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I. THE IMPORTANCE OF SULLIVAN

William J. Brennan's opinion for a unanimous Supreme Court in *New York Times v. Sullivan* (1964) was the Justices' greatest constitutional pronouncement on the law of political libel. It was, as well, Brennan's most important contribution to constitutional law up to that time and, of the Court's work during the 1963 term, only the *Reapportionment Cases* matched *Sullivan*'s significance. Brennan rested his opinion on a simple proposition: that the nature of public discourse shaped the character of democratic self-governance. According to Brennan, the accountability of public officials rose in direct proportion to the extent to which citizens could challenge the actions of those officials. In the hope of fostering a rich political discourse and an open marketplace for ideas, Brennan established in federal constitutional law the doctrine of *actual malice*. It prohibited "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ... knowledge that it was false or with reckless disregard of whether it was false or not." Traditionally, truth had been a complete defense of libelous statements made about public figures. If the statements were true, then there was no libel and certainly no damages. If the statements were false, then there was a libel and a jury could award damages.

*Sullivan* brought civil libels against public officials under the protection of the

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5. Although appointed by Republican President Dwight D. Eisenhower eight years earlier, Brennan in *Sullivan* and several other cases caused the former president to rank his decision to appoint Brennan as one of his two greatest political mistakes—the other being the appointment of Brennan's closest ally on the bench, Chief Justice Earl Warren. Brennan's opinion in *Sullivan* gave the former President little reason to alter his opinion.
first amendment through the due process clause of the fourteenth amendment. The Justices simultaneously "constitutionalized" and "federalized" the law of political libel. Neither Brennan nor his brethren worried over the prospect of introducing the actual malice test into federal constitutional law, since it was already entrenched in the states. Historically, malice had meant ill will, but in the nineteenth-century judges added the concept of improper motive. Brennan put these elements together, along with knowledge of falsity or reckless disregard for the truth, to form the Court's definition of "actual malice." That definition was not a quantum leap from the common law, but it did take the most stringent elements in the common law and constitutionalize them. The result was a qualified privilege for political criticisms of public officials. At this point Justices Hugo Black, William O. Douglas, and Arthur Goldberg, all of whom urged an absolute privilege, entered concurring opinions. Nonetheless, Brennan's Sullivan ruling had far-reaching consequences, since it held that freedom of political expression formed the central meaning of the first amendment.

The Court's decision to nationalize the law of political libel and announce a first amendment standard for such suits faithfully mirrored the theories of then prevailing liberal legal culture. Sullivan presented the Warren Court with a textbook example of illiberal "blockages" in the political and intellectual marketplace. Through the use of libel suits, a minority of entrenched public officials could disrupt the flow of information and undermine the public welfare. By removing these blockages, Brennan concluded, people of good will were far more likely to discover solutions to political controversies.

Brennan's actual malice test minimized the chill on political speech and gave new protection to previously repugnant forms of discourse. Even false and defamatory speech uttered "from personal spite, ill will or a desire to injure" did not amount to constitutional malice. Brennan also broadened the scope of appellate review in political libel cases. Sullivan permitted appellate judges

6. The traditional literature stresses that only a minority of states accepted the actual malice test, yet the evidence suggests that a majority of states may well have adopted it. See W. Hopkins, supra note 4, at 80-83.
7. Id. at 110.
8. Sullivan, 376 U.S. at 254, 297-305. The considerable wrangling within the Court that led to Brennan's opinion is discussed in B. Schwartz, supra note 2, at 531-41.
12. Indeed, much of the internal debate in the Court over how to dispose of the case centered on whether the appellate judges should be able to claim such sweeping power. Justice John Marshall Harlan was predictably the most outspoken critic of such a procedure, believing that the case should be sent back to the Alabama courts for retrial. Brennan objected to Harlan's strategy, since doing so would simply result in another Alabama jury finding in favor of the public officials. Harlan became sufficiently agitated that he threatened to dissent from a portion of Brennan's opinion; it took all of
to conduct their own independent review of the facts to make certain that a jury had not committed "a forbidden intrusion on the field of free expression." 13

Equally important, Brennan's reasoning subjected the traditional cultural assumptions about libel law to new pressures. 14 Historically, the sense of American community drew strength from measured public discourse and deference to public officials. Political libel law had protected the so-called "best men"—elected and appointed officials—from slanderous attacks. 15 Brennan's opinion disrupted this traditional basis for civil discourse by eroding the concept of civic republicanism, in which virtuous persons conducted public affairs in a disinterested manner and almost always at considerable sacrifice to themselves. 16

For precisely these reasons, Sullivan was a remarkable incident in modern American cultural history, an understanding of which reveals how conflicting social demands shaped and in turn were shaped by first amendment law. 17 Historians and legal scholars have regularly insisted that Sullivan compels our attention because of its connection to the civil rights movement of the 1960s. Sullivan, in this view, was a necessary step in the legal confirmation of the civil rights movement, one that shielded its leadership from exposure to the constraining effects of state-administered common law rules of political libel. The white public officials of the South that brought Sullivan and other libel actions, according to this literature, were provincial racists, who hypocritically complemented the force and violence they used against the movement with a cynical invocation of the law's sweet reason. From this perspective, Justice Brennan wisely collapsed traditional lines of constitutional understanding in the

Brennan's and Chief Justice Earl Warren's negotiating and drafting skills to force Harlan to join fully in the opinion at the last moment. See B. SCHWARTZ, supra note 2, at 535-41.

15. Id.
16. Id.
face of massive, pent-up demands for racial equality.18

Scholars writing from this orthodox perspective of liberal legalism have taught us much. Yet they have done so by giving a remarkably one-sided reading to the events that generated the Sullivan case in the first place and by ignoring the commitment of Southern public officials to habits and manners of civility in public discourse.19 Southern courts, far more than their Northern counterparts, historically had protected these values through common law rules of political libel. Justice Brennan erased this tradition. The liberal interpretation of Sullivan and the events surrounding it incorrectly dismiss the possibility that, quite apart from the substantive issues of racial equality, the Southern white vision of civil discourse had intrinsic worth.

