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THE ANATOMY OF AN HISTORIC DECISION: *NEW YORK TIMES CO. V. SULLIVAN*

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New York Times Co. v. Sullivan[1] is a landmark decision in the law of libel and in the field of civil liberties because the United States Supreme Court, for the first time, determined "the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[2] In unanimously reversing the judgment of the Supreme Court of Alabama, the Court held that the first and fourteenth amendments to the Constitution[3] prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[4] Justices Black, Goldberg, and Douglas concurred with the result reached, but in the concurring opinions of Black and Goldberg—both of whom were joined by Douglas—they contend that the Constitution affords greater pro-

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[1] 376 U.S. 254 (1964).

[2] *Id.* at 256.

[3] The first amendment reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The section of the fourteenth amendment applicable to this case provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Since 1925 the guarantees in the first amendment have been applied to the states through the due process clause of the fourteenth amendment. Thus, the states are under federal judicial discipline in the matter of these rights. See Gitlow v. New York, 268 U.S. 652 (1925).

[4] 376 U.S. at 279-80.

tection to persons exercising the right of public criticism than the standard adopted by the Court.

Mr. Justice Goldberg, in his concurring opinion, took the position that the Constitution affords to citizens and the press "an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses."[5] In short, he disagreed with the test of "actual malice" contained in the rule adopted by the Court.

The position taken by Mr. Justice Black is close to that of Mr. Justice Goldberg. He expressed the opinions that the first amendment to the Constitution, *at the very least*,[6] gives people and the press an unconditional right "to criticize [public] officials and discuss public affairs with impunity"[7] and that the rule adopted by the Court requiring such criticism and discussion to be without malice is not sufficient.

The views of the concurring members of the Court raise the fundamental question of whether the rule adopted by the Court is adequate. It shall be the purpose of this article to analyze carefully the *Sullivan* case and to discuss the adequacy of the criterion adopted by the Supreme Court, as well as other questions raised or suggested by the case, with the objective of appraising and evaluating the case's significance.

I. The Case

A. Precipitating Events

For over a century Negroes in the United States have been struggling for human dignity and full citizenship. Their efforts to attain these objectives have been met with constant resistance by opponents who seek to perpetuate racial segregation and discrimination.[8] The resistance techniques used against Negroes have been many and varied. They have ranged from such crude or obvious means as violence and intimidation, Black Codes, and Jim

[5] *Id.* at 298.

[6] Mr. Justice Black would probably support a rule giving greater protection to free speech and press than the one set forth in his concurring opinion. See *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U.L. Rev. 549 (1962); *cf.* Meiklejohn, *The First Amendment Is Absolute*, 1961 Supreme Court Rev. 245.

[7] 376 U.S. at 296.

[8] King, Stride Toward Freedom 154-58 (1958).

Crow laws[9] to the more subtle methods of token desegregation and the gerrymandering of election districts.[10]

In recent years, however, substantial gains have been made in the Negro's struggle for human dignity. The United States Supreme Court, through its decisions affecting civil rights, has played a major role in giving impetus to the recent progress of the Negro. Time and time again the Court has struck down, as being in violation of the Constitution, methods and techniques devised to perpetuate practices of racial segregation and discrimination.[11] In addition, during the past decade, there has been a growing self respect which has "inspired the Negro with a new determination to struggle and sacrifice until first class citizenship becomes a reality"; and there has been "an awakening moral consciousness on the part of millions of white Americans concerning segregation" which has also helped to move the Negro more rapidly toward his goal.[12]

The greatest opposition to the Negro's advancement is in the Deep South; and nowhere, with the possible exception of Mississippi, has that opposition been more fierce and tenacious than Alabama. The opponents to civil rights in that state, for example, have bombed religious institutions and private homes,[13] whipped up hysterical mobs, attempted to suppress the National Association for the Advancement of Colored People,[14] and threatened to close down a public school.[15]

On February 29, 1960, Dr. Martin Luther King, Jr., a national

[9] "Jim Crow laws" is a colloquial, generic term used to refer to any laws which have as their purpose discrimination against or segregation of Negroes. Immediately following the Civil War a number of state legislatures passed laws defining the status of ex-slaves. These laws, which were called "Black Codes," replaced the chains of slavery with peonage so as to make Negroes an inferior and subordinate economic caste. See DUBOIS, BLACK RECONSTRUCTION 381-525 (1935); FRANKLIN, FROM SLAVERY TO FREEDOM 299 (1956); KONVITZ & LESKES, A CENTURY OF CIVIL RIGHTS 15 (1961).

[10] See, *e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); Bush v. School Bd., 308 F.2d 491, 499 (5th Cir. 1962).

[11] Watson v. City of Memphis, 373 U.S. 526 (1963) (education); Bush v. School Bd., 364 U.S. 500 (1960) (education); Brown v. Board of Educ., 347 U.S. 483 (1954) (education); Shelley v. Kraemer, 334 U.S. 1 (1948) (housing); Smith v. Allwright, 321 U.S. 649 (1944) (voting).

[12] KING, *op. cit. supra* note 8, at 154.

[13] Record, vol. 4, pp. 1549-55, 1557, 1618-19, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[14] Record, vol. 4, pp. 1413-15, 1556-63, 1565-67 (mob hysteria). See NAACP v. Alabama, 357 U.S. 449 (1958) (attempted suppression of NAACP activities).

[15] Record, vol. 4, p. 1586.

civil rights leader, was arrested on an indictment charging two counts of perjury in connection with the filing of his Alabama State Income Tax Return, a felony carrying a maximum penalty of ten years imprisonment upon conviction.[16] Many believed that this arrest was without merit and was made because of Dr. King's civil rights activities in Alabama.[17] A "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" was formed, and on March 29, 1960, it published the advertisement in *The New York Times* which gave rise to the case under discussion.[18]

The advertisement, which consisted of a full page, was entitled "Heed Their Rising Voices."[19] The first paragraph stated that thousands of Southern Negro students "are engaged in wide spread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights" and the efforts of those students to uphold those guarantees "are being met by an unprecedented wave of terror."

The second paragraph told of how 400 students were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse, and otherwise mistreated when they tried to integrate lunch counters in Orangeburg, South Carolina.

The third paragraph spoke of Montgomery, Alabama, and complained that after students sang "My Country 'Tis of Thee" on the State Capitol steps their leaders were expelled from school, and truckloads of armed policemen ringed the Alabama State College Campus; and that when the student body protested to state authorities, their dining hall was padlocked in an attempt to starve them into submission.

The fourth paragraph praised young American teenagers in

[16] *Id.*, vol. 5, pp. 1934-37.

[17] Dr. King was acquitted of both counts of the indictment. See *id.*, vol. 2, p. 680.

[18] N.Y. Times, March 29, 1960, p. 25, col. 1-8. A copy of the advertisement is attached as an appendix to the Supreme Court's opinion. 376 U.S. at 292.

[19] This phrase was taken from a *New York Times* editorial of March 19, 1960, which read in part as follows: "The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable . . . . Let Congress heed their rising voices, for they will be heard." N.Y. Times, March 19, 1960, p. 20, col. 1. The entire ad appears in the Record, vol. 5, p. 1925.

Southern cities for taking part in demonstrations, referring to them as "protagonists of democracy."

The fifth paragraph was rather long, but it essentially lauded Dr. King for his great leadership in the Negro's non-violent struggle for civil rights, and asserted that the "Southern violators of the Constitution" are determined to destroy him, since he "more than any other, symbolizes the new spirit now sweeping the South." It stated also that the Southern Christian Leadership Conference which Dr. King had founded was "spearheading the surging right-to-vote movement."

The sixth paragraph alleged what the so-called "Southern violators" had done to Dr. King and explained why. It stated that the "Southern violators" had repeatedly "answered Dr. King's peaceful protests with intimidation and violence" by bombing his home, assaulting his person and arresting him seven times for various offenses. The paragraph went on to state that "they" have now charged him with the serious crime of perjury and that this was done to remove him physically as the leader to whom millions look for guidance and thereby to "demoralize Negro Americans and weaken their will to struggle."

The remaining four paragraphs essentially constituted a request for funds. The last of these paragraphs concluded with the following plea:

> We urge you to join hands with our fellow Americans in the South by supporting, with your dollars, this Combined Appeal for all three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote.

The names of "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South" appeared directly below the appeal. The committee included a host of prominent personalities such as A. Philip Randolph, Mrs. Eleanor Roosevelt, Dr. Algernon Black, Dr. Harry Emerson Fosdick, Marlon Brando, and Langston Hughes.

Below the names of the committee members were the following words: "We, in the south who are struggling daily for dignity and freedom warmly endorse this appeal"; and under those words were listed a number of persons, practically all of whom were ministers, who lived in the South. Four of these individuals, the Reverends

Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery were residents of Alabama and subsequently were named as defendants in this litigation.

The circumstances under which this advertisement was published are significant. John Murray, a writer who had participated in the composition of the ad, delivered it to Gershon Aaronson, a member of the national advertising staff of the *Times* specializing in "editorial type" advertising.[20] The copy delivered to Aaronson was accompanied by a letter from A. Philip Randolph, chairman of the committee, which read:

> This will certify that the names included on the enclosed list are all signed members of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South.
>
> Please be assured that they have all given us permission to use their names in furthering the work of our Committee.[21]

The copy as submitted to Aaronson, however, did not contain the statement, "we in the south . . . warmly endorse this appeal," or any of the names printed under it. Those names were added to a revision of the proof at the suggestion of Bayard Rustin, the director of the committee. Rustin told Murray that it was unnecessary to obtain the consent of the individuals involved since they were all members of the Southern Christian Leadership Conference and, as the SCLC supported the work of the committee, there was no need to consult them.[22]

The original copy Murray delivered to Aaronson was sent to D. Vincent Redding, manager of the advertising acceptability department of *The New York Times,* which department is responsible for screening advertisements.[23] Redding read the copy and approved it for publication.[24] He gave his approval because he knew nothing to cause him to believe that anything in the proposed text was false and because it bore the endorsement of a number of people who were well known and whose reputations he had no reason to question.[25] Consequently, he did not think it was necessary to

[20] *Id.*, vol. 2, pp. 731, 738, 805.
[21] *Id.*, vol. 5, p. 1992.
[22] *Id.*, vol. 2, pp. 806-09.
[23] *Id.* at 733-34.
[24] *Id.* at 758.
[25] *Id.* at 758, 759-60, 762-63.

make any further check on the accuracy of the statements contained in the copy.[26]

The New York Times was paid slightly more than 4,800 dollars for the publication of the advertisement.[27] The total circulation of the issue containing the ad was approximately 650,000, of which about 394 copies were mailed to Alabama subscribers or shipped to newsdealers in the state. Of the copies that were sent into the state, about 35 went into Montgomery County.[28]

The publication resulted in a storm of protest in Alabama. Soon after the advertisement was published, libel suits were instituted by the three incumbent City Commissioners of Montgomery, by a former City Commissioner, and by the then Governor of Alabama, demanding millions in damages.[29] One of the incumbent Commissioners who brought suit was L. B. Sullivan, who had been Commissioner of Public Affairs since October 5, 1959, and whose specific duties were to supervise the Police Department, Fire Department, Department of Cemetery, and Department of Scales.[30]

On April 8, 1960, prior to bringing suit against the *Times* and the Reverends Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery—the ministers residing in Alabama whose names appeared in the ad—Sullivan wrote each of them a letter demanding a retraction.[31] The letters were in identical terms. In each of them Sullivan set forth the passages of the advertisement complained of.[32] He then stated that the "foregoing matter, and the publication as a whole" charged him with "grave

[26] *Id.* at 765, 771.

[27] *Id.* at 752.

