

IN SULLIVAN'S SHADOW:
THE USE AND ABUSE OF LIBEL LAW DURING
THE CIVIL RIGHTS MOVEMENT

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In loving memory of my father,
Ned Edmondson

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CHAPTER ONE

Libel and the South

In the hours before the bloody race riots at the University of Mississippi in 1962, highway patrolmen from around the state descended upon Ole Miss to back up federal officers.¹ African American James Meredith was attempting to desegregate the university by court order, and a white mob with shotguns and Molotov cocktails was aiming to stop him. Protesters flooded the Oxford campus, spurred by Governor Ross Barnett's rebellious threats to defy a federal court order to admit Meredith.² As violence erupted, Mississippi state police melted quietly into the crowd and left the roiling campus to federal officers, a cobbled-together pack of deputy marshals, border patrol and prison guards who were scarcely prepared to deal with the chaos. Forbidden to use their side arms, the officers had only tear gas to keep hundreds of rioters and anarchy at bay. By dawn, two people were dead and 160 federal marshals were injured, many with gunshot wounds, stretched out on a blood-covered administration building floor.

After a story on the riot called "What Next in Mississippi?" ran in the *Saturday Evening Post*, the head of the Mississippi Highway Patrol, T.B. Birdsong, filed a libel suit against the magazine seeking \$1 million for himself and \$1 million for each of his 220 patrolmen.³ Birdsong said the libelous information in the article encompassed these two sentences on the failure of his officers to take control of the deteriorating situation:

¹ Among the most helpful texts in the vast literature of the civil rights movement that discuss the Ole Miss riot for the purposes of this study are Taylor Branch, *Parting the Waters, America in the King Years, 1954-1963* (New York: Simon & Schuster, 1988), 633-672; Gene Roberts & Hank Klibanoff, *The Race Beat, The Press, the Civil Rights Struggle, and the Awakening of a Nation* (New York: Knopf, 2006), 270-300; and James W. Silver, *Mississippi: The Closed Society* (New York: Harcourt, Brace & World Inc., 1966).

² *Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962), ordering the reversal of a district court.

³ *Curtis v. Birdsong*, 360 F.2d 344; 1966 U.S. App. Lexis 7392.

“A sizable portion of blame must go to the gray-uniformed men of the Mississippi Highway Patrol. “Those bastards just walked off and left us,” said one top official of the Department of Justice.”⁴

This study will show that *Birdsong*’s case is just one example of the use and abuse of libel law during the civil rights movement. This is a study of libel cases filed by southern public officials primarily in the 1960s relating to African Americans’ increasing fight for equal rights. Emphasis will be on little-known lawsuits like *Birdsong* that were filed in the shadow of the famous *New York Times. v. Sullivan* case in Alabama in 1960, through its adjudication in 1964 and in its aftermath.⁵ This study will expand upon the evidence and argument that southern officials used existing libel laws to craft what amounted to a sedition law in order to stop the press from covering the civil rights struggle.⁶ The message: Criticize our government or our public officials and you will be punished. It has been well established that had the United States Supreme Court failed to overturn *Sullivan*, the case’s impact on the civil rights movement would have been staggering.⁷ Without the world looking at the South through the lens of the national press, southern officials and other segregationists would have been free to continue to squelch activism in their own way. “The last desperate reaction of a clinging regime was to try to suppress the message itself,” wrote legal scholar Rodney A. Smolla. “If one could not

⁴ Robert Massey, “What Next in Mississippi?” *Saturday Evening Post*, November 10, 1962, 18-23.

⁵ 376 U.S. 254 (1964).

⁶ Louis G. Forer, *A Chilling Effect, The Mounting Threat of Libel and Invasion of Privacy Actions to the First Amendment* (New York: W.W. Norton & Company, 1987); Harry Kalven, *The Negro and the First Amendment* (Chicago: University of Chicago Press, 1965); Clifton O. Lawhorne, *Defamation and Public Officials, The Evolving Law of Libel* (Carbondale: Southern Illinois University Press, 1971); Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* (Berkeley: University of California Press, 1991); Norman L. Rosenberg, *Protecting the Best Men, An Interpretive History of the Law of Libel* (Chapel Hill: The University of North Carolina Press, 1986).

⁷ An excellent study of the *Sullivan* case and its impact on the civil rights movement is Anthony Lewis’ *Make No Law, The Sullivan Case and the First Amendment* (New York: Random House, 1991). Lewis, a Pulitzer Prize winning reporter, covered the Supreme Court for the *Times* when this case was argued.

stop the marches, one might at least keep the marches off television and out of the newspapers.⁸

Shattering precedent, the nation's high court constitutionalized libel law with the *Sullivan* decision, creating a new standard that required public officials to prove "actual malice" and insuring that citizens were free to exercise their First Amendment right to criticize the government. *Sullivan* is the most significant libel opinion ever written, and is one of the most important free-expression cases in American history.⁹ Under this new standard, Montgomery, Alabama police commissioner Lester Bruce Sullivan had to prove that *New York Times* published "with malice" an advertisement that included charges of police brutality against civil rights demonstrators. That is, the *Times* knew the information was false or should have known it (reckless disregard for the truth) when it published the information. Sullivan was unable to prove such, according to the Supreme Court, which in March 1964, reversed a record high \$500,000 libel judgment that had been affirmed by the Alabama high court.

In the *Sullivan* opinion, the Supreme Court turned away from centuries of common law handed down from English courts to extend a right unique to the United States, constitutional protections of speech critical of the government, even speech that is false. In his study of the *Sullivan* case, Anthony Lewis argued what has become a generally accepted tenet among media law scholars: Southern officials were using existing libel law to silence their critics and stop the groundswell of national media

⁸ Rodney A. Smolla, *Suing the Press* (New York: Oxford University Press, 1986), 43. Also see Lewis, *Make No Law*; Roberts and Klibanoff, *The Race Beat*. For an international perspective, see Mary L. Dudziak, *Cold War Civil Rights, Race and the Image of American Democracy* (Princeton: Princeton University Press, 2000). Dudziak points out the country's leaders, both from the North and South, were cognizant of the United States' image as a world leader in the post-World War II era, a time when democracy prevailed over the evils of the world's repressive regimes. America's civil rights conflicts were front page around the world and in direct opposition to the image American leaders were trying to project.

⁹ W. Wat Hopkins, *Mr. Justice Brennan and Freedom of Expression* (New York: Praeger, 1991).

coverage of the civil rights movement.¹⁰ But Lewis kept his analysis to the *Sullivan* case, which was the first to reach the Supreme Court. By 1964, when *Sullivan* was overturned, government officials had filed at least \$300 million in libel actions against newspapers, news magazines, television networks and civil rights leaders.¹¹ *Sullivan* and its companion cases accounted for well under \$10 million, a huge sum at the time and one that threatened the financial solvency of the *New York Times*. But it was not just the *Times* that felt the pain of the adverse libel judgment. Editors and publishers could not send a reporter or photographer into the South to cover civil rights demonstrations without fear of being sued.¹² The Supreme Court's startling decision thus widened the doors for the national press to cover civil rights demonstrations and activities in the South.

This study will illustrate that the use and abuse of libel law became an integral part of the story in the battle for equal rights. In these cases, public official-plaintiffs were angry about stories that they said reflected negatively on them.¹³ Libel suits arose out of the Ole Miss riots in 1962 as James Meredith sought to desegregate Mississippi's flagship university.¹⁴ Libel suits arose out of the Birmingham bus station beatings during the 1961 Freedom Rides.¹⁵ They arose out of the 1963 March on Washington.¹⁶ They arose out of the Freedom Summer murders of three civil rights workers in Philadelphia,

¹⁰ Lewis, *Make No Law*.

¹¹ Harrison E. Salisbury, *Without Fear or Favor* (New York: Times Books, 1982).

¹² *Ibid.*, 384.

¹³ This study also includes public figure plaintiffs, relevant with the extension of the actual malice standard to public figures through a 1961 civil rights-related case.

¹⁴ *Associated Press v. Walker*, 388 U.S. 130 (1967); *Curtis v. Birdsong*, 360 F.2d 344.

¹⁵ Howard K. Smith, *Events Leading Up to My Death, The Life of a Twentieth-Century Reporter* (New York: St. Martin's Press, 1996), 274.

¹⁶ *New York Times*, "Curtis Publishing Is Named In a \$3 Million Libel Suit," Feb. 27, 1964.

Mississippi in 1964.¹⁷ Still more were filed for coverage of Martin Luther King Jr.'s assassination in 1968.¹⁸ These legal battles rightfully have not gotten the same attention as bombed churches, beaten and bloody Freedom Riders or civil rights workers mysteriously disappearing in the night. But the cases remain an important piece of the civil rights story, nonetheless, as well as an insidious shackling of free-speech rights.

Libel law, especially *Sullivan*, has been widely studied. But this will be a deeper analysis of libel within the context of the civil rights movement, with emphasis on how the movement helped shape the law. There has been no comprehensive study focusing on the overall role played by the increasing use of libel in the giant shadow of *Sullivan*. Scholars and other media experts agree *Sullivan* stopped what surely would have been an onslaught of libel cases. Yet research is scarce on the suits that actually *were* brought during this era. These cases likely would have been dismissed after *Sullivan* was overturned since public-official plaintiffs were required to meet the newer, tougher actual malice standard. But that does not diminish their historical value in the context of the civil rights movement and southern officials' efforts to sustain the cultural norm of white supremacy. They used the suppression of free speech to, in fact, repress the right to vote and the right to equal protection under the law. In short, the right to the Bill of Rights had been curtailed.

Chapter one will discuss the United States' early sedition laws and the resulting cases where citizens criticized the government, its officials or its policies. This background will help illustrate that the civil rights-era libel suits studied here were tantamount to sedition cases, serving as a necessary reminder that the government's

¹⁷ E.g., *Rainey v CBS*, Neshoba County Circuit Court, Case No. E78-0121 (1978).

¹⁸ *Ray v. Time*, 582 F2d.1280 (6th Cir. 1978).

attempt to silence its critics is nothing new. Here was just a new way to do it. Justice William Brennan Jr. made the connection in the *Sullivan* decision, writing that the expired Sedition Act of 1798, "because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment."¹⁹ This chapter will discuss the cases arising from sedition laws enacted by the newly minted federal government in 1798, during World War I and to a lesser extent during the World War II and McCarthy eras. Further, this chapter will illustrate that libel became a potent weapon to perpetuate the South's societal norm of whiteness as antithetical to blackness in the 1960s. Using libel, segregationist leaders attempted to maintain the fallacy of white supremacy when faced with the groundswell of civil rights demonstrations and the resulting media coverage. This study draws heavily from the cultural history of race making in the United States, most notably Grace Elizabeth Hale's *Making Whiteness*, a study of the South from post-Reconstruction through the 1940s, the eve of the modern civil rights movement.²⁰ Hale argues that through popular culture, including such tools as bestselling novels, films, product advertising and even media depictions of lynching, white southerners systematically and deliberately created "whiteness" as a societal ideal in direct opposition to "blackness" in order to reestablish the antebellum caste system. Facing the active citizenship of their ex-slaves after the Civil War, white southerners sought to re-establish their dominant role through a cultural system based on physical separation and violence. Through a wide range of cultural artifacts, Hale shows what

¹⁹ 376 U.S. 254 (1964), 276.

²⁰ Grace Elizabeth Hale, *Making Whiteness, The Culture of Segregation in the South, 1890-1940* (New York: Pantheon, 1998).

W.E.B. Du Bois called the "color line" and how it came to define identity.²¹ Whiteness became the standard while blackness was pushed to the margins and to the back of the bus. Hale's work on popular southern culture will help lend critical insight into the environment in which the civil rights-era litigation was filed. This study also seeks to expand upon Hale's work on race making, suggesting that whites found libel as yet another tool in the effort to maintain the status quo. Plaintiffs were only successful, however, until the Supreme Court, through the famous *Sullivan* opinion written by Justice Brennan, said no more. "[We have] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."²²

Chapter two will provide an overview of the cases already studied by scholars, suits filed by public officials against the media and civil rights leaders. This includes the *Sullivan* case and its companion cases, which were filed against both the *New York Times* and four Alabama ministers. Spawned from the same *Times* advertisement, "Heed Their Rising Voices," that brought about *Sullivan*, virtually identical libel suits were filed by Alabama Governor John Patterson and three other Montgomery officials. The ad did not name any names, but referred to "Southern Violators of the Constitution" who were "determined to destroy the one man, who, more than any other, symbolizes the new spirit now sweeping the South — the Rev. Dr. Martin Luther King Jr." ²³ The full-page ad was placed by the Committee to Defend Martin Luther King and the Struggle for Freedom in

²¹ W.E. Burghardt Du Bois, *The Souls of Black Folk* (Chicago: A.C. McClurb & Co., 1903; Reprint Boulder: Paradigm Publishers, 2004), 8.

²² 376 U.S. 254 (1964), 270.

²³ *New York Times*, March 29, 1960, 25.

the South. Within the court system, King had become a huge target of white segregationists, charged with among other things felony tax evasion, the first such case in Alabama's history.²⁴ The New York-based committee was seeking support for the movement and help in paying for King's rising legal bills. However, Sullivan and other plaintiffs charged that the ad reflected negatively on them and was critical of how they performed their duties as public officials.

Also, Birmingham leaders – most notably police commissioner T. Eugene "Bull" Connor – filed libel suits against the *Times* and one of its reporters for coverage there. These cases arose out of reporter Harrison Salisbury's stories that ran in April 1960, two weeks after the "Heed Their Rising Voices" advertisement appeared. Salisbury, a Pulitzer Prize winner and a former *Times* Moscow correspondent, wrote a front page story headlined "Fear and Hatred Grip Birmingham" and infuriated Birmingham's establishment.²⁵ Connor and other Birmingham officials sought damages for Salisbury's story on racial tensions that said "every inch of middle ground has been fragmented by the emotional dynamite of racism, reinforced by the whip, the razor, the gun, the bomb, the torch, the club, the knife, the mob, the police and many branches of the state's apparatus."²⁶

What is sometimes missing from writings about these cases is their context within the civil rights movement. For example, plaintiffs Sullivan and Connor were the police officers who also gave mobs of Klansmen time to waylay Freedom Riders at the Montgomery and Birmingham bus stations before calling in their officers to haul the

²⁴ For details on the case, see Branch, *Parting the Waters*, 277.

²⁵ Diane McWhorter, *Carry Me Home* (New York: Simon and Schuster, 2001); and William A. Nunnally, *Bull Connor* (Tuscaloosa: The University of Alabama Press, 1991).

²⁶ Harrison Salisbury, "Fear and Hatred Grip Birmingham," *New York Times*, April 8, 1960.

wounded demonstrators off to jail.²⁷ It was Connor who made an international spectacle out of Birmingham with his lunging police dogs and skin-shredding fire hoses that washed young protesters down the street and into newspapers and broadcasts around the world. It was also Connor, along with other city officials, who sued CBS for Howard K. Smith's documentary "Who Speaks for Birmingham?" Smith's broadcasts on the Freedom Riders' bus station beatings threw a blinding spotlight on the city.²⁸ Another prominent case, *A.P. v. Walker*, will also be reviewed in this chapter.²⁹ *Walker*, like the lesser-known *Birdsong* case discussed above, arose out of the 1962 Ole Miss riots. The case extended *Sullivan*'s actual malice requirement to public figures, thus continuing the Supreme Court's rewriting of libel law through civil rights-related suits.

Chapter three will attempt to break new ground by identifying little-known cases where public officials filed libel suits against the media *and* civil rights activists. The intent here is to show a historical pattern of public officials' efforts to silence all critics and agitators. Along with *Birdsong*, cases include a suit filed against the less-heralded civil rights activist Aaron Henry. This was unusual because public officials targeted the speaker quoted in a story rather than the media outlet. Henry, a Clarksdale, Mississippi pharmacist and long-time head of the state NAACP was sued successfully by the local sheriff and district attorney after he was quoted by the Associated Press as merely saying there was a "diabolical plot" against him because of his civil rights leadership.³⁰ Another case was filed by an Alabama sheriff against *Ladies Home Journal* over a story about the

²⁷ This point has been widely established in the literature. See e.g., Howard K. Smith, *Events Leading Up to My Death, The Life of a Twentieth-Century Reporter* (New York: St. Martin's Press, 1996); J. Mills Thornton III, *Dividing Lines, Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham and Selma* (Tuscaloosa: The University of Alabama Press, 1991).

²⁸ Smith, *Events Leading Up to My Death*, 268.

²⁹ *Associated Press v. Walker*, 388 U.S. 130 (1967).

³⁰ *Henry v. Collins*, 380 U.S. 356, grouped with *Henry v. Pearson*.

March on Washington in August 1963. Etowah County, Alabama Sheriff Dewey Colvard said Curtis Publishing libeled him in the article, "Sophronia's Grandson Goes to Washington," which was written by the playwright Lillian Hellman.³¹ Still other libel suits that have received little scholarly attention were filed by Neshoba County, Mississippi Sheriff Lawrence A. Rainey against several media outlets that covered the story about the three murdered civil rights workers during the Freedom Summer of 1961.³² Rainey was suspected of being involved in the deaths of Andrew Goodman, Michael Schwerner and James Chaney, who disappeared while investigating the burning of a black church that was also a voter's registration site. All told, Rainey filed six separate suits against the media ó refusing to yield years after the *Sullivan* verdict made it incredibly difficult for him to recover damages. In one example, Rainey sued Orion Pictures and movie producer Fred Zollo for \$8 million, arguing that fictionalized accounts in the movie *Mississippi Burning* (1988) actually portrayed him. "They have sure done some terrible harm," Rainey said. "Everybody all over the South knows the one they have playing the sheriff is referring to me."³³

James Earl Ray, Martin Luther King's assassin, sued *Time* magazine, among others, for coverage of the shooting, the resulting manhunt and murder trial. This suit was among the first that helped jurists establish the "libel proof doctrine," which now applies to the notorious and infamous, typically habitual criminals and high-profile murderers. In essence, Ray's reputation was so bad after King's murder that he was to be considered

³¹ Lillian Hellman, "Sophronia's Grandson Goes to Washington," *Ladies Home Journal*, December 1963, 80.

³² E.g., *Rainey v. Orion Pictures* (1989), No. E89-0014, filed in Neshoba County Circuit Court.

³³ Allison Graham, *Framing the South: Hollywood, Television, and Race During the Civil Rights Struggle* (Baltimore: The Johns Hopkins University Press, 2001), 147.

libel-proof. Nothing could be written that would actually libel him or worsen his reputation, according to the court.³⁴

Chapter four will illustrate that the northern media were not the only ones getting sued over the civil rights story. Several cases that have received little attention include libel suits against Pulitzer Prize winners publishing in Mississippi, Hodding Carter Jr. of the Greenville *Delta Democrat-Times* and Hazel Brannon Smith of the *Lexington Advertiser*, and in Alabama, Buford Boone of the *Tuscaloosa News*. While these three publishers became well known for their civil rights-era journalism, less is known about southerners' attempts to silence them using libel law. Former Major General Edwin A. Walker sued Carter for slander based on remarks the publisher made about him at the University of New Hampshire's Distinguished Lecture Series in October 1962. Walker sought \$2 million.³⁵ Smith was sued by the local sheriff for an editorial she wrote about his harassment of black citizens. Smith opined that the sheriff should resign after he harassed a group of black men and accidentally shot one person in the leg.³⁶ In addition, Ku Klux Klan Imperial Wizard Robert M. Shelton sued the *Tuscaloosa News* and Boone in 1964 and again in 1965.³⁷ Shelton sought a total of \$1 million in damages for two anti-Klan editorials that he said subjected him to "public contempt, ridicule and shame."³⁸

Chapter five will offer conclusions and suggestions for further research. Relevant cases discussed in this study were found through LexisNexis using a variety of keyword searches. However, some cases that would be relevant to this study have not been

³⁴ *Ray v. Time*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976), affirmed by the Sixth Circuit Court of Appeals, 582 F.2d 1280.

³⁵ *Walker v. Carter*, Cause No. 6182, Circuit Court of Washington County, Mississippi.

³⁶ Arthur J. Kaul, "Hazel Brannon Smith and the Lexington Advertiser," in *The Press and Race: Mississippi Journalists Confront the Movement*, ed. David R. Davies (Jackson: University Press of Mississippi, 2001).

³⁷ "Shelton Files New Suit Against News," *The Tuscaloosa News*, July 15, 1965.

³⁸ *Ex parte Tuscaloosa Newspapers Inc.*, 1967 Ala. LEXIS 914, 281 Ala. 170, 200 So.2d 471.

reported in any legal journals because they only reached the trial level. Other cases were found using a keyword search of the *New York Times* archive from 1955 to 1970. Editors and reporters at the *Times* were particularly attuned to the use of libel during the civil rights movement since this is the newspaper that faced the brunt of the suits. Still other cases were located in more general works on the history of the movement and were given only brief attention. A few were identified through citations in other libel cases. Others were located through local newspaper coverage of the court proceedings.

CHAPTER TWO

Silencing the dissenters

When Montgomery, Alabama police commissioner L.B. Sullivan sued the *New York Times* for libel in 1960, he had long been accustomed to reading newspapers run by editors who thought like he thought.³⁹ That is, blacks had their place in society and be damned if they ever tried to step out of it. But Northern journalists had begun swooping into his state in the 1950s to write about race, telling the story of the civil rights movement as it unfolded and telling the story from the unheard of African Americans' point of view. With that, Sullivan would become but one government official in the South who would use libel law to shut down speech critical of his actions, speech he found threatening. But long before this, government officials' silencing of unpopular speech using libel had found a comfortable place in American history.

The ink was still drying on the First Amendment when Congress passed its first sedition law in 1798.⁴⁰ This law did nothing more than stop speech critical of government officials, in this case, President John Adams and the Federalist Party. Tensions with France and fear that the upheaval of the French Revolution might spread to the United States helped prompt the Federalist-controlled Congress to look for ways to silence agitators and critics.⁴¹ As paranoia and fighting through party newspapers increased, President Adams' Federalists attempted to muzzle enemies and dissenters with the Alien

³⁹ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

⁴⁰ The standard history of the Alien and Sedition Acts of 1798 is James Morton Smith, *Freedom's Fetters, The Alien and Sedition Laws and American Civil Liberties* (Ithaca: Cornell University Press, 1956).

⁴¹ Invaluable discussion of events leading up to the passage of the Alien and Sedition Acts of 1798 can be found in Norman L. Rosenberg, *Protecting the Best Men, An Interpretive History of the Law of Libel* (Chapel Hill: The University of North Carolina Press, 1986). John C. Miller's *The Federalist Era, 1789-1800* (1960) is also an excellent introduction to the earliest party system.

and Sedition Acts of 1798. Congress voted on the acts along party lines on July 4, ironically, and set an expiration date of 1801, when Adams's term as president expired.⁴² This would protect Adams from criticism and leave the next president, possibly a Republican, to fend for himself. The Sedition Act criminalized writing, publishing or speaking in "a false, scandalous and malicious" manner about the government, Congress or the president, "with the intent to defame" them or arouse "the hatred of the good people of the United States." It was widely considered a blatant attempt to hush critics and the Republican newspapers that supported Thomas Jefferson. Those convicted faced a fine of up to \$2,000 and two years in jail.⁴³ America's colonial courts had long relied on English common law, where criticism of government officials was automatically considered seditious. It was assumed that such criticism was false, scandalous and malicious and that such expression would likely provoke public unrest. Truth was not a defense. It was actually worse for the speaker or writer when the words were true because truth could be more damaging than a falsehood. The jury's job was to decide whether the speaker said or published the words, and it was up to the judge to decide if the speech was seditious.⁴⁴

The most famous case in America is an anomaly but provides a glimpse of what would eventually be. German immigrant John Peter Zenger, publisher of the *New York Weekly Journal*, was charged with seditious libel in 1734, though he was really just

⁴² Rosenberg cautions against characterizations that only Federalists sought to silence critics and that Jeffersonians were libertarians by modern standards. Though the latter considered the acts unconstitutional, they did not believe in absolute freedom of political expression. They did not focus on protection of government as an entity but rather protection for the reputations of public leaders, or the "the best men."

⁴³ Proponents of the acts were quick to point out that the law differed from traditional seditious libel tenets in that it included the principle of truth as a defense. 1. U.S. Statutes at Large, Chap. 75, 596, as discussed in Rosenberg, *Protecting the Best Men*.

⁴⁴ See generally Smith's *Freedom's Fetters*, and John C. Miller, *Crisis in Freedom* (Boston: Little, Brown, and Company, 1951).

printing the words of his boss, James Alexander. In an unprecedented move, the jury disregarded common law, finding Zenger not guilty of seditious libel for his newspaper's criticism of the unpopular New York governor William Cosby. The eloquence of Zenger's lawyer, Alexander Hamilton, is widely credited for the jury's radical departure from tradition. He settled the question of whether Zenger had published the criticism by admitting outright that he printed the material, and instead convinced the jury that it was a citizen's right to truthfully criticize their elected officials.⁴⁵ But this case was a deviation from the norm, and the law did not change. When the Bill of Rights was adopted in 1791, federal common law and state laws were already in place to criminalize speech critical of the government and punish violators with jail terms and fines.⁴⁶ But it did plant the seed, that the utterance of words critical of the government should not be a crime.

Truth as a libel defense was an American invention, starting with the 1798 Alien and Sedition laws. Adams and his fellow Federalists even tried to spin the passage of the repressive acts as a good thing for the press, because truth would defend them.⁴⁷ But that did not mean much. Most of the judges were Federalists, and they required defendants to prove every word they had written or spoken, no matter how trivial or minute. All 10

⁴⁵ For details on the Zenger trial and free speech in general, see Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* (Berkeley: University of California Press, 1991); Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985); Leonard W. Levy, *Legacy of Suppression, Freedom of Speech and Press in Early American History* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1960); and William Lowell Putnam, *John Peter Zenger and the Fundamental Freedom* (Jefferson, N.C.: McFarland & Company, Inc. Publishers, 1997).

⁴⁶ For details on early free speech cases and sedition in general, see Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* (Berkeley: University of California Press, 1991); Leonard W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985); Leonard W. Levy, *Legacy of Suppression, Freedom of Speech and Press in Early American History* (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1960); and William Lowell Putnam, *John Peter Zenger and the Fundamental Freedom* (Jefferson, N.C.: McFarland & Company, Inc. Publishers, 1997).

⁴⁷ J. Herbert Altschull, *From Milton to McLuhan, The Ideas Behind American Journalism* (White Plains, New York: Longman, 1990), 122.

convictions under the acts were of Republicans, and eight of those were editors of the country's most influential Republican newspapers. Still in its infancy, the United States government had become quite successful in silencing its critics.⁴⁸

Jefferson, James Madison and others widely denounced the acts as unconstitutional, and the laws began fanning dissent rather than squelching it. In the Virginia and Kentucky Resolutions of 1798 secretly penned by Madison and Jefferson, they furthered their radical argument that the Sedition Act was unconstitutional and that a democratic government cannot be libeled. Madison insisted a free press is "the only effectual guardian against every other right."⁴⁹ Much has been written about the framers' intent at the time of the drafting of the Constitution.⁵⁰ "Congress shall make no law which abridges freedom of speech or of the press" – Did they mean for the First Amendment to free the press from prior restraint? Madison certainly had formulated his thoughts and made them known not long after, most notably in his Virginia Resolutions. He and his fellow Virginians made a "remarkable" declaration that was brand new in the history of Western political thought: an absolute restriction on the authority of the national government to issue any restraints at all on the press.⁵¹ As Altschull aptly questions, why would the First Amendment merely restate the common law definition of a free press, which was free only from prior restraint?⁵²

⁴⁸ Ibid.

⁴⁹ James Madison, *The Virginia Report of 1799-1800, Touching on the Alien and Sedition Laws; Together with the Virginia Resolutions of December 21, 1798, The Debate and Proceedings Thereon in the House of Delegates of Virginia, and Several Other Documents* (Richmond, Va.: J.W. Randolph, 1850), 210.

⁵⁰ See, for example, *Legacy of Suppression*, where Levy discusses the difficulty of understanding the reasoning of the Founding Fathers and the fact that the Framers were far from libertarian by modern standards.

⁵¹ Altschull, 122.

⁵² Altschull, 122-123.

This flew in the face of the most quoted English jurist of the era, Sir William Blackstone, who argued against prior restraint but believed publishers should be held accountable for libel after publishing. He wrote in his influential *Commentaries* in the 1760s: "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity."⁵³ In short, speak now and pay for it later. Since he was one of the founding fathers, Madison's criticism of the acts had received considerable attention and helped launch the most substantial debates of American libertarian theory up to that time. Madison argued the American system of government was fundamentally different than that of England, with its prior restraints and licensing of printers. In the United States, the people, not the government, were sovereign.⁵⁴

The Alien and Sedition Acts, which contributed to Adams's defeat by Jefferson in the presidential election of 1800, expired when Jefferson took office. No test case of their constitutionality made it to the Supreme Court, but Jefferson pardoned those convicted under the act, and Congress later agreed to return their fines. In Anthony Lewis's words: "As a political tactic, the Sedition Act was a disaster. But the act did make an inadvertent contribution, and important one, to the American system of government. It made large numbers of Americans appreciate the importance of free speech and freedom of the press in a democracy."⁵⁵

⁵³ See 4 William Blackstone, *Commentaries of the Laws of England*, 1765-1769, 152 (William Carey Jones ed., 1916) (1769).

⁵⁴ Excellent discussion of the sedition acts are in Powe, *The Fourth Estate and the Constitution*; also, Richard Labunski, *Libel and the First Amendment, Legal History and Practice in Print and Broadcast* (New Brunswick: Transaction Publishers, 1989).

⁵⁵ Anthony Lewis, *Make No Law, The Sullivan Case and the First Amendment* (New York: Random House), 65.

The tradition of prior restraint dates to at least 1538 when England's Henry VIII sought to control this new, powerful printing technology through his official Crown licensers. Unlicensed printers were simply jailed. Some form of licensing remained in place for the next 150 years, with its most noted criticism coming from John Milton's classic assault on censorship, *Areopagitica*, printed in 1644.⁵⁶ Though the poet was mainly ranting against authorities for failing to grant him a divorce from his 16-year-old bride, he did it eloquently. His argument against pre-publication censorship was hailed as an awe-inspiring call for liberty by First Amendment theorists. "If though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; whoever knew Truth put to the worse, in a free and open encounter?"⁵⁷ This idea, Milton's self-righting principle, is commonly referred to as "the marketplace of ideas" theory.⁵⁸

A stronger call for liberty in speech came in 1859, from British philosopher and liberal thinker John Stuart Mill, most noted, as an enduring defender of a free press. Censorship would only bring about "ignorance and imbecility, against which [the press] is the only safeguard."⁵⁹ His treatise *On Liberty* marked the most notable call for freedom of expression since Milton, and it was a call heard loudly in America.⁶⁰ "We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure,

⁵⁶ Merritt Y. Hughes (ed.), *John Milton, Complete Poems and Major Prose* (New York: The Odyssey Press, 1957), 746-47.

⁵⁷ *Ibid.* The most comprehensive study of Milton can be found in David Masson, *The Life of Milton* (Gloucester, Mass: Peter Smith, 1965).

⁵⁸ Altschull, *From Milton to McLuhan*, 40.

⁵⁹ John Stuart Mill, *Law of Libel and Liberty of the Press*, reprinted in G.L. Williams, ed., *John Stuart Mill on Politics and Society* (Hassock, England: Harvester Press, 1975), at 169. The essay was first published in *Westminster Review*, 3 (1825).

⁶⁰ John Stuart Mill's *On Liberty* has gone through many reprints. For an unabridged version, see Max Lerner, ed., *Essential Works of John Stuart Mill* (New York: Bantam Books, 1961).

stifling it would be an evil still," he wrote.⁶¹ Scholars find Milton's marketplace of ideas theory well entrenched in Mill's works, though his essay did not use the precise nomenclature. Justice Oliver Wendell Holmes Jr. would refer to the concept in his most important free speech cases,⁶² and Justice William Brennan Jr. would use Milton and Mill as cornerstones in the *New York Times v. Sullivan* decision in 1964.

With the unpopularity of the Alien and Sedition Acts of 1798, it took more than a century and a very controversial war for Congress to pass another sedition law proscribing expression critical of the government and its policies. This came on the eve of World War I, German immigrants and others had become vocal in their aversion to fighting their homelands. Many saw this as a war started by the wealthy that would have to be won on the backs of the penniless foot soldier. Hysteria and paranoia pervaded as Congress approved the Espionage Act of 1917. The law criminalized speaking or writing with the intent to hinder the United States's war efforts, making it illegal to cause or try to cause insubordination or disloyalty in the military or obstruct recruiting.⁶³ It was also illegal to mail any material that violated the act. Those convicted faced up to a \$10,000 fine and 20 years in jail.

In 1918, the Sedition Act was an all but reincarnated version of the Federalists's law from 1798. It criminalized speech or the publishing of "any disloyal, profane, scurrilous or abusive language intended to cause contempt for the government, Constitution, the flag or the military uniform."⁶⁴ Roughly 2,000 people were tried under

⁶¹ *Ibid.*, 269.

⁶² *Abrams v. U.S.*, 250 U.S. 616, 630 (1919), Holmes dissenting. "The ultimate good desired is better reached by free trade in ideas; the best test of truth is the power of the thought to get itself accepted in the competition of the market."

⁶³ The Espionage Act of 1917, ch. 30, title I §3, 40 Stat. 219, current version codified at 18 U.S.C. §2388.

⁶⁴ As amended May 16, 1918, ch. 75, 40 Stat. 553-54.

these laws, resulting in the conviction of about 900 people, most of whom were aliens, radicals or publishers of foreign language magazines and newspapers, with the most noted being socialists and German immigrants.⁶⁵ Once again, government officials were quite effective in silencing their critics.

The United States Supreme Court initially went along with public officials' efforts to silence speech they did not agree with. Among the most notable cases arising from the acts are *Schenck v. United States* and *Debs v. United States*, incitement cases where the court unanimously agreed in 1919 that seditious utterances were not protected speech.⁶⁶ These cases mark the most active struggle by the court to find the line between unpopular speech and genuine threats to national security. The question in *Schenck*: Was the country's ability to raise a fighting force for World War I threatened by war protestors' expression? New York socialist Charles T. Schenck sent leaflets to men of draft age, encouraging draftees to "assert their rights" by refusing to serve. Justice Holmes first articulated his clear-and-present-danger test in *Schenck*, writing that expression is not protected when words "are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁶⁷ So if the speech is evil, Congress could stop it. Take this line of thought and place it in the South in the 1960s. Speech advocating civil rights was evil and it, too, could be stopped, according to those in control of the government.

⁶⁵ H.C. Peterson and Gilbert C. Fite, *Opponents of the War, 1917-1918* (Madison: University of Wisconsin Press, 1957). Excellent discussion can also be found in Powe, *The Fourth Estate and the Constitution*.

