Office-Supreme Court, U.S.
FILED
SEP 9 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 39

THE NEW YORK TIMES COMPANY,
Petitioner,

v.

L. B. SULLIVAN,
Respondent.

No. 40

ABERNATHY, *et al.*,
Petitioners,

v.

L. B. SULLIVAN,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE*

EDWARD S. GREENBAUM
HARRIET F. PILPEL
285 Madison Avenue
New York 17, New York
Attorneys for Amici

MELVIN L. WULF
NANETTE DEMBITZ
NANCY F. WECHSLER
Of Counsel

LoneDissent.org

TABLE OF CONTENTS

LoneDissent.org

TABLE OF AUTHORITIES

Cases:

LoneDissent.org

LoneDissent.org

LoneDissent.org

CONSTITUTIONS AND STATUTES

LoneDissent.org

IN THE

Supreme Court of the United States

October Term, 1963

No. 39

THE NEW YORK TIMES COMPANY,

Petitioner,

v.

L. B. SULLIVAN,

Respondent.

No. 40

ABERNATHY, *et al.*,

Petitioners,

v.

L. B. SULLIVAN,

Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE*

Interest of *Amici*

The American Civil Liberties Union is a national non-political organization devoted solely to defending the civil

LoneDissent.org

liberties granted by the Constitutions of the United States and of the several states. The New York Civil Liberties Union is the New York affiliate of the national organization. (Amici will be referred to herein as "the Union.") Fundamental objectives of the Union are and have been to prevent impairment of the freedom of speech and press protected by the First Amendment, and to secure fair trials and the equal protection of laws guaranteed by the Fourteenth Amendment. The Union has for many years endeavored to help clarify and define these constitutional guarantees through various activities, including participation as *amicus curiae* in relevant litigation. It believes that its brief in this case may be of assistance to the Court in viewing the relationship between the common law libel rulings of the states and the free exercise of speech and press as guaranteed by the First Amendment. The Union maintains there is also involved here the constitutionally protected right to a fair trial and to the equal administration of the laws as guaranteed by the Fourteenth Amendment.

The Union believes that the instant libel judgment standing alone presents an important issue of freedom of expression. The Union's interest in the case is emphasized by the fact that this suit is one of several actions brought by officials of the State of Alabama, following the recommendation of its Attorney General that they sue The New York Times for libel on account of its publication of the advertisement in the present case, and of two articles by its correspondent, Harrison E. Salisbury, describing conditions in Birmingham, Alabama. That recommendation was followed by libel suits, including the case at bar, one by the Governor of Alabama and ten suits by other public

LoneDissent.org

officials seeking damages aggregating $6,100,000, as well as by the indictment of Harrison E. Salisbury for criminal libel on forty-two counts. Five additional libel suits were brought against The Columbia Broadcasting Company, seeking damages aggregating $1,700,000.

Questions Discussed by the Union

(1) Whether the Alabama law of libel, as applied to the petitioners, abridges the right to publish discussion and criticism of governmental conduct, in violation of the freedom of speech and of the press guaranteed by the Fourteenth Amendment.

(2) Whether the trial in this case denied the petitioners due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment.

Constitutional Provisions Involved

The issues discussed by the Union involve the First and Fourteenth Amendments to the Constitution of the United States.

Statement of the Case

The judgment of the Supreme Court of Alabama was entered on August 30, 1962. It affirmed the judgment for libel of November 3, 1960 of the Circuit Court of Montgomery County against The New York Times and four individual defendants, awarding to L. B. Sullivan, Com-

LoneDissent.org

missioner of the City of Montgomery $500,000* as "presumed" and punitive damages on the basis of an advertisement published in The New York Times on March 29, 1960. The advertisement was inserted by a "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" and signed by a group of distinguished citizens, including Mrs. Eleanor Roosevelt. The advertisement concluded with this statement:

> "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal."

Among the twenty Southerners listed beneath this statement were the names of the four individual petitioners, who are Negro clergymen in Alabama active in the struggle for civil rights. They contend that they neither signed nor authorized the advertisement.

This publication was followed by attacks in Alabama newspapers on the "corner pick-ups" like Mrs. Roosevelt who signed the advertisement (Def. Ex. 77, R. 2127-9),** and on The New York Times for publishing it (Def. Ex. 3, R. 2001-3; Def. Ex. 80, R. 2132-3) as well as for publishing articles which appeared in the Times on April 8, and 9, 1960 under the byline of its corespondent Harrison E. Salisbury about conditions in Birmingham, Alabama, and the nearby city of Bessemer (Def. Ex. 9, R. 2013-5; Def. Ex. 86, R. 2139-40; Def. Ex. 90, R. 2145-6; Def. Ex.

---

* Under Alabama Law a 10% penalty is assessed on an appealed judgment unless the affirming judgment substantially corrects it (Title 7, Section 814). Adding this sum of $50,000.00 to the judgment of $500,000.00 entered in this case, with 6% interest from November 3, 1960 to November 3, 1963, the total on that date will make the award $640,000.00.

** Throughout this Brief, references are to the page in the printed Record.

LoneDissent.org

91, R. 2146-7; Def. Ex. 94, R. 2151-2). Statements were reported of the Secretary of State of Alabama that there should be a prosecution and the Attorney General "and other state officials" denounced the publication (Def. Ex. 79, R. 2131). It was explained that the State could not sue for libel (Def. Ex. 81, R. 2134; Def. Ex. 89, R. 2144) but that the Attorney General would recommend libel suits on publications "critical of Alabama" (Def. Ex. 80, R. 2132) and which "defame Alabama" (Def. Ex. 89, R. 2144). The Governor was reported as saying that he had decided to sue on the advertisement which "constitutes a defamation of the citizens of Alabama" (Def. Ex. 92, R. 2148) and it was further reported that the Attorney General was going to recommend libel suits (Def. Ex. 3, R. 2001-3; Def. Ex. 84, R. 2136-8; Def. Ex. 85, R. 2138-9, 2140) and would make definite recommendations to the "proper public officials" (Def. Ex. 1, R. 1999). He then did so, saying, "My conclusions and recommendations were definite. File a multi-million dollar law suit" (Def. Ex. 89, R. 2143). The action in this case was started the day before that statement was made public. Similar actions were brought by Commissioner Frank Parks and by Mayor Earl James, on the same advertisement, in the same court, for the same amount—$500,000.00 in each action (Def. Ex. 88, R. 2141-3). Governor John Patterson brought his action on the same advertisement for $1,000,000.00 (Def. Ex. 104, R. 2160), and former Commissioner Clyde Sellers sued for $500,000.00 (Def. Ex. 150, R. 2224).*

---

* The *Patterson, Parks* and *Sellers* cases were removed by petitioner The New York Times to the Federal District Court, which sustained the removal (195 F. Supp. 919) but the Circuit Court of Appeals reversed (308 F. (2d) 474). A petition to review this reversal on certiorari is pending (No. 687, October Term 1962).