II. THE ATTACK ON "HEED THEIR RISING VOICES"

The Sullivan case involved an advertisement, titled "Heed Their Rising Voices," which appeared in the March 29, 1960 issue of the New York Times.20 A. Philip Randolph, chairman of the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South," composed the full page ad. It was a direct solicitation for contributions to King's legal defense against pending charges of perjury and tax evasion in Alabama. The ad listed the names of the committee—which included such prominent figures as Harry Belafonte, Marlon Brando, Jackie Robinson, and Eleanor Roosevelt, as well as four black Alabama ministers—Ralph David Abernathy, S. S. Seay, Fred Shuttlesworth, and Joseph Lowery. The four ministers knew nothing of the committee's decision to use their names, but Randolph and others had not given a second thought to including them since the ministers were veteran supporters of King and co-founders of the Southern Christian Leadership Conference (SCLC).21 Because the advertisement was placed by a responsible person, was signed by well-known persons, and appeared to be accurate, the staff of the Times ignored their own


19. I would like to make it clear that my point is not that muzzling the leadership of the civil rights movement through libel law was either a good or a wise strategy on the part of Southern segregationists. Nor do I intend this essay as a paean either to Southern racism or the section's alleged gentility. Such an argument would stand the region's history so completely on its head as to beggar reality. Nonetheless, I do believe that viewing Sullivan from the perspective of the Southern, white elite can help to cast in sharper relief the implications of Brennan's opinion, not just for the civil rights movement (as important as that was) but for our own understanding of the competing vision of public discourse that formed the segregationist position in the first place. In short, by dismissing segregationists we miss an opportunity to better understand their time, the civil rights movement, and the meaning of public discourse for our own time.


21. Interview with Fred Shuttlesworth, Cincinnati, Ohio (Dec. 29, 1989); Interview with Fred Grey, Tuskegee, Ala. (June 27, 1990).
internal policies and published it without first confirming its accuracy. A quick check of the newspaper's own files, however, would have revealed certain small inaccuracies.\(^2\)

The ad portrayed the desperate straits facing the civil rights movement in Alabama. The text drew particularly on the confrontation in February 1960 between Montgomery police and sit-in demonstrators at the cafeteria of the state capitol in Montgomery and at Alabama State University.\(^2\) The ad also provided a small clip-out section to be filled in by contributors.

The ad named no specific public officials in Alabama, but called attention in somewhat hyperbolic fashion to "truckloads of police armed with shotguns and tear-gas [that] ringed the Alabama State College Campus" and "padlocked" the dining hall in "an attempt to starve them [the student protestors] into submission."\(^2\) The ad portrayed the civil rights movement in general, and Martin Luther King, Jr. in particular, in a sympathetic and heroic manner. It left little doubt in reader's minds that unnamed Southern public officials were bent on King's and the movement's destruction.\(^2\)

The ad was an emotional appeal intended to tap the wallets of Northern liberals. It was also filled with certain inaccuracies. The "police," for example, never ringed the Alabama State Campus; the expulsion of student leaders was for their part in the lunch-counter sit-ins and not for singing "My Country, 'Tis of Thee" on the Capitol steps; and less than the full student body protested by not re-registering for classes. Furthermore, the ad charged that Dr. King was arrested seven times, when he was actually arrested only four, and that "Southern violators of the Constitution" were responsible for the assaults and bombings against Dr. King, when there was no evidence indicating who committed these crimes.\(^2\)

These latter inaccuracies prompted L. B. Sullivan, the elected Commissioner for Public Affairs responsible for overseeing the police and public safety, to charge that the Times had defamed him. He was joined by the two other elected commissioners, Mayor Earl James and Frank Parks. The errors were minor, but they were nonetheless errors, a fact that had substantial legal ramifications in

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\(^2\) B. SCHWARTZ, *supra* note 2, at 531.


\(^2\) The first paragraph of the ad described the efforts by "Southern Negro students" acting "in ... positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." *Id.* The second paragraph asserted that more than 400 students in Orangeburg, South Carolina had been forcibly ejected, tear-gassed, arrested en masse, and herded into a barbed-wire stockade when they attempted to sit-in at a lunch-counter. The third paragraph spoke directly to the events at Alabama State College in Montgomery, while the fourth paragraph noted similar student activity in other major Southern cities. The fifth and sixth paragraphs praised Martin Luther King, Jr., for his leadership of the civil rights movement and charged that "Southern violators" had answered King's peaceful protests with intimidation and violence. The final four paragraphs called for "moral" and "material" support. *Id.*

\(^2\) *Id.*
Alabama where truth was the only defense to a charge of libel. The inaccuracies, in short, presented segregationist public officials, such as Sullivan, with a way of attacking the Times' appeal.

But why the attack? The simple (and correct) answer, when viewed from the perspective of the civil rights movement, is that Southern whites were committed to its destruction. Yet there is another way of examining the events leading to Sullivan, one that emphasizes the class, political, and personal tensions within the white community of Montgomery and that stresses its distinctive vision of public discourse. The emerging notion of the public marketplace of ideas associated with Northern liberal intellectuals and embodied in Brennan's opinion stood in sharp contrast to the persistent belief on the part of many Southern whites in the concepts of local control, manners and habits of civility, and of honor and dignity in public affairs. What lay behind the case were powerful cultural assumptions on the part of whites about the nature of community, of personal autonomy, and of democratic self-governance that Southern civil rights leaders and the Northern liberal press threatened. What was at stake was not just traditional patterns of race relations, although they certainly were involved, but the way in which Southern whites explained their public affairs to one another and the outside world.