⁶⁶ *Schenck v. United States*, 249 U.S. 47 (1919); *Debs v. United States*, 249 U.S. 211 (1919). *Frohwerk v. United States*, 249 U.S. 204 (1919) was an obscure Missouri case that the court decided at the same time where a publisher was convicted under the Espionage Act and sentenced to 10 years in prison for a series of articles that said the United States' participation in World War I was wrong.

⁶⁷ 249 U.S. 47, 52 (1919).

In 1919, the Supreme Court upheld Schenk's conviction, agreeing unanimously that the possibility draftees would refuse induction amounted to a clear and present danger to the country. Justice Holmes said speech critical of government officials' actions or policies may be curbed more frequently during wartime because of the increasing danger to national security. Before this, the court used the ambiguous "bad tendency" test, where speech could be punished even if there was no identifiable danger related to it.⁶⁸ Eugene V. Debs' case, decided the same day, was also part of this line of incitement cases where government critics and threats to the status quo were targeted. The Socialist Party leader and perennial presidential candidate was convicted under the Espionage Act for an anti-war speech in Canton, Ohio, where he said "men were fit for something better than slavery and cannon fodder."⁶⁹ Debs, a major public figure who received more than one million votes (or 6 percent) in the presidential election of 1912, was found guilty of attempting to incite insubordination in the armed forces, as well as obstructing military recruitment and for encouraging support of the enemy.⁷⁰ On each of three counts, he was sentenced to 10 years in prison.⁷¹ Yet again, government officials had succeeded in legally silencing the opposition, in this case, the anti-war socialists' leading spokesman.⁷²

The pivotal point in which the court began to change its thinking about freedom of expression revealed itself in Justice Holmes' remarkable dissent in another incitement

⁶⁸ Noted law professor Zachariah Chafee argued in his essay *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932 (1919), that the clear and present danger test was more protective of free speech. Scholars have argued that both standards are unclear and overly restrictive.

⁶⁹ 249 U.S. 211.

⁷⁰ Margaret A. Blanchard, *Revolutionary Sparks, Freedom of Expression in Modern America* (New York: Oxford University Press, 1992).

⁷¹ While serving his prison term, Debs received more than 900,000 votes in the presidential election of 1920.

⁷² For detail on the trial of this largely forgotten activist, see Nick Salvatore's biography, *Eugene V. Debs: Citizen and Socialist* (Champaign, Ill.: University of Illinois Press, 2007).

case, *Abrams v. United States*, decided just months after *Schenck* and *Debs*. This was the most serious discussion of seditious libel as a violation of the First Amendment to date and marked the beginning of modern debate on the meaning of free speech.⁷³ In this case, Jacob Abrams and three other young Jewish-Russian immigrants were convicted of attempting to interfere with the war against Germany after they dropped leaflets written in English and Yiddish from a Lower East Side factory window urging workers to strike in protest of the war that was being carried out by an unjust government.⁷⁴

Justice Louis D. Brandeis joined Justice Holmes in dissent, agreeing that the four were essentially convicted for their socialist and anarchist views and their criticism of the government. Holmes wrote: "I wholly disagree with the argument that the First Amendment left the common law as to seditious libel in force."⁷⁵ In *Abrams*, Holmes famously referenced the marketplace of ideas philosophy, implying the principle, but never actually using the term. He wrote of the importance of "a free trade in ideas" and "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."⁷⁶ In the *Sullivan* decision 45 years later, Brennan would point to Holmes's words in this case as a guiding force for unpopular speech during the civil rights movement: "Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."⁷⁷

The eight months between the *Schenck* and *Debs* cases and the *Abrams* case have been given considerable scrutiny by First Amendment scholars trying to figure out what

⁷³ Blanchard, *Revolutionary Sparks*, 83.

⁷⁴ For a more thorough study of the case, see Richard Polenberg, *Fighting Faiths: The Abrams Case, the Supreme Court, and Free Speech* (New York: Viking, 1987).

⁷⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919).

⁷⁶ *Ibid.*

⁷⁷ 376 U.S. 254 at 276.

changed Holmes's mind.⁷⁸ One influence was Holmes's correspondence with U.S. District Court Judge Learned Hand, considered the greatest judge never to sit on the Supreme Court. Hand had rejected the court's "bad tendency" test two years earlier in a sedition case against socialist publication *The Masses*, substituting a tougher test of "direct incitement of violent resistance" in deciding whether speech was seditious.⁷⁹ In his dissent, Holmes called Abrams's circulars "silly leaflets" that the "defendants had as much right to publish as the Government has to publish the Constitution of the United States."⁸⁰ This was the beginning of the judiciary's slow evolution to a more libertarian interpretation of the First Amendment that would reach its height with the Warren Court in the 1950s and 1960s as the civil rights movement took off.⁸¹

Just as the Espionage Act of 1917 helped Congress silence mostly socialist and immigrant dissent during wartime, the Alien Registration Act of 1940 was aimed at domestic communists.⁸² The first peacetime sedition law since 1798, it criminalized the advocacy of the violent overthrow of the government and the publishing or distributing of material advocating it. Chafee estimated that about 100 people were fined or imprisoned under the Smith Act between 1940 and 1960.⁸³ Among the most noted cases was *Dennis v. United States*, where the Supreme Court, using the clear and present danger test, upheld the conviction of 12 leading members of the Communist Party who had been

⁷⁸ See, for example, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 *Stan. L. Rev.* 719, 719 (1975); Fred D. Ragan, "Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919," *Journal of American History* 58 (1971): 39-43; and David S. Bogen, "The Free Speech Metamorphosis of Mr. Justice Holmes," *Hofstra Law Review* 11 (1982): 97-189.

⁷⁹ *Masses Publishing Co. v. Patten*, 244 F. 535.

⁸⁰ 250 U.S. 616, at 629.

⁸¹ After Abrams, a series of opinions from Holmes and Justice Louis D. Brandeis helped further the argument that speech must bring about imminent danger before it can be proscribed. See e.g., *Gitlow v. New York*, 268 U.S. 652 (1925) and *Whitney V. California*, 274 U.S. 357 (1927).

⁸² 54 U.S. Statutes 670.

⁸³ Zechariah Chafee, Jr., *The Blessings of Liberty* (New York: J.B. Lippincott Co., 1954).

charged with conspiring to teach and advocate communist doctrine.⁸⁴ Caught up in anti-communist hysteria, the court pointed to the advocacy of the overthrow of the democratic government by force and worried about an "armed internal attack."⁸⁵ Justice William O. Douglas dissented: "Free speech is the rule, not the exception." Communism has been so thoroughly exposed in this country that it has been crippled as a political force. Free speech has destroyed it as an effective political party."⁸⁶

The 1954 Senate censure of Wisconsin Senator Joseph McCarthy helped take the wind out of Smith Act prosecutions as the crusade to find communist infiltrators ebbed. And McCarthy-era prosecutions died out with the Supreme Court's decision in *Yates v. United States* in 1957.⁸⁷ Oleta Yates and 13 other Communist Party leaders were convicted of violating the act by writing of the necessity to overthrow the government by force. The Supreme Court agreed with the defense, that this was abstract doctrine that presented no imminent danger. The court distinguished the difference between teaching or discussing the violent overthrow of the government as abstract theory or doctrine and actually teaching it to bring about specific action. Abstract doctrine was protected by the First Amendment, the court said, instructing the government to prove the *Yates* defendants directly advocated illegal action. The government then dropped the case, and no other charges were filed under the Smith Act. The Supreme Court's decision in *Yates* underscored First Amendment rights and would help insure that such laws might not be enacted in the future.

⁸⁴ *Dennis v. United States*, 341 U.S. 494 (1951).

⁸⁵ 341 U.S. 494, 509.

⁸⁶ 341 U.S. 494, 588.

⁸⁷ 354 U.S. 298.

The Warren Court's more liberal decisions regarding a host of issues in the 1950s and 1960s, including segregation and free speech, were unprecedented. But no one would suspect that the court would extend free speech rights as far as it did with the *Sullivan* decision in 1964. Before *Sullivan*, libel law was common law. Under what was termed "strict liability," a libel plaintiff could win his case merely by proving that someone published a defamatory statement that identified him. That statement was automatically presumed false and damaging to the plaintiff's reputation. And it did not matter how careful the journalist had been in getting the information.

Scholars have suggested that the circumstances surrounding *Sullivan* were so blatantly racist, so over the top, the Supreme Court was compelled to address it. Forer summed up what many analysts of *Sullivan* have concluded: "The lawsuit was preposterous, and the verdict outrageous."⁸⁸ This case amounted to unjust punishment of those critical of government officials and their policies. Members of the court also figured that Alabama segregationists would just devise another case to harass agitators and critics if they did not quash *Sullivan*.⁸⁹ Lewis, the *Times* reporter who covered the *Sullivan* case argued before the Supreme Court, wrote that in *Sullivan* "the sense of unfairness was intensified by the context of racial hostility."⁹⁰

Regardless of how ridiculous or unfair a decision may seem, the Supreme Court may only review decisions under the federal Constitution or under federal law. Libel up to that point was governed by state law and was completely outside the protection of the

⁸⁸ Louis G. Forer, *A Chilling Effect, The Mounting Threat of Libel and Invasion of Privacy Actions to the First Amendment* (New York: W.W. Norton & Company, 1987), 61. See also Clifton O. Lawhorne, *Defamation and Public Officials, The Evolving Law of Libel* (Carbondale: Southern Illinois University Press, 1971), 230-231.

⁸⁹ Rosenberg, *Protecting the Best Men*, 243-244. See also Bernard Schwartz, *Super Chief, Earl Warren and His Supreme Court – A Judicial Biography* (New York: New York University Press, 1983), 538.

⁹⁰ Lewis, 103.

First Amendment. But in the *Times* petition for certiorari, lawyers stuck to their First Amendment argument. They wrote that Alabama state law was so restrictive it transforms the action for defamation from a method of protecting private reputation to a device for insulating government against attack.⁹¹ The opinion of the [Alabama] Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.⁹¹ So not only would the case transform libel law and protect government critics, it would go on to change the way the United States looked at, thought about and discussed the issue of race.

The public conversation about race had long been established. Narratives of white supremacy have long woven their way through popular books, movies, advertising and the press. As the civil rights movement gained momentum and press coverage ballooned, *Times* southern bureau chief John N. Popham, whose family had come to Virginia in 1680, acknowledged the narrative of white supremacy in his native South. "I can never be angry about the last-ditch fights of some of these people, because I understand what made them."⁹²

That race making has received a great deal of attention by scholars.⁹³ In her cultural history, *Making Whiteness, The Culture of Segregation in the South*, Grace Elizabeth Hale studied southerners' attempts to reestablish the antebellum caste system between Reconstruction through World War II.⁹⁴ White middle class southerners were

⁹¹ Certiorari to the Supreme Court, available at <http://supreme.justia.com/us/376/254/case.html>, accessed March 30, 2008.

⁹² Gene Roberts & Hank Klibanoff. *The Race Beat, The Press, the Civil Rights Struggle, and the Awakening of a Nation* (New York: Knopf, 2006), 185.

⁹³ See, eg., W.J. Cash, *The Mind of the South* (New York: Alfred A. Knopf, 1941); Jack Temple Kirby, *Media-Made Dixie: The South in the American Imagination* (Baton Rouge: Louisiana State University Press, 1978).

⁹⁴ Grace Elizabeth Hale, *Making Whiteness, The Culture of Segregation in the South, 1890-1940* (New York: Vintage Books, 1999).

able to maintain "whiteness" as separate from "blackness," creating their own dominant sphere. Using a variety of tools, they were able to maintain distinct racial identities and segregation.⁹⁵ For example, Hale focuses on some of the country's first blockbuster films such as D.W. Griffith's *Birth of a Nation* and David O. Selznick's *Gone with the Wind* in an analysis of the emerging post-Reconstruction culture.⁹⁶

Hale tracks the transformation of the image of the loyal servant to the black animal rapist as depicted in Thomas Dixon's 1905 best-selling novel *The Clansman*, which was made into a motion picture in 1915, Griffith's wildly successful *Birth of a Nation*. The post-Civil War story depicts whites as powerless victims who can only stand by and watch their nightmare unfold: blacks control the government and legalize intermarriage. After the attempted rape of a white woman, the Ku Klux Klan hunts down the animal. Griffith even had a white actor in black face play the would-be rapist so a real black man would not be touching a white actress.⁹⁷ In the end, the Klan is victorious and Christ floats into the sky to proclaim the "beginning of the millennium."⁹⁸

Gone with the Wind was the next generation's *Birth of a Nation*.⁹⁹ Written in 1936, Margaret Mitchell's 1,039-page novel was a mighty success, with seven million

⁹⁵ See also Cash, *The Mind of the South*; George M. Fredrickson, *The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914* (New York: Harper & Row, 1971); Paul M. Gaston, *The New South Creed: A Study in Southern Mythmaking* (New York: Knopf, 1970).

⁹⁶ For further study on race making in films, see Gwendolyn Audrey Foster, *Performing Whiteness: Postmodern Re/Constructions in the Cinema* (Albany: State University of New York Press, 2003); Richard Harwell, ed. *Gone With the Wind as Book and Film* (Columbia: University of South Carolina Press, 1983); and Donald Bogle, *Toms, Coons, Mulattoes, Mammies, and Bucks: An Interpretive History of Blacks in American Films* (New York: Continuum, 1989). For particular attention to stereotypes in music, see J. Stanley Lemons, Black stereotypes as Reflected in Popular Culture, 1880-1920 *American Quarterly*, Vol 29, No. 1 (Spring 1991), 106-116.

⁹⁷ Lary May, *Screening Out the Past, The Birth of Mass Culture and the Motion Picture Industry* (New York: Oxford University Press, 1980).

⁹⁸ *Ibid*, at 81.

⁹⁹ Kirby, *Media-Made Dixie*, 72.

copies sold over the next 30 years.¹⁰⁰ The premiere of the 1939 film was a Hollywood spectacle planted deep in the stereotypical Old South, on Atlanta's Peachtree Street. The festivities included a Junior League *Gone With the Wind* Ball for celebrities and notable Atlantans, a glitzy event that historian Taylor Branch characterized as that evening's "center of the universe."¹⁰¹ No blacks were allowed to attend the gala or premiere as guests. But Hollywood did recruit local blacks to give an authentic southern feel to the event as bit players in the romanticized Old South setting, which included a replica of Tara, Scarlett O'Hara's white-columned Georgia plantation. The only black leader there was the Reverend Martin Luther King, whose Ebenezer Baptist Church choir performed spirituals for the guests. Dressed in Aunt Jemima bandanas and aprons, they entertained at an event that excluded even Hattie McDaniel, the first African American to win an Oscar for her performance as Mammy. Also left out was Butterfly McQueen, who played Prissy in the film and who had starred in some of the most notable productions of the Harlem Renaissance. Young Martin Luther King Jr. even had a role in the spectacle, his first appearance in the national spotlight, as a member of the "slave choir" from his father's church. In a widely circulated photograph at the time, he is sitting front and center on the steps of the Tara replica, flanked by the black choir members from his father's church.¹⁰² *Gone With the Wind* contributed to the establishment of American whiteness and racial identity, and southerners praised it lavishly. "Americans were

¹⁰⁰ Ibid.

¹⁰¹ Taylor Branch, *Parting the Waters, America in the King Years, 1954-1963* (New York: Simon & Schuster, 1988), 55.

¹⁰² This photo is housed at the Atlanta History Center.

reinforced mightily in the Never-Never Land of Dixie, where the social order contained no middle class and the darkies were gay.¹⁰³

It was not just the Junior League set who relied on their whiteness to navigate the post-Reconstruction social order. Du Bois pointed out that after the Civil War, the black and white underclass missed out on the opportunity to unite against the propertied, or bourgeoisie, to improve their lot.¹⁰⁴ They might be lowly, poor whites figured, but at least they were above the black underclass. The white underclass identified first as white, having more in common with the white bourgeoisie than with blacks of their own class. Working class whites were typically paid more than blacks, for starters. But they also had what Du Bois called a "public and psychological wage" that their whiteness insured. He rightly predicted in his 1903 classic, *The Souls of Black Folk*: "The problem of the twentieth century is the problem of the color line." No sooner had Northern armies touched Southern soil than this old question, newly guised, sprang from the earth: "What shall be done with Negroes?"¹⁰⁵

Hale also gives considerable attention to race making through literature, including the work of journalist-turned-author Joel Chandler Harris, who wrote *Uncle Remus* as a celebration of the past. It is one of the first and longest lasting works sentimentalizing the black characters of the paternal plantation.¹⁰⁶ In this series of popular stories, an ex-slave tells stories to the white Little Boy, talking of the harmony of the good old days and

¹⁰³ Kirby, *Media-Made Dixie*, 73.

¹⁰⁴ W.E. Burghardt Du Bois, *Black Reconstruction in America 1860-1880* (New York: The Free Press, 1935, reprinted 1962), 700.

¹⁰⁵ W.E. Burghardt Du Bois, *The Souls of Black Folk* (Chicago: A.C. McClurb & Co., 1903; Reprint Boulder: Paradigm Publishers, 2004), 8.

¹⁰⁶ Joel Chandler Harris, *Uncle Remus: His Songs and His Sayings*, 1880. (Reprint, New York: D. Appleton, 1917).

õuppity city niggersö as troublemakers.¹⁰⁷ During the Civil War, Remus had hidden his master's livestock in the swamp when the Yankees came through. His character became cliché, the protector of his mistress and her silver, armed with an ax. Remus loved his masters, as Hale puts it, more than his freedom.¹⁰⁸

As the consumer culture began to take root by the turn of the century, the construction and retention of racial identities also found form in advertising.¹⁰⁹ Hale traces a host of prominent advertising campaigns of the era, from the Gold Dust Twins' washing powder to Aunt Jemima's ready-made pancake mix. They existed to make their white masters' lives easier and more comfortable. The Aunt Jemima trademark was created when pancake mix maker Chris Rutt saw an 1889 blackface minstrel show in St. Joseph, Missouri. Rutt, a newspaperman and entrepreneur, hired a former Kentucky slave named Nancy Green to dress in a mammy costume and flip pancakes made from his premade mix at the 1893 World's Columbian Exposition in Chicago.¹¹⁰ Aunt Jemima became one of the most enduring advertising trademarks and thus one of the most subversive racial stereotypes,ö according to Morris.¹¹¹ The Gold Dust Twins were black-faced caricatures, unmistakable representations of slave labor with the slogan: "Let the Gold Dust Twins do your work."ö Hale characterizes Aunt Jemima, the Gold Dust Twins,

¹⁰⁷ Hale, *Making Whiteness*, 56.

¹⁰⁸ Hale, *Making Whiteness*, 71.

¹⁰⁹ See also Kenneth Goings, *Mammy and Uncle Mose: Black Collectibles and American Stereotyping* (Bloomington: Indiana University Press, 1994); Patricia Morton, *Disfigured Images: The Historical Assault on Afro-American Women* (New York: Greenwood Press, 1991); Jackson Lears, *Fables of Abundance: A Cultural History of Advertising in America* (New York: Basic Books, 1994); Patricia A. Turner, *Ceramic Uncles and Celluloid Mammies: Black Images and Their Influence on Culture* (New York: Anchor Books, 1994).

¹¹⁰ M.M. Manring, *Slave in a Box: The Strange Career of Aunt Jemima* (University of Virginia Press, 1998); and Diane Roberts, *The Myth of Aunt Jemima: Representations of Race and Region* (New York: Routledge, 1994).

¹¹¹ Sarah P. Morris, in *Black Women in America*, ed. Darlene Clark Hine (Bloomington: Indiana University Press, 1993).

even Uncle Ben and Rastus, the Cream of Wheat character, as nationally known
“spokesmen,” representations of the Old South Negro packaged for the white
consumer.¹¹²

Trade cards, a popular advertising vehicle especially in the late 1800s, are also
notable here, sporting such ads as those for Henry’s Carbolic Salve, which “would almost
make a nigger white.”¹¹³ Companies chose their brand names to showcase the difference
between blackness and whiteness. Consider the Nigger Head brand, for example, a name
used for canned fruits and vegetables, stove polish, tobacco and even oysters.¹¹⁴ One card
for Master Soap had a black man playing a tambourine and dancing. Another for Black
Coats Thread featured a black girl standing in the rain. A white girl told her to come
inside and out of the weather, but the black girl says she is “like Black Coats Thread, the
color won’t come off by wetting.”¹¹⁵ Central to the selling were the boilerplate
representations of blackness as part of popular consumer culture.

Making whiteness with gusto, white supremacist organizations in the South
created their own propaganda machines that cranked out newspapers, newsletters, flyers
and even television and radio programming. Consider the work of the White Citizens’
Councils, for example. This organization was formed in 1954 in Indianola, Mississippi by
14 men in response to “the terrible crisis,” Black Monday, the day the U.S. Supreme

¹¹² Hale, *Making Whiteness*, 164.

¹¹³ Hale, *Making Whiteness*, 162. For a more comprehensive study, see Robert Jay, *The Trade Card in Nineteenth Century America* (Columbia: University of Missouri, 1987).

¹¹⁴ Marilyn Kern-Foxworth, *Aunt Jemima, Uncle Ben, and Rastus: Blacks in Advertising, Yesterday, Today, and Tomorrow* (Westport, CT: Greenwood Press, 1994).

¹¹⁵ This vintage trade card was for sale online March 22, 2008, at Moody’s Collectible Vintage Postcards website at <http://www.moodycollectibles.com/TradeCards/index.htm>. Click on “Blacks” for more examples. The company also sells vintage cards on ebay.

Court ordered school desegregation.¹¹⁶ Within two years, the organization boasted 80,000 members in the state and soon began publishing an official journal, *The Citizen*, carrying a logo that read "Remember Little Rock," in reference to the desegregation of Central High in 1957.¹¹⁷ The organization even produced its own television show, the Citizensø Council Forum, which was broadcast on at least 40 television and 200 radio stations in 39 states, where "outstanding Senators and Congressmen talk about Fundamental American Principles."¹¹⁸ The Citizensø Council was able to produce the show using money from such black tie affairs as the \$25-a-plate fundraising dinner in the Victory Room of the Heidelberg Hotel in Jackson. Then governor-elect Ross Barnett gave a special address at the 1959 dinner called "The Voice of the South."¹¹⁹ The organization even sponsored a high school essay contest with \$500 prizes going to the best boy and best girl entries. Winning titles were: "Why Separate Schools Should Be Maintained for the White and Negro Races," and "Why I Believe in Social Separation of the Races of Mankind."¹²⁰

So here is the backdrop of *New York Times v. Sullivan*, a case spawned out of a racist society, one that would constitutionalize libel law and forever cut off this particular channel of censorship by government officials. When Montgomery police commissioner L.B. Sullivan sued the Times, he had long been accustomed to reading newspapers whose editors thought like he thought. For example, in the 1950s and 1960s, newspapers across the South often wrote glowing editorials about the activities of their city's Citizensø Council chapter. Editors gushed over the group that almost always included "the finest

¹¹⁶ Association of Citizensø Councils of Mississippi Annual Report, Aug. 2, 1956, Box 1, Folder 1, *Mississippi Citizen's Council Collection*, University of Mississippi Department of Archives and Special Collections. (Hereafter, *MCCC*.)

¹¹⁷ *Ibid.*

¹¹⁸ Jackson Citizensø Council fundraising letter, Aug. 31, 1959, Box 1 Folder 28, *MCCC*.

¹¹⁹ *Ibid.*

¹²⁰ Publicity pamphlet with reprints of the winning essays. Box 1, Folder 17, *MCCC*.

white citizenry such as bankers, lawyers, businessmen and farmers.¹²¹ *The Meridian Star* in Mississippi encouraged readers to join their local Council. *The News and Courier* in Charleston, S.C., urged their local chapter to be strong to protect the state during the crisis of the 1954 desegregation decision, *Brown v. Board of Education*. And the *Jackson Daily News* offered support under such headlines as "Citizens Council Gets Credit."¹²² But even this support was too mild for some white supremacist groups. The Women of the Ku Klux Klan published *The Kourier Magazine* in Atlanta.¹²³ Along with its newspaper, *The Fiery Cross*, the White Knights of the Ku Klux Klan maintained a robust pamphlet and flyer circulation. For example, the Klan distributed 100,000 flyers in West Tennessee warning: "Negroes and Whites are being served together at Woolworth's lunch counter in violation of our Southern Heritage. Attention White Men, caution your wives and daughters that they may be associating with negroes if they eat at Woolworth's lunch counter."¹²⁴

Hale also brings spectacle lynching within the whiteness pop culture frame. "Lynchings conjured whiteness, then, through their spectacle of a violent African American otherness as much as through the narratives of white unity they generated."¹²⁵ Newspaper coverage of the lynchings were "central to the power" of the event.¹²⁶ As the coverage increased, so did the crowds. Newspapers such as Alabama's *Dothan Eagle* ran

¹²¹ Association of Citizens Councils of Mississippi press release, November 17, 1961, Box 1, Folder 28, MCCC.

¹²² "Join Citizens Council," *The Meridian Star*, Sept. 10, 1961; "Citizens Councils Must Be Strong To Protect S.C. If Crisis Comes," *The News and Courier*, July 14, 1958; and "Citizens Council Gets Credit," *Jackson Daily News*, April 11, 1963; Box 1, Folder 18, MCCC.

¹²³ See examples in Box 1, Folder 19, *Women of the Ku Klux Klan Collection*, University of Mississippi Department of Archives and Special Collections.

¹²⁴ Box 8, Folder 1, *Ku Klux Klan Collection*, University of Mississippi Department of Archives and Special Collections.

¹²⁵ Hale, *Making Whiteness*, 228.

¹²⁶ *Ibid.*, 206.

lynch party announcements as late as the 1930s. The lynchings usually included a pre-hanging torture session and even castration for the entertainment and amusement of whites. Lynching photos were turned into souvenir postcards and sold for ten cents each ó a whole new form of commercialism to insure racial order.¹²⁷ Further, Hale writes: "No one is ever more white than the members of a lynch mob." This made other types of mistreatment "seem tame" and "in the end blackness was destroyed and whiteness was all."¹²⁸ Repressive laws dictating where African Americans were permitted to sit, drink, eat or go to the bathroom seemed minor by comparison, thus reinforcing the status quo.

By the 1950s that status quo was being challenged by members of the elite northern press, most notably the *New York Times*, and later, newsmagazines such as *Newsweek* and *Time*, along with NBC and CBS news. Roberts and Klibanoff identify a new beat that began to emerge in midcentury newsrooms of many major metropolitan dailies in America.¹²⁹ Reporters had long covered the cops beat, the courts beat, the education beat and the city government beat. A few key newspaper reporters began to recognize the growing story emerging from early demonstrations. They dubbed it the race beat, and their reporting began to break down southerners' white-good and black-bad dichotomy.

Scholars have well documented the role of the northern press in spurring the civil rights movement. As Swedish economist Gunnar Myrdal noted in his famous work *American Dilemma*: "the Negro is increasingly given sympathetic publicity by

¹²⁷ For further study of lynching and representations in the media, see Johnathan Markovitz, *Legacies of Lynching: Racial Violence and Memory* (University of Minnesota Press, 2004); and Jacqueline Goldsby, *A Spectacular Secret: Lynching in American Life and Literature* (Chicago: University of Chicago Press, 2006).

¹²⁸ Hale, *Making Whiteness*, 230.

¹²⁹ Roberts and Klibanoff, *The Race Beat*.

newspapers, periodicals, and the radio¹³⁰ one result is that the white Northerner is gradually waking up and seeing what he is doing to the Negro...the North is getting prepared for a fundamental redefinition of the Negro's status in America.¹³⁰ Martin Luther King Jr. knew that publicity was of the utmost importance to the cause, and southern officials working to keep protests at bay knew it.¹³¹ As the racial order was increasingly threatened in the 1950s and 1960s with voter registration drives, freedom rides and sit-ins, the media reacted accordingly by sending across the country and the world the now iconic images of the struggle.¹³² More than half of all American homes had a television by 1954, and the numbers were steadily rising.¹³³ Writes Hale of the changing conversation: "African Americans had finally found a way to counter the black mammy and Uncle Remus and the rapist, with more modern and persuasive images: white customers pouring ketchup and abuse on black college students at lunch counters, police dogs biting black children in public parks, and firehose torrents rolling black bodies down city sidewalks."¹³⁴ These photos blew up the images of blackness as inferior and whiteness as supreme. Now the issue surrounded moral supremacy.

Along with stopping the demonstrations, southern whites sought to stop outsiders from revealing the state of the South to the outside world. It makes sense that they would

¹³⁰ Gunnar Myrdal, *An American Dilemma, The Negro Problem and Modern Democracy* (New York: Harper & Brothers Publishers, 1944), 1010.

¹³¹ One of King's lieutenants, Rev. Ralph Abernathy, also a defendant in the *Sullivan* suit, focuses on the importance of media coverage in his autobiography, *And the Walls Came Tumbling Down* (New York: Harper & Row, 1989). At 155, Abernathy writes of his, King's and others' efforts to keep the media interested in the civil rights story: "When our struggle was not being carried on the Associated Press wires, the nation forgot about us."

¹³² For further study on how journalists gauge story suitability, the media's interest in covering violent and nonviolent protests, along with the preservation of social order, see Herbert J. Gans, *Deciding What's News, A Study of CBS Evening News, NBC Nightly News, Newsweek and Time* (New York: Vintage Books, 1980). The conflict, power struggles and dramatic footage provided a made-to-order story for the media.

¹³³ William Boddy, *Fifties Television, The Industry and Its Critics* (Chicago: University of Illinois Press, 1990); and Gary R. Edgerton, *The Columbia History of American Television* (New York: Columbia University Press, 2007).

¹³⁴ Hale, *Making Whiteness*, 293.

turn to the courts. And it goes without saying that the cult of whiteness had long oozed into the legal system. The legal history of black as racial otherness in the United States is as old as America itself. The three-fifths compromise between northern and southern states, for example, which established the apportionment for the House of Representatives, counted slaves as "three-fifths of all other persons."¹³⁵ At the Constitutional Convention of 1787, Gouverneur Morris of Pennsylvania questioned the establishment of racial otherness, and how black would be considered in its relationship to white: "Upon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them citizens and let them vote. Are they property? Why then is no other property included?"¹³⁶

In 1896, the United States Supreme Court had famously endorsed the black-white distinction in one of its most far-reaching rulings related to race, *Plessy v. Ferguson*, which established the separate but equal doctrine.¹³⁷ Fair-skinned Homer A. Plessy, whose great-grandmother was black, challenged the 1890 Louisiana Separate Car Act, buying a ticket to ride a white car from New Orleans to Covington, Louisiana, a bedroom community on the north shore of Lake Ponchartrain.¹³⁸ When a conductor came by to pick up his ticket, 29-year-old Plessy told him he was seven-eighths white, an octoroon, and

¹³⁵ The three-fifths compromise is located in Article 1, Section 2, Paragraph 3 of the United States Constitution: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

¹³⁶ Max Farrand, ed. *The Records of the Federal Constitution of 1787* (New Haven, CT: Yale University Press, 1911), at 222. For more information on Morris, who is widely credited with writing much of the Constitution's Preamble, including "We the People of the United States, in order to form a more perfect union," see Richard Brookhiser, *Gentleman Revolutionary: Gouverneur Morris - The Rake Who Wrote the Constitution* (New York: Free Press, 2003).

¹³⁷ 163 U.S. 537 (1896).

¹³⁸ Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (New York: Oxford University Press, 1987).

he refused to ride in the blacks-only car. Police arrested him for violating the Jim Crow statute.¹³⁹

The court decided the law should reflect the racial difference that it said was the essence of human nature itself.¹⁴⁰ The bottom line, in Hale's words: "Plessy could not be both black and white."¹⁴¹ The court institutionalized differences based on race, perpetuating the power structure built on what scholars have called "race reputation."¹⁴² In so doing, "the possessors of whiteness were granted the legal right to exclude others from the privileges inhering in whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded."¹⁴³ Even when the legal tide began turning away from them, as the NAACP began winning its arguments before the United States Supreme Court, whites skirted or ignored the rulings. From property rights and voting rights to equal facilities in interstate transportation and education, whites found ways to defy the court orders "in some instances for decades."¹⁴⁴

¹³⁹ For discussion of the American system of legally mandated race segregation, see generally C. Vann Woodward, *The Strange Career of Jim Crow* (New York: Oxford University Press, 1974).

¹⁴⁰ Courts would apply that racial difference in countless post-Reconstruction cases and provide a legal roadmap for how blacks could be kept in their place, e.g.: *Williams v. Mississippi* (1898), 170 U.S. 213, where the Supreme Court did not find that a literacy test and poll tax were discriminatory; and *Virginia v. Rives* (1879) 100 U.S. 313, where the court refused to interfere in a state case where no black had ever served on a jury.

¹⁴¹ Hale, *Making Whiteness*, 23.

¹⁴² Cheryl Harris, "Whiteness as Property," *Harvard Law Review*, Vol. 106, No. 8 (June 1993), 1707-1791.

¹⁴³ *Ibid.*

¹⁴⁴ E.g., *Shelley v. Kramer*, 334 U.S. 1 (1948), where the Supreme Court held that neighborhoods' restrictive covenants cannot be enforced by state and federal courts because they violate the 14th Amendment equal protection guarantee. So whites made private agreements instead and kept blacks out of their neighborhoods with ease; *Smith v. Allright* (1944) 321 U.S. 649, where the Supreme Court struck down the white primary. In the heavily Democratic South, the primary may well be the general election, and blacks were systematically terrorized for trying to vote; *Morgan v. Virginia* (1946) 328 U.S. 373, where the Supreme Court struck down state laws requiring segregation when interstate travel is involved. This ignored case helped inspire the Freedom Rides in 1961; *In Gaines v. Canada* (1938) 305 U.S. 337, the Supreme Court ruled that states must provide equal in-state educational opportunities for blacks and whites. This was the first successful NAACP case that would eventually lead to the Court's overturning the separate-but-equal doctrine. Yet Missouri officials managed to ignore and avoid the ruling until 1950. And perhaps most notoriously defied by whites: *Brown v. Board of Education of Topeka* (1954) 347 U.S. 483.

Libel and whiteness were well acquainted prior to the rash of *Sullivan*-like cases that cropped up during the civil rights movement. Consider, for example, lawsuits where whites were identified as black, dating from the late 1700s to as recently as 1957. In one case, when the *Natchez Times* incorrectly identified a white woman as a “Negro,” it was libelous in the eyes of the court in 1954.¹⁴⁵ The newspaper had published a story identifying the woman as the black driver in a car crash. The story said she was in the car with two black men. The Mississippi Supreme Court wrote that “there is direct proof that some of her friends and acquaintances exhibited an attitude of ridicule and semi-criticism towards her” after the article appeared.¹⁴⁶ The court recognized “the reputational interest in being regarded as white as a thing of significant value, which, like other reputational interests, was intrinsically bound up with identity and personhood.”¹⁴⁷ It upheld an Adams County jury award of \$5,000, a substantial amount at the time.

