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THE FIRST AMENDMENT LAW REVIEW'S ANNUAL SYMPOSIUM: A DIALOGUE ON THE LEGACY OF *NEW YORK TIMES CO. V. SULLIVAN*

KEYNOTE ADDRESS

KEN PAULSON*

(This article is based on remarks prepared for the First Amendment Law Review's annual symposium held at the University of North Carolina and presented on October 12, 2013.)

Good Morning. I'm honored to join you for this exploration of *New York Times Co. v. Sullivan*,¹ in this, its fiftieth anniversary year.

This was truly a landmark case, pivotal to our understanding of freedom of the press and critical to the momentum of the civil rights movement.

And though now five decades old, it is arguably even more important in this digital age.

In addition to framing this historic case, I would like to offer some perspective as a former newspaper editor. I've managed newsrooms from the *Green Bay Press Gazette* to *USA TODAY*, and know firsthand the profound impact of this decision on how we gather and publish the news.

But first, I want to tell you how good it is to be on this campus. I was here last year to talk about the First Amendment, and we had a great evening with a lecture and pop quiz, testing a group of journalism students on their knowledge of the First Amendment. Tough questions were asked and answered, and t-shirts were won. We had a great time.

At the heart of our conversation that night was a discussion of how the Bill of Rights came to be.

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1. 376 U.S. 254 (1964).

It's important to remember that the American people demanded a guarantee of a Bill of Rights as a precondition to ratifying the American Constitution in 1789.² They weren't comfortable with creating a strong central government without also establishing some safeguards.³ Their demands included guarantees of jury trials, the right to bear arms, freedom from unreasonable search and seizure, the right to worship freely, and the opportunity to change government through petition.⁴

The First Amendment guaranteed the right to a free press, among other freedoms.⁵ Although there is much talk today about biased news media, today's generation of journalists are far more professional than their counterparts of 1789. In this nation's earliest days, you did not start a newspaper to make large sums of money. You published a newspaper to support your political position and attack your rivals.⁶ Yet, even when many newspapers were extraordinarily one-sided, the first generation of Americans saw that a free press would be an important safeguard for democracy, keeping those in power accountable and helping to ensure the preservation of our collective constitutional rights.

And of course, a free press also helps fuel social progress. When John Adams undercut the newly ratified Bill of Rights with the Alien and Sedition Acts and other repressive measures, Benjamin Franklin Bache, the editor of the *Aurora* took him on.⁷ Although staying in the black was always a goal, crusading editors were more concerned with staying out of prison.

As early as 1827, *Freedom's Journal*, a newspaper published by African Americans, called aggressively for the abolition of slavery, not exactly a viable business model in the early nineteenth century.⁸

2. See Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 537–38 (2003).

3. *Id.*

4. U.S. CONST. amend. I–X.

5. U.S. CONST. amend. I.

6. See generally MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 1–12* (1978).

7. See generally Arthur Scherr, "Vox Populi" Versus the Patriot President: Benjamin Franklin Bache's Philadelphia *Aurora* and John Adams (1797), 62 PENNSYLVANIA HISTORY, no. 4, 1995, at 503–31.

8. See generally JACQUELINE BACON, *FREEDOM'S JOURNAL: THE FIRST AFRICAN-AMERICAN NEWSPAPER* (2007).

The first newspaper to fight for women's suffrage was the *Revolution*, published by Susan Anthony and Elizabeth Cady Stanton beginning in 1868.⁹ Their primary goal was to raise hell, not revenue.

The roots of the civil rights movement can be found in the pages of the *Chicago Defender* in 1905, taking a stand against segregation and lynchings.¹⁰

Yet as important as a free press has been, it received surprisingly little protection in this nation's first century. It wasn't until *Gitlow v. New York*¹¹ in 1925 that the Supreme Court concluded that the First Amendment applies to the actions of states.¹²

Today's freedom of press guarantees are far more robust than they were during much of the nation's first two centuries, thanks in large part to *New York Times Co. v. Sullivan*, arguably the most important freedom of press case in modern American history.¹³

In order to understand *Sullivan*, one must first understand its time and place.