[28] *Id.* at 601-02; *id.*, vol. 5, pp. 1942-43.

[29] See *id.*, vol. 5, pp. 1999-2243; *id.*, vol. 2, pp. 871-89. See also Parks v. New York Times Co., 195 F. Supp. 919, 921 (M.D. Ala. 1961), *rev'd*, 308 F.2d 474, 476 (5th Cir. 1962). The writer was informed by Mr. Louis Loeb, a member of the firm of Lord, Day & Lord, general counsel for the *Times*, that after the Supreme Court's decision in *Sullivan*, all of the other libel suits based on the advertisement were dismissed.

[30] Record, vol. 2, p. 703.

[31] *Id.* at 588, 671, 776; *id.*, vol. 5, pp. 1949, 1962-68. The letters sent by Sullivan were erroneously dated "March 8, 1960." They should have been dated April 8, 1960. It should be noted that Alabama law prohibits a public officer from recovering punitive damages in a libel suit unless he first makes a written demand for a public retraction and the defendant fails or refuses to comply. Therefore, Sullivan had to send out these letters in order to be able to recover punitive damages for the alleged defamation. See ALA. CODE ANN. tit. 7, § 914 (1958).

[32] The passages complained of were the third and sixth paragraphs of the advertisement.

misconduct and of improper actions and omissions as an official of the City of Montgomery" and called on the addressee to "publish in as prominent and as public a manner as the foregoing false and defamatory material . . . . a full and fair retraction."[33]

The *Times* turned Sullivan's letter over to its general counsel for response. In a letter to Sullivan dated April 15, 1960, Lord, Day & Lord, attorneys for the *Times,* stated in part:

> We have been investigating the matter and are somewhat puzzled as to how you think the statements in any way reflect on you. So far, our investigation would seem to indicate that the statements are substantially correct with the sole exception that we find no justification for the statement that the dining hall in the State College was "padlocked in an attempt to starve them into submission."
>
> In the meanwhile you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.[34]

On April 19, 1960, without answering this letter, Sullivan commenced a libel suit for 500,000 dollars in the Circuit Court of Montgomery County against *The New York Times* and the four ministers, none of whom had responded to Sullivan's letter of April 8.[35]

At the time the suit was instituted, The New York Times Company, which is a New York corporation, was not qualified to do business in Alabama, had not designated anyone to accept service of process there,[36] and did a negligible amount of business there.[37] Under these circumstances, the plaintiff relied on sections 188 and and 199(1) of title 7 of the Alabama Code to effect service upon the *Times.* Section 188 provides that service against a corporation may be executed by delivering a copy of the summons and complaint upon several types of officers or employees of a corporation

[33] See Record, vol. 2, pp. 588-89.

[34] *Id.* at 589-90; *id.,* vol. 5, p. 1971. Subsequently, on May 9, 1960, Governor John Patterson of Alabama sent a demand for a retraction to the *Times* similar to the one Sullivan had sent. The Governor's letter asserted that the publication charged him "with grave misconduct and of improper actions and omissions as Governor of Alabama and Ex-Officio Chairman." The *Times* did print a retraction. *Id.,* vol. 2, p. 773; *id.,* vol. 5, pp. 1958, 1998. This retraction later became of some significance in the litigation. See text accompanying note 98 *infra*; *cf.* 376 U.S. at 286-87.

[35] Record, vol. 1, pp. 1-2.

[36] *Id.* at 134-35.

[37] See generally *id.* at 330-408, 437-62.

including "any . . . agent thereof."[38] Pursuant to this section, the plaintiff served Don McKee, a "stringer" for *The New York Times* in Montgomery, claiming him to be an agent under section 188. In addition, the plaintiff served the Secretary of State under section 199(1), the so-called "long arm" statute of the state.[39]

B. Claims and Defenses on Trial and Appeal

In the early stages of the litigation, a very substantial amount of time was spent on a motion to dismiss brought by *The New York Times*.[40] Prior to answering the complaint, the *Times* appeared "specially" and moved to dismiss the action against it on the ground that the Circuit Court of Montgomery County did not have jurisdiction over the *Times* or over the subject matter of the action.[41] The newspaper's attorneys argued that it was a nonresident corporation which was not doing business in the state and that the alleged cause of action had not arisen out of any business conducted by the *Times* in Alabama.[42] They contended that title 7, section 199(1) of the Alabama Code of 1940 was not applicable to this situation and that if the court assumed jurisdiction it would "deny" to their client "due process of law in contravention of" the first, fifth, and fourteenth amendments to the Constitution.[43]

Judge Walter B. Jones denied the motion on the ground that the *Times* had made a general appearance in the action even though its motion papers had stated that it was making a special appearance. In support of his decision, the judge pointed out that one of the prayers in the motion requested the court to "dismiss this action as to The New York Times Company . . . for lack of jurisdiction of the subject matter of said action."[44] He said that this clearly went beyond the question of jurisdiction of the court over the person

[38] ALA. CODE ANN. tit. 7, § 188 (1958).

[39] This section, at the time of the present suit, provided in essence that any nonresident who had not qualified to do business in the state would, by doing any business, work, or service there, be deemed to have appointed the Secretary of State to be his lawful agent, upon whom process could be served in any action arising out of or incidental to that nonresident's doing business or performing work or services in Alabama. Ala. Acts 1953, No. 282, at 347.

[40] The court spent three days hearing this motion—July 25-27, 1960. Roughly the same amount of time was spent on the trial of the case on the merits. See Record, vol. 1, p. 130; *id.*, vol. 2, p. 567.

[41] *Id.*, vol. 1, pp. 39-46.

[42] See note 39 *supra*.

[43] Record, vol. 1, pp. 43-44.

[44] *Id.* at 49.

of the defendant and constituted a general appearance in the case. He stated the defendant could not assert that it was not properly before the court and "in the same breath argue" that if it was, "this Court has no jurisdiction of the subject matter of the action." The judge further stated that "a party's appearance in a suit for any purpose other than to contest the Court's jurisdiction over the person of such party, is a general appearance."[45]

After holding that the *Times* had made a general appearance in the case and had thus waived its special appearance, Judge Jones went on by way of elaborate dictum to explain why he considered that the *Times* was "amenable to process and suit in the Alabama courts regardless of its general appearance."[46] In reaching this conclusion, he brushed aside the *Times'* contention that section 199(1) of the Alabama Code did not apply to it since the cause of action did not arise out of business it conducted in Alabama. He said that where a corporation is doing business in the state, due process does not require the cause of action to arise out of business done there. He then went on to find that the evidence adduced at the hearing supported the conclusion that *The New York Times* was doing business in Alabama.

The trial on the merits of the case was relatively short. It commenced on November 1, 1960, and was over on November 3.[47] The conditions under which the trial took place are worthy of comment.

The atmosphere was one of hostility toward the defendants. For some time prior to the trial, the Montgomery press had continuously denounced the defendants and the advertisement that had been published in the *Times*.[48] For example, an article entitled "The Abolitionist Hellmouths," which appeared in *The Montgomery Advertiser* on April 17, 1960, started off by stating: "The Commonwealth of Alabama with its three million people has been painfully and savagefully injured by *The New York Times*."[49]

Press photographers took pictures in the courtroom of the jurors for local newspapers,[50] and television cameras followed the

[45] *Id.* at 49-50. See Blankenship v. Blankenship, 263 Ala. 297, 303, 82 So. 2d 335, 340 (1955).
[46] Record, vol. 1, p. 51.
[47] *Id.*, vol. 2, p. 567.
[48] *Id.*, vol. 5, pp. 1999-2077.
[49] *Id.* at 2013.
[50] *Id.*, vol. 2, pp. 951, 955.

jury to the very door of the juryroom.[51] Two Montgomery newspapers, one on its front page, carried the names of the jurors.[52]

Judge Jones presided over the trial. Much of his philosophy about segregation and some of his thoughts about how the Constitution should be interpreted were reflected in a statement he made from the bench in a companion case. In a libel action arising out of the same set of facts as the *Sullivan* case and against the same defendants, Judge Jones stated in open court:

> From this hour forward, in keeping with the common law of Alabama, and observing the wise, time honored customs and usages of our people, both white and black, . . . there will be no integrated seating in this courtroom. Spectators will be seated in this courtroom according to their race, and this for the orderly administration of justice and the good of all people coming here lawfully.
>
> Much has been said at the Bar, and out of the hearing of the trial jury, as to the supposed requirements of the XIV Amendment directing the Trial Judge of the Court of a sovereign state how he will conduct a trial before a jury in the courts of Alabama.
>
> I would like to say for those here present, and for those who may come here to litigate in the future, that the XIV Amendment has no standing whatever in this Court, it is a pariah and an outcast, if it be construed to hold and direct the Presiding Judge of this Court as to the manner in which proceedings in the Court, . . . shall be conducted. . . .
>
> 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. . . .
>
> 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, . . . will give the parties at the Bar of this Court, regardless of race or color, equal justice under law.[53]

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[51] *Id.* at 889-90; *id.*, vol. 5, p. 2242.

[52] *Id.* at 952, 2079-80.

[53] W. B. Jones, *Court Room Segregation,* 22 ALA. LAW. 190-92 (1961). The ALABAMA LAWYER reprinted this statement, which was made from the bench of the Circuit Court of Montgomery County on February 1, 1961, during the trial of a related libel action based on the March 29 advertisement which Mayor Earl James of Montgomery had brought against The New York Times Company and the Reverends Abernathy, Shuttlesworth, Seay, and Lowery.

It was against this background that the case went to trial on the merits. The plaintiff claimed damages against defendants in the sum of 500,000 dollars for maliciously publishing in the advertisement false and defamatory matter about him in his capacity as a public official of the City of Montgomery.[54]

The specific subject matter which the plaintiff alleged damaged his reputation was set forth in the complaint as follows:

> In Montgomery, Alabama, after students sang, 'My Country 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truckloads 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.
>
> Again and again the Southern violators have answered Dr. King's peaceful protests 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 could imprison him for *ten* years.[55]

With respect to the first paragraph quoted above, which was in fact the third paragraph of the advertisement, the plaintiff produced evidence to show that it contained inaccuracies. The first half of the first sentence in the paragraph seemed to imply that student leaders were expelled for singing on the Capitol steps. The plaintiff showed that a succession of student demonstrations had occurred in Montgomery, beginning with an unsuccessful effort by some Alabama State College students to obtain service at a lunch counter in the Montgomery County Court House. Subsequently, on March 1, 1960, a thousand students marched from the college campus to the State Capitol, and on the steps of the Capitol they said the Lord's Prayer and sang the National Anthem. The following day, nine students, leaders of the lunch counter demonstration, were expelled by the State Board of Education, but singing on the Capitol steps was not the basis of the disciplinary action.[56]

With regard to the remaining portion of the first sentence, the plaintiff showed that "never at any time did the police 'ring' the

[54] Record, vol. 1, pp. 2-5.
[55] *Id.* at 2-3.
[56] *Id.*, vol. 2, pp. 593-94, 696-99; *id.*, vol. 5, pp. 1972-74.

campus although on three occasions they were deployed near the campus in large numbers."[57]

The plaintiff further demonstrated that the second sentence of the paragraph in question was completely inaccurate. Alabama State College students stayed away from classes on March 7, 1960, in a sympathy strike for those who had been expelled on March 2, but virtually all of them returned to class after a day;[58] and there was no foundation for the charge that the dining hall had been padlocked in an effort to starve the students into submission.[59]

It should be noted that except for the statement relating to the police "ringing" the campus, the inaccuracies in the paragraph of the advertisement under discussion concerned the State Department of Education, not the plaintiff's office of Commissioner of Public Affairs.[60] Consequently, the only inaccuracy which concerned the plaintiff was the very subtle one involving the distinction in substance between police "ringing" the campus and police being "deployed near the campus in large numbers."

