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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 40

RALPH D. ABERNATHY,
FRED L. SHUTTLESWORTH,
S. S. SEAY, SR., and
J. F. LOWERY,

Petitioners,

v.

L. B. SULLIVAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR THE PETITIONERS

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BRIEF FOR THE PETITIONERS

Petitioners Abernathy, Shuttlesworth, Seay, and Lowery submit this brief for reversal of the judgment of the Supreme Court of Alabama entered on August 30, 1962, which affirmed a $500,000 libel judgment for punitive damages entered on November 3, 1960 in the Circuit Court of Montgomery County, Alabama against petitioners and The New York Times Company, their co-defendant, in a suit for alleged libel, based on an advertisement (R. 6, 1925; reproduced in Appendix A *infra,* p. 63) printed in The New York Times on March 29, 1960, appealing for contributions to aid the civil rights movement in the South.

Opinions Below

The Trial Court (Circuit Court of Montgomery County) did not write an opinion. Its judgment is printed at R. 862. The Opinion of the Alabama Supreme Court (R. 1139) affirming said judgment is reported at 273 Ala. 656.

Jurisdiction

The judgment of the Supreme Court of Alabama was entered on August 30, 1962 (R. 1180). The petition for writ of certiorari was filed on November 21, 1962 and was granted on January 7, 1963, 371 U. S. 946 (R. 1194). The jurisdiction of this Court rests upon 28 U. S. C. § 1257(3).[1]

Questions Presented[2]

1. May the State of Alabama, under the guise of civil libel prosecutions, suppress criticism of the political conduct of unnamed public officials, consistently with the guaranteed freedoms of speech, press, assembly and association of the First and Fourteenth Amendments?

2. Were petitioners' rights to due process of law, as guaranteed by the Fourteenth Amendment, violated by a $500,000 punitive judgment against them upon a record devoid of evidence of authorization, consent, publication or malice on their part or of pecuniary damage to respondent?

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[1] By letter of the Clerk of this Court dated August 9, 1963, the time of petitioners to file this brief has been extended to September 9, 1963.

[2] Influenced by the landmark decisions of this Court in the "sit in" cases (n. 6, *infra*), *NAACP* v. *Button,* 371 U. S. 415 and *Johnson* v. *Virginia,* 373 U. S. 61 among others, and the historic events which have taken place since the filing of the petition for writ of certiorari herein on November 21, 1962, petitioners have in this brief consolidated the five questions there presented to this Court so as to focus their argument on the all-pervasive issue of the impingement on and serious threat to their First and Fourteenth Amendment rights.

3. Does the rule of law adopted by the State of Alabama below, requiring total strangers to the challenged publication, to procure and study it and, under pain of $500,000 punitive damages, "retract" any claimed libel therein, impose an arbitrary and onerous burden which unconstitutionally infringes petitioners' rights under the First and Fourteenth Amendments?

4. Were the rights of Negro petitioners to equal protection, due process of law and fair and impartial trial under the Fourteenth Amendment violated by the trial of the suit brought against them by a white public official of Montgomery (i) in a segregated Courtroom, rife with racial bias and community hostility, (ii) before an all-white jury (from which Negro citizens were intentionally and systematically excluded), and (iii) before a trial judge, not properly qualified, who has stated from the Bench that the Fourteenth Amendment is inapplicable in Alabama Courts, which are governed by "white man's justice"?[3]

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved are the First, Fourteenth and Fifteenth Amendments to the United States Constitution which are set forth in Appendix B, *infra,* pp. 65-66.

The Statutes involved are Title 7, Sections 913-16 of the Code of Alabama (i.e., the Alabama "Retraction"

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[3] Judge Jones *On Courtroom Segregation,* 22 The Alabama Lawyer, No. 2, pp. 190-192 (1961), which reprints "Statement made from the Bench of the Circuit Court of Montgomery County, February 1, 1961, . . ." during the trial of the related libel action by Mayor Earl James of Montgomery against The New York Times Company and the four Negro petitioners herein. On March 17, 1961, Judge Jones entered his order denying the new trial application herein (R. 970).

Statute) and Title 14, Sections 347 and 350 thereof (i.e., the Alabama "Criminal Libel" Statute) which read as follows:

Title 7, Section 913 of the Code of Alabama:

"RETRACTION MITIGATES DAMAGES.—The defendant in an action of slander or libel may prove under the general issue in mitigation of damages that the charge was made by mistake or through inadvertence, and that he has retracted the charge and offered amends before suit by publishing an apology in a newspaper when the charge had been thus promulgated, in a prominent position; or verbally, in the presence of witnesses, when the accusation was verbal or written, and had offered to certify the same in writing."

Title 7, Section 914 of the Code of Alabama:

"AGGRIEVED PERSON MUST GIVE NOTICE TO PUBLISHERS OF ALLEGED LIBEL BEFORE VINDICTIVE DAMAGES CAN BE RECOVERED.—Vindictive or punitive damages shall not be recovered in any action for libel on account of any publication concerning the official conduct or actions of any public officer, or for the publication of any matter which is proper for public information, unless five days before the bringing of the suit the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter."

Title 7, Section 915 of the Code of Alabama:

"WHEN ACTUAL DAMAGES ONLY RECOVERABLE.—If it shall appear on the trial of an action for libel that an article complained of was published in good faith, that

its falsity was due to mistake and misapprehension, and that a full correction or retraction of any false statement therein was published in the next regular issue of said newspaper, or in case of daily newspapers, within five days after service of said notice aforesaid, in as conspicuous a place and type in said newspaper as was the article complained of, then the plaintiff in such case shall recover only actual damages."

Title 7, Section 916 of the Code of Alabama:

"RECANTATION AND TENDER; EFFECT OF.—If the defendant, after or before suit brought, make the recantation and amends recited in the preceding sections, and also tender to the plaintiff a compensation in money, and bring the same into court, the plaintiff can recover no costs, if the jury believe and find the tender was sufficient."

Title 14, Section 347 of the Code of Alabama:

"LIBEL.—Any person who publishes a libel of another which may tend to provoke a breach of the peace, shall be punished, on conviction, by fine and imprisonment in the county jail, or hard labor for the county; the fine not to exceed in any case five hundred dollars, and the imprisonment or hard labor not to exceed six months."

* * * * *

Title 14, Section 350 of the Code of Alabama:

"DEFAMATION.—Any person who writes, prints, or speaks of and concerning any woman, falsely imputing to her a want of chastity; and any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude, shall, on conviction, be punished by fine not exceeding five hundred dollars,

and imprisonment in the county jail, or sentenced to hard labor for the county, not exceeding six months; one or both, at the discretion of the jury.

Statement

Numerous recent decisions of this Court[4] have focused sharply on the intense nationwide efforts to secure the constitutional rights of Negroes, and on the numerous unconstitutional acts committed in various Southern states to frustrate these efforts. The four petitioners herein are Negro ministers (resident in Alabama at all relevant times) and religious and spiritual leaders of the movement to secure civil rights in Alabama and throughout the South.

1. *The Nature of the Publication*—To enlist public support and raise funds for the legal defense of Dr. Martin Luther King, Jr. (who shortly before had been indicted in Alabama for perjury)[5], and in aid of the non-violent demonstrations against racial segregation, a New York group called "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South" ("Committee" hereinafter), with which petitioners had no connection, caused to be printed and published in The New York Times (*"The Times"* hereinafter) on March 29, 1960, an advertisement entitled: "Heed Their Rising Voices" (R. 6; Pl. Ex. 347 at R. 1925, reproduced in full in Appendix "A" p. 63, *infra*). The advertisement commented on the activities of *unnamed* governmental authorities, in cities in a number

[4] *United States* v. *Alabama,* 373 U. S. 545; *United States* v. *Barnett,* 373 U. S. 920; *NAACP* v. *Alabama,* 357 U. S. 449; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293; *Fair* v. *Meredith,* 305 F. 2d 341 (C. A. 5), cert. den., 371 U. S. 828; *Brown* v. *Board of Education,* 347 U. S. 483; *Holmes* v. *City of Atlanta,* 350 U. S. 879; *Cooper* v. *Aaron,* 358 U. S. 1; *Morgan* v. *Virginia,* 328 U. S. 373.

[5] Dr. King was later acquitted of this charge (R. 680).

of Southern states, designed to stifle the then-current protest demonstrations[6] against segregation by students in various Southern institutions (including Alabama State College at Montgomery). In commenting on such activities, the advertisement used the broad, generic term "Southern violators of the Constitution".

The ad referred to the harassments to which Rev. King had been subjected, including arrests, imprisonment, the bombings of his home, and the then-pending perjury indictment, and concluded with an appeal for contributions to be sent to the Committee's office in New York in support of Dr. King's defense, the desegregation movement, and the voter registration drive in the South.

Under the text of the appeal appeared the names of some sixty eminent sponsors (including Mrs. Eleanor Roosevelt, Drs. Harry Emerson Fosdick, Mordecai Johnson, Alan Knight Chalmers and Algernon Black, and Messrs. Raymond Pace Alexander, Elmer Rice and Norman Thomas).

Below the list of sponsors appeared the caption "We in the south who are struggling daily for dignity and freedom warmly endorse this appeal", under which caption were printed the names of eighteen (18) ministers from various Southern states, including the four petitioners.

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[6] See Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First 60 days,* DUKE L. J. 315 (Summer, 1960), describing in detail (at 323-325) repressive acts and statements of Alabama public officials.

This Court has already reversed as unconstitutional a number of such repressive actions of officials of various Southern States including Alabama. *Shuttlesworth* v. *City of Birmingham,* 373 U. S. 262; *Gober* v. *City of Birmingham,* 373 U. S. 374; *Peterson* v. *City of Greenville,* 373 U. S. 244; *Garner* v. *Louisiana,* 368 U. S. 157; *Lombard* v. *Louisiana,* 373 U. S. 267.

The appeal concludes with the following plea for funds:

> "We must extend ourselves above and beyond moral support and render the material help so urgently needed by those who are taking the risks, facing jail, and even death in a glorious re-affirmation of our Constitution and its Bill of Rights.
>
> "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."

2. *The Evidence Concerning Publication*—The undisputed record facts demonstrate that the names of petitioners were added to the advertisement without consultation with them and without their authorization or consent (R. 788-90; 792-4; 797-8; 801-2; 806-10; 824-5; 1175). Indeed, the record is clear that their first knowledge of *The Times* ad came when they received in the mail respondent Sullivan's identical letters which had been posted on or about April 8, 1960, and which were admittedly misdated "March 8, 1960" (Pl. Exs. 355-8, R. 1962-7). Moreover, these letters did not contain a copy of the ad, but merely quoted out of context the two paragraphs on which Sullivan based his complaint, and demanded that each petitioner "publish in as prominent and public a manner" as *The Times* ad, "a full and fair retraction of the entire false and defamatory matter . . ." (R. 1962-8). Petitioners could not possibly comply with this demand; and, before they could consult counsel or even receive appropriate advice in regard thereto, suit was instituted by respondent on April 19, 1960 (R. 789; 793; 798; 801-3).