I say this knowing full well that for many of you, an African-American president is not a novelty. Some of you have spent a quarter of your life with a black president. In some ways, that earlier pervasive institutional racism must be almost unthinkable.

Montgomery, Alabama, was one of those communities where civil rights history was made, particularly after Rosa Parks refused to give up her seat on a city bus on December 1, 1955.¹⁴

The incident inspired the Montgomery bus boycott, led by a then 26-year-old Martin Luther King, Jr. The boycott attracted extensive news coverage from northern news organizations and tension grew. City officials dug in their heels and resisted integration.¹⁵

In 1960, Alabama Governor John Patterson ordered that Martin Luther King be charged with tax evasion and perjury in a case involving

9. See generally COLLEEN ADAMS, *WOMEN'S SUFFRAGE: A PRIMARY SOURCE HISTORY OF THE WOMEN'S RIGHTS MOVEMENT IN AMERICA* (2003).

10. See generally MYITI SENGSTACKE RICE, *CHICAGO DEFENDER* (2012).

11. 268 U.S. 652 (1925).

12. *Id.* at 666–67.

13. See, e.g., ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

14. See generally CHERYL FISHER PHIBBS, *THE MONTGOMERY BUS BOYCOTT: A HISTORY AND REFERENCE GUIDE* (2009).

15. *Id.*

his state income tax returns. Outraged by this, civil rights leaders decided to set out to raise money to defend Dr. King, and part of their strategy was to put a full page ad in the New York Times.¹⁶

That ad was headlined "Heed Their Rising Voices," and it painted a negative picture of Southern officials. It began:

Heed Their Rising Voices

As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights. In their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom

In Orangeburg, South Carolina, when 400 students peacefully sought to buy doughnuts and coffee at lunch counters in the business district, they were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold.

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was pad-locked in an attempt to starve them into submission.

In Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte, and a host of other cities in the South, young American

16. LEWIS, *supra* note 13, at 5-6.

teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy. Their courage and amazing restraint have inspired millions and given a new dignity to the cause of freedom.

Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement. Small wonder that they are determined to destroy the one man who, more than any other, symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest. For it is his doctrine of non-violence which has inspired and guided the students in their widening wave of sit-ins; and it is this same Dr. King who founded and is president of the Southern Christian Leadership Conference—the organization which is spearheading the surging right-to-vote movement. Under Dr. King's direction the Leadership Conference conducts Student Workshops and Seminars in the philosophy and technique of non-violent resistance.

Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding" "loitering" and similar "offenses." And now they have charged him with "perjury"—a *felony* under which they could imprison him for *ten years*. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South. Their strategy is to behead this affirmative movement,

and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.

Decent-minded Americans cannot help but applaud the creative daring of the students and the quiet heroism of Dr. King. But this is one of those moments in the stormy history of Freedom when men and women of good will must do more than applaud the rising-to-glory of others. The America whose good name hangs in the balance before a watchful world, the America whose heritage of Liberty these Southern Upholders of the Constitution are defending, is our America as well as theirs . . .

We must heed their rising voices—yes—but we must add our own.

We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.

We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

Your Help is Urgently Needed . . . NOW!!¹⁷

Thirty-five copies of the New York Times with that ad made its way to Montgomery, Alabama,¹⁸ where it drew the attention of a number

17. *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at L25 (some formatting from the original advertisement omitted).

18. *New York Times Co. v. Sullivan*, 376 U.S. 254, 260 n.3 (1964).

of people, including a newspaper reporter who noted that the ad had a number of errors. For example, the ad said student leaders from Alabama State College were expelled after singing on the steps of the state capitol. In truth, the students were expelled because they had led a sit-down strike in a dining area at the courthouse.¹⁹ They had also alleged that when students protested by refusing to re-register, their dining hall was padlocked. There doesn't appear to have been any truth to that story either.²⁰

As it turns out, the New York Times ignored its own guidelines in publishing the ad and didn't confirm the claims in the ad or even check to see if those listed as supporters had in fact signed it.²¹

Many in Montgomery, Alabama, including city commissioner L.B. Sullivan, viewed the ad as a personal affront. Sullivan, who was responsible for overseeing the police, demanded a retraction and subsequently sued the New York Times and several civil rights leaders who were listed as signers for defamation.²²

This was a matter of pride and reputation. Although very few copies were distributed in the community, those who saw themselves as maligned were determined to reestablish their reputation and make the New York Times pay.²³

Looking back over five decades, it's easy to dismiss these plaintiffs as racists. But no one sees himself or herself as a racist. In their

19. LEWIS, *supra* note 13, at 10.

20. *Sullivan*, 376 U.S. at 258–59.