These pre-*Sullivan* libel cases documenting efforts to keep whiteness and blackness as two distinct and opposing categories may not have involved public officials, but their inclusion in this study should provide further insight on the early use of libel during the era and the culture that brought about the 1960s litigation. It was routine, for example, for the *Commercial Appeal* in Memphis to shell out money to whites mistakenly identified as blacks in the police blotter. Rather than go to court where the newspaper would likely lose a libel case, editors created a policy where it would automatically give \$150 to the misidentified white person if they agreed they would not

¹⁴⁵ *Natchez Times Publishing v. Dunigan*, 221 Miss. 320; 72 So 2nd 681 (1954).

¹⁴⁶ *Ibid.*

¹⁴⁷ Harris, *Whiteness as Property*. See also, Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691 (1986).

file suit.¹⁴⁸ Turner Catledge, a Mississippi native and executive editor at the *New York Times* during the civil rights era, worked at the *Commercial Appeal* in the 1920s and noted how the error could occur. “A white man who happened to be dark-skinned, or have a dirty face” might be marked down by the desk sergeant as a Negro. Then the police reporter, never actually seeing the man, might copy off the police blotter that so-and-so, Negro, had been arrested for such-and-such.¹⁴⁹ The *Commercial Appeal*’s policy even created a cottage industry for local attorneys, who would watch for the mistakes, visit the man in jail, talk him into signing a paper and pick up the \$150 from the newspaper. The lawyer gave \$50 to the jailed man, paid his fine and kept the rest of the money for himself. One of the reporters even “got into a racket with a police sergeant and several shady lawyers whereby wrong designations would be put down deliberately.”¹⁵⁰

On the other end of the spectrum, the *Anderson Daily Mail* chose to fight a case of mistaken racial identity to the South Carolina Supreme Court in 1957. But it lost. The court held that the newspaper had libeled a white woman by including her name under the headline “Negro News.” The brief mention of the woman was included next to a photograph of a black soldier who had been hospitalized. The newspaper mistakenly said the young man was her son.¹⁵¹ In this case, the court referred to a line of South Carolina cases dating to 1791, justifying its opinion that “there is still to be considered the social distinction existing between the races, since libel may be based upon social status.”¹⁵² The court also said: “Although to publish in a newspaper of a white woman that she is a Negro imputes no mental, moral or physical fault for which she may justly be held

¹⁴⁸ Turner Catledge, *My Life and The Times* (New York: Harper & Row, 1971).

¹⁴⁹ *Ibid.*, 39.

¹⁵⁰ *Ibid.*, 39-40.

¹⁵¹ *Bowen v. Independent Publishing Co.*, 230 S.C. 509; 96 S.E. 2d 564 (1957).

¹⁵² *Ibid.*, at 565.

accountable to public opinion, yet in view of the social habits and customs deep-rooted in this state, such publication is calculated to affect her standing in society and to injure her in the estimation of her friends and acquaintances.¹⁵³ Her race reputation had been harmed. Bottom line, the court specifically asked “Is it libelous per se to identify a white person as a Negro?” Before the *Sullivan* case in 1964, the answer was yes.

This study seeks to further the making whiteness scholarship, extending the construct to the use of libel as yet another way to secure the separateness of the two races in the American South. In the 1960s, libel became a potent weapon to perpetuate the societal norm, a new way to maintain white supremacy when faced with the grassroots civil rights demonstrations and the increasing media coverage. The media was changing the public conversation about race, and viewers and readers were no longer seeing *Gone With the Wind*’s pastoral images of the South. Faced with disruption of the status quo, southern leaders were able to take the work of the era’s leading journalists out of the public sphere and bog their newspapers down in the court system. The tools of popular culture aided the establishment in maintaining the status quo for the first half of the century, and the increasing use of libel could be added to the toolbox for the second half. Or so they thought.

¹⁵³ Ibid.

CHAPTER THREE

Libel: A New Way to Fight the Movement

It was a Wednesday in May 1961, exactly seven years since the earthquake *Brown vs. Board of Education* desegregation case rattled the South. Ten Freedom Riders were rolling from Nashville to Birmingham, trying to draw attention to yet another unenforced court ruling, a mandate desegregating interstate travel.¹⁵⁴ Birmingham police commissioner Bull Connor, a cardboard cutout of the southern lawman, had his police officers pull the bus over as it reached the outskirts of his city. Connor boarded at the front and saw two Freedom Riders, one black and one white, sitting together in the seat directly behind the driver. He told Paul Brooks and Jim Zwerg to separate, but the Freedom Riders did not budge. Smiling, Connor said they were breaking Alabama law and had his officers arrest them. This, “the most powerful racist in Alabama,”¹⁵⁵ was the officer who once told *Newsweek*: “We ain’t gonna segregate no niggers and whites together in this town.”¹⁵⁶

Connor had been a local baseball broadcaster who got his nickname for his uncanny ability to shoot the bull on the radio during periods of inactivity on the field. “Bull” also seemed to fit his reputation as the sauntering cop that elite Birmingham whites relied on to browbeat and intimidate blacks who stepped out of their place.¹⁵⁷ Connor had ties to the Ku Klux Klan and had a reputation of only halfheartedly

¹⁵⁴ *Morgan v. Commonwealth of Virginia*, 184 Va. 24 (1946). For a thorough narrative on the Freedom Riders, see Raymond Arsenault, *Freedom Riders, 1961 and the Struggle for Racial Justice* (New York: Oxford University Press, 2006).

¹⁵⁵ David Halberstam, *The Children* (New York: The Ballantine Publishing Group, 1998), 293.

¹⁵⁶ *Newsweek*, April 15, 1963, 29.

¹⁵⁷ Diane McWhorter, *Carry Me Home* (New York: Simon and Schuster, 2001).

investigating the many racial bombings across the city nicknamed "Bombingham." Rather than integrate Birmingham's 68 public parks, 38 swimming pools and four golf courses, for example, the all-white city commission followed Connor's recommendation to shut them down.¹⁵⁸

By May 1961, Connor had known about the Freedom Rides for more than a month. The FBI kept the Birmingham Police Department updated on the Riders with the idea that local law enforcement could help protect the demonstrators. However, keeping Birmingham's law enforcement in the loop would have the opposite effect. Connor could not afford direct and blatant association with the Klan, but his police sergeant Tom Cook was an enthusiastic Klan supporter who shared the Riders' itinerary with the white supremacist group and helped prepare "a rude welcome for the invading "niggers" and "nigger-lovers" who were about to violate the timeworn customs and laws of the sovereign state of Alabama."¹⁵⁹ Martin Luther King Jr. had been warned that the Freedom Riders were heading for trouble when they crossed into the state, and he in turn, warned them before they hit the Deep South.

Anything but subtle, Connor remained confident that he could maintain the status quo, and he rode with the Freedom Riders into the Birmingham station on the bus he

¹⁵⁸ Undated internal memo, Box 7, Folder 10, *Papers of James T. "Jabbo" Waggoner*, Birmingham Public Library Department of Archives and Manuscripts (hereafter *Waggoner Papers*). Before closing the Birmingham parks, city officials studied how L.B. Sullivan shut down the public parks in Montgomery rather than allow desegregation as ordered by a federal district court. Birmingham officials noted in this memo that all black employees of Montgomery parks were dismissed, and the white employees were redistributed.

¹⁵⁹ Arsenault, *Freedom Riders*, 136. He and other historians have relied on volumes of FBI correspondence to piece together events that led to the Klan's unfettered access to the bus terminals in Birmingham and Montgomery. This includes documentation on Klansman-turned FBI informant Gary Thomas Rowe. Rowe told the FBI that Connor had a secret meeting with Bobby Shelton, a Tuscaloosa tire salesman and the Imperial Wizard of the Alabama Knights of the Ku Klux Klan. Arsenault writes that Connor's "behind-the-scenes role was a crucial element of the evolving plan to teach the Freedom Riders a lesson they would never forget." Connor reportedly promised Shelton 15 or 20 minutes to beat the Freedom Riders before the police would arrive.

boarded that day. Once in the terminal, he ordered his officers to cover the bus windows with newspaper and tape so members of the press could not see in. Inside the darkened bus, officers inspected each bus ticket, and used their billy clubs on anyone trying to head for the door.¹⁶⁰ Freedom Rider John Lewis, later a United States congressman from Georgia, had been badly beaten in the Greyhound terminal in Rock Hill, South Carolina, a few days before. He was relieved when he saw reporters in Birmingham as the bus pulled into the terminal. He remained optimistic since the demonstrations were finally getting the attention of the national media. "There was no purpose in offering yourself up to your sworn enemies if no one was watching," pointed out David Halberstam, then a reporter for *The (Nashville) Tennessean* who covered the protests.¹⁶¹ After about two hours in the dark bus, Connor had the demonstrators arrested and taken to jail, what the veteran protestors called "Connor's Chapel for Freedom."¹⁶²

Just as Connor covered the windows to shut out the media's view that day at the bus station, he sought to shut out the world's view of his brand of law and order in Birmingham. He sought to shut down coverage of the race story being broadcast around the country night after night. In so doing, Connor and other southern officials turned to the court system and libel law in their quest to get northern newspapers to go back home and mind their own communities. By 1964, when the U.S. Supreme Court heard the first such libel case, *New York Times v. Sullivan*, government officials had filed at least \$300 million in libel actions against newspapers, news magazines, television networks and

¹⁶⁰ Taylor Branch, *Parting the Waters, America in the King Years, 1954-1963* (New York: Simon & Schuster, 1988), 431.

¹⁶¹ Halberstam, *The Children*, 293.

¹⁶² McWhorter, *Carry Me Home*, 338.

civil rights leaders.¹⁶³ Connor and his fellow Birmingham officials would later sue the *New York Times* over Harrison Salisbury's story "Fear and Hatred Grip Birmingham."¹⁶⁴ Prompted by Salisbury's reporting, Howard K. Smith of CBS headed to Birmingham to see if the *Times* reporter was exaggerating the shocking conditions in the South and found it even worse than Salisbury wrote. Connor and other Birmingham officials would then sue CBS for the documentary "Who Speaks for Birmingham?"¹⁶⁵

But it all started with the best known libel case, the one that would reach the U.S. Supreme Court first, that of Montgomery police commissioner Lester Bruce Sullivan. After a *New York Times* advertisement called "Heed Their Rising Voices" ran on March 29, 1960, Sullivan sued the *Times* and four African American ministers for libel.¹⁶⁶ The ad claimed that unnamed public officials used violent and often illegal measures to stop civil rights protests in the South. The ministers named in the suit were well-known leaders in their communities — Ralph C. Abernathy, J.E. Lowery, S.S. Seay and Fred L. Shuttlesworth. But they did not know about the ad before it was published, much less agree to have their names included at the bottom of the page.

The full-page advertisement had been placed by the New York-based Committee to Defend Martin Luther King and the Struggle for Freedom in the South, which was led by A. Philip Randolph, the revered president of the Brotherhood of Sleeping Car Porters. King was charged with felony tax evasion and perjury in filing state income tax returns, the first such charge in Alabama's history, and the committee was seeking support to help

¹⁶³ Harrison E. Salisbury, *Without Fear or Favor* (New York: Times Books, 1982), 388.

¹⁶⁴ *Connor v. New York Times*, 5th Cir.1962, 310 F.2d. 133.

¹⁶⁵ "CBS Reports: Who Speaks for Birmingham?" Transcript of broadcast, May 18, 1961, Birmingham Public Library Department of Archives and Manuscripts; See also Howard K. Smith, *Events Leading Up to My Death* (New York: St. Martin's Press, 1996), 274.

¹⁶⁶ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

pay his mounting legal bills.¹⁶⁷ Those charges came just days after King had endorsed the sit-in movement that started at Woolworth's lunch counter in Greensboro, North Carolina and swept across the South. The ad in the *Times* quoted an editorial printed in the same newspaper a week before. "The growing movement of peaceful mass demonstrations by Negroes is something new in the South. Let Congress heed their rising voices, for they will be heard."¹⁶⁸ The ad went on to say demonstrators were "being met by an unprecedented wave of terror." It said students were expelled from Alabama State College for singing "My Country, 'Tis of Thee" on the capitol steps in Montgomery. It said "truckloads of police armed with shotguns and tear-gas ringed the [campus]" and "their dining hall was padlocked in an attempt to starve them into submission." The ad did not name any names, but referred to "Southern Violators of the Constitution" who were "determined to destroy the one man, who, more than any other, symbolizes the new spirit now sweeping the South - the Rev. Dr. Martin Luther King Jr." The ad said "the Southern violators" had bombed King's home and had "arrested him seven times for such petty offenses as speeding and loitering." Further, the ad read that "obviously their real purpose is to remove him physically as the leader to whom the students and millions of others look for guidance and support." The signatures of such big names as Eleanor Roosevelt, Jackie Robinson, Sidney Poitier, Marlon Brando and Harry Belafonte were followed by sixty other supporters, including 20 black ministers from the South.

¹⁶⁷ For details on the case, see Branch, *Parting the Waters*, 277. Audited by the state of Alabama and the IRS, King paid back taxes totaling more than \$2,000. After a citizen pays back taxes they likely would not even face misdemeanor tax evasion charges. In King's case, however, the state charged him with the unheard of felony tax evasion. Even more unusual, Alabama attorney general (later governor) John Patterson had King arrested in Atlanta, where he was then living, and extradited from Georgia.

¹⁶⁸ *New York Times*, March 29, 1960, 25.

Montgomery officials would probably have never seen the ad if it was not for Ray Jenkins, editor of the afternoon newspaper, the *Alabama Journal*. He came across it while flipping through the *Times* on his lunch break.¹⁶⁹ The ad had a local angle. King had been the pastor at Montgomery's Dexter Avenue Baptist Church before moving back home to Atlanta, so Jenkins wrote a short story detailing its content. Grover Hall Jr., the editor of the dominant paper in town, the *Montgomery Advertiser*, picked up on the story and ran with it after that. Hall was the son of a crusading editor who won a Pulitzer Prize in 1926 for editorials criticizing the Klan. But the son, more conservative than the father, was furious about the *Times* ad. Hall editorialized in the *Advertiser* that the ad was full of "lies, lies, lies" and possibly willful ones "on the part of abolitionist hellmouths."¹⁷⁰ The next day, Sullivan wrote to the *Times* demanding a retraction, insisting it charged him of "grave misconduct" and that it was "false and defamatory."¹⁷¹ He sent the same letters to the four Alabama ministers Abernathy, Lowery, Seay and Shuttlesworth, who did not even know their names were included in any ad until then. Sullivan was a well known figure in state and local politics from the early 1950s until his death in 1977. He headed the Alabama state police during the 1950s. A Kentucky native and son of a sheriff, Sullivan also was reported to have close ties to the Ku Klux Klan.¹⁷²

The New York law firm representing the *Times* responded to Sullivan on April 15, informing him that it was investigating the matter, but also asked Sullivan to explain how the ad reflected on him since he was never named. Sullivan did not respond. Instead,

¹⁶⁹ Gene Roberts & Hank Klibanoff. *The Race Beat. The Press, the Civil Rights Struggle, and the Awakening of a Nation* (New York: Knopf, 2006), 270-300.

¹⁷⁰ *Montgomery Advertiser*, April 7, 1960.

¹⁷¹ Petitioner's brief to the U.S. Supreme Court in *New York Times v. Sullivan*, Case No. 40, October Term, 1963.

¹⁷² Kermit L. Hall, "Lies, Lies, Lies": *The Origins of New York Times Co. v. Sullivan*, 9 Comm. L. & Pol'y 391-421 (2004), quoting Merton Roland Nachman, Sullivan's attorney who argued his case before the Supreme Court.

he filed a libel suit in the Circuit Court of Montgomery County against the *Times* and the four ministers, seeking \$500,000. Sullivan was the former state director of public safety who was elected to a similar position in Montgomery after the bus boycott on a pledge to bring new business to the state capitol. Three weeks before the *Times* ad ran, he had lauded the cooperation between a hoard of 5,000 whites and the police who successfully halted black demonstrators marching to the state capital building.¹⁷³ The marchers were protesting the expulsion of Alabama State students who had requested service at the capital building's basement cafeteria.¹⁷⁴

Sullivan had been incensed at the temerity of the students' demonstrations, appearing on television, red-faced with eyes bulging. "I want to assure the citizens of Montgomery that we are prepared to take whatever actions that might be necessary to maintain and preserve the time-honored traditions and customs of the South."¹⁷⁵

As money poured into King's defense fund in response to the ad, Alabama Attorney General MacDonald Gallion announced that Governor John Patterson asked him to study how he might sue the *Times* and the ad's sponsors for libeling Alabama officials.¹⁷⁶ Three weeks after Sullivan filed suit, Patterson, also a former state attorney general, demanded that the *Times* run a retraction, insisting he was accused of "grave misconduct" as the head of the state. Alabama law required that public officials seek a

¹⁷³ WeWhorter, *Carry Me Home*, 164. See also, Branch, *Parting the Waters*, 283. Quoting from an interview in the *Montgomery Advertiser*, March 6, 1960, Sullivan warned demonstrators who continued to march and conduct sit-ins that the police would discipline them for "flaunting their arrogance and defiance by congregating at the Capitol."

¹⁷⁴ According to Branch, *Parting the Waters*, 280, Alabama Governor John Patterson ordered Alabama State President H. Council Trenholm to expel the students who requested service. Faced with losing state funding, Trenholm told reporters he had no choice but to do so.

¹⁷⁵ *Montgomery Advertiser*, February 26, 1961, as cited in "Affidavit in Support of Motion For Temporary Relief and Order to Show Cause," by Bernard Lee, in the case of *Abernathy v. Patterson*, supporting court documents found in Box 4, File 3, *Papers of Vernon Z. Crawford*, University of South Alabama (hereafter *Crawford Papers*.)

¹⁷⁶ Branch, *Parting the Waters*, 289.

retraction before filing a libel suit. If no retraction is made, they may recover punitive damages. In response, the *Times* ran an apology in a story under the headline "Times Retracts Statement in Ad."¹⁷⁷

Patterson filed suit anyway. It was identical to Sullivan's, naming the *Times* and the four ministers, demanding total of \$1 million in damages.¹⁷⁸ One exception, however, Patterson named King in the suit. By naming the Alabama ministers, he and Sullivan had assured that an Alabama Court would hear the case. Otherwise, the law could have allowed the *Times* to move the case to a federal court, and likely a more sympathetic one. Patterson had a long history of fighting desegregation. As state attorney general he secured a court order in 1956 barring NAACP activities in Alabama and fining the organization \$100,000 for failing to turn over its membership roster and contribution list.¹⁷⁹ The NAACP shut down its offices in Birmingham and fled to Atlanta. Seven years later the U.S. Supreme Court would rule against the state in the case.¹⁸⁰ It was also Patterson who engineered the state's perjury case against King. State officials had charged King with diverting church and civil rights contributions to his personal bank account without declaring them on his tax return. It was not long after Sullivan filed his suit that a white jury found King not guilty in the perjury case. As Roberts and Klibanoff put it: "Now the governor decided on a different strategy against King." Libel.¹⁸¹ Following Sullivan and Patterson, three more Montgomery officials followed with libel

¹⁷⁷ *New York Times*, May 16, 1960, 22.

¹⁷⁸ 376 U.S. at 278, n. 18.

¹⁷⁹ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), 360 U.S. 240 (1959), and 368 U.S. 16 (1961).

¹⁸⁰ 377 U.S. 288 (1964).

¹⁸¹ Roberts & Klibanoff. *The Race Beat*, 231.

suits. Mayor Earl James, city commissioner Frank Parks and former city commissioner Clyde Sellers each sued the *Times* and the four ministers for \$500,000.

Just weeks after the advertisement "Heed their Rising Voices" ran, the *Times* managed to stir up another hornet's nest 90 miles up the road in Birmingham, Bull Connor's fiefdom. *Times* editors had realized their lead civil rights reporter Claude Sitton needed more help as protests spread across the South in early 1960. They sent in another of the newspaper's stars, Harrison Salisbury, who had won a Pulitzer Prize for international reporting and had witnessed untold atrocities covering war in Europe. In one story filed from Alabama, he compared the atmosphere in Birmingham to that of Stalin's Moscow, though that was later edited out as too inflammatory. In his memoir, Salisbury wrote that it was easy to see that Birmingham was not your run-of-the-mill story. "I quickly compiled a list of horrors — beatings, police raids, floggings, cross burnings, assaults, bombings (dynamite seemed to be as common as six-packs), attacks on synagogues, terror, wiretapping, mail interception, suspicion of even worse" I soon realized that I had stumbled into a part of the United States where I had to apply the conspiratorial rules of reporting I had practiced for years in the Soviet Union."¹⁸²

On page one, the *Times* ran Salisbury's story on racial tensions under the headline "Fear and Hatred Grip Birmingham." He wrote: "No New Yorker can readily measure the climate of Birmingham today. Ball parks and taxicabs are segregated. So are libraries. A book featuring black rabbits and white rabbits was banned. A drive is on to forbid 'Negro music' on 'white' radio stations."¹⁸³ Salisbury also wrote of black men standing guard at night over black churches that were likely bomb targets because the

¹⁸² Salisbury, *Without Fear or Favor*, 380. For example, Salisbury later learned that the telephone in his Birmingham hotel room had been tapped.

¹⁸³ Harrison Salisbury, "Fear and Hatred Grip Birmingham," *New York Times*, April 8, 1960.

police would not help. He quoted anonymous sources, both black and white, who said they were afraid they would be killed if they spoke out. He quoted "an educator" as saying: "I am ashamed to have to talk to you off the record— these are not ordinary times. The dangers are very real and people up North must realize that." Salisbury also wrote that police commissioner Connor "ran on a platform of race hate." He quoted an anonymous businessman, who said "Bull is the law in Birmingham, like it or not."¹⁸⁴

The *Birmingham News* reprinted the story under the page-one headline: "New York Times Slanders Our City — Can This Be Birmingham?" An accompanying editorial said that Salisbury's story was "another journalistic and literary libel against the South" and complaining that it was "an amazing recital of untruths and semi-truths."¹⁸⁵

Salisbury's story brought more libel suits against the *Times*. Connor and other public officials demanded a total of \$3.5 million from the newspaper and \$1.5 million from him.¹⁸⁶ Plaintiffs in still other libel cases included Birmingham commissioners James Morgan and J.T. Waggoner, each asking \$400,000. Not long after, a Birmingham city detective named Joe Lindsey sued, asking for \$150,000.¹⁸⁷ A private communiqué between Waggoner and his lawyer, James A. Simpson, casts some doubt on whether Waggoner felt defamed personally. Simpson told Waggoner the suit would help deter newspapers such as the *Times* from committing "ruthless attacks on this region and its people. I am sure this is the primary motive which has prompted you to embark upon this troublesome litigation."¹⁸⁸

¹⁸⁴ Ibid.

¹⁸⁵ *Birmingham News*, April 15, 1960.

¹⁸⁶ *Connor v. New York Times*, Civil Action No. 9634, United States District Court Northern District of Alabama.

¹⁸⁷ *Lindsey v. New York Times*, Civil Action No. 9711. (Filed in the same court and later consolidated with the other Birmingham suits.)

¹⁸⁸ Simpson to Waggoner, April 19, 1960, Box 7, Folder 10, *Waggoner Papers*.

The story also brought libel suits from the bedroom community of Bessemer. Salisbury wrote of a lawless atmosphere where the police acted like hoodlums, beating civil rights protesters and sympathizers. "If fear and terror are common in the streets of Birmingham, the atmosphere in Bessemer, the adjacent steel suburb, is even worse."¹⁸⁹ Salisbury wrote about the "flogging" of a 19-year-old white woman named Barbara Espy. "She was seized by four or five men, dragged into a car, beaten until she signed a confession that she had been "dating" Negroes. She has since sworn out warrants charging that she was abducted and beaten by a sheriff's deputy, an alderman and three other persons. The sheriff repeatedly refused to entertain charges against his deputy. The Federal Bureau of Investigation has been asked to look into the case for possible violations of civil rights." The list of beatings, intimidations and violence could be continued almost indefinitely."¹⁹⁰

Three Bessemer city commissioners filed identical suits, also asking for \$500,000 each.¹⁹¹ A few months later, a Bessemer grand jury indicted Salisbury on 42 counts of criminal libel. No one could remember such a case in the previous quarter of a century and legal researchers on the case could find no direct precedent.¹⁹² Salisbury faced \$21,000 in fines and 21 years in jail.¹⁹³ It was evident, Salisbury later said, that the suits made news outlets covering the civil rights story "think twice about reporting the facts,

¹⁸⁹ Salisbury, "Fear and Hatred Grip Birmingham."

¹⁹⁰ Ibid.

¹⁹¹ *Lanier v. New York Times, Thompson v. New York Times, Parsons v. New York Times*, Case Nos. 9659, 9660, 9221, respectively, filed in 1960 in the U.S. District Court, Northern District of Alabama.

¹⁹² Salisbury, *Without Fear or Favor*, 383.

¹⁹³ According to an interview conducted by Lucas Powe and printed in *The Fourth Estate and the Constitution*, (Berkeley: University of California Press, 1991), the Bessemer indictments worried Salisbury "for several years since no DA was willing to take the political risk of dismissing them. Finally one quiet day three or four years later they were dismissed." See author's notes, 312.

harsh and raw as they often were.¹⁹⁴ Hall's *Montgomery Advertiser* discussed the same trend in a story about the rash of libel cases: "State Finds Formidable Legal Club to Swing at Out-of-State Press," and "the recent checkmating of the *Times* in Alabama will impose a restraint upon other publications."¹⁹⁵ Lawyers for the *Times* advised reporters to steer clear of Alabama for fear of bringing more libel suits or risk being served with a subpoena. Sitton, the *Times*'s most noted civil rights reporter, later told Salisbury, "Boy did I cuss you out. Your damn stories kept me out of Alabama for over a year."¹⁹⁶ But Sitton's coverage of the movement was affected for much longer than that. On the advice of their lawyers, *Times* editors killed a Sunday story Sitton wrote in late 1962 about a change in the Birmingham city government that might "depose Commissioner Eugene (Bull) Connor, whom Negroes regard as one of the South's toughest police bosses."¹⁹⁷ *Times* lawyer Tom Daly advised editors that the story "might indicate malice" in the pending Sullivan suit before the Supreme Court.¹⁹⁸ It did indeed appear that "public officials had achieved their objective, Jim Crow could return to its good old days, operating with virtually no scrutiny."¹⁹⁹

The libel actions had become a "state political weapon to intimidate the press," Anthony Lewis later wrote. "The aim was to discourage not false but true accounts of life under a system of white supremacy: stories about men being lynched for trying to vote, about cynical judges using the law to suppress constitutional rights, about police chiefs turning attack dogs on men and women who wanted to drink a Coke at a department-

¹⁹⁴ Salisbury, *Without Fear or Favor*, 384.

¹⁹⁵ Grover Hall, "Checkmate," *Montgomery Advertiser*, May 22, 1960, 15.

¹⁹⁶ Salisbury, *Without Fear or Favor*, 384.

¹⁹⁷ Memo for the file, November 27, 1962, Box 6; Sitton, Claude; 1961-1968, *Papers of Turner Catledge*, Mississippi State University (hereafter *Catledge Papers*).

¹⁹⁸ Memo for Mr. Catledge from the National News Desk, Box 6; Sitton, Claude; 1961-1968, *Catledge Papers*.

¹⁹⁹ Roberts and Klibanoff, *The Race Beat*, 240.

store lunch counter. It was to scare the national press ó newspapers, magazines, the television networks ó off the civil rights story.ö²⁰⁰

Coordinated efforts?

To what extent were the suits planned and coordinated by the groups of plaintiffs in Montgomery and Birmingham? Scholars have looked for such documentation, finding little direct evidence. T. Eric Embry, one of the lawyers representing the *Times* who would later sit on the Alabama State Supreme Court, reportedly said that the judge in the *Sullivan* case, Walter Burgwyn Jones, helped plan the libel actions. He said a group ömet in Jonesøoffice and concocted all these lawsuits.ö²⁰¹ Regarding any coordination, Salisbury only said: öGossip in the Montgomery courthouse had it that Jones sat in with the Montgomery citizens who masterminded the -libel suitøstrategy.ö²⁰²

Diane McWhorterø Pulitzer Prize winning book *Carry Me Home* also ponders the question. State senator James Simpson had long been the man behind the Bull in state and local politics. Simpson, a lawyer who represented iron and steel corporations and Birminghamø elite, had backed Connor in a successful run for state representative in 1934. Connor was wildly popular at the time and played up his role as representative of the common man, with his bad grammar and folksy demeanor. And like Simpson, Connor ran as a racist extremist. Simpson served three terms in the senate and was considered one of the most powerful men in Alabama. After three years in the state house, at the urging of Simpson, Connor made a successful run for Birmingham city

²⁰⁰ Anthony Lewis, *Make No Law, The Sullivan Case and the First Amendment* (New York: Random House), 35.

²⁰¹ *Ibid*, 26. Lewis also wrote that if there was such a meeting, the evidence probably no longer exists.

²⁰² Salisbury, *Without Fear or Favor*, 385.

commissioner, developing Birmingham into what was widely considered a police state with close ties to the Klan. Simpson often said: "He may be a son of a bitch, but he's my son of a bitch."²⁰³ Simpson represented Connor and the other Birmingham officials in their libel suits. "He took the *Times*'s affront personally: After all, he had helped create the [government] Salisbury had so witheringly invoked."²⁰⁴ In a letter to his clients, Connor, Morgan and Waggoner, Simpson worried that Salisbury's criminal libel indictment in Bessemer might hurt their case. Simpson said the Bessemer case "may make a martyr out of Salisbury or the people may conclude that he has been punished sufficiently and by the time the jury gets around to our case, the keenness of what we hope will be their resentment at his falsehoods may be dulled."²⁰⁵ Montgomery attorney M. Roland Nachman encouraged Sullivan and other commissioners to file suit, later insisting that they occurred independently from the Birmingham cases.²⁰⁶ Alabama's State Board of Education also contemplated filing suit based on the Heed "Their Rising Voices" ad, but appeared to discuss the matter independent of Montgomery and Birmingham officials.²⁰⁷

There also was a 1963 letter unearthed years later in the Birmingham city files written by an assistant city attorney discussing a possible libel suit relating to a pamphlet circulated by a civil rights organization headed by Rev. J. L. Ware and alleging police brutality.²⁰⁸ According to the Inter-Citizens Committee, Inc., a 26-year-old black World

²⁰³ McWhorter, *Carry Me Home*, 21.

²⁰⁴ *Ibid.*, 159.

²⁰⁵ Simpson to Morgan, Waggoner and Connor; September 8, 1960, Box 7, Folder 10, *Waggoner Papers*.

²⁰⁶ Kermit L. Hall, "Lies, Lies, Lies: The Origins of *New York Times Co. v. Sullivan*," *9 Comm. L. & Pol'y* 391-421 (2004).

²⁰⁷ Simpson to Waggoner, April 19, 1960, Box 7, Folder 9, *Waggoner Papers*.

²⁰⁸ Birmingham assistant city attorney William A. Thompson to Earl McBee, also an assistant city attorney, October 14, 1963, referring to: "Document No. 7 on Human Rights in Alabama, Unprovoked Shooting of Theotis Crymes By Police Officer Paralyzes Him For Life; Officer Goes Free." Pamphlet circulated by the Inter-Citizens Committee, Inc., Collection 987, Box No. 1, Folder 7, Birmingham Public Library Archives and Manuscripts.

War II veteran, Theotis Crymes, was driving to his home in Montevallo, Alabama, when he was stopped by police. The pamphlet said Helena, Alabama police chief Roy Damron shot Crymes in the back while he was standing with his hands on the police car. Crymes was paralyzed from the waist down. After the FBI identified Damron as the shooter, the officer was indicted by a federal grand jury, and later acquitted by an all-white jury. Birmingham assistant city attorney William A. Thompson suggested the authors of the pamphlet be prosecuted for criminal libel, citing city code.²⁰⁹ The Birmingham law read “Any person who publishes a libel of another which may tend to provoke a breach of the peace shall be punished, on conviction, as provided in Section 4.”²¹⁰ It appears that Birmingham officials were more interested in using libel law to keep the peace, reminiscent of the incitement cases from the eras of John Adams’s federalists, World War I and during the midcentury Red Scare. In 1963, Thompson argued that a libel “need not be directed toward a particular person.”²¹¹ It is arguable, then, that this ordinance allowed for prosecution of seditious libel.

Connor versus CBS

A year after the suits were filed against Salisbury and the *Times*, Connor once again turned to libel law when faced with coverage of the demonstrations in Birmingham. But this time, his wrath was aimed at CBS reporter Howard K. Smith, who had made his

²⁰⁹ Ibid. The pamphlet did not name any Birmingham police officers but referred to them in one paragraph: “When one reads in the local Birmingham newspaper of a police officer who was fired because he reportedly only shot into the fender of a car he was chasing (which he claimed was going over 100 miles an hour, the occupants being white), and then reads also that a federal court exonerates an officer who shoots down an unarmed, innocent Negro in cold blood, one might well question the existence of justice in the state at all.”

²¹⁰ Section 845 of the General City Code. Thompson noted almost identical wording from a similar 1940 ordinance, Title 14, Section 347, Code of Alabama 1940.

²¹¹ Ibid.

mark as a correspondent during World War II, one of the Murrows Boys who helped CBS dominate television news in the early days of broadcasting. Smith had come down to Birmingham to check out Salisbury's reports for the *Times*, and found that the reporter had not exaggerated.²¹² Many of his black sources were afraid to go on the air or be identified, yet Smith felt like the documentary would be in good shape to air after a week of editing and refining back in New York. He decided to delay his trip home after receiving a Klansman's tip that something big was going to happen at the bus terminal the next day, which also happened to be Mother's Day. The Freedom Riders were making their way into the Deep South.

Staked out at the Greyhound station before their bus arrived, Smith noticed police activity that would become their MO during demonstrations. Connor's men just melted away, refusing to keep order or protect demonstrators. Hundreds of whites milled around the terminal, which was across the street from police headquarters and Connor's office. The only national newsman on the scene, Smith later wrote: "All at once, in midafternoon, policemen began moving from the street into the basement of the Police HQ. Within five minutes there were no police to be seen anywhere."²¹³

When the bus pulled in, the melee soon became a bloodbath, Smith reported. "The riders were being dragged from the bus into the station. In a corridor I entered they were being beaten with bicycle chains and blackjacks and steel knucks. When they fell they were kicked mercilessly, the scrotum being the favored target, and pounded with baseball bats."²¹⁴ Smith then saw a white man look at his watch and shout to the others that it was time to leave. The police arrived moments after the whites fled in cars and on foot. Smith

²¹² Smith, *Events Leading Up to My Death*, 268.