LoneDissent.org

On May 6, 1960, suits against The New York Times on the basis of the Salisbury articles were started for $500,000.00 by each of the Birmingham Commissioners, Eugene (Bull) Conner, J. D. Waggoner and Mayor James W. Morgan (Def. Ex. 95, R. 2152-3; Def. Ex. 103, R. 2159). On July 19, 1960 another suit was brought based on the same articles by Birmingham City Detective Joe Lindsay, for $100,000.00 (Def. Ex. 29, R. 2041). On May 30, 1961, officials of Bessemer, Alabama, started action against The New York Times. These were Mayor Jess Lanier and Commissioners Raymond Parsons and Herman Thompson, each of whom sued for $500,000.00 (Def. Ex. 103, R. 2159).

On September 6, 1960, Harrison E. Salisbury was indicted in Jefferson County, Alabama, on forty-two counts, for criminal libel for the articles published in April under his by-line (Def. Ex. 135, R. 2195-6).*

Thereafter, the Montgomery Advertiser, under the headline:

> "STATE FINDS FORMIDABLE LEGAL CLUB TO SWING AT OUT-OF-STATE PRESS"

carried an article referring to the civil libel suits and the Salisbury indictment (Def. Ex. 45, R. 2064-8), saying:

> "State and city authorities have found a formidable legal bludgeon to swing at out-of-state newspapers whose reporters cover racial incidents in Alabama." (R. 2064).

---

* Five libel suits also were brought against the Columbia Broadcasting Company, three of them by the Commissioners of Birmingham, Eugene (Bull) Conner, J. D. Waggoner, and Mayor James W. Morgan, each asking $500,000.00 damages (U. S. D. C. N. D. Ala. (So. Div.) Civil Actions No. 10067-S, 10068-S, 10069-S) and two by Mrs. Samuela P. Willis and George Penton, members of the Board of Registers, each for $100,000.00 [U. S. D. C. M. D. Ala. (No. Div.) Civil Actions No. 1790-N, 1791-N (pending on removal)].

LoneDissent.org

Subsequently the present action was tried and resulted in a verdict for the respondent for $500,000.00 on November 3, 1960. The *James* case has since been tried and likewise resulted in a judgment of $500,000.00, on February 1, 1961 (Def. Ex. 71, R. 2114-7). A motion for a new trial in that action is pending. None of the other cases has been tried.

The advertisement sued on in this action did not mention the respondent by name but he claims that he was libeled because in its third paragraph, it stated:

> "In Montgomery, Alabama, after students sang 'My Country 'Tis of Thee' on the State Capital steps, their leaders were expelled from school, and truck loads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to State authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission." (R. 7)

Respondent's proof at the trial established that in October 1959 (R. 1173) he became one of the Commissioners of the City of Montgomery, the Commissioner of Public Affairs, with supervisory duties over the Police Department, the Fire Department, the Department of Cemetery and the Department of Scales (R. 703); that he was not the Chief of Police and was not responsible for day-by-day operations (R. 720); that although truckloads of police did not "ring" the Alabama State College campus, on three occasions large numbers of police were deployed near the College campus (R. 594). The respondent testified that the police had no responsibility for expelling students or running the dining hall, as that responsibility rested with the State Department of Education (R. 716).

LoneDissent.org

Respondent also claimed that the sixth paragraph of the advertisement libeled him, because it said:

> "Again and again the Southern violators have answered Dr. King's peaceful protest with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for 'speeding', 'loitering' and similar 'offenses'. And now they have charged him with 'perjury'—a *felony* under which they can imprison him for *ten years.*" (R. 7-8)

Respondent's proof showed that Dr. King's house was bombed twice while his wife and child were in it, but that this occurred before respondent was in office (R. 688). On one occasion the bomb went off. On the other the bomb had nine sticks of dynamite wrapped around a pipe, and although a fuse burnt into the dynamite, the cap did not go off (R. 685). Dr. King was arrested only four times; three of them were before respondent became Commissioner (R. 592, 594-5, 703). Dr. King was later acquitted of the charge of perjury. It was for his defense in this action that funds were sought in the advertisement on which the instant suit is based (R. 680).

Respondent's contention was that the advertisement, although not naming him, referred to him and was so understood. In support of this he called six witnesses who said that the advertisement made them think of the police department and of the Commission (R. 619, 636, 666). Four of these witnesses had not seen the advertisement until they were sent for by respondent's lawyer and saw it in his office (R. 618, 637, 643, 647, 649). None of the respondent's witnesses said they thought less of him after reading the advertisements (R. 625, 638, 647, 657, 666), and the

LoneDissent.org

respondent offered no proof that he was damaged (R. 721-4). Only 35 copies of The New York Times were sold in Montgomery County (R. 714).

After the verdict, petitioner, The New York Times moved for a new trial (R. 896-964, 1999-2242) and this motion was denied (R. 970). The Times filed a bond for double the amount of the judgment (R. 1028-9). The individual petitioners were unable to file a bond and property belonging to them was seized (Def. Ex. 66, R. 2106) including a five-year old car belonging to petitioner Abernathy (R. 2111, 2225) which was sold for $400 (Def. Ex. 74, R. 2122; Def. Ex. 155, R. 2231).

Before the trial, petitioner, The New York Times, claiming that it was a foreign corporation not doing business in the State, sought to quash service of process as a violation of the Fourteenth Amendment and the Commerce Clause (R. 39-46). This was denied (R. 49-51). Petitioners contended by demurrer (R. 58, 74) and numerous objections at the trial, as well as by requests for a directed verdict that the publication was not libelous, that the advertisement did not mention or refer to the respondent, and that the judgment against them infringed their freedom of speech and of the press as guaranteed by the First and Fourteenth Amendments. These contentions were rejected by the trial court (R. 970) and its rulings were affirmed by the Supreme Court of Alabama (R. 1139-1180).

LoneDissent.org

POINT I

The Alabama law of libel as applied below to criticism of public officials in matters of public concern abridges the petitioners' freedom of the press in violation of the Fourteenth Amendment to the Constitution of the United States.

(A) The charge and rulings of the Court below

The trial court, and the Alabama Supreme Court in upholding the verdict, both entirely ignored the basic First Amendment issues in this case, and, in particular, the fact that the alleged libel was a criticism of the conduct of public affairs in a matter of intense public concern. We do not mean to suggest that this advertisement was libelous or that there is sufficient basis for holding the individual petitioners responsible for it or for finding that the statements contained in the advertisement were made "of and concerning" this respondent. On the contrary, we discern no grounds here for any libel claim, whether asserted on behalf of public officials or of private citizens. Since, however, the claim of libel here was made by a public official, the case is necessarily presented in the context of the rule constitutionally applicable to criticism of public officials and discussions of public affairs.