The undisputed record facts further show a complete lack of connection between petitioners and the publication

of the advertisement. The typescript was submitted to *The Times* by one John Murray (R. 732), with a space order from The Union Advertising Service (R. 736). Names of sponsors (the Committee) were typed at the foot (R. 739). Accompanying (or submitted shortly following) the typescript was a letter, signed by A. Philip Randolph, (R. 739, 756-757) purporting to authorize the use of the names of the "signed members of the Committee" as sponsors (R. 1992). It is not disputed that petitioners' names did not appear on the manuscript as submitted (R. 806-7). Petitioners' names were subsequently placed on the advertisement by one Bayard Rustin, on his own motion, without any consultation with petitioners as shown by the undisputed evidence (R. 808-810) and the findings of the Court below (R. 1174-5). No representative of *The Times* ever asked petitioners whether they had consented to this use of their names (R. 754-5, 770, 790, 793, 797-8, 802).

None of the petitioners saw the *full text* of the advertisement prior to the commencement on April 19, 1960 of respondent Sullivan's suit (R. 789, 793, 798, 801); petitioners' first notice of *The Times* ad (and only of the language complained of) came from Sullivan's aforementioned misdated letters mailed on or about April 8, 1960 (R. 789, 793, 798, 802). Petitioners each wholly denied any knowledge of the ad prior to its publication, any consent to the use of their names and any responsibility for its publication (R. 788-90, 792-4, 795, 797-8, 801-2). Respondent in no way disputed these record facts which are confirmed in the opinion of the Court below (R. 1174-5).

3. *The Alleged Libel—The Times* ad in suit, without identifying or naming any particular individual or fixing

any particular time period, refers to various incidents of claimed repression in numerous cities throughout the South, commencing with "Orangeburg, South Carolina" and continuing on to "Montgomery, Alabama" and "Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Charlotte and a host of other cities in the South. . . ."

On October 5, 1959, respondent Sullivan became one of the City Commissioners of Montgomery, Alabama (R. 694). Nowhere in *The Times* ad in suit was respondent Sullivan or any other southern official referred to by name or office. Many of the repressive actions in Montgomery, referred to in the ad, occurred prior to Sullivan's term of office, as Sullivan himself admitted (R. 703-19).

The entire *gravamen* of Sullivan's complaint (which alleged no special damage but sought $500,000 as punitive damages) concerned the following two paragraphs of the advertisement (*i.e.,* the third and sixth), which were alleged to be defamatory:

> "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."
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> * * * * *
>
> "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.*" (R. 2-4).

Although Sullivan's complaint (R. 2-3) and his letters to petitioner demanding retraction (R. 1962-7) suggest that the above quoted paragraphs followed one another in consecutive order in *The Times* ad in suit, the record fact is that the first paragraph quoted is separated from the second by two lengthy paragraphs comprising almost a complete column of the ad—one relating to events in numerous cities in Southern states other than Alabama, and the other lauding Dr. King as the "world famous leader of the Montgomery Bus Protest" and the symbol of "the new spirit now sweeping the South" (Pl. Ex. 347, R. 1923-6, reproduced in full in Appendix "A" hereto).

Moreover, Sullivan's entire claim of libel rests on the following minor discrepancy: whereas the ad said that "truckloads" of armed police "ringed the Alabama State College Campus," the fact was that "on three occasions they [police] were deployed near the Campus in large numbers" (R. 594).

Clearly no distinction of substance can validly be drawn between police "ringing" the campus and being "deployed near the campus in large numbers"—particularly in the context of comment and criticism of official conduct on this most vital public issue.

Further, the ad said that Dr. King was arrested "seven times". The testimony was that he was arrested three or four times in Montgomery, Alabama (three of which arrests admittedly occurred prior to the respondent's term of office) (R. 592, 594-5); but there is nothing in the text or context of the advertisement which either requires or permits the inference that the seven arrests occurred in Montgomery

or anywhere else in Alabama. Other alleged inaccuracies in the ad were conceded by respondent Sullivan to refer to matters within the jurisdiction of the State Education Department or other agencies, and to matters occurring long prior to respondent's taking office (R. 684-5, 688, 694, 701, 716, 719, 725).

None of Sullivan's witnesses (four of whom first saw the ad when called to the office of plaintiff's counsel shortly before the trial to be prepared as witnesses) testified that they believed the ad, or that they thought any less of respondent by reason of its publication (R. 623, 625, 636, 638, 644, 647, 651, 667).

4. *Biased Trial and Judgment*—Alabama has enacted sweeping racial segregation laws,[7] which reflect the community hostilities and prejudices that were funneled into the Courtroom. Continuous denunciations of the defendants and of the material in the advertisement appeared in Montgomery newspapers prior to the trial, and continued throughout the trial and while the defendants' motions for new trial and appeals were pending (R. 1999-2243; 871-89).

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[7] See Southern School News, August 1960, Vol. 9, No. 2, p. 1, (no desegregation in Alabama schools);

Alabama Code Recompiled 1958, Title 44 § 10 (Segregation of paupers)

id., Title 45 §§ 52, 121-3 (Segregation of prisoners)

id., Title 48 § 186 (Segregation of railroad waiting rooms)

id., Title 48 §§ 196-7 (Segregation of railroad coaches)

id., Title 48 § 301(31a) (Segregation of motor busses)

id., Title 51 § 244 (Accounts of poll taxes paid by each race must be kept separate)

id., Title 52 § 613(1) (Segregation of delinquents)

id., Title 45 § 4 (Segregation of tubercular patients)

id., Title 45 § 248 (Segregation of patients in mental institutions)

cf. Green v. *State,* 58 Ala. 190 (no intermarriage).

The trial itself took place in a carnival-like atmosphere, with press photographers in the Courtroom taking pictures of all the jurors for the two local newspapers (R. 951, 955), and television cameras following the jury to the very door of the juryroom[8] (R. 889-90, 2242). Two Montgomery newspapers, one on its front page, carried the names of the jurors (R. 2079-80, 952).

This suit was tried in November 1960, in Montgomery County, before Judge Walter B. Jones, and an all-white jury. The Trial Judge himself was a member of the jury commission of Montgomery County, the group responsible for the selection of the jury panel (R. 936, 971), from which Negroes have been intentionally and systematically excluded.

Respondent Sullivan's counsel was permitted by the Trial Judge, without restraint, over objections of petitioners' counsel, to indulge in such inflammatory appeals to racial bias as the mispronunciation of the word "Negro" as "Nigra" and "Nigger" in the presence of the jury, (R. 579-80), and in an invidious reference in his summation to purported events in the Congo (R. 929-30, 939-41). The Opinion of the Alabama Supreme Court below, in condoning such conduct, accepts counsel's lame excuse that he pronounced "the word 'negro' " as he did because that was the way he had pronounced it "all my life"[9] (R. 1168-9).

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[8] The Judicial Conference of the United States strongly condemned such practices "as inconsistent with fair judicial proceedings . . ." by resolution adopted at its meeting in March 1962 (See New York Law Journal, July 13, 1962, at p. 1).

[9] *Cf. Screws* v. *United States,* 325 U. S. 91, 135, where Mr. Justice Murphy stated in dissent: "As such, he [Robert Hall, a Negro citizen] was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution." [Brackets added].

Throughout the proceedings below, petitioners took all possible steps to preserve their constitutional rights. They demurred to the complaint (R. 15-24) and filed Amended Demurrers (R. 74-99); their demurrers, as amended, were all overruled (R. 108-9). They made numerous proper objections and excepted to the repeated admission of improper testimony of respondent's witnesses (R. 1102-09). They twice moved to exclude plaintiffs' evidence (R. 109-14, 728, 816), which motions were denied (R. 728, 816-17). They made motions for special findings (R. 114-18) and submitted written requests to charge (see R. 827); they made due and timely objections and exceptions to the denial of their motions and requests. Petitioners moved (see, *e.g.*, R. 109-14; 728, 816) for a dismissal at the end of plaintiff's case and for a directed verdict at the conclusion of the entire case, which motions were denied (R. 728, 816-18). Each petitioner duly and timely submitted a motion for new trial (R. 970-1028) on which Judge Jones refused to rule. This evasion of duty by the trial court was, in turn, seized upon by the Alabama Supreme Court as a pretext for denying review (R. 1169-70).

The treatment afforded petitioners' motions for new trial underlines the repeated denial to petitioners of proper opportunity to be heard below. On December 2, 1960 petitioners properly and timely made, filed and submitted motions for new trials. Petitioners duly appeared, in compliance with Title 13, Sec. 119 of the Alabama Code, on December 16, 1960, the day to which said motions (and the motions of their co-defendant, The New York Times) had been continued. On March 3, 1961, the day on which, the general understanding was, the motions of petitioners and The New York Times would be heard together, the Trial

Court heard extensive argument on behalf of The New York Times in support of its motion for a new trial and then refused to hear petitioners' counsel, or permit him to argue, or allow him even to make a statement for the record (R. 895-6). Despite the fact that he had petitioners' papers properly before him, Judge Jones erroneously refused repeated demands by petitioners' counsel for rulings on their motions for new trials (R. 984, 998-9, 1013, 1027-8). On March 17, 1961, Judge Jones denied the Times' motion for a new trial (R. 970); arbitrarily, he never ruled on petitioners' motions (R. 895-6).

All of the foregoing rulings were properly objected to and challenged, and embodied in petitioners' Assignments of Error to the Alabama Supreme Court, duly filed therein and affixed to the certified transcript Record duly submitted and filed with this Court (R. 1100-1132).

In this setting and notwithstanding the complete absence of any evidence of or legal basis for liability of petitioners or any showing of actual damage suffered by respondent, the jury, upon the clearly erroneous instructions of the Trial Judge (R. 819-28), on November 3, 1960 rendered a one sentence verdict in "favor of the plaintiff" in the sum of $500,000 (R. 862), on which the Trial Judge entered judgment[10] (R. 863).

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[10] *The Times'* Trial Counsel stated that the Sullivan verdict "could only have been the result of the passion and prejudice revived by that celebration [the Centennial Commemoration] and other events embraced within that Civil War celebration" and the failure of the Court to adjourn the trial even during the day "while ceremonies took place changing the name of the Court Square to "Confederate Square" (R. 2222); and again that plaintiff [Sullivan] "was allowed to present the case to the jury as a sectional conflict rather than as a cause of action for libel" (R. 944).

Summary of Argument

The State of Alabama and its public officials have developed refined and sophisticated schemes of repression, striking directly at the rights of free speech and press, the roots of our democracy. To silence people from criticizing and protesting their wrongful segregation activities, Alabama officials now seek to utilize civil libel prosecutions which require still less proof than was required under the infamous Sedition Act of 1798, 1 Stat. 596.

The libel prosecutions and enormous judgment herein are clearly induced by Alabama's massive "cradle to grave" statutory system of racial segregation, and clearly constitute another "ingenious" scheme by the State of Alabama and its public officials to suppress criticism of the political conduct of Southern public officials. As such, they clearly constitute prohibited state action and cannot be protected from review by mere labels such as "libel per se."

The preferred First and Fourteenth Amendments' freedoms of speech, press, assembly and association are the very cornerstone of the Bill of Rights. Moreover, the constitutional protection of criticism of the political conduct and actions of public officials extends even to exaggerations and inaccuracies.

Since ". . . public men are as it were, public property" (*Beauharnais* v. *Illinois,* 343 U. S. 250, 263), criticism and defamation of their official conduct is clearly within the protections guaranteed by the First and Fourteenth Amendments. The judgment and proceedings below clearly abridge these basic constitutional protections, especially in view of the vital public interest in the integration struggle,

the role of petitioners as spiritual leaders of the non-violent resistance movement, and the unconscionable penalty imposed below.

