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# *New York Times v. Sullivan* and the Rhetorics of Race: A Look at the Briefs, Oral Arguments, and Opinions

CARLO A. PEDRIOLI\*

This crisis was created when the aspirations of the Negroes were met “with tenacious and determined resistance” by “the guardians of the status quo,” which “resistance grows out of the desperate attempt of the White South to perpetuate a system of human values that came into being under a feudalistic plantation system which cannot survive” today.<sup>1</sup>

## I. INTRODUCTION

*New York Times v. Sullivan*<sup>2</sup> is one of the most significant First Amendment cases that the United States Supreme Court decided in the twentieth century.<sup>3</sup> In *Sullivan*, a libel suit by a public official against the *New York Times* and four clergymen,<sup>4</sup> the U.S. Supreme Court placed the First Amendment on top of centuries of British libel law. After the *Sullivan* decision, a public official who sued for libel had to make more than a common law case for libel; the plaintiff also had to show actual malice, which the Court defined as knowledge of falsity or reckless disregard for truth.<sup>5</sup>

The importance of the *Sullivan* doctrine of actual malice, which “revolutionized libel law,”<sup>6</sup> would be hard to overstate. With *Sullivan* on the books, government officials had a much higher standard to meet when suing their critics, including those in the news media. The purpose of elevating the standard was to give greater protec-

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1. Brief for Petitioners at 19, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40) (quoting MARTIN LUTHER KING, JR., STRIDE TOWARD FREEDOM 155, 156, 158 (1958)).

2. 376 U.S. 254 (1964). The Supreme Court issued one opinion for both *Sullivan* and the companion case of *Abernathy v. Sullivan*, Numbers 39 and 40 respectively on the Court’s docket. *Id.*

3. Many scholars have discussed the importance of the case. For example, only a few years after the Supreme Court decided *Sullivan*, one commentator described the opinion as “a landmark decision.” THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 524 (1970). More recently, another observer characterized the case as “the most important libel opinion ever written” and perhaps “the most important free-expression opinion in U.S. jurisprudence.” W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION 83 (1991). An additional commentator called the case “one of the greatest cases of modern free speech law.” CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 38 (1995). Yet another observer described the case as “this nation’s greatest constitutional pronouncement on the law of political libel” and the opinion by Justice William Brennan as “Brennan’s most important contribution to constitutional law up to that time.” Kermit L. Hall, “Lies, Lies, Lies”: *The Origins of New York Times Co. v. Sullivan*, 9 COMM. L. & POL’Y 391, 391 (2004).

4. 376 U.S. at 256.

5. *Id.* at 279-80. The common law traditionally had favored plaintiffs in libel suits, including those suits that government officials brought. W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *TIMES V. SULLIVAN* 6 (1989).

6. Susan Dente Ross & R. Kenton Bird, *The Ad That Changed Libel Law: Judicial Realism and Social Activism in New York Times Co. v. Sullivan*, 9 COMM. L. & POL’Y 489, 490 (2004).

tion to speech, including speech in the press, that was critical of the government.<sup>7</sup> Such speech related to self-governance captured “the central meaning of the First Amendment.”<sup>8</sup> The case provided substantial space for seditious libel, which had been punishable under British law and later in the young United States under the Sedition Act of 1798.<sup>9</sup> In the years after *Sullivan*, the Court expanded the rule of actual malice to a variety of situations.<sup>10</sup>

Despite the importance of the doctrine of actual malice, particularly in a representative democracy, the case, including the Supreme Court’s decision, did not happen in a vacuum.<sup>11</sup> The plaintiff, Lester Bruce Sullivan, was White and a commissioner in Montgomery, Alabama, and the four individual defendants were Black ministers.<sup>12</sup> Shortly before the allegedly libelous advertisement was published in late March 1960, the sit-in movement, which had been spreading throughout the South, arrived in Montgomery.<sup>13</sup> On February 25, 1960, thirty-five students from Alabama State College, a segregated public institution of higher learning for African-Americans, requested service at the snack bar located in the basement of the Montgomery County Courthouse, and authorities arrested the students for this action.<sup>14</sup> The next day, Governor John Patterson demanded that the students be expelled from school for their conduct.<sup>15</sup> One day later, almost all of the students at Alabama State College marched to the state capitol to protest the recent events.<sup>16</sup> When members of the Ku Klux Klan (“KKK”) attacked the student protesters with bats, state and local authorities stood by idly.<sup>17</sup> The KKK members were not punished for their attack.<sup>18</sup>

On March 5, 1960, Sullivan issued a statement regarding public assembly in Montgomery. In the statement, Sullivan called those who wanted to assemble at the state capitol building the next Sunday “the Negro troublemakers” who sought “to further incite the tense situation that exist[ed] in Montgomery.”<sup>19</sup> He accused those who wanted to assemble of “flaunting their arrogance and defiance.”<sup>20</sup> Sullivan

7. See Harry Kalven, Jr., *The New York Times Case: A Note on “the Central Meaning of the First Amendment”*, 1964 SUP. CT. REV. 191, 208-10.

8. *Sullivan*, 376 U.S. at 273. See also Kalven, *supra* note 7, at 208-10.

9. See Zechariah Chafee, *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 948 (1919); Act of July 14, 1798, 1 Stat. 596.

10. See W. Wat Hopkins, *Editor’s Note*, COMM. L. & POL’Y 387, 389 (2004).

11. See Ross & Bird, *supra* note 6, at 522. Of note, a rhetorical culture, including its legal branch, evolves through adaptation “to changing social, political, and economic exigencies.” Marouf Hasian, Jr., Celeste Michelle Condit & John Louis Lucaites, *The Rhetorical Boundaries of ‘the Law’: A Consideration of the Rhetorical Culture of Legal Practice and the Case of the ‘Separate But Equal’ Doctrine*, 82 Q. J. SPEECH 323, 327 (1996) (commenting that the process of change is organic).

12. KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* 11 (2011); *Sullivan*, 376 U.S. at 256.

13. HALL & UROFSKY, *supra* note 12, at 14.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. L. B. Sullivan, *Statement*, ALA. TEXTUAL MAT’L COLLECTION (Mar. 5, 1960), <http://digital.archives.alabama.gov/cdm/singleitem/collection/voices/id/3445/rec/4>.

20. *Id.*

assured his audience, “[W]e have no intention whatsoever of permitting our city to be used as a site for the racial agitators and prejudiced Northern press to further their program of racial strife and exploitation for financial gain and spectacularly distorted news coverage.”<sup>21</sup> He closed by noting that any resistance would “be dealt with according to law.”<sup>22</sup> Presumably, the operative law that Sullivan mentioned was not that of the U.S. Constitution, but the law of Alabama.

Given the strife of the Civil Rights Movement that surrounded the case, this Article looks back at the use of race in *New York Times v. Sullivan*.<sup>23</sup> Specifically, the Article examines how the advocates, led by Herbert Wechsler for the *Times*, I. H. Wachtel, William Rogers, and Samuel Pierce for the four ministers, and Roland Nachman for Sullivan, dealt with race in their rhetorics to the Court, both in their merits briefs and their oral arguments,<sup>24</sup> and also how the justices used race in their opinions. Although Justice William Brennan did not explicitly focus on race in his opinion for the Court, the racial context that framed the case was hard to ignore, and Brennan, in ultimately resolving the case without remanding it to the Alabama courts for further proceedings, did not completely ignore race. Additionally, Justice Hugo Black, a native of Alabama,<sup>25</sup> discussed race explicitly and at more length in his concurring opinion, and Justice Arthur Goldberg briefly mentioned race.

To further the proposed discussion, the Article initially will sketch out a brief definition of race. Then the Article will provide some background on the *Sullivan* case before it arrived at the U.S. Supreme Court. Next, the Article will discuss the nature of the Supreme Court as an audience for the lawyers who advocated for the various parties in the case. After discussing the judicial audience, the Article will address how the various advocates used or declined to use race in their merits briefs and oral arguments. Finally, the Article will look at how the justices considered race in their opinions. The Article should provide a better understanding of some of the rhetorical choices that may be available to legal advocates and members of the bench regarding complex topics like race.

## II. A BRIEF NOTE ON RACE

The word *race* is a complicated term to define.<sup>26</sup> Historically, the term had a biological referent, but support for a biological view of race declined in the early

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21. *Id.*

22. *Id.*

23. Other foci of study beyond the doctrinal and civil rights components of *Sullivan* are possible. For a study of judicial philosophy and *Sullivan*, see Carlo A. Pedrioli, *A Key Influence on the Doctrine of Actual Malice: Justice William Brennan's Judicial Philosophy at Work in Changing the Law of Seditious Libel*, 9 COMM. LAW & POL'Y 567 (2004).

24. The merits briefs and oral arguments represented the heart of advocacy in the case. Amicus curiae briefs came from the ACLU, the *Chicago Tribune*, and the *Washington Post*. See HALL & UROFSKY, *supra* note 12, at 134-36.

25. ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 150 (1991).

26. A. Cheree Carlson, “You Know It When You See It”: *The Rhetorical Hierarchy of Race and Gender in Rhinelander v. Rhinelander*, 85 Q. J. SPEECH 111, 111 (1999). For a discussion of the terms *race* and *ethnicity*, including how the two terms converge and diverge, see Carlo A. Pedrioli, *Respecting Language As Part*

twentieth century.<sup>27</sup> From more contemporary social construction perspectives, race can be viewed as “a complex of social and economic relationships”<sup>28</sup> and “social value become perception.”<sup>29</sup> Race, a “taken-for-granted structural formation[ ] . . . personally lived and experienced by everyday social actors,”<sup>30</sup> can be “a site of struggle.”<sup>31</sup> The meaning of race often depends on historical conditions,<sup>32</sup> and as racial categories change over time,<sup>33</sup> the racial landscape requires “constant attention and monitoring.”<sup>34</sup> Race can be destabilized and should be treated as a contested object of study.<sup>35</sup>

Race functions in a variety of ways. For example, race can be used to exercise power in a manner that promotes dominant ideologies.<sup>36</sup> Alternatively, race can be used to transform society through the allocation of various resources.<sup>37</sup> Race also can play a role in identity construction<sup>38</sup> and help with the resistance of external phenomena.<sup>39</sup>

In the United States, while members of minority groups generally have to deal with race, White individuals have the choice of ignoring race.<sup>40</sup> Such a choice is a

of *Ethnicity: Title VII and Language Discrimination at Work*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 97, 110-14 (2011).