Despite petitioners' claim by demurrer, plea and request to charge (R. 61, 73, 101, 841, 842) the trial judge held petitioners liable to the respondent public official to the same extent as if a statement had been directed against him as a private citizen or with respect to his private conduct. Throughout, the trial judge refused to recognize that freedom of the press in discussing public affairs requires a

LoneDissent.org

distinction between public officials and private citizens in imposing liability for libel per se—liability for presumed hurt without showing of actual damage. Thus, the trial court charged that the alleged libel was

> "libel per se * * * We can say, as part of the law of this case, that a publication is libelous per se when they (sic) are such as to degrade the plaintiff in the estimation of his friends and the people of the place where he lives, as to injure him in his public office, or impute misconduct to him in his office, or want of official integrity, or want of fidelity to a public trust or such as will subject the plaintiff to ridicule or public distrust. All these kinds of charges are called, libelous per se". (R. 823-4)

Similarly, the Supreme Court of Alabama held:

> "Where the words published *tend to injure a person libeled by them in his reputation, profession, trade or business,* or charge him with an indictable offense, or tends to bring the individual into public contempt are libelous per se * * * We hold that the matter complained of is, under the above doctrine, libelous per se * * *" (Italics supplied.) (R. 1155)*

* The two cases the Supreme Court cited in support of this holding emphasize that Alabama made no distinction between public officials and private individuals with respect to libel per se. In *White* v. *Birmingham Post Co.*, 233 Ala. 547, 172 So. 649 (1937) the statement held libelous per se was that plaintiff, a private citizen, was ready to assist Alabama girls to enter the harem of plaintiff's Arabian friend. The Court held: "It is sufficient if the language tends to injure the reputation of the party * * * if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se."

In the other case cited by the Alabama Supreme Court, *Iron Age Publishing Co.* v. *Crudup*, 85 Ala. 519, 5 So. 332 (1889), plaintiff was a clerk and the statement held libel per se accused him of col-

LoneDissent.org

Alabama not only applied this all inclusive liability to criticisms of the official conduct of government representatives, but added to its *in terrorem* effect by a conclusive presumption of malice for the purpose of imposing *punitive* damages, as well as "presumed general" damages (R. 824). Though petitioner, The New York Times, tendered the issue of malice by plea and request to charge (R. 103, 844, "Refused charge No. 18"), the trial judge charged that malice was presumed in the case of libel per se, and that punitive damages could be awarded "as a kind of punishment to a defendant with a view of preventing similar wrongs in the future" and to "deter all other persons similarly situated * * *" (R. 825-6).

While not explicitly stating whether or not punitive damages depend on a showing of malice, the Supreme Court of Alabama notes that the Secretary of the Times testified that "the advertisement was 'substantially correct' " and that this was a "cavalier ignoring of the falsity of the advertisement" from which the jury could infer malice (R. 1178). However since falsity was presumed because the advertisement was held libel per se (R. 824), the statement of the Alabama Supreme Court was supported neither by a finding of malice nor by a finding of falsity.

Thus, Alabama has held that criticisms of official conduct in the context of public affairs are subject to the same liability in suits for libel per se as criticisms of pri-

---

lecting payment on a bill due his employer, deceiving friends into lending him money and other defalcations.

The cases cited by respondent in his opposition to certiorari (at p. 18) again emphasize a failure to recognize the special problems of due process and free expression with respect to criticisms of public officials, for all of respondent's cases concern libels of private individuals, and all concern the privilege of reporting a suspicion that a private citizen was engaging in criminal conduct.

LoneDissent.org

vate citizens: it has presumed malice, without proof, as it would between private citizens, and it has assessed huge damages without any showing of actual loss on the same basis as between private citizens. We shall show below that the presumptions both of malice and of damage are unreasonable when applied to criticisms of public officials, and that many common-law libel holdings have rejected these presumptions for the public arena. But first we wish to emphasize the importance of the First Amendment issue presented by the Alabama law as applied here, and the extraordinary restraint imposed on discussion of public issues by the Alabama concept of libel per se.

(B) The prohibitory effect of the charge and rulings below on political comment

The issue is whether the state of Alabama can, under the label of libel, penalize these petitioners by a $500,000 judgment in favor of a public official, because of publication by them of an appeal for political and social change. To state the question is to answer it, for the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U. S. 476, 484 (1957); see also *Thornhill* v. *Alabama,* 310 U. S. 88, 101-2 (1940).

The fact that the penalty was imposed under the label of libel is constitutionally immaterial. Whether the deterrent to freedom of expression is justified under the guise of "contempt of court" [*Pennekamp* v. *Florida,* 328 U. S. 331 (1946)]; "breach of the peace" [*Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), *Garner* v. *Louisiana,* 368 U. S. 157 (1961), *Edwards* v. *South Carolina,* 372 U. S. 229

LoneDissent.org

(1963)]; obscenity [*Roth* v. *United States, supra, Smith* v. *California,* 361 U. S. 147 (1959)] or otherwise, this Court has looked beyond the alleged justification to what is actually involved and has determined the constitutional limits of state power to control speech, no matter what interest antagonistic to freedom of expression is said to be served.

The standard, whatever the label, must provide "safeguards adequate to withstand the charge of constitutional infirmity." *Roth* v. *United States, supra,* at 488-9. That the law of libel, specifically, must be applied subject to the guarantees of the Fourteenth Amendment has been clearly recognized by this Court. Thus, in *Near* v. *Minnesota,* 283 U. S. 697 (1931), this Court, while acknowledging the occasion for libel remedies, noted that they must be "consistent with constitutional privilege" (at 720). And again: "'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." *Beauharnais* v. *Illinois,* 343 U. S. 251, 263-4 (1952); *cf. Wood* v. *Georgia,* 370 U. S. 375, 391-2 (1962).

Certainly the effect of civil liability can be as suppressive as a criminal penalty. *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958); *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402 (1950). The enormous penalty here imposed cannot but have a drastic effect on future expression. Punitive damages which were here authorized by Alabama and are apparently the basis for the verdict, have as their explicit purpose the deterrence of similar publications and are thus basically analogous to criminal penalties.

LoneDissent.org

As this Court said in *Speiser* v. *Randall, supra*:

> "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech * * * [T]he denial * * * necessarily will have the effect of coercing claimants to refrain from the proscribed speech." (357 U. S. at 518, 519).

