IN *NEW YORK TIMES CO. V. SULLIVAN*, THE SUPREME COURT GOT IT RIGHT THEN—AND NOW

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On April 5, 1960, Ray Jenkins, a city editor for the *Alabama Journal*, the afternoon paper in Montgomery, was having lunch at his desk and skimming through the old papers that had piled up.[1] They included a week-old copy of the *New York Times*.[2] He spotted an item that had a local angle, and he wrote a thirteen-paragraph story for that day's paper.[3]

"Sixty prominent liberals, including [former First Lady] Eleanor Roosevelt, have signed a full page advertisement in the *New York Times* appealing for contributions to 'The Committee to Defend Martin Luther King and the Struggle for Freedom in the South,' " it began.[4] He reported the ad as saying King and the students were facing an "unprecedented wave of terror" in Alabama.[5] He noted several minor factual errors.[6] While the ad said, "Negro student leaders from Alabama State College were expelled" after they sang " 'My Country 'Tis of Thee' on the state Capitol steps," Jenkins said they were expelled for "leading a sit-down strike at the Courthouse Grill."[7]

The article caught the attention of Grover Hall, the editor of the *Montgomery Advertiser*. "Lies, lies, lies—and possibly willful ones," he wrote in an editorial that appeared two days later.[8] "The Republic paid a dear price once for the hysteria and mendacity of abolitionist agitators. The author of this ad is a lineal descendant

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[1] GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT: THE PRESS, THE CIVIL RIGHTS STRUGGLE, AND THE AWAKENING OF A NATION 229 (2006).

[2] *Id.*

[3] *Id.*

[4] *Id.* (internal quotation marks omitted).

[5] *Id.*

[6] *Id.* at 230.

[7] *Id.*

[8] Mary-Rose Papandrea, *The Story of* New York Times Co. v. Sullivan, *in* FIRST AMENDMENT STORIES 234–35 (Richard W. Garnett & Andrew Koppelman eds., 2012).

of those abolitionists and the breed runs true."[9] Hall gave a copy of the *New York Times* ad to an attorney for the city and urged him to "show it to City Hall" because it "libeled every one of them."[10]

How is that for a strange beginning to what became the most important freedom-of-the-press case in the Supreme Court's history? It took a local newspaper editor to report on a paid ad that had appeared in an out-of-town paper, that in turned riled up a local editor who urged city officials to take umbrage and to sue. Thanks to these local newspapermen, Montgomery's Commissioner of Public Safety L.B. Sullivan learned he had been "libeled" in the *New York Times* by an ad which, as has often been noted, did not mention him. Notice too the mindset reflected in Hall's editorial. Nearly a century after the Civil War had ended slavery, Hall referred to the abolitionists as "agitators" given to "hysteria and mendacity."[11] As the Alabama editor saw it, the Civil Rights Movement led by Dr. King was engaged in a campaign of slander against the South, one that could provoke violence.

But the most important news story of that week appeared on the front page of the *New York Times* just a week later, on April 12, 1960 under the by-line of Harrison Salisbury.[12] Salisbury had been a distinguished United Press reporter in Europe during World War II[13] and would later write the history of the German Army's 900-day siege of Leningrad.[14] After the war, he was the *New York Times* correspondent in Moscow in the last years of Stalin's reign.[15]

In 1960, Salisbury was a roving national reporter for the *New York Times* assigned to write about the growing civil rights movement.[16] His specialty was to "parachute" into a southern city, spend a few days reporting and then file a dispatch to run in the *New York Times*.[17] When he arrived in Birmingham, he found a

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[9] *Id.* at 235 (quoting Editorial, *Will They Purge Themselves*, MONTGOMERY ADVERTISOR, Apr. 7, 1960, at A7).

[10] *Id.* (internal quotation marks omitted).

[11] *Id.*

[12] ROBERTS & KLIBANOFF, *supra* note 1, at 232–33.

[13] *Id.* at 232.

[14] HARRISON E. SALISBURY, THE 900 DAYS: THE SIEGE OF LENINGRAD (1969).

[15] ROBERTS & KLIBANOFF, *supra* note 1, at 232.

