Benjamin J. Stein

FREE TO LIBEL

Reckless Disregard has a long history.

On March 29, 1960, an advertisement entitled "Heed Their Rising Voices" appeared in the *New York Times*. The ad was a fundraising appeal on behalf of a group of black clergymen backing civil rights demonstrators in and around Montgomery, Alabama. The text in the ad vividly depicted a series of depredations which were being visited upon civil rights demonstrators at Alabama State College by the local police. The advertisement also described genuinely terrible brutalities experienced by Martin Luther King, Jr. in Alabama jails. It told of students peacefully demonstrating for justice who were beaten, locked out of their dining hall "... in an attempt to starve them into submission," and a great non-violent leader viciously abused by the police of Montgomery.

The ad ended with a stirring appeal for Northerners to show solidarity with these demonstrators by sending money.

There were two distinctive aspects to this advertisement. First, it was largely false in its descriptions of brutality and repression, which turned out to be often *made up*.

Second, the advertisement changed history.

An irate L.B. Sullivan, commissioner of police and other things of Montgomery, sued the black clergymen and the *New York Times* for libel. He won in all of the Alabama courts where the case was heard, and a judgment of $500,000 was awarded against the *New York Times*.

The case was appealed to the Supreme Court of the United States, and that was when the history was made.

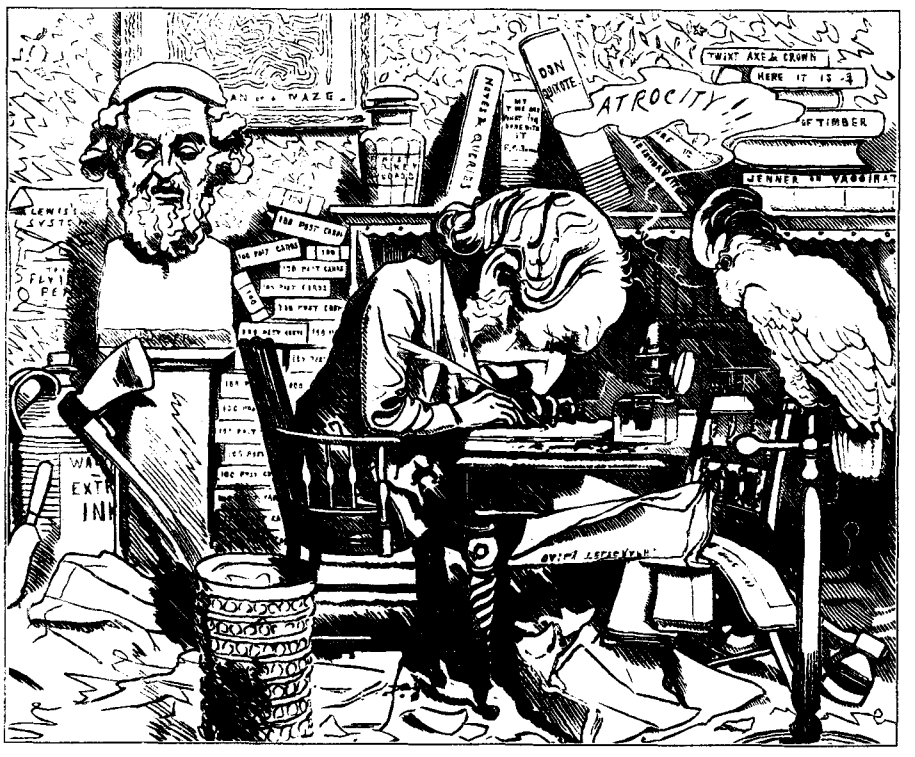
Most Americans believe that the judges of this land decide cases by reading or hearing the facts of a case, studying the law on similar cases, and laying down one next to the other to see what should come out in the way of a decision. This principle is called "*stare decisis*." It means "let the decisions stand."

It took some doing to believe that *stare decisis* was indeed the governing principle of law when the Supreme Court had ruled at one time that blacks were chattel in the slave states and then a few years later said the Emancipation Proclamation was valid. It also took some doing to believe in *stare decisis* when the Supreme Court had upheld "separate but equal" as the racial law of the land and then, within two generations, absolutely barred racial segregation by law. Then there were all those flip-flops about New Deal agencies and procedural due process, and next thing you knew, someone had A Better Idea.

The someones were two law professors at Yale (my alma mater), Myres McDougal and Harold Lasswell. These two geniuses said that *stare decisis* explained nothing. Rather, it was a fig leaf for a far more basic rule of judicial conduct; judges were first and foremost human beings. They put on their pants one leg at a time, and they had emotions and prejudices like other human beings.

