Book Review

Kermit Hall and Melvin I. Urovsky
New York Times v. Sullivan: Civil Rights, Libel Law, and the Free Press
Lawrence: University of Kansas Press, 2011

Reviewed by Howard A. Doughty

Having found myself on the receiving end of libel suits more often than is good for me, I have become familiar with some of the more interesting legal precedents in the field—both in Canada and in the United States. They have so far stood me in good stead, for I have yet to be convicted of any such offence.

My main interest in the book under review is not, however, the case itself, but the circumstances in which it was heard and the influence those circumstances had on the final decision. The principal points to be made are:

(1) despite the conceits of lawyerly professionals concerning the alleged uniqueness and special qualities of "legal reasoning" and the ideal of having the law stand above petty politics and public opinion, the fact is that current events, the personal ideology of judges and broad changes in social arrangements deeply influence what judges do;

(2) no matter how decisions are made, legal findings can have profound effects on social behaviour, with an important question being whether "judge-made law" runs ahead of public opinion and legislative action or runs to catch up with changing social values and legislative choices.

At least since John Milton published his *Areopagitica* in 1644, the concept of free speech has been an important item in the liberal inventory of rights—whether natural, divinely ordained or humanly constructed. The struggle for liberty in expression and especially the rights of a free press have rarely been more eloquently expressed than in the *First Amendment to the Constitution of the United States*, a text which I personally regard as having almost sacred status among inspired and inspiring political documents. Protection under that and similar statements of fundamental liberties, such as the somewhat less ornate version contained in the Canadian *Charter of Rights and Freedoms 2(b)*, has been more easily stated in theory than instituted in procedure and process. Less than a decade after the United States affirmed the inviolability of free speech, for instance, it passed the infamous *Alien and Sedition Acts* of 1798, which made it a criminal offence to criticize the federal government, a crime for which an opposition member in Congress, Matthew Lyon, was actually jailed for four months. The road from principle to practice is sometimes hard.

In terms of the Common Law, a singular turning point came in 1964 (*New York Times Co. v. Sullivan, 376 US 254 - 1964*), when the Supreme Court of the United States handed down a decision that affirmed the rights of free speech and a free press beyond anything that had applied before. As it happened, the Court got almost everything at least slightly wrong in the process of coming to a decision that was almost certainly right.

The basic facts of the matter were clear. On 29 March, 1960, a full-page advertisement was printed in the *New York Times* under the title, "Heed Their Rising Voices," a phrase borrowed from an earlier editorial in the same newspaper. It was intended to help raise money for Dr. Martin Luther King and other civil rights activists who were regularly being arrested by local authorities in the American South on all sorts of charges—real, imagined or mischievously concocted—as part of a common, if not necessarily a well-organized and carefully coordinated, plan to obstruct the campaign for civil rights and especially the right to vote.

Among the specific allegations made were that:

- eight hundred students from the black Alabama State College in Montgomery had marched to the state capitol and sung "My Country, 'Tis of Thee";
- their payback was expulsion from the school;
- police, armed with shot-guns, had surrounded the campus;
- college officials had locked the dining hall in an effort to "starve out" the occupying students;
- Dr. King had been arrested seven times for frivolous or specious charges such as "loitering."

None of those statements was true.

Mr. L. B. Sullivan, the plaintiff, was the Montgomery City Commissioner who had the specific responsibility for overseeing the police force. He was not, however, mentioned by name in the contested advertisement. Despite the fact that only thirty-five copies of the *New York Times* penetrated the perimeter of Montgomery, Alabama, Mr. Sullivan alleged that his reputation had been severely damaged because of what he considered false and unwarranted criticism.

The defendants were *The New York Times* and four fairly famous clergymen and civil rights leaders (Ralph Abernathy, J. E. Lowery, Solomon S. Seay, Sr. and Fred Shuttlesworth). At trial, all four individuals were able to prove to the Montgomery County Court that they were unaware of the advertisement prior to publication, and only learned that their names had been included as supporters without their knowledge or consent after the fact, when Mr. Sullivan sent them legal letters demanding that they retract their statements.

The initial decision, upheld on appeal to the Alabama Supreme Court, was in favour of the plaintiff. Mr. Sullivan was awarded half a million dollars—almost four million today

when adjusted for inflation. In time, the case made its way, again under appeal by the defendants, to the Supreme Court of the United States. There, the plaintiff lost.

