, purveyors of indecent, obscene, and pornographic materials,⁹ the institutional press and other mass media corporations,¹⁰ commercial advertisers,¹¹ anti-war

7. Some First Amendment claims involved political protests. See *Terminiello v. Chicago*, 337 U.S. 1, 6 (1949) (finding that ordinance which forbade speech intended to invite dispute violated First Amendment); *Hague v. CIO*, 307 U.S. 496, 518 (1939) (finding unconstitutional decree that forbade distribution of literature containing viewpoints on NLRB and that placed conditions upon right to hold public meetings). Others involved advocacy of violent overthrow of the government. See *Dennis v. United States*, 341 U.S. 494, 516-17 (1951) (finding that Sections 2 and 3 of Smith Act, in so far as they prohibited advocating violent overthrow of government, did not violate protections of First Amendment). And still other claims involved religious proselytizing. See *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (finding that statute which required certificate to solicit support for religious cause was prior restraint on exercise of religion).

8. See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002) (finding laws banning virtual child pornography overinclusive and in violation of First Amendment); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001) (finding regulation of certain outdoor tobacco advertising in violation of First Amendment); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (finding ordinance banning completely nude dancing content neutral and permissible).

9. See, e.g., *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47-53 (1986) (finding content-neutral zoning ordinance for sexually explicit theaters constitutional); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 62-63 (1976) (concluding that zoning ordinance that regulated location of adult entertainment establishments was not prior restraint on speech and thus not violative of First Amendment).

10. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997) (Turner II) (finding that must-carry rules for cable operators serve compelling government interest and do not violate First Amendment); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) (Turner I) (finding that must-carry provisions for cable operators are content-neutral regulations but that government must demonstrate compelling interest before regulations are valid under First Amendment); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591-93 (1983) (concluding that Minnesota tax on ink and paper violated First Amendment because it singled out press and targeted small group of newspapers); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 607-11 (1982) (invalidating on First Amendment grounds statute that provided for mandatory closure during testimony of minor victim in sex offense trial); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (concluding that absent compelling government interest, trial judge's order barring public and press from criminal trial violated First Amendment).

11. See, e.g., *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512 (1981) (determining that ordinance restricting off-site commercial speech on billboards is constitutional).

protesters,¹² misusers of the flag,¹³ political parties and other campaign organizations,¹⁴ public forum seekers,¹⁵ anti-abortion protesters,¹⁶ government-subsidized speakers,¹⁷ religious speakers (from Christians¹⁸ to the International Society for Krishna Consciousness¹⁹), outright racists,²⁰ and – just to keep the Justices awake – a fair number of nude dancers.²¹ As even this partial list of

12. *See, e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971) (finding that expletive written on jacket regarding its owner's criticism of military draft was protected speech).

13. *See, e.g.*, *United States v. Eichman*, 496 U.S. 310, 317-19 (1990) (finding that Flag Protection Act of 1989, which prohibited all flag burning except for disposal, violated speech rights under First Amendment).

14. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465 (2001) (Colorado II) (holding that party's "coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits"); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614-18 (1996) (Colorado I) (finding that statute limiting party expenditures on United States Senate campaign violated First Amendment); *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 222-29 (1989) (holding that California statutes prohibiting primary endorsements by political parties violated First and Fourteenth Amendments because no compelling government interest to silence such speech existed); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224-25 (1986) (finding that statute limiting primary elections to party members violated party's First Amendment right of association); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 490-501 (1985) (declaring that statute prohibiting independent political committees from spending more than \$1000 on presidential campaign violated First Amendment); *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 207-08 (1982) (finding that Congress's interest in regulating campaign contributions of unions outweighed NRWC's interest in association).

15. *See, e.g.*, *Greer v. Spock*, 424 U.S. 828, 838 (1976) (determining that regulations limiting distribution of pamphlets and prohibiting political speeches without prior approval at Fort Dix posed no constitutional problem).

16. *See, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768-73 (1994) (finding Florida law creating buffer zones and noise restrictions around abortion clinics constitutional).

17. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 542-49 (2001) (finding rules prohibiting government subsidized welfare attorneys from challenging existing welfare law on behalf of their indigent clients violated First Amendment).

18. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 111-12 (2001) (concluding that school's exclusion of Christian club from use of school premises was "impermissible viewpoint discrimination").

19. *See, e.g.*, *Int'l Soc'y of Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683-85 (1992) (determining that regulations limiting solicitation of funds to areas outside airport terminals were reasonable).

20. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380-81 (1992) (finding ordinance used to convict cross-burning teens violated First Amendment because ordinance "prohibit[ed] otherwise permitted speech solely on the basis of the subject the speech addresses").

21. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-72 (1991) (finding Indiana law requiring nude dancers to wear pasties and G-strings constitutional because it aimed to combat nudity in general and not expression); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (overturning convictions of adult bookstore owners who provided live nude

contestants suggests, First Amendment litigation has become "a stage upon which practically the entire dramatic repertoire of contemporary American life could be played out."²² It would surely overstate the matter to suggest that the entire dramatic repertoire of contemporary American life represents "the jurisprudential legacy" of the Warren Court. Likewise, it would be a mistake to attribute the First Amendment doctrines that the Court has developed in response to these various dramas solely to the Warren Court's jurisprudence. It seems just plain reckless even to venture a guess as to how much attribution is enough, although it is probably wrong to assert that there are so many independent causes of today's decisions that no causal link exists between the Warren Court's First Amendment and today's. Because the causal questions present so many imponderables, the analysis that follows will not draw causal conclusions. It will instead consist simply of an inquiry into what has become of some of the key First Amendment initiatives that the Warren Court undertook.

In offering the following observations about what has become of some of the Warren Court's First Amendment-civil rights cases that Kalven so brilliantly analyzed, I implicitly give short shrift to the view that changes in Court composition have been outcome-determinative or even that they can be usefully explanatory. Unrealistic as ignoring this particular causal factor may seem to some, short shrift is warranted. The judicial philosophy of individual Justices is of course not irrelevant to the conclusions they reach and the outcomes they endorse, but the process by which individual philosophies coalesce to forge general doctrines and generate particular results is almost completely opaque to the outside observer. The only incontestible evidence of the Warren Court's jurisprudential legacy that we possess resides in that Court's written opinions – they are what constitutes the Warren Court's jurisprudence – and in the opinions of succeeding Courts, which represent its jurisprudential legacy. Accordingly, the decisions themselves will be my chief data points. In particular, I shall look at what has become of *New York Times Co. v. Sullivan* and of the cases involving speech in public places. *New York Times Co.* was an important and obvious exemplar of the Court's use of the First Amendment to protect the civil rights movement,²³ and the "speech

dancing because commercial zone regulations violated First Amendment); *California v. LaRue*, 409 U.S. 109, 114-19 (1972) (finding that regulations placed on licensed bars prohibiting certain sexually explicit activities were constitutional under Twenty-first Amendment).

22. Lillian R. BeVier, *Free Expression in the Warren and Burger Courts*, 25 J. SUP. CT. HIST. 191, 192 (2000).

23. See *N.Y. Times Co.*, 376 U.S. at 301 (Goldberg, J., concurring) (acknowledging that Alabama libel laws impacted First Amendment freedoms in race relations context and thus concurring in judgment to restrict libel damages for public official to cases that show proof of actual malice).

in public places" cases that the Warren Court decided offer additional evidence of an underlying civil rights agenda at work.²⁴ The jurisprudential legacy of neither *New York Times Co.* nor the speech in public places cases is, I venture to guess, what one would have expected – or, perhaps, what the Warren Court itself might have hoped.

One more preliminary comment is in order. The focus on the Warren Court's jurisprudential legacy seems to imply that we are assaying what has become of the parts of the law in which Chief Justice Warren himself exerted notable jurisprudential leadership. But the Warren Court's First Amendment decisions do not appear to exemplify Chief Justice Warren's jurisprudential leadership. Chief Justice Warren rarely wrote in First Amendment cases, and the opinions he did write were seldom doctrinally innovative. Although his Court decided many seminal First Amendment cases, the Chief wrote but one major opinion announcing a new turn in the law. He wrote for the Court in *United States v. O'Brien*,²⁵ in which the Court sustained the federal statute that banned draft-card burning and announced a "test" that, although often cited, could hardly be characterized as either illustrative or a high-water mark of the Warren Court's First Amendment jurisprudence:

[W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.²⁶

In terms of the First Amendment, the jurisprudential legacy of the Warren Court was left not by the Chief himself, but rather by Justice Brennan and, surprisingly perhaps, by the conservative Justice Harlan.

Let us begin with Justice Brennan's masterful and doctrinally innovative opinion in *New York Times Co. v. Sullivan*, a paradigmatic example of Warren Court First Amendment jurisprudence in service of the civil rights cause. As

24. See, e.g., *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 323-24 (1968) (finding injunction issued by court barring union protesters from shopping center hindered communication of protesters' speech and that it violated First Amendment); *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (finding ordinance, which banned leasing of hall without permit discretionarily issued by police chief, unconstitutionally infringed on organization's speech rights). In *Hague*, Justice Roberts suggested that the First Amendment guaranteed citizens the right to use public places for speech purposes. *Id.* at 515.

25. 391 U.S. 367 (1968).