III. COMMUNITY AND CONFRONTATION IN MONTGOMERY, ALABAMA

Sullivan was the product of a place in time. Montgomery in the 1950s divided along geographic, class, and racial lines. It was also, as the historian J. Mills Thornton has written, a city whose municipal politics underwent a profound transformation. From the end of World War I to the outbreak of World War II, William A. Gunter, Jr., ruled Montgomery. Gunter, as mayor during most of this period, built a political machine that drew its support from the city's white upper class and its morning newspaper, the Montgomery Advertiser, edited by Grover C. Hall, Sr. Gunter epitomized the traditions of aristocratic paternalism, political deference, honor, and gentility that stretched back to the Civil War. The Gunter machine was nonetheless a machine, albeit one with a "Gone With the Wind" quality. It doled out city jobs to supporters; it kept constituents happy during the dark days of the Depression by running up a huge debt; it opposed prohibition; and it denounced the Ku Klux Klan. The latter, with strong lower class and fundamentalist religious ties, made Gunter and his followers special objects of hatred, but Klan attacks only served to reinforce Gunter's hold over city politics. Throughout most of this period the city's

27. W. Hopkins, supra note 4, at 76.
30. Id. at 7-9.
population remained racially balanced, with 55% white and 45% black.31

Following Gunter’s death in 1940, changes in the political and demographic patterns of Montgomery gradually eroded the machine’s strength along with its dominant social and cultural values. During World War II many blacks left Montgomery for the North’s large industrial cities while rural white Alabamians moved into the state’s capital. By 1955, Montgomery’s population of 120,000 was about 64% white and 36% black. The new white lower class residential developments on the city’s eastside brought the Gunter machine under increasing pressure, especially when its upper-class rivals, the Hill family, whose prominence dated only to the late nineteenth-century, made increasing political appeals to them. The political calculus was further complicated by the growing power of black voters. While the percentage of blacks in the city declined, their political influence actually increased, thanks to the Supreme Court’s decision in Smith v. Allwright (1944), which invalidated the all-white primary.32 By 1955, more than 7% of the black population was registered to vote, twice as many as five years earlier. In short, with the machine losing control and the white vote increasingly split along class lines, blacks held the balance of power.33

For a brief period in the 1950s, control of the black vote became one of the chief objects of Montgomery politics. In 1953, David Birmingham successfully ran a populist campaign that combined black voters and eastsiders resentful of the longtime domination of the white business and professional classes from the southside. Once in office, Birmingham began rewarding blacks, and calling for the integration of the city’s police force and public parks, something that the two other commissioners (both machine supporters) reluctantly agreed to. Only two weeks before the Supreme Court handed down its decision in Brown v. Board of Education, the Montgomery City Council voted to hire its first black policeman.34 This policy stirred a backlash among eastside segregationists, who felt betrayed—by Birmingham and by the machine. At the same time, black leaders boldly pressed their new political advantage. High on the list of black demands was the adoption by the city council of the so-called Mobile Plan for seating on public buses.35

Birmingham’s political strategy collapsed under the weight of demographic and economic pressures, and a white population simply unprepared for significant black political participation. Montgomery was ripe for political confrontation

31. Id. at 8-9.
35. The Mobile Plan provided that, unlike Montgomery, drivers of the city’s buses were not required to unseat black passengers as whites entered the bus. Rather, whites were seated from the front to the back, blacks from the back towards the front. When riders left the bus, the line of division separating whites and blacks was adjusted, but no rider was required to surrender his or her seat. See C. Barnes, Journey from Jim Crow: The Desegregation of Southern Transit (1983).
and white backlash, especially from the eastside. The initial result was the election in 1955 of Clyde Sellers, a termite exterminator and ardent segregationist, to replace Birmingham as police commissioner. It was Sellers' victory that forced black leaders to use Rosa Park's defiance to seek change outside the city commission. A citywide bus boycott in 1955-56 ultimately produced a federal court order to integrate Montgomery's transportation facilities. These same events also thrust Martin Luther King, Jr., into the spotlight.

The bus boycott thoroughly polarized Montgomery. For example, the largest organization in Montgomery by early 1958 was the White Citizen's Council, which demanded absolute subservience by whites to the segregationist line and which had its strength on the city's eastside. When, for example, a group of white women in 1958 organized a series of weekly inter-racial prayer meetings at a Black Roman Catholic hospital, the Council singled them out for public ridicule. In November, under threats that their husbands' businesses would be destroyed, most of the white women publicly recanted their racially moderate beliefs, although one woman, librarian Juliette Morgan, chose to commit suicide rather than recant.

These events further undermined the old Gunter machine and with its collapse went the traditional vehicle for distributing political power, conducting public debate, and adjusting race relations. This institutional dislocation fueled tension in the white community and between lower class whites and blacks. The bus boycott was especially embarrassing for the white elite of the fading Gunter machine. The boycott eroded some of the machine's most cherished assumptions about the nature of the social order at the same time that political influence slipped into the hands of persons it had historically disdained—white, populist, race-baiting, lower class, religious fundamentalists and their upper class allies, the Hills.

The presence of an aggressive Northern news media during the boycott made developments all the more galling. What the Northern press reported about was not the paternalism and civility that upper-class white Montgomerians had embraced in their relations with the black community, but the ugly violence of the Klan and the lower-class segregationists. The increasing attention paid by the Northern press to the boycott spurred the segregationists to press for victory over black agitators, while white moderates from the city's southside searched for a compromise, all the while damning the interference of the Northern liberal press.

On the eve of Sullivan, therefore, a regime of total segregation seemed within the grasp of eastside political forces at the same time that upper-class whites

40. See, e.g., on reporting, N.Y. Times, Feb. 24, 1956, at 1, col. 8; Interview with M. Roland Nachman, Jr., lawyer, Montgomery, Ala. (Mar. 24, 1989).
from the machine, who profoundly disdained this new political force, wanted to set the public record straight—they, not the Klan, embodied the South's real traditions. The demagogic exploitation of race, they asserted, violated the machine's tradition of political deference based on class, paternalism toward blacks, and habits and manners of civility in public discourse.31

By 1960, the segregationist forces had scored impressive political and legal victories, both in the state and Montgomery. In 1958, former Attorney General John Patterson won election to the Alabama governor's mansion by conducting a political campaign of unalloyed racism that handed George C. Wallace a surprising defeat. Patterson also won an order from Circuit Judge Walter Burgwyn Jones, who would later preside over the trial phase of Sullivan, that outlawed the NAACP in Alabama.42 Finally, in January 1959, Montgomery city officials made clear that they were not going to retreat from their hard segregationist line, ordering that all thirteen city parks and the city zoo be sold as a way of evading a federal court order mandating their integration.43