Rulings below analogous to Alien and Sedition enactments

Any criticism of official conduct would "tend to injure * * * (an official) in his reputation", and thus under the Alabama Supreme Court's holding would constitute libel per se. The publisher is liable to heavy damages for publishing any such criticism even though he has no intent even to refer to any individual, let alone to injure him.*

Alabama's application to public officials of this all-inclusive and punitive definition of libel per se is reminiscent of the discredited Alien and Sedition Act of 1798 which punished publications intended to bring the government, Congress or the President "into contempt or disrepute". While Alabama has not gone as far as to state in so many words that criticisms of the government are actionable, it has in effect re-created this type of seditious libel. A criticism of the opposition of local southern officials to Negro equality has been made actionable by combining the doctrine that a general statement may be interpreted as referring to a specific individual, with

* While the jury was instructed to find whether an ordinary reader could have read these paragraphs as referring to respondent, it assessed $500,000 damages without any finding as to whether petitioners so understood or intended them or had ever even heard of him.

LoneDissent.org

the application to public officials' actions in public matters of Alabama's broad definition of libel per se. Indeed, from the standpoint of intent, the Alabama courts went even further than the Alien and Sedition Act. Under that Act malicious intent was a question of fact for the jury, and here heavy damages were imposed without such a factual finding.*

As against constitutional doctrine today the Alien and Sedition Act of 1798 is seen in all its constitutional infirmity. Thus, in *Near* v. *Minnesota ex rel. Olson supra,* at page 718, Justice Hughes, speaking for this Court, quoted Madison in the Report on the Virginia Resolutions:

> "Had 'Sedition Acts' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation?"**

---

* As to malicious intent as a question of fact for the jury under the Alien and Sedition Act, see *People* v. *Croswell,* 3 Johns. Cas. 337, 364-5 (N. Y. Sup. Ct. 1804) (Appendix); *Lyon's Case,* 15 Fed. Cas. 1183, 1185 (No. 8646) (Vt. 1798); opinion by Kent J. in *Commonwealth* v. *Kneeland,* 37 Mass. (20 Pick) 206 (1838) (dissent).

** As to later views of the Alien and Sedition Act, see Holmes, J. dissenting in *Abrams* v. *United States,* 250 U. S. 616, 630 (1919); and Note to *Lyon's Case, supra,* at p. 1191. By the time of enactment of the Espionage Act of 1918, the concept of free expression had advanced sufficiently so that the Act was aimed at "publications concerning the very form of government itself, as distinguished from criticism, no matter how violent and abusive, of public officers." Brief for the United States in *Abrams* v. *United States,* 250 U. S. 616, Oct. Term, 1919, p. 18.

LoneDissent.org

Criticism of the government today is considered a right guaranteed by the First and Fourteenth Amendments, subject to restraint only if it is coupled with incitement creating a clear and present danger to the government [*Yates* v. *United States,* 354 U. S. 298, 312-313 (1957)] or, we submit, insofar as defamation of individuals is concerned, only within confines narrow enough to insure the right to criticize.

Suppression of appeals by minority groups

Another grave element from the standpoint of inhibition of free expression in this case is that the medium of expression here was a political advertisement. Assuming, *arguendo,* that this was libel, the newspaper-petitioner was heavily penalized in damages for a concealed "libel" in a political advertisement. If newspapers are to be liable without fault to heavy damages for unwitting libels on public officials in political advertisements, the freedom of dissenting groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.

> "Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution." *Farmers Educational & Coop. Union* v. *WDAY Inc.,* 360 U. S. 525, 530 (1959).
>
> "But our holding in *Roth* [v. *United States,* 354 U. S. 476 (1957)] does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing book sellers even though they had not the

LoneDissent.org

slightest notice of the character of the books they sold." *Smith* v. *California,* 361 U. S. 147, 152 (1959).

We suggest that acceptance for publication of appeals by minority groups is a duty of the press—particularly in a time in which mass communication, such as the daily press provides, is one of the only effective means for communication of ideas.

(C) Infirmity of rulings below not alleviated by supposed availability of defense of truth and fair comment

The respondent asserts that under Alabama law the defendants could only assert truth and fair comment on facts truly stated as a defense. But the availability of a defense based on truth does not derogate from the evil of imposing on criticism of public affairs liability without fault in punitive damages.*

We do not suggest that a public official ought not to be able in any circumstances to sue for libel; we shall point out below that many courts have applied the common law of libel to give adequate protection to public officials and at the same time assure a measure of freedom of the press about public affairs. We do assert that under the Alabama rule the limited and hazardous availability of a defense

* While respondent states that *substantial* truth is a defense under Alabama law, *Ferdon* v. *Dickens,* 161 Ala. 181, 200, 49 So. 888, 895 (1909), which he cites on this point, states: "if the defendant had written nothing in that letter except things that were true, then, of course, the act was not a libel. But the mere fact that the defendant believed they were true could not amount to a complete defense. * * *" In the other two cases respondent cites dealing with truth [*Alabama Ride Co.* v. *Vance,* 235 Ala. 263, 265, 178 So. 438, 439 (1938) and *Kirkpatrick* v. *Journal Publishing Co.,* 210 Ala. 10, 11, 97 So. 58, 59 (1923)] the court said that the defense of truth imposes the burden on defendant of proving that the publication is "true without qualification, in all respects material."

LoneDissent.org

dependent upon factual truth not only cripples but virtually destroys freedom of expression as applied to public officials in matters of public concern.

The difficulty of distinguishing fact, of which truth must be shown, from comment is notorious.* As long as a statement might be taken as referring to an individual, no publisher could be sure that the statement would be classed as merely opinion, so that truth need not be shown. And the prospect of carrying the burden of proving truth to the jury's satisfaction is a heavy one, regardless of how firmly the publisher believes in the truth of the statement. Compare *Speiser* v. *Randall, supra,* at 526:

> "The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens."

And see *Smith* v. *California, supra,* at 151 noting, as to the area of expression:

> "* * * a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

As long ago stated in the Virginia Resolution (protesting against the effect of the Alien and Sedition Act on

---

* "Whether a statement is defamatory is rarely clear." *Farmers Educational & Coop. Union* v. *WDAY, Inc.,* 360 U. S. 525, 530 (1959). See *e.g., Charles Parker Co.* v. *Silver City,* 142 Conn. 605, 616, 116 A. 2d 440, 445 (1955); *Sweeney* v. *Patterson,* 128 F. 2d 457, 458 (D. C. Cir. 1942); *Hall* v. *Binghamton Press Co.,* 263 App. Div. 403, 412, 33 N. Y. S. 2d 840, 848 (1942); Noel, Defamation of Public Officers and Candidates, 49 Col. L. Rev. 1, 875, 895 (1949); Reisman, Democracy and Defamation, 42 Col. L. Rev. 1282, 1287 (1942).

LoneDissent.org

freedom of discussion) that Act's "baneful effect" was not relieved by the provision that truth was a defense.

Even if the defense of truth and fair comment were available without these dangers under Alabama law, its availability would do nothing to relieve publishers of the burden of inspecting every discussion of public affairs with minute care to determine whether any statement might be read as referring to an individual official, and might be taken to reflect in any way on esteem for him as a public official in that particular community.