26. *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

all who have even a passing acquaintance with the First Amendment know, in *New York Times Co.* the Court began the process of constitutionalizing the law of defamation.²⁷ It held that the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."²⁸

The case was almost as much a civil rights case as it was a First Amendment case because, as the Court well knew, it involved "the application of the libel laws to the Negro critics of Southern treatment of the protest movement,"²⁹ and the Court's sweeping new First Amendment doctrine protected the critics. Its civil rights ancestry no longer has any doctrinal impact, for it is almost exclusively as a First Amendment case that it lives today. And the feature of the case that exerts the most influence on today's First Amendment jurisprudence is its memorable endorsement of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."³⁰

Three aspects of *New York Times Co.* warrant attention here. First, "[t]he key source of insight for the Court . . . comes from seditious libel – or rather from what one might better call the negative radiations from seditious libel."³¹ "[T]he lesson to be drawn from the great controversy over the Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment," said the Court, is that "neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct."³² This insight provided the premise for the Court's decision.

The second noteworthy feature of *New York Times Co.* is that the Court annulled the long-standing assumption that state defamation law did not raise First Amendment issues. In 1942, in *Chaplinsky v. New Hampshire*,³³ the Court described libel as a "well-defined and narrowly limited class[] of speech, the prevention and punishment of which have never been thought to

27. See BeVier, *supra* note 22, at 205 ("[D]uring the Warren and Burger Court years, the press received a very substantial reprieve. On account of the then unprecedented reading of the First Amendment [in] *New York Times v. Sullivan*, . . . the press is liable for publishing false defamatory statements of fact only when they have done so 'with actual malice.'").

28. *N.Y. Times Co.*, 376 U.S. at 279-80.

29. KALVEN, *supra* note 1, at 53.

30. *N.Y. Times Co.*, 376 U.S. at 270.

31. KALVEN, *supra* note 1, at 57.

32. *N.Y. Times Co.*, 376 U.S. at 273 (citations omitted).

33. 315 U.S. 568 (1942).

raise any Constitutional problem."³⁴ In 1952, it confirmed libel's unprotected status in *Beauharnais v. Illinois*,³⁵ noting that "[l]ibelous utterances not being within the area of constitutionally protected speech, it is unnecessary . . . to consider the issues behind the phrase 'clear and present danger.'"³⁶ In *New York Times Co.*, Justice Brennan brusquely distinguished these precedents on purportedly factual grounds. Their holdings did not govern the present case, he said, because "[n]one of [them] sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials."³⁷ But this factual distinction seems ultimately to have been rather beside the point, given that Justice Brennan proceeded to declare unequivocally that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."³⁸ With this bold stroke of Justice Brennan's confident pen, the Court signaled the constitutionalization of an entire set of common law doctrines that it had previously announced were beyond the Constitution's purview.³⁹ Even after *New York Times Co.*, much of state libel law would have remained intact had the Court in later cases more strictly hewed to the limitation to seditious libel that was implicit in granting a constitutional privilege to "expression critical of the official conduct of public officials."⁴⁰ Instead of limiting the *New York Times Co.* privilege to criticism of government officials, however, the Court three years later extended it to defamatory statements about public figures who held no public office.⁴¹ The Court recognized that the seditious libel analogy was inapt in this context, and the asserted grounds for extending the privilege had almost nothing to do with the potential for government to quell criticism of itself by punishing seditious libel.⁴² Rather, the Court thought it

34. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

35. 343 U.S. 250 (1952).

36. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

37. *N.Y. Times Co.*, 376 U.S. at 268.

38. *Id.* at 269.

39. *See Beauharnais*, 343 U.S. at 266-67 (concluding that Illinois law outlawing criminal libel was not constitutionally objectionable); *Chaplinsky*, 315 U.S. at 571-72 (holding that prevention and punishment of certain classes of speech could be done without raising constitutional problems).

40. *N.Y. Times Co.*, 376 U.S. at 268.

41. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (holding that "a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers").

42. *Id.* at 154.

dispositive that distinctions between government officials and private actors had become blurred to the point that many individuals who do not hold public office are influential in resolving important public questions or are simply famous enough to play an important role in setting society's agenda.⁴³ Thus, what mattered was not that there be more speech about government but rather that there be more speech, period.