In March 1959, the power of eastside segregationists surfaced again in the municipal elections. Earl James, another eastside leader, won the mayor's post over incumbent William A. Gayle, a machine supporter and son of a distinguished Alabama family. James successfully charged Gayle with being soft on the segregation issue because he lost the bus boycott. An even more portentous political event for segregationists was the election of L. B. Sullivan over incumbent segregationist police commissioner Clyde Sellers.44

Lester B. (L.B.) Sullivan was a former Director of Public Safety for Alabama, a position that put him in control of the Alabama State Police.45 In 1954, he made his reputation, as did John Patterson and Walter B. Jones, by cleaning up Phoenix City, Alabama. Phoenix City was close to Fort Benning military reservation; it was known in the 1950s as the most corrupt city in America. Events in Phoenix City reached a climax with the assassination of Governor Albert Patterson, the father of John Patterson. The junior Patterson, along with Sullivan and Jones, then swept through Phoenix City, freeing the city from much of the corruption into which it had fallen. This experience forged a bond among the three men, one that carried over into Montgomery. There Sullivan became involved in police and public affairs as well as with the Ku Klux Klan. Sullivan

42. On June 1, 1956, Patterson secured from Montgomery Circuit Court Judge Walter B. Jones an order barring the NAACP from operating in Alabama. Judge Jones and Patterson were close personal and political friends. For the next eight years, the NAACP was out of business in Alabama, until the Supreme Court finally voided these sanctions. Contrast NAACP v. Button, 371 U.S. 415 (1963), with NAACP v. Alabama, 357 U.S. 449 (1958) (exemplifying the Court's earlier treatment).
44. Id. at 21-22.
is described by those who knew him as "smooth, polished, relatively sophisticated for Montgomery. He had read a few books."\textsuperscript{46}

Sullivan's biggest political opportunity in Montgomery came as a result of events in the city's black community during the summer of 1958. At that time, Martin Luther King, Jr.'s closest associate and friend, the Reverend Ralph D. Abernathy, had an affair with one of his female parishioners. On August 29, the woman's husband, Edward Davis, who had been away studying at Indiana University, attacked Abernathy in the basement of his church office, first with a hatchet and then a gun. The minister fled to the street where two Montgomery police officers took Davis into custody.\textsuperscript{47} When King arrived at the courthouse to aid Abernathy, Montgomery police, already unsettled by the bizarre behavior of both Davis and Abernathy, arrested him for loitering. He was convicted and fined ten dollars. Police Commissioner Clyde Sellers, however, decided to pay King's fine rather than have him jailed as a martyr. In the 1959 commission race, Sullivan effectively exploited this incident, charging incumbent police commissioner Sellers with using "kid gloves in the handling of social agitators."\textsuperscript{48}

Sullivan and state officials crassly manipulated the legal process to their advantage.\textsuperscript{49} Governor Patterson and Sullivan, in February 1960, decided to break the sit-in movement through officially sanctioned force and intimidation. While state and Montgomery police stood idly by, baseball wielding Klansman waded into a group of some 800 black students from Alabama State University supporting a sit-in at the restaurant in the state capitol. It was these events that formed the basis for the charge in the \textit{Times} ad that a "reign of terror" existed in Montgomery. On May 20, 1960, the first wave of freedom riders reached Montgomery with a guarantee that local law enforcement would protect them. When the freedom riders arrived, however, Montgomery police were nowhere to be found, and for ten minutes a white mob attacked the riders with chains and clubs.\textsuperscript{50} A subsequent investigation disclosed that "Police Commissioner L. B. Sullivan had conspired with mob leader Claude Henley to allot the mob ten minutes to do with the Freedom Riders as they saw fit."\textsuperscript{51}

These events formed the immediate background of the Sullivan case. Segregationists controlled the White Citizen's Council and the police force, and they used both to cow white moderates and black civil rights protestors. The
traditional political culture of Montgomery, with its values of paternalism, deference, and civility, was in disarray. The once powerful leaders of the Gunter machine suffered the ironic fate of political attack from eastsiders and a Northern liberal press barrage that equated their values with those of their eastside opponents. Taken together, lower-class segregationists and Northern journalists threatened to rob the once powerful leaders of the Gunter machine of not just their political fortunes, but of their sacred honor as well.

IV. THE MONTGOMERY PRESS AND THE NEW YORK TIMES

The social tensions that divided Montgomery's white community, not just the black civil rights movement, surfaced in Sullivan. One of the little noticed facts of Sullivan was the extent to which the Montgomery press actually supported the litigation. One would assume that newspaper editors and publishers would want as much discretion as possible to report and comment on the news. Yet Sullivan can be interpreted as a Southern newspaper—the Montgomery Advertiser—suing a Northern newspaper—The New York Times—through the aegis of L. B. Sullivan and the other plaintiffs.

Grover Hall, Jr., whose father had edited the Advertiser during the Gunter era, gave his full backing to the suits. Hall was a complex figure: a bachelor who reveled in his reputation as a dandy, a white newspaper editor who was not a knee-jerk segregationist, and a son who never quite lived up to his father's success in winning a Pulitzer Prize for attacking the Ku Klux Klan. Hall earned a reputation for professional reporting on civil rights matters, he once served on the national board of the American Civil Liberties Union, and he urged a moderate course during the bus boycott. Yet Hall was as much a Southerner and Alabamian as he was a professional journalist. As a member of Montgomery's elite, he disdained lower-class white segregationists, such as Sullivan, whom he disliked, and the Klan because they mocked the South's historical position on the race issue. He viewed the Times as a model of modern newspaper reporting, relying on it for much of the international news reported in his own paper. Yet he also believed that its editors and reporters affronted his and his paper's honor by giving far too much attention to white extremists, which the Advertiser railed against, and not enough attention to the South's ability to evolve gradual solutions to the race issue.

