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Books: *Make No Law* by Anthony Lewis

THE BULWARK BRENNAN BUILT

by Alex Kozinski[*]

Simple facts often give rise to important constitutional cases. So it happened on March 29, 1960, when *The New York Times* accepted an advertisement from an organization calling itself the Committee to Defend Martin Luther King and the Struggle for Freedom in the South, which led to *New York Times Co. v. Sullivan*, probably the most important free press case since the dawn of the Republic.

In *Make No Law*, Anthony Lewis tells the story of the *Sullivan* case, from its mundane beginnings to Justice William J. Brennan, Jr.'s electrifying opinion four years later, which cut through two centuries of constitutional doctrine with the precision of a diamond saw. *Make No Law* is a brilliantly conceived and executed constitutional detective story, describing the search for a principled way to endow the spare words of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech"—with the power to protect against monstrous libel judgments that threatened to stifle criticism of public officials. It is a tribute to the story and the storyteller that the mystery is not a bit diminished because we know the outcome.

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In the 1950s, the Southern Way of Life, as it was quaintly called, came under attack after the Supreme Court's *Brown v. Board of Education* decision. Particularly irksome to those who saw integration as a threat to the established order were press reports bringing southern practices to the attention of the country and the world. Like mildew, these practices flourished in no small part because they were shielded from the light of scrutiny. If only the press could be silenced, southern segregationists had a reasonable hope of maintaining their ways.

"Heed Their Rising Voices," an advertisement describing a variety of misdeeds by police and others in Montgomery, Alabama, was placed in *The New York Times* to promote the cause of integration. After the ad ran, Police Commissioner L. B. Sullivan and other officials brought libel suits against the *Times* seeking $ 3 million in damages—an astronomical figure then and not spare change even today. If successful, the lawsuits would effectively ring down the curtain on conditions of blacks in the South, for every story and every advertisement commenting on those conditions would expose the media sources to liability. Worse, if L. B. Sullivan—a small-town official from the heart of Dixie—could intimidate *The New York Times*, the media in this country would become as effective as a toothless guard dog.

It almost worked. Lewis describes in meticulous detail how *The New York Times* and the four other defendants—black ministers who appeared as signatories to the ad—were hustled through the Alabama courts on the way to a jury verdict. All of the facts are necessary to understand the enormity of the injustice perpetrated by the Alabama courts, but a few examples suffice to show that libel law was being used as a cover for quite a different agenda:

- The judge, a Confederacy enthusiast, had shown overt hostility to the civil rights movement and the government's efforts at integration and was quoted as praising "white man's justice, a justice born long centuries ago in England, brought over to this country by the Anglo-Saxon race."
- The case against the four individual defendants was particularly threadbare. Not only did the evidence

show without contradiction that none of them even knew about the ad, but it was also clear that they had no means of paying the judgments. True to form, Sullivan promptly started collection proceedings, impounding the Reverend Ralph Abernathy's five-year-old Buick and selling his land at auction.

- In the stenographic transcript of the proceedings, the white lawyers are referred to as Mr. X and Mr. Y—the universal practice in this country—whereas the black lawyers are relegated to the status of Lawyer W and Lawyer Z.

These petty cruelties underscore the fact that this case had little to do with Commissioner Sullivan's reputation, which was probably given a boost by *The New York Times* ad, but was designed instead to teach a painful lesson to those who would reverse the "natural order" by disturbing the Souther Way of Life.

It is a common misconception that once the Supreme Court discovers an injustice, it has plenary authority to correct it. In fact, it is the state supreme courts that are the ultimate arbiters of state law. If the Supreme Court of the sovereign State of Alabama should hold that, as a matter of state law, a flounder is a variety of chicken, then everyone, including the United States Supreme Court, will have to act on the assumption that in Alabama flounders scratch for grubs. Having been hit with a judgment based on a transparent misinterpretation of state law, the *Sullivan* defendants were stuck with it unless they could demonstrate that it was not merely unfair but unconstitutional. As Lewis explains, in 1962 this was a tall order indeed. The most likely avenue of attack—via the First Amendment—was seemingly blocked by a solid wall of Supreme Court pronouncements stating clearly that libel was not protected speech.

Lewis sets the stage for the legal battle by giving a concise, yet surprisingly comprehensive, summary of First Amendment jurisprudence. In particularly, he skillfully draws on the history of the Sedition Act of 1798, passed by President Adams's Federalists to suppress Jefferson's Republicans. While the act was never challenged, consensus had formed over the years that it was precisely

the type of law the First Amendment was meant to prohibit. By analogizing the state libel action brought by *Sullivan* to the Sedition Act, *The New York Times*'s lawyers were able to persuade the Supreme Court to take the case and reverse the Alabama judgment.