Judges did not make decisions by following precedent, said Lasswell and McDougal. Rather, they simply decided how they wanted a case to turn out, then decided it that way. But because they were not legislators with independent legislative authority, they had to *pretend* that their authority derived from following previous cases, or *stare decisis*. That is, *stare decisis* was only a cover for judges making up the law as they went along, according to their whims and fancies.

This doctrine, which was both revolutionary and self-evident, was called "legal realism." Within a few decades, there were few serious legal scholars who doubted that it was revealed truth. Still, by definition, judges had to deny the truth of "legal realism." If they admitted that they were law-makers instead of law-interpreters, people might wonder where they got their authority, and where they stood relative to the Congress or the state legislators.



Legal realism has to be understood, at least glancingly, before one can even start to understand what happened when the Supremes got the appeal on *New York Times* v. *Sullivan*. The justices in their black robes were faced with an awesome legal realism problem. On the one hand, clearly the lower courts were correct in *Sullivan*. The advertisement had been not only false, but wildly, irresponsibly, cruelly false. A man had been called a lawless "violater" (sic) when many of the specifics of his bad acts were simply made of whole cloth. Libel was a crucial part of the legal structure of America. The decision allowed individuals to protect their reputations. The Founders, especially Thomas Jefferson, had held reputation sacred. Jefferson had not wanted libel cases in federal courts, but he wholeheartedly supported and joined in libel actions in state courts. As recently as 1952, the Supreme Court, per Justice Frankfurter, had said that there was no First Amendment protection for libel. Frankfurter said that libel, like obscenity or incitements to violence, was not "speech" under the First Amendment and therefore not protected. In fact, Frankfurter's court had said that there could even be criminal prosecutions for libel and the First Amendment would not stand in the way.

So all of the weight of authority stood for the proposition that Sullivan had been defamed falsely, had lost reputation, and could collect. Plus, the decisions of lower courts are presumed to have some weight just because they saw the evidence and the witnesses with their own eyes.

On the other hand . . . the appellee, Mr. Sullivan, was a segregationist, an official of George Corley Wallace's Alabama, and all of his friends and supporters were racists and bigots too, presumably. The appellants, and the libelers, so to speak, were kindly black

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clergymen allied with Martin Luther King, Jr. They were for racial justice. Also, one appellant was the *New York Times*, by far the most powerful newspaper in the world, a voice of enlightened racial harmony, a strong, important backer of the Warren Court in its most controversial decisions.

How could the same Supreme Court which had only a few years earlier thundered against racial segregation in *Brown* v. *Board of Education* now possibly turn its back on the brave fighters for racial decency and give half a million real bucks to the racist swine, no matter what the decisions said?

They couldn't. The result, as Lasswell and McDougal would have predicted, was a unanimous Supreme Court reversal of the Alabama courts and a decision, penned by William Brennan, which set libel law on its head.

In a long, bizarre decision marked by an almost unbelievable misuse and abuse of precedents, Brennan quoted Mill, quoted Milton, quoted cases on totally unrelated matters such as membership lists and contempt of court, and announced a brand new rule about libel. Of course, he said it was the same old rule, but no one quite fell for that. Somehow, this was a completely new rule and at the same time it followed all of the old cases. It was a clever trick, and for those who want to see it in action, the case can be found in your law libraries at 376 U.S. 254.

According to Brennan, the nation needed a new (but somehow hauntingly old) rule which would ensure that national debate on crucial issues was "uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." There was no citation of any authority to show that national debate had ever *not* been that way. Still, Brennan said that if injured officials could sue for libel and win, that might chill open speech, and that would be bad.

Therefore, Brennan and his brothers created a wide zone of protection around free speech and explicitly said that they would now protect false, defamatory speech in many instances. The theory again was that if there could be libel actions by public officials, free speech would be inhibited. Some lies might not be told, but some truths also would not be told if speakers had to thread their way between truth and lies for fear of libel suits. Brennan wanted everything to come out, the false as well as the true, so that the debate would be truly open. From that day on, Brennan said in effect, critics of the government could speak their minds freely without having to worry about occasionally lying.

The rule Brennan propounded to create this protection for false statements—and therefore presumably for true statements as well—was known as the "actual malice" rule. From 1964—the year of the decision—public officials could only recover for libel if they showed that the offending statement was 1) false, 2) defamatory, 3) made with knowing falsity or reckless disregard of whether it was true or false, both of which were to be considered signs of particularly evil intent, or "actual malice."

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After 1964, the Supreme Court gradually expanded the "actual malice" rule so that not only public officials, but public figures, retired public figures, involuntarily well-known figures, people caught in a controversy not of their making, and, finally, almost anyone was included. By 1974 no plaintiff could collect significant damages without showing actual malice on the part of the speaker. In practice, this meant that there were almost never any notable libel judgments that stood up on appeal.