²¹³ Smith, *Events Leading Up to My Death*, 271.

²¹⁴ Ibid.

broadcast hourly for the remainder of the day, and the *Times*, still steering clear of Alabama, published one of his broadcasts as text.²¹⁵ The reporter received so many death threats over the next few days he had to hire bodyguards. The mayor of his hometown, Monroe, Louisiana, sent him a telegram asking, “When are you going to do something we can be proud of?”²¹⁶ Smith’s producer David Lowe had warned him that the response to CBS coverage was going to be bad in the South, telling him before the broadcast, “You know how this report is going to turn out. However balanced we try to keep it, the Establishment is going to look awful because its position is awful.”²¹⁷

After the bus station beatings, the local Birmingham press, typically silent on civil rights issues or critical of the demonstrators and out-of-town troublemakers, actually began to cover the news with some semblance of balance. The *Birmingham News* asked in an editorial headlined “Where were the Police?”²¹⁸ The *News* accused Connor of knowing that the white “hoodlums” were waiting to waylay the Freedom Riders and that he sat in his office at City Hall and did nothing about it. “The Birmingham Police Department under Mr. Connor did not do what could have been done Sunday.” In the same edition, Connor defended his department’s performance by pointing out that he had let many officers off for Mother’s Day. And he showed his disdain for the unwelcome invaders of his city: “I have said for the last 20 years that these out-of-town meddlers were going to cause bloodshed if they kept meddling in the South’s business.”²¹⁹

²¹⁵ *New York Times*, May 15, 1961, 10.

²¹⁶ Smith, *Events Leading Up to My Death*, 272.

²¹⁷ Smith, *Events Leading Up to My Death*, 269. Pretrial documents in *Connor v. CBS* show that CBS conducted 77 interviews in Birmingham in preparation of “Who Speaks for Birmingham?” Documents located in Box 7, Folder 14, *Waggoner Papers*.

²¹⁸ *Birmingham News*, May 16, 1961, 1.

²¹⁹ *Ibid.*

Smith's documentary aired to a national audience at 9 p.m. on May 18, 1961.²²⁰ He gave time to both black and white citizens in a long series of interviews. In one interview, *Birmingham Post-Herald* columnist John Temple Graves insisted that Salisbury's reports were incorrect, that there was no "reign of terror." Birmingham attorney William S. Pritchard blamed "northern agitators" for wreaking havoc in his city, causing Negroes to "believe that they are the equal to the white man in every respect and should be just taken from savagery and put on the same plane with the white man in every respect. That's not true. He shouldn't be." Pritchard continued his racist diatribe on the air, insisting that "even the dumbest farmer in the world knows that if he has white chickens and black chickens, that the black chickens do better if they're kept in one yard to themselves." Shuttlesworth, one of the defendants in the Sullivan case, was among the few blacks willing to go on the air.²²¹ The civil rights leader talked of the beatings, of the attempts to bomb his church and home, including a blast on Christmas in 1956 that blew him out of his bed, amazingly unharmed. "I have to have somebody guard my home at night; the police won't do it." Life is a struggle here in Birmingham, but it's a glorious struggle.²²² At the end of the hour-long documentary, after recounting the latest beatings of the Freedom Riders at the bus terminal, Smith quoted a May 16 *Birmingham News* editorial agreeing with Salisbury's story, that "fear and hatred did stalk Birmingham's

²²⁰ *CBS Reports "Who Speaks for Birmingham?"*

²²¹ Shuttlesworth was one of the four ministers sued by Sullivan in 1960. In Birmingham, he was a big target, having successfully challenged, among many other things, a city ordinance that forbade whites and blacks from playing together. (*Shuttlesworth v Gaylord*, Civil Action No. 9505, in U.S. District Court for the Northern District of Alabama.) Struck down by Judge H.H. Grooms, the ordinance had listed forbidden interracial activities, including cards, dice, dominoes, checkers, softball, basketball, baseball, football, golf, track, and others.

²²² Shuttlesworth's battles with Birmingham officials have been well documented. See, e.g., Andrew M. Manis, *A Fire You Can't Put Out, The Civil Rights Life of Birmingham's Reverend Fred Shuttlesworth* (Tuscaloosa: The University of Alabama Press, 1999).

streets yesterday.”²²³ Yet, back in New York, CBS officials were running scared, critical of Smith’s civil rights coverage and insisting he should have been more balanced. Then they suspended the venerable reporter, one who had long been a household name. Simpson, the attorney for Connor and two other Birmingham officials, wrote CBS demanding a retraction. The letter insisted that Connor, Mayor James W. Morgan and Commissioner J.T. Jabbo Waggoner, were embarrassed both personally and as public officials and that the broadcast falsely accused them of being derelict in their work. The letter also said they were falsely reported to be “guilty of or encouraged or condoned ethnic, racial or religious intolerance.”²²⁴ Connor denied that he “aided, abetted, encouraged or approved delay in the arrival of police” to the scene of the Mother’s Day massacre at the bus station. After receiving the letter, CBS attorneys flew from New York to Birmingham to meet with Simpson. During the almost three-hour meeting, CBS representatives tried with little success to convince Simpson that the broadcast was truthful and presented both sides of the story.²²⁵ In a letter to his clients, Simpson discussed the issue of balanced reporting and encouraged them to proceed with the suit: “You cannot cure a libel after you have once stated it by showing that someone else disagrees with you or takes a different view.”²²⁶ CBS retracted the story in the *Birmingham News* on November 30, 1961 and broadcast a retraction on the local station WBRC-TV.²²⁷

²²³ “People are asking: ‘Where were the police?’” *Birmingham News*, May 16, 1961.

²²⁴ Simpson to CBS, November 6, 1961, Box 7, Folder 10, *Waggoner Papers*.

²²⁵ Simpson to Connor, James W. Morgan and Waggoner; November 24, 1961, Box 7, Folder 10, *Waggoner Papers*.

²²⁶ *Ibid.*

²²⁷ Simpson to Waggoner, Connor and Morgan; December 4, 1961, Box 7, Folder 11, *Waggoner Papers*. Simpson told his clients that the retractions “in no wise [sic] remedied the situation” and proceeded to file suit.

CBS executives had been most concerned with the network's image in the South. Smith remembered CBS creator William S. Paley once complaining: "While you boys are attending awards ceremonies for your latest bold thrust, it is left to me to look after the source of your livelihood, the offended Southern station owners who threaten a mass disaffiliation. You give me a stomachache."²²⁸ CBS officials fired Smith and prepared for a court battle with Connor and his cohorts.²²⁹

When the Freedom Riders moved on from Birmingham to Montgomery, federal officials realized too late that Sullivan was in cahoots with Connor.²³⁰ He also gave a mob of Klansmen time to confront the Freedom Riders at the bus station before calling in police.²³¹ "The local cops had agreed to give the Klan fifteen minutes to welcome them and work them over, and then, the damage done, the cops were to arrive. Fifteen minutes to have their pleasure."²³² After the riot, Sullivan told reporters in the terminal parking lot: "I really don't know what happened. When I got here, all I saw were three men lying in the street. There was two niggers and a white man."²³³ But it became apparent that he and other city leaders were getting worried about how the lawless beatings would look in press reports. He said later that afternoon: "We all sincerely regret that this happened here in Montgomery; it could have been avoided had outside agitators left us alone. Providing police protection for agitators is not our policy, but we would have been ready

²²⁸ Smith, *Events Leading Up to My Death*, 276.

²²⁹ *Connor v. CBS*, No. 10068-S; *Morgan v. CBS*, No. 10067-S; *Waggoner v. CBS*, No 10069-S, U.S. District Court for the Northern District of Alabama. As was the case with many of the near identical, multiple suits, these were consolidated not long after they were filed in 1961.

²³⁰ Arsenault, *Freedom Riders*, 215.

²³¹ See Branch, *Parting the Waters*, 420. See also J. Mills Thornton III, *Dividing Lines, Municipal Politics and the Struggle for Civil Rights in Montgomery, Birmingham and Selma* (Tuscaloosa: The University of Alabama Press, 2002).

²³² Halberstam, *The Children*, 309.

²³³ *Ibid.*

if we had had definite and positive information they were coming.”²³⁴ A Klansman was later overheard heralding Sullivan for working with his organization. “Sully kept his word. He said he’d give us half an hour to beat up those God-damned sons of bitches and he did.”²³⁵

On to Trial

Sullivan’s case was the first to make it to trial, and things looked bad for the defendants from the beginning. Embry, the *Times* attorney, as well as the lawyers for the four Alabama ministers, objected to the use of the word “nigger” in opening statements, but Judge Walter B. Jones overruled because this was the customary pronunciation.²³⁶ Also, white attorneys refused to address one of the ministers’ lawyers, Fred Gray, with “Mr.” and instead insisted on calling him “Attorney Gray.”

As it turned out, there were minor mistakes in the “Heed Their Rising Voices” ad. Sullivan pounced on them as evidence of falsity and libel. If the ad carried false statements, it contained false criticism of him, his lawyers argued. King had been arrested four times in Alabama rather than seven. The students had sung “The Star-Spangled Banner” at the Alabama state capitol, not “My Country ‘Tis of Thee,” which the ad claimed. The police did not “ring” the Alabama State campus, but rather amassed along one side of it with carbines, sub-machine guns, tear gas and drawn rifles. Also, nine Alabama State University students were expelled, but this was for demanding service at a lunch counter in the Montgomery County courthouse, not for leading the demonstration

²³⁴ As quoted in Arsenault, *Freedom Riders*, 217.

²³⁵ *Ibid.*, 220.

²³⁶ Brief and Arguments of Appellants, Abernathy, Shuttlesworth, Seay and Lowery, filed October 5, 1961 in *New York Times v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), Civil Rights Series, Box 4, File 2, *Crawford Papers*. See also Branch, *Parting the Waters*, 370-371.

at the Capitol building. The dining hall had not been padlocked, and nobody tried to starve the students. In fact, students who had protested were not allowed to register for the next semester, so they did not have access to the cafeteria between semesters. During this "week of grace," registered students get temporary meal tickets to tide them over.²³⁷ All of this was bad news for the *Times*. If Sullivan could show that there were errors in the ad, however insubstantial, he could win a libel case. Truth is an absolute defense in a libel suit, long established in common law and through various state statutes.

A series of witnesses for the plaintiff testified that the ad reflected badly on Sullivan. This included *Montgomery Advertiser* editor Hall, who had previously editorialized that the *Times* ad was made up of "lies, lies, lies" and possibly willful ones.²³⁸ On cross examination, Embry tried to get witnesses to say the ad made Sullivan even more popular in the community rather than damage his reputation. Two witnesses said they had not seen the ad until Sullivan's attorney showed it to them. On cross examination, all six witnesses said they believed the ad was false and none thought any less of him because of it. Sullivan also testified that he had not been shunned or ostracized after the ad ran. He said no one suggested he be removed from office and that he had lost no compensation.²³⁹

An all-white jury in Montgomery awarded Sullivan \$500,000 in damages and the Alabama Supreme Court affirmed the decision.²⁴⁰ The court agreed that the ad referred to Sullivan and that two paragraphs in question were libelous per se. Under Alabama law,

²³⁷ Affidavit in Support of Motion For Temporary Relief and Order to Show cause, by Bernard Lee, in the case of *Abernathy v. Patterson*, supporting court documents found in Box 4, File 3, *Crawford Papers*.

²³⁸ Grover Hall, "Lies, Lies, Lies," *Montgomery Advertiser*, April 17, 1960, at 3.

²³⁹ Testimony of Harry W. Kaminsky, William Parker, L.B. Sullivan and others, found with court documents in Civil Rights Series, Box 4, File 2, *Crawford Papers*.

²⁴⁰ *New York Times v. Sullivan*, 376 U.S. 253, 273 Ala. 656, 144 So. 2d 25 (1962).

this meant that the words tend to injure a person's reputation, trade or business, or charge him with an indictable offense or bring him into public contempt. While the case was on appeal, authorities seized Shuttlesworth's late-model Plymouth, which brought \$400 at auction, to help pay the judgment. They also sold off land owned by the three other ministers, bringing \$4,350 at auction.²⁴¹

Montgomery mayor Earl James's libel trial against the *Times* and the four preachers came next, in February 1961. *Jet* reported that the beards that James and five jury members wore were in preparation for the upcoming Civil War centennial event commemorating the Confederacy.²⁴² Judge Jones, who presided over the *Sullivan* case the previous November, was to administer the oath of office to a Jefferson Davis re-enactor at the upcoming 100th birthday event honoring the Confederate States of America.²⁴³ In keeping with tradition, he strictly enforced segregation in the courtroom. Jones also was the judge who issued a state injunction barring the Freedom Riders from the state, though demonstrators obviously ignored it.²⁴⁴

After the Alabama jury found for Sullivan and then James, *Times* managing editor Turner Catledge said he was "frightened as hell at this new weapon of intimidation which seems in the making."²⁴⁵ In a massive letter writing campaign, he tried to impress upon other editors around the country that they too would be in danger of being dragged into southern courts should the *Times* lose its appeal. He also worried about the financial hardships the *Times* was enduring with the wave of suits, complaining the newspaper's

²⁴¹ Manis, *A Fire You Can't Put Out*, 238; Branch, *Parting the Waters*, 386.

²⁴² *Jet*, February 16, 1961, 4.

²⁴³ *New York Times*, February 19, 1961, 50. Jones was also the judge who in 1956 outlawed the NAACP in the state. That injunction was still in effect at the time of the libel trials.

²⁴⁴ Branch, *Parting the Waters*, 442.

²⁴⁵ Catledge to *Miami Herald* editor Lee Hills, December 30, 1960, Box 16, Folder: Litigation: Libel-Alabama Case, 1960-1964, *Catledge Papers*.

bank accounts were coming out cleaned. This is an expensive business.²⁴⁶ He wrote to a friend at the Associated Press that if the Supreme Court upheld the Alabama judgments then all of us are out of business, because we will not be able to do our jobs.²⁴⁷

To the Supreme Court

Up to this point, the U.S. Supreme Court had not considered a libel case in the freedom-of-speech context. Libel laws were state laws, and the First Amendment did not protect libel or slander.²⁴⁸ In the U.S. Supreme Court's reversal of *Sullivan*, it established the landmark actual malice standard, marking not only a fundamental change in the law but in setting a course for First Amendment theory that would help alter the course of the civil rights movement. The Supreme Court ruled that in order to win a suit, a public official like Sullivan must prove the *Times* knew the material was false or that it exhibited reckless disregard for the truth when it printed the information. In his famous opinion, Justice William Brennan Jr. wrote that some errors are inevitable in an open debate of public issues and that freedom of expression needs breathing space to survive. False and defamatory statements should therefore be protected.²⁴⁹ In a case against a public official relating to his official conduct, merely allowing for truth as a defense does not protect speech as it should because it does not take into account self-censorship. People will be less likely to speak if they fear they will have to prove the

²⁴⁶ Catledge to W.F. Aycock, Jr., Memphis Publishing Company, March 23, 1962, Box 16, Folder: Litigation: Libel-Alabama case, 1960-1964, *Catledge Papers*.

²⁴⁷ Catledge to Wes Gallagher, October 11, 1962, Box 16, Folder: Litigation: Libel-Alabama case, 1960-1964, *Catledge Papers*.

²⁴⁸ Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale University Press, 2002).

²⁴⁹ 376 U.S. at 271-73.

truth of every utterance in court. Brennan referenced John Milton and John Stuart Mill on the important role false statements play in a hearty debate, quoting Mill: There is a clearer perception and livelier impression of truth, produced by its collision with error.²⁵⁰

The court agreed that the defendants were being punished for criticizing the government, hence, seditious libel had been resurrected. This was the very thing, Brennan said, that the First Amendment was supposed to guard against. Brennan drew from James Madison's central meaning of the amendment, that the people were sovereign, not the government. He wrote that "the great controversy over the Sedition Act of 1798" first crystallized a national awareness of the central meaning of the First Amendment.²⁵¹ In his analysis of *Sullivan*, Hopkins saw Brennan's heavy footprints through the social responsibility theory.²⁵² It is each citizen's duty, not just right, to question and even criticize the government. Further, Brennan drew on the work of Justice Oliver Wendell Holmes Jr. in applying the marketplace of ideas theory relating to the hazards of a sedition law: When given an opportunity, truth will win out over falsity.²⁵³ Justice Hugo Black, an Alabama native, met the issue of race head on in his concurring opinion in *Sullivan*, arguing that libel law was being used to beat down the civil rights movement: "One of the acute and highly emotional issues in this country arises out of efforts of many people, even including some public officials, to continue state-commanded segregation of

²⁵⁰ John Stuart Mill, *On Liberty* (Oxford: Blackwell, 1947), at 15; John Milton, *Areopagitica* in *Prose Works* (Yale, 1959).

²⁵¹ 377 at 273.

²⁵² W. Wat Hopkins, *Mr. Justice Brennan and Freedom of Expression* (New York: Praeger, 1991).

²⁵³ Hopkins, 84; Holmes's dissent in *Abrams v. United States*, 250 U.S. 616 (1919).

racism in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment.²⁵⁴

Sullivan shifted the burden of proof in libel cases from the defendant to the plaintiff and introduced the notion of fault in this context. The plaintiff has to show that the defendant published false information with a high degree of fault, that is, knowingly or recklessly.²⁵⁵ With *Sullivan*, the court allowed for honest mistakes in writing and speaking about a public official and relating to his public conduct.²⁵⁶ However, not all of the cases filed in the shadow of *Sullivan* automatically went away for the defendants after the Supreme Court's reversal. For example, Connor's case against the *Times* dragged on for two years after the Supreme Court ruled in *Sullivan*, for a total of six years in the court system. Other officials kept trying the same tactic, with the added burden of proving actual malice, filing libel cases in southern courts for years after the *Sullivan* ruling in 1964. Southern plaintiffs and their attorneys appeared not to see the actual malice standard as insurmountable, and merely added the "actual malice" language to their original complaints already in the court system.²⁵⁷

After Sullivan

In Connor's battle against the *Times*, an Alabama jury heard the case in U.S. District Court relating to Salisbury's story "Fear and Hatred Grip Birmingham."²⁵⁸ Among the libelous statements, Connor said, was that he campaigned on a platform of

²⁵⁴ 376 U.S. at 294-95 (Black, J., concurring).

²⁵⁵ Lewis, *Make No Law*, 157.

²⁵⁶ Clifton O. Lawhorne, *Defamation and Public Officials, The Evolving Law of Libel* (Carbondale: Southern Illinois University Press, 1971).

²⁵⁷ For example, Connor's attorney filed a quick-and-easy amendment that tweaked his claim against the *Times*, charging that Salisbury acted with actual malice.

²⁵⁸ *Connor v. New York Times*, 144 So.2d.

race hate. Connor testified at trial that he still advocate(s) the supremacy of the white race, and that he believed strongly in maintaining segregation, but denied that he campaigned on such a platform or that he hated anyone. Connor also said the *Times* libeled him by reporting that Shuttlesworth was a frequent target of police harassment. Shuttlesworth told Salisbury he had been arrested three times in a 72-hour period, that his telephone was tapped and that he had several civil-rights related cases on appeal.²⁵⁹ The court responded somewhat wryly: "A random glance at [court records] indicates that Rev. Shuttlesworth has indeed been involved in extensive appellate litigation."²⁶⁰ A sampling of Shuttlesworth's arrests, for example, include parading without a permit, failure to obey an officer, vagrancy, conspiring to commit a breach of the peace, disorderly conduct, criminal contempt for statements made at a press conference and for violating Birmingham's segregated bus ordinance.²⁶¹ Connor also complained that the *Times* told only one side of the story and that Salisbury did not try to verify facts or contact him. Connor had demanded a retraction after the story ran, so the newspaper printed his letter and an editor's note recognizing that the *Times* failed to stress the obvious fact that an overwhelming percentage of the citizens of that city lead happy and peaceful lives in a growing and prosperous community (and) that this substantial element of the citizenry

²⁵⁹ See Manus, *A Fire You Can't Put Out*. Here is a sampling: *Shuttlesworth v. City of Birmingham*, 1965, 382 U.S. 87, 86 S. Ct. 211, 15 L.Ed. 2d. 176; *Shuttlesworth v. City of Birmingham*, 1963, 373 U.S. 262, 83 S. Ct. 1130, 10 L.Ed 335; *In re Shuttlesworth*, 1962, 369 U.S. 35, 82 S. Ct. 551, 7 L.Ed.2d. 548; *Hanes v. Shuttlesworth*, 5th Cir. 1962, 310 F.2d 303.

²⁶⁰ 144 So.2d, 574.

²⁶¹ Arrest record of Fred Lee Shuttlesworth, October 16, 1963, Microfilm roll 9.11, *Birmingham Police Surveillance* Files, Birmingham Public Library Department of Archives and Manuscripts.

deplores any lawlessness that may exist in their city.²⁶² It also ran a rebuttal by the Birmingham Chamber of Commerce.²⁶³

At the District Court trial, even the judge questioned whether Connor was actually harmed by the article. From the bench, Judge H.H. Grooms told the jury before releasing them for deliberations that when they considered whether Connor suffered damage from the article, that they also might consider whether "instead of being damaged, Mr. Connor's political, social and financial prestige has likely been enhanced by *The New York Times* publication in Alabama." ²⁶⁴ After almost nine hours of deliberations, the Birmingham jury found that the *Times* acted with actual malice and awarded Connor \$40,000 in compensatory damages rather than the \$400,000 in compensatory and punitive damages he had requested. Connor told reporters he was pleased with the amount. "I appreciate it," he said from the courthouse steps.²⁶⁵ This was September 1964, six months after the Supreme Court reversed the Sullivan case. The two other libel suits filed by Mayor Morgan and Commissioner Waggoner came to trial with Connor's suit, but Grooms dismissed them because neither of their names were mentioned in Salisbury's story.

The *Times* appealed Connor's case in 1966, and the Fifth Circuit Court reversed the district court under the *Sullivan* rule. It held that Connor could not recover damages

²⁶² *New York Times*, May 4, 1960.

²⁶³ The Birmingham Chamber of Commerce passed a resolution condemning Salisbury and the *Times* for damaging the city's reputation and requested space in the newspaper for a rebuttal. The Chamber also offered to pay for a *Times* reporter to visit the city again in order to double check the accuracy of their rebuttal. Resolution dated April 21, 1960, Box 7, Folder 9, *Waggoner Papers*.

²⁶⁴ *Connor v. New York Times*, trial transcript, judge's instructions to the jury, unnumbered page, Box 1, Folder 9, *Connor v. New York Times Collection*, Birmingham Public Library Archives and Manuscripts.

²⁶⁵ "Connor Awarded \$40,000 In NY Times Libel Suit," United Press International story, undated, found in Box 1, Folder 9, *Connor v. New York Times Collection*.

because he failed to show that the *Times* acted in reckless disregard for the truth.²⁶⁶ It also ordered Connor to pay \$2,617.50 in court costs.²⁶⁷ In its reversal, the court praised the *Times*'s coverage. "They have exhibited a high standard of reporting practices. Salisbury did contact persons representing different viewpoints and made a conscientious effort to interview Connor and others; there is no evidence that he misquoted his sources or gave the information acquired from them a different slant than intended." Clearly these are not the actions of a sensation-seeking publication or of careless and shoddy reporting.²⁶⁸ After referencing the new actual malice standard in *Sullivan*, the court said that a reporter may rely on statements made by a source "even though they show only one side of the story" without fear of libel suits filed by public officials. However, Edward R. Murrow found grave defects in Salisbury's stories. After Murrow worked on stories from Birmingham in 1961, he said the situation was much worse than Salisbury had reported, that he had never seen such an atmosphere except in Hitler's Berlin just before World War II.²⁶⁹

Extending the *Sullivan* rule to public figures

The Supreme Court continued its rewriting of libel law through civil rights related cases with *A.P. v. Walker*, a suit resulting from coverage of the 1962 Ole Miss riot.²⁷⁰ With this case, the court left no doubt that it considered coverage of the movement "and the national conversation about it" protected by the First Amendment. Former Major General Edwin A. Walker had commanded federal troops at Little Rock's Central High

²⁶⁶ *New York Times v. Connor*, 365 F. 2d. 567 (1966).

²⁶⁷ *Ibid.*, Judgment, August 4, 1966.

²⁶⁸ 265 F. 2d. 567, 577.

²⁶⁹ Salisbury to Catledge, January 30, 1961, Box 16, Folder: Litigation: Libel-Alabama Case, 1960-1964, *Catledge Papers*.

²⁷⁰ 388 U.S. 130 (1967).

School in 1957 when President Eisenhower intervened during desegregation efforts there. Five years later at Ole Miss, Walker was widely reported to have unofficially led the white supremacists' forces during the violent desegregation protest. Walker, a Texan who had been highly decorated for commanding troops in World War II and Korea, had been disciplined for insubordination after distributing extremist right-wing literature to his troops while serving in peacetime Europe, and as a result had resigned from the military in 1961.²⁷¹ He had despised the Little Rock assignment and later said he regretted obeying Eisenhower's orders to desegregate Central High.²⁷² An unsuccessful run for governor of Texas followed. Walker remained active in politics, primarily as an extreme right-wing pundit with his own fan club of sorts, "Friends of Walker."

Over a Shreveport, Louisiana radio station, Walker issued a "call to arms" at Ole Miss to join Mississippi Governor Ross Barnett in fighting James Meredith's enrollment.²⁷³ During the broadcast, he called the Supreme Court "the anti-Christ" and urged "ten thousand strong" to bring your flags, your tents and your skillet!"²⁷⁴ The next day, he renewed the call during a television interview in Dallas. The day after that, he rallied listeners on a New Orleans radio station. At a September 30, 1962, press conference in Oxford, he again urged whites to stand by defiant Governor Barnett. Meanwhile, President Kennedy urged peace as Meredith was escorted on campus.

When the melee commenced that night, Walker was front and center, egging on the protesters, according to scores of reports from journalists on the scene. Karl Fleming

²⁷¹ Eric Pace, "Gen. Edwin Walker, 83, Is Dead; Promoted Rightist Causes in the 60s," *New York Times*, November 2, 1993.

²⁷² Jonathan M. Shoenwald, *A Time For Choosing, The Rise of American Conservatism* (New York: Oxford University Press, 2001).

²⁷³ 388 U.S. 130, note 22.

²⁷⁴ Brief for the Petitioner, *A.P. v. Walker*, January 4, 1967, 13.

of *Newsweek* later said Walker hopped onto a Confederate statue to encourage the crowd. "This time I'm on the right side," he shouted, waving his signature Stetson. "Don't let up now. You may lose this battle, but you will have to be heard. You must be prepared for possible death. If you are not, go home now."²⁷⁵ Associated Press cub reporter Van Savell wrote in his dispatch that he was standing less than six feet from Walker when he rallied his impromptu battalion. Savell, who, at age 21 and dressed like a college student, was able to fit in with the mob unnoticed. He also was a Mississippi native and former reporter for the segregationist Jackson *Clarion-Ledger*. His report was a hard news story, but also a scene setter told partially in the first person:

Walker first appeared in the riot area at 8:45 p.m., Sunday near the University Avenue entrance about 300 yards from the Ole Miss Administration Building. He was nattily dressed in a black suit, tie and shoes and wore a light tan hat.

The crowd welcomed Walker, although this was the man who commanded the 101st Airborne Division during the 1957 school integration riots at Little Rock, Arkansas. One unidentified man queried Walker as he approached the group. "General, will you lead us to the steps?"

I observed Walker as he loosened his tie and shirt and nodded "Yes" without speaking. He then conferred with a group of about 15 persons who appeared to be the riot leaders.

The crowd took full advantage of the near-by construction work. They broke new bricks into several pieces, took survey sticks and broken soft drink bottles.

Walker assumed command of the crowd, which I estimated at 1,000.²⁷⁶

The next morning as the riot quelled, federal marshals arrested Walker and charged him with sedition and insurrection. He was held by federal officials on a \$100,000 bond and sent to a Springfield, Missouri psychiatric facility for examination.²⁷⁷

²⁷⁵ Karl Fleming, *Son of the Rough South, An Uncivil Memoir* (New York: Public Affairs, 2005), 278.

²⁷⁶ September 10, 1962 Associated Press wire story, as cited in 388 U.S. 130.

²⁷⁷ Fleming, *Son of the Rough South*, 282.

Doctors pronounced him sane, but a federal grand jury in Oxford later refused to indict him.²⁷⁸ Walker sued the Associated Press and Savell for the stories about his actions in the Ole Miss riots. He denied categorically that he had any part in charging the marshals, which had been widely reported. He said he had counseled restraint and peaceful protest.²⁷⁹ He filed still more libel suits against 15 other media outlets for more than \$33 million in damages.²⁸⁰ They were virtually identical. According to Walker, he had been libeled with the report that he "led a charge of students against federal marshals on the Ole Miss campus" and the words "Walker assumed command of the crowd."²⁸¹

It was post-*Sullivan* 1964 when Walker's first case came to trial. Since Walker was not a public official he did not have to prove that the A.P. acted with actual malice. A particularly generous Shreveport, Louisiana jury awarded Walker \$ 3 million even though he had only asked for \$2.25 million.²⁸² He also found early success when a Texas jury awarded him \$500,000 in compensatory damages, and \$300,000 in punitive

²⁷⁸ "The General v. the Cub," *Time*, June 26, 1964; See also, Pace, "Gen. Edwin Walker, 83, Is Dead."

²⁷⁹ 388 U.S. 130, 141.

²⁸⁰ *Walker v. A.P.*, District Court, Tarrant County Texas, No. 16624, seeking \$2 million; he also sued the A.P. in Circuit Court of Duval County Florida, Civil Action No. 64-246-L, \$2 million; Circuit Court of Pulaski County, Arkansas, No. 58859, \$1 million; Caddo Parish District Court, Louisiana No. 160,536. *The Times-Picayune* was also named in that \$2.25 million suit; District Court in the City and County of Denver, Colorado, Civ. No. B66072. *The Denver Post* was named in this \$1 million suit; Circuit Court, Jackson County, Missouri, No. 133,768. *The Kansas City Star* was also named in this \$1 million suit; Circuit Court, Lafayette County, Mississippi, \$2 million. Walker's suits where the A.P. was not named included *Walker v. Courier-Journal*, U.S. District Court, Western District of Kentucky, Civil Action 4639, \$2 million; *Walker v. Times Publishing Company*, Circuit Court, Pinellas County, Florida, No. 17,694-L, \$2 million; *Walker v. Pulitzer Publishing Company*, U.S. District Court, Eastern District of Missouri, Eastern Division, No. 63C, \$2 million; *Walker v. Atlanta Newspapers, Inc.*, U.S. District Court, Northern District of Georgia, Civ. No. 8590, \$10 million; *Walker v. The Journal Company*, U.S. District Court, Eastern District of Wisconsin, Civ. No. 64-C-270; *Walker v. The Gazette Publishing Company*, Circuit Court, Pulaski County, Arkansas, Civ. No. 58857, \$1 million; *Walker v. Arkansas Democrat Company*, Circuit Court, Pulaski County, Arkansas, Civil No. 58858, \$1 million.

²⁸¹ Associated Press report, October 3, 1962.

²⁸² "Walker is Awarded \$3 Million In a Libel Suit Against the A.P.," *New York Times*, October 30, 1965. However, District Judge William Woods reduced the award against A.P. and the New Orleans Times Picayune Publishing Corporation, holding that a jury cannot award a plaintiff more than he asked for.

damages.²⁸³ But the United States Supreme Court found this ridiculous. In its 1967 reversal, the Court extended the *Sullivan* rule to public figures.²⁸⁴ It reasoned that “public men” are often in a position to exert an enormous amount of influence on the public in their words and actions. They are often speaking about issues that are of public interest, the court said, pointing to Walker’s media blitz leading up to the riot. And, like public officials, public figures can counter stories about them through ready access to the media, so they have plenty of opportunities to give their side of the story or counter any inadvertent mistakes the press might make.

Holding that the Associated Press did not publish the story with reckless disregard for the truth, the Supreme Court bought the argument as sold by the A.P.’s attorneys, that Walker “willfully, aggressively and defiantly thrust himself into the vortex of the controversy” at Ole Miss, a controversy “of profound political and social importance and national public interest.” And because of Walker’s stature, he was “in a position to significantly influence the resolution” of the “Oxford confrontation,” a showdown “which arrested the attention of the entire nation, and which has become a milestone in the century-long battle for racial equality.”²⁸⁵ Attorneys for the A.P. also pointed to what they saw as an obvious attempt by southern officials to stop coverage of the civil rights movement. “These cases were for the most part filed in forums in Southern or border states where it could reasonably be anticipated that juries would share the belief, widely held in the South, that the South’s position in the segregation controversy had been grossly falsified and maliciously reported by the national news media, and might

²⁸³ The trial court judge threw out the punitive damages, ruling that the A.P. showed no ill will, and the Texas Court of Civil Appeals affirmed, 393 SW. 2d 671 (1965).

²⁸⁴ The case actually was issued as a joint opinion reported as *Curtis Publishing Co. v. Butts, A.P. v. Walker*, 388 U.S. 130 (1967).

²⁸⁵ Brief for the Petitioner, *A.P. v. Walker*, January 4, 1967, 42.

therefore be influenced, in determining the issues of liability and damages, by the widespread regional feeling that irresponsible outsiders should be taught a lesson.²⁸⁶

In reversing the judgment, the Court said there was no evidence that the reporter had personal prejudice against Walker. Savell's reporting was accurate given that witnesses for both the plaintiff and the defendant testified that Walker assumed command of the crowd and led a charge. The court also said the nature of Savell's work, rapid dissemination of wire reports as events unfolded, should allow for innocent mistakes and there was not the slightest hint of a severe departure from accepted publishing standards.²⁸⁷

This chapter reviewed and in some instances delved deeper into libel suits previously studied by media law scholars. What follows are the libel cases that wound quietly through the courts that have heretofore gone unnoticed by historians. Bull Connor and General Walker were well known, of course. But they were not the only famous, or perhaps infamous, players who attempted to stop the media from covering their roles in the movement. Perhaps this dearth in scholarship is due to the fact that libel suits do not spark the emotion so easily prompted by bullets and billy clubs. Some of the plaintiffs and defendants are obscure, what Dittmer would call "local people."²⁸⁸ However, libel suits were filed for coverage of some of the most notable moments in the history of the civil rights movement. Suits working their way through the court system alongside *Sullivan* were filed by Neshoba County Sheriff Lawrence Rainey, who captured the nation's attention as a suspect in the murder of three civil rights workers in Philadelphia,

²⁸⁶ Ibid, 30.

²⁸⁷ 388 U.S. 130, 159.

²⁸⁸ John Dittmer, *Local People, The Struggle for Civil Rights in Mississippi* (Chicago: University of Illinois Press, 1991).

