LEGAL TRADITIONALISM, CREATIVE DESTRUCTION, AND THE ROLE OF MEDIA LAW IN THE INTERGENERATIONAL SOCIAL CONTRACT

ANUJ C. DESAI*

I want to start with a point that I hope won't be controversial: the concept of intergenerational equity necessarily entails thinking about the future. Thought about in those terms, the topic of this panel, "Media and Speaking to the Future," is obviously, and inherently, future-oriented. How should we think about the role of the media as it relates to subsequent generations, our descendents?

I'd like, however, to shift our focus to the past. While our topic is inherently future-oriented, we are lawyers trained in the common-law tradition and are thus almost necessarily rooted in the past. In my brief remarks here, I will argue that there is an interesting tension between thinking about intergenerational equity and new media through a standard future-oriented lens and thinking about it through the lens of the common law, which of course continues to pervade much of our thinking about law in the American system.

To preview, the tension I describe is in essence one between building and destroying. To be more specific, the building and destroying that I want to focus on is the building and destroying of First Amendment institutions.[1] I will leave the definition vague for the moment, but let me give some examples. A library is a First Amendment institution. So too are a university, a school, and the post office. But so too are the entities we traditionally call "media"—or perhaps I should say "mediums" to avoid any connotations that the word "media" conjures up. Here I mean both content providers and conduits and, indeed, amalgams of the two: the newspaper, the magazine, the book publisher, the radio station, television station, or cable TV or satellite operator. These, though, are abstractions in some

---

* Associate Professor of Law, University of Wisconsin Law School. These remarks were made at the *Wisconsin Law Review* 2010 Symposium on Intergenerational Equity and Intellectual Property held at the University of Wisconsin Law School on November 12, 2010. Thanks to Shubha Ghosh and Deven Desai for inviting me to the conference, to Andy Coan for comments, and to Melissa Moravec for help with word processing and editing.

1. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005); Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998); *see also* Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

sense. So, we could—and I will—go further. The *New York Times* is an "institution," as are NBC and AT&T. And, so too—at least now—is Google. At this point, I have described the term "institution" so broadly that you have good reason to suspect that I will be unable to say anything useful with it. But bear with me.

The tension I want to describe is between variations of a classic Schumpeterian "creative destruction"[2] on the one hand—innovation comes from the new, from the challenger to the existing social and economic order—and the role of courts, law, and precedent in a common-law system on the other. To contrast with Schumpeter, we might call using precedent "creative *con*struction." Using this framework, I want to focus here on the ways in which courts rely on First Amendment institutions to further innovations—both legal and technological—whose effects in turn may transcend the present generation.

But first let me back up. In a now classic article, Dean Anthony Kronman argued that following precedent in the common law was deeply intertwined with what he referred to as "the world of culture."[3] Kronman argued, in some of the most beautiful prose one can find in a law review article, that this "world of culture" is what makes us distinctive as humans. "[R]espect for the work of past generations, who have given that world to us, is founded upon something deeper than utilitarian or deontological defenders of precedent acknowledge. . . . We must respect the past because the world of culture that we inherit from it makes us who we are."[4] Drawing on Burke's famous metaphor of "the flies of a summer,"[5] Kronman argues that a society that fails to respect the past, "for its own sake" and because of its "inherent authority," ignores the importance of the true intergenerational connection.[6] Kronman attacks what he refers to as the "realm of thought," which "lacks the features of impermanence and additivity that mark the world of culture."[7] For Kronman, again drawing deeply on

2. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81–86 (3d ed. 1942).

3. Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1051–55 (1990).

4. *Id.* at 1066.

5. *Id.* at 1048–49 (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 192–93 (Conor Cruise O'Brien ed., Penguin Books 1969) (1790)). Burke referred to the present generation as "temporary possessors and life-renters" and decried those who "teach[] [their] successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers." Burke argued that failing to link the present generation to the *past* would render us "little better than the flies of a summer." BURKE, *supra*, 192–93.

6. Kronman, *supra* note 3, at 1044, 1066.

7. *Id.* at 1055.