Hindsight tells us that this argument carries considerable force, but this was far from obvious at the time. Had the case been presented on less egregious facts; had it not so clearly implicated race relations; had the lawyers for *The New York Times* been less imaginative; had the *Times* itself been more timid about pressing a freshly minted First Amendment argument; had the composition of the Court been different—had any of a dozen factors broken otherwise—the case could easily have escaped Supreme Court review. As it happened, circumstances conspired to induce the birth of a new constitutional doctrine which gives the press substantial shelter from attacks by public officials whose noses it has tweaked.

"Vehement, caustic, and sometimes unpleasantly sharp attacks"—so reads the core of Justice Brennan's most profound statement about the role of the press in a free society. The right to discuss public issues includes the right to discuss them vigorously. The right to criticize includes the right to rake over the coals. The right to disagree includes the right to be disagreeable. And the right to call public officials to task for their misdeeds includes the right to be mistaken about what precisely they mis-did.

As important as the substantive standard adopted by Justice Brennan's opinion is the methodology it imposed for reviewing the record in libel cases. As the *Sullivan* case points out, the law and the facts matter little when applied by biased judges and hostile juries. In libel cases, therefore, appellate courts have a special obligation to determine whether the evidence comports with the constitutional standard. In simple, intelligible terms, Lewis explains why legal abstractions such as burden of proof and standard of review have very important consequences in litigation and, ultimately, the real-world conduct which is the subject of the litigation.

Perhaps the most interesting part of the book describes the internal workings of the Supreme Court during the crafting of the *Sullivan* opinion. The process

took just over two months, a remarkably short gestation period for an opinion of this magnitude. Lewis describes the process of drafting, editing, compromising, and redrafting as Justice Brennan responded to the concerns of his colleagues. Working from documents in Supreme Court files, Lewis offers a rare glimpse into the workings of the Supreme Court and the differing styles and philosophies of some of the legal giants of the day. He also shows Justice Brennan to have been a persistent and skillful negotiator who, against all expectations, pulled out an opinion supported by a solid majority of the Court.

The Supreme Court's far-reaching Sullivan opinion has had a profound impact on the tenor of our public discourse. Coverage of Vietnam, Watergate, Iran-contra, and the Keating Five might have been much tamer had the press been required to defend itself against guerrilla warfare from thin-skinned public officials and their lawyers. Indeed, much of what we now consider essential press functions would not have been possible in such a hostile environment. As Lewis points out, the Sullivan decision provides a striking example of the immense power of the Supreme Court in shaping the nature of our most important institutions and, consequently, our way of life.

The Sullivan case was also the precursor of a phenomenon that has become a plague in more recent years: resort to the courts not to recover damages or to right a wrong, but as a means of beating a party into submission with the hobnailed club of litigation. What was once a process for resolving legitimate differences between civilized people often becomes the legal equivalent of biological warfare. Marginally profitable institutions—and the press usually has more than its share of those—are particularly vulnerable, finding it cheaper to settle than to pay the bills of their legal gladiators and suffer the risk of crushing verdicts. Lewis points out that, despite Sullivan, there have been a number of astronomical verdicts in press libel cases, often where the plaintiff clearly suffered no injury. Other suits, fended off successfully or reversed on appeal, were so costly to defend they chilled the vigor of the press because of the fear of litigation alone.

This is a real problem, but not one that can be solved in a way specific to libel cases. While Lewis may be

correct that large libel verdicts reflect popular mistrust of the press, there are plenty of other individuals and institutions that are devastated by vexatious litigation. *New York Times v. Sullivan* provides a workable legal structure if courts are vigilant in enforcing it, but even the clearest legal standard is capable of being abused or ignored. If sanity is to be brought back to the American legal system, those of us in the legal profession must restore the function of litigation as a method for resolving legitimate disputes rather than as a means of extortion.

Finally, Lewis properly raised the question of press responsibility in the wake of Sullivan. A prophylactic rule like Sullivan's is capable of abuse and Lewis offers several sharp examples, including *Time* magazine's failure to offer an apology to Ariel Sharon, which precipitated a bitter and well-publicized lawsuit. Another telling example—one not mentioned by Lewis—is reflected by the recent Supreme Court case of *Cohen v. Cowles Media Co.*, a case in which the editors of the *Minneapolis Star and Tribune* deliberately reneged on the promise of confidentiality given to a source.

Legal niceties aside, the facts in Sharon and Cohen provide a setting for the shaping of public perceptions quite different from those in Sullivan. And public perceptions and attitudes ultimately have a substantial bearing on how much freedom the press will be afforded under the amorphous standard of the First Amendment. It is a lesson Lewis understands well. His book, remarkable for the breadth and depth of material he is able to cram into fewer than 250 elegantly written pages, is a tour de force. No responsible journalist will be without it.