IN THE

# Supreme Court of the United States

October Term, 1963

No. 39

THE NEW YORK TIMES COMPANY,
*Petitioner,*

v.

L. B. SULLIVAN,
*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

## BRIEF FOR THE PETITIONER

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### Opinions Below

The opinion of the Supreme Court of Alabama (R. 1139) is reported in 273 Ala. 656, 144 So. 2d 25. The opinion of the Circuit Court, Montgomery County, on the petitioner's motion to quash service of process (R. 49) is unreported. There was no other opinion by the Circuit Court.

### Jurisdiction

The judgment of the Supreme Court of Alabama (R. 1180) was entered August 30, 1962. The petition for a writ of certiorari was filed November 21, 1962 and was granted January 7, 1963. 371 U. S. 946. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

## Questions Presented

1. Whether, consistently with the guarantee of freedom of the press in the First Amendment as embodied in the Fourteenth, a State may hold libelous *per se* and actionable by an elected City Commissioner published statements critical of the conduct of a department of the City Government under his general supervision, which are inaccurate in some particulars.

2. Whether there was sufficient evidence to justify, consistently with the constitutional guarantee of freedom of the press, the determination that published statements naming no individual but critical of the conduct of the "police" were defamatory as to the respondent, the elected City Commissioner with jurisdiction over the Police Department, and punishable as libelous *per se*.

3. Whether an award of $500,000 as "presumed" and punitive damages for libel constituted, in the circumstances of this case, an abridgment of the freedom of the press.

4. Whether the assumption of jurisdiction in a libel action against a foreign corporation publishing a newspaper in another State, based upon sporadic news gathering activities by correspondents, occasional solicitation of advertising and minuscule distribution of the newspaper within the forum state, transcended the territorial limitations of due process, imposed a forbidden burden on interstate commerce or abridged the freedom of the press.

## Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix A, *infra,* pp. 91-95.

## Statement

On April 19, 1960, the respondent, one of three elected Commissioners of the City of Montgomery, Alabama, instituted this action in the Circuit Court of Montgomery County against *The New York Times,* a New York corporation, and four co-defendants resident in Alabama, Ralph D. Abernathy, Fred L. Shuttlesworth, S. S. Seay, Sr., and J. E. Lowery. The complaint (R. 1) demanded $500,000 as damages for libel allegedly contained in two paragraphs of an advertisement (R. 6) published in *The New York Times* on March 29, 1960. Service of process was attempted by delivery to an alleged agent of *The Times* in Alabama and by substituted service (R. 11) pursuant to the "long-arm" statute of the State. A motion to quash, asserting constitutional objections to the jurisdiction of the Circuit Court (R. 39, 43-44, 47, 129) was denied on August 5, 1960 (R. 49). A demurrer to the complaint (R. 58, 67) was overruled on November 1, 1960 (R. 108) and the cause proceeded to a trial by jury, resulting on November 3 in a verdict against all defendants for the full $500,000 claimed (R. 862). A motion for new trial (R. 896, 969) was denied on March 17, 1961 (R. 970). The Supreme Court of Alabama affirmed the judgment on August 30, 1962 (R. 1180).* The Circuit

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* Libel actions based on the publication of the same statements in the same advertisement were also instituted by Governor Patterson of Alabama, Mayor James of Montgomery, City Commissioner Parks and former Commissioner Sellers. The James case is pending on motion for new trial after a verdict of $500,000. The Patterson, Parks and Sellers cases, in which the damages demanded total $2,000,000, were removed by petitioner to the District Court. That court sustained the removal (195 F. Supp. 919 [1961]) but the Court of Appeals, one judge dissenting, reversed and ordered a remand (308 F. 2d 474 [1962]). A petition to review that decision on certiorari is now pending in this Court. *New York Times Company* v. *Parks and Patterson,* No. 687, October Term, 1962, No. 52, this Term.

Court and the Supreme Court both rejected the petitioner's contention that the liability imposed abridged the freedom of the press.