Justice William Brennan wrote the decision in a unanimous 9-0 decision. He made three main points:

(1) a thriving democracy requires open debate, and part of the cost of becoming a public official is that you necessarily may become the subject of passionate, scathing and possibly hurtful attack;
(2) when fervent debates take place, it is inevitable that factually incorrect statements will be made in the heat of the moment or even in a the course of a lengthy and hotly contested campaign;
(3) whereas private citizens may be able to prevail in a libel case wherein they can demonstrate that allegations made against them or statements made about them are false and harmful to their reputations, a public official must be able to prove "actual malice"—an extremely difficult test to meet.

Put simply, when you enter politics, you may expect every sort of insulting, abusive and obnoxious comment to be made about your performance and your person. Your opponents may knowingly or unknowingly publish falsehoods about you. The court's ruling was tantamount to saying: That's politics! Suck it up! If you can't stand the heat, get out of the kitchen! And so on.

Hall and Urofsky take these elementary facts and turn out a provocative thesis. They say that this was not a case about the *First Amendment*, free speech or a free press at all. Rather, it was a case that was shoulder-deep in the civil rights turmoil. In so doing, they present a defence of Sullivan and his supporters which, in my view, constitutes a casuistic stretch that exceeds believable levels of elasticity. They claim that Sullivan, his associates and fellow white citizens in Montgomery were legitimately distressed by rowdy street demonstrations and intemperate accusations of racism. They were unused to having their authority undermined and their cultural traditions threatened. They claimed that inherent in Southern culture and particularly Southern political culture was a commitment to refined civility and mutual respect. They are sympathetic to Sullivan's attempt to turn himself into the victim of an alien cultural intervention, and not the enabler, if not the direct perpetrator, of vicious attacks on civil rights advocates and a pattern of violence that had and would continue to cost people their lives. They imply that, in the absence of wide-spread sympathy and growing support, at least in the North, Sullivan would and should have prevailed.

It is all a bit much to take; but Hall and Urovsky nonetheless have a point—even if it is not quite the one they hoped to make.

Three years after the Sullivan case was resolved, the same Dr. Martin Luther King was on the cusp of his definitive success—persuading President Lyndon Baines Johnson to pass seminal legislation guaranteeing, among other things, voting rights for all Americans including Black citizens in the South. In February, 1965, I vividly recall spending almost

every night at the New Gate of Cleve coffee house in Toronto, where I listened to Phil Ochs sing "Here's to the State of Mississippi," "Talking Birmingham Jam," "Too Many Martyrs," "Days of Decision" and other civil rights anthems. In March, 1965, I also recall spending hours—day and night—on the sidewalk in front of the US Embassy marching in solidarity with Dr. King and his associates as they made their way from Selma to Montgomery, despite initial opposition by uniformed officers with police dogs and fire hoses—not exactly illustrations of the genteel and well-mannered society that Sullivan had portrayed. In 1964, President Johnson signed the *Civil Rights Act* (Pub.L. 88-352, 78 Stat. 241) and the *Voting Rights Act* of 1965 (42 U.S.C. §§ 1973–1973aa-6), and I honestly believed that the moral fortitude and physical courage of Black activists and their occasional White supporters had won the day.

In a sense, of course, they had, but I was taken aback in October, 1966, when I was offered a fundamentally different perspective by the conservative Canadian philosopher George Grant. Speaking to an assembled multitude of vaguely leftish and liberal students at the University of Toronto, he explained something that few of us had seriously considered before. He argued that the struggle for civil rights in the American South was noble and just. It vindicated the sacrifices made by thousands of dissenters throughout the decades of turmoil and turbulence. There was no doubt about that, and Grant made it clear that he in no way wished to detract from the righteousness, bravery and fundamental decency of those who had served the cause. But, he added, the victory had been inevitable from the outset. The timing no doubt was influenced by immediate events, but the success itself was not the result of chanting and marching and enduring beatings, imprisonment and even death. The achievements of the civil rights movement were underwritten, however reluctantly, by the power of the state and the increasing support of the national mass media. It was in the material interest of the dominant liberal, technological business and administrative elites to encourage modernization in the South. So, Jim Crow had to go.

Associating himself with the cry for social justice and praising the protesters for their commitment, Grant nonetheless believed that "the new left is deluded about what is happening in North America … because it has misinterpreted the events which took place in the southern United States … [It has] forgotten … that the powerful among the institutions of North America were more than willing that the society of the white South should be broken. The civil rights movement had behind it all the powerful forces of the American empire. It marched protected by federal troops, it had the blessing of the leading government figures, it was encouraged night after night over NBC and CBS. There was violence from the white South but the traditional South is not an important part of the American power elite." When protest is raised against some project dear to the hearts of the liberal establishment, he warned, things would be different. Could it be a coincidence that Martin Luther King was assassinated only after his focus went beyond the campaign against domestic racism, and embraced first the peace movement and the anti-Vietnam War movement, and then went on to link both of them to issues of social class? After all, it may be worth recalling that King was in Memphis to support striking public employees when he was shot.