In addition to their patent disregard of these preferred constitutional protections, the Alabama Courts rendered and affirmed the judgment below on a record devoid of evidence of publication by petitioners, evidence of their consent to or authorization of publication, or evidence of damage of any kind to respondent due to the publication of the alleged libel. This disregard is all the more flagrant where the libel alleged is based solely on one claimed minor discrepancy in an advertisement (which is substantially correct) that nowhere mentions respondent by name or refers to him by office or title. Further, they attempted to meet petitioners' defenses that they had not published the ad and that it was not libelous, by adopting definitions of libel, libel per se and ratification, so strained, vague and detached from established legal principles as to amount in and of themselves to unconstitutional infringements of petitioners' rights.

Moreover, imposition of such liability because of petitioners' silence abridges petitioners' First Amendment rights of free association and belief.

Coupled with all of these violations of basic rights is the fact that the trial proceedings patently denied petitioners due process and equal protection of laws. Clearly, when four Negro ministers are sued by a white City Commissioner for an ad seeking support for Dr. Martin Luther King, and the case is tried in a segregated court room in Montgomery, Alabama, during a Civil War Centennial, before an all-

white jury and a trial judge elected at polls from which Negroes were excluded, and when that very Judge states that "white man's justice" governs in his court and permits respondent's counsel to say "Nigger" and "Nigra" to the jury, then the Fourteenth Amendment does indeed become the "pariah" that the Trial Judge below called it.

ARGUMENT

I

This Court Must Nullify Schemes Which Encroach on Freedom of Utterance Under the Guise of Punishing Libel.

The century-long struggle of the Negro people for complete emancipation and full citizenship has been met at each step by a distinct pattern of resistance, with only the weapons changing, from lynching, violence and intimidation, through restrictive covenants, Black Codes,[11] and Jim Crow laws, to avoidance, "interposition," "nullification," tokenism and open contempt. Into this pattern, the case at bar fits naturally as a further refinement.

In recent years, when tremendous advances have occurred, "when growing self-respect has inspired the Negro with a new determination to struggle and sacrifice until first-class citizenship becomes a reality" (King, *Stride Toward Freedom* 154 (1958)), when there has come "an awakening moral consciousness on the part of millions of white

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[11] Immediately following the Civil War, the former slave owners sought to replace the shackles of slavery "with peonage and to make the Negroes an inferior and subordinate economic caste . . . [T]he consequences of slavery were to be maintained and perpetuated." Konvitz, *A Century of Civil Rights* 15 (1961); Franklin, *From Slavery to Freedom* 299 (1956); Du Bois, *Black Reconstruction* 381-525 (1935).

Americans concerning segregation'' (*id.*, p. 154), a national crisis has developed. This crisis was created when the aspirations of the Negroes were met ''with tenacious and determined resistance'' by ''the guardians of the status quo,'' which ''resistance grows out of the desperate attempt of the White South to perpetuate a system of human values that came into being under a feudalistic plantation system which cannot survive'' today (*id.*, pp. 155, 156, 158).[12]

Because the essence of this brief is that the civil libel prosecutions involved herein constitute another of the ''evasive schemes for racial segregation whether attempted 'ingeniously' or 'ingenuously' '' (*Cooper* v. *Aaron,* 358 U. S. 1, 18), we believe it pertinent and material to view this ''scheme'' historically, in the ''mirror''[13] of the Supreme Court's approach and reaction to other, related ''schemes'' to preserve segregation.

Even if consideration be limited to the fields of education, voting and housing, such ''evasive schemes'' have been struck down because of this Court's conviction that ''constitutional rights would be of little value if they could be thus indirectly denied'' (*Smith* v. *Allwright,* 321 U. S. 649, 664).

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[12] "The articulate and organized group, however, was the one favoring the maintenance of the caste system, and it used boycotts, effective appeals to the Southern legislatures, violence and *other means to resist the changes.* In general this group is larger and more effective in the Deep South . . . [Emphasis Added]

"All of the continuing leaders of the Southern resistance are persons with some traditional and legitimate authority. They apparently have a strong racist ideology, and strong personal desires to keep the Negro subordinate . . ." *Postscript Twenty Years Later* to Myrdal, *The American Dilemma* XXXVII (1962).

[13] "The Court is a good mirror, an excellent mirror, of which historians for some reason have little availed themselves, of the struggle of dominant forces outside the Court." Mr. Justice Frankfurter, as quoted in the preface of Vose, *Caucasians Only* (1959).

Thus, the "separate but equal" concept of *Plessy* v. *Ferguson,* 163 U. S. 537 (1896) entrenched segregation in schools until 1954[14] when this Court, in *Brown* v. *Board of Education,* 347 U. S. 483, enunciated the fundamental constitutional principle that racial segregation in the field of public education stamped Negroes with a "badge of inferiority" and violated the equal protection of the laws guaranteed by the Fourteenth Amendment.

For almost a decade, to this very day, there has been "massive resistance" to this decision. (Mendelson, *Discrimination* 40 (1962); also see *id.,* pp. 33-68 *passim*). The State of Alabama has been a leader of the resistance. This Court in 1958 was compelled to observe that the constitutional rights of school children "can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted *'ingeniously or ingenuously'* " (*Cooper* v. *Aaron,* 358 U. S. 1, 17) [Emphasis added]. In 1960, this Court in a unanimous memorandum made it clear that it would brook no further delay through the series of laws based upon the

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[14] The 1960 Report of the U. S. Commission on Civil Rights (1863-1963 Freedom to the Free—Century of Emancipation) p. 5, refers to the period of 1875-1900 as "Reaction, Redemption and Jim Crow," when "the former masters would have mastered the techniques of maintaining separation of the races through the agencies of the law." It was the period when "the Supreme Court was becoming attuned to the changing temper of the times" (*Id.,* p. 62). See, *e.g., Slaughter-house Cases,* 83 U. S. 36 (1873); *United States* v. *Reese,* 92 U. S. 214 (1876); *Cruikshank* v. *United States,* 92 U. S. 542 (1876); *Civil Rights Cases,* 109 U. S. 3 (1883); and *Plessy* v. *Ferguson,* 163 U. S. 537 (1896). But note the sole dissent of the first Mr. Justice Harlan which foreshadowed the reversal in the *Brown* case 58 years later. "... [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law" (*Id.,* p. 559).

"concept" of "interposition" (*Bush* v. *Orleans School Board,* 364 U. S. 500). Dilatory requests for review have been refused. "Tokenism" as a device is under challenge.[15]

The resistance techniques have taken many forms, some subtle and others overt, including contempt of federal court orders by the Governors of Alabama and Mississippi which required the use of federal troops to enforce basic constitutional rights. Ironically, the resistance took the equitable concept of "all deliberate speed," (*Brown* v. *Board of Education,* 349 U. S. 294, 301), which this Court proffered as a shield, and converted it to a sword. It was employed not for "consideration" of a "prompt and reasonable start towards full compliance" (349 U. S. at 300), but for resistance and nullification. This Court in its last term recognized that the concept of "all deliberate speed" had been abused and subverted. *Watson* v. *City of Memphis,* 373 U. S. 526.[16]

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[15] "This Court . . . condemns the Pupil Placement Act when, with a fanfare of trumpets, it is hailed as the instrument for carrying out a desegregation plan while all the time the entire public knows that in fact it is being used to maintain segregation by allowing a little token desegregation" (*Bush* v. *Orleans Parish School Board,* 308 F. 2d 491, 499 (CA 5)).

[16] Mr. Justice Goldberg stated *"Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools, let alone other public facilities not involving the same physical problems or comparable conditions. [373 U. S. 526, 530]

". . . Hostility to the constitutional precepts underlying the original decision was expressly and firmly pretermitted as such an operative factor. . . . [*Id.,* p. 531]

"Most importantly, of course, it must be recognized that even the delay countenanced by *Brown* was a necessary, albeit significant, adaptation of the usual principle that any deprivation of constitutional rights calls for prompt rectification. The rights here asserted are, like all such rights, *present* rights; they are not merely hopes to some *future* enjoyment of some formalistic constitutional promise. The basic guarantees of our Constitution are warrants for the here and now and unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled." (*Id.,* pp. 532-3).

This Court has been vigilant, as it pledged it would be in *Cooper* v. *Aaron, supra,* to invalidate direct and indirect schemes seeking to preserve racial segregation.[17] Such vigilance must now be directed against the "civil libel" scheme so "ingeniously" and "ingenuously" and to date successfully employed as a weapon against the Negro petitioners and The New York Times.

Similarly, in the realm of Negro voting rights and other appurtenances of full citizenship, this Court has exposed the use of "evasive schemes" designed to nullify and sterilize Negro civil rights.

After this Court struck down a Texas law which bluntly denied the Negro the right to vote in a Democratic Party primary (*Nixon* v. *Herndon,* 273 U. S. 536), circumvention and more subtle means were employed. When these too failed to pass this Court's scrutiny (*Nixon* v. *Condon,* 286 U. S. 73), Texas repealed all such laws and fell back successfully to the legal sanctuary of "private action", placing the device beyond the reach of the Fourteenth Amendment (*Grovey* v. *Townsend,* 295 U. S. 45).

But, several years later, in 1944, this Court in *Smith* v. *Allwright,* 321 U. S. 649, overcame the "private action" device by going behind the white primary. Mr. Justice Reed aptly described this Court's searching approach to

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[17] Thus, for example, peonage and involuntary servitude imposed through ingenious subterfuges, whether by contract or otherwise, have been stripped of their "casting" and branded violations of the Thirteenth Amendment. This Court went behind the basic agreement between private individuals—being alert and vigilant to subtle means of reimposing slavery. *Bailey* v. *Alabama,* 219 U. S. 219; *Taylor* v. *Georgia,* 315 U. S. 25; *Pollack* v. *Williams,* 322 U. S. 4.

nullification of constitutional rights by indirection (321 U. S. at 664):

> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a *form* which permits a private organization to practice racial discrimination in the election. *Constitutional rights would be of little value if they could be thus indirectly denied*" (Emphasis added).

Foreshadowing the aftermath of *Brown* v. *Board of Education, supra, Smith* v. *Allwright* "aroused a storm of denunciation in the south, participated in by members of Congress, governors and others who proclaimed that 'white supremacy' must be preserved. They threatened that the decision would be disregarded or circumvented." Fraenkel, *The Supreme Court and Civil Liberties* 31 (1963). Thus, each "evasive scheme" thereafter employed to achieve discrimination in primary machinery was struck down. See *Terry* v. *Adams,* 345 U. S. 461; Fraenkel, *supra,* p. 31; Myrdal, *The American Dilemma* 479-86 (1944).[18]

In addition to the right to vote, full citizenship includes the right of jury service. Southern efforts to restrict and prevent jury service by Negroes reflect a similar pattern of resort to the full arsenal of "evasive schemes" after the passage of direct laws denying Negroes service on juries was barred by this Court. *Strauder* v. *West Virginia,*

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[18] This text under the heading "Southern Techniques for Disfranchising of Negroes" refers not only to evasive legal schemes but to "violence, terror and intimidation" as the effective means used to disfranchise Negroes in the South (p. 485).

