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INTRODUCTION: STILL LEARNING FROM *NEW YORK TIMES V. SULLIVAN*

Paul Horwitz[*]

This Symposium marking the fiftieth anniversary of the landmark Supreme Court decision in *New York Times v. Sullivan*[1] is many things: celebration, inquiry, exploration. Symposia and articles on the *Sullivan* decision often sound an elegiac or critical note, as the speaker laments the declining importance or relevance of *Sullivan*[2] or questions the decision altogether.[3] This collection of articles is less negative than that; there is very little hint of regret here. But it certainly does not ignore *Sullivan*'s flaws—whether they were inherent in the judgment itself, or emerged in the doctrine that has flowed from it since 1964.

But there is another aspect of this Symposium, one that is absent in most such gatherings. It is also an act of repatriation. L.B. Sullivan was the police commissioner of Montgomery, Alabama, and *New York Times v. Sullivan*'s journey to the Supreme Court began in this state. One of the subjects of the case—or at least one of its subtexts—was the civil rights movement in the Deep South. Alabama was, of course, one of the central battlegrounds in that struggle.

The University of Alabama School of Law has not been the only law school to observe the fiftieth anniversary of *New York Times v. Sullivan*. But that occasion has special resonance here. And the *fact* that we are marking the occasion has its own significance. It signals a willingness, even an eagerness, on the part of those of us who live here—especially its students, who will lead the state's legal and political community in the years to come—to own, and own up to, our history as we shape the state's future.

That is an important step, and one reason this Symposium was so important. One need not be a Faulkner scholar to know that the South has a

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

2. *See, e.g.*, Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 LAW & SOC. INQUIRY 197 (1993).

3. *See, e.g.*, Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986).

deep and troubled connection to its history—to a past that is not yet past.[4] Indeed, the *Alabama Law Review*'s celebration of the anniversary of *New York Times v. Sullivan* came not long after the University of Alabama marked another such occasion: the fiftieth anniversary of the "stand in the schoolhouse door," that legendary dumb-show in which Governor George Wallace physically confronted the federal authorities who were tasked with ensuring that a judge's order to admit black students to the university was enforced.[5] A half-century later, our university still struggles in its own way with related issues.

This Symposium thus marks the recognition by the students here that we must take responsibility for our history in order to secure our future. In doing so, there is considerable solace in knowing that we can tell that history differently. We can claim as our true forebears not Sullivan, but those civil rights activists, lawyers, and judges whose work resulted in the *Sullivan* decision. (That includes Alabamian Justice Hugo Black, whose concurrence in *Sullivan* would have gone further than the majority opinion, and was also more forthright about recognizing the connection between this First Amendment case and the civil rights movement.[6]) That our students chose to mark the occasion, and that they saw the case not just as a First Amendment landmark, but as a case with important ties to the civil rights movement in Alabama, is something to be applauded.

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The historical elements of *New York Times v. Sullivan* are touched upon in a number of the articles that form this collection. But the most thorough treatment of the historical background of *Sullivan* and its relationship to the civil rights movement is Christopher Schmidt's fascinating paper, New York Times *and the Legal Attack on the Civil Rights Movement*.[7]

As Schmidt notes at the outset, the goal of his paper is to "place[] *New York Times v. Sullivan* into the context of the legal counteroffensive that defenders of racial segregation waged against the Civil Rights Movement."[8] In particular, Schmidt makes the important observation, one

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4. *See* WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1950).

5. *See, e.g.*, DIANE MCWHORTER, CARRY ME HOME: BIRMINGHAM, ALABAMA, THE CLIMACTIC BATTLE OF THE CIVIL RIGHTS REVOLUTION 441–44 (2001); E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA (2007).

6. *See, e.g.*, *Sullivan*, 376 U.S. at 294–96 (Black, J., concurring).

7. Christopher W. Schmidt, New York Times v. Sullivan *and the Legal Attack on the Civil Rights Movement*, 66 ALA. L. REV. 293 (2014).