The contradictions in Hall's position put him under substantial personal and professional pressure. His paper lost advertising and subscription revenues as

52. T. BRANCH, supra note 18, at 152.
54. Interview with William McDonald, media consultant, Montgomery, Ala. (June 26, 1990).
55. Id.; Interview with Ray Jenkins, editor, Baltimore Evening Sun, Baltimore, Md. (Mar. 25, 1990). As Jenkins points out, blacks gradually became critical of both paternalism and violence-backed segregation. Leaders such as Martin Luther King, Jr., eventually concluded that moderates offered little hope for real change, and that strategy simply left white moderates isolated.
a result of its moderate position during the bus boycott. Hall decided in 1957 to recoup his financial loss by dispatching his own reporters to investigate race relations in the heart of the liberal North. The so-called Ascalon series revealed racial injustices, discrimination, and de jure segregation in the big cities of the North. Hall was proud of his efforts; he believed he would win the Pulitzer Prize for investigative journalism in 1957. When he did not, he concluded that liberal Northerners failed to appreciate the unique ways in which Southerners accommodated problems of racial adjustment.

The first discovery of the ad came at the Advertiser. Ray Jenkins, the city editor, while paging through the Times in early April 1960, spotted the appeal. He called it to Hall’s attention, and the editor quickly grasped it possibilities. Even though the ad named no public officials, Hall construed it as an attack on them, on Montgomery, and on Alabama. City officials and Governor Patterson, upon learning of the ad, quickly directed their legal counsel to examine the possibility of suing the Times and the signatories to the ad. Calvin Whitesell, Montgomery city attorney, provided initial legal advise to Sullivan and the two other commissioners, but he was shortly replaced by Roland Nachman, Jr., a fresh graduate from Harvard Law School who practiced in the firm on retainer to Hall’s Advertiser. On Nachman’s instructions, Sullivan wrote identical letters to each of the four Alabama preachers demanding that they prepare a full retraction. The latter were joined as parties in order to keep the litigation in the Alabama courts and to block removal to the potentially more sympathetic federal courts. Sullivan also asked the same of the Times as did Governor Patterson through his Attorney General. Shortly thereafter, Hall’s editorial pages denounced the Times as “abolitionist hellmouths” who propagated “the big lie” about the city’s racial conditions. On April 19, 1960, Sullivan, along with commissioners Earl James and Frank Parks, individually filed suits in the Montgomery County Circuit Court against the Times and the four ministers seeking damages of $500,000 against each of the defendants.

56. T. Branch, supra note 18, at 183-84. See also Interview with Joe Azbell, political consultant, Montgomery, Ala. (June 25, 1990).
57. Interview with William McDonald, media consultant, Montgomery, Ala. (June 26, 1990).
58. Id.
59. Id.
60. Interview with John Patterson, Judge, Montgomery, Ala. (June 26, 1990).
61. The Times did publish a retraction with regard to Governor Patterson, but they refused to do so in the case of Sullivan.
64. Montgomery Advertiser, Apr. 20, 1960, at 1; and Alabama Journal, Apr. 20, 1960, at 1. Governor Patterson on May 30, 1960 filed suit against the Times, the four Alabama ministers, and Martin Luther King, Jr. The latter only the day before had been acquitted by an all-white jury of the tax charges. The suit filed by Sullivan was tried first. In January 1961, Earl James’ suit was tried, and a jury awarded him $500,000. The decision in the Sullivan case, however, was equally applicable to the jury verdict in James’s case. Frank Parks’ suit never came to trial. See Ottley, Lewis & Ottley, supra note 17, at 749.
Those living in Montgomery today insist that all of these actions occurred independently. Perhaps this is true, but Montgomery in the 1960s was still a small community, one in which ties of family, friends, neighborhoods, and clubs bound persons together. Lawsuits, moreover, often make for strange bedfellows. Hall, for example, held Sullivan and the other city commissioners in contempt for their race demagoguery and their connections to lower-class whites on the eastside. Yet they shared a common disdain for an implacable Northern press and an active black civil rights movement.

The stakes were high for all concerned. The plaintiffs saw not only their own honor and dignity impugned, but that of the region as a whole. The suit, Grover Hall proclaimed in an 

Advertiser editorial of May 22, 1960, promised that "the recent checkmating of the Times in Alabama will impose a restraint upon other publications." For the management of the Times, the lawsuits represented a threat to the paper's balance sheet and, even more important, a chilling of its coverage of the civil rights movement. In 1960 there were only thirty-four daily subscribers to the Times in Montgomery. The Alabama circulation of the paper was about 394 copies a day, with about thirty-five copies distributed in Montgomery County. The Times' total circulation was approximately 650,000 copies. The Times had no corporate offices in the state; its advertising revenues in Alabama over the previous six months amounted to about $18,000 out of total advertising revenues of $37,500,000. The paper had no resident reporter assigned to the state; instead, it relied on local stringers and an occasional visit by Claude Sitton, based in Atlanta.

These numbers were certainly important to the Times, since its defense

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There was also a blizzard of lawsuits going on in the federal courts. On May 7, 1960, the three city commissioners of Birmingham, Alabama sued the Times and Harrison Salisbury for his story that described their city as "the Johannesburg of America." See N.Y. Times, Apr. 12, 1960, at 1, col. 1. On May 27, 1960, the three city commissioners of Bessemer, Alabama each filed similar suits seeking $500,000. On July 20, 1960 a Birmingham city detective filed a libel action seeking $100,000. Finally, there were five other suits brought against CBS for its television coverage of the "Heed Their Rising Voices" ad and its treatment of Salisbury's April 12 article. See Montgomery Advertiser, May 7, 1960, at 1; June 1, 1960, at 1; July 20, 1960, at 1.