1. **The Nature of the Publication.**—The advertisement, a copy of which was attached to the complaint (R. 1, 6), consisted of a full page statement (reproduced in Appendix B, *infra* p. 97) entitled "Heed Their Rising Voices", a phrase taken from a *New York Times* editorial of March 19, 1960, which was quoted at the top of the page as follows: "The growing movement of peaceful mass demonstrations by Negroes is something new in the South, something understandable . . . Let Congress heed their rising voices, for they will be heard."

The statement consisted of an appeal for contributions to the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South" to support "three needs—the defense of Martin Luther King—the support of the embattled students—and the struggle for the right-to-vote". It was set forth over the names of sixty-four individuals, including many who are well known for achievement in religion, humanitarian work, public affairs, trade unions and the arts. Under a line reading "We in the South who are struggling daily for dignity and freedom warmly endorse this appeal" appeared the names of twenty other persons, eighteen of whom are identified as clergymen in various southern cities. A New York address and telephone number were given for the Committee, the officers of which were also listed, including three individuals whose names did not otherwise appear.

The first paragraph of the statement alluded generally to the "non-violent demonstrations" of Southern Negro

students "in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." It went on to charge that in "their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom . . . ."

The second paragraph told of a student effort in Orangeburg, South Carolina, to obtain service at lunch counters in the business district and asserted that the students were forcibly ejected, tear-gassed, arrested en masse and otherwise mistreated.

The third paragraph spoke of Montgomery, Alabama and complained of the treatment of students who sang on the steps of the State Capitol, charging that their leaders were expelled from school, that truckloads of armed police ringed the Alabama State College Campus and that the College dining-hall was padlocked in an effort to starve the protesting students into submission.

The fourth paragraph referred to "Tallahassee, Atlanta, Nashville, Savannah, Greensboro, Memphis, Richmond, Charlotte and a host of other cities in the South," praising the action of "young American teenagers, in face of the entire weight of official state apparatus and police power," as "protagonists of democracy."

The fifth paragraph speculated that "The Southern violators of the Constitution fear this new, non-violent brand of freedom fighter . . . even as they fear the upswelling right-to-vote movement," that "they are determined to destroy the one man who more than any other, symbolizes the new spirit now sweeping the South—the

Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest." It went on to portray the leadership role of Dr. King and the Southern Christian Leadership Conference, which he founded, and to extol the inspiration of "his doctrine of non-violence".

The sixth paragraph asserted that the "Southern violators" have repeatedly "answered Dr. King's protests with intimidation and violence" and referred to the bombing of his home, assault upon his person, seven arrests and a then pending charge of perjury. It stated that "their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate *all* leaders who may rise in the South", concluding that the defense of Dr. King "is an integral part of the total struggle for freedom in the South."

The remaining four paragraphs called upon "men and women of good will" to do more than "applaud the creative daring of the students and the quiet heroism of Dr. King" by adding their "moral support" and "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".

2. **The Allegedly Defamatory Statements.**—Of the ten paragraphs of text in the advertisement, the third and a portion of the sixth were the basis of respondent's claim of libel.

(a) The third paragraph was as follows:

> "In Montgomery, Alabama, after students sang 'My Country, 'Tis of Thee' on the State Capitol steps, their leaders were expelled from school, and truck-

> loads of police armed with shot-guns 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."

Though the only part of this statement that respondent thought implied a reference to him was the assertion about "truckloads of police" (R. 712), he undertook and was permitted to deal with the paragraph in general by adducing evidence depicting the entire episode involved. His evidence consisted mainly of a story by Claude Sitton, the southern correspondent of *The Times,* published on March 2, 1960 (R. 655, 656-7, Pl. Ex. 169, R. 1568), a report requested by *The Times* from Don McKee, its "stringer" in Montgomery, after institution of this suit was threatened (R. 590-593, Pl. Ex. 348, R. 1931-1935), and a later telephoned report from Sitton to counsel for *The Times,* made on May 5, after suit was brought (R. 593-595, Pl. Ex. 348, R. 1935-1937).