8. *Id.* at 294.

that he rightly notes is "little appreciated in the scholarly literature on the Civil Rights Movement or on the *Sullivan* case," that this era saw the increasing reliance of southern resisters not on laws that explicitly discriminated on the basis of race and trumpeted the views of white supremacists, but on "laws that said nothing about race."[9] Laws barring disorderly conduct or disturbing the peace, tax laws—and, yes, the law of defamation—were generally applicable, race-neutral tools lying close at hand for those who sought to quell the civil rights movement. These "legalistic tactics"[10] were not as vulnerable to the Fourteenth Amendment challenges that the Warren Court made possible through *Brown v. Board of Education*[11] and its progeny, and civil rights activists sometimes lost cases involving general rule-of-law values even as they won on the underlying substantive legal challenge.[12] Schmidt puts the point eloquently: "The race-conscious use of race-neutral law became Jim Crow's front line of defense."[13]

To be sure, there were other doctrines at hand, and other constitutional issues raised by such laws, including central issues of freedom of speech and association. In relying on these other grounds—the First Amendment in particular—to defeat the use of race-neutral laws to suppress the civil rights movement, the Warren Court not only sheltered the movement, but also expanded the reach of constitutional rights for all.[14] The constitutionalization of defamation law in *New York Times v. Sullivan* is one such example, perhaps the most prominent in that era or since.

But Schmidt argues that it would be a mistake to conclude that the Supreme Court was the primary agent in protecting and sustaining the civil rights movement. "Just as it took more than the Supreme Court alone to move the South toward desegregation," he writes, "Court decisions alone could not diffuse the Southern attack on the Civil Rights Movement."[15] The movement had many other tools and arguments at its disposal and it pursued them energetically. In recognizing that *Sullivan* was a civil rights case of sorts, we should not overstate its (or the Court's) centrality to the movement. Moreover, by drawing attention to the use of race-neutral laws

9. *Id.* at 296.

10. *Id.* at 294.

11. 347 U.S. 483 (1954).

12. *Compare Walker v. City of Birmingham*, 388 U.S. 307 (1967) (upholding a conviction of Martin Luther King, Jr., for contempt for violating an injunction) *with Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (holding that the ordinance on which the contempt conviction was based was unconstitutional on First Amendment grounds).

13. Schmidt, *supra* note 7, at 295.

14. *See, e.g.*, Harry Kalven, Jr., *The Negro and the First Amendment* (1965).

15. Schmidt, *supra* note 7, at 296.

in the program of massive resistance, Schmidt offers a useful reminder that such race-neutral laws continue to undergird "[t]he continued racial stratification of our society today."[16] In looking back to *Sullivan* and examining its connections with the civil rights movement, "we can see both the achievement and the limitations of the civil rights revolution" in our own time.[17]

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Of course, *Sullivan* was not only a case about the civil rights movement. Indeed, on its face it was barely that at all. We remember it today primarily for bringing the common law doctrine of defamation within the fold of the First Amendment. It has bequeathed to us sweeping general principles announced in memorable language, such as Justice William Brennan's paean to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[18] It has also given us technical doctrines, concepts, and terms of art. Generations since then have struggled with the precise meaning of phrases like "actual malice," and with the question of who is a "public figure."

Several articles pick up this thread of the *Sullivan* case. Few if any people are better qualified to explore it than Judge Robert Sack. Sack is the author of the nation's leading treatise on defamation law;[19] before he took up his current seat on the United States Court of Appeals for the Second Circuit, he was also one of the country's leading practitioners of media law. In his contribution to the Symposium, Judge Sack skillfully provides a legal background to the decision.[20] He introduces the reader to the "ancient English common law and statutory tools of suppression" from which modern defamation law descended, and points to an "arc of emerging Supreme Court jurisprudence," of which *Sullivan* was just one piece, that erected constitutional barriers to their use in the United States.[21] With that background in place, Sack carefully examines the multiple questions and conundrums raised by the *Sullivan* decision. If, as he writes, *Sullivan* "has

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16. *Id.* at 335.
17. *Id.*
18. *Sullivan*, 376 U.S. at 274.
19. *See* ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER, AND RELATED PROBLEMS (4th ed. 2010).
20. Robert D. Sack, New York Times v. Sullivan—*50-Year Afterwords*, 66 ALA. L. REV. 273 (2014).
21. *Id.* at 278.

worked very well" from the perspective of freedom of speech and press,[22] it is not perfect and it has produced at least as many questions as answers.