The plaintiff contended that the remaining paragraph of the ad alluded to him because it described "police action."[61] Except for the fact that Dr. King had been arrested only four times instead of seven as alleged in the ad, there were no inaccuracies in the facts stated in this paragraph.[62] However, the plaintiff took the position that this paragraph could be read to accuse the police, and hence the plaintiff, of bombing Dr. King's home, assaulting his person, arresting him, and charging him with perjury. Therefore, the plaintiff was allowed to present evidence to show that neither he nor the police were responsible for any of these things.[63]

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[57] *Id.*, vol. 2, p. 594.

[58] *Id.* at 593-94.

[59] *Id.* at 594.

[60] This fact was even testified to by the plaintiff himself. On cross-examination he said that the statement about the dining halls being padlocked related to a "responsibility of the State Department of Education" and that "as far as the expulsion of the students is concerned that responsibility rests" with the same Department. *Id.* at 716.

[61] *Id.* at 724.

[62] *Id.* at 592, 594-95.

[63] *Id.* at 707-12, 685-88. It should be noted that Dr. King's home was bombed twice, but both occasions were before plaintiff's tenure in office (*Id.* at 594, 685, 688); that Dr. King had been arrested four times and three of these preceded the plaintiff's tenure (*Id.* at 592, 594-95, 703); and that Dr. King did claim that he had been assaulted when he was arrested (*Id.* at 594), although one of the officers who participated in the arrest denied it (*Id.* at

The plaintiff and six other witnesses testified as to the impact of the alleged defamatory statements upon his reputation. Sullivan testified that he felt the advertisement reflected upon him, the other Commissioners, and the community.[64] He thought that statements in the ad referring to "police activities" or "police action" related to him, impugned his "ability and integrity," and reflected on him "as an individual."[65]

The six witnesses testified that they had associated all[66] or portions[67] of the two paragraphs of the ad in question with the plaintiff. None of the witnesses testified that they believed the statements contained in the advertisement, and five of the six testified affirmatively that they did not believe any of such statements.[68]

The four ministers' principal line of defense was that they simply had nothing at all to do with the advertisement. Each denied any knowledge of the ad prior to its publication, any consent to the use of his name in connection with it, and any responsibility for its publication.[69] Their first notice of the *Times* ad (and only of the language complained of) came from Sullivan's letters mailed to them on April 8, 1960.[70]

The atmosphere of the courtroom as it related to the four Negro defendants is of interest. Certain parts of the record will give the reader some feeling of that atmosphere. For instance, at the very outset of the trial when Judge Jones asked the prospective jurors if any of them had any connection with the various lawyers who would be trying the case, he referred to lawyers for the plaintiff and *The New York Times* as "Mr." However, he noticeably dropped the "Mr." when referring to the ministers' attorneys, who were Negroes. He referred to them as "Fred Gray of Montgomery, Solomon Seay and V. Z. Crawford of Mobile."[71] Futhermore, throughout the record the Negro attorneys for the ministers were referred to as "Lawyer Crawford, Lawyer Gray, and Lawyer Seay," while the

692-93). In any event, the assault incident also antedated Sullivan's tenure as Commissioner. *Id.* at 694.

[64] *Id.* at 724.

[65] *Id.* at 712, 713, 724. However, the plaintiff did not point to any sign that he was held in less esteem because of the ad. See *id.* at 721-24.

[66] *Id.* at 635-36, 645, 650, 663.

[67] *Id.* at 605, 616, 618, 640.

[68] *Id.* at 623, 636, 638, 647, 651, 667.

[69] *Id.* at 788-90, 792-94, 795, 797-98, 801-02.

[70] *Id.* at 789, 793, 798, 802.

[71] *Id.* at 570.

attorneys for the plaintiff and the *Times* were consistently called "Mr. Nachman," "Mr. Embry," etc. Moreover, the record indicates that on one occasion an attorney for the plaintiff mispronounced the word "Negro" as "nigger."[72] Finally, in summation, one of the plaintiff's attorneys stated: "In other words, all of these things that happened did not happen in Russia where the police run everything, *they did not happen in the Congo where they still eat them,* they happened in Montgomery, Alabama, a law abiding community."[73]

Let us now turn to the defensive position taken by the *Times.* It contended that the plaintiff had not sustained his burden of proving that the advertisement complained of was published of or concerning him. The newspaper also argued that the subject matter was not defamatory of the plaintiff and did not charge him with any misconduct in office.[74] For these reasons the *Times* believed the plaintiff's complaint against it should be dismissed. Furthermore, the *Times* took the position that even if the jury should find that the alleged defamatory matter was published of and concerning the plaintiff, the *Times* did not publish the ad maliciously and this should result in the mitigation of damages against it.[75]

Judge Jones, in charging the jury,[76] pointed out that a person does not have to be specifically named in order to sustain a suit for damages in a libel action. He said that where the libel is addressed to a class or group, any member of that group can sue on the libel if he can prove that the words complained of were published of or concerning him. He instructed the jury that the burden rested upon the plaintiff to prove to their reasonable satisfaction that the material in the ad complained of was published of and concerning him. The court told the jury that if Sullivan sustained this burden, the court was satisfied that the statements relied on by the plaintiff were libelous per se. He stated that

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[72] *Id.* at 579. The pertinent part of the record reads:

Mr. Whitesell: . . . . The ad reads as follows: As the whole world knows by now, thousands of Southern Negro students—

Lawyer Crawford: Your Honor, we would like to object to the reading of that ad unless the counsel who reads it will read what is said and as I recall from reading that ad there is nothing on there that is spelled N-i-g-g-e-r-s. It is spelled N-e-g-r-o and I am sure he is well aware of it.

[73] *Id.* at 929-30. (Emphasis added.)

[74] *Id.* at 821, 829-36.

[75] *Id.* at 844.

[76] The charge appears in the Record, vol. 2, pp. 819-29.

> 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 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.[77]

Judge Jones also stated in his charge that where a writing is libelous per se "the law implies legal injury from the bare facts of the publication itself"; that "falsity and malice are presumed"; that "general damages need not be alleged or proved, but are presumed";[78] that "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown";[79] and that punitive damages are "given as a kind of punishment to the defendant with a view of preventing similar wrongs in the future."[80]

The judge continued his charge by stating it was for the jury to determine whether the four ministers had approved and sanctioned the advertisement by ratification. If it was found that they did, then they too would be liable. The court defined ratification as "the approval by a person of a prior act which did not bind him, but which was professedly done on his account or on his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning."[81]

Many written requests to charge were submitted to the court by the attorneys for the defendants. Some were given by Judge Jones and others were not. Several are of particular significance and should be mentioned. While the court instructed, as requested by the *Times,* that "mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an award of exemplary or punitive damages,"[82] it refused to instruct that the jury must be "convinced" of malice in the sense of "actual intent" to harm or "gross negligence and recklessness" to make such an award.[83] The court also declined to require that a verdict for the

[77] *Id.* at 824.
[78] *Ibid.*
[79] *Id.* at 825.
[80] *Id.* at 825-26.
[81] *Id.* at 825.
[82] *Id.* at 836.
[83] *Id.* at 844.

plaintiff differentiate between compensatory and punitive damages.[84]

The jury returned a verdict in favor of the plaintiff assessing 500,000 dollars in damages against the defendants, and a judgment was entered against the defendants accordingly.[85] Thereafter, defendants made motions requesting the court to set aside the verdict and to grant them a new trial.

In the motions for a new trial, the defendants claimed that during the course of the litigation the court had erred in a number of its rulings. They contended that certain errors by the court as well as the excessive verdict violated the Constitution.[86] In addition, the ministers claimed, for the first time, in their motions for a new trial that they had not received a fair trial and that this was a violation of the Alabama and federal constitutions.[87] Judge Jones denied the *Times'* motion for a new trial and stated that the defendant ministers had allowed their motions for a new trial to lapse and, consequently, he could not consider them.[88]

The Supreme Court of Alabama sustained the circuit court on appeal.[89] The question of jurisdiction was again raised by the *Times,* and the appellate court held that the lower court had jurisdiction over the *Times* for three reasons. First, the court stated that the activities of the *Times* in Alabama were more than sufficient to meet the minimal standards required for service on an agent or representative of the company; and the court declared that McKee, who worked as a "stringer" for the *Times* and who was served by Sullivan, was its agent. Therefore, service of process upon him was good and sufficient service.

Secondly, the court held that the *Times* had been properly served by substituted service under title 7, section 199 (1) of the Alabama Code of 1940, as amended—the state's so-called "long arm" statute. The court pointed out that under that law any nonresident person who is not qualified to do business in the state, but who nonetheless actually does some business, work, or service

[84] *Id.* at 846.

[85] *Id.* at 862-63. Note that the amount of the verdict was 1000 times greater than the maximum fine of $500 under Alabama's criminal libel statute. See ALA. CODE ANN. tit. 14, § 350 (1958).

[86] Record, vol. 2, pp. 896-949, 970-98.

[87] *Id.* at 977-78, 992-93.

[88] *Id.* at 875, 970.

[89] New York Times Co. v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962).

there, shall be deemed to have appointed the Secretary of State to be his agent for the service of process in any action accruing from or incidental to the business, work or service done by such a non-resident in the state of Alabama. The court concluded that the cause of action in this case was connected with activities of the *Times* in Alabama since "the publishing of advertisements was a substantial part of the business of the *Times,* and its newspapers were regularly sent into Alabama," and because the *Times* solicited advertising in Alabama and called upon its "correspondent McKee" to investigate "the truthfulness or falsity of the matters contained in the advertisement after the letter from the plaintiff."[90] Therefore, the appellate tribunal held that the service under section 199 (1) was valid.

Finally, the court held that the lower court was correct in finding that the *Times,* by requesting the circuit court to dismiss the action against it for lack of jurisdiction over the subject matter, went beyond the question of jurisdiction of the person and thereby made a general appearance. The appellate court stated the "conclusions of the trial court in this aspect are in accord with the doctrines of a majority of our sister states, and the doctrines of our own decisions."[91]

After ruling on jurisdiction, the Alabama Supreme Court discussed the merits of the appeal. In upholding the court below, it stated that where "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" they are "libelous per se,"[92] and that under this doctrine the matter complained of by Sullivan was libelous per se once the jury found that it was published of and concerning him. The court further stated libel per se was actionable without "proof of pecuniary injury . . . such injury being implied,"[93] and that actual damages are presumed and need not be proved.[94]

With respect to damages it is interesting to observe that, under Alabama law, where it is established that a writing is libelous per se, compensatory damages are presumed. However, an award of

[90] *Id.* at 671, 144 So. 2d at 35.
[91] *Ibid.*
[92] *Id.* at 673, 144 So. 2d at 37.
[93] *Id.* at 676, 144 So. 2d at 41.
[94] *Id.* at 685-86, 144 So. 2d at 50.

punitive damages in such a case apparently requires proof of actual malice.[95] Judge Jones refused to charge at the request of the *Times* that the jury had to be convinced of malice, in the sense of actual intent to harm, or gross negligence and recklessness, to award punitive damages;[96] and he declined to require that a verdict for the plaintiff differentiate between compensatory and punitive damages.[97] In the writer's opinion, the Alabama Supreme Court failed to come really to grips with this apparently significant error in Judge Jones's charge. The appellate tribunal handled the problem in rather an oblique fashion by pointing out conduct of the *Times* that could have justified the jury's making a finding of malice. In this regard, the Supreme Court of Alabama stated:

> The Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement. Upon demand by the Governor of Alabama, The Times published a retraction of the advertisement insofar as the Governor of Alabama was concerned. Upon receipt of the letter from the plaintiff demanding a retraction of the allegations in the advertisement, The Times had investigations made by a staff correspondent, and by its "string" correspondent. Both made a report demonstrating the falsity of the allegations. Even in the face of these reports, The Times adamantly refused to right the wrong it knew it had done the plaintiff. In the trial below none of the defendants questioned the falsity of the allegations of the advertisement.
>
> On the other hand, during his testimony it was the contention of the Secretary of The Times that the advertisement was "substantially correct." *In the face of this cavalier ignoring of the falsity of the advertisement, the jury could not have but been impressed with the bad faith of The Times, and its maliciousness inferable therefrom.*[98]

The highest court of Alabama summarily rejected constitutional arguments made by the *Times* with the statements that the "First Amendment of the U. S. Constitution does not protect libelous publications" and the "Fourteenth Amendment is directed against State action and not private action."[99] It approved the trial court's charge

[95] See *id.* at 685-86, 144 So. 2d at 50, and cases cited therein.
[96] Record, vol. 2, p. 844; *id.*, vol. 3, p. 1060.
[97] *Id.*, vol. 2, p. 846.
[98] 273 Ala. at 686, 144 So. 2d at 50-51. (Emphasis added.) See note 34 *supra.*
[99] *Id.* at 676, 144 So. 2d at 40.

as a "fair, accurate, and clear expression of the governing legal principles,"[100] and sustained the lower court's determination that the damages awarded by the verdict were not excessive.