27. Lisa A. Flores, *The Rhetorical “Realness” of Race, or Why Critical Race Rhetoricians Need Performance Studies*, 34 TEXT & PERFORMANCE STUDS. 94, 94 (2014). See also Darlene K. Drummond & Mark P. Orbe, *Cultural Contracts: Negotiating a Ubiquitous U.S. Dominant Worldview on Race and Ethnicity*, 61 COMM. STUDS. 373, 373 (2010).

28. Carlson, *supra* note 26, at 111.

29. Flores, *supra* note 27, at 94.

30. Rona Tamiko Halualani, Deanna L. Fassett, Jennifer Huynh Thi Anh Morrison & Patrick Shaou-Whea Dodge, *Between the Structural and the Personal: Situated Sense-Makings of “Race”*, 3 COMM. & CRITICAL/CULTURAL STUDS. 70, 71 (2006) (emphasis in the original).

31. Flores, *supra* note 27, at 94.

32. Carlson, *supra* note 26, at 111.

33. Drummond & Orbe, *supra* note 27, at 373-74. For example, in the first U.S. census, which Thomas Jefferson supervised, the three racial categories included were free Whites, slaves, and other free persons. *Id.* at 374. Subcategories for the third category included free Blacks and “taxable Indians.” *Id.* Over two hundred years later, in the 2000 census, the six racial categories included were White, Black/African-American, American Indian or Alaska Native, Asian-American, Pacific Islander, and Some Other Race. *Id.*

34. Lisa A. Flores, Dreama G. Moon & Thomas K. Nakayama, *Dynamic Rhetorics of Race: California’s Racial Privacy Initiative and the Shifting Grounds of Racial Politics*, 3 COMM. & CRITICAL/CULTURAL STUDS. 181, 183 (2006).

35. Carlson, *supra* note 26, at 126.

36. Halualani et al., *supra* note 30, at 89. Because of the way that race can be used negatively, discussions of race, like discussions of other rhetorical phenomena conducted by critical studies scholars, often end with depressing critiques of discourse. However, this type of conclusion to the discussion does not always have to result because communication is not always a negative phenomenon; critics can offer suggestions for improvement. See *Identifying Key Intercultural Urgencies, Issues, and Challenges in Today’s World: Connecting Our Scholarship to Dynamic Contexts and Historical Moments*, 7 J. INT’L. & INTERCULTURAL COMM. 38, 62 (2014) (comments of Jing Yin).

37. Brenda J. Allen, *Theorizing Communication and Race*, 74 COMM. MONOGRAPHS 259, 259 (2007).

38. Halualani et al., *supra* note 30, at 90. Some individuals seem able to transcend race.

See Christopher B. Brown, *Barack Obama as the Great Man: Communicative Constructions of Racial Transcendence in White-Male Elite Discourses*, 78 COMM. MONOGRAPHS 535, 539 (2011). Prominent examples of such race-transcendent individuals include Oprah Winfrey, Colin Powell, Bill Cosby, and Michael Jordan. *Id.*

39. Halualani et al., *supra* note 30, at 90.

40. Allen, *supra* note 37, at 260.

privilege that comes with being White.<sup>41</sup> From a self-reflective White perspective, this White privilege is “an invisible package of unearned assets that I can count on cashing in each day, but about which I was “meant” to remain oblivious.”<sup>42</sup> White privilege derives from Whiteness, which works “as an invisible, uninterrogated, non-particular, and universalizing background against which all ‘others’ are racialized.”<sup>43</sup> Of particular note to this Article, White privilege plays a role in the judicial context, where the system often functions to maintain power for elite Whites.<sup>44</sup>

### III. BACKGROUND ON THE SULLIVAN CASE BEFORE IT REACHED THE U.S. SUPREME COURT

In the early 1960s, Lester Bruce Sullivan was one of three city commissioners in Montgomery, Alabama.<sup>45</sup> He sued the *New York Times* and four African-American ministers, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery,<sup>46</sup> for libel based on a full-page advertisement that appeared in the *Times* on March 29, 1960.<sup>47</sup> A jury awarded Sullivan a \$500,000 verdict, and the Alabama Supreme Court upheld the verdict.<sup>48</sup>

The advertisement was entitled “Heed Their Rising Voices.”<sup>49</sup> According to the advertisement, the purpose of the document was to support the student movement, the movement for voting rights, and Dr. Martin Luther King, Jr., who was facing a perjury indictment in Montgomery.<sup>50</sup> The Committee to Defend Martin Luther King and the Struggle for Freedom in the South (“Committee”) sponsored and created the advertisement.<sup>51</sup> The names of many individuals, including the four individual defendants, appeared on the advertisement, presumably to endorse the

41. *Id.*

42. Aaron Hess & Miriam Sobre-Denton, *Setting Aside the “Wise Latina?”: Postracial Myths, Paradoxes, and Performing Enculturation in the Sotomayor Confirmation Hearings*, 65 COMM. STUDS. 1, 3 (2014).

43. Meryl J. Irwin, “*Their Experience is the Immigrant Experience*”: *Ellis Island, Documentary Film, and Rhetorically Reversible Whiteness*, 99 Q. J. SPEECH 74, 81 (2013) (noting that Whiteness “seems forever to escape having its substance captured and described”).

44. Hess & Sobre-Denton, *supra* note 42, at 4 (noting that, in the United States, White privilege often intersects with nationalism and, in turn, objectivity). See also IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 7-8 (2006).

45. HALL & UROFSKY, *supra* note 12, at 11; *New York Times v. Sullivan*, 376 U.S. 254, 256 (1964). Sullivan had won a position as a city commissioner the year before. Susan Lindley Smith, *Casual Conversation or Constitutional Conspiracy: Controverting the Origins of New York Times v. Sullivan*, 42 FREE SPEECH Y.B. 1, 4 (2005). In campaigning for reelection in 1963, Sullivan ran on a segregation platform. *Id.* at 6.

46. HALL & UROFSKY, *supra* note 12, at 51.

47. *Sullivan*, 376 U.S. at 256. Although this particular item was a paid advertisement, the *Times* had “devote[d] considerable resources to covering the civil rights movement in the South,” which had elevated the movement to the level of national news. Ross & Bird, *supra* note 6, at 497.

48. *Sullivan*, 376 U.S. at 256.

49. *Id.* “Heed Their Rising Voices” was one of at least fourteen pro-civil rights advertisements that various civil rights groups placed in the *Times* between 1945 and 1964. Ross & Bird, *supra* note 6, at 492.

50. *Sullivan*, 376 U.S. at 257.

51. *Id.*

message.<sup>52</sup> Among the names on the list were those of Eleanor Roosevelt and Jackie Robinson.<sup>53</sup>

Although materially accurate in describing the struggle for civil rights in Montgomery, the advertisement contained several factual errors in paragraphs three and six.<sup>54</sup> For example, the students that assembled on the steps of the Alabama state capitol had sung “The Star Spangled Banner,” not “My Country, ’Tis of Thee.”<sup>55</sup> The campus dining hall at Alabama State College had never been padlocked, and the police had never surrounded the campus.<sup>56</sup> Dr. King had been arrested four times, not seven.<sup>57</sup>

The connection between the advertisement and Sullivan was tenuous, and the negative impact of the advertisement was dubious. Nowhere did the advertisement mention Sullivan by name.<sup>58</sup> Rather, the advertisement referenced the “police.”<sup>59</sup> However, Sullivan noted that one of his duties as commissioner included supervision of the police department.<sup>60</sup> Additionally, Sullivan did not demonstrate any pecuniary loss due to the allegedly libelous statements.<sup>61</sup> Of note, the circulation of the *Times* in Alabama was about 394, and only 35 copies were circulated in Montgomery County.<sup>62</sup>

For \$4,800, the *Times* had accepted the advertisement from a New York advertising agency that worked on the Committee’s behalf.<sup>63</sup> Along with the advertisement, the *Times* received a letter from A. Philip Randolph, the chairperson of the Committee, which certified that the individuals had authorized the use of their names for the advertisement.<sup>64</sup> The editors at the *Times* knew that Randolph was responsible and accepted the advertisement pursuant to standard practices.<sup>65</sup> However, no one at the *Times* made an effort to confirm whether the advertisement was accurate, and, as it turned out, none of the four individual defendants had authorized the use of his name in the advertisement or had known about the advertisement in advance of its publication.<sup>66</sup>

The trial judge, Judge Walter Jones,<sup>67</sup> informed the jury that the material in the advertisement was libelous per se and not privileged, so the jury only needed to find

52. *Id.*

53. LEWIS, *supra* note 25, at 7.

54. *Sullivan*, 376 U.S. at 257-58.

55. *Id.* at 258-59.

56. *Id.* at 259.

57. *Id.*

58. *Id.* at 258.

59. *Id.*

60. *Id.*

61. *Id.* at 260.

62. *Id.* at 260 n.3. The entire daily circulation of the *Times* for March 29, 1960, was about 650,000 copies. *Id.*

63. *Id.* at 260.

64. *Id.*

65. *Id.*

66. *Id.* at 260-61.