Burke, this realm of thought is the "philosopher's talent for abstraction," and he contrasts it with "the wisdom and experience of a statesman."[8] The philosopher's arrogance, according to Kronman, "is a foolish presumption and one, Burke insists, that is certain in the long run to diminish the happiness of the human beings who live in any regime that adopts it."[9] Key to Kronman—and of particular relevance for my present purposes—is that "the 'chain and continuity' of the generations of which Burke speaks is therefore a chain of interwoven obligations."[10] Those obligations run in both directions, towards future generations, but also towards the past:

> We are indebted to those who came before us, for it is through their efforts that the world of culture we inhabit now exists. But by the same token, they are indebted to us, for it is only through our efforts that their achievements can be saved from ruin. Our relationship with our predecessors is therefore one of mutual indebtedness, and so, of course, is our relationship with our successors, though the debts in that case are reversed.[11]

Now, much can be said in response to Kronman—indeed, much ink has been spilled on Burke, long before Kronman came around[12]—but I want to draw here on an essay by David Luban entitled *Legal Traditionalism*.[13] Luban gives Kronman—and in turn, Burke—his due, but rejects the notion that preservation alone is at the heart of human culture: "Kronman's account, which stresses the importance of preserving our cultural heritage but neglects our capacity for transforming it, has simply begged the question in favor of traditionalism and against political change."[14] Luban thus emphasizes Kronman's failure to take innovation into account in his characterization of human culture:

---

8. *Id.* at 1056.

9. *Id.* at 1057. It is worth noting that this point is a consequentialist argument, notwithstanding Kronman's claim that we should respect the past "for its own sake." Kronman, *supra* note 3, at 1066.

10. *Id.* at 1067.

11. *Id.*

12. *See, e.g.*, O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468–72 (1897); THOMAS PAINE, *Rights of Man: Part the Second*, *in* COLLECTED WRITINGS 541, 583–84 (1995). *See generally* GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW TRADITION (1986).

13. David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035 (1991).

14. *Id.* at 1054.

> Correctly understood, [Burke's] "great primeval contract of eternal society" contains two clauses that pull in opposite directions. The first, upon which Kronman and Burke focus exclusively, is a "preservation" clause, in which we pledge to conserve our ancestral heritage and trust that our descendants will likewise preserve theirs. The second, which Kronman and Burke neglect altogether, is an "innovation" clause, in which we offer our descendants the same freedom to break with the past that we ourselves enjoy.[15]

Given these two clauses in the "intergenerational social contract," Luban concludes with the following observation:

> In the end, . . . it falls to us (who else?) to pass judgment on the traditions into which we are born, and to determine whether a multigenerational project should be tended and cultivated or abandoned without regret. Thus, in the end, rationalist inquiry into the justification of traditions is inescapably our lot.[16]

Picking up on Luban, I argue here that the traditionalist-rationalist divide goes to the heart of the intergenerational compact. Law itself is constantly struggling with the tension between these two clauses. What I hope to show—through a couple of suggestive examples if not well-supported data—is that the question of intergenerational equity as it applies to new media can in quite concrete terms also be viewed through the lens of this tension.

Intergenerational equity asks us what we owe our descendents, while the common law asks us (among other things) what we owe our ancestors. One possible response to this tension is the classic descriptive law-and-economics claim that the common law itself has historically led to efficiency[17] and that it will continue to do so, all to the benefit of our descendents. Another might be the Burkean notion that there is a wisdom of the ages embedded in the common law, an epistemic argument in favor of the common law.[18] But, let me bring the question down from this level of generality. My claim is that creative destruction alone cannot create the conditions for the advancement of

---

15. *Id.* at 1055 (quoting BURKE, *supra* note 5, at 195).

16. *Id.* at 1057.

17. *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2011).

18. *See, e.g.*, CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 51–52, 91–92 (2009).

the concerns of future generations. We need creative construction too, and that construction must build on the past.