67. The total amount of damages sought by the plaintiffs, including Governor Patterson, was $5,600,000. The Times also faced suits elsewhere in Alabama, as did other Northern media companies, including CBS. See H. SALSBURY, WITHOUT FEAR OR FAVOR: THE NEW YORK TIMES AND ITS TIMES 121 (1980). Montgomery officials were optimistic about the success of their suits. They not only had state law on their side but recent experience with the press had shown that libel actions could be quite effective in disposing of liberal Northern publishers. In 1956, Ken magazine, a pulp publication based in New York, ran a feature story about runaway gambling and prostitution in Montgomery. At one time, the after hours life of the city had been tawdry, but the same white progressive business reformers that sought to integrate the city police force in the early 1950s succeeded in driving out the corruption. These same officials then brought suit against the magazine and won. At the trial, it was discovered that the author of the piece never visited Montgomery, that he had simply assembled a series of lurid tales about the city's moral bankruptcy, and that the magazine had published them knowing that they were false. As a result, city officials won, creating a modest precedent of sorts for Sullivan's actions.
68. Sullivan, 376 U.S. at 260 n.3.
69. Ottley, Lewis & Ottley, supra note 17, at 758.
counsel, T. Eric Embry, a Birmingham labor lawyer, insisted that the newspaper was not a business entity that could be sued in the Alabama courts. The figures also suggested how unlikely it was that all but the smallest portion of Alabama's population would actually read the ad. Sullivan, Nachman, and Hall were not worried about the Times changing minds in Alabama; they worried, instead, about the fate of their reputations in the North. A newspaper editor as egocentric and energetic as Hall should have wanted to enhance the right of the press to comment critically on public figures. However, Hall took the opposite position: he complained that the Times ad fostered a climate of disrespect for authority by holding the South up to national ridicule. Lingering below the surface of Hall's slashing editorials was a sense of inferiority that had long plagued the region. Hence, an Alabama newspaper editor, and a liberal one at that, cast his journalistic fate with segregationists that he neither liked nor respected in attempt to protect the honor of his section and his class.

V. THE TRIAL

The trial of the Times and the four ministers began on November 1, 1960, the final week of the Kennedy-Nixon presidential campaign. The then existing law of political libel in Alabama was squarely on the plaintiff's side, reflecting the greater emphasis in the South than the North on protection of reputation in public discourse. A minority of states actually protected false statements, if they were made in good faith and were part of privileged communications. The majority rule, on the other hand, left all false statements unprotected—truth was the only defense to a charge of libel. Alabama in 1913 adopted this latter position in Parsons v. Age Herald Publishing Co., and it echoed through the state courts of the deep South. Of the sixteen states that adhered to the majority rule in 1960, seven were Southern. The Southern press, at least where political libels were concerned, operated on a shorter leash than its Northern counterparts.

Walter Burgwyn Jones presided over the trial. He was the son of former Governor Thomas Goode Jones, an intellectually powerful, even intimidating man who totally dominated his son. Walter B. Jones was the youngest person ever elected to the circuit court bench in Alabama, with almost forty years of

70. Interview with M. Roland Nachman, Jr., lawyer, Montgomery, Ala. (Apr. 24, 1989).
72. W. Hopkins, supra note 4, at 75. Hopkins argues, correctly I believe, that the so-called minority rule was actually the majority rule. He shows convincingly that most states actually allowed false statements about public officials as long as they were not done with actual malice. His argument, of course, makes all the more impressive the degree to which Montgomery and Alabama officials were isolated in their views of what should be the proper basis of political discourse.
73. 181 Ala. 439 (1913).
74. The states were Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, and Texas. For a discussion of the case law in these states, see W. Hopkins, supra note 4, at 76-86, 193-98.
service by 1960. Equally important, he wrote a weekly column for Hall's Advertiser entitled "Off the Bench." Through this column he blasted federal interference with local racial affairs, condemning the Supreme Court's school desegregation decision in Brown v. Board of Education and its repeated use of the due process and equal protection clauses of the fourteenth amendment to substitute national for local values. Jones, like Hall, took particular umbrage at the "unjust" assault by "radical newspapers and magazines, communists and the federal judiciary." Jones did not worry about what the people of the South felt; he fretted, instead, over the destruction of the region's reputation in the North. "Columnists and photographers," he wrote, "have been sent to the South to take back to the people of the North untrue and slanted tales about the South. Truly a massive campaign of super-brainwashing propaganda is now being directed against the white race, particularly by those who envy its glory and greatness." The themes of damaged reputation and honor were deeply rooted in his racial beliefs. "Because our people have pride of race," Jones continued, "we are denounced as bigoted, prejudiced, racial propagandists and hate-mongers by those who wish an impure mixed breed that would destroy the white race by mongrelization."

Jones's views complemented those of his friend, Grover Hall, Jr. Both Jones and Hall were bachelors, both fancied themselves raconteurs in Montgomery high society, both belonged to the 13 Club (the city's most prestigious intellectual group), and both of them grew up in families dominated by strong fathers.

Judge Jones consistently supported the plaintiffs at every turn. Initially, the Times' attorney, T. Eric Embry, a labor lawyer from Birmingham, sought to remove the case to the federal district court for the Middle District of Alabama. Embry made a special appearance before Jones's seeking to quash
the service of process on the grounds that the Montgomery Circuit Court lacked both personal and subject matter jurisdiction. Embry believed such an appearance would permit him to raise the jurisdictional question without conceding to the court's jurisdiction. Judge Jones, however, took the position that the *Times* had not argued the matter of personal jurisdiction, as was then provided under Alabama law, but had instead argued the subject matter jurisdiction. This argument, according to Jones, could only be made by a general appearance, which in turn meant that the *Times* accepted the court's jurisdiction. Judge Jones also concluded that the *Times* was doing business in Alabama and that due process did not require the cause of action arise out of business done in Alabama.

The trial lasted only three days; its purpose and outcome were never in doubt. As a writer for Hall's *Advertiser* noted: "State and City authorities have found a formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama." The courtroom atmosphere was so tainted by racial prejudice that the four ministers subsequently used this prejudice as a basis to appeal the decision to the Supreme Court. Hall's *Advertiser* focused attention on the all-white jury, printing the names and photographs of the jurors in the paper. Hall himself testified that the advertisement, which listed no names, had raised in his mind without a doubt that its authors intended it to apply to Sullivan.

Throughout the three-day trial, Embry fenced unsuccessfully with Judge Jones and Sullivan's witnesses. In addition to Hall, five other witnesses, although never

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82. Prior to the federal rules, the practice was to appear specially to challenge the jurisdiction of the court. See 5A C. Wright & A. Miller, Federal Practice & Procedure Civil § 1344 (1990).