In the ten years after 1964, libel, which had been a basic part of the common law since Magna Carta, virtually vanished as a tool for the protection of individual reputation. Media defendants simply did not lose libel cases except in the rarest of circumstances. Obviously, the relative strength under law of media and of individuals changed drastically. The press was basically free to play with private or public reputation as it saw fit, which was rough play indeed in many cases. How this freedom to lie, especially about private individuals, benefited the Republic has never been disclosed.

The virtual abolition of libel as a cause of action coincided with the apotheosis of the media in other ways. Television had created a fabulously wealthy media super-class. The emergence of a few monopoly newspapers in major cities and a handful of dominant news magazines had joined with legal developments to give to the media a material, moral, and legal protection which media in a free society had never had before.

That is, media by the late 1970s were rich, legally protected, and self-confident, not to say self-righteous. The nation, of course, was dedicated to the proposition that all men are created equal. But some men who sat before cameras or before word processors were more equal than others.

A few great media empires in particular combined magazine ownership, TV and radio station ownership, financial clout, and a sheen of moral correctness, all surrounded by the moat of "actual malice." Most viewer-listener serfs looked to the castles of the media and were awed.

Onto this extremely tilted playing field in 1982 and 1983 came two exceptional men who were not awed, at least not at first. In 1982, "CBS Reports" aired what it called a documentary entitled "The Uncounted Enemy—A Vietnam Deception." The bizarre thesis of this bizarre show was that General William Westmoreland and his circle had suppressed data about the true strength of the Vietcong prior to 1968. This suppression of the truth, supposedly, had the aim of making the war seem winnable and making Westmoreland seem more successful.

The show used interviews, newsreels, close-ups, trembling upper lips, all of the tricks of the "simulation of the actual," as Renata Adler says in her extraordinary book about two recent immense libel cases in America, *Reckless Disregard*.[1] The show was produced by a dedicated proponent of the deception theory, George Crile, and it featured and was inspired by interviews with an even more devout believer in the conspiracy-by-the-generals theory, Sam Adams.

As Miss Adler points out, the show was widely believed by all segments of the political spectrum and soon became part of the lore of Why We Lost in Vietnam. The only problem was—and it was a big problem—the show was, as Miss Adler shows, utterly, completely false. Many interviews had been coached. Any interviews which did not support Crile and Adams had been discarded or cut drastically. Answers to one question had been spliced onto another. Sam Adams had been paid by CBS without any on-air disclosure of that fact. In fact, the reporters for the story should have and could have learned in the course of their research that the whole theory of the "documentary" was fraudulent.

About eleven months later, *Time* magazine ran a story about the Kahan Commission inquiry into the massacres of Palestinians at Palestinian refugee "camps" outside Beirut during the Lebanon war of 1982. In the *Time* story there was a paragraph which said explicitly that General Ariel "Arik" Sharon had visited the headquarters of the Lebanese Phalange shortly after the murder of Bashir Gemayel by a bomb. The story further said that at the meeting, Sharon urged the Phalange to take revenge on the Palestinians for what had happened to Bashir.

The story was a bombshell, leading to a world-wide outcry against Sharon and against Israel.

There was a major problem with the story. It was completely and totally false, literally invented like the Wizard of Oz. As Renata Adler has found out, the man who sent in the story from Jerusalem, a *Time* "reporter" of long standing in Israel, had been a bitter opponent of the Sharon political party, a long-time Laborite political figure, a man with a known and documented history of false filings of important stories, a man with a police record for bizarre behavior, and a man whom *Time* itself had put on probation for his false reporting.

Both General Westmoreland and General Sharon asked for retractions. Neither man got them. Libel lawsuits were begun in federal courts in New York.

Reckless Disregard is the painstaking, brilliantly realized analysis of these two cases. To write it, Miss Adler, a distinguished critic of many kinds and a graduate of Yale Law School, read most of the depositions in the cases, many of the transcripts (which no one else did), and attended the trials.

Most important of all, Miss Adler brought to her observations a keen sense of right and wrong, a contextual framework of truth and falsehood, and an even deeper sense of outrage. Miss Adler does something in her book which smart people do all the time in real life but hardly anyone bothers to do systematically in a book: she goes through the whole soggy mess of the trials and points out, almost day by day, the lies, treachery, bullying, thuggery, and just plain immorality of the lordly media class and their highly paid lawyers. She applies her sense of right and wrong to the repeated lies of David Halevy, the *Time* correspondent, the brutal insensitivity of the Cravath

[1] *Reckless Disregard: Westmoreland v. CBS et al.; Sharon v. Time*. Alfred A. Knopf, $16.95.

lawyers defending their sanctimonious media clients, the incredible betrayal of General Westmoreland by Dan Burt, his own lawyer, the whole motley crew of lies and liars and brigands who crucified General Westmoreland to get revenge for petty bureaucratic battles of twenty years before. Miss Adler brings a compass of decency to the revolting spectacle of modern litigation by name counsel and name defendants in the name of the First Amendment.