Mississippi. Other plaintiffs were Martin Luther King Jr. assassin James Earl Ray and Robert Shelton, Alabama's imperial wizard of the Ku Klux Klan. Some of their cases would remain in the court system for years, and even decades, after the *Sullivan* decision.

CHAPTER FOUR

The Suits in the Shadow

The pastoral images of the South's magnolias and mint juleps continued to crumble with the powerful work of photographers like Charles Moore in the 1960s. He spent years on the front lines of the civil rights struggle, camera in hand. And when Air Force veteran James Meredith desegregated Ole Miss by court order in 1962, Moore was the only photographer trapped inside the Lyceum administration building on the university campus with scores of United States marshals. In his photos, the officers looked like invading aliens with their gas masks and white domed helmets.²⁸⁹ To southerners, the marshals might as well have been. They were here to destroy a way of life, to breakdown the whiteness myth that had enjoyed decades of cultivation.

Moore's pictures show rows of bandaged and bloody federal officers. Earlier in the day, Moore had been all over Oxford, Mississippi with his camera, capturing images of jeering Ole Miss students and other locals sitting on each another's shoulders and waving Confederate flags the size of bed sheets. The South looked bad and Mississippi Highway Patrol Commander T.B. Birdsong hated the way the national media portrayed his troopers. He especially hated what they wrote. These journalists were taking over some of the traditional tools of newspapers and magazines that white southerners had long utilized to help them maintain blackness and whiteness in distinct opposition. The image of the black animal rapist so aptly described by Hale was thrown out the window

²⁸⁹ For Moore's body of work on the civil rights movement, see *Powerful Days, The Civil Rights Photography of Charles Moore* (New York: Steward, Tabori & Chang, 1991).

by clean-cut, necktie-bedecked Air Force veteran James Meredith.²⁹⁰ He was the civilized one and the white protestors were the animals, according to media images sent around the world. That role reversal represented a direct threat to the race making that had formed the bedrock of southern society.

Stinging from the coverage in the days following the riot, Birdsong was particularly irked by a story in the *Saturday Evening Post* called "What Next in Mississippi?" by Robert Massie. He was a freelancer living in New York who witnessed the Oxford riots on September 30, 1962.²⁹¹ Like the scores of other reporters on the scene, Massie portrayed the white protestors as the armed aggressors and the marshals as overwhelmed. Governor Ross Barnett had whipped the protestors into a frenzy, appearing on statewide television and declaring on the radio that Mississippi was a sovereign state that would not obey the court's desegregation order. Racial mixing, according to Barnett, was unthinkable and would lead to the demise of the pure white race. "NEVER! We will not drink from the cup of genocide."²⁹²

Birdsong filed a \$220 million class action suit for Massie's article that said his men failed to help federal marshals rein in the mob that night.²⁹³ Birdsong said he and his men were libeled in these two sentences about the riots that killed two people and wounded more than 100 others: "A sizable portion of the blame must go to the gray-uniformed men of the Mississippi Highway Patrol. Those bastards just walked off and

²⁹⁰ Grace Elizabeth Hale, *Making Whiteness, The Culture of Segregation in the South, 1890-1940* (New York: Vintage Books, 1999).

²⁹¹ Robert Massie, "What Next in Mississippi?" *Saturday Evening Post*, November 10, 1962, 18-23.

²⁹² John Dittmer, *Local People, The Struggle for Civil Rights in Mississippi* (Chicago: University of Illinois Press, 1991), 274, quoting a transcript of Barnett's speech housed at Mississippi State University.

²⁹³ *Curtis Publishing v. Birdsong*, 360 F.2d 344; 1966 U.S. App. Lexis 7392.

left us,ö said one top official of the Department of Justice.ö²⁹⁴ Birdsong took exception to öthose bastards,ö which he said were öobscene and fighting wordsö that reflected on his personal reputation and that of his officers.²⁹⁵

The work of other reporters lends credence to Massie's veracity in the *Post* article. For example, Karl Fleming of *Newsweek* saw Mississippi state troopers doing little to control the riot and he overheard one officer scornfully dub the marshals öKennedy's Coon Clan.ö²⁹⁶ With another *Newsweek* reporter, Fleming had darted into an adjacent building and watched the battle from the windows of a science lab classroom. He wrote that öthe badly outnumbered and outgunned marshals were fighting for their lives.ö²⁹⁷ Fleming said that during the riots he was stunned to see the patrolmen driving away from the scene. öI counted sixty-eight cars in all ö past our window and out of the campus, leaving the marshals on their own. The front entrance to the campus was now unguarded, and more rioters poured in, armed with .22 squirrel guns, high-powered rifles, shotguns, knives, clubs, and blackjacks.ö²⁹⁸

Birdsong's official police report of the riots paints a completely different picture of the state troopers' actions. Birdsong, code named öUnit A,ö faults the marshals for starting the riot and characterizes the National Guard as overtly hostile to his police force.²⁹⁹ Birdsong wrote in his report that before the riot started, several of his officers

²⁹⁴ Massie, öWhat Next in Mississippi?ö 19.

²⁹⁵ Amendment to Complaint, *Curtis Publishing v. Birdsong*, No. 22,277 (5th Cir. July 14, 1964). Lower courts had addressed the question regarding whether words of general abuse and vituperation are libelous, ruling that they are not in and of themselves actionable. E.g., *Crozman v. Callahan*, 136 F. Supp. 466 (W.D. Okla. 1955); *Bolton v. Strawbridge*, 156 N.Y.S. 2d 722 (1956); *Notarmuzzi v. Schevack*, 108 N.Y.S. 2d. 172 (1951).

²⁹⁶ Karl Fleming, *Son of the Rough South, An Uncivil Memoir* (New York: Public Affairs, 2005), 279.

²⁹⁷ *Ibid.*, 278.

²⁹⁸ *Ibid.*, 279.

²⁹⁹ Official Report, Box 8, Folder 7, *Leesha Faulkner Collection*, McCain Library and Archives, University of Southern Mississippi (Hereafter *Faulkner*).

saw an unprovoked marshal strike a student with his billy club. "Students came to his rescue and Highway Patrolmen stepped in and sent the crowd back across the street. The marshals were told by the Patrolmen that they had come close to causing a riot and that their cooperation was necessary to prevent one getting started. The crowd was complying excellently with the Patrolmen's directions." Birdsong continued: "Suddenly someone shouted 'Gas,' and the marshals began firing immediately. There was no incident or provocation that prompted the firing of gas."³⁰⁰ Birdsong said the marshals fired their gas guns point blank at his troopers' backs instead of the customary method of firing them at the feet of the crowd. One trooper, Birdsong wrote, was even knocked unconscious and hospitalized by such a blow. After they had retrieved their gas masks from their cars, the troopers returned to their posts, according to the report. However, the gas was so overwhelming, "Unit A" ordered the men to regroup on Highway 6 and await further instructions. Birdsong said that he met with the federal officers inside the Lyceum administration building and they agreed the state troopers should move out of town to set up roadblocks for any more rioters arriving on campus. He said his officers held their posts "throughout the night without sleep and no relief." At dawn, Birdsong said, a detachment of the 503rd Military Police Battalion confronted his troopers at the roadblock on Rebel Drive and Fraternity Row. The MPs had fixed bayonets and marched the state troopers to the shoulder of the road before releasing them a couple of hours later.³⁰¹

Stories of what happened and when are bound to differ amid such chaos.

Historian Taylor Branch confirms some of Birdsong's version of events, writing that there were a "few remaining highway patrolmen struggling against the mob, these most

³⁰⁰ Ibid., 8-9.

³⁰¹ Ibid., 15.

dutiful of the Mississippi officers were rewarded with a dose of gas from behind at point-blank range. A casing knocked one patrolman unconscious and the gas nearly killed him.³⁰² FBI agents said they heard Birdsong's withdrawal order on the state patrol's radio frequency at about 7:25 p.m. Birdsong's report had the time at 2100 hours, or 9 p.m. Branch wrote that by 7:40 p.m. "it was generally established that most of the highway patrolmen had vanished."³⁰³

Stories like Massie's for the *Post* overwhelmingly painted the Mississippi officers in a bad light. He wrote that a state patrolman laughed as white protesters slashed the tires of an army truck. He also said a state trooper stood by while a mob beat up a news photographer. "An Oxford woman rushed over to the state trooper. 'Aren't you going to stop them?' she cried. The patrolman grinned at her. 'I don't see nothing, lady, do you?'"³⁰⁴ There is no question that this characterization of the trooper as the antithesis of the southern gentlemen flew in the face of the carefully cultivated image that the South had made. Birdsong demanded a retraction and *Post* editors refused. Though the riot occurred in Mississippi and all plaintiffs were residents of that state, Birdsong sought \$220 million in a class action suit filed in U.S. District Court in Birmingham, Alabama, a court known for its willingness to punish members of the northern media. Birdsong said the *Post* libeled all 220 officers in the state highway patrol, but lawyers for Curtis Publishing argued that a class action suit, by its very definition as a large group of plaintiffs, cannot a libel suit make.³⁰⁵ The individuals in such a case are not

³⁰² Taylor Branch, *Parting the Waters, America in the King Years, 1954-1963* (New York: Simon & Schuster, 1988), 664-665.

³⁰³ *Ibid.*

³⁰⁴ Massie, "What Next in Mississippi?" 19.

³⁰⁵ Though he refused to dismiss the case, U.S. District Judge H. H. Grooms agreed with Curtis Publishing on the class action question, writing: "if this is not a proper class action in that the particular part of the publication complained of refers only to those members of the Mississippi Highway Patrol who were

identifiable.³⁰⁶ Curtis lawyers argued that this was an impersonal criticism of governmental operations.³⁰⁷ The court ruled that the case could be heard in Alabama, and Curtis Publishing appealed to the Fifth Circuit on the grounds that Alabama courts had no jurisdiction in Mississippi.³⁰⁸ The riot did not occur in Alabama. The writer did not even pass through Alabama while working on the story, and none of the parties involved in the case had any connection to Alabama.

Before the Fifth Circuit, well after the U.S. Supreme Court overturned *New York Times v. Sullivan*, Curtis Publishing argued that the actual-malice doctrine applied here because the alleged libel concerned criticism of public officials in the performance of their official duties. The appeals court reversed the lower court's decision.³⁰⁹ But it did not even reference the *Sullivan* ruling, by then two years old. There was no discussion about the need to prove actual malice when writing about a public official. Instead, the appeals court focused on jurisdictional problems and the use of the words "those bastards." The appeals court found it was easy to see why Birdsong sought an Alabama court, which had proven that its long-arm statute was more generous than that of Mississippi. Alabama courts had become notorious for ruling that northern publications should have to answer to Alabama citizens for coverage of the civil rights movement, as illustrated by cases filed by L.B. Sullivan, Bull Connor and others. The Fifth Circuit

involved at Oxford and who wore gray uniforms. Certainly not all of the (member of the department) were on duty at Oxford. ö

³⁰⁶ Curtis Publishing cited some convincing case law in this regard, including a case where Curtis had been the defendant, *Fowler v. Curtis Publishing Co.*, 182 F. 2d 377 (D.C. Cir. 1950), in which the court held that one cab driver was not libeled by a statement calling a group of 61 drivers dishonest. ö Also, see *Service Parking Corp. v. Washington Times Co.*, 92 F2d 502 (D.C. Cir. 1937), where one of 10 parking lot owners was denied recovery for a charge that the downtown lot owners were "chiselers." ö

³⁰⁷ Motion of Defendant to Dismiss Action for Failure to State a Claim upon which Relief can be Granted, *Curtis Publishing v. Birdsong*, No. 22,277 (5th Cir. June 16, 1964).

³⁰⁸ Application for Permission to Appeal from Orders of the United States District Court for the Northern District of Alabama, *Curtis v. Birdsong*, No. 22,277 (5th Cir. January 6, 1965).

³⁰⁹ 360 F. 2d. 344 (1965).

agreed with Curtis Publishing that the word "bastard" did not defame Birdsong: "It is not entirely clear whether the plaintiffs are alleging that by the use of the phrase "those bastards" the allegedly libelous article questioned the legitimacy of their birth."³¹⁰ The court said no reasonable person would believe that the reporter accused every patrolman on duty at Ole Miss "of having been born out of wedlock." The court said that the words "reflect more on the character of the user" than on the person to whom they are referring.³¹¹

Sheriff Dewey Colvard's Cow Prods

Playwright Lillian Hellman attended the 1963 March on Washington as a freelancer for *Ladies Home Journal*, writing a story sprinkled with memories of race relations in the South from her perspective as a New Orleans native.³¹² She had planned to meet up with a young marcher from Louisiana, the son of her childhood nanny, Sophronia. Though she and Sophronia's son did not find each other in the sea of demonstrators, Hellman found plenty of material in her interviews with other marchers, focusing on three youths from Gadsden, Alabama.

She wrote of police officers there using electric cow prods on black protesters in Alabama. She quoted a young man who said: "It's just awful when you're sweating, it's just awful how it comes through you. But nobody screamed except one boy when they put the cow prodders to his pants. You know, the place in his pants." The youth told

³¹⁰ Ibid., at 348.

³¹¹ The court cited other cases that agreed such words are not of themselves actionable. Among them: *Robbins v. Treadway*, 1829, 25 Ky. (2J.J. Marsh.) 540, 541 and *Rice v. Simmons*, 1838, 2 Del. (2 Harr.) 417, 31 Am.Dec. 766.

³¹² Lillian Hellman, "Sophronia's Grandson Goes to Washington," *Ladies Home Journal*, December 1963, 80.

Hellman that his friend still drags his legs, and the doctor said maybe he always would. A teen girl also told Hellman that police put the prod to her breast during a protest in Gadsden. Hellman quoted Alabama Senator John Sparkman as saying the use of cow prods was nothing new in police departments. Other participants in the Washington march described mistreatment at the Alabama State Penitentiary, where they were taken after picketing in Gadsden. People were crammed into cells with no beds or blankets and given dirty food twice a day.³¹³ In the South, race making had created black as animal and white as master, so the protestors were being treated like the cattle they were thought to be.

The editors at *Ladies Home Journal* were thrilled with the imagery in the story Hellman filed. Editor Caskie Stinnett sent Hellman an edited copy of the article marked with only minor changes before it was published in December 1963. He gushed: I can't say that I'm surprised at receiving such a fine article from you because I was quite sure that we would, but I wanted you to know that I was genuinely delighted.³¹⁴ Before Hellman's story ran in the magazine, another *Journal* editor asked her to take more assignments, also praising her story: It's a wonderful piece filled with meaning and beautifully written [sic], and I'm proud to publish it in our magazine.³¹⁵

Hellman did not name names in her story, but Etowah County, Alabama Sheriff Dewey Colvard said Curtis Publishing libeled him in the article, "Sophronia's Grandson Goes to Washington."³¹⁶ Colvard said the "sensational" story was "wholly untrue and not

³¹³ Ibid., 80.

³¹⁴ Caskie Stinnett to Lillian Hellman, September 20, 1963. Box 72, Folder 5, *Papers of Lillian Hellman*, Harry Ransom Humanities Research Center, University of Texas at Austin (*Hereafter Hellman Papers*).

³¹⁵ Davis Thomas to Hellman, September 23, 1963, Box 72, Folder 5, *Hellman Papers*.

³¹⁶ *Colvard v. Curtis*, United States District Court of the Northern District of Alabama, Case No. 64,140, filed March 23, 1964.

founded in fact,ö demanding \$1 million in compensatory and \$2 million in punitive damages.³¹⁷ At this point, Curtis Publishing was drowning in litigation, but not all of it relating to civil rights stories. By the end of 1963, the company was facing almost \$30 million in libel suits.³¹⁸ With declining circulation figures and advertising revenues, editors had tried to reverse course by turning the flagship *Saturday Evening Post* into a ösophisticated muckraker.ö³¹⁹ Some sloppy journalism followed, most notably a gaff published in the *Post*, öThe Story of a College Football Fix,ö which used unreliable sourcing to accuse University of Alabama football coach Bear Bryant of öfixingö a game with Wally Butts of the University of Georgia.³²⁰ Once a prosperous trailblazer in the magazine industry, the struggling company was eager to settle out of court whenever it could. So when the Gadsden sheriff threatened to sue, the gun shy *Journal* issued a retraction. The bellicose Hellman was furious, and in a letter to the magazine editors, said: öI wish to disassociate myself from the above retraction. What is true should not be obscured by fear of lawsuits.ö³²¹ Hellman, linked with many left-wing causes, was known for her strong personality and for standing by her convictions. For that, she had been blacklisted in Hollywood during the 1950s when she refused to denounce friends who had been labeled as communists.³²²

Colvard had originally filed suit in the Circuit Court of Etowah County, but Curtis Publishing was able to get the case transferred to U.S. District Court for the Northern District of Alabama, citing conflict-of-interest concerns since Colvard would be party to

³¹⁷ öCurtis Publishing Is Named in a \$3 Million Libel Suit,ö *New York Times*, February 27, 1964, 39.

³¹⁸ Theodore Peterson, *Magazines in the Twentieth Century* (Urbana: University of Illinois Press, 1964).

³¹⁹ *Ibid.*, 198.

³²⁰ *Curtis Publishing v. Butts*, 388 U.S. 130 (1967). Coincidentally, this is the companion case to *AP v. Walker*, the civil rights related case also discussed in this study, which extended the actual malice standard to public officials.

³²¹ Hellman to Curtis Publishing, February 28, 1964, Box 72, Folder 5, *Hellman Papers*.

³²² Deborah Martinson, *Lillian Hellman, A Life with Foxes and Scoundrels* (Berkeley: Counterpoint, 2005).

a libel case in his own county. Like other members of the northern media, Curtis had originally tried to get the case thrown out all together for lack of jurisdiction.³²³ Alabama Courts, however, had consistently rejected that idea. By the end of 1964, Curtis was ready to settle out of court. The company reported a net loss of \$4.2 million for the third quarter of that year and an operating deficit of \$8 million for the first half of the year.³²⁴ But with the timing of the *Sullivan* decision, the law was now on Curtis's side. Just like *Sullivan*, Colvard was an elected police official. And just like *Sullivan*, he sued though he was never even named in the article. A federal judge in Birmingham dismissed the suit six months after the *Sullivan* doctrine was created.³²⁵ This was one of the fastest reactions to *Sullivan* by a southern court, and Colvard, unlike Bull Connor, did not appeal.

Aaron Henry and the 'Diabolical Plot'

Mississippi's NAACP president Aaron Henry was driving about 30 miles south of his home in Clarksdale when he picked up a white hitchhiker in March 1962. After the teenager, Sterling Lee Eilert, settled in the front seat and the pair was back on the road, Henry asked the Memphis youth if he could find him a white woman. When Eilert refused, Henry said he could stand in as a substitute and reached for the 18-year-old's crotch. Eilert then jumped from the slow moving car and ran, noting the make and model of Henry's vehicle and the last few digits of his license plate number.³²⁶ This is the story that Clarksdale police chief Ben Collins spread around anyway. He arrested Henry on a

³²³ Petition of the Curtis Publishing Company, Inc. for Removal, filed March 18, 1964.

³²⁴ Robert E. Bedingfield, "Minow May Take Top Curtis Post," *New York Times*, November 12, 1964, 1.

³²⁵ Robert E. Bedingfield, "Filing of \$2 million Libel Suit Adds Item to Agenda at Curtis," *New York Times*, November 11, 1964, 61.

³²⁶ Aaron Henry with Constance Curry, *Aaron Henry, The Fire Ever Burning* (Jackson: University Press of Mississippi, 2000).

general charge of misconduct the same day and jailed him overnight. At a justice of the peace hearing two days later, the hitchhiker testified that the Clarksdale pharmacist had picked him up then propositioned him for sex.³²⁷

Henry said he had never seen Eilert before and accused Collins and Coahoma County district attorney Thomas H. (Babe) Pearson of setting him up to make everyone believe he was homosexual. Henry said Collins and Pearson must have enlisted the teenager to make the charges against him. He was fined \$500 and sentenced to six months in jail on a charge of disorderly conduct.³²⁸ He said the usual accusation that NAACP leaders were communists or communist sympathizers was not doing enough to discredit civil rights leaders, so this was what Collins and Pearson must have come up with instead. "There's not a soul involved in this except that goddamn Ben Collins and that chickenshit Babe Pearson," Henry said to some friends, later wishing he had not been so vocal in public.³²⁹ But he worried that charges of homosexuality would scare away would-be participants in the movement and figured Collins and Pearson would do anything to discredit him.

Vera Pigeo, a civil rights activist who worked regularly with Henry, told him a few days later of an anonymous phone call she had received. The caller whispered to her that Henry was lucky to be alive. The caller said he had agreed to hang Henry in the jail the night he was charged but decided not to go through with it. Police were to explain the

³²⁷ *Henry and Curry, Aaron Henry*, 128. According to Constance Curry: "While it appears that the 1962 charge was trumped up and a case of harassment, Aaron Henry's bisexuality was later assumed by his friends and associates. The essence of their interview comments was: 'We all knew it, it made no difference to us, and it had no impact on his political life nor on his contributions to the freedom movement.'" Henry's memoir was completed by Curry after Henry's death. She added this footnote.

³²⁸ "New Trial Opens For Aaron Henry, Youth Accuses Official Of NAACP With Making Immoral Advances," UPI wire story, *Commercial Appeal*, May 22, 1962.

³²⁹ *Ibid.*, 124.

next day that he committed suicide in disgrace over the morals charge.³³⁰ Henry's friend Medgar Evers encouraged him to tell U.S. Justice Department official John Doar about the incident, and they made a late-night appointment to meet while Doar was in Jackson. United Press International reporter John Herbers saw Henry leaving the federal building after midnight and called him the next day to ask what was going on. "I told him everything that had happened and almost everything I suspected," Henry later wrote in his memoir.³³¹ Henry doesn't remember using the words "diabolical plot." He thought later that Herbers suggested it and he agreed. Regardless, Herbers quoted him as saying there was "a diabolical plot cooked up" by Pearson and Collins to discredit him.³³² Further, Henry said he asked the Justice Department to investigate his Saturday night arrest and said he had "unimpeachable witnesses to prove" he had not left Clarksdale over the weekend.³³³

Clarksdale officials were furious about the temerity of one of their second-class citizens. "Babe Pearson phoned me and said, 'Look here, nigger, I just got through reading the paper where you have been talking about me. Listen goddammit, I'm gonna stop you from talking about me.'"³³⁴ Pearson filed a \$25,000 libel suit against Henry several days later based on the UPI story and Henry's "diabolical plot" quote.³³⁵ Collins also filed suit, this one for \$15,000, for the same story.³³⁶ Henry, Pearson and Collins had already had a long history together as leaders of the black and white communities. Henry worked for equal rights. Pearson and Collins had long worked against him.

³³⁰ Ibid., 123.

³³¹ Ibid., 125.

³³² Exhibit B, United Press International, *Pearson v. Henry*, No. 5724, Coahoma County Circuit Court.

³³³ Ibid.

³³⁴ Henry and Curry, *Aaron Henry*, 125.

³³⁵ *Henry v. Pearson*, 253 Miss. 62 (1963).

³³⁶ *Henry v. Collins*, 253 Miss. 34, 158 So. 2d 28 (1963).

This suit was unusual in that Pearson and Collins went after the civil rights leader rather than the media outlet distributing the message. It harkened back to *Sullivan*, though, where four civil rights leaders were named as defendants along with the *New York Times*. In one of Sullivan's companion suits, the one filed by Alabama Governor John Patterson, Martin Luther King Jr. was also added as a defendant. Clearly, in their efforts to keep whiteness supreme, southern officials had become interested in punishing the disenfranchised speaker as well as the media messenger.

Henry had grown up in Clarksdale and whites did not consider him a threat. But Henry served as a staff sergeant in an all-black trucking unit in World War II and returned eager to change society, like so many other black soldiers. Blacks had fought Nazism and fascism overseas, and it was time to insist on exercising their rights back home. In 1946, when Henry returned to Clarksdale, he became the first black to register to vote in Coahoma County. He faced no opposition from whites. A handful of other black men, mostly World War II veterans, saw that Henry was not harassed for registering so they followed suit, all voting in the next Democratic primary.

There was no pharmacy school for blacks in Mississippi, so he attended Xavier University in New Orleans on the GI Bill, graduating in 1950 with a bachelor's degree in politics and government, as well as pharmacy. He then returned to Clarksdale with his new wife Noelle to open a drugstore. The Fourth Street Pharmacy became the unofficial headquarters for civil rights workers for the next three decades. Two years after he moved home, Henry led the push to establish an NAACP chapter in Clarksdale after two white men raped two black teenagers and went free. He was elected president of the local chapter at the organizational meeting in 1952. Originally the idea was to get NAACP

legal help when court cases arose, but national NAACP representatives such as attorney Thurgood Marshall visited Clarksdale from time to time and promised astonishing things. The desegregation of Ole Miss was one. Medgar Evers became one of the first members of Clarksdale's chapter, and he would become its best known.

In 1956, the state legislature established the Mississippi Sovereignty Commission to fight enforcement of school desegregation, suffrage and other civil rights. Along with conducting a massive public relations campaign, the Sovereignty Commission funneled funds to the local Citizens' Councils and set up an intricate spy network to undermine civil rights efforts. The commission employed investigators and paid informers to watch the troublemakers. Sovereignty Commission records detail the close tabs segregationists kept on Henry, showing an eagerness to follow his actions closely and discredit him if need be.³³⁷ In 1957, Clarksdale's white leaders told Sovereignty Commission investigators they would rather have Henry lead the local chapter of the NAACP because they knew him. "He acts in the open and makes it easier to keep up with the activities of the Negroes in [the] area. About all that Henry and his crowd have done is to talk" ³³⁸ They noted that Henry planned to run for the state NAACP presidency and that he appeared to have enough support to be elected. White leaders "found him to be lesser a radical than the current group of state officials."³³⁹

Henry was elected NAACP state president in 1959. It was customary for a state officer to resign his local post, but because no one wanted to take the Clarksdale

³³⁷ Report to Governor Coleman from DeCell, December 17, 1957, SCRID# 1-16-1-19-1-1-1, Mississippi State Sovereignty Commission, Mississippi Department of Archives and History, viewed on June 19, 2007 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php (hereafter *Sovereignty Commission*).

³³⁸ Ibid.

³³⁹ Memo to Governor Coleman from Hal C. DeCell, January 6, 1958, SCRID# 1-16-1-2-1-1-1, viewed on June 19, 2007 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php, *Sovereignty Commission*.

leadership position for fear of white reprisal, Henry kept that position simultaneously. Reprisals would come, however, as Clarksdale whites began to worry about Henry's growing influence, and the Citizens' Council plotted to neutralize him. In a 1959 memo to the director of the Sovereignty Commission, an investigator wrote "the Citizens' Council in Clarksdale is giving thought to measures of bringing pressure against Henry for the purpose of having him move away from Clarksdale. It is believed that if Henry leaves this area, the NAACP will die as he is the main one and keeps it alive."³⁴⁰ Pharmaceutical companies were refusing to sell to him, so Henry had to drive to Memphis to replenish his stock at a higher price. Business was down because he had been forced to pass the extra cost on to his customers. White leaders also discussed how to get Henry's wife fired from her teaching job in the Coahoma County school system. Several members of the Citizens' Council had accused the school superintendent L.L. Bryson of "playing politics" in his refusal to fire Henry's wife and the wives of other NAACP members.³⁴¹ Because of Bryson's refusal, whites began actively campaigning against his re-election as superintendent. It was clear that whites were worrying more about the possibility Clarksdale's black community gaining any political power. About 700 black citizens were on the voting rolls and about 400 actively voted.³⁴² Bryson lost reelection and white leaders expected the new superintendent "to get rid of" Noelle Henry.³⁴³

³⁴⁰ Memo to Director from Zack J. Van Landingham, January 26, 1959, SCRID# 1-16-1-21-2-1-1, viewed on June 19, 2001 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php, *Sovereignty Commission*.

³⁴¹ Ibid.

³⁴² Ibid.

³⁴³ Memo to director, State Sovereignty Commission from Zack J. Van Landingham, October 13, 1959, SCRID# 1-16-1-27-1-1-1, viewed June 19, 2007 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php, *Sovereignty Commission*.

Clarksdale's state legislators were gleeful when they thought they had evidence of Henry violating state tax laws in 1960.³⁴⁴ The local tax commissioner said Henry reported that he sold several hundred dollars of school supplies to the county, reporting that the materials were tax exempt when they were not. State legislator Kenneth Williams was very anxious that Aaron Henry be criminally prosecuted for this violation rather than have him pay a penalty and back taxes. Williams said that [local attorney] John Stone had told him they had never used the criminal provisions to put anyone in jail under this particular tax law, but when Williams told Stone that Henry was President of the NAACP in Clarksdale, Stone said that this might put a different light on the situation.³⁴⁵ State tax commissioner Noel Monaghan agreed to send an investigator to Clarksdale to look into the matter within 10 days. A Sovereignty Commission memo also noted: "Mr. Monaghan said that Kenneth Williams has tried every way possible to get Aaron Henry. He had tried to get Henry in handling dope and liquor, but Henry has always been too smart to fall for such."³⁴⁶

Henry also became even more noted as a troublemaker for complaining of police brutality against blacks on the part Clarksdale officers and the state patrol.³⁴⁷ The Sovereignty Commission then noted that whites were complaining that blacks were addressing them by their first names in retaliation for not being properly addressed at Mr. and Mrs. themselves. They blamed Henry and the NAACP for the fracas threatening to disrupt the status quo. "The Citizens Council are [sic.] trying every way possible to

³⁴⁴ Memo to File from Zack J. Van Landingham, February 23, 1960, SCRID# 1-16-1-35-1-1-1, viewed on June 19, 2001 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php, *Sovereignty Commission*.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Memo to file, from Zack J. Van Landingham, May 6, 1960, SCRID# 1-16-1-42-1-1-1, viewed on June 19, 2001 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php, *Sovereignty Commission*.

deflate Aaron Henry in the eyes of the negroes of the community so they will realize he cannot do them any good.³⁴⁸

After blacks were excluded from Clarksdale's annual Christmas parade, Henry and the NAACP called for a boycott of area stores with the slogan, "If we cannot parade downtown, we won't trade downtown." Clarksdale businesses began hurting immediately since more than half the city population was black, and county attorney Pearson charged seven black leaders with restraint of trade in conspiring to boycott.³⁴⁹ Five of them, including Henry, were convicted, fined \$500 and sentenced to six months in jail. All appealed. "The five Negroes convicted in this case are five of the most vicious agitators in Mississippi," wrote Sovereignty Commission investigator Tom Scarbrough. "I do not know what this group will do next, but they are not going to remain quiet for long. Most of this group are school teachers or housewives teaching in Coahoma County. Steps should be taken by those in authority to cut off as much of this gang's income as possible. This was discussed at the December 28th meeting in the Mayor's office."³⁵⁰

Noelle Henry's teaching contract with Coahoma County Schools was not renewed for the 1962-63 school year. At that time, teachers were required to provide a list of all organizations they belonged to, and Henry listed the NAACP, the only teacher in the state to do so.³⁵¹ A public school teacher for 11 years, she tried to get an explanation for her firing, but the school board refused to talk about it. She filed suit in 1962, charging that she was being penalized because she was a member of the NAACP and her husband was

³⁴⁸ Ibid.

³⁴⁹ Memo, Coahoma County ó Boycotters, investigated by Tom Scarbrough, January 9, 1962, SCRID# 1-16-1-57-1-1-1, viewed on June 19, 2001 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php, *Sovereignty Commission*.

³⁵⁰ Ibid.

³⁵¹ *Henry v. Coahoma County Board of Education*, 353 F.2d 648 (1965).

state president. At trial, school representatives said they did not renew her contract because her husband had been convicted on the morals charge. They also pointed to the libel suit working its way through the courts, denying that her NAACP membership had anything to do with her firing. U.S. District Court for the Northern District of Mississippi refused to issue an injunction requiring that Henry be re-employed by the school district, and the Fifth Circuit affirmed. The appeals court said the superintendent had broad discretion in recommending teachers for employment and that Henry failed to prove that her husband's civil rights activism had anything to do with her firing.³⁵²

Meanwhile, Aaron Henry continued to fight the morals charge. After he was found guilty at the justice of the peace trial, Henry made an unsuccessful appeal to the circuit court. Henry and six other witnesses testified that he was in Clarksdale when the hitchhiker said he was picked up. Henry also made sure to tell the court that he was not homosexual.³⁵³ The Mississippi Supreme Court reversed the circuit court conviction on a technicality, agreeing that Collins searched Henry's car illegally.³⁵⁴ However, the court reversed itself a few weeks later holding that while the search was illegal, defense attorney Jack Young lost the right to object to it because he did not do so during the trial.³⁵⁵ State Attorney General John Patterson issued a statement commenting on the high court reversing itself, praising the "judicial courage and the legal talent exhibited by [the court]. It is indeed indicative of the high caliber of justices making up our court."³⁵⁶

³⁵² Ibid.

³⁵³ "Jury Votes 'Guilty' For NAACP Leader, Aaron Henry is Convicted On Morals Charge," UPI wire story, *Commercial Appeal*, May 23, 1962.

³⁵⁴ "Aaron Henry Gets Reversal, NAACP Leader Scheduled For New Trial Due to Illegal Search," *Commercial Appeal*, June 4, 1963.

³⁵⁵ Court Reverses Henry Decision, Conviction of NAACP Chief On Morals Charge is Upheld, UPI wire story, *Commercial Appeal*, July 12, 1962.

³⁵⁶ Ibid.

To Patterson, also a plaintiff in a *Sullivan* companion suit, one threat to the southern way of life had been neutralized. Here was race making at its highest level in Mississippi, and at the same time, Henry's libel suit proceeded. A jury in Coahoma County Circuit Court agreed that Pearson and Collins had been libeled, awarding both officials the amount they asked for, \$25,000 and \$15,000, respectively.³⁵⁷ Pearson's lawyer, Charlie Sullivan, who later ran unsuccessfully for governor, told the all-white jury that Henry made false statements about the county attorney intending to defame him. He said Pearson was afraid he would not be re-elected because of Henry's "diabolical plot" comment. If he lost the next election, Pearson would lose his salary, which amounted to \$16,800 over a four-year term. On cross examination, however, Pearson said he had received no calls or criticism since the article ran.³⁵⁸

On the witness stand under Sullivan's hostile questioning, a frazzled Henry testified that he did not remember using the word "diabolical" and denied using the word "plot."³⁵⁹ Henry said: "I am saying the words 'diabolical plot' were developed during the conversation." However, Sullivan produced a letter written by Henry the day before the news story came out where Henry used the words "diabolical plot" in complaining about Pearson and Collins's harassment.³⁶⁰ Along with talking to the UPI reporter, Henry had given an interview to AP reporter Van Savell, who testified at trial that Henry used the words "diabolical plot" during the conversation.³⁶¹ In his closing argument, Pearson's

³⁵⁷ *Pearson v. Henry*, No. 5725, Coahoma County Circuit Court.