83. Order and Opinion on Motion to Quash, 1 Record at 49, *Sullivan*. The beginning of the trial may also have been delayed in part because of the presidential election. Governor Patterson had been one of the earliest and most vocal supporters of John F. Kennedy's candidacy for president; indeed, Patterson had come out so early and so strongly for Kennedy that the future president worried that his connection with the segregationist Alabama governor would hurt his chances with white, Northern liberals. Patterson had his own political problems in Alabama, not the least of which was proving that in his attachment to the Catholic Kennedy he had lost none of his enthusiasm for segregation, the principal means by which the Alabama Democratic party had maintained its strength. The *Sullivan* trial became a symbol for the idea that even with a liberal, Catholic Democrat at the head of the national ticket it was still safe to vote Democratic in Alabama. See Interview with John Patterson, Judge, Montgomery, Ala. (June 26, 1990).


85. Brief for the Petitioners, Abernathy v. Sullivan, 376 U.S. 254 (1964), 6 Record at 52-62, *Sullivan*. Judge Jones's feelings on these matters were never far from the surface. In the action brought by Mayor Earl James, Jones ordered segregated seating in the courtroom, declared that "the XIV Amendment has no standing whatsoever in this Court, it is a pariah and an outcast," and observed that "white man's justice... will give the parties at the Bar of this Court, regardless of race or color, equal justice under law." See Alabama Journal, Feb. 1, 1961, at 1.

86. Transcript of Proceedings on Merits, 2 Record at 930, *Sullivan*.

87. Id. at 602-69.
testifying that they actually believed the advertisement, insisted that persons reading it could conclude that it libeled the commissioner of public safety. Embry argued that since no one was named in the advertisement, it was impossible to reach such a conclusion. Even if a connection could be established between the events described in the ad and Sullivan, the Times had not published the advertisement maliciously. The ministers, for their part, sought to disassociate themselves entirely from the Times by arguing that they knew nothing of the advertisement and had never given their consent to having their names listed.

The jury decided the case after two hours of deliberation. Following the instructions of Judge Jones that the third and sixth paragraphs of the advertisement were libelous per se, it returned a verdict of $500,000 in punitive damages against the Times and each of the four ministers. Judge Jones turned aside motions for new trials based on the excessive amount of the damages. The Alabama Supreme Court denied appeals from both the Times and the ministers, whose property was immediately seized by Montgomery county officials.

In retrospect, these damages seem at once enormous and tactically foolish. Roland Nachman, Sullivan's attorney, was staggered by his own success and perplexed by the swiftness with which Alabama authorities seized the ministers' meager holdings. The damages and the quick action against the ministers underscored the determination of local authorities to subject the Northern press and SCLC to a political trial. Despite their significant differences, well-to-do white moderates and lower-class white segregationists joined the legal process in pursuing the complete destruction of the civil rights movement and the silencing of what was perceived in Alabama as a hostile liberal Northern press. Alabama officials already had decided to rid the state of agitators; breaking the ministers' financial backs promised to hasten that process. The large damage judgments were meant to do with the Southern Leadership Conference what had already been done with the NAACP—drive it and its leaders from the state.

VI. JUSTICE BRENNAN AND THE SECTIONAL BASES OF POLITICAL LIBEL AND REPUTATION

When framed against this background, Justice Brennan's opinion dripped irony for the supporters of the old Gunter machine. Figures such as Hall and Jones liked to think of themselves as models for and agents of manners and habits of civility—as moderating influences on the racism of lower-class Southern whites and a break on the overbearing and hypocritical egalitarianism of the North. These self-perceptions contained some of the most profound tensions in

88. Oral Charge and Exceptions Thereto, 2 Record at 836, Sullivan.
89. Transcript of Proceedings on Merits, 2 Record at 787-804, Sullivan.
90. Final Judgment, Jury and Verdict, 2 Record at 862, Sullivan.
92. Interview with M. Roland Nachman, Jr., lawyer, Montgomery, Ala. (June 25, 1990).
American public life in the post-World War II era, and not the least of these, as Grover Hall's behavior so aptly illustrated, was an overweening sense of Southern inferiority tied to the region's tangled history of race relations.

Upper-class Southerners, who championed ideas of local control and state sovereignty, set in motion forces of constitutional nationalization that opened the South to greater outside influence and further eroded their position of social dominance in Montgomery. Justice Brennan's opinion gave the Supreme Court, which the upper-class South so despised, new powers of review and blasted "habits and manners of civility" as an appropriate guide to public discourse.93 One of the virtues of protecting public officials was that doing so created a climate of respect for governmental authority and encouraged the best men to enter public life. That vision of public affairs, of course, was always something of a willow of the wisp, as the struggle between the Gunter machine and its opponents during the 1950s made clear.

The Sullivan decision reinforced and contributed to the prevailing ideology of liberal legalism, with its emphasis on rights consciousness and total justice, and under such circumstances, notions of deference to political authority seem antique. In the minds of some, of course, Brennan's opinion in Sullivan degraded public life and invited second rate political figures to govern. The most talented persons supposedly refused to risk their political careers in a climate where accountability was valued above independence, where criticism was valued above truth, and in which public officials were distrusted.94

In this sense, Brennan contributed to the decay of community values associated with first amendment law since the 1930s. The decision helped to push American public life, at least where criticism of officials was involved, away from the idea of a New England town meeting, in which the quality of what was said was more important than the quantity.95 Some would argue as well that Sullivan has debased the news media that so eagerly embraced it. Initially, Sullivan brought a burst of enthusiasm and an expansion of investigative and regular news reporting. The news business created a milieu in which fundamental social problems became subjects of intensive media—and ultimately—public concern. The chances of reporters stepping on the reputations of important people grew accordingly, and with it charges of sleazy journalism.96

Brennan's opinion embodied an ideal of professional journalism at odds with that in the South in general and Montgomery in particular. The real question was not whether there should be accurate reporting, since both Grover Hall and the editorial staff of the Times accepted as much. The important differences emerged in their contending views of reputation. As Robert Post argued,