The third noteworthy aspect of *New York Times Co.* is the extent to which it reflects the Warren Court's determination to engage in strategic First Amendment rule-making. Kalven viewed the *New York Times Co.* privilege to make false statements of fact as very much akin to a bargain with the devil.⁴⁴ Justice Brennan thought the bargain necessary because true speech and political opinions, which have considerable First Amendment value, were likely to be deterred if the Court permitted the common law rule imposing strict liability for false statements of fact to stand.⁴⁵ Therefore, in return for a rule that would deter less true speech than would the common law rule, the Court was willing to immunize some false speech.⁴⁶ The Court had concluded that it was necessary to *overprotect* speech – in *New York Times Co.* by privileging some false speech – to protect "speech that matters,"⁴⁷ that is, true speech and opinions about the official conduct of public officials.⁴⁸

The deliberately strategic approach to First Amendment rule-making that *New York Times Co.* exemplifies had first emerged in two cases decided the same day in 1958, *Speiser v. Randall*⁴⁹ and *NAACP v. Alabama*.⁵⁰ These two

43. See *id.* at 155 (finding that private persons had sufficient public interest and access to means of counterargument to expose falsehood of defamatory statements).

44. See KALVEN, *supra* note 1, at 53 ("On its facts, the *Times* case seems to have been put together by the Devil himself in order to embarrass the legal system.").

45. See *N.Y. Times Co.*, 376 U.S. at 279 (describing stifling effect on speech of rule requiring critic to prove veracity of his allegations).

46. See *id.* at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive . . .'" (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

47. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

48. See *N.Y. Times Co.*, 376 U.S. at 271 ("The constitutional protection [of speech] does not turn upon 'the truth . . . of the ideas and beliefs which are offered.'" (quoting *Button*, 371 U.S. at 445)).

49. See *Speiser v. Randall*, 357 U.S. 513, 529 (1958) (concluding that statute requiring filing of oath that applicant did not advocate violent overthrow of government was unconstitutional because it placed burden on taxpayer to prove he was not member of class denied tax exemption).

50. See *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (finding production order issued by Alabama court requiring that NAACP turn over membership lists unconstitutional because it conflicted with members' right of association under First Amendment).

Warren Court decisions, with opinions written by Justices Harlan and Brennan respectively, proved genuinely catalytic. They:

broadened the Court's First Amendment horizon and adumbrated a conception of the Court's function that requires the justices to be engineers of a system of free speech rights, that charges them to identify and forestall the effect of hitherto disregarded imperfections in seemingly carefully designed regulatory efforts and that requires them to craft rules that purport to take realistic account of the incentives confronting *all* the affected actors. Both opinions implicitly set out not merely to preserve formal freedom but to encourage – or at the very least not predictably to discourage – its exercise.⁵¹

And in *New York Times Co.*, the same conception of the Court's task was clearly at work.

But what has been the jurisprudential legacy of *New York Times Co.*, and in particular of these three noteworthy aspects of the case? Put bluntly, *New York Times Co.*'s direct progeny and their close cousins, namely the First Amendment cases dealing with libel and privacy, are for the most part an undistinguished lot of surprisingly trivial cases clothed in ill-fitting but by now wholly conventional-seeming First Amendment garb. Constitutional constraints now govern much of the substantive common law of defamation⁵² and most aspects of libel litigation.⁵³

Since *Curtis Publishing Co. v. Butts*,⁵⁴ however, the doctrinal developments have taken place in disregard – perhaps in reckless disregard – of the seditious libel analogy that gave the doctrine birth.⁵⁵ There is irony in this fact. Although conventional wisdom has it that since and perhaps even on account

51. BeVier, *supra* note 22, at 200.

52. See, e.g., *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985) (concluding that when defamatory statements involve no issue of public concern, states may award presumed and punitive damages even absent showing of actual malice); *Gertz*, 418 U.S. at 346-47 (holding that First Amendment prohibits states from imposing liability without fault in defamation cases brought by private individuals, although *New York Times Co.* privilege does not apply in such cases).

53. See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (finding that plaintiff must bear burden of proof of falsity before he may recover damages from media defendant); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984) (concluding standard of review for "actual malice" should comply with Federal Rule of Civil Procedure 52(a) and rule of independent review applied in *New York Times Co.*).

54. 388 U.S. 130 (1967).

55. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (holding that public figure who is not public official may recover damages for defamation so long as danger to reputation is apparent and conduct of media was "highly unreasonable" in that it departed from normal standards of reporting and investigation).

of *New York Times Co.*, "the avoidance of seditious libel [has become] the 'central meaning' of the First Amendment,"⁵⁶ such avoidance is most certainly not the central meaning of the Court's post-*New York Times Co.* defamation jurisprudence. Indeed, I would argue that post-*New York Times Co.* defamation jurisprudence has neither a central First Amendment meaning nor a discernible core. It consists rather of a series of decisions in which the Court has engaged in case-by-case balancing of the need to avoid self-censorship against the state's interest in compensating individuals for harm occasioned by defamatory falsehood.⁵⁷ And neither the decisions nor the opinions give any hint that the Court has been moved, in any of its subsequent crafting of doctrinal details, by a broader, if unspoken, civil rights agenda.