The court quickly brushed aside the arguments made by the four individual appellants. It said that their exceptions to the trial court's charge and their requests to charge which the trial court refused to give were either too indefinite or not "expressed in the exact and appropriate terms of the law"[101] and, therefore, were not subject to review. The court called the individual appellants' objection to the alleged mispronunciation of the word "Negro" in the court below "mere quibbling."[102]

The ministers also sought a reversal on the ground that the courtroom was segregated during the trial and on the further ground that the trial judge was not duly and legally elected because of deprivation of voting rights to Negroes. The appellate tribunal took the position that since these matters were not presented during the trial they could not be raised on appeal.[103]

The Alabama Supreme Court also decided that the motions of the individual defendants for a new trial were discontinued. Therefore, "those assignments by the individual appellants attempting to raise questions as to the weight of the evidence, and the extensiveness of the damages are ineffective and present nothing for review" because these "matters can be presented only by a motion for a new trial."[104]

C. The Supreme Court Decision

It was against the foregoing background that this case was appealed to the United States Supreme Court by the *Times* and Reverends Abernathy, Shuttlesworth, Seay, and Lowery. The Court granted certiorari on January 7, 1963;[105] and after hearing arguments on January 6 and 7, 1964, it rendered its opinion on March 9, 1964.[106]

The Supreme Court did not discuss the question of the Alabama courts' jurisdiction over the *Times,* although this issue was argued at

[100] *Id.* at 680, 144 So. 2d at 44.
[101] *Id.* at 681, 144 So. 2d at 45.
[102] *Ibid.*
[103] *Id.* at 681, 144 So. 2d at 45.
[104] *Id.* at 682, 144 So. 2d at 46.
[105] New York Times Co. v. Sullivan, 371 U.S. 946 (1963).
[106] 376 U.S. 254 (1964).

length by the *Times* in its brief to the Supreme Court. By its silence, it is not clear whether the Court completely agreed with the views expressed by the Supreme Court of Alabama on the subject, or whether the Court considered that the Alabama courts had gained jurisdiction solely because the *Times* had mistakenly converted a special appearance into a general one. In any event, the Court must have been satisfied that the Alabama courts had proper jurisdiction over the *Times*.

The respondent, L. B. Sullivan, raised three defenses which he contended removed his case from constitutional scrutiny. First, he contended that the fourteenth amendment is directed against state action and not private action. Secondly, he argued that the constitutional guarantees of freedom of speech and of the press were inapplicable because the allegedly libelous statements were published as part of a paid "commercial advertisement" which the Supreme Court had held in *Valentine v. Chrestensen*[107] was not protected by the first amendment. Finally, he took the position that the first amendment does not protect libelous publications.

The Supreme Court was not swayed by any of these arguments. The Court said the proposition that the fourteenth amendment was directed against state action had no application to the instant case. It took the view that although this was a civil law suit between private parties, state action was involved because the Alabama courts had applied a state rule of law which the petitioners claimed imposed invalid restrictions on their constitutional freedoms of speech and press. The Supreme Court, speaking through Mr. Justice Brennan, said that the "test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[108] Thus, the application of a state rule of law by the courts of Alabama involved state power which is subject to the fourteenth amendment.

The Court also swept aside the respondent's argument that the advertisement was "commercial advertising" and therefore not protected by the first amendment. The Court said the respondent's reliance on the *Chrestensen* case was "wholly misplaced."[109] It was pointed out that in *Chrestensen* the Supreme Court had held that a "city ordinance forbidding street distribution of commercial and

[107] 316 U.S. 52 (1942).
[108] 376 U.S. at 265.
[109] *Ibid.*

business advertising matter did not abridge the First Amendment freedoms, even as applied to a handbill having a commercial message on one side, but a protest against certain official action on the other."[110] The Court went on to state that its holding in *Chrestensen* was based on the "factual conclusions that the handbill was 'purely commercial advertising' and that the protest against official action had been added only to evade the ordinance."[111]

By contrast, the Court did not consider the publication involved in the instant case to be a commercial advertisement. "It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern."[112] The Court said the fact that the advertisement in this case was paid for was immaterial and that any

> other conclusion would discourage newspapers from carrying "editorial advertisements" of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.[113]

The Court concluded that the effect of this would be "to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources'."[114]

The Court also rejected the respondent's contention that the first amendment does not protect libelous publications. The respondent relied heavily on statements by the Court to the effect that libelous utterances are not protected by the Constitution.[115] The Court said that those statements did not foreclose its inquiry into the instant case because none of the cases containing such

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[110] *Ibid.*
[111] *Id.* at 266.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*
[115] See Konigsberg v. State Bar of Cal., 366 U.S. 36, 49-50 (1961); Barr v. Matteo, 360 U.S. 564 (1959); Farmers Union v. WDAY, Inc., 360 U.S. 525 (1959); Roth v. United States, 354 U.S. 476 (1957); Beauharnais v. Illinois, 343 U.S. 250 (1952); Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); Near v. Minnesota, 283 U.S. 697, 715 (1931).

statements "sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials."[116] The Court pointed out that *Schenectady Union Publishing Co. v. Sweeney*[117] was the only previous case that presented the question of constitutional limitations upon the power to award damages for libel of a public official, and in that case the Court was equally divided so that the question was never decided. The Court continued its rationale by stating that 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."[118] The Court concluded that like "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."[119] Thus, the Court rejected the three grounds asserted for insulating the judgment of the Alabama courts from constitutional scrutiny.

Under the Alabama rule of law, as applied in this case, a written publication is libelous per se if the words tend to injure a person's reputation or tend to bring the individual into public contempt. The standard is met if the words are such as to injure an individual in his public office or impute misconduct to him in his office. A jury must find that such words were published of or concerning the plaintiff, but "where the plaintiff is a public official his place in the governmental hierarchy is sufficient evidence to support a finding that his reputation has been affected by statements that reflect upon the agency of which he is in charge."[120]

Once it is established that a statement is libelous per se and that it was published of and concerning the plaintiff, the defendant has no defense under the Alabama rule of law except truth. Unless the defendant can prove to the jury's satisfaction that the statement involved is true in all particulars, general damages are presumed and may be awarded without proof of pecuniary injury. Recovery of punitive damages apparently requires proof of actual malice. If a defendant retracts or corrects the defamatory matter

[116] 376 U.S. at 268.
[117] 316 U.S. 642 (1942).
[118] 376 U.S. at 269.
[119] *Ibid.*
[120] *Id.* at 267.

under certain circumstances prescribed by statute,[121] he is entitled to a complete defense against the assessment of punitive damages. However, good faith motives and belief in the truth do not negate an inference of malice, but may be considered by the jury in the mitigation of punitive damages.

The question before the Supreme Court was whether the Alabama rule of law as applied to an action brought by a public official against critics of his official conduct abridged the freedom of speech and of the press guaranteed by the first and fourteenth amendments.[122] In the process of rationalizing its determination of this issue, the Court discussed certain events in the Nation's history as well as key judicial decisions on the interpretation of the first amendment to show the scope of the protection afforded expressions concerning public affairs and public officials by that amendment. The analysis clearly depicted a profound national commitment to free, uninhibited debate and expression on public affairs and about public officials. The Court's discussion also made it clear that despite the abuses and harm which result from it, such as exaggeration, inaccurate and false statements, half-truths, and damaged reputations, liberty of expression on matters relating to government and involving public officials is a keystone of democracy.[123]

Against this background, the Court considered the safeguards of the Alabama rule of law to see whether they adequately protected freedom of speech and press as guaranteed by the first and fourteenth amendments. The Court commenced the analysis by comparing civil and criminal libel in Alabama. The Court set forth as a premise that "what a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel,"[124] and then proceeded to show that the civil law of libel in Alabama had fewer safeguards than criminal libel in that state. For instance, the maximum fine for criminal libel is 500 dollars,[125] as compared with the 500,000 dollar verdict in the instant case. Moreover, anyone accused of violating the criminal libel statute has the criminal law safeguards such as requirements of an indictment and proof beyond reasonable doubt, as well as the limi-

[121] ALA. CODE ANN. tit. 7, § 915 (1958).
[122] The text of the amendments is set out in note 3 *supra*.
[123] 376 U.S. at 269-77.
[124] *Id.* at 277.
[125] ALA. CODE ANN. tit. 14, § 350 (1958).

tation upon double jeopardy. None of these safeguards are available to the defendant in an action for civil libel in Alabama. The Court concluded that the "Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' "[126]

The defense of truth was not considered an adequate safeguard either. The Court said:

> Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars .... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." ... The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.[127]

Thus, the Supreme Court decided that the Alabama rule of law as applied in the instant case abridged freedom of speech and of the press as guaranteed by the first and fourteenth amendments since the Alabama rule failed to provide adequate safeguards for the protection of those liberties.

After holding that the Alabama rule was contrary to the first and fourteenth amendments, the Court stated:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[128]

The rule adopted by the Court is similar to the one stated in the Kansas case of *Coleman v. MacLennan*,[129] which has been followed by a number of state courts. The Court's rule is based on

[126] 376 U.S. at 278, citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[127] 376 U.S. at 279. (Citations omitted.)

[128] *Id.* at 279-80.

[129] 78 Kan. 711, 98 Pac. 281 (1908). See also New York Times Co. v. Sullivan, 376 U.S. 254, 280 n.20 (1964).

the balancing of "rights." The Court took the view that freedom of speech and of the press are not absolute rights: That although uninhibited expression and discussion about public affairs and public officials are an essential part of democracy and, consequently, cannot be shackled by the imposition of the standard of absolute truth upon those who engage in such discussion, there are limitations to the rights of free speech and press. It was the Court's position that those constitutional guarantees do not include false and malicious utterances and that a public official has the right to have his reputation in public office protected from them.

As the Alabama rule was inconsistent with the federal rule, the Supreme Court reversed the judgment of the Alabama Supreme Court and remanded the case. Since the respondent might seek a new trial under this holding, the Court stated that considerations of effective administration required it to review the evidence in the record to determine whether it could constitutionally support a judgment for the respondent. The Court then analyzed the evidence that had been presented against the defendants. It concluded, with respect to the individuals, that even if it were assumed that they authorized the use of their names on the advertisement, there was no evidence whatsoever to show that they were aware of erroneous statements or in any way reckless in that regard. Consequently, there was no showing of actual malice as required by the federal rule. With regard to *The New York Times,* the Court reached the conclusion that even though the evidence against it might support a finding of negligence for failing to discover misstatements in the advertisement upon which the case was based, the evidence in the record was insufficient to show the gross negligence or recklessness necessary to support a finding of actual malice. Consequently, as in the case of the individual defendants, the judgment against the *Times* was without constitutional support.