To further First Amendment values, for example, we need to build institutions and to build on those institutions that have furthered those values in the past. New media are insufficient. We must have the old too. This is both a normative and a descriptive claim: a normative claim that these institutions further values society seeks, and a descriptive claim that law acts in ways that favor and preserve these institutions. The descriptive point might result from the fact that the common law is inherently conservative, perpetuating the cultural heritage it has been given, or might instead be a quasi-Marxist, materialist point, that law represents the interests most wedded to institutions because of the economic power those institutions wield. Whatever the case, that is the crux of my descriptive claim. Now, I'm not in a position to defend this claim empirically or in all its particulars, but I want to sketch out a little evidence that suggests the courts' conservatism in the context of the media. The evidence will be anecdotal and case-specific, but will also, I hope, be suggestive of a broader pattern.

My examples should be familiar to many of you, but I hope to put them in a slightly different light. The first example involves the U.S. Supreme Court's role in technological innovation. The second, in contrast, involves a legal innovation. In both, the Court is looking to the future, but at the same time is depending on an institution rooted in the past.

With that, let me turn to my first example. In the past three decades, the Supreme Court has decided two important cases involving the "secondary liability" doctrine in copyright law, *Sony Corp. of America v. Universal City Studios, Inc.*[19] and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*[20] The *Sony* case arose out of the development and marketing of the then-novel videotape recording device, what Jack Valenti, the head of the Motion Picture Association of America, famously called "the Boston strangler" of the film industry.[21] Universal's claim was that Sony should be liable when VCR owners copy Universal's television shows and that, because of that liability, Sony should be prevented from selling VCRs. The Supreme Court rejected that argument, concluding that since the VCR was "capable of substantial noninfringing uses,"[22] Sony could not be held secondarily liable for any infringement its users engaged in. The

19. 464 U.S. 417 (1984).

20. 545 U.S. 913 (2005).

21. JAMES LARDNER, FAST FORWARD: A MACHINE AND THE COMMOTION IT CAUSED 1 (rev. ed. 2002).

22. *Sony*, 464 U.S. at 442.

decision was vital to the development of the video-cassette industry and to furthering technological innovation in general.

Two decades later, MGM Studios sued Grokster, the distributor of peer-to-peer software, for the copyright infringement of its users. This time, the Supreme Court sided with the plaintiff, MGM, effectively shutting down Grokster's website and business. The Court punted on whether Grokster was entitled to *Sony*'s "substantial noninfringing uses" test for secondary liability.[23] In doing so, the Court refused to address the central question raised by the parties, the lower courts, and many of the amici: how to use the secondary liability doctrine to balance the tension between "supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement."[24] Instead, the Court found that Grokster could be held secondarily liable for its users' infringement based on a "theory of inducement."[25] Under this approach, the Court held that because Grokster had promoted its software as a way to infringe, Grokster could be held liable for the copyright infringement of its users.

The Court has obviously been criticized for its decision in *Grokster*, but I'd like to ignore the normative arguments at the moment. My claim here is that *Sony* and *Grokster* can best be explained by thinking about the social meaning of the cases—in particular, by thinking about the cases through the framework of institutions. In both cases, the Court had to decide whether to permit a technological innovation, but it was only in *Sony* that the innovation occurred in the context of an institutional structure that the Court recognized and implicitly sought to validate. Sony was part of a larger corporate culture that was renowned for its scientific research,[26] and the Supreme Court viewed the video-cassette recorder—and Sony's approach to innovation more generally—as part of that broader institutional structure and as thus worth preserving. On the other hand, the Court viewed Grokster as unconnected to the preservation of anything. It arose from a hacker culture: Grokster itself was based in the West Indies, and its software had been written by Estonian programmers working outside any institutional structure at all, or at least one recognizable to the Court. The Court thus implicitly viewed Grokster as all innovation and no preservation. Without an institutional hook—the

23. *See Grokster*, 545 U.S. at 927–34; *see also id.* at 942–49 (Ginsburg, J., concurring); *id.* at 949–66 (Breyer, J., concurring).

24. *Id.* at 928.

25. *Id.* at 930, 934–41.

26. *See* LARDNER, *supra* note 21, at 22–38.

"preservation" clause of Burke's "great primeval contract"—the Court unanimously rejected the claim on behalf of technological innovation.