100 U. S. 303. It was in this context that this Court first observed that it would not tolerate discrimination "whether accomplished ingeniously or ingenuously." *Smith* v. *Texas,* 311 U. S. 128, 132; see also *Norris* v. *Alabama,* 294 U. S. 587; *Cassell* v. *Texas,* 339 U. S. 282; *Avery* v. *Georgia,* 345 U. S. 559. Even the finding of a state court that no discrimination existed did not bar this Court from going behind the facade to unmask, after review of the facts, subtle techniques for achieving denial of impartial jury. *Ross* v. *Texas,* 341 U. S. 918; *Shepherd* v. *Florida,* 341 U. S. 50.

Grand jury selections which directly or indirectly discriminated were interdicted. *Smith* v. *Texas, supra; Eubanks* v. *Louisiana,* 356 U. S. 584.

This Court overcame the artifice of gerrymandering which is in essence an "evasive scheme" to disenfranchise Negroes. *Gomillion* v. *Lightfoot,* 364 U. S. 339; and in *Baker* v. *Carr,* 369 U. S. 186, it has begun to grapple with more subtle, deeply entrenched means of effective disenfranchisement. In the same spirit, this Court did not permit voting registrars who committed wrongful acts to be insulated by the designation of "private persons." *United States* v. *Raines,* 362 U. S. 17.

Finally, in the realm of housing, the use of artificial forms and "legalisms" as techniques for perpetuating discrimination was struck down. Racially restrictive zoning ordinances were declared illegal. *Buchanan* v. *Warley,* 245 U. S. 60; *Harmon* v. *Tyler,* 273 U. S. 668. In this field, the label of "private action" on racially restrictive covenants remained an impregnable fortress for discrimination for many decades (cf. *Civil Rights Cases,* 109 U. S. 3; Vose, *Caucasians Only* (1959)). Through racially restric-

tive covenants, efforts of Negroes to move out of slums and ghettoes to find better homes and schools were effectively and "legally" thwarted.[19]

In *Shelley* v. *Kraemer,* 334 U. S. 1, 19, this Court breached the walls of the fortress protecting these obnoxious covenants and held that the "private action" of contracting parties, when enforced by state courts, resulted in state action, saying: "active intervention of the state courts supported by the full panoply of state power" resulted in state action in the full and complete sense of the phrase.

Again, as with *Smith* v. *Allwright* and *Brown* v. *Board of Education,* both *supra,* a landmark declaration of positive constitutional right and privilege was met by resistance. A search was on to nullify, interpose or circumvent. (Vose, *op. cit., supra,* 227-34). This Court, five years later, in 1953 had to stem a tide of damage suits which had victimized those who "breached" the racial covenants. *Barrows* v. *Jackson,* 346 U. S. 249. Mr. Justice Minton, in a decision which bears close scrutiny as applicable to the case at bar, concluded that the grant of damages by a state court constituted state action under the Fourteenth Amendment; that to allow damages against one who refuses to discriminate "would be to encourage the use of restrictive covenants. To that extent, the State would act to put

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[19] A leading Negro newspaper, "The Chicago Defender," is quoted in Vose, *Caucasians Only:*

> "These covenants have been responsible for more human misery, more crime, more disease and violence than any other factor in our society. They have been used to build the biggest ghettoes in history. They have been used to pit race against race and to intensify racial and religious prejudice in every quarter" (p. 213).

its sanction behind the covenants . . . [T]he Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of laws to other individuals'' (346 U. S. at 254-60).

The foregoing discussion of ''ingenious'' efforts to find ''evasive schemes'' for segregation was intended to place the case at bar in true perspective. It brings to the fore Mr. Justice Frankfurter's statement, in *Beauharnais* v. *Illinois, supra,* that this Court ''retains and exercises authority to nullify action which encroaches on freedom of utterance under the *guise* of punishing libel'' (343 U. S. at 263-4) [Emphasis added]. We submit that the civil libel prosecutions involved in the case at bar represent just such a ''guise''; that they fall squarely within the pattern of devices and subterfuges which this Court has struck down in the realm of education, peonage, voting rights and housing, and must strike down here.

II

The Proceedings Below Constitute Prohibited State Action and, Together with the Concepts of Libel Enunciated by the Alabama Courts, Unconstitutionally Abridge Freedoms of Press, Speech, Assembly and Association.

A. Prohibited State Action is Clearly Involved

To insulate this case against critical review by this Court, the erroneous assertion was made in the courts below[20] that there is an absence of ''state action'' and that

[20] Trial Judge Jones' disregard of the guarantees and requirements of the Fourteenth Amendment is understandable in view of his shockingly biased statement from the Bench during the trial of the related *James* case (n. 2 at p. 3, *supra*) :

> ''. . . [T]*he XIV Amendment has no standing whatever in this court, it is a pariah and an outcast,* if it be construed to . . .

this is merely a "private action of libel". This contention has no validity.

In *Shelley* v. *Kraemer,* 334 U. S. 1, 14, the Court stated:

> "That the action of *state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.*" [Emphasis added].
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> * * * * *
>
> "We have no doubt that there has been state action in these cases in the full and complete sense of the phrase." (*Id.,* p. 19).

See *Barrows* v. *Jackson,* 346 U. S. 249, 254 (state court suit between private parties, seeking damages for breach of a racially restrictive covenant, held barred by the Fourteenth Amendment); *American Federation of Labor* v. *Swing,* 312 U. S. 321 (state court's enforcement of a common law policy held state action within the Fourteenth Amendment); accord: *Bridges* v. *California,* 314 U. S. 252; *Wood* v. *Georgia,* 370 U. S. 375.

Moreover, the action by respondent Sullivan and the actions and pronouncements of other public officials (including the Attorney General and Governor of the State of

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direct . . . this Court as to the manner in which . . . its internal operations [requiring racial segregation in seating persons in the courtroom] . . . shall be conducted . . ."

* * * * *

"We will now continue 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 . . . equal justice under law." *Judge Jones on Courtroom Segregation,* 22 The Alabama Lawyer, 190 at pp. 191-2 (1961) [Emphasis and brackets added].

Alabama) *in and of themselves* clearly constitute "State action" within the concepts enunciated by this Court in *Lombard* v. *Louisiana,* 373 U. S. 267.

The record herein notes that the instant case was instituted by Sullivan several days after the public announcement by Attorney General Gallion of Alabama that, on instructions from Governor Patterson, he was examining the legal aspects of damage actions by the State against the New York Times and others based on the advertisement here involved (R. 1999, 2001). The related companion libel suits filed by Mayor James, Commissioner Parks, former Commissioner Sellers and Governor Patterson, as well as the instant case, were instituted soon thereafter. All of these suits were based on substantially identical claims of libel and were instituted against petitioners and The New York Times based on the same advertisement, in the same circuit court of Montgomery County. (See *Parks* v. *New York Times,* 195 F. Supp. 919 (M. D. Ala.), rev'd on other grounds, 308 F. 2d 474 (C. A. 5), cert. pending; *Abernathy* v. *Patterson,* 295 F. 2d 452 (C. A. 5), cert. den., 368 U. S. 986).

Governor Patterson's complaint prays for damages in the sum of $1,000,000, and the Parks and Sellers and James complaints each pray for $500,000 damages.

Four other libel suits were instituted by Birmingham officials, seeking a total of $1,300,000 in damages, based on articles on racial tensions by Harrison Salisbury in *The Times.* Alabama officials have also filed libel actions against the Columbia Broadcasting System, seeking $1,500,000 in damages based on a television news program devoted, in part, to the difficulties experienced by Negro citizens of Montgomery in registering to vote. *Morgan, Connor &*

Waggoner v. *CBS, Inc.* (N. D. Ala., So. Div.) Civ. Nos. 10067-10069S; *Willis & Ponton* v. *CBS, Inc.* (M. D. Ala., No. Div.) Civ. Nos. 1790-1791N.

On May 22, 1960, shortly after the institution of the above-described actions against petitioners and *The Times,* the Montgomery Advertiser (a prominent local newspaper) stated editorially:

> "The Advertiser has no doubt that the recent checkmating of The Times in Alabama will impose a restraint upon other publications which have hitherto printed about the South what was supposed to be." (R. 2025).

It is difficult to believe that this flood of libel prosecutions instituted by public officials of the State of Alabama was simply a spontaneous, individual response to a critical newspaper advertisement. One is compelled to conclude that these actions by public officials are part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize and seek to change Alabama's notorious political system of enforced segregation (See n. 7, p. 12, *supra*).

The Sullivan case, considered in conjunction with the activities of the other Alabama city and state officials, is clearly within the state action doctrine enunciated in the *Lombard* case, *supra.* "A State or a city may act as authoritatively through its executive as through its legislative body" (373 U. S. at 273). Clearly, Alabama has interceded, by its judiciary and its city and state officials, to put state sanctions behind its racial segregation practices.

Once the shelter of "private action" is removed from the "libel" judgment below, that judgment and its affirmance are exposed as another "scheme" to abridge the peti-

tioners' basic constitutional rights of free political expression.

B. The First and Fourteenth Amendments Protect Criticism and Discussion of the Political Conduct and Actions of Public Officials

Since this Court in the public interest accords to public officials immunity from libel (*Barr* v. *Matteo,* 360 U. S. 564), the same public interest must insure a corresponding protection to those who criticize public officials.[21]

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[21] *Cf.* Chief Justice Warren's comment in his dissent:

> ". . . The public interest in limiting libel suits against officers in order that the public might be adequately informed is paralleled by another interest of equal importance: that of preserving the opportunity to criticize the administration of our Government and the action of its officials without being subjected to unfair—and absolutely privileged—retorts. If it is important to permit government officials absolute freedom to say anything they wish in the name of public information, it is at least as important to preserve and foster public discussion concerning our Government and its operation" (at p. 584).

See also *Douglas, The Right of The People* 25 (1961), quoting "as the true spirit of the Bill of Rights":

> "In times like those through which we have recently passed, the doctrine of fair comment should be extended as far as the authorities will permit. With unprecedented social and governmental conditions, our own institutions threatened, national legislators who participate in the formation of governmental policies should be held to the strictest official accountability. History has shown that this is promoted through free exercise of the right to criticize official acts. The people furnish the legislators with an extensive and expensive secretariat, give them the right to use the mails at public expense. Their colleagues are generous in granting leave to print. With these opportunities for personal praise and propaganda, opposition newspapers and editorial writers should not be limited to weak, tepid, and supine criticism and discussion" (*Hall* v. *Binghamton Press Co.,* 263 App. Div. 403, 411, (3d Dept.)).

See also *Hall* v. *Binghamton, supra,* 263 App. Div. at pp. 412-13 (concurrence of Justice Bliss) for an eloquent dictum on this subject:

> "Ours is a representative government, and one who assumes to represent our citizens in a legislative hall must expect that his

Public officials, backed not only by the full power of their offices but also by the aura of power, must be held to strictest account. To expect such account to be received dispassionately and dealt with in polite phrases by press and public is to deny effective criticism and comment.

In *Roth* v. *United States,* 354 U. S. 476, 484, this Court ruled that the First and Fourteenth Amendments were "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

In Justice Hughes' classic statement is found support for the key role of political discussion:

> "[I]mperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government" (*De Jonge* v. *Oregon,* 299 U. S. 353, 365).