New York Times Co.'s jurisprudential legacy is, however, more significant than the hodge-podge of supposedly constitutionally mandated adjustments to the common law of libel might suggest. In fact, quite apart from its lineal descendants, Justice Brennan's opinion has exerted a profound influence on the Court's general approach to First Amendment questions. In a wide variety of contexts other than defamation, for example, the Court continues to craft doctrines based on the assumption of a strategic mission to overprotect speech.⁵⁸ To be sure, the Court first embarked on this mission as early as the 1958 cases of *NAACP v. Alabama*⁵⁹ and *Speiser v. Randall*.⁶⁰ In the former case, the Court protected the right of association by protecting NAACP membership lists;⁶¹ in the latter, the Court found unconstitutional a requirement that veterans who sought a tax credit take an oath that they did not support violent overthrow of the government.⁶² However, *New York Times Co.* gave the Court's mission to overprotect speech unprecedented rhetorical momentum. Few First Amendment phrases have been so often invoked as Justice Brennan's ringing endorsement of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"⁶³ and few ideas have taken so firm a root in First Amendment doctrine

56. KALVEN, *supra* note 1, at 58.

57. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-42 (1974) (noting Court's continuing "effort to define proper accommodation between these competing concerns").

58. See *id.* at 341 ("The First Amendment requires that we protect some falsehood to protect speech that matters.").

59. 357 U.S. 449 (1958).

60. 357 U.S. 513 (1958).

61. See *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958) (finding that compelling state interest in securing membership lists did not outweigh members' right of association).

62. See *Speiser v. Randall*, 357 U.S. 513, 529 (1958) (concluding that state oath requirement for veteran's tax credit violated veteran's right to free speech).

63. *N.Y. Times Co.*, 376 U.S. at 270.

as the idea that speech is so important that constitutional doctrine must create as few incidents of unearned deterrence as possible.

A second Warren Court context in which freedom of speech principles and values seemed to intersect with – and have the potential to be put to the service of – the civil rights movement involved speech in public places. Civil rights advocates took to the streets in the early 1960s, in what Kalven described in 1965 as "a massive self-help movement . . . [that was] imaginative, tactful, effective, and the news story of the [first-half] of the decade."⁶⁴ Kalven also noted that "[s]etting the legal limits to the Negro use of self-help [was] one of the great legal issues of [the] day."⁶⁵ As things turned out, however, this legal issue proved to be, for the most part, a First Amendment dog that did not bark.

Demonstrators at privately owned places that were opened to the public for purposes of commerce presented the first "speech in public places" issue to emerge from the civil rights movement. Sit-ins at privately owned lunch counters in the South were a common form of self-help, and they often led to the arrest and state court conviction of the protesters. The Warren Court managed to overturn all of the convictions of the sitters-in without ever directly confronting, much less answering, the important constitutional questions they posed.⁶⁶ The broadest question these cases posed was framed in equal protection rather than First Amendment terms. It was whether state enforcement of a "neutral" trespass law at the instance of a racially motivated private owner constitutes "state action" for purposes of the Equal Protection Clause of the Fourteenth Amendment.⁶⁷ A second question was framed as a free speech issue. It was whether the First Amendment, made applicable to the states by the Fourteenth, protects protesters and demonstrators on private property that the owner has opened to the public for purposes of commerce.⁶⁸ The passage of the Civil Rights Act of 1964, and in particular of the Public Accommodations title, mooted the first question, enabling the Court permanently to finesse

64. KALVEN, *supra* note 1, at 124. The news story of the second half of the decade was, of course, the Vietnam War.

65. *Id.* at 125.

66. See generally Monrad G. Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None,"* 1964 SUP. CT. REV. 137 (describing and defending Court's refusal to reach central question of extent to which Fourteenth Amendment forbids states to support private choices that could not constitutionally be made by judiciary, executive, or legislature).

67. See, e.g., *Bell v. Maryland*, 378 U.S. 226, 227-28 (1964) (reviewing trespass convictions of sitters-in at restaurant under neutral trespass law challenged as violating Fourteenth Amendment and reversing convictions on nonconstitutional grounds).