Let me turn to my second example, which is undoubtedly one of the most important media-law cases in history, *New York Times Co. v. Sullivan*.[27] The case was, to put it mildly, revolutionary. Fifty years later, we see it as having dramatically transformed defamation law—indeed it set in motion the trend towards subjecting all manner of civil liability claims to First Amendment scrutiny.[28] It is difficult to think of another case—certainly in the First Amendment or media-law areas—that has had a greater impact on the law. There may be opinions that we think of as more important—for example, *Brandenburg v. Ohio*,[29] the *Pentagon Papers* case,[30] Brandeis's concurrence in *Whitney v. California*,[31] Holmes's dissent in *Abrams v. United States*[32]—but none transformed the actual course of legal doctrine nearly as much.

But, where did *Sullivan* come from? It involved an "editorial" advertisement placed in the *New York Times* in March 1960 by an organization called the Committee to Defend Martin Luther King and the Struggle for Freedom in the South, a New York-based group raising money for the Civil Rights Movement. The ad was an entire newspaper page entitled *Heed Their Rising Voices*, which was itself a quotation from a *New York Times* editorial.[33] The heading was followed by ten

---

27. 376 U.S. 254 (1964).

28. *See generally* ROBERT M. O'NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY (2001); Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1656–60 (2009). Strictly speaking, this is not quite right as a legal matter. There certainly were pre-*Sullivan* civil liability claims that the Court had subjected to First Amendment scrutiny. As the Court put it, in an attempt to make the decision seem to follow from precedent:

> In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

Sullivan, 376 U.S. at 269 (citations omitted). Still, it is fair to say that arguments that privacy, intentional infliction of emotional distress, and other common law torts implicate the First Amendment owe far more to *New York Times v. Sullivan* than any of the decisions prior to that time.

29. 395 U.S. 444 (1969).

30. *N.Y. Times Co. v. United States (Pentagon Papers* case*)*, 403 U.S. 713 (1971).

31. 274 U.S. 357 (1927).

32. 250 U.S. 616 (1919).

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

paragraphs describing events in the South, descriptions aimed at eliciting the readers' sympathy for the cause of civil rights.[34] Under the text were sixty-four names—including luminaries of all stripes, such as Eleanor Roosevelt, Jackie Robinson, and Nat King Cole—all of whom were members of the Committee.[35] Below that was a list of twenty Southerners, mostly ministers, accompanying the words, "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal."[36] In the bottom right corner was a cut-out coupon enabling readers to send in contributions.[37]

The text of the ad made no reference to anyone specific other than Martin Luther King, but it did mention things done by "truckloads of police" and did refer to the opponents of King as "Southern violators of the Constitution."[38] L.B. Sullivan, the City Commissioner of Montgomery, Alabama, sued the *New York Times* for defamation in state court. To preclude the *Times* from removing the case to federal court,[39] Sullivan added as defendants four Alabamans, all black ministers, whose names were on the ad. An all-white jury[40] awarded Sullivan $500,000, and the Alabama Supreme Court upheld the award. The *Times* and the four ministers then sought certiorari in the Supreme Court. The Court reversed, holding, for the first time, that libel law is not immune from First Amendment scrutiny and that public figures could not prevail in a libel suit without showing both factual falsity of the allegedly defamatory statement and either knowledge or reckless disregard of falsity on the defendant's part.[41]

But *Sullivan* was more than just a case articulating beautiful abstract phrases about "the central meaning of the First Amendment"[42] and about a First Amendment that is "uninhibited, robust, and wide-open."[43] First, as I noted, it was principally a civil rights case. Second, and most important for my present purposes, the *New York Times* was

---

34. *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25; *see also Sullivan*, 376 U.S. at 305.

35. *Heed Their Rising Voices*, *supra* note 34, at 25; *see also Sullivan*, 376 U.S. at 305.

36. *Heed Their Rising Voices*, *supra* note 34, at 25; *see also Sullivan*, 376 U.S. at 305.

37. *Heed Their Rising Voices*, *supra* note 34, at 25; *see also Sullivan*, 376 U.S. at 305.

38. *Heed Their Rising Voices*, *supra* note 34, at 25; *see also Sullivan*, 376 U.S. at 305.

39. *See* ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 13–14 (1991).

40. *Id.* at 27.