67. HALL & UROFSKY, *supra* note 12, at 48. Judge Jones was “a devotee of the Confederacy,” and his father had fought in the Confederate army. LEWIS, *supra* note 25, at 25. Jones was also opposed to the Civil Rights

that the defendants had published the advertisement and that the advertisement was of and concerning Sullivan.<sup>68</sup> Further, Jones instructed the jury that injury was implied, and that falsity and malice were presumed.<sup>69</sup> Moreover, Sullivan did not have to show or even allege general damages, and, as a result, the jury could opt to award punitive damages.<sup>70</sup>

The Alabama Supreme Court affirmed the judgment.<sup>71</sup> In the process of doing so, the state's highest court upheld the trial court's rulings and jury instructions.<sup>72</sup> The Alabama Supreme Court also briefly rejected the idea that the First Amendment, operative through the Fourteenth Amendment, protected the speech in the advertisement.<sup>73</sup> "The First Amendment of the U.S. Constitution does not protect libelous publications," the Alabama Supreme Court opined.<sup>74</sup>

#### IV. THE U.S. SUPREME COURT AS AUDIENCE

Audience, or "the ensemble of those whom the speaker wishes to influence by his argumentation,"<sup>75</sup> is a key component in the process of persuasion. The skillful communicator must adapt rhetorically to the audience in the given rhetorical situation.<sup>76</sup> Knowing the views of the audience, including the values that the audience holds, is critical to such adaptation.<sup>77</sup> When contrasted with general audiences, audiences like the U.S. Supreme Court are specialized in nature because they exist within specific disciplines.<sup>78</sup>

During the 1963 term, when *Sullivan* was argued, the members of the U.S. Supreme Court included Earl Warren, Hugo L. Black, William O. Douglas, Tom C. Clark, John M. Harlan, William J. Brennan, Potter Stewart, Byron R. White, and Arthur J. Goldberg, all of whom were White.<sup>79</sup> This membership, which embodied

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Movement. HALL & UROFSKY, *supra* note 12, at 49. For instance, he had prohibited Freedom Riders from demonstrating against a segregated busing system, stopped the National Association for the Advancement of Colored People ("NAACP") from conducting business in Alabama, and kept the U.S. Department of Justice from reviewing voter registration records in Alabama counties. *Id.* Seating in his courtroom was segregated. *Id.* Nonetheless, Jones knew the law of libel and "had a reputation for running a strict courtroom." *Id.*

68. *Sullivan*, 376 U.S. at 262.

69. *Id.*

70. *Id.*

71. *Id.* at 263.

72. *Id.*

73. *Id.* at 264.

74. *New York Times v. Sullivan*, 273 Ala. 656, 676 (1962).

75. CHAÏM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE IN ARGUMENTATION* 19 (1969).

76. CHAÏM PERELMAN, *THE REALM OF RHETORIC* 13 (1982); Lloyd F. Bitzer, *The Rhetorical Situation*, 1 PHIL. & RHETORIC 1 (1968). For a critique of Bitzer's argument, see Richard E. Vatz, *The Myth of the Rhetorical Situation*, 6 PHIL. & RHETORIC 154 (1973).

77. PERELMAN & OLBRECHTS-TYTECA, *supra* note 75, at 23-24; Malcolm O. Sillars, *Audiences, Social Values, and The Analysis of Argument*, 22 THE SPEECH TEACHER 291, 299 (1973).

78. PERELMAN & OLBRECHTS-TYTECA, *supra* note 75, at 99-100.

79. *Warren Court (1962-1965)*, THE OYEZ PROJECT, <http://www.oyez.org/courts/warren/war7> (last visited Dec. 8, 2014).



Whiteness on the bench,<sup>80</sup> had changed somewhat over the years since the beginning of the Warren Court in 1953.<sup>81</sup> Nonetheless, the same chief justice had presided over the Court for the past decade, and other key members like Justices Black and Douglas were constants.

During the decade before *Sullivan*, the Court as an audience was open to, although cautious about, addressing the topic of race in a manner favorable to minorities who sought true equal protection under the law.<sup>82</sup> Prior to *Sullivan*, the Court had issued several major decisions on race. For instance, in 1954, the Court decided the famous *Brown v. Board of Education*<sup>83</sup> case, announcing, in the words of Chief Justice Warren, “We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”<sup>84</sup> Such segregation violated the Equal Protection Clause of the Fourteenth Amendment.<sup>85</sup> *Brown* included the following three state companion cases: *Briggs v.*

80. See Hess & Sobre-Denton, *supra* note 42, at 4 (describing the Supreme Court “as a location that centers whiteness”). The Court was entirely White until 1967, when Thurgood Marshall, an African-American and an appointee of President Lyndon Johnson, replaced Tom Clark. BERNARD SCHWARTZ, *SUPREME CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY* 678 (1983). Marshall had worked at the NAACP Legal Defense Fund for over two decades and had been chief counsel in the *Brown* case. *Id.*

81. For example, the composition of the Court during the 1953 term included Earl Warren, Hugo L. Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Robert H. Jackson, Harold Burton, Tom C. Clark, and Sherman Minton. *Warren Court (1953-1954)*, THE OYEZ PROJECT, <http://www.oyez.org/courts/warren/war1> (last visited Dec. 8, 2014).

The response to Earl Warren’s appointment as chief justice was not entirely favorable. Warren, then the governor of California, had spent his career in public life, but he had no judicial experience. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 666 (2d ed. 2004). Felix Frankfurter was allegedly outraged that Eisenhower would appoint a politician to the position. *Id.* at 667. One commentator expressed the belief that “a first-rate appointment” might have helped the country forget the low-quality appointments that President Harry Truman had made in recent years. *Id.*

Regardless, Justices Harold Burton and Robert Jackson agreed that Warren would be “the most logical candidate.” *Id.* at 660. Moreover, Eisenhower had met Warren at the 1952 Republican convention and generally admired the man’s lengthy public record. *Id.* at 666. Thus, in September 1953, shortly after the death of Chief Justice Fred Vinson, Attorney General Herbert Brownell flew to California to see if Warren would be open to a sudden move from Sacramento to Washington, DC. *Id.* at 659, 666.

Since Congress was not in session, the appointment had to be a recess appointment. *Id.* at 667. On March 1, 1954, the Senate confirmed Warren for a permanent position, and no senator voted against the chief justice. *Id.* at 696. Meanwhile, Warren “had won the admiration of his brethren for traits of character if not breathtaking legal acumen.” *Id.* For instance, Warren proved to be good at listening and also at asking questions during oral argument. *Id.* at 697.

82. Actually, the Court’s openness to discussing race in a positive way for minorities had begun before Earl Warren had assumed his position as chief justice in 1953. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (deciding that courts could not enforce racially restrictive covenants); *Sweatt v. Painter*, 339 U.S. 629 (1950) (holding that the University of Texas Law School had to admit a Black student because the state’s newly-created law school for Blacks was not the equivalent of the law school at Texas); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950) (holding that the University of Oklahoma could not require a student to use only designated facilities on campus because of his race).

83. 347 U.S. 483.

84. *Id.* at 495. To send a strong message, Warren wanted to avoid a divided Court and eventually produced a unanimous one. KLUGER, *supra* note 81, at 682-83, 711-12.

85. *Brown*, 347 U.S. at 495. For a discussion of how Black and White interests converged in *Brown*, see DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR*

*Elliott, Davis v. County School Board*, and *Gebhart v. Belton*.<sup>86</sup> In the federal companion case of *Bolling v. Sharpe*, the Court held that racially segregated schools in the District of Columbia violated the Due Process Clause of the Fifth Amendment.<sup>87</sup>

The Court followed these pronouncements with another major case favorable to those who supported the idea of racial equality. In 1958, when the governor and legislature in Arkansas attempted to prevent desegregation of the public schools in Little Rock, the Court, in *Cooper v. Aaron*,<sup>88</sup> called upon *Brown* and reminded the Arkansas officials that, under the Supremacy Clause in the federal Constitution,<sup>89</sup> the Constitution was the supreme law of the land.<sup>90</sup> Since segregated schools violated the Equal Protection Clause of the Fourteenth Amendment, the public schools in Arkansas had to be desegregated.<sup>91</sup>

Despite these major judicial statements in favor of civil rights, the Court exhibited a good degree of caution on the topic of race. In 1955, the Court discussed remedies for school segregation in *Brown v. Board of Education II*,<sup>92</sup> but the Court offered only generalities and left the lower courts, including those in the South, to work out the details of the remedies.<sup>93</sup> Thereafter, other than in *Cooper*, the justices denied full review to further school desegregation cases until 1963.<sup>94</sup> Particularly on school desegregation, the justices may have been waiting for some support from the other two branches of the federal government.<sup>95</sup> For the most part, that support was not immediate.<sup>96</sup> For example, Republican President Dwight Eisenhower avoided endorsing the *Brown* decision.<sup>97</sup> In 1956, Democratic contenders for the presidency did not offer much more support for the decision, and neither did Congress.<sup>98</sup>

In the years after the original *Brown v. Board of Education* case, the Court did extend *Brown* to other areas, but only in a weak manner. For instance, the Court

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RACIAL REFORM 59-68 (2004). See also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

86. The four state cases were Numbers 1, 2, 4, and 10. *Brown*, 347 U.S. at 483.

87. 347 U.S. 497, 500 (1954). In *Bolling*, Chief Justice Warren wrote, "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.*

88. 358 U.S. 1 (1958).

89. U.S. CONST. art. VI, cl. 2.

90. 358 U.S. at 17-18.

91. *Id.* at 18-20.

92. 349 U.S. 294.

93. *Id.* at 299-300. *Brown* and *Brown II* did not have an immediate effect on desegregation in the South. A decade after *Brown*, among the eleven states in the old Confederacy, 1.17% of Black students attended school with White students. BELL, *supra* note 85, at 96. When school districts would not desegregate, Black parents had to obtain court orders, and many parents lacked the funds to bring lawsuits. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 351-52 (2004). Also, many federal judges in the South did not support *Brown*. *Id.* at 354-56. In light of the vague guidelines in *Brown II*, one could describe the sequel case as "a solid victory for white southerners." *Id.* at 318.

94. *Id.* at 324.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 325.

struck down government discrimination in public beaches and bathhouses,<sup>99</sup> public golf courses,<sup>100</sup> public buses,<sup>101</sup> and public parks.<sup>102</sup> However, rather than offering reasoned elaborations on why the government discrimination violated the Fourteenth Amendment, the Court in all of these cases merely issued one-sentence opinions that announced the results. While this approach might have been progress, the approach hardly constituted robust enforcement of minority rights.