94. W. HOPKINS, supra note 4, at 161-68.
95. Review Essay, supra note 93, at 555.
96. R. BEZANSON, G. CRANBERG & J. SOLOSKI, supra note 17, at 111-44.
reputation has historically been defined as property, as honor, and as dignity. Each of these concepts of reputation "presupposes an image of how people are tied together, or should be tied together, in a social setting. As this image varies, so [does] the nature of the reputation that the law of defamation seeks to protect."9

Northern courts historically had defined reputation as a species of property in which individuals were connected to one another through the institution of the market.9 A merchant depends on his reputation to sustain himself in the market, meaning that his reputation may vary with his or her worth in that marketplace. In short, Northern courts appear to have been far less likely to treat reputation as an absolute; judges there approached it as a variable condition that the individual, through his or her own initiative, might control. This idea of reputation as property presupposed a degree of equality among all persons in the marketplace, meaning that reputation was earned through equal competition with some individuals faring better than others. The judicial view of reputation as property complemented the entrepreneurial and industrial ethos of the free, northern states and helps to explain why judges there were more likely to grant a qualified privilege toward political libels.10

In the South, reputation turned more on concepts of honor and dignity than property.10 The South's historic social stratification and racial inequality anchored the notion of reputation as honor and set the area apart from the North. Reputation as honor offered individual Southerners a social order with a fixed base that did not fluctuate with the marketplace. Under such circumstances, individual reputation was unalterably linked to individual identity, so much so that a person's social behavior became conditioned by it, and deference was expected (and often given) by those below to the honorific roles filled by those above.102 The preservation of honor in the South's deferential society was not a matter of individual well-being; instead, as Robert Bellah has observed, it was "a public good, not merely a private possession."103

Northerners and Southerners did agree that reputation was connected to dignity, although until recently (and, in part due to the Sullivan decision one might speculate) they gave it different weight. Once again, race and market relations help to explain these approaches. The concept of reputation as dignity

98. Id. Post argues that the question of how these concepts have been formed historically is complex and will require a good deal of further investigation. Id.
99. Much more research needs to be done on the attitudes of Northern and Southern judges toward reputation, but the findings are suggestive of the differences that I outline in this Article. See W. HOPKINS, supra note 4, at 81.
100. On the ideological differences between the North and the South, see B. WYATT-BROWN, SOUTHERN HONOR: ETHICS AND BEHAVIOR IN THE OLD SOUTH (1982).
101. Id. at 97, 88-114.
102. Id.
is premised on the notion that an individual's identity is constantly being formed through social action, and how one feels about themselves and how they are treated by those around them can vary. If an individual is slandered, it is not just that others will view him or her negatively but that the individual may view himself that way as well. Under the concept of reputation as dignity, individuals can claim protection against trauma to their own sense of worth.104

Originally, honor and dignity were closely linked with one another, but in this century they have separated, more quickly in the North than the South where ascriptive social status persisted much longer. As Post has argued, the modern image of society is made possible by this split between honor and dignity, because without it, civilization as we know it would not be possible.105 A modern, egalitarian scheme of social relations developed much more slowly in the South than the North, and the South's social system derived from its history of slavery and racial segregation. The white community of Montgomery, like most of the South, struggled among itself as much as it did with blacks. Upper-class whites from the southside sought to tie their identity to habits and manners of civility; lower-class whites from the eastside turned to violence, intimidation, and the security of the Klan. In the North, however, the race issue did not interfere with the idea that there were universal rules that encompassed all social classes and roles. The market-based societies of the North made individual reputation a public as well as a private good, a development that reinforced ideas of individualism and egalitarianism.106

When reputation is approached as an incident of social organization, therefore, the *Sullivan* case speaks with equal, if not greater, force than when it is recounted solely as an episode of the civil rights movement. The South, of which Montgomery, the former capital of the Confederacy, was the heart, had a long tradition of treating reputation more as honor and dignity than as property.107 Not only was the South considerably more hierarchical than the North, but it was also far more suspicious of social relations created in the marketplace. Southern political leaders cut from the mold of the Gunter machine conducted public affairs that relied on hierarchy, deference, and paternalism, and invoked race to structure interpersonal relations. Under these circumstances, the Montgomery elite in 1960 were confronted with a dual threat: from competing white segregationists on the eastside, who dismissed as pretentious the traditional notion of reputation as honor, and from a Northern press schooled to understand political reputation as a species of property, the value of which was determined in a marketplace of ideas. Hence, the reaction of Montgomery's leaders to the *New York Times* ad specifically and the civil rights movement in general has to be explained as more than mean-spirited racism. It entailed an understanding that certain benefits of order and harmony

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105. *Id*.
106. *Id* at 716.
would flow from a system of libel law that protected the best men. What was distinctive about events in Montgomery was not that its leaders (from either the old Gunter machine or the eastside) were merely racists, but that they departed from their Northern counterparts in making sense of political discourse, the social bases of politics, and the purposes of the press.

Justice Brennan’s opinion in *Sullivan*, therefore, is notable not just for the legal change that it promoted but for the sectionally bound cultural assumptions that it rejected. Brennan adopted a modern, Northern conception of libel law that was designed to encourage a robust exchange of ideas, but this formulation rejected the South’s most enduring contribution to that body of law, the notion that habits and manners of civility should govern public discourse.

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108. Little did Brennan and his brethren realize the poignant irony played out when the case was argued before the full court. Martin Luther King, Jr., and his entourage spent the weekend before the oral arguments in a suite at the Willard Hotel that the FBI bugged. It was a weekend of some extramural entertainments, which included two women from the Philadelphia Naval Yard. FBI director J. Edgar Hoover used the tapes from that bugging in an unsuccessful attempt to blackmail King and his wife into abandoning his crusade. Subsequently, Senator Jesse Helms of North Carolina, fruitlessly urged a federal court to direct the National Archives to open the tapes to the public shortly before Congress voted on making King’s birthday a national holiday.

The treatment of Martin Luther King, Jr., underscores that the marketplace of free ideas was even more vulnerable than Justice Brennan and his brethren on the high court could have known. The historical lesson that *New York Times v. Sullivan* and its times teaches is how little those ideas meant in practice then and how vulnerable they remain today. See D. Garrow, *The FBI and Martin Luther King, Jr.: From "Solo" to Memphis* 104-05 (1981).