[16] *Id.*

[17] *Id.*

climate of fear that reminded him, he said later, of Moscow under Stalin and Berlin in the Nazi era.[18] He worked from a downtown hotel and was surprised at how many prominent citizens—white and black—feared being quoted by name.[19] Police Commissioner Bull Connor was not reluctant to speak out, however. "Damn the law—down here we make our own law," Connor said, a phrase that Salisbury jotted down.[20] His story ran under a headline that read: "Fear and Hatred Grip Birmingham."[21] It included comments from unnamed residents speaking of the climate of fear, vicious racism, and violence in the city.[22] Two days later, the *Birmingham News* republished the Salisbury story on its front page under the title: "*New York Times* Slanders Our City—Can This Be Birmingham?"[23]

In the spirit of Grover Hall's denunciation of "lies, lies, lies," a prosecutor convened a grand jury to investigate who had said such damning things about Birmingham and its city officials. Within six months, most of the people Salisbury had interviewed were uncovered and called to testify before the grand jury.[24] They were tracked through the hotel's phone records and reports of who had visited with Salisbury during his time in the city.[25] The grand jury handed down a forty-two-count indictment against the *New York Times* reporter for criminal libel, which could have sent him to prison for more than twenty years.[26] In addition, seven municipal officials sued for libel. Salisbury faced $1.5 million in civil liability, and the *New York Times* faced another $3.1 million in libel claims.[27] The indictment and the barrage of civil suits made clear that the *New York Times* faced a life-or-death legal battle in Alabama. Claude Sitton, another national reporter assigned to the South, had briefly stopped in Montgomery that spring, but fled when he was warned he might be detained.[28] And for nearly three

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[18] *Id.* at 233.
[19] *Id.* at 232, 234.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 233.
[23] *Id.*
[24] *Id.* at 234.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*

years that followed, the *New York Times* kept its reporters out of Alabama.[29]

If anyone has a doubt about the importance of *New York Times Co. v. Sullivan*[30] decision, just consider the situation then. The civil rights movement and the demand for equal rights for African Americans was one of the defining American stories of the twentieth century. Of course, the defining story of the nineteenth century was the split between the North and South over slavery and the resulting Civil War. The civil rights movement 100 years later carried many echoes. Many officials in one region of the nation refused to go along with the Supreme Court's decree that racial segregation was unconstitutional and that African Americans deserved equal rights under law, including the right to travel on interstate buses and the right to vote. And it was the national news coverage and the TV images that forced the nation to confront that fact. New stories and photos of the beatings meted out to the Freedom Riders, the bombing of the 16th Street Baptist Church in Birmingham, the use of fire hoses by Bull Connor's police, and, finally, the beatings on the Edmund Pettis Bridge in Selma all ultimately led directly to national legislation—the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Had the Supreme Court stood back and said that libel and defamation are matters of state law—and outside the reach of the U.S. Constitution—this history could have played out differently. National newspapers like the *New York Times* as well as national TV networks could not have continued reporting from states like Alabama if they faced crippling lawsuits over alleged minor errors of fact in a single news story. They would have fled the scene in the mid-1960s, just as Claude Sitton was forced to do.

As the *Sullivan* case moved forward, it also dramatically illustrated the problem facing the northern news media. The Alabama plaintiffs would not only have the home-field advantage, but they would get the benefit of all the close calls. The trial judge in *Sullivan*, Walter B. Jones, was an ardent segregationist. In his own off-the-bench writings for the *Montgomery Advertiser*, he accused "hundreds of newspapers and magazines published in the North" of "libeling the white race."[31] Their true goal, he said, was

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[29] *Id.* at 235.

[30] 367 U.S. 254 (1964).

[31] Papandrea, *supra* note 8, at 238 (internal quotation marks omitted).

not just an end to discrimination, but the "intermarriage and mongrelization of the American people."[32] Lawyers for the *New York Times* initially sought dismissal of the case on the ground that the Alabama court could not properly exercise personal jurisdiction over the New York-based paper.[33] Judge Jones, however, rejected this argument and determined that the suit could proceed in Alabama.[34] Judge Jones also decided the statements in the paid ad were per se libelous because they would damage the reputation of local officials like Sullivan.[35] The jury took two hours to award Sullivan the full $500,000 in damages he had sought.[36] The Alabama Supreme Court affirmed.[37]

In 1961, however, the *New York Times* succeeded in winning a dismissal of the suits against Salisbury over his news story from Birmingham.[38] The Fifth Circuit Court of Appeals in New Orleans had decided that because Salisbury's story was published in New York, the plaintiffs had to sue him there.[39] But the Alabama state judges had allowed the suit in *Sullivan* to go forward in part because the paid ad included the names of several ministers who were located in Alabama.[40] The state court concluded that because some Alabamans (in this instance, the named ministers) were defaming other Alabamans, the suit could be heard and decided in an Alabama court.[41] This ruling on state jurisdiction posed a threat to out-of-state news outlets that published damaging stories on Alabama officials that quoted Alabama residents.