Nonetheless, during the early 1960s, the Court became more involved in addressing racial issues in a robust manner. In the area of voting rights, the Court issued its decision in *Gomillion v. Lightfoot* in 1960 and struck down the boundaries of Tuskegee, Alabama, which were drawn in a twenty-eight sided figure to disenfranchise Black citizens, as a violation of the Fifteenth Amendment.<sup>103</sup> During the 1961 and 1962 terms, the Court decided several sit-in cases in favor of the protesters who had objected when proprietors of lunch counters across the South had refused to provide service to African-American patrons.<sup>104</sup> In looking for a legal justification, the Court struggled with the “No state shall” language in the Fourteenth Amendment<sup>105</sup> because the action in the sit-in cases was primarily private.<sup>106</sup> During the 1963 term, several more sit-in cases were on the Court’s docket, as was the *Sullivan* case.<sup>107</sup>

## V. RACE IN THE ADVOCATES’ RHETORICS

As this section of the Article will show, the legal advocates used race in different ways in their briefs and during oral arguments. Counsel for the *Times* did not make much use of race, instead choosing to focus more on the free speech and press issues in the case. Counsel for the ministers, on the other hand, focused heavily on race, highlighting the racial problems not only with the trial, but also with Southern society. Meanwhile, counsel for Sullivan attempted to deflect any serious discussion of race, frequently employing legal technicalities to avoid the subject matter.

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99. *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955), *affirming per curiam* *Dawson v. Mayor & City Council of Baltimore*, 220 F.2d 386 (4th Cir. 1955).

100. *Holmes v. City of Atlanta*, 350 U.S. 879 (1955), *reversing per curiam* *Holmes v. City of Atlanta*, 223 F.2d 93 (5th Cir. 1955).

101. *Gayle v. Browder*, 352 U.S. 903 (1956), *affirming per curiam* *Browder v. Gayle*, 252 F.2d 122 (M.D. Ala. 1956); *Holmes*, 350 U.S. at 879.

102. *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958), *affirming per curiam* *New Orleans City Park Improvement Ass’n v. Detiege*, 252 F.2d 122 (5th Cir. 1958).

103. 364 U.S. 339.

104. SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 216-17 (2010).

105. U.S. CONST. amend. XIV, § 1.

106. STERN & WERMIEL, *supra* note 104, at 217. The problem of needing state action to firmly justify a violation of the Fourteenth Amendment was resolved when, after a fifty-seven day filibuster in the Senate, Congress finally passed and Lyndon Johnson signed the Civil Rights Act of 1964. The Act banned, among other action, discrimination in public accommodations. *Id.* at 219-20.

107. *Id.* at 217.

*A. Race and the Advocacy for the Times*

The Brief for the Petitioners in Number 39 listed Herbert Brownell, Thomas F. Daly, and Herbert Wechsler as the attorneys for the *New York Times*.<sup>108</sup> Listed as of counsel were Louis M. Loeb, T. Eric Embry, Marvin E. Frankel, Ronald S. Diana, and Doris Wechsler.<sup>109</sup> At this stage, Herbert Wechsler, a professor at Columbia Law School and a veteran of a dozen arguments before the U.S. Supreme Court, was in charge of the advocacy for the *Times*.<sup>110</sup> Wechsler had a reputation for original thinking.<sup>111</sup> Embry had been counsel for the *Times* during both the trial and the appeal to the Alabama Supreme Court,<sup>112</sup> but Wechsler presented oral argument before the U.S. Supreme Court.<sup>113</sup>

In the brief, Wechsler and his colleagues did not make much of race. Because they offered a description of the advertisement and its factual errors, Wechsler and his fellow attorneys necessarily had to discuss various aspects of the Civil Rights Movement that the advertisement referenced.<sup>114</sup> In the brief's appendix, counsel included a copy of the advertisement, which presented various aspects of the struggle for civil rights in the South.<sup>115</sup> Despite these references, the attorneys focused on other matters. Specifically, counsel claimed the Alabama courts' actions had violated the freedom of the press. Counsel argued that, in the interest of promoting democratic discourse, the Constitution should protect criticism of government.<sup>116</sup> This argument embraced "the central meaning of the First Amendment," an idea supposedly learned in the wake of the Sedition Act of 1798.<sup>117</sup> Counsel added that nothing in the evidence supported a finding of injury to Sullivan's reputation and that the jury award was excessive.<sup>118</sup> Eventually, counsel contended the *Times* lacked suitable contacts with Alabama to justify jurisdiction.<sup>119</sup>

During oral argument,<sup>120</sup> Wechsler took similar positions, again focusing on the First Amendment and not developing the racial dimension of the case. In a grand manner, he claimed that the Alabama courts' action posed "hazards to the freedom of

108. Brief for Petitioner at cover, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

109. *Id.*

110. HALL & UROFSKY, *supra* note 12, at 120-21. Wechsler had a reputation for expertise in the area of federalism, which proved appropriate for *Sullivan*. LEWIS, *supra* note 25, at 104.

111. CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 213 (2007). One law school colleague said of Wechsler, "He's the kind of person who takes a thought wherever it leads him, refusing to be deflected by where it is going." *Id.*

112. HALL & UROFSKY, *supra* note 12, at 46-47, 93. Embry was elected to the Alabama Supreme Court in 1975. LEWIS, *supra* note 25, at 44.

113. HALL & UROFSKY, *supra* note 12, at 148.

114. Brief for Petitioner at 4-10, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

115. *Id.* at app. B1-B3.

116. *Id.* at 41-43, 45-46.

117. *Id.* at 45-48. See also Act of July 14, 1798, 1 Stat. 596.

118. Brief for Petitioner at 58-59, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

119. *Id.* at 77-79.

120. Martin Luther King, Jr., was a spectator during oral argument. STERN & WERMIEL, *supra* note 104, at 222. His presence likely contrasted with, and perhaps problematized, the Whiteness of the bench.

the press of a dimension not confronted since the early days [of] the Republic.”<sup>121</sup> Once more, he addressed the criticism of officials’ conduct and used the Sedition Act of 1798 to illustrate what could happen without a robust First Amendment.<sup>122</sup> The advocate also addressed the size of the jury award.<sup>123</sup>

That Wechsler and his colleagues did not make much of the racial dimension of the case may be understandable. Their client was a corporation from New York City, as opposed to a member of a minority group who had suffered racial discrimination by the government, and counsel had plenty to say about the First Amendment. Still, because the *Sullivan* case developed from the Civil Rights Movement, during which the Supreme Court had decided several cases in favor of pro-civil rights forces, a reasonable attorney could have thought that the Court would be open to arguments that considered the racial dimension of the case. Of course, the Court had been cautious on the race issue since *Brown*, and Wechsler, as a veteran Supreme Court advocate and seasoned law professor, was likely familiar with the Court’s caution.

### B. *Race and the Advocacy for the Ministers*

The Brief for the Petitioners in Number 40 listed I. H. Wachtel, Charles S. Conley, Benjamin Spiegel, and Raymond S. Harris as attorneys for the four Black ministers.<sup>124</sup> Listed as of counsel were Harry H. Wachtel, Samuel R. Pierce, Jr., Joseph B. Russell, David N. Brainin, Stephen J. Jelin, Clarence B. Jones, David G. Lubell, and Charles B. Markham.<sup>125</sup> Samuel R. Pierce and William Rogers, the latter of whom had written an amicus brief in the case for the *Washington Post*, presented oral argument before the Supreme Court.<sup>126</sup>

In the brief, counsel for the four ministers focused much more extensively on race than Wechsler and his colleagues had in their rhetoric, although this was not the only type of argument made for the ministers. Like Wechsler and his fellow attorneys, counsel for the ministers described the advertisement as an aspect of the Civil Rights Movement.<sup>127</sup> Additionally, counsel developed First Amendment arguments similar to those of Wechsler and his colleagues.<sup>128</sup>

However, in various places in the brief, the ministers’ counsel offered much more. In the brief’s statement of facts, counsel drew out the racial dimensions of the case. Counsel pointed to Alabama’s “sweeping racial segregation laws” that were operative in Montgomery.<sup>129</sup> Moreover, as counsel noted, the jury in the case had been entirely White, and the trial judge, Judge Walter Jones, was on the jury commission in Montgomery County that had “intentionally and systematically excluded” Blacks

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121. Oral Argument at 00:29, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (No. 39), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#argument).

122. *Id.* at 43:17.

123. *Id.* at 58:43.

124. Brief for Petitioners at cover, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40).

125. *Id.*

126. HALL & UROFSKY, *supra* note 12, at 158.

127. Brief for Petitioners at 6-8, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40).

128. *Id.* at 30-39.

129. *Id.* at 12.

from jury service.<sup>130</sup> Further, Jones had allowed plaintiff's counsel to make racially charged appeals by mispronouncing the word *Negro* as *Nigra* and *Nigger* with the jury present.<sup>131</sup>

In the brief's summary of the argument, counsel picked up on similar themes, observing the following about the case:

Clearly, when four Negro ministers are sued by a white City Commissioner for an ad seeking support for Dr. Martin Luther King, and the case is tried in a segregated court room in Montgomery, Alabama, during a Civil War Centennial, before an all-white jury and a trial judge elected at polls from which Negroes were excluded, and when that very Judge states that "white man's justice" governs in his court and permits respondent's counsel to say "Nigger" and "Nigra" to the jury, then the Fourteenth Amendment does indeed become the "pariah" that the Trial Judge below called it.<sup>132</sup>

This discourse framed the rhetorical situation for the argument to follow.

In the argument section itself, counsel again put the racial matters before the Court. The opening paragraph of this section framed the rhetorical situation even more broadly by speaking of "[t]he century-long struggle of the Negro people for complete emancipation and full citizenship," which "ha[d] been met at each step by a distinct pattern of resistance, with only the weapons changing, from lynching, violence and intimidation, through restrictive covenants, Black Codes, and Jim Crow laws, to avoidance, 'interposition,' 'nullification,' tokenism and open contempt."<sup>133</sup> The current case was just another manifestation of the same racism.<sup>134</sup> Indeed, the libel suit was the latest "weapon" that Southern officials were using to restrict the rights of Black citizens.<sup>135</sup>

Furthermore, counsel drew attention to the *Brown v. Board of Education*<sup>136</sup> decision from a decade earlier and the ensuing Southern resistance, of which Alabama was a leader.<sup>137</sup> The resistance had manifested itself in a variety of areas, including voting, jury service, and housing.<sup>138</sup> Despite the Supreme Court's warnings, the Southern states refused to make material changes on public policies regarding racial discrimination.<sup>139</sup>

In light of some of these broader historical and contemporary social concerns, counsel for the ministers developed the argument about racism with reference to the specifics of the trial below. In an observation similar to one in the summary of the argument, counsel noted the following:

130. *Id.* at 13.

131. *Id.*

132. *Id.* at 17-18.