This evidence showed that a succession of student demonstrations had occurred in Montgomery, beginning with an unsuccessful effort by some thirty Alabama State College students to obtain service at a lunch counter in the Montgomery County Court House. A thousand students had marched on March 1, 1960, from the College campus to the State Capitol, upon the steps of which they said the Lord's Prayer and sang the National Anthem before marching back to the campus. Nine student leaders of the lunch counter demonstration were expelled on March 2 by the State Board of Education, upon motion of Governor Patterson, and thirty-one others were placed on probation (R. 696-699, Pl. Ex. 364, R. 1972-1974), but the singing

at the Capitol was not the basis of the disciplinary action or mentioned at the meeting of the Board (R. 701). Alabama State College students stayed away from classes on March 7 in a strike in sympathy with those expelled but virtually all of them returned to class after a day and most of them re-registered or had already done so. On March 8, there was another student demonstration at a church near the campus, followed by a march upon the campus, with students dancing around in conga lines and some becoming rowdy. The superintendent of grounds summoned the police and the students left the campus, but the police arrived as the demonstrators marched across the street and arrested thirty-two of them for disorderly conduct or failure to obey officers, charges on which they later pleaded guilty and were fined in varying amounts (R. 677-680, 681, 682).

A majority of the student body was probably involved at one time or another in the protest but not the "entire student body". The police did not at any time "ring" the campus, although they were deployed near the campus on three occasions in large numbers. The campus dining hall was never "padlocked" and the only students who may have been barred from eating were those relatively few who had neither signed a pre-registration application nor requested temporary meal tickets (R. 594, 591).

The paragraph was thus inaccurate in that it exaggerated the number of students involved in the protest and the extent of police activity and intervention. If, as the respondent argued (R. 743), it implied that the students were expelled for singing on the steps of the Capitol, this was erroneous; the expulsion was for the demand for service at a lunch counter in the Courthouse. There was,

moreover, no foundation for the charge that the dining hall was padlocked in an effort to starve the students into submission, an allegation that especially aroused resentment in Montgomery (R. 605, 607, 949, 2001, 2002, 2007).

(b) The portion of the sixth paragraph of the statement relied on by respondent read as follows:

> "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."

As to this paragraph, which did not identify the time or place of the events recited, but which respondent read to allude to himself because it also "describes police action" (R. 724), his evidence showed that Dr. King's home had in fact been bombed twice when his wife and child were at home, though one of the bombs failed to explode—both of the occasions antedating the respondent's tenure as Commissioner (R. 594, 685, 688); that Dr. King had been arrested only four times, not seven, three of the arrests preceding the respondent's service as Commissioner (R. 592, 594-595, 703); that Dr. King had in fact been indicted for perjury on two counts, each carrying a possible sentence of five years imprisonment (R. 595), a charge on which he subsequently was acquitted (R. 680). It also showed that while Dr. King claimed to have been assaulted when he was arrested some four years earlier for loitering outside a courtroom (R. 594), one of the officers participating in arresting him and carrying him to a detention cell at

headquarters denied that there was a physical assault (R. 692-693)—this incident also antedating the respondent's tenure as Commissioner (R. 694).

On the theory that the statement could be read to charge that the bombing of Dr. King's home was the work of the police (R. 707), respondent was permitted to call evidence that the police were not involved; that they in fact dismantled the bomb that did not explode; and that they did everything they could to apprehend the perpetrators of the bombings (R. 685-687)—also before respondent's tenure as Commissioner (R. 688). In the same vein, respondent testified himself that the police had not bombed the King home or assaulted Dr. King or condoned the bombing or assaulting; and that he had had nothing to do with procuring King's indictment (R. 707-709).