³⁵⁸ Court transcript, 35, *Pearson v. Henry*, No. 5725, Coahoma County Circuit Court.

³⁵⁹ *Ibid.*, 22.

³⁶⁰ Henry to Mr. Norwood, Boliver County deputy sheriff, March 6, 1962, Exhibit P.1., *Pearson v. Henry*, No. 5725, Coahoma County Circuit Court. Henry originally had been arrested in Boliver, the county south of Coahoma, and jailed there. He wrote Norwood looking for his address book, which had not been returned to him when he was released from jail.

³⁶¹ Court transcript, 102, *Pearson v. Henry*, No. 5725. Savell was also the Associated Press reporter sued by General Edwin Walker for his dispatches from Oxford during the Ole Miss riot.

attorney told the jury that not so long ago, if a black man had made such a statement against a white man he would not have lived to see the sun rise. Pearson was merely asking for \$25,000 instead. "If Aaron Henry had accused this man of being a dirty crook, there was a time when there would have been a killing that night."³⁶² He made a similar statement at Collins' libel trial the next week. The juries awarded Pearson and Collins full damages, and the Mississippi Supreme Court affirmed in 1963, holding that evidence "showed positively that no one had framed the defendant or cooked up any plot, diabolical or otherwise, to have him arrested."³⁶³

This was the same year more than 78,000 disenfranchised voters cast ballots in a mock election called the Freedom Vote. Both Democrat and Republican tickets ran on segregationist tickets. Henry ran at the top of the Freedom Vote ticket with Edwin King, a white minister from Jackson. The vote was held over a three-day period in 200 communities, in churches, schools, poolrooms and "votemobiles."³⁶⁴ This was also the year that Henry's home was bombed. Up to this time, physical threats against Henry and his family had been nominal, limited to harassing phone calls and intimidation on the street. While the family was asleep, two firebombs were thrown into Henry's house on Easter weekend in 1963. Michigan Congressman Charles Diggs was a guest in the home at the time, and the bombing made it into newspapers around the country. The fire department took almost 30 minutes to arrive, and Henry and Diggs had gotten most of the fire extinguished by the time they got there. Chief Collins said the following morning that

³⁶² *Henry v. Collins*, 253 Miss. 34, 52. At the objection of Henry's attorney, the judge instructed the jury to disregard the statement.

³⁶³ 253 Miss. 62; 158 So. 2d 695; 1963 Miss. LEXIS 551.

³⁶⁴ "Over 70,000 Cast Freedom Ballots, Henry-King Ticket Tops Mock Election," *The Student Voice*, undated copy found in Sovereignty Commission files, SCRID# 1-16-1-81-1-1-1, viewed on June 19, 2001 at www.mdah.state.ms.us/arlib/contents/er/sovcom/result.php.

there was supposed to be a third bomb, and it would be dangerous if they didn't find it. Two white men were eventually charged with the crime. At trial, however, the first was found not guilty by an all-white jury and the charges against the second man were dropped. After the bombing Henry put a huge sign in his front window that read: "Father Forgive Them, For they know not what they do."³⁶⁵ In May 1963, an explosion ripped a hole in the drugstore. No charges were ever filed in that incident.

In 1965, the U.S. Supreme Court agreed to hear Henry's appeal of the Collins and Pearson libel suits.³⁶⁶ It was one year after the *Sullivan* ruling, and the high court held that Henry's remarks amounted to fair criticism of public officials. The court reversed, holding that the Mississippi high court's decision violated the First Amendment since this was merely a criticism of public officials' performance of their public duties. Not long after the case was decided, Henry bumped into Ben Collins while at the jail posting bond for a friend. "Ben stopped me and said, 'Say, fellow, when you gonna pay me?' 'When am I gonna pay you?' I said. 'Ain't you heard what the court said? You are gonna have to pay me.' Ben looked perplexed for a second and then said, 'Is that right. Well, I sure ain't got it.'" After that, the pair bantered back and forth about the case when they saw each other at civil rights demonstrations. "About this time, the question of my life insurance became a joke with Ben, and I never really minded," Henry said.³⁶⁷ Henry, who had been jailed more than 30 times for his civil rights work, was elected to the Mississippi House of Representatives in 1979.

³⁶⁵ Henry and Curry, *Aaron Henry*, 143.

³⁶⁶ 380 U.S. 356 (1965). The Collins and Pearson suits were combined.

³⁶⁷ Henry and Curry, *Aaron Henry*, 127.

James Earl Ray and the Libel-proof Doctrine

Cultural historian Grace Elizabeth Hale writes, “No one is ever more white than the members of a lynch mob.”³⁶⁸ She has shown spectacle lynching within the pop culture frame of whiteness, illustrating that newspaper coverage of the lynching is “central to the power” of that event. Given this, James Earl Ray had achieved the pinnacle of race making in his efforts to secure white supremacy. The confessed assassin of Martin Luther King Jr. reveled in the media coverage of his murder of the civil rights leader. Ray enjoyed his prominence in the newspapers he read every day in his jail cell, but he did not like the way journalists were covering this most spectacular lynching of all.³⁶⁹ Where were his accolades? Even the southern press distanced itself from this particular race making effort. But to Ray, the national news magazines and northern reporters were the worst. He first began plotting his libel suits in jail within weeks of his June 1968 arrest, targeting several publications for coverage of King’s murder, the two-month manhunt, his capture and initial incarceration in Tennessee.³⁷⁰ Atlanta attorney J.B. Stoner originally agreed to represent Ray in a series of libel suits just months after Ray’s capture. Puffing on a cigar and smiling broadly, Stoner held a press conference outside the Tennessee State Prison in Nashville after visiting Ray, promising to punish the media for what he considered unfair coverage.³⁷¹ Stoner, an avowed white supremacist, would later be convicted of the 1958 bombing of a Birmingham church.³⁷² When Ray hired him, he was head of the National States Rights Party and often carried a

³⁶⁸ Hale, *Making Whiteness*, 230.

³⁶⁹ William Bradford Huie, *He Slew the Dreamer, My Search, with James Earl Ray, for the Truth about the Murder of Martin Luther King* (New York: Delacorte Press, 1968), 157.

³⁷⁰ Untitled memo, *Birmingham Police Department Surveillance Files*, 1947-1980, Birmingham Public Library, Department of Archives and Manuscripts, microfilm, 9.26.

³⁷¹ *Ibid.*, undated newspaper photo in *Birmingham Police Surveillance Files*.

³⁷² “Around the Nation: Conviction in Bombing in Alabama is upheld,” *New York Times*, August 14, 1982.

briefcase bearing a sign that read "Rights for Whites."³⁷³ He even made statements to reporters such as: "We didn't shed no tears when Saint Martin Lucifer Coon was shot."³⁷⁴

Ray's criminal lawyer at the time, former Birmingham mayor Arthur Hanes, refused to have anything to do with Stoner, threatening to abandon Ray if he allowed Stoner to represent him in the libel cases or in any legal matter. So Ray asked Hanes to represent him in his civil suits, as well. Meanwhile, freelance writer William Bradford Huie convinced Ray to give him exclusive rights to his story for \$40,000.³⁷⁵ The resulting book, *He Slew the Dreamer*, published in 1970, was a first-person account of Huie's investigation of Ray, including his written correspondence with him and conversations with Hanes. Huie, a tenth-generation Alabama native who had sold 40 million books and had several of his works turned into Hollywood films, was becoming known for elbowing in on the hottest civil rights story of the day. Other reporters scornfully dubbed his work "checkbook journalism," and he was best known for causing a firestorm with his paid-for exclusive interview with the white men who were found not guilty of Emmett Till's murder in Money, Mississippi.³⁷⁶ They later confessed to Huie in an article for *Look* magazine, providing a step-by-step story showing how they tortured and executed the black youth for whistling at a white woman.³⁷⁷

Indeed Huie's checkbook gave him access that no other reporter could get, including virtually unlimited letters to and from James Earl Ray and chats with Ray's

³⁷³ "Stoner extradition delayed," wire story dated October 3, 1978, found in *Birmingham Police Surveillance files*, 1947-1980, Birmingham Public Library, Department of Archives and Manuscripts, microfilm, 9.26.

³⁷⁴ William Bradford Huie, *He Slew the Dreamer, My Search, with James Earl Ray, for the Truth about the Murder of Martin Luther King* (New York: Delacorte Press, 1970), 155.

³⁷⁵ *Ibid.*, 194.

³⁷⁶ Gene Roberts & Hank Klibanoff. *The Race Beat. The Press, the Civil Rights Struggle, and the Awakening of a Nation* (New York: Knopf, 2006), 101-106.

³⁷⁷ Huie, "The Shocking Story of Approved Killing in Mississippi," *Look*, January 1956.

attorney. "He's burned up at some of his publicity and wants me to sue some magazines for libel," Hanes told Huie in July 1968.³⁷⁸ Hanes complained that the press was calling Ray *the* killer, rather than the *alleged* killer and that reporters were "beating him to death" in their stories.³⁷⁹ The more reporters waded into his seedy past as a life-long con, a bumbling burglar and a prison escapee, the madder Ray got. "He's mad about all the lies that have been printed about him," Hanes said to Huie. "One magazine says his father died as an alcoholic. Ray says the man is not only alive but he's too stingy to buy whiskey. He says all the stories about him chasing whores and wasting money in nightclubs are lies. He says, 'Every newspaper and magazine is trying to make me look like nobody in the world likes me.'"³⁸⁰

As Huie's investigation continued, he came to believe Ray acted alone rather than as part of a larger conspiracy. And he was not surprised when Ray pled guilty to King's murder in March 1969 and was sentenced to 99 years in prison. Realizing that he had been portrayed as a villain rather than a hero, Ray spent the rest of his life insisting that his confession was coerced and trying to secure a trial. He also had plenty of time to file those libel suits. Ray, who lived in solitary confinement for the first five years, declared himself a pauper and acted as his own attorney in his civil cases. Court costs were even waved. His most notable libel suit was actually combined with a suit for civil rights violations.

In January 1976, *Time* magazine revisited King's assassination, focusing on the emerging controversy surrounding the FBI's harassment of the civil rights leader.³⁸¹

³⁷⁸ Ibid., 157.

³⁷⁹ Ibid. (Emphasis in the original.)

³⁸⁰ Huie, *He Slew the Dreamer*, 164.

³⁸¹ George McMillan, "The King Assassination Revisited," *Time*, January 26, 1976, 16-23.

Reporter George McMillan had spent about seven years researching a book about the murder and this article was based on that book. The *Time* story said Ray was a drug dealer while in prison in Missouri, known as the "merchant" who dealt in speed, prison food supplies and other contraband. The story also quoted former inmates as saying Ray fantasized about killing King while he was incarcerated in Jefferson City. Fellow convict Raymond Curtis said Ray figured there must be a bounty on King's head and that he jokingly called King his "retirement plan."³⁸² Ray sued *Time* and McMillan in federal court in Memphis, seeking \$500,000 in punitive damages from each defendant.³⁸³ He also named Huie and Gerold Frank, who had authored an earlier book about Ray. Still other defendants were Tennessee assistant attorney general W. Henry Haile, U.S. District Judge Robert M. McRae Jr. and McRae's clerk Brenda Pellicciotti.

Ray accused Huie and Frank of furnishing false information about him to McMillan through their separate books on the assassination. Haile was the state assistant attorney general who opposed Ray's efforts to withdraw his guilty plea. Ray complained that Haile acted in collusion with *Time* and McMillan, helping supply information to the magazine and timing the article to influence the Sixth Circuit Court of Appeals' ruling in his criminal case. In so doing, Ray said Haile and the others conspired to violate his civil rights. McRae was the federal judge who denied Ray's motion to withdraw his guilty plea for King's assassination.³⁸⁴ He accused McRae and his clerk of playing politics by refusing to forward parts of the hearing transcript to the appeals court. Ray also lumped

³⁸² *Ibid.*, 18.

³⁸³ *Ray v. Time* (1976), U.S. District Court for the Western District of Tennessee, No. C-76-274.

³⁸⁴ *Ray v. Rose*, 392 S. Supp. 601 (Western District of Tennessee, 1975). The Sixth Circuit affirmed, 535 F.2d. 966 (6th Circuit, 1976).

an additional defamation of character complaint against Huie stemming from an interview Huie did with Dan Rather on CBS in 1976.

This was not Ray's first libel suit against Frank, author of *An American Death*, a 1972 book about King's assassination and the hunt for and subsequent court machinations involving Ray.³⁸⁵ Ray first sued him in 1973, also in federal court in Memphis, but that case was dismissed for lack of jurisdiction since the writer lived and worked in New York City.³⁸⁶ This second go around with Frank, Ray alleged that Frank supplied *Time* writer McMillan with substantial portions of his article. However, Frank said he never talked to McMillan about helping him and did not know a story about Ray was to be published by *Time* until it hit the newsstands. Frank pointed out that the only possible reference to him in the article was a mention of "experienced writers who spent years researching books on the assassination."³⁸⁷ On top of that, Frank argued, any background McMillan would have used from Frank's book was not actionable because the one-year statute of limitations had passed. Frank complained to the court: "For a second time, at great expense and inconvenience, I am forced to defend myself some 1,000 miles from my residence against the meritoriously bankrupt suits of a convicted slayer who obviously has nothing better to do with his time but institute these frivolous suits."³⁸⁸

Huie also questioned how he could be sued for the *Time* article since he had nothing to do with its publication. Ray complained that he initially cooperated with Huie on a book entitled *They Slew the Dreamer*, rather than *He Slew the Dreamer*. For Ray,

³⁸⁵ Gerold Frank Jr., *An American Death* (New York: Doubleday, 1972).

³⁸⁶ *Ray v. Frank* (1973), No. C-73-126.

³⁸⁷ *Time*, 18.

³⁸⁸ Affidavit of Gerold Frank, *Ray v. Time*, filed July 1, 1976.

this could have been a celebration of race making with Huie, a southerner. Instead, it turned out to be a condemnation. While doing his research on the murder, Huie had come to the conclusion that had Ray acted alone and Ray did not know of Huie's change of heart until the book was released. After defendant McRae requested dismissal, claiming judicial immunity, Ray dropped the judge and his clerk as parties to the suit. Another flaw in Ray's case is the civil rights law he relied on protects against violations in state law, and McRae was a federal officer.

Time's lawyers all but scoffed at Ray's claims: "It is inconceivable that a single article published nearly eight years after the assassination, the last of his many criminal adventures, could further affect or damage his reputation."³⁸⁹ They argued that the story had nothing to do with the case before the Sixth Circuit, but rather was prompted by revelations of the FBI's "vicious vendetta" against King. They also charged that the suit was nothing more than an indirect attack on the Sixth Circuit decision, pointing out that Ray did not even allege injury to his reputation in his libel claim. Further, they argued the story might have even helped Ray's case, quoting sections of the article that questioned whether the crime had been solved, thus casting some doubt on Ray's guilt. For example, McMillan wrote: "Nearly eight years later, the widespread feeling still persists that King's murder has not been solved." And "Certainly there are a number of unanswered questions." And "Did Ray really kill King? The evidence against him is persuasive, but it is also largely circumstantial. The case might be tough to prove in court."³⁹⁰ *Time* also

³⁸⁹ Memorandum in Support of Time Inc.'s and George McMillan's Motion to Dismiss, 15, *Ray v. Time*, filed September 7, 1976.

³⁹⁰ *Time*, 16.

argued that Ray was a public figure.³⁹¹ He had “injected himself into the controversy about the assassination of Dr. King by pleading guilty to the assassination and by providing information about it to writers with the understanding that his revelations would be published.”³⁹²

Judge Harry Wellford dismissed the case, ruling that Ray was “libel proof.”³⁹³ He had pled guilty to murdering King and was sentenced to 99 years. Wellford also noted that Ray had pled guilty to two prior felonies and was a prison escapee. Since Ray was a habitual criminal, subject to widespread publicity, it would be impossible to injure his reputation further, Wellford said.³⁹⁴ The courts had previously noted that Ray was “internationally famous” and Wellford held there was no question he was a public figure for First Amendment purposes.³⁹⁵ Any coverage about Ray was of public interest, and he would have ample opportunity to refute the articles he deemed false or unfair. Wellford also agreed that this was clearly an attempt on Ray’s part to get a review and retrial of his criminal case.

It was 12 years after *Sullivan* and nine years since the court had extended the actual malice standard to public figures when Ray sued *Time*. His chances of getting a

³⁹¹ Citing *Gertz v. Welch*, 418 U.S. 323, 351 (1974), where the court further worked through the Sullivan doctrine’s extension of the actual malice standard to public figures: “In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”

³⁹² Memorandum in Support of Time Inc.’s and George McMillan’s Motion to Dismiss, *Ray v. Time*, filed September 7, 1976.

³⁹³ The courts first announced this doctrine the year before in *Cardillo v. Doubleday*, 518 F. 2d. 638 (1975). The Second Circuit affirmed the dismissal of a libel action brought by an incarcerated criminal who was named in the book, *My Life in the Mafia*.

³⁹⁴ As cited in *Ray v. Rose*, 392 F. Supp. 613, Ray was convicted for burglary in Los Angeles in 1949. He served 22 months in prison for another conviction in Chicago. In 1955, he robbed an Illinois post office and forged postal money orders, serving time in the federal penitentiary at Leavenworth, Kansas. He was convicted in October 1959 of a robbery in St. Louis and sentenced to 20 years. He escaped the Jefferson City prison in 1967.

³⁹⁵ *Ray v. Rose*, 362 F. Supp., 610.

favorable judgment, even in southern courts, had long passed. Southern judges and juries had begun seeing the writing on the courtroom wall, and public sentiment had turned against the violent extremists of Ray's ilk. Through a series of libel cases, many not relating to the civil rights movement, courts had applied the *Sullivan* edict and worked through some of the finer points of the actual malice standard. But still, for extremists like Ray, took a bit longer to get the message. He died in prison in 1998, having never won a libel case.

Sheriff Rainey and “Mississippi Burning”

Of all the southern lawmen during the civil rights era, perhaps Neshoba County, Mississippi Sheriff Lawrence Rainey was the most litigious. Between 1966 and 1989, Rainey filed six separate libel suits against the media, all stemming from questions about his involvement in the notorious 1964 murders of three civil rights workers. Rainey was suspected but never convicted of the crime that garnered national attention, became a defining moment in the civil rights movement and was later the subject of the 1988 film “Mississippi Burning.” Films had long been a part of the race making culture. But like James Earl Ray, Rainey found himself portrayed as the villain of the story rather than the hero.

The three workers, Michael Schwerner and Andrew Goodman, white men from New York City, and James Chaney of Meridian, Mississippi, who was black, were in Neshoba County investigating the burning of a black church that was also a base for voter registration. It was June 1964, Freedom Summer, and hundreds of civil rights volunteers were setting up schools and working voter registration drives in the state. Cecil R. Price,

Rainey's deputy, stopped the civil rights workers' car on June 21, hauling the men to jail in Philadelphia, one on speeding charges and the others for allegedly burning the church themselves. After several hours in jail, they were released and then disappeared into the night. Federal authorities discovered their bodies six weeks later, buried in an earthen dam in Neshoba, after receiving a tip from a paid informant.³⁹⁶

There was wide speculation that Price and members of the Ku Klux Klan killed the three men, but no state charges were ever filed. Federal authorities did bring suit in 1965 against Rainey, Price and 16 others for violating the civil rights of the three workers.³⁹⁷ The Federal Bureau of Investigation said Sam Bowers, the Klan's imperial wizard, gave the order to eliminate Schwerner, whom the KKK had nicknamed "Goatee." The FBI said the murders were planned and organized with Edgar Ray Killen, Bowers' right-hand man in the eastern Mississippi KKK, along with other Klansmen. Rainey and seven other defendants were acquitted of the charges. Price, Bowers and five others were convicted. The jury could not agree on the remaining men, all suspected Klansmen.

The murders and trial captured the nation's attention and spawned scores of articles and books. But the era of D.W. Griffith's wildly successful *Birth of a Nation* had long since past. In 1915, the film's white-sheet bedecked cavalry saved white purity from black contamination. But now the Klan was being criticized even in some southern newspapers. Other southern publications maintained a stony silence. This time, it was not the black animal rapist that was evil, according to many mainstream reports. It was the white sheriff.

³⁹⁶ For detailed accounts on the incident, see Seth Cagin and Philip Dray, *We are not Afraid, The Story of Goodman, Schwerner, and Chaney and the Civil Rights Campaign for Mississippi* (New York: Macmillan Publishing Company, 1988); and Florence Mars, *Witness in Philadelphia* (Baton Rouge: Louisiana State University, 1977).

³⁹⁷ *U.S. v. Price et. al*, 383 U.S. 787 (1966).

Rainey hired James McIntyre, his lawyer in the federal trial, and started filing libel suits. In 1966, Rainey, Price and Neshoba Justice of the Peace Leonard Warren sued the New York Herald Tribune Company, WCC Books and William Bradford Huie for Huie's news articles and his book *Three Lives For Mississippi*.³⁹⁸ Rainey sought \$3 million in damages, claiming 33 separate passages in the book libeled him. For example, Huie wrote that most of the violence against civil rights workers and blacks occurs in small towns like Philadelphia and McComb, with the larger cities being "relatively safe for agitators." "The big-city politicians know "the smart way to resist "agitators" in Mississippi is not to break their heads but to protect them and let time and circumstance break their hearts. The men with power in Mississippi know this. Only the peckerwood politicians and the jerks in the backwoods don't know it."³⁹⁹ Rainey also objected to the characterization of Neshoba as a "maximum-danger county." Huie wrote that the three civil rights workers "knew it was one of the counties where the sheriff had been elected on the promise that he'd "handle the niggers and the outsiders." "They knew the sheriff and his only deputy had friends who were Ku Klux types."⁴⁰⁰ Huie also quoted an anonymous elderly black resident of Neshoba discussing the presence of the media and the outside civil rights workers for the summer: "When you leave, then it gets might [sic.] lonesome out here. There ain't nobody under these pine trees except us and the big man with guns buckled on and the red light flashing on top of his big car."⁴⁰¹

³⁹⁸ *Rainey v. New York Herald Tribune*, Neshoba County Circuit Court, No. 3063. (Huie freelanced for the *Tribune* and drew much of his book material from his published articles. WCC Books is a division of New York Herald Tribune, Co.)

³⁹⁹ William Bradford Huie, *Three Lives for Mississippi* (New York: WCC Books, 1965), 88.

⁴⁰⁰ *Ibid.*, 120.

⁴⁰¹ *Ibid.*, 142.

Price filed an identical lawsuit against the New York Herald Tribune Company, WCC Books and Huie, also seeking \$3 million.⁴⁰² He objected to 31 separate passages in Huie's book. Among them: "Sheriff's deputy Cecil Price believed he was protecting the State of Mississippi, and acting in its best interest, when he arrested Michael Schwerner and when he delivered him to his murderers."⁴⁰³ Neshoba County Justice of the Peace Leonard Warren also sought \$3 million, objecting to 15 specific passages in Huie's book and the general implication that he was involved in the murders. In his book, Huie described Warren this way: "A third, but not usually uniformed, law-enforcement figure at the courthouse is Justice of the Peace Leonard Warren. His office is in the courthouse, and most miscreants are brought before him. He attracts attention by being the physical opposite of Rainey and Price: skinny, no more than 140 pounds, chicken-necked, with a prominent Adam's apple. He, too, likes to don the cattleman's hat, the gun, and the nightstick and work as a part-time cop."⁴⁰⁴

Like Price and Rainey, Warren objected to being called a "white supremacy terrorist" and to Huie's description of "a Master Plan for Protection" that the killers were to have carried out.⁴⁰⁵ Huie describes the four-part plan for maintaining the racial status quo, each "successively more violent, with all plans activated as necessary."⁴⁰⁶ Plan One involves cross-burnings and leaflets. Plan Two progresses to arson and dynamite. Plan Three calls for whippings. Plan Four is extermination. Huie wrote: "During the second week in May 1964 a decision to activate Plan Four was reached by a group of

⁴⁰² *Price v. New York Herald Tribune*, U.S. District Court for the Southern District of Mississippi, No. 1346.

⁴⁰³ Huie, *Three Lives for Mississippi*, 170.

⁴⁰⁴ *Ibid.*, 134.

⁴⁰⁵ *Ibid.*, 105.

⁴⁰⁶ Widely distributed Klan literature also describes this four-part plan of action. *Ku Klux Klan Collection*, Box 1, Folder 4, Department of Archives and Collections, University of Mississippi.

terrorists in Mississippi.ö The target was öthe Jew-Boy with the beard.ö Mickey Schwerner.⁴⁰⁷ Clearly, the spectacle lynching was no longer hailed as heroic. Where the southern press remained silent, the northern press was condemnatory.

Whether Rainey was a public official or public figure for libel purposes would plague him for a quarter of a century after the murders. The law was against him, but he also was his own worst enemy. Rainey had basked in his legend following his December 4, 1964 arrest. He told reporters, öIt took me an hour to get to work today, I had to shake so many hands.ö⁴⁰⁸ Rainey had essentially said the publicity surrounding the murder of civil rights activists improved a man's status in the South in the 1960s. So how could he be defamed by the resulting coverage?

Broad coverage of the murders had seared his image into the national consciousness. For starters, there is the famous photograph of a smirking Rainey, stuffing a huge wad of Red Man tobacco in his mouth during his arraignment in the federal case where he was accused of violating the three workers' civil rights. After that photo appeared in magazines and newspapers across the country, Toledo, Ohio-based Pinkerton Tobacco Company mailed Rainey a case of Red Man.⁴⁰⁹ Rainey also appeared in advertisements for a Mississippi chiropractor.

But when Rainey's term as sheriff ended in 1967, the then infamous former lawman said he could not find a job. When he sued *Time* magazine the next year, he claimed that he had a öpriceless, untarnished, and unblemished and unassailable reputationö when the article was published.⁴¹⁰ Rainey sought \$50,000, claiming his

⁴⁰⁷ Huie, 107.

⁴⁰⁸ Cagin and Dray, *We Are Not Afraid*, 377.

⁴⁰⁹ Ibid.

⁴¹⁰ *Rainey v. Time*, Circuit Court of Neshoba County, Mississippi, No. 3363.

reputation had been ruined by a story that suggested he was a “Klan sympathizer or member” and that the story erroneously said he was convicted with Bowers and five other co-defendants of violating the three workers’ civil rights.⁴¹¹ The following passage from the February 1968 *Time* article was the crux of the complaint and seemed to be more about a Klan lawyer who did not even represent Rainey: “Whenever Ku Klux Klansmen needed legal aid in Mississippi, they invariably turned to Lawyer Travis Buckley. A cocky, stocky, pugnacious little man with jug ears, Buckley, 35, was chief defense attorney in last October’s trial of Imperial Wizard Sam Bowers, Neshoba County Sheriff Lawrence Rainey, and 17 others accused of conspiring to kill three civil rights workers in 1964. Bowers and six co-defendants were convicted, but Buckley filed an appeal that has kept them all out of jail. Next on his agenda was the defense of Bowers and another gang of Klansmen in the fire-bomb murder of Vernon Dahmer, a Hattiesburg, Miss., N.A.A.C.P. official. As always, Buckley was outwardly confident.” Once again, Rainey turned to James McIntyre, his lawyer in the civil rights cases, to represent him. In 1969, five years after *Sullivan*, a U.S. District judge in Meridian dismissed Rainey’s case against *Time*.⁴¹² *Time* argued successfully that Rainey was public official when the events took place and that he remained a public figure.

Undeterred, Rainey filed still more libel suits, moving from the written word to made-for-TV movies and a Hollywood film. Along with Price, Rainey sued CBS and the producers of the television movie “Attack on Terror: The FBI versus the Ku Klux Klan in Mississippi.” Price and Rainey sued when it first aired in 1975 and again when it was

⁴¹¹ Declaration filed by Rainey, *Rainey v. Time*, September 21, 1968.

⁴¹² Order, filed March 21, 1969.

broadcast late-night in 1977.⁴¹³ Both men sought \$1.5 million in compensatory and punitive damages for each broadcast. In its defense, CBS said producers consulted with FBI officials involved in the case, relied on government documents and uncontested court testimony in telling the story, which was based on Don Whitehead's book of the same name. The film was made in good faith, without malice, CBS asserted. It did not use Rainey or Price's names, or the names of the town or county where the murders occurred. In this post-*Sullivan* world of libel, CBS also argued that the story involved public officials and was a matter of public interest. Rainey and Price again had the burden of proving malice, that CBS acted with reckless disregard for the truth.

This was not the only difficulty for Rainey and Price in the CBS case. The pair had signed releases in 1968, giving actor Jack Lemmon and his Jalem Productions, Inc. the right to use "the character, personality, physical attributes and/or biographical information concerning me and to portray in any way it deems appropriate."⁴¹⁴ In exchange for \$6,000 apiece, both Rainey and Price agreed they would not sue for libel, slander, invasion or right of privacy. The agreement even allowed Jalem to use the real names of the civil rights workers. Inexplicably, the agreement Rainey and Price had signed off on involved the making of the movie called "Three Lives for Mississippi," based on the book by Huie. Two years before, they had unsuccessfully sued the writer claiming that the book had libeled them. The movie was never made, however, and CBS bought the rights originally purchased by Jalem. There was no stipulation in the agreement regarding the selling of those rights.

⁴¹³ *Rainey v. CBS and QM Productions*, No. E75-23, filed in U.S. District Court for the Southern District of Mississippi, Eastern Division. Price's suit, No. E75-37, was consolidated with Rainey's. The second round of consolidated suits in 1978 were numbered No. E78-0121 and filed in the same court.

⁴¹⁴ Exhibit 1, *Rainey v. CBS*. Price signed the agreement June 26, 1968. Rainey signed the agreement July 4, 1968.

In his claim, Rainey said he was fired from his job as a security guard after the movie's 1975 airing on CBS. He said when his term as sheriff ended in 1967, he "was refused employment in Mississippi and surrounding states because of the adverse publicity surrounding the trial."⁴¹⁵ Since then, Rainey said, he worked at "numerous meager jobs" and after the publicity subsided he was able to find a job as a security guard. His situation had been improving, Rainey said, until CBS brought the incident up again. Rainey complained that the film depicted him as "a person bent on violence, that he had conspired with others to kill and murder three human beings, and that he was and is guilty of un-American racial prejudice against persons of other than the White Race and guilty of conduct unbecoming to public officers." Further, he said CBS and movie director Quinn Martin portrayed him as "a white supremacy terrorist" and "a Ku Klux Klan sympathizer and/or member."⁴¹⁶

U.S. District Judge Harold Cox granted CBS's motion for summary judgment in 1976, citing *Sullivan*. He said the plaintiffs were public officials at the time and the events depicted in the movie were of national interest. In dismissing the case, Cox pointed out that Rainey and Price did not claim the movie was false, "instead these plaintiffs complain only that eight years have passed and these defendants should have let sleeping dogs lie."⁴¹⁷

The dogs were definitely revived in 1988, when the movie "Mississippi Burning" appeared in theaters across the nation. In the film starring Gene Hackman and Willem Defoe, FBI agents poured into fictional Jessup County to investigate the murder of three civil rights workers. The large, tobacco-chewing sheriff was Ray Stuckey, a thinly veiled

⁴¹⁵ Declaration filed by Rainey in court documents.

⁴¹⁶ *Ibid.*

⁴¹⁷ Motion for Summary Judgment, October 4, 1976.

stand-in for Lawrence Rainey. Rainey sued again, claiming that he was identifiable as the sheriff in the movie and seeking \$8 million from Orion Pictures.⁴¹⁸ In his 1989 claim, Rainey said “the film depicts [me] as a terrorist. They didn’t use my name. They intended that sheriff to be me...the character in the movie was a big man like me, and he chewed tobacco like I chew tobacco all the time. The actor had twice as big a chew of tobacco as I ever had, but they might as well have called him Lawrence Rainey.”⁴¹⁹ He also said he had not been a public official since 1967 and therefore “had not had access to the media.” He was leading a “quiet and peaceable life with his family” until the movie was released.⁴²⁰ However, Rainey did appear on the morning new shows, as well as Nightline and a Current Affair, after the movie was released.⁴²¹ This is the very activity that the nation’s high court referred to in enunciating public officials’ higher standard in proving fault in *Sullivan*. Public officials by their very definition are newsworthy characters and are often discussed in the context of important public events. Therefore, they have easy access to the media in order to refute false or misleading statements about them.

Orion’s attorney, Jackson, Mississippi-based Jack Ables III, pointed out that in the movie, Sheriff Stuckey is not present at the shooting. In the film the sheriff’s alibi is solid – he was playing poker with his wife’s brother and his two cousins, losing \$11.38 during the night.⁴²² (In real life, Rainey said he was in a Meridian hospital at his ill wife’s bedside.) Most notably in this case, however, Orion sought to prove truth, which is an

⁴¹⁸ *Rainey v. Orion Pictures* (1989), No. E89-0014, originally filed in Neshoba County Circuit Court and later moved to U.S. District Court for the Southern District of Mississippi, Eastern Division.

⁴¹⁹ Rainey’s claim filed with court documents.

⁴²⁰ *Ibid.*

⁴²¹ Deposition transcript, 175, *Rainey v. Orion Pictures*.

⁴²² Orion’s First Request for Admission by Lawrence A. Rainey, E89-0014, submitted by Jackson Ables, April 24, 1989.

absolute defense in defamation suits. Ables warned in early court documents that the defense would prove Rainey was involved in the murders.⁴²³ "Because Rainey seeks relief for defamation based on the implication of involvement in the events, Orion is entitled to prove the truth of Rainey's involvement in the events he alludes to in his complaint."⁴²⁴ Ables then set out to prove Rainey was a member of the Klan, to establish his presence at Klan meetings, laying out details of his harassment and even the murder of two other black men while he was sheriff. Ables also said he would introduce evidence that was not available in the 1965 trial that would prove Rainey was involved in the conspiracy to kill Schwerner, Goodman and Chaney.

In court documents, Ables said Rainey and the other defendants in the civil rights case "took the defensive tack that membership in and activity by the 'White Knights of the KKK' in 1964 was noble, selfless, and patriotic. The 3,000-page transcript is replete with this drivel. Rainey then presented himself as a 'Christian' sentinel guarding white Neshoba Countians against hordes of black communists who were there, among other things, marshaling local blacks to sign pledge cards to rape a white woman at least once a week all summer during 1964."⁴²⁵

In his deposition during the Orion case, Rainey again denied he was involved in the murders. "I wasn't even in the county that week."⁴²⁶ When Ables pressed him and questioned the veracity of his alibi, it was if the former sheriff was on trial for murder.

Rainey: "You see, that's been 25 years ago."

⁴²³ Interview with Jack Ables, April 21, 2008.

⁴²⁴ Response filed by Orion, June 5, 1989. Emphasis added by Ables in the original document.

⁴²⁵ Ibid.