68. Cf. *Marsh v. Alabama*, 326 U.S. 501, 509 (1946) (finding that state cannot constitutionally impose criminal punishment on person distributing religious literature on premises of private company-owned town, even though distribution is contrary to wishes of town's owner and manager).

it.⁶⁹ The Warren Court flirted with a positive answer to the second question when it held, in *Amalgamated Food Employees Union v. Logan Valley Plaza*,⁷⁰ that a state may not, "through the use of its trespass laws, wholly . . . exclude [those] members of the public wishing to exercise their First Amendment rights" in a privately owned shopping center where the protest proceeded "in a manner and for a purpose generally consonant with the use to which the property is actually put."⁷¹ But the Burger Court soon backtracked, squarely holding that "the constitutional guarantee of freedom of expression has no part to play" in securing the right of access to private property for speech purposes, even when that property is generally open to the public for business purposes.⁷²

The next cluster of issues presented by civil rights advocates' speech in public places concerned publicly owned property. In the 1939 case of *Hague v. CIO*,⁷³ Justice Roberts penned his famous dictum suggesting that the First Amendment guarantees citizens access to streets and parks for speech purposes: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions."⁷⁴ In his 1965 book, Kalven proposed that "in an open democratic society the streets, the parks, and *other public places* are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer."⁷⁵ He recognized that if the Court were to confront such a proposition, "[t]he test question [would be] whether the state can bar the use of public places for speech altogether . . . in the interest of other uses of the facility."⁷⁶ Some Justices urged that any governmental attempt to prohibit First Amendment activity on publicly owned property – whether a traditional public forum or not – should be subject to close judicial scrutiny to determine whether the proposed speech would be "basically compatible with the activities otherwise occurring"

69. The Court sustained the public accommodations title, Title II, as a valid exercise of the power to regulate interstate commerce. It has never had to decide whether to overrule *The Civil Rights Cases*, 109 U.S. 3 (1883), which held that Section 5 of the Fourteenth Amendment does not give Congress power to enact a public accommodations law.

70. 391 U.S. 308 (1968).

71. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-20 (1968), *overruled by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

72. *Hudgens*, 424 U.S. at 521.

73. 307 U.S. 496 (1939).

74. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

75. KALVEN, *supra* note 1, at 185 (emphasis added).

76. *Id.* at 191.

there.⁷⁷ But the Warren Court signaled that the answer to Kalven's test question was going to be yes – the state may bar the use of at least some public places for speech altogether in the interests of those places' other uses, and not every choice to bar speech would evoke careful review.

In *Adderley v. Florida*,⁷⁸ the Court affirmed the convictions of student demonstrators who went to the county jail to protest the arrest of their classmates and were themselves arrested when they refused to leave the jail grounds.⁷⁹ Their failure to leave violated a Florida statute that declared unlawful "every trespass upon the property of another, committed with a malicious and mischievous intent."⁸⁰ In Justice Black's majority opinion affirming the convictions, he wrote that the "state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."⁸¹ The deference to state regulator-owners of non-public forum property implicit in Justice Black's statement gained momentum and is for all practical purposes the standard operating procedure today, at least when the challenged regulations are content- or viewpoint-neutral and the public property is not a traditional public forum such as a street or a park.⁸² In fact, in recent years the Court has sustained many regulations of speech activity even in traditional public fora.⁸³

In regard to the Warren Court's jurisprudential legacy, there are at least two ways to interpret the developments with respect to speech in public places.

77. *Greer v. Spock*, 424 U.S. 828, 860 (1976) (Brennan, J., dissenting).

78. 385 U.S. 39 (1966).

79. *See Adderley v. Florida*, 385 U.S. 39, 47 (1966) (affirming conviction for trespassing on jail grounds).

80. *Id.* at 40 n.1.

81. *Id.* at 47.

82. *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 813 (1985) (sustaining executive order excluding legal defense and political advocacy organizations from participation in Combined Federal Campaign, which is annual fund-raising drive conducted during working hours in federal workplace); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) (sustaining provision of school district collective bargaining agreement granting access to district's interschool mail system to exclusive bargaining representative of district's teachers, but to no other union); *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133-34 (1981) (sustaining federal statute prohibiting deposit of unstamped "mailable matter" in Postal Service-approved letter box).

83. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989) (sustaining New York City regulation requiring use of city-provided sound systems and technicians for concerts in Central Park's Bandshell); *Frisby v. Shultz*, 487 U.S. 474, 488 (1988) (sustaining ordinance that prohibited picketing on residential street when picketing focuses on and takes place in front of particular residence); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984) (sustaining application of regulation prohibiting camping in certain parks in Washington, D.C., to protestors seeking to dramatize plight of homeless).

