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THE OTHER *SULLIVAN* CASE

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The American philosopher Alexander Meikeljohn famously reacted to the news of the Supreme Court's decision in *Sullivan* by saying, "It is an occasion for dancing in the streets." [1] There is something disturbing and perhaps even vaguely repellent in the image of a giddy throng of philosophers, media lawyers and law professors getting jiggy with it on the boulevards of America over the enunciation of the "actual malice" doctrine. As both a professor and a former newspaper editor I would join that ungainly celebration. *Sullivan* has been a good thing on balance for free press, free speech and free government. But as a human being, I can't help but wonder whether Ralph David Abernathy ever felt like joining the dance.

Abernathy was one of four local defendants sued by L.B. Sullivan over the advertisement: the others were S.S. Seay Sr. of Montgomery, Fred L. Shuttlesworth of Birmingham and J.E. Lowery of Mobile.[2] Each of these men was an important figure in the civil rights movement. Abernathy, for example, was Dr. Martin Luther King Jr.'s right hand man in the operation of the Southern Christian Leadership Council—so much so that when King left Montgomery in 1960, he immediately began beseeching Abernathy to come to Atlanta with him. Abernathy had a complex relationship with King. He understandably felt overshadowed and ignored in the adulation given to King, but he stuck with SCLC throughout the King years. When King was assassinated in 1968, Abernathy was given the impossible task of taking up King's cross and carrying it into the chaos of the late '60s and the Nixon era. The other three were also men with substantial careers in the Southern Civil Rights Movement; they were im-

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[1] ANTHONY LEWIS, MAKE NO LAW 154 (1991).

[2] *Id.* at 11-12.

portant before the *Sullivan* case and continued to be important after it. During the early '60s, I, as a young white teenager in Virginia, had heard three of the names—Abernathy, Shuttlesworth and Lowery—repeatedly spoken in tones of derision and anger by white neighbors who were struggling to preserve segregation. These four ministers were the men who *made* the history that Claude Sitton of *The New York Times* recorded. And yet there is *not one word about any of them* in the *Sullivan* opinion. Indeed, Abernathy's name appears in the caption only.[3] Seay, Shuttlesworth and Lowery do not receive even the dignity of a mention in the caption; they are in Brennan's opinion known only as "individual petitioners." Beyond that, their case raised distinct civil liberties and civil rights issues as profound as did the case against the *Times*. And there is virtually no discussion of those issues in the opinion or in the literature that has grown up to celebrate and explain it. Indeed, as I search the scholarly legal literature on *Sullivan,* more has been written abut L.B. Sullivan, the plaintiff police commissioner of Montgomery, and the other white plaintiffs than about the effect of this defamation lawsuit on the individual defendants.[4]

How did they get involved in the case? Bayard Rustin, that fascinating, chilly and peculiarly Northern Movement leader, added their names to *Heed Their Rising Voices* without their permission—and without even notifying them.[5] They had never seen or heard of the advertisement until they received a letter from L. B. Sullivan demanding that they take out another full-page ad to disavow it. About ten days later they were sued.[6]

They denied that they had published the article and there was no real evidence at trial that they had. But the judge simply refused to rule on their motions to dismiss.

In the official record—and in Anthony Lewis's wonderful book, *Make No Law*—it is stated that the only reason they were sued was to destroy diversity jurisdiction, so that Sullivan and the other libel plaintiffs could make sure their cases were heard in Alabama state court. In *Parks v. Abernathy,* a companion case, Judge Frank Johnson dismissed them as "fraudulently joined," on the grounds that no theory under Alabama law could make them liable for the advertisement. The Fifth Circuit, however, ordered them restored.[7]

But was the joinder really fraudulent? Or is this an example of seeing things anachronistically and in a press-centered way, assuming that the *Times* and the na-

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[3] New York Times Co. v. Sullivan, 376 US. 254 (1964).
[4] *See, e.g.*, Kermit Hall, *"Lies, Lies, Lies": The origins of* New York Times Co. v. Sullivan, 9 Comm. L. & Pol'y 391 (2004).
[5] Lewis, *supra* note 1, at 31, Hall, *supra* note 4, at 37.
[6] Petition's Reply to Respondent's Brief in Opposition at 8, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 40).
[7] Parks v. New York Times Co., 195 F. Supp. 919, 925 (M.D. Ala 1961), *rev'd* 308 F.2d 474 (5th Cir. 1962).

tional media were the only game worth bagging by the plaintiffs? Does the "fraudulent joinder" issue not reduce them to mere objects, tools to be used in getting the "real" defendants? Isn't it a reflection of the "Mississippi Burning" theory of the Movement, which retells the story as one of passive black Southerners being rescued by heroic white moderates, FBI agents and journalists?[8]

Certainly the state of Alabama was doing everything it could to shut down the NAACP (outlawed at the time) and the SCLC and to cripple and destroy its leaders.