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acts will be commented upon and criticized. . . . Freedom of speech and press are guaranteed to us in our form of government, and it is the right of the free press to criticize severely and of a free citizenry to speak plainly to and of its representatives. . . . If the press or our citizens honestly believe that the acts of a legislative representative lend comfort to our nation's enemies there must be no question about the right to tell him just that in no uncertain terms. Queasy words will not do. How else can a democracy function? If the citizens believe such acts may be setting up a government of Quislings, they must have the right to say so. It is one of the verities of democracy that eternal vigilance is the price of liberty. The courts may not muzzle those who maintain such vigilance. Great issues require strong language."

Such criticism and discussion of the actions of public officials are constitutionally protected not only against prior restraint but also against subsequent punishment. *Wood* v. *Georgia, supra; Schneider* v. *State,* 308 U. S. 147; *Bridges* v. *California,* 314 U. S. 252; *Grosjean* v. *American Press Co.,* 297 U. S. 233, 243-245; *Near* v. *Minnesota,* 283 U. S. 697, 707; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296.

Perhaps more than any other issue in the history of the United States, the demand of Negro Americans to be granted full rights as citizens, from the slave revolts through the Abolition Movement and the Civil War to the present non-violent movement, has been a most graphic witness to these observations by Justice Jackson:

> ". . . a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purposes when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminello* v. *Chicago,* 337 U. S. 1, 4.

This Court ruled in *Cantwell, supra,* that the Fourteenth Amendment invalidates state court judgments "based on a common law concept of the most general and undefined nature" (310 U. S. at 308) used by those on one side of "sharp differences" to penalize those on the other side. It concluded that:

> ". . . the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essen-

> tial to enlightened opinion and right conduct on the part of citizens of a democracy'' (310 U. S. at 310).

This Court has repeatedly recognized that the preferred First and Fourteenth Amendment freedoms of speech, press, assembly and association are the very cornerstone of the Bill of Rights and our entire democratic heritage (*Wood* v. *Georgia, supra; Thomas* v. *Collins,* 323 U. S. 516; *Schneider* v. *State,* 308 U. S. 147, 161; *De Jonge* v. *Oregon, supra,* 364); and that the constitutional protection of such criticism of public officials extends even to ''half truths'', ''misinformation'', exaggerations and inaccuracies (*Pennekamp* v. *Florida,* 328 U. S. 331; *Bridges* v. *California,* 314 U. S. 252; *Cantwell* v. *Connecticut,* 310 U. S. 296, 310). ''Freedom of petition, assembly, speech and press could be greatly abridged by a practice of meticulously scrutinizing every editorial, speech, sermon or other printed matter to extract two or three naughty words on which to hang charges of 'group libel' '' (Mr. Justice Black, dissenting, in *Beauharnais* v. *Illinois,* 343 U. S. 250, 273).

Neither the State of Alabama nor any other state may foreclose the exercise of these basic constitutional rights by the appellation of ''libel per se'' or any other like label (*NAACP* v. *Button,* 371 U. S. 415, 429; *Wood* v. *Georgia,* 370 U. S. 375, 386; *Craig* v. *Harney,* 331 U. S. 367; *Norris* v. *Alabama,* 294 U. S. 587).

As this Court ruled in *NAACP* v. *Button, supra:*

> ''A State cannot foreclose the exercise of constitutional rights by mere labels'' (371 U. S. at 429).

The decision and judgment below clearly conflict with these prior decisions.

Indeed, as emphasized by the context in which they arose, the proceedings below are nothing more than a subterfuge to employ legal sanctions, and the fear of legal sanctions, to silence criticism of the official conduct of public officials, and to thus, revive, in new guise, the heinous, long-proscribed doctrines of "Seditious Libel". This tyrannical device and its civil counterpart, Scandalum Magnatum (described in Odgers, *Libel and Slander* 65 (6th Ed. 1929)), have long been considered barred by the preferred constitutional guarantees of freedom of speech, press, assembly and association embodied in the First and Fourteenth Amendments (see Holmes, J., in *Abrams* v. *United States,* 250 U. S. 616, 630; *De Jonge* v. *Oregon,* 299 U. S. 353, 365; *Sillars* v. *Collier,* 151 Mass. 50; Chafee, *Free Speech in the United States* 27-29 (1941); Schofield, *"Freedom of Press in the United States",* ESSAYS ON CONSTITUTIONAL LAW AND EQUITY 540-541 (1921)). They must not now be permitted resurrection for any purpose, much less that repressive use attempted here.

This Court's recent decision in *Wood* v. *Georgia, supra,* restates and reaffirms the well-established doctrine that criticism of the official conduct of public officials is protected against state infringement by the First and Fourteenth Amendments. There, the Court found these Amendments protected Sheriff Wood's written accusations to a Grand Jury that the Superior Court Judges of Georgia were guilty of abusing their offices, misusing the state criminal law, attempted intimidation of Negro residents, fomenting racial hatred, "race baiting" and "physical demonstrations such as used by the Ku Klux Klan". In so holding, this Court said, per Mr. Chief Justice Warren:

> "Men are entitled to speak as they please on matters vital to them; errors in judgment or unsubstantiated

> opinions may be exposed, of course, but not through punishment for contempt for the expression. *Under our system of government, counterargument and education are the weapons available to expose these matters, not abridgement of the rights of free speech and assembly.''* (370 U. S. at 389) [Emphasis added].

A fortiori, The Times advertisement, which contained no official's name, no charge of crime or corruption in office, but rather which treated of vital and significant issues of the times, must fall well within that constitutionally protected ambit. Nor can any reasonable representation be made, to remove this case from that protected area, that *The Times* advertisement created any likelihood of immediate danger of conflict or violence. (*Whitney* v. *California,* 274 U. S. 357).

Further, the enormous sum of $500,000, awarded as punitive damages on a record so thoroughly devoid of crucial evidence, is wholly unconscionable. Such penalty by way of punitive damages (which, the jury was charged, constitutes ''punishment'' designed to deter defendants and others (R. 825-6)) represents a grave impairment of free expression and an unconstitutional restraint upon ''the public need for information and education with respect to the significant issues of the times'' (*Thornhill* v. *Alabama,* 310 U. S. at 102, quoted with approval in *Wood* v. *Georgia, supra*). The mere threat[22] of such ''punishment'' is far

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[22] In *Farmers Ed. & Coop. Union* v. *WDAY,* 360 U. S. 525, 530, this Court said: "Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution." See also Riesman, *Democracy and Defamation: Fair Game and Fair Comment,* 42 COLUM. L. REV. 1282 (1943): There is a "need for protecting political and economic criticism against intimidation by the libel laws" (at p. 1309) ". . . smaller journals, struggling along on subsidies or barely managing on their own, are, of course, highly vulnerable to a libel suit . . ." (at p. 1310).

greater than the $400 fine and 20-day sentence for contempt which this Court has reversed as violative of the First and Fourteenth Amendments. (*Wood* v. *Georgia, supra.* See also *Barrows* v. *Jackson,* 346 U. S. 249; *Grosjean* v. *American Press Co.,* 297 U. S. 233).

The Alabama Supreme Court sustained the $500,000 verdict and judgment solely as proper "punitive damages" (R. 1175-9).[23] The technical and formal distinction that this huge penalty was imposed through civil rather than criminal libel prosecution is, in this situation, disingenuous at best, and lends no support to the judgment below.

For both this Court and the Circuit Court of Appeals have recognized that both civil and criminal libel prosecutions may encroach on the preferred rights guaranteed by the First and Fourteenth Amendments. See, *e.g., Beauharnais* v. *Illinois,* 343 U. S. 250, 263-4 (criminal); *Sweeney* v. *Patterson,* 128 F. 2d 457 (C. A., D. C.), cert. den., 317 U. S. 678 (civil).

In *Beauharnais* this Court stated:

> " 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled." (343 U. S. at 263, 264)

and significantly added in a footnote:

> "If a statute sought to outlaw libels of political parties, quite different problems not now before us would be

[23] Sullivan proved no special damages. Moreover, his testimony and that of his witnesses left little doubt that there was no injury to his reputation or standing in the community; more than likely, the contrary was true (R. 625, 638, 647, 651, 666, 721-4).

> raised. For one thing, the whole doctrine of fair comment as indispensable to the democratic political process would come into play [citing cases]. Political parties, like public men, are, as it were, public property." (*Id.*, p. 263, n. 18).

Criticism and discussion of the actions of public officials are a *sine qua non* of the democratic process.[24] It may fairly be said that the genius of our Bill of Rights lies precisely in its guarantee of the right to speak freely on public issues and to criticize public officials' conduct on the assumption that only an informed people is fit to govern itself. First Amendment freedoms are "the most cherished policies of our civilization"[25] "vital to the maintenance of democratic institutions".[26]

This Court has recognized that the right to speak out for the civil rights of Negro citizens, and against those in public or private life who would deny them, is under bitter attack in Southern States, and has acted to protect that right in a long line of cases. *Gibson* v. *Florida Legislative Investigation Committee,* 372 U. S. 539; *NAACP* v. *Button,* 371 U. S. 415; *Shelton* v. *Tucker,* 364 U. S. 479; *Bates* v. *City of Little Rock,* 361 U. S. 516; *NAACP* v. *Alabama,* 357 U. S. 449.

In *Button,* this Court stated:

> "We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the in-

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[24] "In dealing with governmental affairs, or the fitness of a political candidate for office, the law, however, has come to recognize a very broad privilege to comment freely and even criticize harshly. On matters of public concern, the expression of ideas may not be suppressed just because someone decides that the ideas are false. In that way we encourage the widest and broadest debate on public issues." Douglas, *A Living Bill of Rights* 26 (1961).

[25] *Bridges* v. *California,* 314 U. S. 252, 260.

[26] *Schneider* v. *State,* 308 U. S. 147, 161.

> tense resentment and opposition of the politically dominant white community . . ." (371 U. S. at 435).

In *Bates,* this Court noted that:

> "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." (361 U. S. at 523).

The award of punitive damages to a criticized official may well be more subversive of the freedom to criticize the government than is compelled disclosure of affiliation, which this Court has ruled inconsistent with the First Amendment in the cases cited above. See also *Gibson, supra; West Va. Board of Education* v. *Barnette,* 319 U. S. 624.

Indeed, "punishment by way of damages . . . not alone to punish the wrongdoer, but as a deterrent to others similarly minded,"[27] where such damages are subject to "no legal measure,"[28] exceeds even the criminal punishment of Seditious Libel. For here the "fine" is limited only by the complainant's *ad damnum* clause, and may be imposed without indictment or proof beyond a reasonable doubt. The Alabama courts require neither an intent to bring the official "into contempt or disrepute," as in the Sedition Act (Act of July 14, 1798, 1 Stat. 596), nor any proof of actual injury to reputation. The Trial Court below ruled the ad libelous *per se,* and instructed the jury (R. 823) that it was to be presumed to be "malicious." Further, the Court below ruled it was legally sufficient to

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[27] Ala. Sup. Ct. (R. 1176)

[28] *Ibid.* (R. 1177)

constitute libel *per se* that the criticism, "if believed",[29] would "tend to injure . . . [the official] in his reputation."[30]

Were the libel theory of the Alabama courts below allowed to stand, the danger to freedom of written expression would be tremendous. Its infection would spread quickly and disastrously, bringing suit next for slander for spoken words. A veritable blackout of criticism, a deadening conformity, would follow inexorably. It requires little imagination to picture the destructiveness of such weapons in the hands of those who, only yesterday, used dogs and fire hoses in Birmingham, Alabama against Negro petitioners leading non-violent protests against segregation practices.