The effect of Alabama's libel per se rule is that any discussion of public affairs must either be laudatory or couched in such abstract generalities, so remote from the governmental affairs, officials and agencies of concern to the publisher and reader, that it would have no interest or impact on the issues of the day. For it is obvious that any statement—other than in laudation of government affairs—might reflect on the repute of a public official. The publisher would then be subject to the expense of litigation and to the dangers involved under Alabama law in proving the truth.

By applying its interpretation of the libel per se rule to public officials, Alabama has thus ruthlessly suppressed public discussion of a matter of supreme public moment.

(D) No reasonable basis for presuming malice or damage in this case

In support of the result reached below, the Alabama courts invoked a presumption of damage as well as a presumption of malice. The application of these presumptions in the circumstances of the case at bar is, we submit, arbitrary and unreasonable.

LoneDissent.org

The justification for presuming damage from "libel per se" in the ordinary libel case involving a private person is that words which are libelous per se are such that damage to the plaintiff in his acceptance in the community or in his occupation or profession are the probable result. Thus, libel per se characteristically consists of charges of commission of crime, having a "loathsome" disease, unchastity in a woman, incompetency in a person's trade or profession and similar charges.

That presumption is unreasonable and unfounded as applied to a publication such as that involved here criticizing the public conduct of a public official. There is no basis in general experience for assuming that a public official will be personally damaged by comment critical of his *public* acts. Assuming *arguendo* that these paragraphs would be read as referring to respondent, the reader would, nevertheless, realize they were written by those highly sympathetic to the Negroes' cause and weigh the criticism (if any) of respondent accordingly. The fact that statements respecting a public official's conduct do not affect his professional standing in the same way as they would if he were a private citizen is illustrated even by the testimony of respondent's witnesses. Claiming to understand the statements as referring to respondent, they nevertheless viewed the alleged libel more as a critique of government and as an indication that respondent should change his manner of performing his official duties, than as a personal aspersion on his character and capacity (R. 608, 617).

In so far as presumed damages for libel per se are, in fact, a salve for hurt feelings and a mode of retaliation, certainly these purposes have no place for a man who has entered the political arena, and in any event they

LoneDissent.org

are completely dwarfed in importance by the overriding interest in freedom of expression.

As to the presumption of malice: this presumption attaches to libel per se in the ordinary case involving a private individual on the theory that the statement is so obviously damaging to the individual libelled that it would not be uttered without personal ill-will and a desire to injure the individual. This, again, is an entirely unreasonable presumption with respect to statements reflecting on a public official's conduct of his office particularly when published by a newspaper as part of a discussion of a controversial public issue, as in the instant case. And, of course, the presumption is even further unreasonable when applied to a paper's publication of a discussion inserted as a political advertisement by a group interested in presenting one side of an important public controversy, as here.*

As Justice Frankfurter has said: "* * * defamation is generally regarded as an intentional tort." *Farmers Educational & Coop. Union* v. *WDAY, Inc., supra* at 542 (dissent). Intent cannot be presumed squarely against facts of common experience.** And, there is a special constitutional duty to strike down an unreasonable presumption when it affects constitutional rights.*** This Court empha-

---

* *Cf., Layne* v. *Tribune Company,* 108 Fla. 177, 146 So. 234 (1933).

** See, *Tot* v. *United States,* 319 U. S. 463 (1943); *Morrison* v. *California,* 291 U. S. 82 (1934); *Western & A. R. Co.* v. *Henderson,* 279 U. S. 639 (1929); *McFarland* v. *American Sugar Ref. Co.,* 241 U. S. 79 (1916).

*** *Bailey* v. *Alabama,* 219 U. S. 219, 239 (1911) (presumptions cannot be used to escape constitutional restrictions).

LoneDissent.org

sized in *Speiser* v. *Randall, supra,* the extent to which imposition of the burden of proof can restrain expression.

> "It is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends * * * often on how the fact finder appraises the facts. * * * Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied." (*Id.* at 520.)
>
> * * *
>
> "The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." (*Id.* at 525.)

(E) Inconsistency of the decision below with the basic trend in libel law in public official cases

From an early date common law libel decisions in this country have recognized the need for special rules for "libels" against public officials. It was apparent to our forefathers that libel actions in this field involved different values from libels against private citizens and could, unless the relevant interests were balanced, be suppressive of freedom of the press. Thus in *Commonwealth* v. *Morris,* the General Court of Virginia in 1811 stated that it was departing from the then common law rule that truth was no defense and held it was in that case because the "libel" was against a public official, the sheriff. The Court based this departure on the Virginia constitutional provision that the magistrates were the servants of the people and therefore, the people must be informed about their

LoneDissent.org

conduct.* And the early Delaware, Pennsylvania and Illinois Constitutions all provided for truth as a defense where public affairs were concerned, although truth was not at that time a defense to other libels.**

The guarantee of free speech and press, as well as the guarantee of the right to petition, was early seen to call for a special rule as to criticism of public officials, for statements about public officials are often—as in the instant case—tantamount to a petition for a change in governmental conduct. See Justice Jackson dissenting in *Beauharnais* v. *Illinois,* 343 U. S. 250, 287 (1952).***

---

* *Commonwealth* v. *Morris,* 1 Va. Cas. 176, 179-80 (Gen. Ct. Va. 1811): "In this Commonwealth * * * the bill of rights having declared 'that all power is vested in * * * the people, that magistrates are their trustees and servants and at all times amenable to them', it follows as a necessary consequence that the people have a right to be informed of the conduct and character of their public agents. In the case of an indictment or information for a libel against public officers, or candidates for public office [though truth is not ordinarily a defense], truth is a justification * * * but even in such a case any libelous matter which does not tend to show that the person libelled is unfit for the office cannot be justified because it is true."

** Pa. Const. of 1790, Art. 9, §7, Proceedings of Pa. Constitutional Convention, p. 304 (1776): "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature of any branch of government; and no law shall ever be made to restrain the right thereof. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence * * *"; see also Del. Const., 1792, Art. 1, §5; *People* v. *Croswell,* 3 Johns. Cas. 337, 380 (N. Y. Sup. Ct. 1804) (Kent, J.) (Appendix). There was early recognition of the need for greater freedom in criticism of public officials than of private citizens, for, by this freedom "oppressive officials are shamed or intimidated into more honorable or just modes of conducting affairs" 1 Journal of Continental Congress 108 (1904 edition).

*** Compare early English immunity for libels in petitions to Parliament: see *Commonwealth* v. *Morris,* 3 Va. Cas. 176, 181 (Gen. Ct. Va. 1811) (note).