41. *Sullivan*, 376 U.S. at 256, 264, 279–80.

42. *Id.* at 273.

43. *Id.* at 270.

the defendant. It is not for no reason that the *Times* is known as "the old gray lady" and the "newspaper of record." She was—and indeed remains even today in the Internet era—the quintessence of the institutional press. The case did not involve the *Alabama Journal*,[44] and it did not involve some fly-by-night free publication. Everyone—judges, justices, and the rest of us—knew it. Third, and related, the damage award that the Court reversed was for $500,000, a princely sum at the time. Even from a purely financial standpoint, this was a case worth fighting. At the same time, though, this was just one of numerous cases in which juries had awarded large sums against the press reporting on civil rights. One estimate put the total at the time at $300 million.[45] The civil rights struggle was at risk in part because the national media feared sending reporters to the South in case it might bankrupt them.[46] This is important because it means that there was no shortage of cases that the Court could have taken with periodicals of lesser rank. Fourth, the *Times*'s lawyer appearing before the Supreme Court was not just the *Times*'s lawyer. He was Columbia law professor Herbert Wechsler, the doyen of the "legal process" school. It was, in short, a case built around—indeed, its result was dependent on—an institution.

Now, I don't want to suggest, one way or the other, whether the impact of *Sullivan* has been an unalloyed good. There are of course those who believe the case was wrongly decided as an originalist matter[47] and those who believe it was just plain wrongly decided.[48] But, irrespective of this, the way in which the case was dependent on the institutional press and also strengthened that institution has helped give the press not only the backbone to fight government corruption, but also a self-importance and power in society that doesn't exactly endear itself to the public.[49] Still, the fact that the Court was strengthening the

---

44. Importantly, it was the city editor of the *Alabama Journal* who brought the advertisement to the attention of those in Montgomery. Had he not published a story in the *Alabama Journal* describing the *New York Times* advertisement, it is doubtful that Commissioner Sullivan would have known about the advertisement at all. *See* LEWIS, *supra* note 39, at 9–12.

45. HARRISON E. SALISBURY, WITHOUT FEAR OR FAVOR: THE NEW YORK TIMES AND ITS TIMES 388 (1980).

46. *Id.*

47. *See, e.g.*, John W. Dean, *Justice Scalia's Thoughts, and a Few of My Own*, *on* New York Times v. Sullivan, FINDLAW (Dec. 2, 2005), http://writ.news.findlaw.com/dean/20051202.html.

48. *See, e.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 765–74 (1985) (White, J., concurring in judgment); Richard Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782, 817–18 (1986). By 1986, Richard Epstein had declared, in a way that few other than he could, that "the dancing [had] stopped." *Id.* at 783.

49. *See* RODNEY A. SMOLLA, SUING THE PRESS 10–11 (1986).

establishment press, not just interpreting the Constitution in the footsteps of James Madison, is a crucial part of understanding what the Court did.

Moreover, the revolution of *Sullivan*, like the American Revolution itself, was a beginning, not an end. We now have a complex intertwining between the libel tort and a whole host of constitutional rules, rules that ultimately owe their origin to the case. These rules help to build and strengthen the press in general and provide a legal backbone for mass communications, but they all depended originally on the institution of the *New York Times*.

As Harrison Salisbury—a *Times* reporter who was indicted for criminal libel for his reporting in Birmingham during the same period—put it, without the *Sullivan* case, there would have been no *Pentagon Papers* case and perhaps no Watergate either.[50] It was the way in which the Court built law on an institution, strengthening it in turn, that enabled the media to further what we consider one of its core purposes, what Vince Blasi has referred to as the "checking function."[51] In an era in which media concentration continues to be at the forefront of public concern,[52] while at the same time people fear and celebrate the balkanization of media occasioned by the Internet, [53] we must remember that courts are more apt to build media—to the extent that courts are involved at all—on institutions, not just on abstract principles.

50. SALISBURY, *supra* note 45, at ix.

51. Vincent Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RES. J. 521.

52. *See*, *e.g.*, C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007).

53. *See generally* CASS SUNSTEIN, REPUBLIC.COM 2.0 (2007).