Grant's interpretation bears on the matter in the following way. *New York Times v. Sullivan* was swept up in the civil rights controversy. It was an important case regarding free speech and a free press, to be sure, but it may well have been decided on grounds that had less to do with the case itself than with contingent unrelated factors.

By contrast, although it is easy to misunderstand the political dynamics of a process leading to legislative innovation, matters are usually clearer than in judicial decisions in which judges may not appreciate how much they are guided by extra-judicial factors (or, if they do, they may wish to disguise the fact). However we may misinterpret the underlying reasons for legislative change, there is seldom doubt about the issues at stake as they are understood by advocates for all sides. Speeches and debates involving elected political officials are normally recorded, and all are free to hear and to read what is said for and against the introduction and passage of a new law. In the case of court decisions, the influence of the social climate is seldom as apparent. Much will depend upon how a case is framed and argued, and upon the particular points judges choose to highlight as the basis for their judgements.

In my view, both issues—free speech and civil rights—are important and praiseworthy. What Hall and Urovsky add to our understanding is not the idea that the two are inseparable, but that legal decisions about one can reflect changing attitudes toward the other. Legal judgements do not exist in a vacuum. The insulation of legal reasoning from the heat and cold of public passion on a range of political and moral issues is, so to speak, a "legal fiction." So, for example, decisions about the rights of trade unions to engage in strike action may be decided not on the question of constitutional rights to free association, but on questions of economic policy; likewise, aboriginal rights may be enhanced or restricted because of questions arising out of energy policy; in the alternative, abortion rights may be decided in terms of the rights and protections afforded members of the medical profession. The intersection between fundamental rights and contingent and occasionally opportunistic politics sometimes dangerously entices collisions of logic and conscience.

In Canada, a stunning instance of contextual contradiction appeared in two appeals to the Supreme Court of Canada regarding the constitutionality of certain sections of the *Indian Act*. On August 10, 1960, the Government of Canada passed into law the Canadian *Bill of Rights*. It was adopted as a simple statute, and therefore was neither more nor less significant than any other law. That, of course, changed in 1982 when the *Constitution Act* patriated the fundamental law of the nation a scant one-hundred-and-fifteen years after Confederation. Its content was similar to many documents of its kind, in that it affirmed a variety of rights for Canadian citizens, among them being freedom from discrimination because of race and sex. Subsequently, the arrest of a Native Person for the offence of being intoxicated off the reserve was appealed to the Supreme Court. The plaintiff argued that, under the *Indian Act*, he was treated differently from non-Native Canadians and convicted of an offence that applied to Indians only. The Supreme Court agreed. Joe Drybones was exonerated and the particular section of the *Indian Act* was struck down (*R. v. Drybones*, [1970] S.C.R. 282. Later, another case (*Attorney General of Canada v. Lavell; Isaac v. Bédard*, [1974] S.C.R. 1349) concluded that a provision of the

Indian Act that allowed aboriginal women to be forced off a reserve if they married someone who was not a "Status Indian" under the terms of the *Act*, but it imposed no such demand or penalty on aboriginal men. Accordingly, it was argued that this section too should be deemed unconstitutional. In my view, the cases were parallel, and Lavell's argument about discrimination because of sex exactly matched Drybones' argument about discrimination because of race. Nonetheless, the Supreme Court denied Lavell's appeal.

In time, what I believe to have been the plain injustice of this ruling played a large part in the drawing of Section 15 of the *Charter of Rights and Freedoms*. I will refrain from speculation about how differential social values concerning racial and sexual equality may or may not have influenced the Court in these cases, but others may feel free to do so. I will, however, urge anyone interested to consult the record and witness the tortuous logic that allowed the Supreme Court to arrive at its seemingly contradictory decisions.

Consideration of both broader social issues and narrower, seemingly unrelated legal interests can and do have profound consequences when changes in public mores affect changes in civil and criminal law (and *vice versa*). Hall and Urovsky have done a service, if for no other reason than they have brought a classic libel case that has confirmed the right to free criticism of public officials to our attention. At a time when the criminalization of dissent is a real danger in liberal democracies as well as authoritarian polities, we are well advised to pay attention to the legal status of our rights and freedoms. That includes paying attention to how they have been enacted and, potentially, how they may be removed.

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