LoneDissent.org

In recognition of the problems raised by alleged libels about public officials, many courts have evolved specific modifications of the general law of libel to meet the realities of the public official situation and to protect First Amendment rights. They have done this on a variety of different theories: some have defined the substantive law as calling for more extreme accusations to justify a holding of libel per se as to a public official; some have obliterated the extremely tenuous distinction between fact and comment and permitted "fair comment" on public officials whether based on facts truly stated or not; some have held the presumptions of damage and malice inoperative as to public officials; some have in effect shifted the burden of proof to the plaintiff; and some have tended to exonerate by a finding of "substantial truth." The results in these cases, unlike the result reached in this one, have tended to safeguard the right of the American people to speak their minds about those whom they elect or appoint to public office. Whatever the theory, most of the libel cases involving public officials as plaintiffs acknowledge that a special rule is applicable to criticisms of them in their public functioning—in line with the policy as to political parties and "public men" enunciated by this Court in *Beauharnais*:

> "If a statute sought to outlaw libels of political parties, quite different problems not now before us would be raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play. See *People* v. *Fuller, supra* (238 Ill. at 125, 87 N. E. 336); *Commonwealth* v. *Pratt,* 208 Mass. 553, 559, 95 N. E. 105. Political parties, like public men, are, as it were, public property." (*Beauharnais* v. *Illinois,* 343 U. S. 250, 263 ftn. 18.)

LoneDissent.org

Thus, the Court of Appeals for the District of Columbia held in an opinion by Judge Edgerton that only a "charge of crime, corruption, gross immorality or gross incompetence" is a basis for an action for libel per se by a public official, unless there is a showing of actual malice or actual damage:

> "Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors.
>
> * * *
>
> The protection of the public requires not merely discussion, but information * * * Errors of fact * * * are inevitable. Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss. Whatever is added to the field of libel is taken from the field of free debate." *Sweeney* v. *Patterson,* 128 F. 2d 457, 458 (D. C. Cir. 1942)*

Other courts recognize that the presumption of malice which the ordinary libel carries with it is contrary to reality when the alleged libel is contained in a criticism of public officials and affairs, and that criticism of governmental affairs would be vapid and meaningless without "factual" statements. Liability without fault for any factual error

* See also, *Lydiard* v. *Wingate,* 131 Minn., 355, 358-9; 155 N. W. 212, 213-4 (1915) : with regard to an official, it should clearly appear "that the criticisms, if false, accuse the individual of positive wrong. * * * They (the people) have a right to be informed * * * too strict censure cannot be drawn upon the right of free speech in such matters."

See also *Knapp* v. *Post Printing & Pub. Co.,* 111 Col. 492, 144 P. 2d 981 (1933).

LoneDissent.org

—regardless of intent to defame an individual or even knowledge that the statement may have this effect—is held to be excessive restraint on expression. See *e.g., Ponder* v. *Cobb,* 257 N. C. 281, 126 S. E. 2d 67 (1962); *Charles Parker Co.* v. *Silver City,* 142 Conn. 605, 166 A. 2d 440 (1955); *Coleman* v. *McLennan,* 78 Kan. 711, 98 P. 281 (1908).

In *Coleman* v. *McLennan, supra,* the Kansas court held that where "matters of public concern, public men and candidates for office" are involved "* * * anyone claiming to be defamed by the communication must show actual malice or go remediless." (78 Kan. at 723; 98 P. at 288).*

In *Ponder* v. *Cobb, supra,* also involving charges as to the conduct of public officials, the North Carolina Court held:

> "The burden should have been placed upon the plaintiffs to establish by a preponderance of the evidence or by its greater weight that the defendant made his charges in bad faith, without probable cause, and with express malice. Unless these facts are so established, the plaintiffs are not entitled to recover." (257 N. C. at 299; 126 S. E. 2d at 80)

* For the doctrine that plaintiff must show actual malice, see *Chagnon* v. *Union Leader Corp.,* 103 N. H. 426 (1961); *Stice* v. *Beacon Newspaper Corp.,* 185 Kan. 61, 340 P. 2d 396 (1959); *Friedell* v. *Blakely Printing Co.,* 163 Minn. 226, 203 N. W. 974 (1925); *Moore* v. *Davis,* 16 S. W. 2d 380 (1929); *Lafferty* v. *Houlihan,* 81 N. H. 67, 121 A. 92 (1923); *Salinger* v. *Cowles,* 195 Ia. 873, 191 N. W. 167 (1922); *McLean* v. *Merriman,* 42 S. D. 394, 175 N. W. 878 (1920); *Boucher* v. *Clark Pub. Co.,* 14 S. D. 72, 84 N. W. 237 (1900). See also *Coleman* v. *Newark Morning Ledger Co.,* 29 N. J. 357, 149 A. 2d 193 (1959), to the effect that defendant is privileged, though the charge is false, when he has a reasonable belief in its truth, at least when no crime is charged. This doctrine approximates the rule that plaintiff must show actual malice; *State* v. *Fish,* 91 N. J. L. 228, 102 A. 378 (1917); *Estelle* v. *Daily News Pub. Co.,* 99 Neb. 397, 156 N. W. 645 (1916); Restatement of Torts, sec. 598.

LoneDissent.org

These courts hold that the rule of fair comment covers all critical statements about public officials, whether such statements are true or false, fact or comment, pointing out that the distinction between opinion and fact is difficult and confusing, and it "does not better serve justice to attempt it." *E.g., Charles Parker Co.* v. *Silver City, supra; Coleman* v. *McLennan, supra.*

The narrowing of the substantive definition of libel where public officials are involved, and the broadening of the defense of fair comment to cover non-malicious false statements of fact as well as comment have the effect of drastically curtailing the presumptions of malice and of damage when the libel is a criticism of the public conduct of a public official—both presumptions being unreasonable in that situation (although rigidly enforced by Alabama in the instant case).

Courts which hold that actual malice must be shown to defeat the defense of fair comment where a public official is concerned sometimes "presume" malice when there is a clear charge of corruption or commission of a crime against a public official.* In such cases, the presumption may be justifiable, since charges of this type cut deeper than the usual and necessary criticism of public officials so essential in a democracy. Where the official's basic character and integrity are impugned, the presumptions of damage and malice may be reasonable as in the ordinary case of a libel per se of a private individual. This rule would not discourage all adverse discussions of government affairs, for serious charges of crime and corruption are discernible without a fine tooth comb.

---

* See *Peck* v. *Coos Bay Times Pub. Co.,* 122 Or. 408, 259 P. 307 (1927); *Mulderig* v. *Wilkes-Barre Times,* 215 Pa. 470, 64 A. 636 (1906).

LoneDissent.org

The alleged libel here involved made no charge against respondent's character, capacity or integrity. Neither the complaint nor the trial judge specified what part of the two paragraphs might be read as referring to respondent; the Supreme Court of Alabama held that references to the police might be read as referring to him (R. 1157). In the first paragraph this would mean the sentence stating that the police "ringed the campus"; as to the second paragraph, the function of the police in making arrests is so well known that the sentence as to the arrests of Reverend King might be deemed within the Supreme Court's holding. At the worst, these sentences might carry the derogatory implication from the context that the police were unsympathetic to the Negro struggle and were acting oppressively and in a discriminatory manner. This amounts to a critique of attitude and method, a value judgment and opinion—but certainly not to an "extreme" charge of corruption or of the commission of a crime which alone could justify the presumptions of malice and damage imposed, not to mention the award of punitive damage.