⁴²⁶ Deposition transcript, 21, *Rainey v. Orion Pictures*.

Ables: "I understand that. But this is the biggest thing that ever happened in your life, I imagine."

Rainey: "Yeah, and the aggravatingest thing."

Ables: "I'm sure it is. Nobody much let this get out of your memory all these years, have they?"

Rainey: "And these dad-blamed moviemakers and news reporters and all, they just keep it going."⁴²⁷

Perhaps most damning, Ables introduced as evidence a 1970 oral history with Paul B. Johnson, Jr., who was governor of Mississippi from 1964 to 1968.⁴²⁸ In the interview, Johnson implicated Rainey and Price in the murders. "Actually, one thing that is not known to the people anywhere in this country is that these Klansmen of course I knew them very well and did not actually intend to kill these people. What happened was that they had been taken from the jail and brought to this particular spot. There were a good many people in the group besides the sheriff and deputy sheriff and that group. What they were going to do, they were going to hang these three persons up in a big cotton sack and leave them hanging in the tree for about a day or a day and a half, then come out there at night and turn them loose. They thought that they'd more or less scare them off." But, Johnson said, they accidentally killed Chaney, the black civil rights worker, who "was acting kind of smart aleck and talking pretty big, and one of the Klansmen walked up behind him and hit him over the head with a trace chain that you use, you know, plowing and that sort of thing" the chain came across his head and hit him just above the bridge of the nose and killed him as dead as a nit. After this boy had

⁴²⁷ Ibid.

⁴²⁸ The Sept. 8, 1970 interview was conducted by T.H. Baker at the governor's home in Hattiesburg and is housed in the Lyndon Baines Johnson Library in Austin, Texas.

been killed, then is when they determined, "Well, we've got to dispose of the other two. Very, very few people know."⁴²⁹

Ables also waded through several of Rainey's defense tactics as carried out by his attorney, James McIntyre, during the federal government's trial for civil rights violations. Among them, McIntyre said at trial that the three bodies were illegally exhumed because the FBI had no permit for exhumation from the Mississippi State Board of Health. Ables asked during the deposition, "I'm just wondering, why would you need a motion to be made like that?"⁴³⁰ He also said he was preparing to call witnesses who could testify of the sheriff's involvement in the murders. Rainey dropped the case against Orion in August 1990. His attorney filed a motion to dismiss the suit, and the judge's order of dismissal came down the next day.⁴³¹ Rainey, the stalwart of southern libel plaintiffs, had reached the end of the line. Race making as a southern mainstay was reaching the end of the line. Twenty six years had passed since the *Sullivan* decision came down. Members of the media, exercising their First Amendment right and responsibility to report on events about public officials and on events of public interest, had spent untold millions trying to defend that right. But they would not be the only ones paying such a high price.

⁴²⁹ Ibid, 32-33.

⁴³⁰ Deposition transcript, 219.

⁴³¹ Order of dismissal, *Rainey v. Orion Pictures*, August 21, 1990.

CHAPTER FIVE

Fighting Southern Editors

The northern media were not the only ones getting sued over the civil rights story. Several libel battles that have received little attention include suits against Pulitzer Prize winners publishing in the South. Any journalist who threatened the status quo could become a target. This included Buford Boone of the *Tuscaloosa News* in Alabama, and in Mississippi, Hodding Carter Jr. of the *Greenville Delta Democrat-Times* and Hazel Brannon Smith of the *Lexington Advertiser*. While these three editors became well known for their civil rights-era journalism, less is known about southerners' attempts to silence them using libel law. They were revered nationally but hated in their own communities. All three won their Pulitzers for progressive editorials on civil rights, and those awards merely underscored the prevailing belief in their own hometowns that they were traitors to the southern cause.⁴³²

Narratives of white supremacy had long woven their way through the southern press, contributing to the cult of whiteness. Blacks were only covered in the mainstream southern press when they were accused of crimes. Coverage of births, deaths, marriages and graduations was nonexistent and in keeping with the making of racial otherness. Packaged for the white consumer, newspapers across the South wrote glowing editorials about the activities of their local White Citizens' Council chapter, for example, which typically included what they called "the finest white citizenry." It was unacceptable when

⁴³² Other southern editors who won the Pulitzer Prize for civil rights coverage and editorials included Harry Ashmore, editor of the *Arkansas Gazette*, Lenoir Chambers, editor of the *Virginian-Pilot*, Ira B. Harkey Jr., editor of the *Pascagoula Chronicle Star*.

white journalists wrote about blacks without using subversive racial stereotypes per tradition. When they did, they paid for it.

Buford Boone and the Imperial Wizard

Buford Boone grew up working on his family's comfortable 100-acre farm in middle Georgia in the 1910s and early 1920s. He would become an unlikely foe for one of the most infamous white supremacists of the civil rights era.⁴³³ Like most southern editors, Boone was not liberal. Nor was he an integrationist. However, he was considered an extremist for his moderate views on race and his stance that desegregation laws must be obeyed. Boone's ancestors were Confederates on both sides of his family, and a great-grandfather had been killed at Bull Run. But his grandfather, who also had been injured in the war and lived well into his 90s, slowly evolved to believe black people should be treated as human beings. The farmer and state legislator even said so publicly later in life and planted the seeds his grandson would grow years later.⁴³⁴

Boone earned his degree in journalism from Mercer College in Macon and took his first job as a reporter for the *Macon Telegraph*. When the United States entered World War II, he became a wartime special agent for the Federal Bureau of Investigation, writing speeches for J. Edgar Hoover. After the war, he returned to the *Telegraph* as managing editor before being wooed to the *Tuscaloosa News* as editor and publisher in 1947. He won the Pulitzer Prize 10 years later for editorials on Autherine Lucy's attempt

⁴³³ Margaret Turner Stewart, "A Rhetorical Criticism of the Oratory of James Buford Boone," unpublished paper, 1966, Box 255, Folder 2, *Papers of Buford Boone*, University of Alabama (hereafter *Boone Papers*).

⁴³⁴ Maurine Beasley and Richard Harlow, *Voices of Change: Southern Pulitzer Winners* (Washington: University Press of America, 1979), 55.

to desegregate the University of Alabama in Tuscaloosa. The United States Supreme Court ordered Alabama to accept Lucy in 1956, but university leaders used mob violence as an excuse to expel her after three days, supposedly for her own protection. Boone's editorials condemned the protestors, who hurled bricks, eggs and insults at the library science graduate student. He shamed university leaders and took the position that the law had to be obeyed: "the community of Tuscaloosa should be deeply ashamed and more than a little afraid. No intelligent expression ever has come from a crazed mob, and it never will."⁴³⁵ Boone urged calm and reasonable discussion of civil rights issues, but he did not editorialize on every civil rights story that arose. He spoke up when the story was in his own backyard, introducing radical ideas like suffrage and truly equal education for blacks. In Alabama, Boone's moderation resulted in canceled subscriptions, late-night telephone threats and bricks thrown in his windows. When Boone was not at home, callers would tell his wife that he was in danger.⁴³⁶

Boone had long condemned the Ku Klux Klan. In 1949, he wrote a four-part series exposing the local Klan's secret start-up meetings, asking how a group labeled "subversive" by the United States attorney general was able to meet in the Tuscaloosa courthouse on Friday nights.⁴³⁷ Boone used an unnamed source attending the meetings to report the goings on verbatim. At a May 6, 1949 meeting, for example, Klansmen discussed a membership application from a "possible candidate for sheriff."⁴³⁸ Boone wrote that at another meeting there was discussion about a local police officer who had to

⁴³⁵ Buford Boone, "What A Price For Peace," *Tuscaloosa News*, February 7, 1956, 1.

⁴³⁶ Gene Roberts & Hank Klibanoff. *The Race Beat, The Press, the Civil Rights Struggle, and the Awakening of a Nation* (New York: Knopf, 2006), 135.

⁴³⁷ *Tuscaloosa News*, May 27, 1949, 1.

⁴³⁸ *Tuscaloosa News*, May 29, 1949, 1.

work the night shift and could not make it to the gathering. During the meeting, Klansmen also complained about several undesirable situations in town, such as whites and blacks crowding into the same elevator at the First National Bank Building and how some black dishwashers in local restaurants laughed and talked with white waitresses. Boone also discussed the ceremonial elements of the meetings, referencing his interview with an anonymous member, and writing that an entire meeting was used to demonstrate and practice the Klan's secret handshake.⁴³⁹

After the series ran, Boone editorialized that the local Klansmen are more than a little gullible. They are forking over \$10 [dues] for the privilege of affiliating with an organization which in present times is becoming more and more a discredit to itself. We wouldn't classify the members of the local Klan as hoodlums, although they could become hoodlums under the protection of their masks and robes.⁴⁴⁰ Boone also said he had a list of the members of the local Klan, about 40 men, but had decided not to publish them at present. We have placed the list in safekeeping. Whether it is brought out and published, or is given to law enforcement officers called upon to investigate illegal activities by hooded men in this area, will depend entirely upon the local Klan.⁴⁴¹

Tuscaloosa's white supremacists responded with a demonstration of their own. With the help of the Birmingham Klavern, a group of 126 donned their white robes and hoods and paraded around the *Tuscaloosa News* building on a steamy June night in 1949. But the Klan remained quiet in the months following their march, and other journalists praised Boone for putting the fledgling local group on the defensive before it got too

⁴³⁹ *Tuscaloosa News*, May 30, 1949, 1.

⁴⁴⁰ "Who Are Our Klansmen?" *Tuscaloosa News*, May 31, 1949, 1.

⁴⁴¹ *Ibid.*

bold.⁴⁴² In town, there was a flurry of discussion about the series, and some businesses selling the newspaper refused to display a *Tuscaloosa News* placard advertising the series. Some parents insisted their sons no longer work as newsboys, afraid they might be attacked.⁴⁴³ Like Hodding Carter and Hazel Brannon Smith, Boone became well known outside the state.⁴⁴⁴ He even turned down an offer from New York publisher Alfred A. Knopf to write a book on the southern moderate position. Boone told Knopf he was busy running a daily newspaper and did not want to become too detached from the community.⁴⁴⁵ He barely had time to do a little fishing and some volunteer work in town.

In his coverage of the Klan, Boone began a long battle with Robert Shelton, a Tuscaloosa tire salesman who would become infamous as the Imperial Wizard of the United Klans of America, Knights of the Ku Klux Klan. For years Shelton sent the editor hate mail in response to his editorials. He blasted Boone during his speeches on the back of flatbed trucks at his Klan meetings. And he took the fight into the Alabama court system in July 1964, filing a libel suit against Boone and the *News* less than four months after the United States Supreme Court overturned *New York Times v. Sullivan*.⁴⁴⁶ Shelton sought \$500,000 for an editorial headlined "Ready for Mob Control?" where Boone wrote that the Klan was a lawless gang that police must rein in.⁴⁴⁷ He wrote: "Supreme commander of these reckless and irresponsible white elements is a sickly-looking, pitiable little man named Robert Shelton. He has no life savings at stake in any private

⁴⁴² Spencer R. McCulloch, "Fighting Alabama Editor Stops the Klan," *St. Louis Post-Dispatch*, November 29, 1949.

⁴⁴³ Ibid.

⁴⁴⁴ See e.g., "The Voice of Reason," *New Republic*, January 21, 1957, 5-8.

⁴⁴⁵ Boone to Knopf, May 7, 1959, Box 255, Folder 2, *Boone Papers*.

⁴⁴⁶ *Shelton v. Tuscaloosa Newspapers*, Circuit Court of Tuscaloosa County, Alabama, No. 19462, filed July 23, 1964.

⁴⁴⁷ July 7, 1964, *Tuscaloosa News*, 1.

business enterprise. He has been reduced to living as a human jackel on a racket known as the Ku Klux Klan.⁴⁴⁸ Boone's editorial ran in response to a series of violent racial clashes in Tuscaloosa in July 1964. Among them, whites had kicked several black men out of Tom's Snack Bar. Whites also marched in front of the movie theater bearing signs that read, "Will you pay a buck to sit next to a coon?"⁴⁴⁹ Boone called those signs "asinine" in his editorial. Members of the Klan raided as many as 3,000 papers from the *News* coin machines in an attempt to deter the coverage.⁴⁵⁰ As Boone challenged the supremacy of whiteness, the Klan resorted to thieving like a pack of juvenile delinquents.

Shelton's libel suit included a litany of complaints typically found in libel cases. He said he suffered embarrassment by Boone's editorial and damage to his character and reputation, that he was subject to "public contempt, ridicule and shame," and that he suffered in his "profession, business or trade."⁴⁵¹ Boone used the suit to delve deeper into Klan activities. During discovery, Boone's attorney Bruce McEachin sought membership rosters of the state and county Klan, any photos of Klan meetings, rallies, or cross burnings, copies of the Klan's newspaper *The Fiery Cross*, copies of the group's bylaws and other written Klan material. He also sought Shelton's income tax returns to determine whether the Imperial Wizard had actually been damaged in his business as a result of the editorials. Boone said the editorial was a matter of public interest and his free speech and press rights were clearly protected by the First Amendment. In his original complaint, Shelton did not use the words "actual malice," in spite of the fact that the new *Sullivan* doctrine required that the plaintiff prove such. Boone's attorney was

⁴⁴⁸ Ibid.

⁴⁴⁹ Memo from Boone's attorney, Bruce McEachin, August 18, 1964, Box 255, Folder 9, *Boone Papers*.

⁴⁵⁰ Boone to McEachin, August 26, 1964, Box 255, Folder 9, *Boone Papers*.

⁴⁵¹ Complaint, *Shelton v. Tuscaloosa Newspapers*.

sure to address it, however, arguing that Shelton did not “sufficiently allege” that Boone published the editorial with reckless disregard for the truth.⁴⁵² Also, Boone said his words were fair comment or criticism in the form of an editorial.⁴⁵³

Meanwhile, Shelton filed a second \$500,000 libel suit against Boone in 1965 in circuit court in Tuscaloosa, also for an editorial that ran in July 1964.⁴⁵⁴ He complained that the second editorial was false and defamatory, noting that Boone called him “a threat to the general public” and “a leader of ‘gorillas’ uncaged but waiting to bite, as one who ‘crawls’ out at night to use the cover of darkness to defy and disobey the law and to lead others to do so.”⁴⁵⁵

At his October 14, 1964 deposition, Shelton refused to answer 139 of the 210 questions posed by McEachin, mostly queries related to Klan activities and his work as Klan leader. It was as if Boone was putting Shelton on trial. For example, McEachin asked Shelton details of his whereabouts and activities relating to the 1961 Mother’s Day beatings of the Freedom Riders in Birmingham. Shelton argued he was protected by his First Amendment right of association. Circuit Court Judge Walter B. Henley ordered Shelton to answer 64 of the 139 questions the Imperial Wizard originally refused to answer.⁴⁵⁶ He did not, however, require Shelton to hand over membership lists or photos taken during Klan rallies, meetings or cross burnings. Judge Henley said it would first have to be proven that the group was engaged in or sanctioning illegal activities before it could be compelled to reveal members’ names. He did require that Shelton provide

⁴⁵² Demurrer to the complaint, *Shelton v. Tuscaloosa Newspapers*.

⁴⁵³ William Prosser, Torts 812-816 (3d ed.1964).

⁴⁵⁴ “Shelton Files New Suit Against News,” *Tuscaloosa News*, July 15, 1965. The editorial was called “Lullaby and Goodnight.” The second suit was Case. No. 20828, also filed in Circuit Court in Tuscaloosa.

⁴⁵⁵ Shelton to Boone, July 9, 1964, Box 255, Folder 9, *Boone Papers*.

⁴⁵⁶ Court order, January 16, 1965, *Shelton v. Tuscaloosa Newspapers*.

copies of all editions of the *Fiery Cross*. Boone appealed the judge's ruling to the Supreme Court of Alabama.⁴⁵⁷ He argued that he sought to prove Shelton's bad reputation existed before Boone's editorials ran.⁴⁵⁸

Ironically, in appeal documents, Shelton's attorney relied on *NAACP v. Alabama*, where the United States Supreme Court ruled that Alabama officials could not require the NAACP to hand over its membership lists.⁴⁵⁹ In this case, Shelton argued, the court recognized "the vital relationship between freedom to associate and privacy in one's association," and that to turn over the Klan roster would "affect adversely" the group's efforts "to foster beliefs which they have a right to advocate."⁴⁶⁰ Also, Shelton argued, the Klan was not party to the suit "he was suing as an individual. In Shelton's second case, Alabama's high court refused to hear Boone's appeal to require the Klan leader to answer the questions posed to him in his deposition. Once again, Boone wanted membership lists and answers to specific questions about Klan activities."⁴⁶¹

Since Shelton alleged that he had been harmed financially from Boone's editorials, the judge agreed that he should hand over his tax returns from 1963 through 1966, along with all accounting records showing his income. Those records reflect a steady increase in his paycheck as Shelton became more involved in the Klan. In 1963, Shelton reported to the Internal Revenue Service that he earned \$1,875 as a salesman, and

⁴⁵⁷ Memoranda of Authorities in Support of Motion of Defendants Tuscaloosa Newspapers and Buford Boone to Compel the Plaintiff to Answer Certain Questions Propounded to him on Oral Examination, December 16, 1964, *Shelton v. Tuscaloosa Newspapers*. McEachin argued that this information was needed in the discovery phase of the suit in order to "identify and locate persons having knowledge of the Plaintiff's reputation or character."

⁴⁵⁸ McEachin cited *Bryant v. Zimmerman*, 278 U.S. 68, 73 L. Ed. 184 (1928), where the court upheld a state statute compelling the Klan to submit membership rosters, based on the "character of the Klan's activities."

⁴⁵⁹ 357 U.S. 449, 2 L.Ed 1488, 78 S. Ct. 1163 (1958).

⁴⁶⁰ Brief and Argument in Support of Answer and Return, August 5, 1965, before the Supreme Court of Alabama.

⁴⁶¹ Petition for Writ of Mandamus, April 6, 1967.

listed his wife, Betty, as a housewife on their joint return.⁴⁶² In 1964, the year Shelton filed suit, he reported to the IRS that he earned \$3,576, a third of that income from his public relations work for the United Klans of America. In 1965, his income continued to increase steadily. Shelton listed his only occupation as president of the United Klans of America, with all of his wages of \$4,663.23 coming from that group. He reported an incredible income jump in 1966 in the same occupation as Klan leader of \$18,061.21. Clearly, Boone's attorney argued, Shelton had not suffered in his business as a result of the editorials.

At his lawyer's suggestion, Boone even thought about throwing a libel suit back at Shelton and the Klan after the *Imperial Wizard* called the publisher either a "rattlesnake" or a "rat-snake" during an April 1966 Klan meeting. However, he later discarded the notion.⁴⁶³ Throughout the lengthy court battle, Boone kept tabs on Shelton's activities, receiving memos from his reporters that read like FBI reports. At an April 17, 1965 rally, according to reporter Jimmy Mizell's memo to Boone, Shelton told members he would fight to protect Klan membership rosters just as the courts protected those of black organizations. Shelton also told the crowd that members of the media were welcome at the rally and that he had just talked to a reporter and photographer from the *News* before coming on stage. He got plenty of laughs and applause when he said in his microphone: "The only thing I ask is if you bring Buford with you, leave him in the middle of the highway."⁴⁶⁴

⁴⁶² Certified copies of Shelton's tax returns from 1963-1966, Box 256, Folder 11, *Boone Papers*.

⁴⁶³ McEachin to Boone, February 24, 1966, Box 255, Folder 12, *Boone Papers*.

⁴⁶⁴ Mizell to Boone, April 17, 1965, Box 255, Folder 11, *Boone Papers*.

Boone, meanwhile, tried to maintain a good relationship with the White Citizensø Council that was active in Tuscaloosa.⁴⁶⁵ He also kept FBI-like files on the groupø leader Leonard R. Wilson. When Boone was asked to speak about desegregation issues at the organizationø regular meeting, he agreed and did not back down from his moderate stance. Though there were a few hecklers who vowed to kill the next black person who stepped on the Alabama campus, Boone was treated cordially at the meeting. During his speech, he told the audience he supported the Supreme Courtø desegregation ruling in *Brown v. Board of Education* (1954). øI believe the Supreme Court decision had to come and that it was morally rightí But we have been telling the rest of the country to go to hell and we canø do that and get away with it.ø⁴⁶⁶ After the meeting Boone wrote a note to himself and put it in his files: ø[Reporter] Bob Kyle told me that I looked like I was scared to death when I started speaking and that if I had been any worse I would have had to sit down. I told him that this was one time that he was wrong, that I was terribly nervous but I wasnø scared.ø⁴⁶⁷

Boone also worked with the U.S. House of Representatives Committee on Un-American Activities in its investigation of Shelton.⁴⁶⁸ He agreed to mail committee members a photo of Shelton at an August 1965 rally where he is pictured with the three men accused of the murder of civil rights demonstrator Viola Liuzzo.⁴⁶⁹ Boone wrote

⁴⁶⁵ In a friendly exchange of letters, White Citizensø Council chairman Leonard R. Wilson assured Boone that his organization would cooperate with the *News* and help Boone provide accurate coverage of the Council. Wilson to Boone, January 10, 1957, Box 255, Folder 7, *Boone Papers*.

⁴⁶⁶ Speech to the West Alabama Citizensø Council, Tuscaloosa County Courthouse, January 4, 1957, Box 255, Folder 7, *Boone Papers*.

⁴⁶⁷ Memorandum re: Speech to Citizensø Council of West Alabama, January 4, 1957, Box 255, Folder 7, *Boone Papers*.

⁴⁶⁸ Boone to Donald P. Appell, U.S. House of Representatives Committee on Un-American Activities, April 20, 1965, Box 255, Folder 11, *Boone Papers*.

⁴⁶⁹ The three men, Collie Wilkins, William Eaton and Eugene Thomas were charged with murder after Liuzzo, a white woman from Michigan, was shot twice in the head after the Selma to Montgomery marches

Donald Appell, a member of the committee: "I have been astonished at the Klan's parading of the three accused of the [Liuzzo] murder at weekend meetings. And they may be planning to keep on presenting them as the Klan's current heroes. I think it is good that they are doing this, for it is proof through Klan action of how extreme, how unreasonable they are and of how much they approve of violence for their cause."⁴⁷⁰ Further, Boone staked out his reporters at a KKK meeting at Tuscaloosa's Stafford Hotel in August 1967 on the advice of his lawyer. It would help to know who was coming and going when it came time to select a jury in the libel trial.⁴⁷¹

At trial in 1968, McEachin argued that Shelton was a public figure and must prove actual malice, citing *A.P. v. Walker*, which had been decided in July 1967.⁴⁷² He argued that Klan activity was a matter of public interest, and Boone's editorials had focused on concerns about mob violence in the streets of Tuscaloosa. McEachin also argued that Shelton had received so much publicity, it was impossible to tell which (if any) news stories actually damaged his reputation. The Tuscaloosa jury awarded Shelton a measly \$500 in punitive damages, refusing to award compensatory damages.⁴⁷³ The segregationist *Clarion-Ledger* in Jackson, Mississippi speculated that white southerners were turning on the Klan, and that moderates, angry with the Klan for civil rights murders, church bombings and other violence, used the suit to expose some of the inner

in 1965. Eaton died after a heart attack before trial. Wilkins and Thomas were acquitted of the charges by an all white jury, but were later found guilty of conspiracy under the 1871 Ku Klux Klan Act, a Reconstruction-era criminal statute.

⁴⁷⁰ Boone to Appell, May 21, 1965, Box 255, Folder 11, *Boone Papers*.

⁴⁷¹ McEachin to Boone, August 26, 1967, Box 255, Folder 12, *Boone Papers*.

⁴⁷² 388 U.S. 130, Supplement to Memorandum Trial Brief, February 1, 1968, *Shelton v. Tuscaloosa News*.

⁴⁷³ McEachin to Worrall, September 20, 1968, Box 256, Folder 1, *Boone Papers*. See also Simon Wendt, "God, Gandhi, and Guns: The African American Freedom Struggle in Tuscaloosa, Alabama, 1964-1965." *Journal of African American History*, Winter 2004, Vol. 89, Issue 1, 36-56.

workings of the secret organization.⁴⁷⁴ Members of the jury later said they thought Boone “overstepped his bounds” in the editorial about Shelton and agreed he should “be paddled a little.”⁴⁷⁵ “The fact that none appeared to want to burn Boone up with a big verdict against him was í the most significant development, particularly as regards [to] future litigation.”⁴⁷⁶ Shelton later dropped the second case.

Throughout the legal battle and his coverage of civil rights issues, Boone managed to keep his sense of humor in the face of a steady stream of hate mail. One of the more civil letter writers from out of town, C.A. Hull, asked Boone: “Are you white or black? You may plead the Fifth Amendment if you wish.”⁴⁷⁷ To which the editor answered: “Dear Mr. Hull, In answer to your question, the *Tuscaloosa News* is black and white and read all over. Yours truly, Buford Boone.”⁴⁷⁸

Boone, an unassuming lifelong southerner, had stared down one of the most notorious Klansmen in the country. To the white supremacists in his community, Boone aided and abetted those who would threaten their core beliefs and their way of life. He had called a race-making icon “a pitiable little man” and a “jackel” and lived to talk about it. Though middle class support of the Klan was beginning to wane, clearly Boone was ahead of his time. Most moderates like Boone were afraid to say what they were thinking, that separate may not really be equal, but Boone had his newspaper and his conscience and enough guts to use them. He could have censored himself or failed to fight Shelton’s libel suits so ardently. As Justice William Brennan Jr. wrote in his opinion in *New York*

⁴⁷⁴ Rowland Evans and Robert Novak, “Million-Dollar Suit May Be KKK End,” *The Clarion-Ledger*, June 4, 1965.

⁴⁷⁵ To Boone from Bob Kyle, a *News* employee, September 23, 1968, Box 256, Folder 1, *Boone Papers*.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ C.A. Hull to Boone, March 1, 1965, Box 255, Folder 2, *Boone Papers*.

⁴⁷⁸ Boone to C.A. Hull, March 23, 1965, Box 255, Folder 2, *Boone Papers*.

Times v. Sullivan, First Amendment freedoms must take into account self censorship. Journalists like Boone should feel free to speak their minds on controversial public issues without the fear of libel suit-induced bankruptcy.

Hodding Carter Jr. and the “seditious psychopath”

Hodding Carter Jr. was a royal pain to white supremacists in Greenville, Mississippi long before the modern civil rights movement took hold. In his *Delta Democrat-Times*, Carter was running photos of Jesse Owens, winner of four gold medals in the Olympics in Berlin, in the 1930s at a time when no southern newspaper ran *any* photos of blacks, much less one who shattered Aryan claims of superiority.⁴⁷⁹ Since African Americans did not exist in mainstream newspapers in the South, he was challenging the existence of a parallel but invisible society living and working under the white man. Carter was a moderate, a dirty word among southerners at the time. But that moderation came later in life. A native of Hammond, Louisiana, Carter bought into the cult of whiteness so thoroughly steeped in society. As a 17-year-old, he shocked his classmates with his racism when he entered Bowdoin College in Brunswick, Maine, refusing to speak to the only black student at the school. Both his grandfathers fought for the Confederacy, one riding with General Nathan Bedford Forrest and who was later founder of the Klan. But as the stamps on his passport multiplied ó he traveled to Egypt and India as a public relations officer for the U.S. Army in the 1940s ó he became more open-minded. The more he traveled, the less prejudiced he became.

⁴⁷⁹ Ann Waldron, *Hodding Carter, The Reconstruction of a Racist* (Chapel Hill: Algonquin Books, 1993), 79.

The cultural climate of Greenville, a river town with a large Syrian and Chinese population, was more progressive than most southern cities. By the 1930s, it was becoming somewhat of a gathering spot for the state's best known writers. The cultural paragon of Greenville was William Alexander Percy, a cotton planter, lawyer and banker who had a national reputation after publishing four books of poetry. Percy was a magnet for visitors such as Carl Sandburg, William Faulkner and Shelby Foote. The country club even had a Jewish president when other towns refused to admit Jews. But blacks remained in their customary place, the lowest class, poorly paid and working mostly as manual labor or as maids.

In his editorials, Carter regularly ridiculed the Klan and tackled issues of race and prejudice. He spent his summers in Maine, writing novels that were for the most part widely acclaimed, such as *Where Main Street Meets the River*.⁴⁸⁰ And he earned thousands of dollars writing for national magazines such as *Life* and *Look*. As Carter became more famous, not just in Greenville or in Mississippi, he was in high demand as a speaker, most often in the North. He spoke progressively about race but also became a noted defender of the South and the importance of slow change in his home state. Some city leaders tried to get merchants to stop advertising with the paper, but business owners resisted and circulation held steady. In 1950, a third of the newspaper's 12,000 subscribers were black.⁴⁸¹ The Carters also were bombarded with insulting letters and telephone calls. He hid an iron bar under the front office counter after some particularly vile threats. Another time, Carter huddled in the bushes in his driveway with a shotgun, waiting for a man who had threatened to kill him.

⁴⁸⁰ Hodding Carter, *Where Mainstreet Meets the River* (New York: Rhinehart & Company Inc., 1953).

⁴⁸¹ Waldron, *Hodding Carter*, 219.

Carter's troubles with libel came after he gave a talk as part of the University of New Hampshire's Distinguished Lecture Series in October 1962. As was customary for him, Carter attempted to explain the causes of the Mississippi mindset, both defending and criticizing the state in his lecture, "The Why of Mississippi," to approximately 1,500 students, faculty and guests.⁴⁸² Carter had originally planned to discuss President Andrew Johnson as "a moderate and defier of the bigots and extremists of his own time," but the Ole Miss riots were still fresh and stinging. Carter said: "The University of Mississippi has suffered a cruel and undeserved blow. There were but a minority of students who took part in the rioting. The troublemakers were mostly hoodlums, crackpots, and racists from the outside." He also told the audience "we can be comforted and reassured" by certain "evident truths." Among them, "General Edwin Walker, who personally led the insurrectionists on the Ole Miss campus, has been exposed once and for all for what he is: A seditious psychopath."⁴⁸³

Carter's speech was covered by the *Union Leader* in Manchester, though that article did not include his remarks about Walker.⁴⁸⁴ However, the university's student newspaper, *The New Hampshire*, printed much of Carter's talk verbatim, including the section referring to Walker.⁴⁸⁵ Thus, Carter joined the multitude of journalists in libel actions against the Texas general.⁴⁸⁶ Walker filed the slander suit in Washington County Circuit Court in Greenville, seeking \$2 million in damages.⁴⁸⁷ Carter's attorney

⁴⁸² Box 69, Folder 11, *Carter Papers*.

⁴⁸³ *Ibid.*

⁴⁸⁴ Paul Dietterle, "Hodding Carter Blames Many for Miss. Woes," *Manchester Union Leader*, October 12, 1962.

⁴⁸⁵ "Carter Calls Barnett 'Demagogue,'" Editor Says Mississippi Politicians Low Caliber," *The New Hampshire*, October 11, 1962.

⁴⁸⁶ Carter was not the only southern journalist experiencing Walker's wrath. He also sued newspapers in Atlanta, New Orleans and Little Rock, among others.

⁴⁸⁷ *Walker v. Carter*, Washington County Circuit Court, Case No. 6182.

interviewed a wide range of audience members in New Hampshire, trying to build an argument that they were already aware of Walker's role in the Ole Miss riots and his resulting arrest thanks to widespread news reports.⁴⁸⁸ Lawyers around the country who were fighting libel suits from the General formed the "Walker Suit Club" and included Carter's counsel along with those for *Newsweek*, the *Associated Press*, *St. Louis Post-Dispatch*, *Denver Post*, *Louisville Courier Journal*, *Atlanta Constitution* and the *Fort Worth Star-Telegram*. The idea was to share information that might help in their defenses. Carter once quipped: "It is very flattering to be sued for two million dollars when the *Times Picayune* has been asked for only three million."⁴⁸⁹

Timing helped Carter in this particular instance. A Washington County circuit judge dismissed the case in December 1967, citing *Sullivan* and a case decided earlier in the year, Walker's own suit against the Associated Press, which extended the actual malice standard to public figures.⁴⁹⁰ The judge pointed out that when Carter made his statements, Walker was under arrest for charges of sedition and had been taken to a Springfield, Missouri mental hospital to determine if he was mentally capable of standing trial. Also, his actions at Ole Miss had been widely reported, that he personally led a charge of students against federal marshals. Most notably, the judge said Carter did not act with malice, that the statements "were made with a reasonable belief in their truth" and that there was a legitimate public interest in the issue being discussed.⁴⁹¹ The First Amendment once again trumped the cult of whiteness. Carter had become a big target in

⁴⁸⁸ University of New Hampshire interviews, undated memo, Box 69, Folder 31, *Carter Papers*.

⁴⁸⁹ Carter to John Hohenberg, October 8, 1965, *Carter Papers*.

⁴⁹⁰ *A.P. v. Walker*, 388 U.S. 130 (1967).

⁴⁹¹ Final Judgment, December 4, 1967.

Mississippi, ostracized, threatened with death and sued for libel. Still he published. White supremacists were starting to run out of ideas.

Hazel Brannon Smith: Southern Belle versus the Sheriff

Hazel Brannon rolled into Holmes County, Mississippi in 1936, fresh from the University of Alabama, a stereotypical Southern Belle, a gregarious sorority girl and self-confident beauty queen. She had borrowed \$3,000 and wanted her own newspaper, settling on the struggling *Durant News* with its circulation of 600.⁴⁹² A few of the men in town took bets on how long the little lady would last, giving her six months at the most. But Brannon had been a journalist since she graduated from high school in 1930, selling ads on commission and reporting for her hometown newspaper, the *Etowah Observer* in Gadsden, Alabama. In college, she worked her way up to managing editor for the student newspaper and graduated with a degree in journalism. She paid off her *Durant News* loan in four years and bought the more established *Lexington Advertiser*, the Holmes County seat's 1,800-circulation weekly, in 1943. Brannon's newspapers prospered with their small-town recording of births, deaths, wedding and anniversaries. In her column, "Through Hazel Eyes," she supported the racial status quo, imagining a Jim Crow world where whites and blacks lived happily and peacefully, each knowing his place.⁴⁹³ Holmes County, 60 miles north of the state capital, Jackson, had a population of about 27,000 at the time, nearly two-thirds black.

⁴⁹² David R. Davies, ed. *The Press and Race: Mississippi Journalists Confront the Movement* (Jackson: University Press of Mississippi, 2001).

⁴⁹³ John A. Whalen, *Maverick Among the Magnolias, The Hazel Brannon Smith Story* (Xlibris Corporation, 2001).