David Anderson is a leading scholar of the First Amendment and its speech and press clauses. In *Wechsler's Triumph*, he places *Sullivan* in a different historical context: not as a victory for the civil rights movement, although it was that, but as one of the many important contributions made to American law in the twentieth century by the legal giant Herbert Wechsler.[23] Aided by his wife, Doris Wechsler, and his Columbia Law School colleague Marvin Frankel, it was Wechsler who came up with the argument in *Sullivan*, transforming a simple common-law suit into a referendum on the place of seditious libel in American history. It was Wechsler who wrote the briefs and argued the case, masterfully, in the Supreme Court. As Anderson writes, Wechsler brilliantly "broadened the issues beyond the necessities of the case to achieve his vision of what the law ought to be. He wanted to do more than win the case; he wanted to remake the law of libel."[24]

Wechsler succeeded at that. Indeed, although the opinion in *Sullivan* will long be remembered as one of the jewels of Justice Brennan's career, Anderson rightly observes: "Intellectually, *New York Times v. Sullivan* is Herbert Wechsler's creation. The structure and ideas of Brennan's opinion are mostly Wechsler's."[25] Like Sack, Anderson does not suggest that *Sullivan* is beyond criticism. He has written elsewhere about the problems with *Sullivan* and the line of cases it engendered.[26] Here, he calls one of its central elements, the actual malice rule, "the one aspect of *New York Times v. Sullivan* that has proved unsatisfactory from almost all points of view."[27] Nevertheless, the decision was an extraordinary achievement, and Anderson rightly puts Wechsler at its center.

Sullivan's influence in the United States, both with respect to defamation law and as a storehouse of quotations and principles that have affected the law of free speech more generally,[28] has been enormous. But its reach extends beyond our borders. (I recall reading the case as a law student in Canada taking a class on freedom of expression.) High courts across the world have cited it countless times.

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22. *Id.* at 289.
23. David A. Anderson, *Wechsler's Triumph*, 66 ALA. L. REV. 229 (2014).
24. *Id.* at 230.
25. *Id.* at 251.
26. *See, e.g.*, David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487 (1991).
27. Anderson, *supra* note 23, at 240–41.
28. Paul Horwitz, *Institutional Actors in* New York Times v. Sullivan, 48 GA. L. REV. 809, 811–12 (2014).

But, as Mark Tushnet observes, those courts have been "more tempered" than the Americans in their view of the case.[29] Tushnet, a leading scholar of both domestic and comparative constitutional law, offers an interesting and nuanced take on what those courts have accepted or rejected from the *Sullivan* decision, and some especially intriguing thoughts on why. Those thoughts may in turn help us to understand why the Court acted as it did in the case itself.

Foreign courts certainly have not rejected it wholesale. They have accepted much of what Brennan had to say about the central importance of freedom of expression and of the press, and of his famous warning that too stringent a defamation rule could exert a "chilling effect" on speakers, causing them to avoid even accurate reporting whose circulation is in the public interest. But they have generally rejected the "precise doctrinal holding" of the case, its "specific rules," especially the actual malice test.[30]

Much of the reason for this has to do with "institutional and cultural differences between the United States and [other] nations."[31] Some of it has to do with the difference between the constitutional text and doctrine of the United States and that of other countries. Those courts, for textual or doctrinal reasons or both, may conclude that the *Sullivan* test "relies too heavily on a rule-like approach in settings where balancing or proportionality ones are more suitable."[32] Finally—and here is where Tushnet's comparative insights also aid us in understanding what *our* Supreme Court was doing in *Sullivan*—there is the fact that many of those courts are fully empowered to hear and decide common law cases. Unlike our court, they did not need to constitutionalize the law of defamation in order to reform it.

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Like most of the central Supreme Court rulings affecting freedom of the press, *New York Times v. Sullivan* is *not* a Press Clause case. It involved an advertisement, not a news story; the defendants included the *Times* but also a host of individuals associated with the advertisement that provoked Sullivan's lawsuit, "Heed Their Rising Voices."[33] The Court clearly had the press and its function substantially in mind in *Sullivan*. But it made clear

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29. Mark Tushnet, New York Times v. Sullivan *Around the World*, 66 ALA. L. REV. 337, 337 (2014).