133. *Id.* at 18 (internal footnote omitted).

134. *Id.*

135. *Id.* at 22. Southern officials also used this "weapon" against newspapers like the *Times*. *Id.*

136. 347 U.S. 483.

137. Brief for Petitioners at 20, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40).

138. *Id.* at 22-26.

139. *Id.* at 20-21.

Where Sullivan, a white public official, sued Negro petitioners represented by Negro counsel before an all-white jury, in Montgomery, Alabama, on an advertisement seeking to aid the cause of integration, the impact of courtroom segregation could only denote the inferiority of Negroes and taint and infect all proceedings, thereby denying petitioners the fair and impartial trial to which they are constitutionally entitled.<sup>140</sup>

These violations of the Fourteenth Amendment were just one part of “Alabama’s massive system of segregation.”<sup>141</sup>

Counsel continued with detail regarding certain racially charged particulars of the trial. Again, counsel raised the matter of the pronunciation of *Negro* by plaintiff’s counsel. The trial judge supposedly accepted the pronunciation because counsel told the judge “that this was ‘the way respondent’s counsel had always pronounced it all his life.’”<sup>142</sup> Also, the jury pool did not contain any Black citizens.<sup>143</sup> Furthermore, Judge Jones had addressed White attorneys as “Mr.” while addressing Black attorneys as “Lawyer.”<sup>144</sup> Although in a companion libel case and not the present case, Jones had declared “that the Fourteenth Amendment was ‘a pariah[]’ and inapplicable in proceedings in Alabama State courts[,] which [were] governed by ‘white man’s justice.’”<sup>145</sup> Given this type of racially charged courtroom environment, counsel argued, the ministers could not receive a fair trial.<sup>146</sup>

During the oral argument, race again received attention, although the familiar First Amendment arguments also appeared. In terms of the First Amendment, William Rogers noted that the advertisement was about “a crucial public issue.”<sup>147</sup> He described the impact of the lower courts’ actions as “possibly[ ] the most serious threat to free press in this country during this century.”<sup>148</sup> Likewise, Samuel Pierce touched on the encroachment of the ministers’ First Amendment rights.<sup>149</sup>

Nonetheless, race received plenty of attention. Not far into his oral argument, Rogers pointed out “[t]hat the central fact of this case is that [the four ministers] are being—drastically punished because they were Negroes residing in Alabama, who’ve had the courage to speak out in the struggle to—to achieve the rights guaranteed by the Constitution for all citizens regardless of race or color.”<sup>150</sup> He added, “Indeed, these petitioners, Dr. King and these four petitioners are the leaders of the civil rights movement in Alabama.”<sup>151</sup> The case had “as its purpose the intimidation of these

140. *Id.* at 53.

141. *Id.* at 52-53.

142. *Id.* at 55.

143. *Id.* at 56.

144. *Id.* at 55-56.

145. *Id.* 58-59.

146. *Id.* at 58.

147. Oral Argument at 41:28, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#40\\_argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#40_argument).

148. *Id.* at 16:59.

149. *Id.* at 22:18.

150. *Id.* at 2:21.

151. *Id.* at 2:41.

petitioners and others like them who speak o[ut] for equality and justice for the Negro in Alabama.”<sup>152</sup>

Rogers followed by emphasizing the unfairness of Sullivan’s action against the ministers. None of the ministers had prior knowledge of the advertisement and thus could not have approved of it.<sup>153</sup> Moreover, the letter that demanded retraction was dated March 8, 1960, yet the letter referred to an item in the *Times* from March 29, 1960.<sup>154</sup>

In his portion of the oral argument, Pierce focused primarily on the unfairness of the trial. Early in the argument, Pierce framed his clients’ position by stating, “The sole purpose of this litigation is to suppress and punish expressions of support for the course of racial equality and to try to keep those who are actively engaged in their fight for civil rights, such as the petitioners in this case[,] from continuing to participate in that [struggle].”<sup>155</sup>

Pierce moved into a discussion of the trial, noting that “[t]his trial was conducted in an atmosphere of racial bias, passion and hostile community pressures.”<sup>156</sup> Specifically, he pointed to a record that referred to White lawyers as “Mr.” but referred to Black lawyers as “Lawyer.”<sup>157</sup> Although the stenographer had made these notations in preparing the transcript, Pierce suggested that a stenographer normally “reflects the attitude and the demeanor of the court and the customs and the usages of what goes on in a place where the court is located.”<sup>158</sup> Regardless, when Justice Brennan asked Pierce if Jones had made these distinctions in addressing trial counsel, Pierce responded affirmatively.<sup>159</sup> Pierce also highlighted the alleged mispronunciation of the word *Negro* by plaintiff’s counsel before the jury, as well as an inflammatory reference in closing argument by plaintiff’s counsel about how Black people had mistreated White people in the Congo.<sup>160</sup>

Pierce then transitioned into a discussion about the conduct of Jones in related litigation. In the companion case of *James v. Abernathy*, Jones had said in open court “that the Fourteenth Amendment was a pariah, an outcast[,] and] that the case would be tried in accordance with White men’s justice, not in accordance with the Fourteenth Amendment.”<sup>161</sup> Pierce continued, “He said, ‘I would like to say for those here present and for those who may come here to litigate in the future that the Fourteenth Amendment has no standing whatever in this Court . . . .’”<sup>162</sup> When Justice Black asked for the sources of the quotation, Pierce directed the native Alabamian to a piece in the *Alabama Lawyer* entitled “Judge Jones on Courtroom Segrega-

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152. *Id.* at 14:32.

153. *Id.* at 7:56.

154. *Id.* at 10:55.

155. *Id.* at 21:59.

156. *Id.* at 22:34.

157. *Id.* at 22:51.

158. *Id.* at 23:31.

159. *Id.* at 23:58.

160. *Id.* at 24:31.

161. *Id.* at 26:33.

162. *Id.* at 26:53.



tion.”<sup>163</sup> Pierce also assured Black that the remarks were printed in the court record for the *James v. Abernathy* case.<sup>164</sup>

Later in the argument, when Chief Justice Warren asked for the quotation again, Pierce took the opportunity to press the point. The advocate quoted, “I would like to say for those present and for those who may come here to litigate in the future, that the Fourteenth Amendment has no standing whatever in this Court.”<sup>165</sup> Pierce added the following:

And it goes on and says, “A number of other things he ends up with, we will now continue the trial of this case under the laws of the State of Alabama and not under the Fourteenth Amendment and in the belief and knowledge that the White men’s justice . . . [ , a] justice born [of] long centuries in England, brought over to this country by the Anglo-Saxon race and brought today to [its] full flower here, a justice which has blessed countless generations of Whites and Blacks[,] will give the parties of the bar of this Court regardless of race or color equal justice under law.”<sup>166</sup>

To give context, Pierce delved into what had prompted the Jones remarks. The advocate explained that many Black individuals had filled the courtroom over which Jones was presiding.<sup>167</sup> When Jones realized that the Black spectators were trying to end segregation in his courtroom, he refused to accept the idea.<sup>168</sup> Pierce quoted Jones again, who had said, “The presence of this crowd of Negro spectators, occupying every seat from the front row to the back row of the courtroom is—is to test and challenge the right and power of the presiding judge to direct the seating of spectators in the courtroom.”<sup>169</sup> Jones had continued, “[S]pectators will be seated in this courtroom according to their race[,] and this [is] for the orderly administration of justice and the good of all people coming here lawfully.”<sup>170</sup>

When Justice Black asked Pierce whether the record in Number 40 contained anything like what had happened in *James v. Abernathy*, Pierce pointed out that, in Number 40, trial counsel for the ministers had made objections about a segregated courtroom.<sup>171</sup> However, Jones had determined that the motions had lapsed.<sup>172</sup> For at least one motion, a motion for a new trial, only counsel for the *Times*, not for the ministers, had appeared to obtain an adjournment.<sup>173</sup> This was done in the interest of efficiency.<sup>174</sup> The matter of who had to appear to request the adjournment presented a question of underlying Alabama procedure for which no on-point cases and

163. *Id.* at 27:05.

164. *Id.* at 29:05.

165. *Id.* at 31:00.

166. *Id.* at 31:15.

167. *Id.* at 32:08.

168. *Id.* at 32:17.

169. *Id.* at 32:27.

170. *Id.* at 33:05.

171. *Id.* at 33:23.

172. *Id.* at 33:40.

173. *Id.* at 35:51.

174. *Id.* at 40:16.

thus no clear answer existed.<sup>175</sup> Nonetheless, technicalities of state procedure, Pierce argued, should not trump fundamental federal constitutional rights.<sup>176</sup>

In rebuttal for the ministers, Rogers again mentioned the racial dimension to the case. He asserted, “The fact of the matter is these petitioners are here today because they’re Negroes and because they’ve been leaders in the fight for civil rights.”<sup>177</sup> In his final sentence of rebuttal, Rogers said, “And if this case should stand[,] . . . the cause [of] . . . civil rights will be set back a great many years.”<sup>178</sup>

As the preceding discussion has shown, counsel for the ministers, in addition to making First Amendment arguments, made extensive use of the racial dimension of the case, which Wechsler and his colleagues did not do. The arguments regarding race referred to both the racial problems in the specific case and also to those more generally in the South. All of the noted problems illustrated how race had been used to promote an ideology of White supremacy, and the racial discrimination that the ministers had suffered at their trial demonstrated how race had been “a site of struggle” for them.<sup>179</sup> Given the discrimination at the trial, the clients, and the post-*Brown* Supreme Court, counsel’s approach was logical. Indeed, counsel’s clients were African-American ministers intimately involved in the struggle for civil rights. For example, Reverend Abernathy was a close confidant of Martin Luther King,<sup>180</sup> and Reverend Shuttlesworth appeared at most of the major events during the Civil Rights Movement.<sup>181</sup> Furthermore, the audience of the rhetoric, the U.S. Supreme Court, had been cautiously open to arguments about civil rights and race for a number of years. Thus, the racially-focused arguments made strategic sense.