21. Although the New York Times was found to have “followed its established practice” in accepting the advertisement from A. Philip Randolph, who was “known to the Times’ Advertising Acceptability Department as a responsible person,” a discrepancy arose as to additional names appended to the advertisement after it was received from Randolph, with the Court finding that “[n]either he [the Manager of the Advertising Acceptability Department] nor anyone else at the Times made an effort to confirm the accuracy of the advertisement, either by checking it against recent Times news stories relating to some of the described events or by any other means.” *Id.* at 260–61.

22. *New York Times Co. v. Sullivan*, 144 So. 2d 25, 30 (1962), *overruled by* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (referencing “receipt of a letter from the plaintiff Sullivan demanding a retraction and apology for the statements appearing in the advertisement, which is the basis for this suit . . .”).

23. See Mary-Rose Papandrea, *The Story of New York Times Co. v. Sullivan*, in *FIRST AMENDMENT STORIES* 233–35 (Richard W. Garnett & Andrew Koppelman eds. 2012).

minds, they were defending a way of life, fending off overbearing federal intervention, or protecting their communities.

While no real damage to reputation was done, there was a clear motivation to sue, and state law at the time provided a fairly easy path to victory.²⁴

The best defense to a libel suit is to establish that you're publishing the truth. But because this article contained a handful of errors, truth would not be an effective defense. Sullivan prevailed and was awarded \$500,000.²⁵

The case was appealed to the U.S. Supreme Court, and on March 9, 1964, the Court unanimously reversed.²⁶

At the heart of the Supreme Court's decision was a recognition of the critical role free and open discourse plays in a democracy. If we are to meaningfully address the most pressing issues in our society, we must accommodate outspoken, provocative, and pointed commentary. In the opinion written by Justice Brennan, the Court concluded: "debate on public issues should be uninhibited, robust[,] and wide[-]open . . ."²⁷

In its ruling, the Supreme Court established a high threshold for public officials to overcome before they could successfully file suit for libel. By adopting the "actual malice" test, the Court established that public officials could not win damages without proof that the defamatory comment was made "with knowledge that it was false or with reckless

24. The "easy path" came from state laws that allowed false or misleading print *per se* to constitute libel. The Alabama Supreme Court in *New York Times Co. v. Sullivan* had determined that "[w]here the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt are libelous *per se*." *Sullivan*, 144 So. 2d at 37 (emphasis added). The easy path was blocked twelve years later in *Gertz v. Welch*, 418 U.S. 323 (1974), in which the majority opinion allowed states to "define for themselves the appropriate standard of liability[.]" but only allowed such power "[s]o long as they do not impose liability without fault." 418 U.S. at 347. Justice White's dissent, responded to in footnote 10 of the majority opinion, lays out a history of strict-liability libel and laments the loss of the action's historic form: "[n]o longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face . . . [i]n addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence." *Id.* at 375-76 (White, J., dissenting).

25. *Sullivan*, 144 So. 2d at 28-29.

26. *Sullivan*, 376 U.S. at 264-65.

27. *Id.* at 270.

disregard of whether it was false or not.”²⁸ Proving “actual malice” would not be an easy task. Reporters working in good faith and with reasonable care would largely be insulated against successful libel suits against public officials, freeing them to do the critical stories about government officials that their watchdog role demands.

This decision accomplished three things immediately. First of all, it kept the civil rights movement on track.

Second, it helped restore the press’s courage. Prior to the suit, the *New York Times* and others had to be extraordinarily careful and step very gingerly.