3. **The Impact of the Statements on Respondent's Reputation.**—As one of the three Commissioners of the City of Montgomery since October 5, 1959, specifically Commissioner of Public Affairs, respondent's duties were the supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales (R. 703). He was normally not responsible, however, for day-to-day police operations, including those during the Alabama State College episode referred to in the advertisement, these being under the immediate supervision of Montgomery's Chief of Police—though there was one occasion when the Chief was absent and respondent supervised directly (R. 720). It was stipulated that there were 175 full time policemen in the Montgomery Police Department, divided into three shifts and four divisions, and 24 "special traffic directors" for control of traffic at the schools (R. 787).

As stated in respondent's testimony, the basis for his role as aggrieved plaintiff was the "feeling" that the advertisement, which did not mention him or the Commission or Commissioners or any individual, "reflects not only on me but on the other Commissioners and the community" (R. 724). He felt particularly that statements referring to "police activities" or "police action" were associated with himself, impugning his "ability and integrity" and reflecting on him "as an individual" (R. 712, 713, 724). He also felt that the other statements in the passages complained of, such as that alluding to the bombing of King's home, referred to the Commissioners, to the Police Department and to him because they were contained in the same paragraphs as statements mentioning police activities (R. 717-718), though he conceded that as "far as the expulsion of students is concerned, that responsibility rests with the State Department of Education" (R. 716).

In addition to this testimony as to the respondent's feelings, six witnesses were permitted to express their opinions of the connotations of the statements and their effect on respondent's reputation.

Grover C. Hall, editor of the Montgomery Advertiser, who had previously written an editorial attacking the advertisement (R. 607, 613, 949), testified that he thought he would associate the third paragraph "with the City Government—the Commissioners" (R. 605) and "would naturally think a little more about the police commissioner" (R. 608). It was "the phrase about starvation" that led to the association; the "other didn't hit" him "with any particular force" (R. 607, 608). He thought "starvation is an instrument of reprisal and would certainly be indefensible . . . in any case" (R. 605).

Arnold D. Blackwell, a member of the Water Works Board appointed by the Commissioners (R. 621) and a businessman engaged in real estate and insurance (R. 613), testified that the third paragraph was associated in his mind with "the Police Commissioner" and the "people on the police force"; that if it were true that the dining hall was padlocked in an effort to starve the students into submission, he would "think that the people on our police force or the heads of our police force were acting without their jurisdiction and would not be competent for the position" (R. 617, 624). He also associated the statement about "truck-loads of police" with the police force and the Police Commissioner (R. 627). With respect to the "Southern violators" passage, he associated the statement about the arrests with "the police force" but not the "sentences above that" (R. 624) or the statement about the charge of perjury (R. 625).

Harry W. Kaminsky, sales manager of a clothing store (R. 634) and a close friend of the respondent (R. 644), also associated the third paragraph with "the Commissioners" (R. 635), though not the statement about the expulsion of the students (R. 639). Asked on direct examination about the sentences in the sixth paragraph, he said that he "would say that it refers to the same people in the paragraph that we look at before", i.e., to "The Commissioners", including the respondent (R. 636). On cross-examination, however, he could not say that he associated those statements with the respondent, except that he thought that the reference to arrests "implicates the Police Department . . . or the authorities that would do that—arrest folks for speeding and loitering and such as that" (R. 639-640). In general, he would "look at" the respondent when he saw "the Police Department" (R. 641).

H. M. Price, Sr., owner of a small food equipment business (R. 644), associated "the statements contained" in both paragraphs with "the head of the Police Department", the respondent (R. 646). Asked what it was that made him think of the respondent, he read the first sentence of the third paragraph and added: "Now, I would just automatically consider that the Police Commissioner in Montgomery would have to put his approval on those kind of things as an individual" (R. 647). If he believed the statements contained in the two paragraphs to be true, he would "decide that we probably had a young Gestapo in Montgomery" (R. 645-646).