Though removal might have been a consideration, the prospect of terrorizing and bankrupting these Southern black leaders might have been a separate and important aim. The four were pursued with vindictiveness. First, the trial judge refused to rule on their motion for a new trial, and then claimed they had waived it. He permitted levy against their property. Abernathy's, Lowery's and Shuttlesworth's cars were seized and sold at auction. Real estate belonging to Abernathy and Seay was attached. This was not symbolic—it was real. "At stake." Taylor Branch notes, "were family treasures of relatively prosperous men." This was official lawlessness, government terror, state-sponsored theft,; and the national press, intimidated by the libel suits brought against it, giving virtually no coverage. As Taylor Branch wrote, "the stories played no better than blurbs."[9]

As state intimidation against individuals with little institutional protection, these tactics partially worked. Abernathy took the Georgia pulpit that King had urged on him, and Fred Shuttlesworth left the South altogether, accepting a call from a church in Cincinnati.[10]

These individual litigants were dragged into a quarrel by their own "ally" without permission, joined to a potentially ruinous lawsuit by their mortal enemy who demanded a "retraction" they could not give and he would not have accepted, and found liable by a racist court system without any opportunity to offer a meaningful defense. Their arguments—the shadow arguments that the Supreme Court never even acknowledged—were as important to the freedom of our nation as the *Times's* free press argument. Those arguments did not, however, relate to the concerns of wealthy corporations but to those of poor Southern blacks. "Freedom of the press," A.J. Liebling wrote, "is guaranteed only to those who own one."[11] The freedom that the "individual petitioners" sought was more basic to the lives of those who did not visit or report on the South, but who lived under the white Southern boot day after day.

Here are the questions presented from the four ministers' petition for certiorari:

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[8] *Don't see* Mississippi Burning (Orion Pictures 1988).
[9] TAYLOR BRANCH, PARTING THE WATERS: AMERICA DURING THE KING YEARS 1954-63 386 (1988).
[10] *Id.* at 580.
[11] A.J. Liebling, "Do You Belong in Journalism?", *The New Yorker,* May 14, 1960 at 109].

> "Were the rights of the four Negro petitioners herein to equal protection and due process of law, as guaranteed by the Fourteenth Amendment, in that the suit brought against them for alleged libel by respondent Sullivan, a white public official of Montgomery, was tried in a Courtroom wherein racial segregation of whites and Negroes was enforced and which was permeated with an atmosphere of racial bias, passion and hostile community pressures?
>
> "Were the rights of the petitioners to due process of law and to a fair and impartial trial under the Fourteenth Amendment violated and abridged by a trial before an all white jury resulting from the intentional and systematic exclusion of Negro citizens, and before a trial judge . . . who on February 1, 1961, while motions for new trial in the instant case were pending undecided before him, stated from the Bench during the trial of a related libel suit before him that the Fourteenth Amendment of the United States constitution is inapplicable in proceedings in Alabama State court, which he stated are governed by 'white man's justice'?"[12]

The ministers also asked in their briefs whether it was prejudicial for the attorney for the plaintiffs, in speaking to the all-white jury, to refer to the four ministers as "nigras" over their protests; and whether it was prejudicial to allow a plaintiff's closing that included these words to the all white jury: "In other words, all of these things that happened did not happen in Russia where the police run everything, they did not happen *in the Congo where they still eat them,* they happened in Montgomery, Alabama, a law-abiding community."[13]

These questions went to the very heart of Southern apartheid, the totalitarian racial caste system whose workings I remember vividly—a system that depended upon the systematic exclusion, stigmatization, and dehumanization of black Southerners by the action of law. The ministers did not seek the freedom to discuss segregation; they sought to destroy it.

Here is the United States Supreme Court's *entire* discussion of these issues: "Since we sustain the contentions of all the petitioners under the First Amendment's guarantees of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment. The individual petitioners contend that the judgment against them offends the Due Process Clause because there was no evidence to show that they had published or authorized the publication of the alleged libel, and that the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom." [14]

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[12] Petition for Certiorari at 2-3, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 39).
[13] Petitioners' Brief at 54, New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (No. 40) (emphasis added).
[14] *Sullivan,* 376 U.S. at 264 n. 4.