The reader is compelled to bring his own sense of screaming outrage to the conclusion of the book, because here even Miss Adler is apparently too overwhelmed by the just plain wrongness of what happened to cry out any longer: Even though the trials clearly showed that *Time*'s Halevy had made up his story, that *Time* had been careless to the point of the incredible in running the story, and that Sharon had been savagely wounded by the story, *Time* got off. The jury could not find the requisite degree of actual malice.

Even though Westmoreland had been shown as completely innocent of the charges against him by CBS, even though he had been shown to be the victim of a media smear without any foundation in fact, even though Adams himself had recanted at one point, his lawyer threw the case away in a meaningless and insulting settlement with CBS that offered no retraction and no damages.

It was as if, as Miss Adler brilliantly notes, CBS and *Time*, with their huge war chest for litigation, had not only told lies, but were now able to *enforce* the lies in court.

To go even further, it was as if the power of the media had grown so great and its resources compared even with generals so disparately large that only the media conglomerates now were allowed to communicate any longer. In a grotesque, atomic age mutation of McLuhan, the media were not only the message but the state as well, and a not at all lawful state either, but a state run by power, raw and simple. The freedom of the press, as Miss Adler notes, may now be so great that it has squeezed out freedom of speech for everyone else.

And there Miss Adler's book stops, without a happy ending, but with provocation for thought: What is the future of America if the rule of law has been supplanted by the rule of media power? Once equal protection gives way to "except for Dan Rather, Mike Wallace, and their pals," what is the meaning of law as the guarantor of a free society?

Twenty-six years ago a group of black clergymen placed an advertisement in the *New York Times*. It caused a trial for libel. The Supreme Court decided it on the basis of legal realism, i.e., who they liked better in the case, instead of on *stare decisis*. The result was a small lift for the civil rights movement, and a sweeping catastrophe for the legal rights of everyone outside the Inner Party of Mass Media. The case, and especially its progeny which deprived private citizens of their rights to reputation, ended in disaster. Still, there is hope. We have a different Court now from the 1964 Court. Perhaps today's justices have different interests and goals. Perhaps on a strictly legal-realism basis they have learned that there is no equal justice when, by legal rule, some groups are more equal than others. Once the law makes the Fourth Estate above the law, there is no law. Lasswell and McDougal would have understood. As for Miss Adler's book, read it and weep, but read it. □

William Tucker

HOMELESS PEOPLE, PEOPLELESS HOMES

No vacancy in New York City.

In 1937, Fitzroy Maclean, a British journalist, wormed his way into the Soviet Union. On May 1, he found himself standing in Red Square observing the annual parade. As the battalions of soldiers marched by, Maclean heard the continual roar of a crowd. "At first it did not occur to me to look and see who was cheering," he later wrote in *Eastern Approaches*.

> Except for the Diplomatic Corps and some heavily guarded school-children, there was no one there to cheer. All around Red Square stretched a grim, silent line of security troops. . . . Nowhere was there anyone who looked like a member of the general public.
>
> It was then that I grasped that the cheering was potted synthetic cheering, issuing from loudspeakers, discreetly sited at the four corners of the square and conveniently obviating the need for unhygienic, insecure spectators.

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New York City today practices its own version of this Potemkin-village reality. The city's Department of Housing Preservation and Development (HPD) currently owns 5,324 vacant buildings containing about 50,000 apartments. One day, of course, the city is going to fix up these buildings to help alleviate New York's monstrous housing shortage—which has lowered vacancy rates to 2 percent and turned 50,000 homeless people into the streets.

But in the meantime, the whole problem of putting real people in real buildings is too complicated and unhygienic. So the city has filled the windows of these vacant buildings with vinyl decals showing cute little shutters, curtains, and flowerpots on the windowsills. The idea is to *pretend* that happy people are living there. As HPD Commissioner Anthony Gleidman said in announcing the policy in 1983, "Appearance is reality."

Why almost 50,000 city-owned apartments sit vacant while another 50,000 people roam the streets is a mystery that genuinely perplexes New Yorkers. The city's Democratic politicians, of course, have a ready answer. The reason—now and forever—is that "Washington hasn't given us enough money to fix them up."

The matter came up once again last November when President Reagan questioned why New York City spends $37,000 a year to put a single family in a welfare hotel. "For $37,000 couldn't