From one perspective, they suggest that a significant aspect of the Warren Court's legacy has withered. On this view, the recent "speech in public places" cases represent a retreat from the conviction, exemplified in *New York Times Co.*, that First Amendment doctrine ought to be crafted so as to permit "the widest possible opportunity for free expression."⁸⁴ According to this perspective, if the Court still held this conviction, it would insist on subjecting regulations and prohibitions of First Amendment activity on publicly owned property to searching review in every case:

The crucial question [in every case would be] whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time [I]n assessing the reasonableness of a regulation, [the Court would] weigh heavily the fact that communication is involved; the regulation [would have to be] narrowly tailored to further the State's legitimate interest.⁸⁵

Another interpretation of the Court's deference to regulators in public and non-public fora puts the developing law in a more benign light. The recent cases do not necessarily appear to reflect either a lack of enthusiasm for, or a hostility toward, freedom of expression. Instead, they demonstrate the Court's appreciation of the limits of judicial capacity and its unwillingness to expend judicial resources for minimal First Amendment gains:

Although access to nonpublic forum public property might make some speech marginally more effective, a denial of access to such property poses no real threat to the marketplace of ideas. But to require such access would necessarily interfere with competing government interests and involve the courts in an endless series of highly subjective and unpredictable judgments. Thus, the costs of such inquiries far exceed the benefits.⁸⁶

If this interpretation is the more accurate perspective, the Court's present unwillingness to apply strict scrutiny to all denials of access to publically owned property can be seen as part of the Warren Court's jurisprudential legacy – as the reaction of a more skeptical Court to the more free-wheeling, judicially self-confident aspect of the Warren Court's jurisprudence.

* * *

84. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 306 (1999).

85. *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972).

86. STONE ET AL., *supra* note 84, at 306; *see also* Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79, 113-22 (evaluating advantages and disadvantages of denying access to publicly owned property).

About so complex a topic as the jurisprudential legacy of the Warren Court, and in the context of such a brief comment, sweeping generalizations are inappropriate. I hope, however, that a couple of modest general observations will not be amiss.

Comparing the Warren Court's First Amendment cases with the Court's more recent efforts reveals some striking contrasts. The differences between the Warren Court's opinions and those that emanate from today's Court have less to do with results and more to do with tone, style, and methodology. During Chief Justice Warren's tenure, the Court's First Amendment perspective broadened considerably. When Chief Justice Warren came to the bench, the First Amendment was hardly the bulwark of freedom it has since become. The "clear and present danger test," for example, was the governing doctrine with respect to regulations of speech advocating or inciting unlawful conduct.⁸⁷ "Clear and present danger" was never a truly speech-protective test. And the Court effectively emasculated its ability to shield First Amendment claimants in *Dennis v. United States*,⁸⁸ in which the Court permitted the gravity of the evil to be discounted by its improbability, thus seemingly doing away with the requirement that the Government prove that harm from speech was imminent.⁸⁹ And in 1953, the reigning methodology for deciding First Amendment cases was ad hoc balancing, with only the occasional foot on the First Amendment side of the scale.⁹⁰ But while Earl Warren was Chief Justice, the Court began to perceive that speech, especially speech about government officials and public affairs, is a positive good in a democratic society rather than a tiresome or trivial nuisance that nevertheless must occasionally be tolerated.⁹¹ In addition, the Court began to perceive that law is sometimes prone to systematic bias against speech and that it was the Court's job to correct for such bias. Prompted by these perceptions, the Court began self-consciously and deliberately to expand the First Amendment's reach in order to craft doctrines that would both enshrine this expansion and protect speakers from the chill of overbroad, vague, or viewpoint discrimina-

87. See, e.g., *Dennis v. United States*, 341 U.S. 494, 503-08 (1951) (providing in-depth analysis of "clear and present danger" test to speech of defendants who conspired to advocate overthrow of government).

88. 341 U.S. 494 (1951).

89. See *Dennis v. United States*, 341 U.S. 494, 510 (1951) (upholding convictions under Smith Act for conspiring to overthrow government by organizing Communist Party).

90. See, e.g., *Schneider v. State*, 308 U.S. 147, 164 (1939) (invalidating anti-littering ordinance on grounds that interest in free expression outweighed city's interest in keeping streets clean).

91. See *N.Y. Times Co.*, 376 U.S. at 270 (affirming "profound national commitment to principle that debate on public issues should be uninhibited, robust, and wide-open").

tory laws. This doctrinal expansion is striking in itself, of course, but what is even more noteworthy is how much vitality the opinions display. Wholly apart from whether they hew to conventional standards of the judicial craft, they generate an impression of a Court vigorously engaged, grappling with fundamental questions and confidently drawing new doctrinal boundaries. The opinions are fun to read; they are lively; they are even occasionally rhetorically memorable.

Fast forward to the present. The Burger and Rehnquist Courts have preserved most of the doctrinal expansion that the Warren Court began, and they have even broadened the Amendment's coverage in some areas. But the opinions are anything but lively, nor are they rhetorically memorable. They tend rather to be wooden, stale, formulaic, tiresome to read – and windy.⁹² The Warren Court's approach has hardened into doctrines that consist of "flagrantly proliferating and contradictory rules."⁹³ Three- or four-prong "tests," whose applications lend to the opinions a mechanistic, bureaucratic tone, abound.⁹⁴ The tests themselves seem designed to give the impression that they genuinely guide and constrain the Court's judgment, perhaps in response to the frequently-expressed concern that the Warren Court's decisions were too result-oriented, improvisational, and maybe even illegitimate.