And third, and critically important, the decision brought a contemporary relevance to the Free Press Clause, reminding a nation that holding those in charge accountable was at the essence of being an American. We were willing to pay the price of ugly, unfair discourse and misleading criticism in the name of democracy.

Some believe the Court overreached. One prominent critic is Supreme Court Justice Antonin Scalia, who told interviewer Charlie Rose in 2012:

One of the evolutionary provisions that I abhor is *New York Times Co. v. Sullivan*. It may indeed be a very good system that you can libel public figures at will so long as somebody told you something—some reliable person—told you the lie that you then publicized to the whole world. That’s what *New York Times Co. v. Sullivan* says. That may well be a good system and the people of New York state could have adopted that by law, but for the Supreme Court to say that the Constitution requires that—that’s not what the people understood when they ratified the First Amendment.²⁹

28. *Id.* at 280.

29. *Charlie Rose: An Hour with Justice Antonin Scalia* (PBS television broadcast Nov. 26, 2012), at 29:00 ff., available at <http://www.charlierose.com/watch/60152154>.

This was an activist court in some respects, but it's important to recognize the many obstacles and the slow pace of needed social change. *Brown vs. Board of Education*³⁰ was revolutionary, but the revolution didn't kick in right away. The Court seized the initiative. In *New York Times v. Sullivan, Civil Rights, Libel, Law and the Free Press*, authors Kermit L. Hall and Melvin Urofsky point to a long list of groundbreaking cases decided by the Warren Court, including the expansion of free expression rights in dramatic, powerful, and long-lasting ways.³¹ In 1962, the court struck down mandatory public school prayer.³² In 1965, they stopped state censorship of movies.³³ In 1969, they took a stand for First Amendment rights of high school students.³⁴ And in that same year, they struck down the last vestiges of seditious libel.³⁵ In terms of the First Amendment, the court was on a roll.

Sullivan arrived just as America's news organizations seemed to be waking from a slumber. Mark Feldstein, Richard Eaton Professor of Broadcast Journalism at the Philip Merrill College of Journalism, observed in *A Muckraking Model: Investigative Reporting Cycles in American History* that there was relatively little investigative reporting during much of the mid-20th century. "The half-century after the muckrakers—from World War I to the Vietnam War—was a kind of 'Dark Ages' for investigative reporting."³⁶

Clearly, *Sullivan* had a profound and liberating effect on America's news media. More stories were reported, more secrets uncovered, and more crooks thrown out of office because of this important decision. The *Sullivan* decision gave a huge boost to newsrooms seeking to do investigative reporting. It was now clear that a newsroom that acted in good faith and was conscientious in pursuing the truth would be largely protected, and likely to prevail, in a libel suit.

30. 349 U.S. 294 (1955).

31. KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* (2011).

32. *Engel v. Vitale*, 370 U.S. 421 (1962) (concerning school prayer).

33. *Freedman v. Maryland*, 380 U.S. 51 (1965) (concerning government censorship of movies).

34. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (concerning First Amendment rights of high school students).

35. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (concerning seditious libel).

36. Mark Feldstein, *A Muckraking Model: Investigative Reporting Cycles in American History*, 11 HARV. INT'L J. OF PRESS/POLITICS 105, 110 (2006).

Virtually concurrent with this decision was another trend in American newspapers. Increasingly, family newspapers were being bought out by large corporations.³⁷ Those large corporations typically had substantial legal departments and were far less likely to settle suits than fight them. Where a local newspaper was extremely vulnerable to a single lawsuit, large corporations were insulated and had the resources to buy the best legal help possible.

That combination—this highly favorable Supreme Court decision and well-resourced corporate newsrooms with significant resources behind them—strengthened the hand of newsrooms across the nation.

Sullivan was a boon in part because of the unique nature of a newsroom. First of all, most reporters think of themselves as independent contractors. They have a boss, but they go out and find their own stories and pitch them to a city desk. Their knowledge of the community generates exclusive news stories, and editors are generally going to be respectful of their reporters' instincts, trusting them to produce copy under severe deadline constraints.