William M. Parker, Jr., a friend of the respondent and of Mayor James (R. 651), in the service station business, associated "those statements in those paragraphs" with the City Commissioners (R. 650) and since the respondent "was the Police Commissioner", he "thought of him first" (R. 651). If he believed the statements to be true, he testified that he would think the respondent "would be trying to run this town with a strong arm—strong armed tactics, rather, going against the oath he took to run his office in a peaceful manner and an upright manner for all citizens of Montgomery" (R. 650).

Finally, Horace W. White, proprietor of the P. C. White Truck Line (R. 662), a former employer of respondent (R. 664), testified that both of the paragraphs meant to him "Mr. L. B. Sullivan" (R. 663). The statement in the advertisement that indicated to him that it referred to the respondent was that about "truck-loads of police", which made him think of the police and of respondent "as being the head of the Police Department" (R. 666). If he be-

lieved the statements, he doubted whether he "would want to be associated with anybody who would be a party to such things" (R. 664) and he would not re-employ respondent for P. C. White Truck Line if he thought that "he allowed the Police Department to do the things the paper say he did" (R. 667, 664, 669).

None of the six witnesses testified that he believed any of the statements that he took to refer to respondent and all but Hall specifically testified that they did not believe them (R. 623, 636, 647, 651, 667). None was led to think less kindly of respondent because of the advertisement (R. 625, 638, 647, 651, 666). Nor could respondent point to any injury that he had suffered or to any sign that he was held in less esteem (R. 721-724).

Four of the witnesses, moreover, Blackwell, Kaminsky, Price and Parker, saw the publication first when it was shown to them in the office of respondent's counsel to equip them as witnesses (R. 618, 637, 643, 647, 649). Their testimony should, therefore, have been disregarded under the trial court's instruction that the jury should "disregard . . . entirely" the testimony of any witness "based upon his reading of the advertisement complained of here, only after having been shown a copy of same by the plaintiff or his attorneys" (R. 833). White did not recall when he first saw the advertisement; he believed, though he was not sure, that "somebody cut it out of the paper and mailed it" to him or left it on his desk (R. 662, 665, 668). Only Hall, whose testimony was confined to the phrase about starving students into submission (R. 605, 607), received the publication in ordinary course at *The Montgomery Advertiser* (R. 606, 726-727).

4. **The Circumstances of the Publication.**—The advertisement was published by *The Times* upon an order from the Union Advertising Service, a reputable New York advertising agency, acting for the Committee to Defend Martin Luther King (R. 584-585, 737, Pl. Ex. 350, R. 1957). The order was dated March 28, 1960, but the proposed typescript of the ad had actually been delivered on March 23 by John Murray, a writer acting for the Committee, who had participated in its composition (R. 731, 805). Murray gave the copy to Gershon Aaronson, a member of the National Advertising Staff of *The Times* specializing in "editorial type" advertisements (R. 731, 738), who promptly passed it on to technical departments and sent a thermo-fax copy to the Advertising Acceptability Department, in charge of the screening of advertisements (R. 733, 734, 756). D. Vincent Redding, the manager of that department, read the copy on March 25 and approved it for publication (R. 758). He gave his approval because he knew nothing to cause him to believe that anything in the proposed text was false and because it bore the endorsement of "a number of people who are well known and whose reputation" he "had no reason to question" (R. 758, 759-760, 762-763). He did not make or think it necessary to make any further check as to the accuracy of the statements (R. 765, 771).

When Redding passed on the acceptability of the advertisement, the copy was accompanied by a letter from A. Philip Randolph, Chairman of the Committee, to Aaronson, dated March 23 (R. 587, 757, Def. Ex. 7, R. 1992) and reading:

> "This will certify that the names included on the enclosed list are all signed members of the Committee

to Defend Martin Luther King and the Struggle for Freedom in the South.

"Please be assured that they have all given us permission to use their names in furthering the work of our Committee."