C. Vagueness and Indefiniteness of Standards Require Reversal of the Judgment Below

Such vague rules of liability, as were employed in the Trial Court's judgment and upheld in the Alabama Supreme Court's affirmance, restrict the exercise of First Amendment rights more seriously than would have the penalties stricken down in *Wood, supra,* or *Cantwell, supra,* or the compulsory disclosure prohibited in *Gibson, supra.* For the uncertainty created thereby is even greater than that involved in the following cases in which this Court has found vagueness constitutionally offensive.

In *NAACP* v. *Button,* 371 U. S. 415, a Virginia statute was condemned on the ground that the conduct it prohibited was "so broad and uncertain" as to "lend itself to selective

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[29] *Ibid.* (R. 1162-3)

[30] *Ibid.* (R. 1155)

enforcement against unpopular causes." As the Court said in *Button, supra:*

> "Broad prophylactic rules in the area of free expression are suspect [citing cases]. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (371 U. S. at 435).

Similarly, in *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 71, the Court struck down a statute ostensibly designed to shield youthful readers from obscenity on the ground that the statutory mandate was "vague and uninformative", leaving the distributor of books "to speculate" as to whether his publication fell within the statute.

Perhaps the most telling of all statements on this point is contained in the dissent of Messrs. Justice Reed and Douglas in *Beauharnais:*

> ". . . Racial, religious, and political biases and prejudices lead to charge and countercharge, acrimony and bitterness. If words are to be punished criminally, the Constitution at least requires that only words or expressions or statements that can be reasonably well defined, or that have through long usage an accepted meaning, shall furnish a basis for conviction.
>
> "These words—'virtue,' 'derision,' and 'obloquy'—have neither general nor special meanings well enough known to apprise those within their reach as to limitations on speech [citing case]. Philosophers and poets, thinkers of high and low degree from every age and race have sought to expound the meaning of virtue, but each teaches his own conception of the moral excellence that satisfies standards of good conduct. Are the tests of the Puritan or the Cavalier to be applied, those of the city or the farm, the Christian or non-Christian, the old or the young? Does the Bill of

> Rights permit Illinois to forbid any reflection on the virtue of racial or religious classes which a jury or a judge may think exposes them to derision or obloquy, words themselves of quite uncertain meaning as used in the statute? I think not. A general and equal enforcement of this law would restrain the mildest expressions of opinion in all those areas where 'virtue' may be thought to have a role. Since this judgment may rest upon these vague and undefined words, which permit within their scope the punishment of incidents secured by the guarantee of free speech, the conviction should be reversed." *Beauharnais* v. *Illinois,* 343 U. S. 250, 283-284.

Accordingly, on grounds of vagueness and uncertainty alone, the judgment below must be reversed.

D. Respondent's Erroneous Contentions as to the Defense of Truth

Respondent, in opposing certiorari, contended that the availability of the defense of truth suffices to protect the First Amendment freedoms against encroachment by a common law libel action. This argument has been rejected by the courts and by history. *Sweeney* v. *Patterson,* 128 F. 2d 457, 458 (C. A., D. C.), cert. den., 317 U. S. 678, held:

> "Cases which impose liability for *erroneous reports of the political conduct of officials* reflect the obsolete doctrine that the governed must not criticize their governors . . . Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended if error subjects its author to a libel suit without even a showing of economic loss. *Whatever is added to the field of libel is taken from the field of free debate."* [Emphasis added].

To the same argument, raised in defense of the Sedition Act of 1798, James Madison replied:

> "... [A] very few reflections will prove that [the Sedition Act's] baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings.
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> * * * * *
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> "But in the next place, it must be obvious to the plainest minds; that opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a court of law." (*Kentucky-Virginia Resolutions and Mr. Madison's Report of 1799,* Virginia Commission on Constitutional Government 71 (1960)).

Respondent's case confirms Madison's observations, resting as it does on one minor inaccuracy in *The Times* ad and the strained inferences therefrom of respondent and his witnesses.

Nor, as this Court has expressly stated in *NAACP* v. *Button, supra,* is the truth of ideas and beliefs a precondition for their constitutional protection:

> ". . . For the Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered." (371 U. S. at 444-5).

And the use by the Alabama Supreme Court (R. 1178) of the testimony of the Secretary of The Times, that the advertisement was "substantially correct" (R. 785), to sustain both an inference of malice and the $500,000 verdict, is best rebutted by Judge Clark in his cogent dissent in *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F. 2d 288, 292 (C. A. 2), aff'd per curiam by an equally divided Court, 316 U. S. 642.

> "I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, . . . and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of proving his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established."

In sum, this Court must not permit a discredited technique of oppression, no matter how "subtle" or sophisticated or refined its new guise (*Bates* v. *Little Rock, supra,* at 523) to be restored as an effective device for men in office to

> ". . . injure and oppress the people under their administration, provoke them to cry out and complain; and then make that very complaint the foundation for new oppression and prosecutions."[31]

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[31] Andrew Hamilton, Argument to the Jury, *Zenger's Trial,* 17 How. St. Tr. 675, 721-2.

III

The Judgment and Proceedings Below Violate Petitioners' First and Fourteenth Amendment Rights in that the Record is Devoid of Evidence of Authorization or Publication of the Ad in Suit, and They Require of Total Strangers to the Publication Expression of Disbelief and Disavowal.

A. Lack of Evidence as Denial of Due Process of Law

The record below is devoid of probative evidence of authorization or publication by any of the petitioners of the alleged libel or of any malice on their part (see pp. 8-12, *supra*).

In examining this record, District Judge Johnson, in *Parks* v. *New York Times Co.*, 195 F. Supp. 919 (M. D. Ala.), rev'd on other grounds by a two to one decision, 308 F. 2d 474 (C. A. 5), petition for cert. pending, (No. 687, 1962 Term, renumbered No. 52, 1963 Term), found and ruled as follows (pp. 922-3):

> "This Court reaches the conclusion that from the evidence presented upon the motion to remand in each of these cases there is no legal basis whatsoever for the claim asserted against the resident defendants Abernathy, Shuttlesworth, Seay, Sr., and Lowery [petitioners herein]. *From the facts available to this Court, no liability on the part of the four resident defendants existed under any recognized theory of law; this is true even with the application of the Alabama 'scintilla rule'.*"
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> * * * * *
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> "They were neither officers nor members of the Committee, and had not authorized the committee, or Murray, or The New York Times, or anyone else to use

> their names in such a manner. *Neither resident defendant knew his name had been used until some time after the publication of the article in question. The theory that the article was authorized and that the individual resident defendants had authorized the use of their names through the Southern Christian Leadership Conference is without any evidentiary basis whatsoever. As a matter of fact, all the evidence is to the contrary and uncontradicted.''* [Emphasis and brackets supplied].[32]

The courts below relied on the unfounded premise that the petitioners were linked with the advertisement in question by the letter from A. Philip Randolph (R. 1948-9; 1992), which the Alabama Supreme Court seized upon and characterized as a certification that the petitioners had consented to the use of their names in the advertisement (R. 1170). On the contrary, however, it is undisputed that the letter referred to "signed members of the Committee" and that the petitioners' names were not attached thereto (R. 805-10, 818).

Therefore, as their names were used without their knowledge or consent (R. 754-5, 806-10), the assertion of

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[32] The majority decision of the 5th Circuit Court of Appeals in *Parks* v. *New York Times, supra,* is clearly shown by the Opinion to rest on matters not contained in the Record in this case (see 308 F. 2d 478, at 479, 482), and the issue there considered was the question of "colorable liability" of petitioners to defeat removal to the federal courts of other libel suits.

In fact, the two majority judges in the *Parks* case had before them the complete Record in the *Sullivan* case at bar and took no issue with District Judge Johnson's findings and decision that, on that Record, there was not a scintilla of evidence or any "recognized theory of law" to support any claim against petitioners (195 F. Supp. 919, 922). This is further confirmed by the dissenting Opinion of Judge Ainsworth in the *Parks* case, which states in relevant part:

> "The majority opinion apparently agrees with the principal findings of fact of the court below [*i.e.,* of District Judge Johnson as quoted above] . . .", 308 F. 2d 474, 483 [brackets added].

the court below (R. 1170) that the Randolph letter certified petitioners' permission to use their names is clearly groundless and constitutes distorted fact finding.

In *Stein* v. *New York,* 346 U. S. 156, 181, this Court set forth the established rule:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."

Accord: *Wood* v. *Georgia,* 370 U. S. 375; *Craig* v. *Harney,* 331 U. S. 367; *Pennekamp* v. *Florida,* 328 U. S. 331.

As indicated, the judgment against petitioners clearly lacks any rational connection with, and is in fact directly contrary to, the undisputed record facts. Accordingly, the result below conflicts with this Court's decisions in *Thompson* v. *Louisville,* 362 U. S. 199; *Postal Telegraph Cable Co.* v. *City of Newport, Ky.,* 247 U. S. 464; *Tot* v. *United States,* 319 U. S. 463.[33]

Since there is no rational evidentiary support in the record for the finding that petitioners authorized the use of their names as sponsors of the advertisements, the judgment below clearly violates the "due process" requirements of the Fourteenth Amendment and must be set aside for lack of evidence. *Garner* v. *Louisiana,* 368 U. S. 157; *Thompson* v. *Louisville,* 362 U. S. 199.

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[33] In *Williams* v. *Tooke,* 108 F. 2d 758, 759 (C. A. 5), cert. den., 311 U. S. 655, the established rule was cogently restated as follows:

> "[I]f a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts, though the court so deciding had jurisdiction over the suit, the judgment may be in violation of the 14th Amendment. *Postal Telegraph Cable Co.* v. *Newport, Ky.,* 247 U. S. 464, 38 S. Ct. 566, 62 L. ed. 1215."

B. Prejudicial Rulings Below Concerning "Ratification"; Silence As Consent

Absent any evidence that petitioners published or authorized publication of the advertisement at issue, and in the face of uncontroverted evidence that petitioners' names were used without authorization or consent, the trial court improperly charged the jury (R. 824-5):

> ". . . although you may believe . . . that they did not sign this advertisement and did not authorize it, yet it is the contention of the plaintiff . . . that the four individuals . . . after knowing of the publication of the advertisement and after knowing of its content, ratified the use of their names . . . and we here define 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 in his behalf whereby the act, the use of his name, the publication, is given effect as if authorized by him in the very beginning. Ratification is really the same as a previous authorization and is a confirmation or approval of what has been done by another on his account."

Petitioners duly excepted, and the Trial Judge duly granted an exception, to this crucial and prejudicial portion of the oral charge (R. 829); but the Supreme Court of Alabama nevertheless refused to rule thereon, on the purported ground that the "attempted exception was descriptive of the subject matter only, and is too indefinite to invite our review" (R. 1168).

The quoted oral charge rests solely on the silence of petitioners for approximately eight days, between their receipt, on or about April 11, 1960 (R. 799), of respondent's demand for retraction, and April 19, 1960, the date of commencement of respondent's suit; for the record is wholly devoid of any other act or omission of petitioners subse-

quent to the publication of the advertisement. Thus, the charge invited the jury to impose liability on petitioners solely on the basis of their silence subsequent to publication of the advertisement. But such silence does not have sufficient rational connection with the publication of the advertisement to satisfy the Due Process Clause of the Fourteenth Amendment, nor can the erroneous refusal of the Alabama Supreme Court to rule on petitioners' exceptions and Assignments of Error preclude review by this Court.