### C. *Race and the Advocacy for Sullivan*

The Briefs for Respondent in Numbers 39 and 40 listed Robert E. Steiner III, Sam Rice Baker, and M. Roland Nachman, Jr., as attorneys for Sullivan.<sup>182</sup> Listed as counsel was Calvin Whitesell.<sup>183</sup> At this stage, Nachman, who had been counsel for Sullivan during both the trial and the appeal to the Alabama Supreme Court, remained in charge.<sup>184</sup> As he had done before the Alabama Supreme Court, Nachman presented oral argument before the U.S. Supreme Court.<sup>185</sup>

175. *Id.* at 36:37.

176. *Id.* at 38:30.

177. *Id.* at 108:00.

178. *Id.* at 110:54.

179. Halualani et al., *supra* note 30, at 89 (observing how race can be used to promote a dominant ideology); Flores, *supra* note 27, at 94.

180. *Ralph David Abernathy, Rights Pioneer, Is Dead at 64*, N.Y. TIMES (Apr. 18, 1990), <http://www.nytimes.com/learning/general/onthisday/bday/0311.html>.

181. Matt Schudel, *Fred L. Shuttlesworth, Courageous Civil Rights Fighter, Dies at 89*, WASH. POST (Oct. 5, 2011), [http://www.washingtonpost.com/local/obituaries/fred-l-shuttlesworth-courageous-civil-rights-fighter-dies-at-89/2011/10/05/gIQA073IOL\\_story.html](http://www.washingtonpost.com/local/obituaries/fred-l-shuttlesworth-courageous-civil-rights-fighter-dies-at-89/2011/10/05/gIQA073IOL_story.html).

182. Briefs for Respondents at covers, *New York Times v. Sullivan, Abernathy v. Sullivan*, 376 U.S. 254 (1964) (Nos. 39 & 40).

183. *Id.*

184. HALL & UROFSKY, *supra* note 12, at 47-48, 93, 128.

185. *Id.* at 153. Nachman had argued a case before the U.S. Supreme Court when he was only twenty-

In the case against the *Times*, Nachman and his colleagues generally focused on matters other than race. In the brief, when describing the advertisement, counsel briefly mentioned some of the components of the struggle for civil rights in Alabama, but counsel quickly dismissed the effort behind the advertisement as “a willful, deliberate and reckless attempt to portray in a full-page newspaper advertisement, for which the *Times* charged and was paid almost \$5,000, rampant, vicious, terroristic and criminal police action in Montgomery, Alabama, to a nationwide public of 650,000.”<sup>186</sup> In terms of the brief’s legal argument, counsel claimed that the Constitution did not provide absolute immunity to libel public officials.<sup>187</sup> Counsel then argued the Supreme Court had no basis for overturning the jury’s determinations on damages or that the advertisement was of and concerning Sullivan.<sup>188</sup> Additionally, jurisdiction over the *Times* in Alabama was proper, counsel argued, because of the contacts that the newspaper had with the state.<sup>189</sup>

Of particular note, counsel did hone in on race briefly. Counsel warned the Court against going outside the record on Number 39, suggesting that the only reason the *Times* would have the Court look at other libel cases was that the newspaper was desperate.<sup>190</sup> Along the same lines, counsel suggested that the *Times* wanted the Court to elevate the legal protection for speech because racial problems were involved.<sup>191</sup> In effect, counsel implied, somewhat ironically since the brief was filed in 1963,<sup>192</sup> the *Times* wanted to benefit from favoritism associated with the topic of race.

During oral argument in the *Times* case, Nachman again focused on matters other than race, including the traditional law of libel. Classical libel law matters such as truth, libel per se, retraction, and association with the plaintiff filled his argument time.<sup>193</sup> Nachman argued that Sullivan had made a case for libel under Alabama law and that the *Times* had not rebutted the case. In terms of the First Amendment, Nachman said, “We—we think that the defendant in order to succeed must convince this Court that a newspaper corporation has an absolute immunity from anything it publishes.”<sup>194</sup> Such a result, Nachman said, would be “something brand new in our jurisprudence.”<sup>195</sup>

At one point early in the argument, Nachman did try to diminish the racial dimension by distinguishing the stage in the proceeding below that was under review. He pointed out, “We’re not here like in *Norris* on a question of whether a judge

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seven. LEWIS, *supra* note 25, at 111. At that time, because Nachman had not been a member of the bar for three years, he had needed to receive permission to argue the case before the Court. *Id.*

186. Brief for Respondent at 6-8, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (No. 39).

187. *Id.* at 29-38.

188. *Id.* at 40-51.

189. *Id.* at 59-63.

190. *Id.* at 52-53.

191. *Id.* at 54-55.

192. *Id.* at cover.

193. Oral Argument at 76:07, 84:57, 75:11 & 87:44, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (No. 39), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#argument).

194. *Id.* at 110:40.

195. *Id.* at 111:10.

in a pretrial proceeding correctly decided the question of whether there was discrimination against Negroes in the selection of a grand jury panel.”<sup>196</sup> Rather, Nachman said, “We’re here after a jury trial with all that that means in terms of the Seventh Amendment.”<sup>197</sup> According to Nachman, racial discrimination mattered much less if a jury had issued a verdict after a trial than if a judge had issued a pretrial ruling; the composition of the jury pool that produced the jury seemingly was not an issue.

That Nachman and his colleagues made little of race in their brief and the oral argument in the case against the *Times* is understandable because Wechsler and his colleagues made little of race in their advocacy for the *Times*. Thus, Nachman and colleagues had little need to respond to the race issue. Still, Nachman and colleagues did argue against extra protection for speech associated with race, and Nachman later deflected any concern regarding racial discrimination, noting that a jury had issued a verdict.

In the case against the four ministers, counsel for Sullivan had much more of a chance to address race and attempted to deflect the topic as inappropriate for discussion. In the brief, Nachman and his colleagues presented a statement of facts that pointed out that, in their own brief, the ministers were relying on matters from the trial that technically were outside of the trial court record. For instance, Sullivan’s counsel identified several matters outside of the trial court record that were only raised when the case reached the Alabama Supreme Court. These matters, all of which counsel designated as only “alleged,” included a racially segregated courtroom, an “atmosphere of racial bias, passion and hostile community pressures,” improper media coverage of the trial, exclusion of Blacks from the jury pool, an unqualified judge, and improper racial references in closing argument.<sup>198</sup> Counsel maintained that, if these matters had been raised at the trial court level, Sullivan would have denied them.<sup>199</sup>

Additionally, counsel pointed to matters outside of the trial court record that were not raised until the case reached the U.S. Supreme Court. These matters, some of which counsel described as only “alleged,” or with words to that effect, included references to White attorneys as “Mr.” and Black attorneys as “Lawyer,” the statement about “white man’s justice,” the racial composition of the jury, and the various other pending libel suits.<sup>200</sup> In terms of the title used for a lawyer, counsel noted that the designation was that of the court reporter after the conclusion of the trial.<sup>201</sup> With regard to justice based on race, counsel highlighted the judge’s instructions to the jurors, in which the judge had said, “Please remember, gentlemen of the jury, that all of the parties that stand here stand before you on equal footing and are all equal at the Bar of Justice.”<sup>202</sup>

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196. *Id.* at 73:42.

197. *Id.* at 74:02.

198. Brief for Respondent at 8-9, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40).

199. *Id.*

200. *Id.* at 10-12.

201. *Id.* at 10.

202. *Id.* at 11.

Counsel did point to one matter that was within the trial court record because the matter had been raised before the trial court. This matter was the pronouncement of the word *Negro*, but counsel noted that the matter was apparently resolved to the ministers' satisfaction.<sup>203</sup> According to Nachman and colleagues, the judge had told plaintiff's counsel "to 'read it just like it is.'"<sup>204</sup>

Later in the brief, Nachman and his colleagues focused on the ministers' use of race in the greater historical context, as opposed to in the trial context, as also outside of the record and thus inappropriate for discussion. This additional material consisted of "racial matters involving peonage, education, voting, housing and zoning, public transportation, parks, libraries, petit and grand jury service, municipal boundaries, and reapportionment."<sup>205</sup> According to counsel, the historical context had no impact on the case.

Characterizing virtually all of the above matters as outside the record of the trial court proceedings,<sup>206</sup> Nachman and his colleagues endeavored to deflect the racial components of the case. In the argument section of the brief, counsel made reference to what was then U.S. Supreme Court Rule 40(5), which prohibited "burdensome, irrelevant, immaterial, and scandalous matter."<sup>207</sup> From the perspective of Nachman and his colleagues, all of the above items would be irrelevant and immaterial to the case.<sup>208</sup> Still, if one were to focus on other language from Supreme Court Rule 40(5), one might wonder whether the racial aspects of the case were too burdensome and scandalous for counsel to address, as they often were for U.S. society at the time and often have been since. Rather than dealing with the contextual complexities, counsel wanted to deal only with a neatly sealed official record that was free of the most complex social issue of the day, so counsel pushed that burdensome and scandalous issue away under the rubric of legal technicality.

Although Nachman and colleagues did address matters of state libel law as they applied to the ministers,<sup>209</sup> more interesting for a study of race and rhetoric was how counsel concluded the argument section of the brief. Quoting a commentator whom the ministers had cited in their brief, counsel, urging responsible use of free speech, asserted, "In the rise of the Nazis to power in Germany, defamation was a major weapon."<sup>210</sup> Given the context of the case, counsel argued that African-American ministers who had in the past criticized discriminatory laws and practices were akin

203. *Id.* at 13.

204. *Id.*

205. *Id.* at 17.

206. Referencing the Fourteenth Amendment issues that stemmed from racial discrimination, counsel described as "too elemental for argument" the idea that the Supreme Court should avoid leaving the record to address possible federal questions not raised in a timely manner based on state procedure. *Id.* at 18.

207. *Id.* at 17.

208. *Id.*

209. *Id.* at 19-24.

210. *Id.* at 24-25 (quoting David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 728 (1942)). The ministers had stated the following: "There is a 'need for protecting political and economic criticism against intimidation by the libel laws.'" Brief for Petitioners at 35 n.22, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40) (quoting David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282, 1309 (1942)).

to Nazis on the path to taking over Germany. This discourse also equated Southern politicians like Sullivan with Jews and other minorities whom the Nazis had defamed and later killed. Although the comparison would not have been perfect,<sup>211</sup> given the players in the case at bar, one would have thought that a rough comparison would have been Blacks with Jews and Southern politicians with Nazis. Victims would compare with victims, and oppressors would compare with oppressors. This Nazi-referencing rhetoric was highly charged indeed. Also, since Sullivan's counsel objected to the ministers' reference to historical discrimination against Blacks in the South, counsel's reference to the Nazis, whose power had ended in the 1940s, was ironic.