Upon examination, however, today's First Amendment tests only serve to disguise, rather than to dispel, the First Amendment's indeterminacy, and they do little to constrain what one commentator called, in reference to the Burger Court, the Court's "rootless activism."⁹⁵ They offer few helpful clues – even to the members of the Court, apparently – about how to answer the hard questions.⁹⁶ Indeed, because they are not firmly tethered to any

92. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (including five interminable opinions discussing First Amendment issues raised by Massachusetts's regulations governing advertising and sale of cigarettes, smokeless tobacco products, and cigars).

93. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

94. See, e.g., *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54-55 (1983) (outlining, with regard to right of access to public property, three separate categories of public property – traditional public forum, designated public forum, and nonpublic forum – and discussing standard of review for denials of access to each respective category); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980) (announcing four-prong test for commercial speech cases); *Miller v. California*, 413 U.S. 15, 24 (1973) (revising permissible scope of regulation of obscenity and laying down three guidelines for trier of fact).

95. Vincent Blasi, *The Rootless Activism of the Burger Court*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 217 (Vincent Blasi ed., 1983).

96. See, e.g., *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 257-58 (1997) (Turner II) (O'Connor, J., dissenting) (discussing 5-4 decision of *Turner Broad. Sys., Inc. v. FCC*, 512 U.S.

consistently applied and articulated theory of the First Amendment and because the Court has developed no metric for weighing the substantiality of the government's interest in particular regulatory schemes or for measuring the harm that any proposed speech will do to the government's ability to achieve its objectives, applying the tests requires the Court to make – but unfortunately does not require it to defend – subjective judgment after subjective judgment. To the extent that this phenomenon represents an aspect of the Warren Court's jurisprudential legacy, it seems a most unfortunate one indeed.

A second modest observation brings back the Warren Court's First Amendment endeavors to advance the cause of the civil rights movement by strengthening the First Amendment shield that protected the movement's activities from unfriendly regulation. It's a fair bet that the Warren Court never imagined that civil liberties and civil rights could ever be on a collision course. The Justices between 1953 and 1968 seemed to think that a choice to protect speech was almost by definition a choice that would promote equality. Yet one of the most unhappy facts about the present day is that so many scholars regard free speech as the enemy – or at least the potential enemy – of civil rights, not its handmaiden. Many regard campus speech codes and state and local regulations of hate speech, for example, as essential to the full enjoyment of civil rights by historically disfavored groups, despite the fact that they raise troublesome civil liberties issues under the First Amendment as conventionally or traditionally understood.⁹⁷ Many regard the regulation of pornography – defined as the sexually explicit graphic depiction of the subordination of women, without regard to whether it contains serious literary, artistic, political, or scientific value that would require its protection under prevailing First Amendment rules⁹⁸ – as necessary to prevent serious harm to

622 (1994) (Turner I), in which majority held that must-carry provisions of Cable Television Consumer Protection and Competition Act of 1992 should receive only intermediate scrutiny, but dissenters argued that must-carry rules were content based, that they deserved strict scrutiny, and that majority went astray when it applied an "inappropriately lenient level of scrutiny . . . [and] misapplic[d] the analytic framework it [chose]").

97. See, e.g., Charles Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438-40 (arguing that racist speech can be regulated pursuant to *Brown v. Board of Education* because it stamps badge of inferiority upon blacks); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989) (describing how racist speech should be treated as *sui generis* because it is so hurtful and harmful that it does not belong within realm of protected speech).

98. See, e.g., Lorene M.G. Clark, *Liberalism and Pornography*, in PORNOGRAPHY AND CENSORSHIP 52-53 (David Copp & Susan Wendell eds., 1983) (describing how pornography uses sexuality as instrument of oppression); Catherine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 22 (1985) (defining pornography and

women, a claim that amounts to an argument that free speech values are antithetical to, and ought to be trumped by, women's interest in full equality.

This is not the occasion to delve into the details of the debates these claims have engendered, nor to summarize the arguments that have been made, nor to offer a possible resolution of the conflicting claims. It is an occasion, however, to note the stark contrast between the mere fact of today's perceived, irreconcilable conflict between civil rights and civil liberties with the vision that the Warren Court embraced: of rights and liberties as two sides of the same coin, in harmony with one another, expanding together rather than at the expense of one another. The most painful question is whether today's bitter disputes should be viewed as part of the Warren Court's jurisprudential legacy – or as a betrayal of it.

indicating that it may cause measurable harm to women).