That makes this a largely spontaneous and even improvisational profession, and there is no time for layered fact-checking. A great many stories are written in twenty minutes, edited in ten more, and posted on the web or published in the next morning paper. Recording and writing the news is not a profession of reflection. It is largely characterized by haste.

That means mistakes will be made. But *Sullivan* offered an insurance policy. Mistakes could be made without disastrous consequences for news organizations. There are countless stories that might not have been reported or not reported as quickly or as intensively without *Sullivan*.

In many respects, these were intensely local stories: the corrupt county commissioner, the embezzling county clerk, the conflict of interest in the mayor's office, the unethical hiring of relatives. These were stories that were given the green light in newsrooms that couldn't afford to be sued.

37. See, e.g., *The Media Monopoly/Corporate Media Ownership*, MEDIA REFORM INFORMATION CENTER, <http://www.corporations.org/media/#monopoly> (last visited Jan. 26, 2014); BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* (2004).

Today, there's a fair question of whether *Sullivan* gives sloppy journalists a "get out of jail free" card. We are seeing significant errors by both traditional and new media in their rush to tweet or post information before anyone else does.³⁸ In my view, there is a disturbing inclination to be first rather than right. Thanks to *Sullivan*, playing fast and loose with the reputation of public figures carries few consequences.

What's most intriguing about *Sullivan* fifty years on is that it may be more vibrant and important than ever. We have to remember that although the case grew out of a newspaper advertisement, it was never just about the press. It was about the ability to speak out against perceived injustice and to challenge the powers that be.

In a digital age, everyone is a publisher and opinions are everywhere. Criticism is everywhere. Personal attacks are everywhere. And while none of that leads to a more civil society, the truth is that social media is used to call out public officials in often very colorful terms.³⁹

Look at the comments section on virtually any story about local or national politics and you will see comments that could have led to a guilty verdict in Montgomery, Alabama, in 1962. And just think about how much more robust our democracy is when every citizen with an

38. NBC News and the LA Times took to Twitter to report on the LAX shooting in November 2013, but reported information that was later uncovered as a hoax. *Globe and Mail, Other Media Outlets Fall for LAX Shooting Hoax*, HUFFPOST MEDIA (Nov. 1, 2013), http://www.huffingtonpost.com/2013/11/01/lax-shooting-hoax-media_n_4194776.html; Adi Robertson & Russell Brandom, *Broken News: Struggling to Find Facts in the Twitter Maelstrom*, THE VERGE (Nov. 1, 2013), <http://www.theverge.com/2013/11/1/5056344/broken-news-struggling-to-find-facts-in-twitter-maelstrom>.

39. We need not look far to find instances of such criticism. Social media was ripe with critique and parody following the exploits of Toronto mayor Rob Ford and former U.S. Representative Anthony Weiner, among others. Criticism via social media can also have historically significant effects: the "Arab Spring" was fueled in large part by criticisms of government on internet forums, where dissenting voices could connect and voice their critiques. See Saleem Kassim, *Twitter Revolution: How the Arab Spring Was Helped by Social Media*, POLICYMIC (July 3, 2012), <http://www.policymic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media>. See generally Gary King et. al., *How Censorship in China Allows Government Criticism but Silences Collective Expression*, 107 AM. POLITICAL SCI. REV. 326 (2013) (analyzing the Chinese government's restrictions on online criticism).

inclination to criticize a public official can do that—in tough and abrasive terms.

That certainly helps ensure the free flow of views, but it's probably also a significant deterrent to those who might consider pursuing public office.

The remarkable thing about the First Amendment is that its forty-five words have aged so well. Those words on parchment have transcended every form of media and expression.

At the heart of our liberties is a commitment to ensuring that every one of us has the right to speak out, and to challenge those in charge, without fear of being punished for our views.

I quoted Justice Brennan earlier, but I will close with this quote from the concurring opinion in *Times v. Sullivan* from Justice Black:

To punish the exercise of this right to discuss public affairs or to penalize it through libel judgments is to abridge or shut off discussion of the very kind most needed. This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials.⁴⁰

It's not a coincidence that the most robust democracy in the world guarantees free and open debate about the quality of its leadership. *New York Times Co. v. Sullivan* has served us well.

40. *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring).