The routine of *The Times* is to accept such a letter from a responsible person to establish that names have not been used without permission and Redding followed that practice in this case (R. 759). Each of the individual defendants testified, however, that he had not authorized the Committee to use his name (R. 787-804) and Murray testified that the original copy of the advertisement, to which the Randolph letter related, did not contain the statement "We in the South . . . warmly endorse this appeal" or any of the names printed thereunder, including those of these defendants. That statement and those names were added, he explained, to a revision of the proof on the suggestion of Bayard Rustin, the Director of the Committee. Rustin told Murray that it was unnecessary to obtain the consent of the individuals involved since they were all members of the Southern Christian Leadership Conference, as indicated by its letterhead, and "since the SCLC supports the work of the Committee . . . he [Rustin] . . . felt that there would be no problem at all, and that you didn't even have to consult them" (R. 806-809). Redding did not recall this difference in the list of names (R. 767), though Aaronson remembered that there "were a few changes made . . . prior to publication" (R. 739).

*The New York Times* has set forth in a booklet its "Advertising Acceptability Standards" (R. 598, Pl. Ex. 348, Exh. F, R. 1952) declaring, *inter alia,* that *The Times* does

not accept advertisements that are fraudulent or deceptive, that are "ambiguous in wording and . . . may mislead" or "[a]ttacks of a personal character". In replying to the plaintiff's interrogatories, Harding Bancroft, Secretary of *The Times,* deposed that "as the advertisement made no attacks of a personal character upon any individual and otherwise met the advertising acceptability standards promulgated" by *The Times,* D. Vincent Redding had approved it (R. 585).

Though Redding and not Aaronson was thus responsible for the acceptance of the ad, Aaronson was cross-examined at great length about such matters as the clarity or ambiguity of its language (R. 741-753), the court allowing the interrogation on the stated ground that "this gentleman here is a very high official of *The Times",* which he, of course, was not (R. 744). In the course of this colloquy, Aaronson contradicted himself on the question whether the word "they" in the "Southern violators" passage refers to "the same people" throughout or to different people, saying first "It is rather difficult to tell" (R. 745) and later: "I think now that it probably refers to the same people" (R. 746). Redding was not interrogated on this point, which respondent, in his Brief in Opposition, deemed established by what Aaronson "conceded" (Brief in Opposition, p. 7).

*The Times* was paid "a little over" $4800 for the publication of the advertisement (R. 752). The total circulation of the issue of March 29, 1960, was approximately 650,000, of which approximately 394 copies were mailed to Alabama subscribers or shipped to newsdealers in the State, approximately 35 copies going to Montgomery County (R. 601-602, Pl. Ex. 348, R. 1942-1943).

5. **The Response to the Demand for a Retraction.**—On April 8, 1960, respondent wrote to the petitioner and to the four individual defendants, the letters being erroneously dated March 8 (R. 588, 671, 776, Pl. Ex. 348, 355-358, R. 1949, 1962-1968). The letters, which were in identical terms, set out the passages in the advertisement complained of by respondent, asserted that the "foregoing matter, and the publication as a whole charge me with grave misconduct and of [*sic*] improper actions and omissions as an offiical of the City of Montgomery" and called on the addressee to "publish in as prominent and as public a manner as the foregoing false and defamatory material contained in the foregoing publication, a full and fair retraction of the entire false and defamatory matter so far as the same relates to me and to my conduct and acts as a public official of the City of Montgomery, Alabama."

Upon receiving this demand and the report from Don McKee, the *Times* stringer in Montgomery referred to above (p. 7), petitioner's counsel wrote to the respondent on April 15, as follows (R. 589, Pl. Ex. 363, R. 1971):

> Dear Mr. Commissioner:
>
> Your letter of April 8 sent by registered mail to The New York Times Company has been referred for attention to us as general counsel.
>
> You will appreciate, we feel sure, that the statements to which you object were not made by The New York Times but were contained in an advertisement proffered to The Times by responsible persons.
>
> We have been investigating the matter and are somewhat puzzled as to how you think the statements in any way reflect on you. So far, our investigation

would seem to indicate that the statements are substantially correct with the sole exception that we find no justification for the statement that the dining hall in the State College was "padlocked in an attempt to starve them into submission."