Some state courts continue to state in flat terms the doctrine that there is liability for libel with respect to appraisals of public officials on the same basis as private individuals, the only stated deference to the public interest being the rule that an "opinion" based on facts truly stated may be "fair comment" and not actionable, even if "false" and defamatory. But even these courts tend to distinguish "fact" and "opinion" in such a way that as to public officials only extreme charges of corruption and affirmative wrongdoing are in practice held actionable. See, Riesman, op. cit. *supra* at 1288.

LoneDissent.org

The opposite impact of Alabama's rigid rule is apparent. Thus, if a newspaper prints criticism of police use of the third degree without naming any names and errs in any particular as to the activity of the police the paper would be answerable for damages in libel, punitive as well as compensatory, to unnamed police officials. The effect in terms of suppression of adverse comment on police activities cannot be overstated.

Formulation by the courts of common law libel doctrine more consonant with constitutional freedom in criticism of public officials has grown as the guarantees of free expression of the federal constitution have been applied to the states and as the restraining effect in practice of civil remedies and common law actions on freedom of expression has been recognized. *Wood* v. *Georgia,* 370 U. S. 375 (1962); *Bridges* v. *California,* 314 U. S. 252, 268 (1941). Moreover, this Court has emphasized a requirement of actual unlawful intent in freedom of expression cases: *Wieman* v. *Updegraff,* 344 U. S. 183, 191 (1952) (knowing activity); *Pennekamp* v. *Florida,* 328 U. S. 331, 347 (1946) (intent to obstruct justice); *Hartzel* v. *United States,* 322 U. S. 680, 686 (1944) (intent to obstruct war effort) *cf., Smith* v. *California,* 361 U. S. 147, 153-4 (1959) (invalidating restraint on those who disseminate the views of others).

The restraint here goes much further than that condemned by this Court in *Smith* v. *California, supra.* There this Court found that liability for selling obscene literature regardless of knowledge of obscenity "tend(s) to restrict the books he (the bookseller) sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." 361 U. S. at 153. Al-

LoneDissent.org

though presence of obscenity is much easier to apprehend from the contents of a book than the presence of libel (anything may turn out to be a libel) this Court held that the First Amendment required scienter to be established in obscenity cases. The Alabama Supreme Court has in effect held there is no such requirement with respect to liability for "libel" based on a criticism of public affairs. Yet to ascertain libel, especially where the complainant is not even mentioned by name imposes a far greater inhibition. To search out every possibility of libel, one must closely inspect, carefully evaluate the hazards of proving truth, and even then run the risk of liability, for lack of knowledge is no defense. Here the extreme penalty of a $500,000 judgment on libel grounds is not limited to a *knowing* disseminator. There is no proof that the Times ever heard of the respondent prior to publication. Thus the restraint goes further than the one invalidated by this Court in *Smith*.

To insure the necessary degree of freedom of public officials to express themselves in the course of their duties, this Court has established a special protection against liability for libel based on statements by Federal public officials in the conduct of their office. *Barr* v. *Matteo*, 360 U. S. 564, 571 (1959). Surely, in a democracy, criticism of official conduct is as important to the proper functioning of government as is the authority of federal officials to transact governmental affairs.

Under the Alabama rules of libel as here applied, expression in the vital area of public affairs is ruthlessly curtailed by imposition of liability without fault and without proof of damage. Resort to the presumptions of damage and malice, in conjunction with the application of an all-

LoneDissent.org

inclusive concept of libel per se as to criticism of a public official, imposes an unreasonable burden, violative of the First Amendment rights of these petitioners and of the right of the people of Alabama to meaningful discussion of their rights and problems.

POINT II

The trial in this case denied the petitioners due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment.

The respondent did not bring this suit to right a personal wrong against him. Instigated by the state, he has brought it, as other public officials have brought their suits, to punish those who ran the advertisement, to punish the newspaper which published it, and to prevent further presentation of the facts in Alabama. Accomplishment of this has been sought by using a segregated courtroom where the Negro has been "kept in his place" and where the court instructed the jury it could award punitive damages as a means of preventing repetition of the alleged offense of publishing comments and criticism of official public conduct.

For many years segregation has been the accepted practice in Alabama, and courtrooms have been no exception. Desegregation of public facilities has been opposed not only by the state but by the local authorities. But the segregated courtroom still remains in Alabama. This, we submit, is in violation of this Court's holding that "state compelled segregation in a court of justice is manifest violation of the state's duty to deny no one the equal protection of its laws." *Johnson* v. *Virginia,* 373 U. S. 61, 62 (1963).

LoneDissent.org

In this case the State of Alabama has sought to prevent comment and criticism of governmental conduct by conducting a trial involving issues of race relations in a segregated courtroom in violation of the constitutional guarantees of equal protection of the laws. Official designation of inferiority of Negroes was manifest throughout the trial. The Negro lawyers who represented the individual defendants were treated as inferiors and were even denied the right to be called "Mister". The word "Negro" was prejudicially mispronounced. Respondent's counsel was permitted to make disparaging remarks about Negroes. Both the trial court and the Supreme Court of Alabama condoned such action (R. 1169).

Judge Walter B. Jones, who presided at the trial below as well as in the *James* case, wherein another $500,000.00 verdict was awarded, made clear his views on the subject of a segregated courtroom. They are quoted in 22 The Alabama Lawyer 2, at pages 190-192, reprinting a statement made from the bench of the Circuit Court of Montgomery County, on February 1, 1961, during the trial of the *James* libel suit against the same petitioners (R. 2213-6). After directing that "spectators will be seated in this courtroom according to their race," Judge Jones made the following statements:

> "The judge presiding here today knows that it is quite the fashion in high judicial place to work the XIV Amendment overtime, to put it above every other part of the Constitution, and to deliberately forget and neglect the more important parts of the federal constitution. At this time I refer particularly to an amendment which is a part of the Bill of Rights (the governing part of the federal constitution) and the XIV Amendment is not, which says: 'The powers not

LoneDissent.org

> *delegated* to the United States by the Constitution, nor *prohibited* by it to the states, are *reserved* to the states respectively, or to the people.'
>
> "Alabama and her Sister States stand on the Tenth Amendment. It is their buckler and shield. Nowhere does the much-quoted XIV Amendment take away from a state court, from a state judge, the right to control the trial of lawsuits over which he presides. The States of the Union have reserved unto themselves, have never surrendered to the government at Washington, the right, the duty and the power belonging to the judges of their state courts to direct how lawsuits shall be tried in the court rooms of the state."