II. Questions Raised Or Suggested By The Case

The analysis of the *Sullivan* case from its incipiency to its final disposition by the United States Supreme Court suggests a variety of questions, and it is not my intention to try to deal exhaustively with all of these. However, there are several problem areas which I believe are more significant than the others and discussion will be concentrated on them.

A. The Adequacy of the Criterion Adopted By the Supreme Court

The resolution of the question of the extent to which constitutional protections for free speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct involves the balancing of several factors: protection of an individual's reputation in public office against false and defamatory statements; the public's interest in the free flow of information about public officials and public affairs; and the right of persons to freedom of speech and of the press as guaranteed by the first and fourteenth amendments. To strike the proper balance among these various factors is not an easy task. After weighing and considering these factors in *Sullivan,* the Supreme Court concluded that the first and fourteenth amendments prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[130]

The rule adopted by the Supreme Court in effect nationalized or unified part of the law of libel. Prior to *Sullivan* many state courts had ruled on the question of the legal liability of the press for publishing false and defamatory statements about public officials in connection with their official duties.[131] It was generally agreed by the state courts that the publication of adverse criticism about a public official that is factually correct is in the realm of fair comment, and is a good defense to any libel action a criticized official may institute against the publisher.[132] However, the state courts had split views with respect to the situation where a publisher, in good faith, reported a false statement about a public official relating to his conduct in office. A majority of the state courts which encountered this problem held that the publisher was liable for such misstatement.[133] A minority of state courts have extended the

[130] *Id.* at 279-80.

[131] Since the courts have treated candidates for public office the same as public officials, the principles stated about public officials should apply to candidates for public office.

[132] See Boyer, *Fair Comment,* 15 OHIO ST. L.J. 280 (1954); RESTATEMENT, TORTS §§ 606-10 (1938); 37 GEO. L.J. 404 (1949); 62 HARV. L. REV. 1207 (1949).

[133] For further discussion and state-by-state authorities, see A. S. Abell

privilege of fair comment to protect a publisher from liability for false and defamatory statements made in good faith about a public official. The rule adopted by the Supreme Court in *Sullivan* is basically the same as the view espoused by a minority of the state courts;[134] and as the federal rule is in terms of the protection the Constitution affords every person in the exercise of public criticism, the Supreme Court has, in effect, unified the law of libel on this point since the majority view simply would not afford a person the constitutional guarantees of freedom of speech and of the press expressed in the rule adopted by the Supreme Court. In brief, the majority view has been eliminated by the position taken by the Supreme Court.

Of the two views followed by the various states, the minority view was the more liberal since it gave the greater encouragement to the free flow of information concerning public affairs. This liberal position was, in effect, followed by the Supreme Court. However, three Justices of the Supreme Court felt that the first and fourteenth amendments demanded that the Court adopt an even more liberal position. Justices Black, Goldberg, and Douglas argued in their concurring opinions that the Constitution gives people and the press an unconditional right to criticize official conduct; that it does not matter whether such criticism is made in good faith or maliciously, or whether it is true or false; and the Court should adopt a rule giving recognition to this principle.

The chief difference between the rule enunciated by the Court and the one urged by the concurring members is the "test of malice." The Court has taken the position that the Constitution protects the person, who, in good faith, makes a false and defamatory statement about a public official's conduct; however, such a statement "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not,"[135] is not privileged and the injured official may recover damages. The Court's rule

Co. v. Kirby, 227 Md. 267, 273, 176 A.2d 340, 342-43 (1961); Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 896 & n.102 (1949); RESTATEMENT, TORTS § 598, comment *a* at 261 (1938); Annots., 110 A.L.R. 412 (1937), 150 A.L.R. 358 (1944).

[134] Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908), is the leading case expounding the minority view. It was cited by the Court in support of the federal rule that it adopted. 376 U.S. at 280-82.

[135] *Id.* at 279-80.

places the burden of proving "malice" upon the public official bringing the action.

The "test of malice" presents some real difficulties. " 'Malice,' . . . is an elusive, abstract concept hard to prove and hard to disprove."[136] In fact, if the "malice" rule had been in effect when the *Sullivan* case was tried, I believe the defendants would have still had to carry their case to the Supreme Court to get relief. Mr. Justice Black observed in his concurring opinion that the record did not "indicate that any different verdict would have been rendered . . . whatever the Court had charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas which in theory would protect the press."[137] That observation appears to be sound. The nature and circumstances of this case were such that the great probability is that even if the trial court had charged that there must be a finding of malice in order to hold the defendants liable, the jury would have made such a finding. The Alabama Supreme Court even stated in its opinion that the conduct of the *Times* had been such as to impress the jury with its "bad faith" and "its maliciousness inferable therefrom."[138] Consequently, there can be little doubt that if the Supreme Court rule requiring the "test of malice" had been in effect at the time of the trial of this case, the chances are that the jury in Montgomery, Alabama, would have returned a verdict against the defendants anyway. I believe, however, that such a verdict would have ultimately been set aside by the Supreme Court. Its opinion in the present case substantiates that view since the Court analyzed the evidence contained in the record and found that there was no showing of actual malice as required by the federal rule.[139]

The "test of malice" principle leaves the door open for more litigation to be resolved eventually by the Supreme Court. A public officer who feels that a defamatory statement about his conduct in office associates him with the locally popular side of a highly controversial and bitterly disputed issue—such as the race question in the Deep South—may well bring suit. With the determination of the question of malice basically in the hands of the jury, he would know

[136] *Id.* at 293 (concurring opinion).
[137] *Id.* at 295 (concurring opinion).
[138] New York Times Co. v. Sullivan, 273 Ala. 656, 686, 144 So. 2d 25, 51 (1962).
[139] 376 U.S. at 285-92.

that his chances of prevailing on the thinnest kind of evidence would be excellent and thus would be encouraged to bring suit. In such a prejudicial atmosphere, the person who made the statement might well have to appeal to the Supreme Court before obtaining relief. Thus, the question of whether the proof presented by the public official who instituted the libel action was sufficient to support a finding of actual malice would again be before the Supreme Court. The Court must carefully consider this question, whenever it is raised, in order to prevent the law of libel from being used in some states as a method of suppressing expressions which support the cause of racial equality or other controversial causes.

Under the Supreme Court rule, a person is culpable of actual malice if he makes a false statement against a public official "with reckless disregard" of whether it is false or not. Precisely what constitutes "reckless disregard" is an open question. It depends on the facts and circumstances of each particular case. As state courts have had little experience in applying the standard of "reckless disregard" for "malice" in libel suits,[140] and as this is an area in which minds can easily differ,[141] further litigation concerning the application of this standard can be expected; and, in my opinion, at least some of it will have to be resolved by the Supreme Court.

As there is plenty of room for litigation under the "actual malice" rule, it can be expected that newspapers and other communications media will carefully watch their activities in certain areas of the Deep South where there is a profound feeling among the white populace against interference with racial problems by "outside agitators." In such places, juries and state courts are likely to be highly prejudiced and accept a substandard amount of evidence as proof of "malice." Certainly persons in the communications field will not want to spend the large sums of money necessary to appeal cases to the Supreme Court in order to obtain relief. Consequently, it is logical to expect them to proceed with caution in the Deep South.

In exercising such caution, communications media will be deterred from freely criticising the conduct of public officials for fear

[140] See Hallen, *Character of Belief Necessary for the Conditional Privilege in Defamation*, 25 ILL. L. REV. 865 (1931); Comment, 69 HARV. L. REV. 879, 929-31 (1956).

[141] See, *e.g.*, New York Times Co. v. Sullivan, 273 Ala. 656, 686, 144 So. 2d 25, 51 (1962). *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254, 285-88 (1964).

of the expense of becoming involved in litigation. There will be a tendency to play it safe. This will have the effect of dampening the free flow of information about certain public issues, particularly those relating to the struggle of the Negro in the Deep South for racial equality.

There would be much less chance of litigation under the rule urged by the concurring members of the Supreme Court. Under this rule a person could make malicious statements about a public official's conduct in office without being held liable for damages in a libel action. Consequently, the area in which a public official could sue successfully would be reduced to defamatory statements about his private life.

Although the rule advocated by the concurring Justices would give the people and press an unconditional right to criticize a public official's conduct in office and thus would stimulate the free flow of information about public affairs by reducing the possibility of libel litigation, such a rule is not without its shortcoming. At the outset of this discussion on the adequacy of the standard adopted by the Supreme Court, it was stated that the resolution of the question of the extent to which the constitutional protections for free speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct involves the balancing of several factors: protection of an individual's reputation in public office against false and defamatory statements; the public's interest in the free flow of information about public officials and public affairs; and the right of persons to freedom of speech and of the press as guaranteed by the first and fourteenth amendments. The rule advocated by Justices Black, Goldberg, and Douglas is heavily weighted in favor of the free flow of information and the protection of freedom of speech and of the press. The emphasis is placed on the need in a democratic society for public affairs to be freely debated, discussed, and criticized so that the people can better determine and resolve public issues. This rule, however, gives virtually no protection to an individual's reputation in public office, and it can be argued that therein lies its failing.

In opposition to the "liberal" rule urged by the concurring Justices it might be argued that maliciously made defamatory statements cannot help the people of the country resolve public issues; in fact, such statements are intentionally made to mislead and mis-

guide the populace and, consequently, may have just that result. In the light of this, it may be contended that it is more reasonable to protect the reputation of a public official than to protect malicious falsehoods which can do nothing but prevent or interfere with the sound resolution of public issues. Therefore, the rights of freedom of speech and of the press should end when a person maliciously makes false statements about a public official's conduct in office; and at that point, the injured public official should have the right to recover damages by proving that such statements were made with "actual malice."

On the basis of the foregoing analysis of the "actual malice" rule adopted by the Court and the "liberal" rule urged by the concurring Justices, it may be concluded that both rules are deficient in some respects. It is submitted, however, that the litigation problem and the adverse effect on the free flow of information which may result therefrom under the "actual malice" rule are of greater consequence than the damage to reputations of public officials which may result under the "liberal" rule. I am inclined to agree with Mr. Justice Black's comment:

> This Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials. "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinion upon any public measure, or upon the conduct of those who may advise or execute it."[142]

Idealistically, however, it would be best if the law were in such a state as to encourage the maximum flow of information about public affairs and at the same time give greater protection to a public official's reputation in office than he would receive under the "liberal" rule. I believe this could be accomplished if the "liberal" rule were adopted and if Congress passed legislation giving a public official a "right of reply." This would enable a public official who felt that misstatements of fact had been made about him in the press or other media of communications to answer his critics in the same medium

[142] 376 U.S. at 297 (concurring opinion).

that the alleged misstatements were made. For instance, if a newspaper published statements about a public official which he considered to be false, that official under the suggested legislation would be able to respond immediately by supplying a written reply which would have to be published by that newspaper.[143] Many nations of the world have had excellent experience with such legislation,[144] and it is generally agreed among those who have written on this subject that Congress does have the power to enact such legislation under its power to regulate interstate commerce and its authority over the postal system.[145]

The combination of the "liberal" rule and the "right of reply" legislation would stimulate the free discussion of public affairs so necessary in a democratic society and, at the same time, give sufficient protection to the reputations of public officials. In fact, from the viewpoint of actually protecting a public official's reputation in office, the "right of reply" is better than a libel action. Frequently what happens in a libel suit is that there is some initial publicity when the suit is brought, then a long period of silence until the case is tried, and a small amount of publicity after the case is over. Usually the press space given to the final determination of a libel suit that is not of sensational importance is extremely limited and is generally relegated to some inconspicuous place in the newspaper. Consequently, even if the public official wins the case, the public as a whole is often unaware that his reputation has been vindicated. On the other hand, if the public official were able immediately to

[143] Naturally the details of such legislation would have to be worked out. Such things as the amount of space that would be given for a reply in a newspaper, methods of replying through media other than the press, the time within which a public official would have to demand the right to reply, etc., would have to be determined. It is not my intention to spell out in this article the points that would go into such legislation, but it is my purpose merely to discuss the principle of the "right of reply." For detailed discussions of such legislation, see 1 CHAFFEE, GOVERNMENT AND MASS COMMUNICATION 145-99, 179-95 (1947); Donnelly, *The Right of Reply: An Alternative to an Action for Libel,* 34 VA. L. REV. 867 (1948); Leflar, *Legal Remedies for Defamation,* 6 ARK. L. REV. 423 (1952).