But the Supreme Court ended that threat on March 9, 1964 when it handed down the *Sullivan* decision and changed the nation's libel laws. The First Amendment's protection for the freedom of the press extends a "constitutional shield" to "criticism of official conduct," wrote Justice William J. Brennan.[42] His

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[32] *Id.*
[33] *Id.* at 239.
[34] *Id.*
[35] *Id.* at 241.
[36] *Id.* at 242.
[37] *Id.*
[38] ROBERTS & KLIBANOFF, *supra* note 1, at 255.
[39] *Id.*
[40] *See* Papandrea, *supra* note 8, at 236 (noting that by joining the Alabama Ministers as defendants in the case, Sullivan effectively prevented the *New York Times* from removing the case to federal court).
[41] *Id.*
[42] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

opinion spoke not only of the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," but also of the specific context in which the case arose.[43] "The present advertisement," he said, was "an expression of grievance and protest on one of the major public issues of our time" and, as such, "would seem clearly to qualify for constitutional protection."[44]

The Court's decision meant the national news media could report on the civil rights clashes throughout the South, confident that they could not be sued for reports that portrayed local officials in a harsh light. Still, the enduring significance of *Sullivan* has little to do with the South or civil rights. Rather, its lasting impact stems, of course, from the "actual malice" rule, which says the news media may file reports that are highly critical of public officials—local, state, or federal—without the fear of crippling liability because they may have gotten some fact wrong. Only defamatory errors about public officials that are knowingly and recklessly false can support a libel verdict against the press, the Court held.[45]

The press is in the business of telling the truth, and factual errors are mistakes and failures. They need to be corrected. If a report is misleading, it should be clarified and set right. But most events and public disputes are complicated, and the participants—even the eye-witnesses to an event—often give conflicting accounts of what happened. As Justice Brennan's opinion put it, "[E]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[46]

Justice Brennan's opinion stands up well after fifty years. While he and the majority gave the press "breathing space" to publish critical reports on the government and public officials, the Court did not extend constitutional protection to maliciously false reports.[47] Three of Justice Brennan's fellow liberals would have

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[43] *Id.* at 270.

[44] *Id.* at 271.

[45] *Id.* at 283.

[46] *Id.* at 271–72 (quoting Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963)).

[47] *See id.* at 279–80 (holding that the Constitution prohibits a public official from recovering damages for a defamatory falsehood unless the official proves that the statement

gone further. Justices Hugo Black, William O. Douglas and Arthur Goldberg would have proclaimed an "unconditional constitutional right" or an "absolute, unconditional privilege" to publish false and defamatory statements about public officials.[48]

In today's new media world of the Internet, countless millions of people are free to post on-line comments and reports on practically everything. These citizen journalists can say and report much more than the traditional news media, and in general, more is better. But the legal challenge for the years ahead will be to find a way to prevent the absolute worst of those comments from inflicting injury on those who are unjustly targeted for attack. What about the school principal or teacher who is falsely and maliciously accused in an anonymous on-line report of sexually molesting students? Imagine the damage such lies can do in a community. Or what about the city official who is wrongly accused of stealing public money to buy a new house or a car? Internet comments, when sent anonymously, can quickly fill a cesspool.

The Supreme Court wisely did not proclaim an "unconditional constitutional right" to lie and defame in 1964. Justice Brennan's opinion set out to protect the "debate on public issues" from thin-skinned officials who went to court to silence their critics. However, the debate on public issues does not require that malicious liars are free to defame local officials from behind a veil of immunity.

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was made with actual malice—that is with knowledge that it was false or with reckless disregard of whether it was false or not).

[48] *See id.* at 294 (Black, J., concurring) ("An unconstitutional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."); *id.* at 305 (Goldberg, J., concurring) ("For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct.").