During the oral argument, as well as addressing the libel and First Amendment aspects of the case,<sup>212</sup> Nachman deflected concerns of race as he and his colleagues had done in the brief. He continued to focus on the issue of matters not raised in the trial court, describing some of those as "matters which don't even relate remotely to this case."<sup>213</sup> Nachman suggested that the race-based titles given the trial lawyers were the court reporter's designation and not that of the trial judge.<sup>214</sup> When Chief Justice Warren pressed Nachman on the issue, Nachman labored to show that the judge's use of titles was not racially discriminatory.<sup>215</sup> For example, at one point Nachman referenced a portion of the transcript where the trial judge, in reading a list of lawyers' names, had not used titles before the names of any of the White lawyers.<sup>216</sup> At another point, Nachman referenced a portion of the transcript where the judge, again in reading a list of lawyers' names, had referred to three White lawyers as "Mr." but had not used any title for another White lawyer.<sup>217</sup>

In reference to the motion for a new trial based on race and the Fourteenth Amendment, Nachman insisted that the motion had lapsed.<sup>218</sup> He concluded that, without a continuance, "the matter [was] discontinued and dead as a matter of—of

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211. As atrocious as Southern racism in the United States was, it would be hard to argue that the situation in the South during the civil rights era was as bad for Blacks as the situation in Germany and its occupied countries during the Nazi era was for Jews. During the Nazi era, Nazis and their collaborators killed approximately six million Jews, who accounted for almost two-thirds of all European Jews at the time. *Introduction to the Holocaust*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005143> (last visited Dec. 8, 2014).

212. In one entertaining part of a discussion of whether the ministers should have denied that they had endorsed the advertisement, Chief Justice Warren asked, "Mr. Nachman, it is not unknown to at least one member of this Court that he receives letters from various parts of the country claiming that he has made statements that are libelous on certain groups or certain individuals and demanding an apology for it. If that member of the Court has made no such statements, is he under obligations to—to apologize or to deny that he made any such statements at the peril of being sued for libel and having that offered as sufficient proof to get a \$500,000 verdict against him?" Oral Argument at 86:43, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#40\\_argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#40_argument). When Nachman indicated that he was not familiar with the contents of any such letter, Warren, causing laughter in the court, replied with reference to the advertisement in the *Times*, "They're far worse than this one." *Id.* at 87:30.

213. *Id.* at 46:56.

214. *Id.* at 50:23.

215. *Id.* at 53:26.

216. *Id.* at 52:00.

217. *Id.* at 54:50.

218. *Id.* at 63:26.

law and—and [could not] be revived by agreement of counsel.”<sup>219</sup> Without this viable motion, the ministers were unable to seek a less racially charged trial and were faced with the \$500,000 verdict against them and the *Times*. Like the claim that certain matters were outside of the record, this argument about the lapsed motion was a technical dodge that attempted to avoid any discussion of the burdensome and scandalous issue of race.

When Nachman returned to some of the questions about the courtroom atmosphere and the suitability of the judge to sit on the bench and to hear the case, Nachman again tried to deflect any concerns about race. For example, he stated the following:

But how the matters of—of the—of—who was sitting where in a courtroom or how a trial judge was elected or what a trial judge said three months after a trial and those things could have been raised by the matters of—in the manner that—that—that the petitioner[s] say they were raised as contrary to any known rule of practice.<sup>220</sup>

Such matters were “complete afterthoughts” that had nothing to do with the record of the case because they had not been raised in a timely manner.<sup>221</sup>

Nachman even ironically described these questions related to race as “smoke screens.”<sup>222</sup> Despite the actions of the authorities in Montgomery just before the appearance of the *Times* advertisement, including allowing KKK members to attack Alabama State College protesters,<sup>223</sup> Nachman claimed, “This case should be heard and we are confident it will be heard on its own merits.”<sup>224</sup> Still, by arguing that the case was in fact about libel, Nachman created his own smokescreen to prevent the Supreme Court from seeing the racial and civil rights issues related to the advertisement.

As the above discussion has shown, Nachman and his colleagues attempted to deflect any serious discussion of race. Specifically, they argued that the ministers should have objected to certain matters earlier in the history of the litigation or should not have allowed some motions to lapse, apparently by having an entire group of lawyers appear to ask the trial judge for a single continuance that would have applied to all parties involved in the litigation. These rhetorical postures were grounded in legal technicalities that, while offering hope for a public official client whose case would not benefit from a discussion of contemporary racism, provided little hope for improvement of race relations, the most thorny social issue of the day.<sup>225</sup> Indeed, counsel did what counsel had been hired to do—and no more.

219. *Id.* at 66:12.

220. *Id.* at 99:51.

221. *Id.* at 98:31.

222. *Id.* at 99:00.

223. See Section I, *supra*.

224. Oral Argument at 100:41, *Abernathy v. Sullivan*, 376 U.S. 254 (1964) (No. 40), available at [http://www.oyez.org/cases/1960-1969/1963/1963\\_39#40\\_argument](http://www.oyez.org/cases/1960-1969/1963/1963_39#40_argument).

225. Lawyers usually focus on their clients' cases and pay little attention to the larger social dynamics in which those cases take place. See Marouf Hasian, Jr., *Performative Law and the Maintenance of Interracial Social Boundaries: Assuaging Antebellum Fears of “White Slavery” and the Case of Sally Miller/Salmon Müller*,

Although not made in the way they would be made in the future, the arguments of Nachman and his colleagues against discussing race previewed later arguments against discussing race. Decades after the heyday of the Civil Rights Movement, some advocates would argue that there was no need to discuss race because society largely had transcended the problems of race.<sup>226</sup> In the absence of specifically seeing racism, one could believe that the phenomenon no longer existed.<sup>227</sup> Since the Civil Rights Movement was continuing to unfold before their eyes, Nachman and his colleagues could not credibly argue that U.S. society had transcended race in 1963 and 1964, but, like future advocates disinterested in addressing the problems of race, Nachman and his colleagues attempted to construct the subject as unsuitable for consideration.

## VI. RACE IN THE OPINIONS OF THE JUSTICES OF THE U.S. SUPREME COURT

Members of the Court used race differently in their respective opinions. In the majority opinion, Justice Brennan did not put much attention on race, although his application of the new federal rule of actual malice to the facts of the case suggested that the majority was well aware of the racial dimension of the case. In contrast, in his concurring opinion, Justice Black, the native Alabaman, explicitly described the racial situation, making no attempt to be subtle about the racial dimension of the case. Justice Goldberg touched on race explicitly, but in a much less detailed manner than Justice Black.

### A. *Race and Justice Brennan's Opinion for the Court*

In his opinion for the Court, Justice Brennan did not focus on race.<sup>228</sup> In one footnote, he recognized that “[t]he individual petitioners contend that . . . the Due Process and Equal Protection Clauses were violated by racial segregation and racial bias in the courtroom.”<sup>229</sup> Nonetheless, he said, “Since we sustain the contentions of all the petitioners under the First Amendment’s guarantee of freedom of speech and of the press as applied to the States by the Fourteenth Amendment, we do not decide the questions presented by the other claims of violation of the Fourteenth Amendment.”<sup>230</sup>

Indeed, the opinion made much of the First Amendment. He focused intently on political communication, quoting from case law to assert, “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all

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23 TEXT & PERFORMANCE Q. 55, 59-60 (2003) (considering this phenomenon of narrow thinking in an academic law context).

226. Flores, Moon & Nakayama, *supra* note 34, at 183; HANEY LÓPEZ, *supra* note 44, at 143.

227. Flores, Moon & Nakayama, *supra* note 34, at 184. However, in “direct[ing] social, political, and legal attention away from race and racism,” colorblindness can facilitate White privilege. *Id.* at 183-84.

228. Warren had chosen Brennan to write the opinion of the Court for several reasons. For instance, Brennan had written on speech issues in several prior cases. HALL & UROFSKY, *supra* note 12, at 164. Additionally, Warren trusted Brennan, and the two men were in frequent agreement on how to resolve cases. *Id.*

229. *New York Times v. Sullivan*, 376 U.S. 254, 264 n.4.

230. *Id.*



public institutions.”<sup>231</sup> Brennan called upon the famous discourse in which Justice Louis Brandeis had stated, “Those who won our independence believed \* \* \* that public discussion is a political duty; and that this should be a fundamental principle of the American government.”<sup>232</sup> Brennan then added what would become a memorable quotation and framed the case as the following: “Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>233</sup>

Drawing upon Thomas Jefferson and James Madison, Brennan belatedly pushed aside the infamous Sedition Act of 1798, which was representative of laws that criminalized criticism of the government.<sup>234</sup> Other famous authorities like Louis Brandeis, Oliver Wendell Holmes, and Zechariah Chafee provided Brennan with additional support for condemning the Sedition Act and in turn providing greater protection for political communication, “the central meaning of the First Amendment.”<sup>235</sup>

Borrowing from the state courts, Brennan introduced to the realm of First Amendment jurisprudence the idea of actual malice, which a government official who was a libel plaintiff would have to show in addition to a common law case for libel. According to Brennan, actual malice referred to knowledge of falsity or reckless disregard for truth.<sup>236</sup> This new doctrine complicated the case for the government official who wished to sue his or her critics.

Rather than simply remanding the case, Brennan took the unusual step of reviewing the evidence in the case. While the *Times* may have been negligent, it did not demonstrate knowledge of falsity or recklessness, the justice concluded.<sup>237</sup> Also, the evidence was defective in showing that the advertisement was of and concerning Sullivan.<sup>238</sup> Meanwhile, the ministers had not known of any errors in the advertisement, nor had they shown any recklessness.<sup>239</sup> In both cases, the evidence of actual malice was insufficient, so both lawsuits failed.

In light of the Warren Court’s history of supporting civil rights, albeit cautiously, Brennan’s not explicitly addressing the racial aspects of the case in any detail might have been somewhat ironic. In their advocacy, the ministers had asked the Court to consider such aspects. One could argue that Nachman and his colleagues succeeded

231. *Id.* at 269 (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)).