Moreover, the trial judge, contrary to established principles, in effect directed the jury to find the New York Times' ad in suit "libelous per se" (R. 823); and the Supreme Court of Alabama, while finding this charge "confused" and "invasive" of the province of the jury (R. 1166-7), still refused to find prejudice to petitioners (R. 1167).

Such erroneous and prejudicial rulings by the courts below unconstitutionally infringed petitioners' basic rights in their gross misapplication of controlling decisions of this Court, and in the oppressive and unreasonable judgment they buttressed. No state court can, particularly on such evidence, exact a price of $500,000 for *eight* days' silence and remain consistent with the First and Fourteenth Amendments.

Nor do petitioners' failures to reply constitute a ratification. Governing authority is clear that a prerequisite of "ratification" (even in contract cases) is knowledge by the "ratifying" party of all the relevant facts involved. Petitioners did not have such knowledge here (R. 787-804). Neither respondent nor the Courts below cited any appli-

cable authority to negate this accepted definition of ratification. (*Cf. A. B. Leach & Co.* v. *Peirson,* 275 U. S. 120; and see *Angichiodo* v. *Cerami,* 127 F. 2d 849, 852 (C. A. 5)).

C. Compulsory Disclosure of Belief

Moreover, any such attempt to require petitioners to retract or deny publication fatally conflicts with the freedoms of thought and association guaranteed by the Constitution and the decisions of this Court. *Gibson* v. *Florida Legislative Investigation Committee; NAACP* v. *Button; Talley* v. *California; Bates* v. *City of Little Rock; NAACP* v. *Alabama; West Va. Board of Education* v. *Barnette; De Jonge* v. *Oregon,* all *supra.*

The applicability of the doctrine of these cases to a failure to retract or deny cannot be seriously disputed. It is patent that compelled expression of disbelief, such as would result from imposition of liability for failure to retract a publication neither made nor authorized, is at least as dangerous as compulsion to disclose belief (*Talley* v. *California, supra; NAACP* v. *Alabama, supra*) or express belief (*West Va. Board of Education* v. *Barnette, supra*). This Court has ruled such compulsions unconstitutional.

These cases guarantee petitioners freedom to believe in the aims of the advertisement as well as freedom to associate themselves with others to accomplish such aims. As this Court said in *Gibson* (*supra,* 544):

> "This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments (citing cases). The respondent Committee does not contend otherwise, nor could it, for, as was said in *NAACP* v. *Alabama, supra,* 'it is beyond

> debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.' 357 U. S. at 460. *And it is equally clear that the guarantee encompasses protection of privacy of association . . .*" [Emphasis added].

Respondent, abetted by the coercive power of the State of Alabama, cannot constitutionally compel petitioners to decide within an *eight* day period whether or not to associate themselves publicly with, or dissociate themselves from, an advertisement seeking to achieve goals which petitioners may constitutionally support, especially under penalty of imputing malice to them and of punitive damages. Certainly no such compulsion can be constitutionally imposed on petitioners to make such disavowal of an ad, the full text of which they had not seen. Any such application of the Alabama retraction statutes cited by respondent (Title 7, Sections 913-16 of the Code of Alabama, at pp. 4-5, *supra*), or any such "rule of evidence" as respondent seeks to apply, would deprive petitioners of their right to obtain a copy of the advertisement, study the content thereof, investigate the accuracy of the statements claimed to be false, analyze the effect of the advertisement, consult with legal counsel, and—in the light of such study, investigation, analysis and consultation—decide either to deny publication, support the advertisement, remain silent or adopt some other course of conduct consistent with their consciences and beliefs.

The Alabama statutes as herein applied compelled petitioners to choose between public dissociation from beliefs and ideas and the legal imputation that they are associated with such beliefs and ideas. The First and Fourteenth

Amendments, as interpreted in the controlling decisions cited above, prohibit such compulsory disclosure of association or dissociation.

Moreover, the Alabama "retraction statute" requires in part that defendant shall "publish . . . in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter." (Title 7, Section 914 of the Code of Alabama, set forth in full at p. 4, *supra*).

Assuming *arguendo* that petitioners might have been willing to "retract," it was clearly impossible for them to meet the conditions imposed by the Alabama statute. To make such retraction would require petitioners to place and pay for an advertisement in *The Times*. The record (together with the subsequent attachments and levies on petitioners made by respondent Sullivan) indicates that the limited salaries of petitioners would probably have made the cost of such an advertisement prohibitive to them. Accordingly, the Alabama retraction statute, as applied in the case at bar, clearly appears to discriminate against the indigent and in favor of the wealthy. It is, thus, apparent that the Alabama retraction statutes, as so applied against petitioners, deny equal protection of law in violation of the Fourteenth Amendment. *Cf. Gideon* v. *Wainwright,* 372 U. S. 335.

This Court has repeatedly held that freedom of thought and belief is absolute (*Cf. Cantwell* v. *Connecticut, supra,* 303; *West Va. Board of Education* v. *Barnette, supra*). Whatever may be the power of the State to restrict or compel actions, the right to remain silent as to a choice of such conflicting beliefs is absolutely protected. The statement at issue here is a constitutionally protected expression

of opinion on important public issues. However, even if this case involved a statement not within the safeguards of the First and Fourteenth Amendments, failure during an *eight* day period to deny publication could not sustain liability for publication of a claimed libel, without unconstitutionally restricting freedom of belief and association. *Gibson, supra; NAACP* v. *Alabama, supra.*

IV

Petitioners' Rights to Due Process and Equal Protection of Law and to a Fair and Impartial Trial as Guaranteed by the Fourteenth Amendment Were Flagrantly Violated and Abridged by the Proceedings Below.

Petitioners submit that their trial below was a "race trial", in which they were from first to last placed in a patently inferior position because of the color of their skins.

Throughout the trial below, the jury had before it an eloquent assertion of the inequality of the Negro in the segregation of the one room, of all rooms, where men should find equality, before the law. This Court's landmark decision in *Brown* v. *Board of Education, supra,* gave Constitutional recognition to the principle that segregation is inherently unequal; that it denies Negroes the equal protection of the law, stamps them with a "badge of inferiority" and deprives them of the full benefits of first-class citizenship.

In *Johnson* v. *Virginia, supra,* this Court specifically held:

> "Such a conviction [for contempt for refusing to sit in a Negro section of the court room] cannot stand, for it is no longer open to question that a State may

> not constitutionally require segregation of public facilities [Citing cases]. 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." 373 U. S. at 62 [Brackets added].

Where Sullivan, a white public official, sued Negro petitioners represented by Negro counsel before an all-white jury, in Montgomery, Alabama, on an advertisement seeking to aid the cause of integration, the impact of courtroom segregation could only denote the inferiority of Negroes and taint and infect all proceedings, thereby denying petitioners the fair and impartial trial to which they are constitutionally entitled. And such courtroom segregation has been judicially noted to be a long-standing practice in the state courts of Alabama,[34] as well as throughout the South.[35]

In such a context and in light of Alabama's massive system of segregation,[36] the segregated courtroom, even if it be the immediate result of the acts of private persons in "voluntarily" segregating themselves, must be viewed as the direct result of state action and policy in contravention of the Equal Protection Clause. *Lombard* v. *Louisiana,* 373 U. S. 267. Here, as in *Lombard,* state policy and action has dictated, and is legally responsible for, the "private act" of segregation.

State courts and judges have an affirmative duty to secure the equal protection of laws (*Gibson* v. *Mississippi,* 162 U. S. 565, 586), which duty cannot be sidestepped, as

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[34] See *U. S. ex rel Seals* v. *Wiman,* 304 F. 2d 53 (C. A. 5), cert. den., 372 U. S. 915.

[35] See *Johnson* v. *Virginia, supra.*

[36] See n. 7, p. 12, *supra.*

below, by ignoring, or merely failing to discharge, the obligation. *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715. Such duty can only be a more stringent obligation when the violation of equal protection occurs within the judge's own courtroom.

Compounding this unconstitutional segregation were the racial animosities of the community which the Trial Judge permitted, indeed encouraged, to enter and pervade the courtroom. See pp. 12-15, *supra.* The conclusion is inescapable that the trial denied petitioners equal protection and due process of law. *Irvin* v. *Dowd,* 366 U. S. 717; *Marshall* v. *United States,* 360 U. S. 310; *Shepherd* v. *Florida,* 341 U. S. 50, 54-5; *Craig* v. *Harney,* 331 U. S. 367.[37]

The conduct of the trial itself emphasized the race and racial inferiority of petitioners. In his summation to the jury, respondent's counsel, without so much as a rebuke from the Bench, made the following highly prejudicial and inflammatory remark:

> "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." (R. 929-30, 941).

Respondent's counsel was also permitted by the Trial Judge, without restraint and over the objections of petitioners' counsel, to mispronounce the word "Negro" as "Nigra" and "Nigger" in the presence of the jury (R.

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[37] Nor does it matter whether the cause of such denial was state action or private action (see *Moore* v. *Dempsey,* 261 U. S. 86, 91) such as inflammatory local newspaper reports. See *Irvin* v. *Dowd, supra.*

579-80). The acceptance by the Court below of the lame excuse that this was "the way respondent's counsel had always pronounced it all his life" (R. 580) is directly in conflict with the decisions of this Court. Customs or habits of an entire community (and, *a fortiori*, of an individual) cannot support the denial of constitutional rights. *Cooper* v. *Aaron,* 358 U. S. 1; *Eubanks* v. *Louisiana,* 356 U. S. 584, 588.

More than fifty years ago in *Battle* v. *United States,* 209 U. S. 36, 39, Justice Holmes noted that racist epithets should never be permitted in a court of law, and that the trial judge should prevent such prejudicial and offensive conduct:

> "Finally, an exception was taken to an interruption of the judge, asking the defendant's counsel to make an argument that did not tend to degrade the administration of justice. The reference was to an appeal to race prejudice and to such language as this: 'You will believe a white man not on his oath before you will a negro who is sworn. You can swallow those niggers if you want to, but John Randolph Cooper will never swallow them.' The interruption was fully justified."

The very use of the term "Nigger" in referring to a defendant or a witness has been recognized by numerous state appellate courts to constitute prejudicial, reversible error. See, *e.g., Taylor* v. *State,* 50 Tex. Crim. Rep. 560, *Harris* v. *State,* 96 Miss. 379; *Collins* v. *State,* 100 Miss. 435; *Roland* v. *State,* 137 Tenn. 663; *Hamilton* v. *State,* 12 Okla. Crim. Rep. 62.

Perhaps the most subtle and personally offensive example of racial derogation is the seeming difference in the

Judge's forms of address to the various trial attorneys. Petitioners' trial counsel, all of whom are Negroes, were never addressed or referred to as "Mister" but always impersonally; indeed, in the transcript they are peculiarly referred to as "Lawyer" (*e.g.,* "Lawyer Gray", "Lawyer Crawford"); whereas all white attorneys in the case were consistently and properly addressed as "Mister" (see, *e.g.,* R. 787-90). Such suggested purposeful differentiation by the Judge himself not only would appear to classify Negro petitioners and their counsel as somehow different; it strongly intimates to all present, including the jurors, that in Alabama courts the Negro practitioner at the bar may be a "lawyer" but is not quite a man to be dignified as "mister".