To be sure, the Court had already held that courtroom segregation was unlawful. In *Johnson v. Virginia,*[15] it had said a year earlier: "it is no longer open to question that a State may not constitutionally require segregation of public facilities."[16] That case established that a black American, *arrested* for peaceably refusing to sit in the area of the courtroom reserved for blacks, would be released by federal court order. But the petitioners were asking for something more radical—a holding that such racial segregation so tainted the atmosphere that defendants, even if they did not choose to risk beating or even death in jail for defying courtroom segregation, were denied a fair trial when subjected to judicial apartheid, no matter what the cause of action. And from the vantage point of 2004, I defy anyone to say that they were wrong.

Can it really be said with a straight face that the four ministers got their day in court before either the state or the federal courts?

Oh, to be sure, Abernathy and the others *won*—they got their property back. They have no *real* grounds for complaint.

And, to be sure, the Court had reasons for its reticence. Important reasons. Lawyer's reasons. Prudential reasons. Institutional limitations, procedural considerations, worries about federalism, concerns over the attitude of the executive branch, ripeness, mootness, justiciability—all the soothing words lawyers and judges use to blur transcendent moral and political issues were no doubt whispered in the Justices' ears. Perhaps the time was not right to consider such an explosive set of issues. Justice Brennan was constrained by the rule of five—the need to keep a majority behind him. There were many issues before the court. The country was tense. One had to proceed cautiously, the Court itself was divided. The black defendants' lawyers may not have preserved—or perhaps had not been allowed to preserve—these questions with crystal clarity.

But can we doubt that the four ministers nonetheless hungered for—and *sub specie eternitatis,* deserved—vindication on the issues they had identified?

To be sure, the national media did continue to report the civil rights story—but for years after *Sullivan,* they were reporting on events in courtrooms where even the Bibles were segregated.

To be sure, the Court reached the right *result.* But isn't it curious that it relied on the Alien and Sedition Acts to reach that result, instead of the Fourteenth Amendment? I have spent the past three years studying the Fourteenth Amendment and I conclude that *Sullivan* concerned the precise evil the Amendment was framed to

[15] Johnson v. Virginia, 373 U.S. 61 (1963).
[16] *Id.* at 62.

avoid—a racial caste system entrenching itself by denying basic dignity and freedom of speech and press.

Isn't it worth wondering why the court invoked Jefferson—a slaveowner and an advocate of states' rights—as its authority for the application of the First Amendment against the states? Why, for example, did Brennan not quote John Bingham, an Abolitionist and the chief author of section 1 of the Fourteenth Amendment? John Bingham, bless his rock-ribbed Buckeye anti-slavery heart, viewed the struggle against Southern racial autocracy as part of God's plan for the perfection of American republicanism; Bingham viewed as the chief crime of the Slave Power its refusal to allow free speech that criticized its racial caste system; Bingham insisted that the Bill of Rights *must* be applied to the states; Bingham is chiefly responsible for the fact that it does so today. In his enmity toward Southern racial tyranny, Bingham was passionate, not cool; evangelical, not philosophical or temporizing like Jefferson. Bingham spoke a language far closer to that of King and Abernathy than to that of Hume and Locke. On the floor of the House in 1857, he told his colleagues that God's whole creation was watching the struggle for Southern freedom.

> It is the high heaven of the nineteenth century. The whole heavens are filled with the light of a new and better day. Kings hold their power with a tremulous and unsteady hand. The bastil[l]es and dungeons of tyrants, those graves of human liberty, are giving up their dead . . . the mighty heart of the world stands still, awaiting the resurrection of the nations, and that final triumph of the right, foretold in prophecy and invoked in song.[17]

To be sure, something very like the resurrection of this nation did take place, piecemeal. Today throughout the region, even the courtroom bibles are desegregated. Black Americans had waited 100 years for that. Many generations had suffered and died without a shred of hope that help was on the way. The Court, to be sure, gave them help.

But when they read the *Sullivan* opinion, I wonder whether Abernathy, Lowery, Shuttlesworth and Seay felt that justice had rolled down like waters, and righteousness like a mighty stream.

To be sure, as we celebrate the anniversary of this decision that repudiated seditious libel, we have every reason to feel satisfied.

And as we—philosophers, lawyers, professors—invite the heirs of the four black defendants to join us in celebrating a case that *could have* dismantled courtroom segregation but for a variety of no doubt important reasons did not, I am sure they will graciously join in.

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[17] ERVING BEAUREGARD, BINGHAM OF THE HILLS: POLITICIAN AND DIPLOMAT EXTRAORDINARY 35 (1989).

But perhaps we should not expect them to dance.