A crusader from the start, Brannon took on illegal bootlegging and gambling, calling on local law enforcement to clean up the county, hounding them in her editorials for months. She challenged Sheriff Walter L. Murtagh to enforce gambling laws or resign. "The only way our officials can prove they are not being paid off, in our opinion, is to start enforcing the law now and continue to enforce it until this county is rid of the bootlegging joints that line our public highways throughout the county."⁴⁹⁴ After the sheriff executed search warrants and began confiscating cases of liquor, Brannon continued her prodding under the headline: "What About the Slot Machines?"⁴⁹⁵ Later that spring, a grand jury returned 52 indictments for gambling and prohibition violations and Brannon was feeling triumphant. "The bootlegger is definitely on the run."⁴⁹⁶

Brannon's newspapers prospered and enabled her to buy a white Cadillac convertible every other year or so, kept her in stylish clothes and allowed her such luxuries as a cruise around the world. In 1949, the town's most desirable catch returned home with her cruise ship's purser, Walter Smith, whom she called "Smitty." He became the administrator of the Holmes County Community Hospital after they married, and her newspapers' mastheads listed her as "Hazel Brannon Smith, (Mrs. Walter D.) Editor and Publisher."

After the United States Supreme Court's unanimous *Brown v. Board of Education* ruling in 1954, Smith defended segregation but wrote the court was "morally right" that separate schools are inherently unequal. "But we know, for practical purposes, that separate educational facilities are highly desirable in the South and other places where the two races live and work side by side. We know that it is to the best interest of both races

⁴⁹⁴ Hazel Brannon, "Through Hazel Eyes," *Lexington Advertiser*, Feb. 28, 1946.

⁴⁹⁵ *Ibid.*, April 11, 1946.

⁴⁹⁶ *Ibid.*, April 25, 1946.

that segregation be maintained in theory and in fact.⁴⁹⁷ Early in life, like Hodding Carter, she had bought into the notion of racial otherness, of popular culture's boilerplate images of blackness. All she knew was a culture built on maintaining distinct racial identities and segregation, yet a sense of right and wrong began to form.

In Indianola, less than 50 miles from Lexington, the first White Citizens' Council was created in response to *Brown* and chapters began springing up around the state. They billed themselves as law-abiding citizens who opposed segregation, but Smith eyed them warily, editorializing in 1954: "They appeal to prejudice and to ignorance and their religion is the doctrine of hatred and greed implemented by the weapons of fear and distrust."⁴⁹⁸ She was no longer in lockstep with her community on the issue of race, most notably on the issue of fair and equal treatment under the law. And for that she became a lightning rod, antagonizing a community bent on ruining her. Smith later traced a run-in with the local sheriff over his treatment of blacks and his resulting libel suit against her as the turning point in her newspaper career. Though she was able to buy two more newspapers, the *Banner County Outlook* in Flora in 1955 and the *Northside Reporter* in Jackson in 1956, a steady barrage of harassment by white supremacists would cripple her financially for decades, make her a legend in national newspaper circles and leave her virtually friendless in her own community.

It all started with a front page story, "Negro Man Shot in Leg Saturday in Tchula; Witness Reports He Was Told to 'Get Going' by Holmes County Sheriff."⁴⁹⁹ Smith reported in July 1954 that Sheriff Richard F. Byrd "came driving up where a group of Negroes were congregated and asked one of them what he meant by 'whooping.' When

⁴⁹⁷ May 20, 1954.

⁴⁹⁸ September 23, 1954.

⁴⁹⁹ July 8, 1954.

the Negro replied that he had not whooped, Sheriff Byrd was reported to have cursed and struck the Negro on the head. When the Negro raised his hand to ward off further blows Sheriff Byrd was reported to have pulled out his gun and told the Negro to "get going" whereupon the man started running. At this time, Sheriff Byrd was reported to have fired his gun several times, one of the bullets entering the left thigh of the victim from the rear and passing through the leg to the front. No charges have yet been filed against Sheriff Byrd in the shooting.⁵⁰⁰

In an editorial the next week titled "The Law Should Be for All," Smith called for Byrd's resignation for this and his overall treatment of black citizens, of "shocking reports too numerous to ignore."⁵⁰¹ Further, Smith wrote: "This kind of thing cannot go on any longer. It must be stopped. The vast majority of Holmes county people are not red necks who look with favor on the abuse of people because their skins are black. In our opinion, Mr. Byrd as Sheriff has violated every concept of justice, decency and right in his treatment of some people in Holmes county. He has shown us without question that he is not fit to occupy that high office." She was defending a black man over a white, and this type of editorial stance was virtually unheard of at the time. It had long been established that justice was doled out differently and depended on race. Smith defended the wounded black man, 27-year-old Henry Randle, writing that, "He had not violated any law or the Sheriff was not trying to arrest him for any offense. He just made the one mistake of being around when the Sheriff drove up."⁵⁰²

Byrd denied that the man was ever shot and sued Smith for \$57,500 in damages in Holmes County Circuit Court, to which Smith replied in print: "This newspaper has in

⁵⁰⁰ Ibid.

⁵⁰¹ Ibid., July 15, 1954.

⁵⁰² Ibid.

the past, and will continue in the future to print the truth as we know it to be. No damage suit can shut us up so easily.⁵⁰³ Byrd won \$10,000 at trial in October 1954, and Smith appealed to the Mississippi Supreme Court.⁵⁰⁴ She said the libel verdict was "punishment for daring to criticize a white man for abusing a Negro."⁵⁰⁵ In October 1955, the state's high court reversed and rebuked Byrd in an opinion written by Justice Percy Lee: "Under the facts of this record, there was no justification whatever for hitting the Negro with the blackjack or shooting him...it follows that the Negro was unlawfully assaulted in both instances." The court held "proof of the substantial truth of a publication, made with good motives and for justifiable ends, is defense to an action of libel" under Mississippi law.⁵⁰⁶ The court also praised Smith's work, pointing out that she had tried to reach Byrd multiple times before running the story and that several witnesses said Byrd fired the shots. "As a newspaper woman, she conceived that it was her duty, through her papers, to give the public the news, and this she did in the utmost good faith. After the news item was published and the Sheriff made no complaint about it, she assumed that it accorded with his version of the facts, and she thereafter made the editorial comment on July 15." Addressing First Amendment rights, Lee wrote that "the freedom of speech and of the press shall be held sacred" and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted." Lee was also ahead of his time, defending press rights in a civil rights-related case almost 10 years before the Supreme Court would do so in *Sullivan*.

⁵⁰³ Ibid., July 22, 1954.

⁵⁰⁴ *Smith v. Byrd*, (1955), No. 39755, Supreme Court of Mississippi, 225 Miss. 331; 83 So. 2d 172; 1955 Miss. LEXIS 588.

⁵⁰⁵ "The Last Word," *Time*, November 21, 1955.

⁵⁰⁶ 225 Miss. 331, at 345.

In a November 1955 editorial headlined "Freedom's Safeguard," Smith said of her libel case essentially what Justice Brennan would say nine years later in the *Sullivan* ruling. "The real point at issue was the right of an editor to criticize a public official in the performance of his official duties. If that right is abridged, the opportunity for people to know and to understand the actions of public officeholders will be seriously weakened, for it is the alert newspaper and the courageous editor who keeps the people informed."⁵⁰⁷

Holmes County residents were unimpressed, and their retaliation came kudzu-quick. Smith had long agitated the establishment with her controversial editorials, and after the libel decision, the fight then moved from the courts to the pocketbook. Smith's husband was fired as administrator of the local hospital, advertisers pulled out and her printing business shrank.⁵⁰⁸ "Sometimes I feel like just going on and selling out—but if I did I feel that I would be compromising everything I have ever stood for and believed in and I can't do it," Smith wrote her friend, Hodding Carter.⁵⁰⁹ As Smith's debts began piling up, Carter and several other mostly moderate Southern editors organized a committee to raise money to help keep her in business.⁵¹⁰ "The gal is too courageous to be destroyed," Carter wrote Norman Isaacs of the *Louisville Times*.⁵¹¹ They appealed to virtually every editor in the country, and thousands of dollars were donated by scores of newspaper men, from media baron Roy Howard to editors from the *Chicago Tribune*, the *Boston Herald*, the *St. Petersburg Times*, even the *Honolulu Advertiser*. Smith was to use

⁵⁰⁷ "Through Hazel Eyes," November 10, 1955. At the end of 1955, the state Supreme Court overruled a suggestion of error filed by Sheriff Byrd's attorneys.

⁵⁰⁸ Untitled memo, Folder 9, Correspondence, 1955-1956, *Papers of Hazel Brannon Smith*, Mississippi State University (hereafter *Smith Papers*).

⁵⁰⁹ Smith to Hodding Carter Jr., Folder 9, Correspondence, 1955, *Smith Papers*.

⁵¹⁰ Included in the group were Ralph McGill of *The Atlanta Journal*; J.N. Heiskell of the *Little Rock Gazette*, Mark Ethridge of the *Louisville Courier-Journal* and Francis Harmon, former owner of the *Hattiesburg American*.

⁵¹¹ Hodding Carter Correspondence: Tri-Anniversary Committee, 1961-1962, *Smith Papers*.

the money to pay for ad space at \$164 a page, and editors could pick a non-profit organization to promote, such as the American Heart Association. Carter also co-signed on a loan from a Greenville bank.⁵¹² The National Council of Churches contributed \$3,000, earmarking the money for lawyers fees related to the sheriff's libel suit.⁵¹³

Failing to run her out of business, a group of community leaders started the *Holmes County Herald* in 1958 with Citizens' Council backers that included public officials, lawyers and prominent Lexington businessmen. Smith challenged them in an editorial. "There is not enough business in Lexington for two newspapers! Somebody is going broke."⁵¹⁴ While Smith picked up state and national journalism awards, the harassment and intimidation continued at home. In 1960, she wrote about an eight-foot cross burning in her yard and how she chased the "culprits" and got the tag number off their Chevrolet station wagon. She identified the owner as Holmes County lawyer Pat Barrett, who later said his son was merely taking part in a high school prank. Undeterred, she continued to use her column to cajole advertisers to come back to her newspapers, pointing out in July 1961 that the *Herald* was late getting its edition on the streets for the fifth week in a row, and lamenting that the crusade against her was a "continuing campaign that has been waged without letup since Richard Byrd filed a libel suit against me in July of 1954 - seven long years ago."⁵¹⁵ An anonymous leaflet, "The Nocturnal Messenger," thrown like a newspaper in driveways throughout Holmes County, railed against blacks, Smith and other "leeches," and encouraged whites to join a "local civic

⁵¹² Ibid. Carter wrote a story in support of Smith, "Woman Editor's War on Bigots," which first appeared in the *St. Louis Post Dispatch*, November 26, 1961. It was later included in an anthology of Carter's work, *First Person Rural* (New York: Double Day, 1963).

⁵¹³ Ibid., a November 9, 1961 unsigned letter to Carter.

⁵¹⁴ December 4, 1958.

⁵¹⁵ July 20, 1961.

group.⁵¹⁶ "We want the Smith woman to know that her Communist financed holiday in Holmes County is just about over. The negro agitators had better hear and head this message too."

For her editorials condemning the White Citizens' Council, Smith won the Pulitzer Prize in 1964, the first woman to do so. Her *Northside Reporter* was bombed that year, and her competition, *The Herald*, had more than a foothold in the circulation war in Holmes County. Though she struggled financially, Smith remained flamboyant and stubborn, and with that, persona non grata in Lexington. In October 1963, law enforcement officers sued her again for libel. This time two Lexington policemen, W.M. McNeer and Frank Davis sought \$50,000 each in actual and punitive damages for a news story and editorial in the June 13 editions of the *Advertiser* and *Durant News*. The officers shot and killed Alfred Brown, 38, a black World War II veteran who had recently been released from a veterans' hospital where he was a mental patient.⁵¹⁷ The officers said they tried to arrest him for public intoxication, and had hit him over the head with a blackjack when Brown pulled a knife. Davis suffered a deep cut on his neck and Brown was shot twice.

Using eyewitness reports, Smith's story "Negro Veteran Killed by Officers" ran in all her papers. In an accompanying editorial, she wrote that "from all accounts of reliable eyewitnesses the killing was senseless and could have been avoided ... If we are to continue to have racial peace here the present situation needs a great deal of improvement from the standpoint of law enforcement and spirit and attitude as well." Echoing her statements about Sheriff Byrd that prompted the earlier libel suit, Smith

⁵¹⁶ The Nocturnal Messenger, undated. Folder: Editorials & Articles, *Smith Papers*.

⁵¹⁷ Whalen, *Maverick Among the Magnolias*, 157.

suggested that the Lexington police officers be ordered to treat both blacks and whites with respect or be fired.⁵¹⁸

At trial in Holmes County Circuit Court, Smith's attorney Robert H. Weaver said the officers never complained about the story or said it contained errors. Judge Arthur Clark Jr. ruled that Smith should publish a statement by the officers, giving them a chance to refute the story. The police officer's reply in her newspaper tried to debunk her story line after line.⁵¹⁹ Smith said in an accompanying article that the "written statement of the police officers was much different than witnesses to the scene."⁵²⁰ But surprisingly, she backed down. She published a retraction to any "erroneous portions" of the story, writing "it was not our intention to impugn either their character or reputation, or to imply they were guilty of unlawful acts."⁵²¹ The case ended as a win for Smith, though, with the judge ruling against the plaintiffs for failure to establish a case. The officers reinstated their libel suits in January 1964, but the actions languished in court on routine continuances until they were dismissed at the cost of the plaintiffs in 1967.⁵²²

By 1968, some 14 years after Sheriff Byrd's libel suit, Smith said she was more than \$200,000 in debt, but promised not to quit.⁵²³ "When are they (the white people) going to find out that what I am trying to do is help ALL PEOPLE, white and black, so that we may work together and try to understand each other in order to build a better community and county?"⁵²⁴ The bank foreclosed on her home, Hazelwood, and its accompanying 135 acres in 1985. Suffering from Alzheimer's, the widowed Smith closed

⁵¹⁸ Ibid.

⁵¹⁹ *Lexington Advertiser*, October 24, 1963.

⁵²⁰ Ibid.

⁵²¹ Ibid.

⁵²² Whalen, *Maverick Among the Magnolias*, 159.

⁵²³ Duard Le Grand, "Hazel Smith is All-Southern Editor," *Lexington Advertiser*, June 6, 1968.

⁵²⁴ Hazel Brannon Smith, "Through Hazel Eyes," *Lexington Advertiser*, June 6, 1968.

the *Durant News* and the *Lexington Advertiser*, and died forgotten in a nursing home run by her niece in Cleveland, Tennessee in 1989.⁵²⁵ Perhaps the actions of these southern editors were more offensive than those of their northern counterparts. Boone, Carter and Smith were betraying their own culture, and to members of the white community, they should have known better.

When studying reporters' attempts to cover the civil rights movement, it is important to include the work of southern journalists who stuck their necks out in the name of truth. It is arguable that southern public officials felt even more threatened by newspaper coverage critical of them in their hometown newspapers. Smith, Carter and Boone lived, worked and went to church in these communities. Local readers subscribed to their newspapers and read them regularly. The hometown folk would not read a publication like the *New York Times* unless somebody showed it to them. L.B. Sullivan knew about the "Heed Their Rising Voices" ad only because someone gave him a copy of the newspaper. At trial, most of Sullivan's witnesses testified that they first saw the ad when the police commissioner's attorney showed it to them in his Montgomery law office.

In a column about Sheriff Byrd's libel suit, Smith insisted that her words were protected by the First Amendment. A Mississippi judge agreed with her, even though her speech was so unpopular at the time. This does not change the fact, however, that journalists like Smith still had much to fear by being hauled into court in an expensive libel case. In his *Sullivan* opinion, Justice Brennan would worry about this "chilling effect" that might retard public dialogue on issues of public interest. And as was the case in the *Sullivan* suit, Smith was analyzing and criticizing an officer of the law in his public

⁵²⁵ Whalen, *Maverick Among the Magnolias*, 318.

duties. The Supreme Court would leave no doubt that this is the kind of speech the First Amendment was designed to secure.

Chapter Six

Conclusion

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. – First Amendment

Throughout the civil rights movement, southern officials typically silenced civil rights advocates using breach of the peace and disorderly conduct charges.⁵²⁶ Close-to-the-ground civil rights demonstrators and their lawyers came to expect these garden variety tactics. It took a little more ingenuity to develop legal weapons to punish the press and keep them out of the South. Among the many rights trampled during the movement were freedom of speech and press, assembly, and their less noted First Amendment cousin, the petitioning of the government. African Americans were trying to exercise their constitutional rights. Journalists were trying to cover the story. But in a practical sense, blacks had no such rights in the South, and so the First Amendment did not apply to them. To southern leaders like L.B. Sullivan and Bull Connor, African Americans were not full-fledged citizens like their white counterparts. And the meddling northern

⁵²⁶ There are untold numbers of such cases, but *Thomas v. State*, 252 Miss. 527 (1964) provides a classic example of the use of disorderly conduct charges to squelch the demonstrations. The Mississippi Supreme Court affirmed a Jackson court's holding that a Freedom Rider's bus station arrest did not violate his constitutional rights. Howard University student Henry J. Thomas refused to obey a police officer's order to leave a whites-only waiting room and was arrested for disorderly conduct. The state Supreme Court held that the officer had reason to believe there would be an imminent breach of the peace. In its unanimous opinion, Mississippi court was scornful of journalists' coverage of the so-called freedom riders' a group of racially mixed out-of-state demonstrators' who caused resentment, apprehension, and fear ' by the invasion, heralded by the news media. Henry said his arrest was illegal because he had committed no violence and was sitting a place where he had a right to be. The United State Supreme Court reversed.

journalists were merely outsiders, foreigners even. The South represented a world that depended on systematic denial of citizenship, and noncitizens and outsiders had no right to tell the South how their society should function.

Facing the ruins of their social order, the use of libel was a logical next step for southerners desperate to keep their equilibrium. Offended and threatened officials were able to proceed with these frivolous cases for years because the southern lawyers who represented them were equally offended and threatened by increasing press coverage. The big fees would roll in only if they won their cases. As such, some of the biggest losers in these suits were the southern lawyers. They were working on faith that southern judges and juries would remain sympathetic to the cause, and their appetites were whetted by their early successes. Those cases dragged on for years in many instances and were a huge economic threat to some of the most respected media outlets in the country. The latest case studied here, *Rainey v. Orion Pictures*, was not dismissed until 1990.⁵²⁷ Neshoba County, Mississippi Sheriff Lawrence Rainey sued the California film company claiming that he was identifiable as the sheriff in the movie "Mississippi Burning," which told the true story of three civil rights workers who were murdered and buried during the Freedom Summer.

After the nation's high court created the actual malice standard in 1964, public officials and their attorneys still refused to relent. They did not realize the ruling's true impact. Even when their losses started stacking up, when it became clear that the courts really were applying the actual malice standard to public officials in their public actions, still the libel suits came. Rainey was able to sue again and again using the same lawyer,

⁵²⁷ *Rainey v. Orion Pictures* (1989), U.S. District Court for the Southern District of Mississippi, Eastern Division.

James McIntyre, a man always willing to take the cases since he also was also threatened by the very coverage. The same goes for James Simpson, long-time attorney for Bull Connor. Simpson was a powerful member of the Alabama legislature and represented Birmingham's powerbrokers in his law practice. Simpson had installed Connor in his position as a Birmingham city leader, so it was as if Simpson himself had been libeled. He became the driving force behind several of the longest lasting suits arising out of the Alabama coverage. Further, confessed assassin James Earl Ray did not need a lawyer to tie up several writers, newspapers and news magazines in court for years. Clearly these men were not getting good legal advice ó their advisers were blinded by their prejudices.

Further, the new actual malice standard was not fully understood. After the doctrine was announced, some plaintiffs merely amended their original complaints to add the language the high court used, that the defendant "acted with knowledge of falsity or reckless disregard for the truth." Nothing else about the complaint was different. For example, in July 1964, three months after the *New York Times v. Sullivan* verdict was announced, Bull Connor did nothing more than amend one sentence in the fifth paragraph of his initial complaint "to bring himself within the ruling in the Sullivan case."⁵²⁸ It was as if changing a few words in the complaint could change the facts. The transcript from *Connor v. New York Times* reflects some of the confusion surrounding the *Sullivan* verdict. After the jury was excused one particular day late in the trial, attorneys for both sides huddled with U.S. District Court Judge H.H. Grooms, pondering the *Sullivan* decision and what the Supreme Court meant by "actual malice." One of those attorneys was T. Eric Embry, who represented the *Times* in the *Sullivan* case. The question: Was

⁵²⁸ Third Amendment to the Complaint, filed July 13, 1964, *Connor v. New York Times*, United States District Court for the Northern District of Alabama, Case No. 9634.

Bull Connor a public official when he was running for Birmingham commissioner? If *Times* reporter Harrison Salisbury wrote that Connor had run on a platform of "race hate," would actual malice have to be proven since he was a candidate? He had long been in the public eye as a member of the Alabama legislature. And most of the article in question referred to Connor in his official duties as police commissioner.

Grooms: Now, I think definitely the article refers to Mr. Connor, and then there is a question for the jury to say, under the proper instructions of the Court, whether this was done maliciously within the framework of the Sullivan case.

Times attorney Embry: I don't think it refers to him any other way than as a public official, and therefore, whatever was said is said of him as a public official, and therefore not libelous of him.

Grooms: He wasn't a public official when he was running for that office.

Connor's attorney James Simpson: That would not be true anyway. You can libel a public official if you do it maliciously.

Grooms: Yes, they haven't said you can't libel one. They have laid down the rules you have to go by if you are going to recover. They have said the ground rules are broad, and it has got to be the right to comment on its activities, and all of that, but if you get into the field where there is malice, he has maliciously done this thing, as I see it, the action is not precluded by the Sullivan case. I may be wrong, but that is my view.⁵²⁹

Further, southern attorneys and judges did not *want* to understand the new doctrine. Southerners' attempts to disregard it were no different than their attempts to disregard the court's desegregation orders and the host of other civil rights laws being added to the books. If they did not like the law of the land, they could just ignore it. The most obvious case is *Brown v. Board of Education*. Ten years after *Brown*, a mere 1.2 percent of black children in the South attended schools with white children.⁵³⁰ In the libel arena, cases continued for decades. Rainey, the former Neshoba, Mississippi sheriff, was still suing almost 25 years after the *Sullivan* doctrine was created, even though the court

⁵²⁹ Trial transcript, 440, Box, 2, Folder 4, *Connor v. New York Times*, Birmingham Public Library Department of Archives and Manuscripts.

⁵³⁰ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (Chicago: University of Chicago Press, 1991), 52.

held again and again that he was a public figure, a central character in one of the most noted events of the modern civil rights era, the Freedom Summer disappearance of three civil rights workers.⁵³¹ But Rainey was not just spinning his own wheels. The expense to the media outlets, hauled into southern courts to answer to public officials for decades after *Sullivan*, is inestimable. The media was being stifled just as the public conversation about race that was starting to take off in the United States. This squelching of speech has been compared to the work of President John Adams's Federalists with their Alien and Sedition Acts of 1798, as it was comparable to the country's second round of such laws, the Espionage Act of 1917 and the Sedition Act of 1918.

When faced with criticism, government officials for the first 150 years of the country's history somehow found a way to silence their critics. At least until Justice William Brennan, an unheralded Eisenhower appointee, convinced his colleagues on the liberal Warren Court, of "the central meaning of the First Amendment." Drawing his inspiration from the writings of James Madison, Brennan wrote: "The censorial power is in the people over the government and not in the government over the people."⁵³²

A More Subtle Form of Maintaining Racial Otherness

Hazel Brannon Smith's Holmes County provides an interesting case study in whiteness versus blackness in modern time. After whites finally realized they had lost the battle to desegregate public schools, they began creating private academies for their children. Such schools sprouted up in former cotton fields across the South, the land donated by local planters. There are two such schools in Holmes County, Mississippi,

⁵³¹ *Rainey v. Orion Pictures* (1989).

⁵³² *New York Times v. Sullivan*, 376 U.S. 254, 275.

with about 400 students combined. Central Holmes Christian School's class of 2008 had 18 graduates, all white. As recently as 1989, East Holmes Academy threatened to cancel a football game with a school that had a black player.⁵³³ The school's headmaster and the football coach changed their minds only after the Mississippi Private School Association said it would expel the school from the organization if it forfeited the game.

In contrast, there are two public school systems in Holmes County with about 4,000 students combined. The Durant Public School district is 95 percent black. The Holmes County School District is 99 percent black. So how much has Mississippi society changed? It has been argued that a more subtle form of racism exists in parts of the South. Yet the racial makeup of Holmes County Schools shows it is anything but subtle. No wonder Hazel Brannon Smith died forgotten and penniless in 1989.

The economic statistics of the county also tell the story. Of Holmes's 21,000 residents, 80 percent are black, according to the U.S. Census. It has the third lowest annual per capita income in Mississippi at \$10,683. And of course, blacks bear the brunt of that poverty, with about 90 percent of public school students eligible to receive free lunch. It is as if the plantation system is alive and well. Look at the *Holmes County Herald* on any given day. This is the newspaper that was started by white leaders to drive Smith's *Lexington Advertiser* out of business. In this, the only newspaper in town today, the separation of the races is glaring. On the front page, photos of Central Holmes Christian School students run above the fold.⁵³⁴ Rows of smiling white faces are pictured. Everyone is holding an award plaque, all dressed up for the spring athletic banquet. On

⁵³³ "School Backs down on Issue of Black Player," *New York Times*, October 20, 1989.

⁵³⁴ May 29, 2008 edition.

the back page of the community newspaper, an all black Girl Scout troop is pictured for participating in Lexington's annual cleanup day.

Contributions to Research and Theory

The use of libel law to squelch the civil rights movement has been a largely unexplored area of legal history, with the exception of *Sullivan*. Prior to this study, little extensive research existed on the supporting cast of cases. By drawing on the cultural history of race making, the researcher sought to provide a framework through which to study the use and abuse of libel during this turbulent period. Grace Elizabeth Hale's "making whiteness" construct provides a basis for explaining how libel became yet another tool in the southern arsenal to shut up those who threatened their way of life. The researcher sought to further Hale's scholarship, which focused primarily on pop culture artifacts such as literature, films, advertising and other media representations from post-Reconstruction through the first half of the twentieth century. Similarly, what was happening in the courts was not occurring in a test tube. What was happening in the courts was a direct reflection of what was occurring in society. The two are inseparable. White southerners did everything they could think of to maintain "whiteness" as a societal ideal in opposition to "blackness" in order to maintain the status quo and any semblance of the antebellum order.

And perhaps most notable from a First Amendment perspective, race making and maintaining whiteness trumped newspaper editors' strong sense of press freedom. The *Montgomery Advertiser's* Grover Hall, for example, appeared to encourage southern

public officials in their filing of libel suits, even testifying for L.B. Sullivan at trial.⁵³⁵ Plaintiffs taking on the *Times*, including Alabama Governor John Patterson, would never have known about the advertisement had journalists like Hall not ranted about it editorially. Hall complained that the people of Alabama had been “painfully and savagely injured by the *New York Times*,” and that the Times was “misleading the United States and much of the civilized world.”⁵³⁶ In his study of Hall’s influence, Cumming aptly posits that the editor seemed to approve of the chilling effect the libel suits had brought about.⁵³⁷ For example, Hall wrote: “The *Advertiser* has no doubt the recent checkmating of the *Times* in Alabama will impose a restraint upon other publications which have hitherto printed [stories] about the South...”⁵³⁸ Hall contributed to the shackling of some of the country’s leading journalists. Perhaps it is because Hall, blinded by the power of the whiteness myth, saw a truth other than the one the *New York Times* was reporting. As Lippmann famously argued, “the pictures in our heads do not precisely reflect the world outside.”⁵³⁹ Hall’s reality was much different, then, than that of New York reporter Harrison Salisbury. The world as Hall knew it – or as he imagined it to be – provided his own truth.

Hall was not the only southern journalist anxious to silence the northern press.

E.L. Holland Jr., editorial page editor of the *Birmingham News*, was glad to see the

⁵³⁵ Sullivan’s lawyers called Hall and five other witnesses to testify whether the ad was “of and concerning” Sullivan and that it tended to lower his reputation. Hall testified that he associated the ad with the city commissioner, especially the police commissioner. Hall said the ad’s accusation that protesters at Alabama State College were “being starved into submission” was particularly “indefensible.” For more detail, see Anthony Lewis, *Make No Law, The Sullivan Case and the First Amendment* (New York: Vintage Books, 1991), 29.

⁵³⁶ “Abolitionist Hellmouths,” *Montgomery Advertiser*, April 17, 1962.

⁵³⁷ Doug Cumming, “Building Resentment: How the Alabama Press Prepared the ground for *New York Times v. Sullivan*,” *American Journalism*, 22:3 (Summer 2005), 7-32.

⁵³⁸ *Ibid.*

⁵³⁹ Walter Lippmann, *Public Opinion* (New York: Harcourt, Brace and Company, 1922), 3.

Alabama attorney general and the secretary of state go after the *Times*. In an editorial headlined "That New York Advertisement," the *News* scorned "Heed Their Rising Voices," which sought funds and support for the Committee to Defend Martin Luther King Jr. and the Struggle for Freedom in the South.⁵⁴⁰

"It may be that there is basis for legal action. The attorney general is certainly performing his duty in checking the possibility," Holland wrote.⁵⁴¹ Further, the *News* complained that the ad was "a solicitation of funds intended to be used to support direct frontal assault, across state lines, against specific public establishments of law and order." The *News* even called on the FBI to investigate the tax-exempt status of the Committee.⁵⁴²

The media had begun to change the national conversation about race, and southern officials and even journalists wanted to change the subject. The tools of popular culture aided the white establishment in maintaining the status quo for the first half of the century. The ever-increasing use of libel was temporarily added to the racists' arsenal early in the second half. The era's leading journalists were attacked as libel plaintiffs sought to take their work out of the public eye and smother it in the court system. The end result, instead, brought about one of the most important press freedom cases in United States history and insured that reporters would be free to write the truth. This study provides yet another way of looking at the civil rights movement. It does so by looking at what was festering in the shadow of *Sullivan*.

⁵⁴⁰ "That New York Advertisement," *The Birmingham News*, April 9, 1960.

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.* The week before, the *News* made similar points in an editorial headlined "They're Raising Money Up North," April 1, 1960.

Limitations of the Study

This dissertation further reveals the determination and desperation of white supremacists faced with a changing world order. Yet there is a major difficulty in researching this area of legal history. In order to gauge *efforts* to stop coverage and discussion of the civil rights movement, trial-level cases must be identified and studied. These decisions, however, are not published in any legal reporter, so they are difficult to find. In many instances, the cases included in this study were located through local newspaper coverage, newspapers like the tiny *Lexington Advertiser* in Mississippi. It might be worthwhile, therefore, to spend more time reading southern newspapers during the 1960s, scouring them for any news items about local public officials suing civil rights leaders for their speech or journalists for their coverage. This lack of a central repository for trial-level cases can leave the researcher with the feeling that she is searching for a needle in a haystack. As such, it may never be known exactly how many libel cases were filed for media coverage of expression relating to the civil rights movement. It is worthwhile, however, to study more than state Supreme Court, courts of appeals and U.S. Supreme Court cases. It is worthwhile to have a picture of this legal phenomenon that is larger and more encompassing than what is provided by *Sullivan*. This was simply the first case to make it to the nation's high court.

Caution is also needed here in discussing the plaintiffs' intent. One can only go so far in describing what each was thinking. In some instances, surely some plaintiffs felt they were libeled, that the cases were not just about silencing the press. They wanted to punish them. From outward appearances, it certainly had that effect.

Suggestions for Further Research

There were countless ways southerners were able to circumvent the law or bend it to suit their own needs during this era. More study is needed on other ways southern officials sought to punish civil rights-related speech. Additional research should focus on the variety of techniques southern officials used to silence such expression through the courts. An interesting example is provided by a case against Medgar Evers, the NAACP field secretary in Mississippi who was assassinated in 1963. Two years before his death, Evers was convicted of constructive contempt of court for criticizing the burglary conviction of a black man, Clyde Kennard, by an all-white jury. Kennard had tried unsuccessfully to desegregate Mississippi Southern College in 1959. A student at the University of Chicago, he had moved home to help out on the family's chicken farm after his father became ill. He sought to finish his last year of college in Mississippi. For that, he was arrested on trumped up charges of illegal possession of whisky and reckless driving.⁵⁴³ When he prepared to enroll again, Kennard, a World War II veteran, was arrested for stealing five bags of chicken feed and sentenced to seven years in prison.⁵⁴⁴ Evers told the Associated Press that Kennard's trial and sentence were "the greatest mockery to justice" when despite the overwhelming evidence in [his] favor, a court room of segregationists apparently resolved to put Kennard "legally away."⁵⁴⁵ Judge Stanton Hall of the Circuit Court of Forrest County, the judge in the Kennard trial, read the story in the *Hattiesburg American* and said Evers's remarks were intemperate and

⁵⁴³ Jason A. Peterson, "Forgotten and Ignored: Mississippi Newspaper Coverage of Clyde Kennard and his efforts to integrate Mississippi Southern College," unpublished paper presented at the Association for Education in Journalism in Mass Communications annual conference, August 2006.

⁵⁴⁴ It was later brought to light that Kennard had been framed, as indicated by records of the Mississippi Sovereignty Commission. See Peterson, "Forgotten and Ignored," for details.

⁵⁴⁵ *Evers v. State*, 241 Miss. 560 (1961), 563.

false, finding him in contempt of court and sentencing him to 30 days in the county jail and a \$100 fine.

Peterson noted that because Evers was so universally hated by the white establishment, newspapers devoted many more inches of copy to his contempt of court case than they did to Kennard's case.⁵⁴⁶ However, in 1961, the Mississippi Supreme Court overturned Evers's conviction, holding that the Forrest County district attorney failed to prove that Evers's remarks "hindered the administration of justice" in Kennard's case.⁵⁴⁷ His quote was published after the verdict was read, the court pointed out, holding that Evers's comments were protected by the First Amendment. The court held that though his words did not qualify as contempt of court, the judge or some other officer of the court may want to file a libel suit.⁵⁴⁸ There is no evidence, however, that Judge Hall made any move to take Evers to court for libel. In a concurring opinion Justice C.J. McGehee said he was most reluctant to overturn Evers's conviction, noting that there are times when public welfare should overrule a citizen's right to speak. Evers wanted to embarrass the Forrest County judge, McGehee opined, adding that it was unwise to "encourage such agitators as Medgar Evers to unjustly criticize our courts at will" "Public outcry to the Supreme Court's reversal was instantaneous, according to the widespread coverage of Evers's case."⁵⁴⁹ The white population wanted Evers in jail, free speech be damned. It is a citizen's duty to question and criticize his government, but Evers was not a true citizen to a racist public bent on punishing unpopular speech. And Evers's speech was certainly that.

⁵⁴⁶ Peterson, *Forgotten and Ignored*.

⁵⁴⁷ 241 Miss. 560, 564.

⁵⁴⁸ *Ibid.*, 569.

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