Furthermore, the systematic and intentional exclusion of Negroes from the jury panel itself again stamped the Negro petitioners inferior and unequal, and inevitably denied them a fair trial. From *Norris* v. *Alabama,* 294 U. S. 587, decided by this Court in 1935, through the recent *U. S. ex rel. Seals* v. *Wiman,* 304 F. 2d 53, cert. den., 372 U. S. 915, the federal judiciary has struck down, as violative of the Equal Protection Clause, the systematic exclusion of Negroes from the jury panels of Alabama.

Such exclusion is "an evil condemned by the Equal Protection Clause" (*Akins* v. *Texas,* 325 U. S. 398, 408), which violates the basic constitutional guarantee of a "fair trial in a fair tribunal" (*In re Murchison,* 349 U. S. 133, 136). For such exclusion deprived petitioners of a tribunal of impartial and indifferent jurors from the locality without discrimination (*Strauder* v. *West Virginia,* 100 U. S. 303; see *Irvin* v. *Dowd,* 366 U. S. 717), and firmly rooted in the minds of all those within the courtroom (most sig-

nificantly, the twelve white jurors) that Negroes are unqualified to sit and render justice over their fellow citizens (*Strauder* v. *West Virginia, supra;* see *Cassell* v. *Texas,* 339 U. S. 282).

The denial of a fair trial is still further evidenced by the illegal election of the trial judge, even under the Alabama Constitution, which requires the lawful election of a judge as a prerequisite to his exercise of judicial power.[38] Yet, as the federal judiciary has recognized, the State of Alabama unconstitutionally deprives Negroes of their franchise. *Alabama* v. *United States,* 304 F. 2d 583, aff'd 371 U. S. 37.[39] And the United States Civil Rights Commission has documented in detail the county by county exclusion of qualified Negroes from the Alabama electorate.[40]

Such long-standing exclusion of Negroes from voting in elections for State judges insured that the Trial Judge, in whom was vested "justice" in the form of the "atmosphere of the court room",[41] would reflect, as in fact he

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[38] Ala. Const. of 1901, Sec. 152.

[39] Thereinbelow the U. S. District Court stated (192 F. Supp. 677, 679 (M. D. Ala.)):

> "The evidence in this case is overwhelming to the effect that the State of Alabama, acting through its agents, including former members of the Board of Registrars of Macon County, has deliberately engaged in acts and practices designed to discriminate against qualified Negroes in their efforts to register to vote."

[40] 1961 Report of U. S. Civil Rights Commission (see p. 26 for paragraph summary of voting registration discrimination in Montgomery County). The detailed factual findings of this eminent government agency are entitled to consideration by this court. See *H. J. Heinz Co.* v. *NLRB,* 311 U. S. 514. The attempt to conceal the voting record of Montgomery County from federal government inspection is a fact also known to the federal courts. See *Alabama* v. *Rogers,* 187 F. Supp. 848 (M. D. Ala.), aff'd 285 F. 2d 430 (C. A. 5), cert. den. 366 U. S. 913.

[41] Judge Learned Hand in *Brown* v. *Walter,* 62 F. 2d 798, 799-800 (C. A. 2); See also *Herron* v. *Southern P. Co.,* 283 U. S. 91, 95.

did, the prejudice of the dominant, white community that elected him.

In this atmosphere of hostility, bigotry, intolerance, hatred and "intense resentment of the . . . white community . . .,"[42] can anyone expect or believe that an all-white jury could render a true and just verdict? It is inconceivable that these twelve men, with the attention of the whole community of their friends and neighbors focused on them, would be able to give their attention to the complex shadings of "truth", malice, fair comment and to the nuances of libel *per se,* injury to reputation and punitive damages despite the absence of proof of pecuniary damages. These twelve men were not, in fact or probably in their own minds, a jury of "peers" of petitioners, but rather an instrumentality for meting out punishment to critics of the political activities of their elected City Commissioner.

The provision of Section 2 of the Fourteenth Amendment, providing for reduction in representation in the event of denial of the right to vote in a federal election or in the election of "the Executive and Judicial officers of a State" is, in part, an implicit recognition that those so elected cannot sit as representatives of those discriminated against, and, therefore, cannot claim full representation. (*Cf. Baker* v. *Carr,* 369 U. S. 186).

In the case at bar, the Trial Judge was not only passively elected by a dominant, prejudiced, white electorate; he actively participated in the perpetuation of white supremacy within the State courts of Alabama. At the very time Trial Judge Jones was considering petitioners' mo-

[42] *NAACP* v. *Button, supra* at 435.

tions for a new trial, he stated in a companion libel case to this one that the Fourteenth Amendment was "a pariah," and inapplicable in proceedings in Alabama State courts which are governed by "white man's justice."[43]

Given the cumulative pressure of all of these forms and techniques of emphasizing petitioners' racial inequality, it is clear that petitioners could not possibly receive a fair trial. The answer prescribes the remedy; for "the apprehended existence of prejudice was one inducement which led to the adoption of the Fourteenth Amendment", *U. S. ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71, 81 (C. A. 5), cert. den., 361 U. S. 838; *Shelley* v. *Kraemer, supra.*

Jurisdiction to Redress Flagrant Violations of Fundamental Constitutional Rights "is not to be defeated under the name of local practice"[44]

Petitioners properly presented numerous objections to all these violations of fundamental rights, to the segregated courtroom, the racial bias and community hostility which pervaded the trial, the improper newspaper and television coverage of the trial,[45] the intentional and systematic exclusion of Negroes from the jury and from voting, the illegal election and improper qualification of the presiding Trial Judge and the *ad hominem* appeals of respondent's attorneys. Such abridgements of due process and equal protection were not and could not be waived, and, under established authority, are properly before this Court for review.

These violations are inherent and implicit in the trial transcript, and too obvious for this Court not to notice.

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[43] See n. 3, p. 3, *supra* and n. 20, pp. 26-7, *supra.*

[44] *Davis* v. *Wechsler,* 263 U. S. 22, 24.

[45] See pp. 12-15, *supra* and n. 10 at p. 15, *supra.*

And, they are shockingly manifest outside the transcript as well. For, three decades after the decision in *Norris* v. *Alabama, supra,* one need only read *U. S. ex rel. Seals* v. *Wiman, supra,* to learn that Alabama still excludes Negroes from juries; *Alabama* v. *United States,* 304 F. 2d 583 (C. A. 5), aff'd 371 U. S. 37, to learn that Negroes are still excluded from voting in Alabama. In fact, state enforced racial segregation is the rule for all areas of public and civil activity,[46] a rule that will not, assuredly, be changed voluntarily by the officials of that state, if recent history is any accurate basis for prediction.[47]

This Court has held repeatedly that violations of fundamental constitutional rights, which plainly appear on the

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[46] See n. 7, p. 12, *supra.*

[47] Desegregation of the State University of Alabama was only achieved with the direct assistance of federal law enforcement authorities, and in the face of vigorous dissent by Alabama public officials. *Alabama* v. *United States,* 373 U. S. 545.

Public facilities in Alabama have been desegregated only after court litigation, and over strenuous opposition of state and local authorities. See: *Browder* v. *Gayle,* 142 F. Supp. 707 (M. D. Ala.), aff'd 352 U. S. 903, reh. den., 352 U. S. 950; *Baldwin* v. *Morgan,* 251 F. 2d 780 (C. A. 5); *Baldwin* v. *Morgan,* 287 F. 2d 750 (C. A. 5); *Gilmore* v. *City of Montgomery,* 176 F. Supp. 776 (M. D. Ala.), modified and aff'd, 277 F. 2d 364 (C. A. 5); *Boman* v. *Birmingham Transit Co.,* 280 F. 2d 531 (C. A. 5); *Lewis* v. *The Greyhound Corp.,* 199 F. Supp. 210 (M. D. Ala.); *Sawyer* v. *City of Mobile, Alabama,* 208 F. Supp. 548 (S. D. Ala.); *Shuttlesworth* v. *Gaylord,* 202 F. Supp. 59 (N. D. Ala.), aff'd *sub. nom. Hanes* v. *Shuttlesworth,* 310 F. 2d 303 (C. A. 5); *Cobb* v. *Montgomery Library Board,* 207 F. Supp. 880 (M. D. Ala.).

Alabama has failed to desegregate its public school system in compliance with the mandate of this Court in *Brown* v. *Board of Education, supra,* and has purposefully passed a series of statutes designed to evade compliance therewith. (See Alabama Code, Title 52 § 61(13) authorizing the closing of integration-threatened schools by boards of education; *Id.,* Title 52 § 197(1)-(30) providing for secession of individual schools from local and state systems and for their organization into independent districts; *Id.,* Title 52 § 61(20) permitting allocation of education funds to private schools, etc.) See also *Statistical Summary, November 1961,* Southern Education Reporting Service, 5-6.

record, are properly reviewable whether or not state "local forms" of practice have been complied with. *Fay* v. *Noia,* 372 U. S. 391; *Williams* v. *Georgia,* 349 U. S. 375; *Terminello* v. *Chicago,* 337 U. S. 1; *Patterson* v. *Alabama,* 294 U. S. 600; *Blackburn* v. *Alabama,* 361 U. S. 199; *U. S. ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71 (C. A. 5), cert. den., 361 U. S. 838.

Moreover, where, as hereinabove shown, petitioners have raised objections as best they can, and have put the issues plainly before this Court, established authority requires review of these objections, even if they were not raised strictly in accordance with local forms of practice and procedural technicalities. *Rogers* v. *Alabama,* 192 U. S. 226. In *Rogers,* a Negro's objection to the selection of the Grand Jury, because Negroes had been excluded from the list of eligible persons, was stricken by the Alabama Court as not in statutorily prescribed form. This Court reviewed the objection and reversed the judgment below, even though it "assume[d] that this section was applicable to the motion," saying (p. 230):

> "It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights."

Accord: *Brown* v. *Mississippi,* 297 U. S. 278, 285; *Davis* v. *Wechsler, supra; American Ry. Express Co.* v. *Levee,* 263 U. S. 19, 21; *Ward* v. *Love County,* 253 U. S. 17, 22.

As this Court held in *Davis* v. *Wechsler, supra,* at p. 24:

> ". . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Conclusion

Petitioners respectfully submit that the headlong clash between the proceedings and judgment below and the United States Constitution as interpreted by this Court requires reversal of the judgment and dismissal of respondent's suit herein, in order to preserve and protect those rights which are the Constitution's greatest gift.

Respectfully submitted,

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APPENDIX "A"

APPENDIX "B"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions herein involved are the First, Fourteenth and Fifteenth Amendments to the Constitution of the United States, which read as follows:

* * * * *

AMENDMENT I

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.

* * * * *

AMENDMENT XIV

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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens

shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claims for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

ERRATA

p.18 - sixth line from the top should read "the 'pariah' that the Trial Judge below called it. (See n.20, pp. 26-27, infra; n.3, p. 3, supra)."

p.18 - third line from the bottom in note 11 should read "Konvitz, A Century of Civil Rights 15 (1961); see also Franklin, From"

p.24 - line 21 from the top should read "sulated from liability by the designation of 'private persons.' United"

p.26 - the parenthetical reference in note 20 to "n.2 at p.3, supra" should be to "n.3 at p. 3, supra"

p.59 - line 12 from the top should read "cert. den., 361 U.S. 838; see also Shelley v. Kraemer, supra."