We shall continue to look into the subject matter because our client, The New York Times, is always desirous of correcting any statements which appear in its paper and which turn out to be erroneous.

In the meanwhile you might, if you desire, let us know in what respect you claim that the statements in the advertisement reflect on you.

Very truly yours,

LORD, DAY & LORD

The respondent filed suit on April 19, without answering this letter.

Subsequently, on May 9, 1960, Governor John Patterson of Alabama, sent a similar demand for a retraction to *The Times,* asserting that the publication charged him "with grave misconduct and of [*sic*] improper actions and omissions as Governor of Alabama and Ex-Officio Chairman of the State Board of Education of Alabama" and demanding publication of a retraction of the material so far as it related to him and to his conduct as Governor and Ex-Officio Chairman.

On May 16, the President and Publisher of *The Times* wrote Governor Patterson as follows (R. 773, Def. Ex. 9, R. 1998):

Dear Governor Patterson:

In response to your letter of May 9th, we are enclosing herewith a page of today's New York Times which contains the retraction and apology requested.

> As stated in the retraction, to the extent that anyone could fairly conclude from the advertisement that any charge was made against you, The New York Times apologizes.
>
> Faithfully yours,
>
> ORVIL DRYFOOS

The publication in *The Times* (Pl. Ex. 351, R. 1958), referred to in the letter, appeared under the headline "Times Retracts Statement in Ad" and the subhead "Acts on Protest of Alabama Governor Over Assertions in Segregation Matter". After preliminary paragraphs reporting the Governor's protest and quoting his letter in full, including the specific language of which he complained, the account set forth a "statement by The New York Times" as follows:

> The advertisement containing the statements to which Governor Patterson objects was received by The Times in the regular course of business from and paid for by a recognized advertising agency in behalf of a group which included among its subscribers well-known citizens.
>
> The publication of an advertisement does not constitute a factual news report by The Times nor does it reflect the judgment or the opinion of the editors of The Times. Since publication of the advertisement, The Times made an investigation and consistent with its policy of retracting and correcting any errors or misstatements which may appear in its columns, herewith retracts the two paragraphs complained of by the Governor.
>
> The New York Times never intended to suggest by the publication of the advertisement that the Honor-

> able John Patterson, either in his capacity as Governor or as ex-officio chairman of the Board of Education of the State of Alabama, or otherwise, was guilty of "grave misconduct or improper actions and omission". To the extent that anyone can fairly conclude from the statements in the advertisement that any such charge was made, The New York Times hereby apologizes to the Honorable John Patterson therefor.

The publication closed with a recapitulation of the names of the signers and endorsers of the advertisement and of the officers of the Committee to Defend Martin Luther King.

In response to a demand in respondent's pre-trial interrogatories to "explain why said retraction was made but no retraction was made on the demand of the plaintiff", Mr. Bancroft, Secretary of *The Times,* said that *The Times* published the retraction in response to the Governor's demand "although in its judgment no statement in said advertisement referred to John Patterson either personally or as Governor of the State of Alabama, nor referred to this plaintiff [Sullivan] or any of the plaintiffs in the companion suits. The defendant, however, felt that on account of the fact that John Patterson held the high office of Governor of the State of Alabama and that he apparently believed that he had been libeled by said advertisement in his capacity as Governor of the State of Alabama, the defendant should apologize" (R. 595-596, Pl. Ex. 348, R. 1942). In further explanation at the trial, Bancroft testified: "We did that because we didn't want anything that was published by The Times to be a reflection on the State of Alabama and the Governor was, as far as we could see, the embodiment of the State of Alabama and the proper representative of the State and,

furthermore, we had by that time learned more of the actual facts which the ad purported to recite and, finally, the ad did refer to the action of the State authorities and the Board of Education presumably of which the Governor is ex-officio chairman . . .'' (R. 776-777). On the other hand, he did not think that ''any of the language in there referred to Mr. Sullivan'' (R. 777).