[144] For discussions of such legislation in other nations, see ROTHENBERG, THE NEWSPAPER 114-32 (1948); and 1 UNITED NATIONS, FREEDOM OF INFORMATION 254-66 (1950). The best known "right of reply" law is probably France's "Droit de Response," which is described in 1 UNITED NATIONS, *op. cit. supra* at 247-48.

[145] See Leflar, *supra* note 143, at 450-54; Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation,* 49 CORNELL L.Q. 581, 607 (1964); Prosser, *Interstate Publication,* 51 MICH. L. REV. 959, 995 (1953).

explain an alleged misstatement of fact, the public would be more aware of his position and better able to judge him fairly. As it is now, the news coverage given to such libel suits is often unfair to both the public official involved and to the general public because frequently all of the material facts are never made known to the public.

B. The Question of Due Process

There are a number of examples in the record which indicate that the defendants, particularly the individual defendants, did not receive a fair trial. This is not significant as far as the final outcome of the case is concerned because the case was not decided on the basis of due process, but it is important to illustrate the difficulty of obtaining a fair trial in certain areas of the Deep South when racial issues are involved; and it serves further to raise the question of what, if anything, can be done to remedy this situation. After considering some of the points that lead to the conclusion that the defendants did not receive a fair trial, the question posed will be discussed.

The advertisement that the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" published in the *Times* stirred up a storm of protest. Government officials in Alabama as well as the white community as a whole resented the advertisement and obviously had a feeling of hostility toward those associated with it.[146] The white community wanted those responsible to be punished and action taken to prevent such a thing from happening again.[147] The law suit brought by Commissioner L. B. Sullivan in the guise of libel was for just that purpose: to suppress future expressions supporting racial equality and sharply criticizing the *status quo* by severely punishing the defendants in the instant case.[148]

In such an atmosphere it was extremely difficult, at best, for the defendants to be tried by a fair and impartial jury. The chance of having an impartial jury was made even more dismal because the local press was allowed to take pictures in the courtroom of the jurors and because television cameras were permitted to follow the

[146] See notes 48 & 49 *supra* and accompanying text.
[147] See generally Record, vol. 5, pp. 1999-2077.
[148] *Cf.* Beauharnais v. Illinois, 343 U.S. 250, 263-64 (1952).

jury to the very door of the juryroom.[149] With the community as a whole and their friends and neighbors in particular watching them so closely through the media of local press and television, it is hard to conceive how the jury in such an atmosphere could have possibly reached a fair and impartial verdict.

The late Judge Walter B. Jones, who presided over the trial, was a staunch segregationist who did not believe in the equality of men, but in white supremacy.[150] He insisted on a segregated courtroom,[151] referred to the fourteenth amendment as "a pariah and an outcast,"[152] and stressed his belief in "white man's justice."[153]

I believe Judge Jones's intense belief in the need to preserve the *status quo* in the South prevented him from treating all who appeared before him equally and fairly. For example, he generally referred to the white lawyers who appeared before him in the *Sullivan* case as "Mr."[154] However, nowhere in the entire record does he refer to the Negro attorneys who appeared for the four individual defendants as "Mr.," showing that Judge Jones must have believed that Negroes were too inferior ever to be called "Mr." To brand an attorney with this mark of inferiority before a jury, as Judge Jones did,[155] places the attorney at an obvious disadvantage because if the court does not show respect for an attorney, the chances are that the jury will not either.

An examination of the court's charge with respect to damages and the amount of damages awarded by the jury gives further insight into the question of fair trial. The plaintiff asked for and received a verdict awarding him damages in the sum of 500,000 dollars. There was no evidence of any special damages[156] suffered

[149] See notes 50-52 *supra* and accompanying text.

[150] See generally W. B. Jones, *Court Room Segregation*, 22 ALA. LAW. 190-92 (1961).

[151] *Id.* at 190-91. *Cf.* Johnson v. Virginia, 373 U.S. 61, 62 (1963), where the Court held that state-compelled "segregation in a court of justice is a manifest violation of the State's duty to deny no one the equal protection of its laws."

[152] W. B. Jones, *supra* note 150, at 191.

[153] *Id.* at 192.

[154] See, *e.g.*, Record, vol. 2, p. 570.

[155] *Ibid.*

[156] The damages in *Sullivan* may be divided into two categories: compensatory or actual damages and punitive or exemplary damages. Compensatory or actual damages consist of general and special damages. General damages are those which the law presumes to flow naturally and necessarily from the tortious act and may be awarded without proof of any specific amount to compensate the plaintiff for the injury done him. Special damages are those

by the plaintiff as a consequence of the advertisement. In fact, none of the witnesses who testified on his behalf stated that they believed the statements contained in the advertisement, and five of the six witnesses who testified concerning the impact of the alleged defamatory statements upon the plaintiff's reputation affirmatively testified that they did not believe any of these statements.[157] It is just as difficult to understand how the plaintiff suffered any general damages. It is hard to conceive how any reasonable person could say that as a natural and necessary consequence of the advertisement which appeared in the *Times* the plaintiff's reputation as a public official was injured. As Mr. Justice Black pointed out in his concurring opinion, "viewed realistically, this record lends support to an inference that instead of being damaged Commissioner Sullivan's political, social, and financial prestige has likely been enhanced by the *Times'* publication."[158] Since there was virtually no basis for the jury to award compensatory damages (special and general damages), it is submitted that the entire award of 500,000 dollars must have been for punitive damages.[159]

Under Alabama law, an award in a libel action for punitive damages—as opposed to one for compensatory damages—apparently requires proof of actual malice.[160] In light of this, it is submitted that the court should have affirmatively instructed the jury as to the meaning of "actual malice" so that the jury would have at least known what standard of proof was required for a finding of

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which actually result from the commission of the tortious act, but are not such a necessary result that they will be implied by law, as in the case of general damages, as necessarily flowing from the wrongful act. These damages are of an unusual or extraordinary nature, and though they may naturally flow from the wrong, they are not the necessary consequences of the wrong complained of. Punitive or exemplary damages are those given, exclusive of compensatory damages, to punish and make an example of the wrongdoer. See generally 25 C.J.S. *Damages* §§ 1-2 (1941); 18 WORDS & PHRASES *General Damages* 276-87 (1956); 39A WORDS & PHRASES *Special Damages* 152-68 (1953).

[157] Record, vol. 2, pp. 623, 636, 638, 647, 651, 667.

[158] 376 U.S. at 294.

[159] The *Times* in its requests to charge asked the court to require that a verdict for the plaintiff differentiate between compensatory and punitive damages, but the court refused. Record, vol. 2, p. 846. Consequently, there is no way of knowing with absolute certainty how much of the $500,000 verdict the jury awarded for compensatory damages and how much it awarded in punitive damages. However, for the reasons stated in the text above, the entire $500,000 must be considered as an award for punitive damages.

[160] New York Times Co. v. Sullivan, 273 Ala. 656, 685-86, 144 So. 2d 25, 50; New York Times Co. v. Sullivan, 376 U.S. 254, 262 (1964).

"actual malice." This was particularly important in this case since it is logical to assume that the entire award was for punitive damages, which means that the jury made this rather fantastic award of 500,000 dollars with incomplete knowledge of the fundamental principles governing an award for punitive damages.

The court's charge was highly inadequate in this regard. Judge Jones stated in his charge that the statements in question were libelous per se and as such, "falsity and malice are presumed."[161] The court further stated that "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown."[162] This meant that if the jury found nothing in the evidence to justify a finding of compensatory damages, it was free to make an award of punitive damages without regard to malice since the court had stated that malice is presumed. Obviously this is wrong. The charge should have made it clear to the jury that punitive damages could only be awarded if actual malice were shown, and the court should have explained what "actual malice" meant. However, the court failed to make such an explanation and refused the *Times'* request to charge that the jury must be "convinced" of malice in the sense of "actual intent" to harm or "gross negligence and recklessness" to make an award of punitive damages. It is submitted that the court's refusal to grant this request to charge was such a grave error that it amounted to a denial of a fair trial.[163]

I believe this conclusion is especially justified in the light of the Alabama law on criminal libel, which limits the fine for conviction under that law to 500 dollars.[164] As the Supreme Court pointed out in its opinion, "what a state may not constitutionally bring about by means of criminal statute is likewise beyond the reach of its civil

[161] Record, vol. 2, p. 824.

[162] *Id.* at 825.

[163] The Alabama Supreme Court sustained the trial court and approved its charge. However, the Alabama appellate court failed to come to grips with the alleged error in the trial court's charge discussed in the text above; and by rather strained reasoning skirted the problem by referring to certain conduct of the *Times* which would have justified an inference of malice on the part of the jury. See 273 Ala. at 686, 144 So. 2d at 51. *Quaere:* Did the Alabama Supreme Court wrongfully invade the fact-finding province of the jury? Regardless of the answer to that question, it is quite clear that the conclusion of the Alabama Supreme Court that facts in the case justified an inference of malice against the *Times* was in error. See *id.* at 286-88, 144 So. 2d at 51-52.

[164] ALA. CODE ANN. tit. 14, § 350 (1958).

law of libel." A verdict for punitive damages in the sum of 500,000 dollars, which is one thousand times more than the maximum fine under the criminal statute, goes far beyond vindication and actually amounts to suppression of freedom of expression. The verdict here was clearly excessive and by ordinary standards of fairness should have been set aside by the Alabama courts.[165]

Aside from the foregoing, there were other, perhaps more technical, reasons why it may be argued that the individual defendants were deprived of due process and equal protection of the laws as guaranteed by the fourteenth amendment and, therefore, did not receive a fair trial. For instance, the courtroom was segregated, which is a "manifest violation of the State's duty to deny no one the equal protection of its laws."[166] Furthermore, it is common knowledge that Negroes are excluded from jury panels in Montgomery, Alabama, and this practice, in and of itself, has been held sufficient to deny a Negro defendant a fair trial.[167] Finally, it may be contended that the long-standing exclusion of Negroes from voting for judges in Montgomery County insured that a judge who reflected the prejudice of the white community who elected him would try this case; and, consequently, this prevented the defendants from receiving a fair trial.[168]

I believe the discussion to this point has clearly shown that defendants did not receive a fair trial. As previously pointed out, *Sullivan* is not unique in this regard. It is a matter of general knowledge that frequently persons receive unfair trials in state courts in certain areas of the Deep South in cases involving racial issues. *Sullivan* is another example of this and serves as a point of departure for a discussion of what, if anything, can be done about this problem.

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[165] *Cf.* Crowell-Collier Publishing Co. v. Caldwell, 170 F.2d 941 (5th Cir. 1948).