30. *Id.* at 342.

31. *Id.*

32. *Id.*

33. *See* Horwitz, *supra* note 28, at 816, 821–22.

that the rule in the case applied to any speaker—individual or institutional, press or non-press.[34]

This irony of First Amendment jurisprudence—that the press tends to fare better under the Speech Clause than it does under the Press Clause—provides a useful launching point for the final two authors in this Symposium, both of whom have done much to revive and advance interest in the Press Clause in the last several years.

In *What the Supreme Court Thinks of the Press and Why it Matters*, RonNell Andersen Jones takes a broad approach, examining the changing and declining view of the press in the language of Supreme Court decisions over the past fifty years.[35] There are many possible reasons for this phenomenon. They include a Court whose members are less friendly to the press, a general decline in public trust in the press, and changes in the press itself—particularly a shift from a more or less professional institutional press to a press that arguably includes any citizen speaker operating through the Internet.

Jones argues that this phenomenon is cause not just for clinical interest, but for genuine concern. The Court's negative characterization of the press may result in less favorable rulings for the press. This may reduce the amount of plentiful and vigorous reporting on matters of public interest. More speculative, but also more worrisome, is the possibility that the negative view of the press may "impoverish a much wider body of First Amendment rights."[36] If, as Jones writes, the Court's "jurisprudential pattern has always been that general speakers and press speakers rise and fall together,"[37] then perhaps a drop in the fortunes of press speakers will coincide with a decline in the fortunes of general speakers.

I am less convinced that this is so. A rising tide may lift all boats; but a single ship running aground doesn't necessarily mean that the tide has gone in. Still, there are ways in which Jones's warning rings true. We could end up with a Speech Clause that does less to advance free speech as a *liberty* interest as such, and more to simply ensure that all individual speakers are treated equally. That is important, to be sure, but it is not all that we may wish for from the First Amendment. And, as Jones notes, such a regime does not provide much incentive for the remaining members of the institutional press to devote their resources to the kind of concerted, costly,

34. *See Sullivan*, 376 U.S. at 282; Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1036–37 (2011); Horwitz, *supra* note 28, at 816.

35. RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why it Matters*, 66 ALA. L. REV. 253 (2014).

36. *Id.* at 269.

37. *Id.*

and labor-intensive litigation that produced the *Sullivan* decision in the first place.

Last but not least, Sonja West offers a novel and important picture of what she calls *First Amendment Neighbors*.[38] West notes two potentially complementary pairs in the First Amendment: the two Religion Clauses, and the Speech and Press Clauses. The religion clauses have been read, with whatever tension, as working separately but in concert, with some room for "play in the joints" between them.[39] The Speech and Press Clauses have not been so treated. In the jurisprudence in this area, the Speech Clause does most of the work while the Press Clause has become virtual surplus. A consistent approach to both sets of neighbors, West argues, would entail "a more active press clause" with independent substantive meaning and power.[40]

West and others have argued that while the Court has recently shown an apparent appreciation for the protection of religious institutions as autonomous actors,[41] it has balked at doing the same for the press as an institutional actor.[42] This is so despite the fact that the religion clauses speak only in terms of "religion," while the Press Clause, whatever its original meaning,[43] at least offers a textual basis for distinctive protection for the press as we currently understand it. The point made by West here is different and new, and worth underscoring. Taken together with the earlier work, it offers another reason to take the Press Clause seriously on its own terms, and not simply as an echo of the Speech Clause.

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These important works offer a valuable set of perspectives on *New York Times v. Sullivan*, which remains a landmark case in the jurisprudence of the First Amendment. They bring it home, setting it in its local and historical context; they send it out into the world; and they help offer a glimpse of what *Sullivan*'s future might be.

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38. Sonja R. West, *First Amendment Neighbors*, 66 ALA. L. REV. 357 (2014).

39. *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (quotation and citation omitted).

40. West, *supra* note 38, at 359.

41. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *see also* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2455–56 (2014); Horwitz, *supra* note 28, at 838–39 & n.160.

42. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 352 (2010); *Branzburg v. Hayes*, 408 U.S. 665, 704–05 (1972).

43. *See, e.g.*, Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).