After referring to the Ninth Amendment as the "forgotten amendment to the federal constitution" and to the pronunciation of the word "Negro," the court concluded with this statement about "white man's justice":

> "We will now continue with the trial of this case under the laws of the State of Alabama, and not under the XIV Amendment, and in the belief and knowledge that the white man's justice, a justice born long centuries ago 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 at the Bar of this Court, regardless of race or color, equal justice under law."

It was in this atmosphere and in such surroundings that the court charged that the statements in the advertisement in this case were libelous *per se* and that "falsity and malice" were to be presumed (R. 824). After the attorney for the respondent, in summing up, had told the jury that the way to get the attention of everyone "who publishes

LoneDissent.org

newspapers is to hit them in the pocketbook'' (Def. Ex. 56, R. 2092), the court, ignoring the basic constitutional principle of freedom to comment on and criticize government, charged the jury that it could give punitive damages as a ''kind of punishment to a defendant with a view of preventing similar wrongs in the future. Punitive damages are awarded on the theory that they will deter the defendant from making a like publication and will also deter all other persons similarly situated if they hear about it from making a like publication'' (R. 825-826).

It is not surprising that after this charge the jury came in with a verdict of the full amount sought, $500,000.00. This was reported to have been the largest libel verdict ever given in the state of Alabama (Def. Ex. 56, R. 2090). The Supreme Court of Alabama has upheld this verdict with the comment that, ''Today the dollar is worth only fifty cents or less of its former value'' (R. 1178). This remark makes it interesting to compare the size of the award in the present case with other verdicts in defamation suits passed on by the Supreme Court of Alabama. This is shown on the attached list which gives the size of verdicts awarded in defamation suits in Alabama since 1900 (Appendix A). The cases which were reversed are shown on the list, which also sets forth some of the statements made about the plaintiffs in the cases that were affirmed.

What the State of Alabama seeks to do will be accomplished if this judgment is allowed to stand. The adjudication as to liability and the amount of the verdict in this case can be expected to set the pattern in the other pending cases, as it did in the *James* case, if this case is affirmed.

LoneDissent.org

This respondent used the court and the judicial process not to compensate himself for injury actually suffered, but as an instrument of local government to prevent the exercise of free speech. Such misuse of judicial process has denied petitioners due process of law. In effect, the state through this respondent, under the guise of legal procedure, used the judicial power of the local courts in its attempt to nullify the provisions of the Federal Constitution. Due process of law and the equal protection of the laws should not yield to attempts by the state to circumvent the constitutional provisions guaranteeing freedom of speech and the press and the equal protection of the laws. Were the courts powerless to stop such action, it may well be, as James Madison said, that the United States would be "languishing at this day under the infirmities of a sickly Confederation."

Conclusion

It is respectfully urged that the judgment in this case be reversed and the complaint dismissed.

(1) The publication complained of was comment about and criticism of governmental activities in the field of race relations. The constitutional guarantees of free speech and freedom of the press protect such publication from attack. Such protection is fundamental to our form of government since it enables us to meet important public issues by the free exchange of ideas and not by the enforced will of the state.

(2) The trial of this action was not brought to right a wrong against the respondent but to carry out the recom-

LoneDissent.org

mendation of the State of Alabama that the respondent and other public officials sue to punish the Negro clergymen and the newspaper that printed the publication and to prevent that newspaper and other newspapers who hear of the judgment from making similar publications in the future. Such a trial, conducted in a segregated courtroom placing Negroes in an inferior position, was a denial of the equal protection of the laws and of due process of law to the petitioners.

Respectfully submitted,

EDWARD S. GREENBAUM
HARRIET F. PILPEL
285 Madison Avenue
New York 17, New York
Attorneys for Amici

MELVIN L. WULF
NANETTE DEMBITZ
NANCY F. WECHSLER
Of Counsel

LoneDissent.org

APPENDIX

LoneDissent.org

Amount of Verdicts in Reported Defamation Cases in Alabama Since 1900
(indicating statement concerning plaintiff in affirmed cases)

1906	Lee v. Crump 146 Ala. 655, 40 So. 609	Thief	$ 300.00
1907	Labor Review Pub. Co. v. Galliher 153 Ala. 364, 45 So. 188		400.00*
1908	Johnson v. Turner 159 Ala. 356, 47 So. 570	Misappropriation	100.00
1909	Tennessee Coal, Iron & Railroad Co. v. Kelly 163 Ala. 348, 50 So. 1008		1,000.00*
1910	Tennessee Coal, Iron & Railroad Co. v. Kelly 165 Ala. 378, 51 So. 604		1,000.00*
	Schuler v. Fischer 167 Ala. 184, 52 So. 390	Thief	197.91
	Advertiser Company v. Jones 169 Ala. 196		5,000.00*
1912	Maddox v. Newton 4 Ala. App. 454, 58 So. 954	Crime against chastity of girl	600.00
1913	Webb v. Gray 181 Ala. 408, 62 So. 194		1,000.00*
1914	Allen v. Fincher 187 Ala. 599, 65 So. 946		100.00*
	Starks v. Comer 190 Ala. 245, 67 So. 440	Chiseling	5,133.33
1916	Donaldson v. Roberson 15 Ala. App. 354, 73 So. 223		1,000.00*
1919	Age-Herald Pub. Co. v. Waterman 202 Ala. 665, 81 So. 621		10,000.00*

* Reversed

LoneDissent.org

1920	Choctaw Coal & Mining Co. v. Lillich 204 Ala. 533, 86 So. 383		250.00*
	Jones v. Spradlin 18 Ala. App. 29, 88 So. 373	Rascal	1.00
1921	Age Herald Pub. Co. v. Huddleston 207 Ala. 40, 92 So. 193		30,000.00*
1927	Peinhardt v. West 22 Ala. App. 231, 115 So. 80		800.00*
1930	W. T. Grant Co. v. Smith 220 Ala. 377, 125 So. 393	Dishonest	1,500.00
1933	Interstate Electric Co. v. Daniel 227 Ala. 609, 151 So. 463		50,000.00 (Reduced by consent to $10,000)
1936	Brotherhood of Railroad Trainmen v. Jennings 232 Ala. 438, 168 So. 173		5,000.00*
1941	Luquire Ins. Co. v. Parker 241 Ala. 621, 4 So. 2d 259		250.00*
	Ripps v. Herrington 241 Ala. 209, 1 So. 2d 889		7,500.00*
1947	Tidmore v. Mills 33 Ala. App. 243, 32 So. 2d 769	A "Hitler"	900.00
1956	American Life Ins. Co. v. Shell 265 Ala. 306	Dishonest	35,260.00
1960	Johnson Publishing Co. v. Davis 271 Ala. 474, 124 So. 2d 441	Improper relations of teacher with students	67,500.00 (Held excessive and reduced to $45,000)

* Reversed

LoneDissent.org