[166] Johnson v. Virginia, 373 U.S. 61, 62 (1963). The record in *Sullivan* does not show that the courtroom was segregated. However, the writer has talked with a number of persons who participated in the trial, and there is no question that the courtroom was segregated.

[167] See Norris v. Alabama, 294 U.S. 587 (1935); United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), *cert. denied,* 372 U.S. 915 (1963); *cf.* Akins v. Texas, 325 U.S. 398, 408 (1945) (dissenting opinion).

[168] For a summary of voter discrimination in Montgomery County, see 1961 U.S. CIVIL RIGHTS COMM'N ANN. REP. 26. See also Alabama *ex rel.* Gallion v. Rogers, 187 F. Supp. 848 (M.D. Ala. 1960), *aff'd,* 285 F.2d 430 (5th Cir.), *cert. denied,* 366 U.S. 913 (1961). Compare Alabama v. United States, 304 F.2d 583 (5th Cir.), *aff'd,* 371 U.S. 37 (1962).

Many thousands of dollars were spent on this litigation by *The New York Times,* and a substantial amount was spent on behalf of the four individual defendants by two civil rights organizations, the Gandhi Society for Human Rights and The Southern Christian Leadership Conference. In addition, a committee of distinguished lawyers was formed to help the individual defendants on their appeal to the Supreme Court.[169] After the expenditure of literally tens of thousands of dollars, and hundreds, if not thousands, of hours by attorneys on behalf of the defendants, this case was finally heard by the Supreme Court, and the injustice which had occurred in the Alabama courts was corrected.

I think most would agree that it is nothing short of shameful for persons and organizations to have to spend continually huge sums of money and tremendous amounts of time taking cases involving racial issues on appeal from state courts in the Deep South to the Supreme Court in order to get relief from decisions molded by racial prejudice and hate. However, the problem of what to do about it is not an easy one. So often, as in the instant case, a racial issue is the underlying theme of the litigation, but the cause of action is one—such as libel—which is usually adjudicated by state courts.[170] There can be little doubt that if there was some way of removing this type of case from state courts in the Deep South, the cause of justice would be better served; but again, the question is how.

One way in which this objective may be partially accomplished is through the enactment of legislation permitting the removal of these kind of cases from state to federal courts.[171] Federal courts

[169] Theodore W. Kheel, Esq., an attorney in New York City, organized the committee of lawyers known as "Lawyers' Committee on the Alabama Libel Suits" to help the individual defendants in their appeal to the United States Supreme Court. Through this committee the services of William P. Rogers, Esq., former Attorney General of the United States, and the writer were secured to argue this case on behalf of the four ministers before the Supreme Court. Mr. Rogers and I donated our services to this cause as did many other lawyers who contributed to the preparation of the brief and other papers on appeal.

[170] Causes of action normally brought in state courts may sometimes be adjudicated in federal district courts on the basis of diversity of citizenship. See 28 U.S.C. § 1441 (1958).

[171] At present, a defendant can remove a case from a state to a federal court to protect his civil rights. However, this right of removal is very restricted. The cases interpreting this law have held that the denial of civil rights must be by state constitution or statute. Denials by illegal or prejudiced acts of state officers, judges, or juries are not sufficient grounds for removal.

in the Deep South, especially the Court of Appeals for the Fifth Circuit, have been vastly more fair and just in handling litigation involving racial issues than state courts in that region.[172] Consequently, it is suggested that federal legislation should be enacted to permit a defendant to remove a case from a state court to a federal court when it can be shown to the satisfaction of the federal district court to which the case is to be removed that the moving party would not receive a fair trial as guaranteed by the fourteenth amendment if the case in question should be tried in the state court. It would be expected that this legislation would require the federal courts to base their exercise of this power upon a rule of reason, *i.e.*, the test would be whether an ordinarily reasonable person would conclude under the facts and circumstances presented that the moving party would not receive a fair trial in the particular state court involved. To protect the parties against a federal district court is unreasonably exercising or refusing to exercise this power, the legislation should allow for the immediate appeal of the district court's decision to the federal court of appeals without any further appeal to the Supreme Court.[173]

Although there is no precise precedent for such legislation, it would seem to be constitutional. It is a matter of common knowledge that defendants in cases with racial aspects frequently do not get fair trials in state courts in the Deep South. Therefore, there is a need for American citizens to be assured of a fair trial in cases involving racial implications brought in state courts in the Deep

See 28 U.S.C. § 1443 (1958). See also MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE, ¶ 0.03(39) (1949).

[172] See, *e.g.*, Bush v. School Bd., 308 F.2d 491 (5th Cir. 1962); Sawyer v. City of Mobile, 208 F. Supp. 548 (S.D. Ala. 1961); Cobb v. Library Bd., 207 F. Supp. 880 (M.D. Ala. 1961); Parks v. New York Times Co., 195 F. Supp. 919 (M.D. Ala. 1961), *rev'd*, 308 F.2d 474 (5th Cir. 1962); United States v. Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583, *aff'd*, 371 U.S. 37 (1962); Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala.), *aff'd*, 352 U.S. 903 (1956).

[173] The Supreme Court is already under an extremely heavy burden handling appeals involving federal and constitutional questions from state and federal courts throughout the land, and no legislation should add to that burden unless, in the interest of justice, it is absolutely imperative to do so. None of the federal courts of appeal have exhibited any substantial amount of prejudice recently, and there is virtually no reason to believe that injustice would result if they finally decided these matters. The district courts, however, have not been as free from prejudice as the federal appellate courts; consequently, there is much more need for a right of appeal from the district court level.

South. If these state courts are allowed to continue denying defendants fair trials in cases with racial aspects, and such denials are left to be corrected by expensive and time consuming appeals to the Supreme Court, or not at all, these courts will be effectively preventing many from receiving a fair trial, which is a right guaranteed to all persons by the fourteenth amendment; and it would certainly seem appropriate for Congress to pass any legislation necessary to prevent the frustration of one of the fundamental objectives of that amendment.[174]

The proposed legislation is not suggested as a panacea for unfair trials involving acute racial hostility. Even where a case is tried in a federal district court before an absolutely fair judge, the jury of local citizens may be unfair in making key factual findings.[175] I do believe, however, that legislation along the lines suggested would help the situation. Essentially, it would introduce a greater element of fairness in the current situation by permitting the removal of cases involving racial issues and tensions to a court system which has exhibited far less prejudice than the state courts in the Deep South in handling these cases. In that way, such

[174] Section 5 of the fourteenth amendment provides that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The Supreme Court has long recognized Congress' right to pass legislation to give force and effect to this amendment. See *Ex parte* Virginia, 100 U.S. 339, 344-45 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879). It may be argued that the proposed legislation would permit a defendant other than one in a case involving racial conflict to seek removal of his case from a state to a federal court on the ground that the defendant would not receive a fair trial in the state court, and that such applications would place an undue burden upon the federal court system. For instance, in states outside of the South, such as New York, Illinois, and California, where there are substantial numbers of criminal cases, defendants in these cases may try to effect a removal of their cases from the state courts to the already very busy and overworked federal courts in those areas. It is true that the proposed legislation might initially invite a large number of applications for removal in cases having nothing to do with racial issues, but I believe in a relatively short time the federal courts could discourage the making of such applications except in the most deserving cases; for there could be instances, not involving racial conflict, where the facts and circumstances would indicate that a defendant would not be able to secure a fair trial in state courts, and on those occasions, which I believe will be rare, it is submitted that it should be possible to remove such litigation to federal courts. Consequently, I think legislation of the type proposed is very much needed and would not place too great a burden on the federal judiciary system.

[175] However, such verdicts would probably be set aside more rapidly in the federal judiciary than in the state court hierarchies of the Deep South.

legislation would, in my opinion, contribute in substantial measure to the solution of a current problem of injustice.

C. The Question of Jurisdiction

The question of whether the Circuit Court of Montgomery County had jurisdiction over the *Times* was tenaciously contested by that newspaper throughout the course of the entire litigation. As previously pointed out the circuit court held that the *Times* had made a general appearance in the action and, therefore, was subject to its jurisdiction. This holding was sustained by the Alabama Supreme Court. In addition, the Alabama Supreme Court ruled that the activities of the newspaper were more than sufficient to meet the minimal standards required for service of process on an agent or representative of the company and, as the advertisement in question was connected with the activities of the *Times* in Alabama, the newspaper was subject to service of process under Alabama's "long arm" statute.[176] The Alabama appellate court declared that the plaintiff's service of process upon Don McKee, a "stringer" for the *Times* in Montgomery whom the court considered to be an agent of the company, and the plaintiff's service pursuant to the "long arm" statute were proper and brought the newspaper company within the jurisdiction of the Alabama courts.[177]

As stated earlier, the Supreme Court did not discuss the question of jurisdiction in its opinion although the issue was argued at length by the *Times* in its brief. By failure to mention the question of jurisdiction, the Supreme Court must have considered that the Alabama courts had jurisdiction over the *Times*. However, the opinion does not indicate whether the Supreme Court based its conclusion on any one or more of the following grounds: that the *Times* had converted a special appearance into a general one; that it was effectively served through service on one of its agents; or that it was subject to and was properly served by substituted service as provided in Alabama's "long arm" statute.

Logically, it would seem the Supreme Court must have considered that *The New York Times* had made a general appearance. The circuit court originally held that the *Times* had made a general appearance and thereby waived any defects in the service of process.

[176] Ala. Acts 1953, No. 282, at 347. See note 39 *supra*.
[177] See 273 Ala. at 686, 144 So. 2d at 51.

The Alabama Supreme Court sustained this finding, which meant that the first question relating to jurisdiction that faced the Supreme Court was whether the *Times* had made a general appearance. If it agreed with this conclusion, there was no need to discuss whether the Alabama courts had jurisdiction, since by its general appearance, the *Times* had voluntarily submitted to Alabama jurisdiction. On the other hand, if the Supreme Court concluded the *Times* had not made a general appearance, then it would seem that it should have explained precisely on what grounds the Alabama courts gained jurisdiction over the *Times*. From its silence, it is logical to assume that the Supreme Court considered that the newspaper company had made a general appearance, thus making the other grounds upon which the Alabama Supreme Court ruled that the state courts gained jurisdiction moot and requiring no further discussion or explanation by the Supreme Court.

However, it cannot be concluded that the Supreme Court, by its silence, also ratified the other rulings by the Alabama Supreme Court on the point of jurisdiction. On the contrary, by agreeing that the *Times* had made a general appearance, it is submitted that the Supreme Court never reached the question of whether the methods of service used by the plaintiff brought the *Times* under the jurisdiction of the Alabama courts.

By failing to discuss the question of jurisdiction, the Supreme Court has left open for future consideration an area of substantial significance to companies operating in communications on an interstate basis. The New York Times Co. is neither an Alabama corporation nor a corporation licensed to do business in that state, and its activities in Alabama were negligible at the time this law suit was instituted.[178] Moreover, the advertisement which formed the basis for the plaintiff's cause of action was not solicited or obtained in Alabama nor was it secured from an Alabama advertiser. In spite of these facts, the Supreme Court of Alabama held that the *Times* had sufficient contacts with the state to justify subjecting it to jurisdiction there. In addition, the court ruled the cause of action was so connected with the newspaper's activities in the state as to warrant service of process on it by substituted service. The United States Supreme Court has never ruled on the question of

[178] See Record, vol 1, pp. 402, 441-45; *id.*, vol. 2, pp. 601-02; *id.*, vol. 5, pp. 1942-43.

jurisdiction in a case involving the press or other communications media where a company's contacts with the state were nearly as minimal as those in *Sullivan*. Whenever this does occur, it would have an inhibiting effect upon those in communications if the Supreme Court should follow the ruling of Alabama's highest court.