232. *Id.* at 270 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

233. *Id.*

234. *Id.* at 274-76. See Act of July 14, 1798, 1 Stat. 596.

235. *Sullivan*, 376 U.S. at 276, 273. Although Brennan did not cite him, another thinker on freedom of expression, Alexander Meiklejohn, had an influence on the Supreme Court. See William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). In his dissent, Black cited Meiklejohn’s work. *Sullivan*, 376 U.S. at 297 n.6.

236. *Sullivan*, 376 U.S. at 279-80. Brennan later regretted the term *actual malice*, thinking it confusing, particularly for juries, who might associate the term with ill will. STERN & WERMIEL, *supra* note 104, at 227.

237. *Sullivan*, 376 U.S. at 287-88.

238. *Id.* at 288.

239. *Id.* at 286. Brennan opined that the ministers’ case “require[d] little discussion.” *Id.*

in deflecting the racial issue, but given the Court's interest in civil rights, this outcome was unlikely.

That Brennan and the rest of the Court recognized and were sensitive to the racial dimension of the case, but handled this dimension of the case discretely, was more likely. In recent years, the U.S. Supreme Court had experienced difficulty in getting the Alabama Supreme Court to follow the former's instructions. For example, after Alabama had sued the NAACP in a case that involved disclosure of the organization's membership records, the Alabama Supreme Court several times had refused to cooperate with the U.S. Supreme Court's decisions.<sup>240</sup> Since the NAACP was a Black organization that Alabama was suing in the 1950s, race was an obvious ingredient in the case. Accordingly, Brennan most likely knew what would happen if he and his colleagues remanded the *Sullivan* case to the Alabama court system for an application of the new constitutional rule to the facts. Rather than giving the Alabama courts a chance to maneuver around the actual malice rule,<sup>241</sup> the U.S. Supreme Court reviewed the evidence in the case. Given the way that the court system in Alabama handled racial matters, Brennan's opinion in *Sullivan* by implication recognized and was sensitive to the racial dimension of the case. While Brennan has been described as perhaps "the greatest judicial politician of his time,"<sup>242</sup> one also could describe him simply as a great politician, judicial or otherwise.

#### B. *Race and the Concurring Opinions of Justices Black and Goldberg*

Although Justice Brennan avoided an open discussion of race in the Court's opinion in *Sullivan*, Justice Black offered a much more explicit discussion of race in his concurring opinion. Black, who was from a rural county in Alabama, had the background to understand the issue from the perspective of a Southerner.<sup>243</sup> Of note, he had been a member of the Ku Klux Klan and had received support from the KKK during his 1926 run for the U.S. Senate.<sup>244</sup> How much Black supported the KKK's ideology during the 1920s may be hard to evaluate, but in a 1937 radio address broadcast nationally, Black insisted that he had resigned his membership in the KKK.<sup>245</sup> Responding to charges that he was "prejudiced against people of the Jewish and Catholic faiths, and against members of the Negro race," Black insisted that he "was of that group of liberal senators who have consistently fought for the civil, economic, and religious rights of all Americans, without regard to race or

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240. HALL & UROFSKY, *supra* note 12, at 90-92. See, e.g., National Association for the Advancement of Colored People v. Alabama, 357 U.S. 449 (1958). See also FRED D. GRAY, *BUS RIDE TO JUSTICE* 105-09 (1995) (offering context for the litigation from the perspective of NAACP counsel).

241. HALL & UROFSKY, *supra* note 12, at 178; STERN & WERMIEL, *supra* note 104, at 225.

242. HALL & UROFSKY, *supra* note 12, at 166 (observing how Brennan would write and re-write opinions to secure the votes of his colleagues).

243. SCHWARTZ, *supra* note 80, at 32.

244. Martin Carcasson & James Arnt Aune, *Klansman on the Court: Justice Hugo Black's 1937 Radio Address to the Nation*, 89 Q. J. SPEECH 154, 155-56 (2003).

245. *Id.* at 158-59. This speech attracted the second largest radio audience of the 1930s. *Id.* at 156. Only the abdication speech of the United Kingdom's Edward VIII drew a larger radio audience during the decade. *Id.* at 168 n.17.

creed.”<sup>246</sup> Whatever Black’s motivations for joining the KKK, he understood the dynamics of race in the South.

In his opinion, Black argued for an absolutist perspective on protection for seditious libel,<sup>247</sup> and he placed this perspective in the context of the civil rights era. He described the case as one with “racial overtones.”<sup>248</sup> He spoke of the financial threat of libel suits to a free press that was covering the segregation of the day.<sup>249</sup> Black observed the following:

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 races in the public schools and other public places, despite our several holdings that such a state practice is forbidden by the Fourteenth Amendment.<sup>250</sup>

He added that Montgomery was one location in which this discrimination continued to occur.<sup>251</sup> Those who advocated for desegregation, including “outside agitators” like the *Times*, often experienced hostility from supporters of segregation, and in this case, given the lack of a showing of any real harm to Sullivan’s reputation, such hostility contributed as much to the verdict as did an assessment of damages.<sup>252</sup> Black even ventured to claim that the advertisement probably enhanced Sullivan’s reputation.<sup>253</sup>

Although he most likely did not need to hear the ministers’ arguments to understand the situation, Black borrowed aspects of the ministers’ arguments regarding race.<sup>254</sup> While Black did not address many of the alleged equal protection violations, he accepted the idea that race was a key ingredient in the case. Black’s concurring opinion in *Sullivan* drew attention to the underlying racial issues of the case, which Nachman and their colleagues had been trying to deflect, and Black’s approach supported opening the door for the press to criticize practices of racial discrimination in the South.

246. *Id.* at 159.

247. *New York Times v. Sullivan*, 376 U.S. 254, 293 (Black, J., concurring). Black stated “that the *Times* and the individual defendants had an absolute, unconditional constitutional right to publish in the *Times* advertisement their criticisms of the Montgomery agencies and officials.” *Id.*

248. *Id.* at 295. Black noted that in Alabama there presently were eleven libel suits against the *Times* and five against CBS. *Id.*

249. *Id.* at 294.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. Black, who joined the Court’s opinion in *Brown v. Board of Education* and various other similar cases, paid a price for supporting the Warren Court’s concern for civil rights. Indeed, many White Alabamans believed that Black had betrayed them. Debbie Elliott, *A Life of Justice: “Hugo Black of Alabama”*, NAT’L PUB. RADIO (Sept. 11, 2005), <http://www.npr.org/templates/story/story.php?storyId=4828849>. For many years, Black did not make public appearances in Alabama. *Id.*

Despite the animosity that many Alabamans had developed for Black during his tenure on the Supreme Court, when he returned home and gave a speech in 1970, he declared, “I love Alabama. I love the South . . . So far as I know not a single ancestor that I ever had settled north of the Mason & Dixon line. They were all Southerners. And so, I am a Southerner.” *Id.*

Also taking an absolutist perspective on protection for seditious libel, Justice Goldberg concurred as well.<sup>255</sup> In his opinion, he touched on race, although much less so than Black. Goldberg declared, “The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations.”<sup>256</sup> Although he did not develop the concept, Goldberg put it on the table in an explicit manner and offered an addendum to the discussion of race in Black’s opinion.

## VII. CONCLUSION

This Article has illustrated the various rhetorical choices regarding race that advocates made in their merits briefs and oral arguments in the landmark *New York Times v. Sullivan* case, as well as how the justices employed race in their various opinions in the case. In terms of the attorneys’ advocacy, counsel for the *Times* focused on the First Amendment instead of race. Meanwhile, counsel for the ministers, as well as making the First Amendment arguments, presented a vision of a case saturated with multiple acts of racism best understood from a perspective that considered the long-standing history of racial discrimination in the South. Finally, via legal technicalities such as objecting to the use of virtually anything outside of a neatly sealed trial court record, counsel for Sullivan tried to deflect any serious discussion of race.

In terms of the judicial rhetorics, Brennan, writing for the Court, declined to focus on race and instead chose to focus on the First Amendment. However, Brennan applied the new rule of federal constitutional actual malice to the facts of the case and prevented resistance from the racially charged Alabama court system. In his concurrence, Black offered an explicit discussion of the racial context for the case. Goldberg raised the issue of race as well, albeit much more briefly than Black.

Accordingly, through analysis of the discourses in *Sullivan*, this Article has offered a better understanding of rhetorical management of a volatile topic like race at the appellate level. The Article has addressed several rhetorical choices available to advocates, including employing alternative arguments, developing the controversial topic in depth, or deflecting that topic. Additionally, the Article has shown how members of an appellate bench can deal with a challenging topic subtly or more explicitly.

Of course, in *Sullivan*, the Fourteenth Amendment was not the only part of the Constitution at issue since the First Amendment was a major part of the case as well. In Fourteenth Amendment cases, such as those that involve the constitutionality of programs like affirmative action,<sup>257</sup> race may be the only major topic on the table, and subtle discussions would be harder to develop. Examination of the rhetorics of such cases may be fruitful in developing a better understanding of appellate discourses that attempt to manage explosive topics.

Despite the efforts of Nachman and his colleagues, *Sullivan* officially turned out to

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255. *Sullivan*, 376 U.S. at 298 (Goldberg, J., concurring).

256. *Id.* at 300-01.

257. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); and *Fisher v. University of Texas*, 570 U.S. \_\_\_ (2013).

be a First Amendment case. Wechsler, his colleagues, and counsel for the ministers all argued in favor of an expansion of the First Amendment to cover libel law. These arguments succeeded, and, at least outside of the South, there was “dancing in the streets.”<sup>258</sup> Nonetheless, the ministers’ arguments that drew attention to race appeared, to one degree or another, in all of the justices’ opinions, although in the majority opinion only subtly and in the concurring opinions less fully than in the briefing and during oral argument. Regardless of whether the justices embraced each of the ministers’ arguments, the advocacy in general proved successful and served the ministers’ ends. Like other critics, members of the Civil Rights Movement would have greater “breathing space”<sup>259</sup> in which to speak their minds on the government and its policies.

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258. *Kalven*, *supra* note 7, at 221 n.125 (quoting Alexander Meiklejohn).

259. *Sullivan*, 376 U.S. at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).