Such a ruling would make it possible for companies in the communications industry to be exposed to vexatious, abusive, and expensive law suits in states where these companies engage in a negligible amount of activity. Moreover, these states might be substantial distances from the home offices of the defendant companies, and litigation in these distant forums could cause tremendous inconveniences. As a consequence of all this, these companies would probably cease their operations in these states altogether. For instance, there would be a tendency among newspaper publishers not to send correspondents or use "stringers" to gather first hand news reports in states where they did not regularly operate. They would rely on wire services and second hand reports gathered from local newspapers. This would bring about more uniformity in news and opinion when greater diversity and less standardization are more essential to the successful functioning of a democratic society.[179]

The Alabama Supreme Court based its finding that the *Times'* activities in the state were sufficient to subject it to jurisdiction upon the following grounds: the gathering of news by the *Times* in Alabama through "stringers"[180] and staff correspondents;[181] the intermittent solicitation of advertising in Alabama by that newspaper and its acceptance of unsolicited advertising from advertisers located within the State;[182] and its delivery to Alabama of a small

[179] The standardization of news and opinion has long been a matter of grave concern. See Terminiello v. Chicago, 337 U.S. 1 (1949); United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); ERNST, FIRST FREEDOM 93 (1946). With respect to the need for diversity, see Wood v. Georgia, 370 U.S. 375 (1962); Cantwell v. Connecticut, 310 U.S. 296 (1940).

[180] A "stringer" gathers and sends news to an out-of-town newspaper or magazine on a part-time basis. He is not considered an employee of the out-of-town newspaper, and payments are made in the case of the *Times* on the basis of material requested or used at the rate of one cent per word. A "stringer" probably has other employment. Usually he works for a local newspaper. See Record, vol. 1, pp. 136, 140-42, 153.

[181] *Id.* at 53-54; *id.*, vol. 3, pp. 1140-42.

[182] *Id.*, vol. 1, pp. 54-55; *id.*, vol. 3, p. 1142.

number of copies of *The New York Times,* pursuant to unsolicited requests by Alabama readers and news dealers.[183] Put in still more specific terms, it appears that the *Times* had two "stringers" in Alabama at the time Sullivan brought suit;[184] and on occasion, it dispatched correspondents to Alabama to cover news events there.[185] To give an idea of how much work these "stringers" did for the *Times* in Alabama, payments to resident "stringers" in Alabama during the first five months of 1960, the year the suit was commenced, totalled 245 dollars—approximately one tenth of one per cent of the total payments to "stringers" by the *Times* during that period.[186] The occasional visits of *Times'* correspondents to Alabama to report on news events places its correspondents in that state with no greater frequency than they are in such far off places as Ankara, Athens, and New Delhi.[187] According to the record in this case, 6/100ths of one per cent of the *Times'* daily circulation and 2/10ths of one per cent of its Sunday circulation are in Alabama, and 46/1000ths of one per cent of its advertising revenue is derived from that state.[188] In a word, the activities of the *Times* in Alabama at the time this suit was initiated were minuscule.

In recent years, the Supreme Court has expanded and made more flexible the standards under which a nonresident corporation may be subjected to a state's jurisdiction. However, it is highly doubtful whether any of these criteria sustain the Alabama Supreme Court's conclusion that the activities of the *Times* in the state were "more than amply sufficient" to meet the minimal standards required to subject that corporation to Alabama's jurisdiction.[189]

For a corporation to be subject to the jurisdiction of a state in suits arising there from transactions unconnected with its activities in that state, the corporation must engage in "continuous corporate operations" in the state which are "so substantial and of such a nature as to justify suit against it on the causes of action arising from dealings entirely distinct from those activities."[190]

[183] *Id.,* vol. 1, p. 55; *id.* at 428; *id.,* vol. 3, pp. 1142-47.
[184] *Id.,* vol. 1, pp. 440-42.
[185] Brief for Petitioner, p. 78, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[186] Record, vol. 1, pp. 441-42.
[187] See Brief for Petitioner, p. 78.
[188] Record, vol. 1, pp. 402, 444-45. See also Brief for Petitioner, p. 78.
[189] See 273 Ala. at 669, 144 So. 2d at 33.
[190] International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945). See also *id.* at 317. Note that even certain forms of regularly recurring

It is submitted that the negligible operations of the *Times* in Alabama were of such a nature as to make its relationship with that state a distal one; and consequently, these operations did not meet the standard of being "so substantial and of such a nature" as to subject the *Times* to the jurisdiction of that state in cases arising out of transactions completely separate from its activities in Alabama.

A nonresident corporation whose operations in a state are not so substantial as to bring it under the rule discussed in the previous paragraph may nonetheless be required to defend a suit in that state where the cause of action is connected with the corporation's activities within the state.[191] However, the activities of *The New York Times* in Alabama were unrelated to the cause of action sued upon by the plaintiff, since the advertisement which formed the basis for the suit was not placed by an Alabama advertiser nor was it solicited or obtained in Alabama. The ad in issue had nothing to do with the *Times'* activities in Alabama. Thus, the facts in the case do not seem to support the finding that Alabama had jurisdiction over the *Times*.[192]

There is further reason to doubt that the *Times* was subject to the jurisdiction of Alabama. The Supreme Court in *International Shoe*[193] stated that the criteria for determining whether a nonresident corporation is subject to the jurisdiction of another state is not

> simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state is a little more or a little less. . . . Whether due process is

activity may not justify the assertion of jurisdiction over a nonresident corporation. See, *e.g.*, Rosenberg Co. v. Curtis Brown Co., 260 U.S. 516 (1923).

[191] International Shoe Co. v. Washington, *supra* note 190, at 317, 319. See also Hanson v. Denckla, 357 U.S. 235, 252 (1958); Blount v. Peerless Chemicals (P.R.) Inc., 316 F.2d 695, 700 (2d Cir. 1963).

[192] *Sullivan* is different from McGee v. International Life Ins. Co., 355 U.S. 220 (1957), which was relied on by the Alabama Supreme Court, because there the cause of action arose directly out of the defendant's activities in California. See also Hanson v. Denckla, *supra* note 191, at 251-52. Moreover, *McGee* involved a suit on an insurance contract against a nonresident insurer, and this contract constituted a continuing legal relationship between the insurer and the insured within the state, a relation which the states, with the concurrence of Congress, have long regulated. 59 Stat. 33 (1945), as amended, 15 U.S.C. §§ 1011-15 (1958).

[193] International Shoe Co. v. Washington, 326 U.S. 310 (1945).

> satisfied must depend rather upon the *quality and nature* of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.[194]

International Shoe also cited with approval what Judge Learned Hand had pointed out years earlier: an " 'estimate of the inconveniences' which would result to the corporation from trial away from its 'home' or principal place of business is relevant . . ."[195] in determining whether a nonresident corporation should be subject to a state's jurisdiction.

Viewed against this background, the Alabama Supreme Court ruling which would permit virtually every newspaper to be sued in any state in which it had just a trivial circulation would be so greatly inconvenient to publishers as to be unfair and, therefore, would certainly not further the "fair and orderly administration of the laws."[196] This conclusion is buttressed in *Sullivan* by the fact that the action was not initiated merely to recover damages for alleged injury to the plaintiff's reputation, but was primarily brought to make an example of the defendant company by imposing upon it unreasonably harsh punitive damages.

Moreover, it would seem that the application of the "flexible standard"[197] of *International Shoe* to newspapers and other communications media which are protected by the first amendment would not only require a consideration of the due process problems present in every jurisdiction case, but a determination of whether the assertion of jurisdiction would impinge upon freedoms of speech and of the press as guaranteed by the first amendment. The Alabama rule would suppress the circulation of out-of-state papers which, like *The New York Times,* are sent principally as an accommodation to local readers. As these out-of-state papers would suffer little financial loss by withdrawing from states like Alabama, they would stop shipping their papers to these states rather

[194] *Id.* at 319. (Emphasis added.) (Citation omitted.)

[195] *Id.* at 317, citing Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930).

[196] In *Sullivan* the total circulation of the issue in which the advertisement giving rise to the suit appeared was 650,000, of which approximately 394 copies went into Alabama, and about 35 of these into Montgomery County. Record, vol. 2, pp. 601-2; *id.,* vol. 5, pp. 1942-43.

[197] The standard set in International Shoe Co. v. Washington, 326 U.S. 310 (1945), was referred to as the "flexible standard" in Hanson v. Denckla, 357 U.S. 235, 251 (1958).

than take the risk of being subjected to expensive lawsuits. The result would be that the residents of such states would be deprived of the opportunity of reading newspapers from other sectors of the country. In addition, as previously pointed out, out-of-state papers would hesitate to use "stringers" or correspondents in such states as Alabama. As the Alabama rule would operate to suppress circulation and newsgathering, it would be inconsistent with the first amendment, and this casts further doubt upon its legal soundness.

In summary, by failing to discuss the question of jurisdiction in *Sullivan,* the Supreme Court left open for future consideration the question of whether a nonresident corporation in the field of mass communications engaged in a minuscule amount of newsgathering, news circulation, and advertising—or other equally negligible activities—in a state is subject to the jurisdiction of that state. When and if this question of substantial significance should come before the Supreme Court, it is unlikely—for the reasons stated above—that the Court's ruling will be similar to that of the Alabama Supreme Court.[198]

III. Appraisal And Evaluation

New York Times Co. v. Sullivan is a most significant decision. For not only did the Supreme Court enunciate, for the first time, a rule to govern "the extent to which the constitutional protections for speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct,"[199] but in making this decision the Court brought considerable uniformity to the law of libel and nullified an action which had encroached upon free speech and press "under the guise of punishing for libel."[200]

For many years state courts have been split on whether a person is liable for publishing a false statement about the conduct in office of a public official when such publication is made in good faith. By adopting the rule requiring a public official to prove "actual malice" to recover damages for a defamatory statement relating to his official conduct, the Supreme Court has, in effect, followed

[198] For excellent discussions of various arguments against the Alabama rule, see Brief for Petitioner, pp. 69-90; Brief for the Washington Post Co. as Amicus Curiae, pp. 28-36.

[199] 376 U.S. at 256.

[200] Beauharnais v. Illinois, 343 U.S. 250, 264 (1952).

the minority state-court view, wiped out the majority view, and unified or nationalized this segment of the law of libel in the United States.

There can be no doubt that the libel action in *Sullivan* was instituted to punish and suppress expressions of support for the cause of racial equality. In this case the Supreme Court actually dealt with the problem it had anticipated in *Beauharnais*.[201] It had to exercise its authority to defeat an action which encroached "on freedom of utterance under the guise of punishing libel."[202]

Sullivan is a landmark decision in the law of libel and in the field of civil liberties. It represents a tremendous step forward in these areas, but like all cases, even great ones, it solved some problems and raised or left others. There is serious question, for example, whether the Constitution affords greater protection to persons exercising the right of public criticism than the standard adopted by the Court. Moreover, although the case was not decided on the basis of due process, it is an excellent example of the difficulty a defendant encounters in obtaining a fair trial in state courts in certain areas of the Deep South when racial issues are involved, and it served as a point of departure in this article for a discussion of the question of what, if anything, can be done to remedy that situation. It also raised some jurisdictional questions which are of substantial significance to communications companies operating on an interstate basis. The Court in its wisdom, and perhaps in its anxiety to reach the very important substantive issues in the case, left these jurisdictional problems for future consideration. When viewed as a whole, however, *New York Times Co. v. Sullivan* is a soundly reasoned decision which dealt with issues of such social and legal magnitude as to make it of historic moment in the annals of American law.

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[201] *Id.* at 263-64 & n.18.
[202] *Id.* at 263-64.