This evidence, together with Mr. Bancroft's further testimony that apart from the statement in the advertisement that the dining hall was padlocked, he thought that ''the tenor of the content, the material of those two paragraphs in the ad . . . are . . . substantially correct'' (R. 781, 785), was deemed by the Supreme Court of Alabama to lend support to the verdict of the jury and the size of its award (R. 1178).

6. **The Rulings on the Merits.**—The Circuit Court held that the facts alleged and proved sufficed to establish liability of the defendants, if the jury was satisfied that the statements complained of by respondent were published of and concerning him. Overruling a demurrer to the complaint (R. 108) and declining to direct a verdict for petitioner (R. 728-729, 818), the court charged the jury (R. 819-826) that the statements relied on by the plaintiff were ''libelous per se''; that ''the law implies legal injury from the bare fact of the publication itself''; that ''falsity and malice are presumed''; that ''[g]eneral damages need not be alleged or proved but are presumed'' (R. 824); and that ''punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown'' (R. 825). While the court instructed, as requested, that ''mere negligence or carelessness is not evidence of actual malice or malice in fact, and does not justify an

award of exemplary or punitive damages'' (R. 836), it refused to instruct that the jury must be ''convinced'' of malice, in the sense of ''actual intent'' to harm or ''gross negligence and recklessness'' to make such an award (R. 844). It also declined to require that a verdict for respondent differentiate between compensatory and punitive damages (R. 846).

Petitioner challenged these rulings as an abridgment of the freedom of the press, in violation of the First and the Fourteenth Amendments, and also contended that the verdict was confiscatory in amount and an infringement of the constitutional protection (R. 73-74, 898, 929-930, 935, 936-937, 945-946, 948). A motion for new trial, assigning these grounds among others (R. 896-949), was denied by the Circuit Court (R. 969).

The Supreme Court of Alabama sustained these rulings on appeal (R. 1139, 1180). It held that where ''the words published tend to injure a person libeled by them in his reputation, profession, trade or business, or charge him with an indictable offense, or tends to bring the individual into public contempt,'' they are ''libelous per se''; that ''the matter complained of is, under the above doctrine, libelous per se, if it was published of and concerning the plaintiff'' (R. 1155); and that it was actionable without ''proof of pecuniary injury . . ., such injury being implied'' (R. 1160-1161). It found no error in the trial court's ruling that the complaint alleged and the evidence established libelous statements which the jury could find were ''of and pertaining to'' respondent (R. 1158, 1160), reasoning as follows (R. 1157):

> ''We think it common knowledge that the average person knows that municipal agents, such as police and

> firemen, and others, are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner. In measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body."

The Court also approved the trial court's charge as "a fair, accurate and clear expression of the governing legal principles" (R. 1167) and sustained its determination that the damages awarded by the verdict were not excessive (R. 1179). On the latter point, the Court endorsed a statement in an earlier opinion that there "is no legal measure of damages in cases of this character" (R. 1177) and held to be decisive that "The Times in its own files had articles already published which would have demonstrated the falsity of the allegations in the advertisement"; that "The Times retracted the advertisement as to Governor Patterson, but ignored this plaintiff's demand for retraction" though the "matter contained in the advertisement was equally false as to both parties"; that in "the trial below none of the defendants questioned the falsity of the allegations in the advertisement" and, simultaneously, that "during his testimony it was the contention of the Secretary of The Times that the advertisement was 'substantially correct' " (R. 1178).

Petitioner's submissions under the First and the Fourteenth Amendments (assignments of error 81, 289-291, 294, 296, 298, 306-308, 310; R. 1055, 1091-1094, 1096-1097, 1098) were summarily rejected with the statements that the "First Amendment of the U.S. Constitution does not protect libelous publications" and the "Fourteenth Amendment is directed against State action and not private action" (R. 1160).

7. **The Jurisdiction of the Alabama Courts.**—Respondent sought to effect service in this action (R. 11) by delivery of process to Don McKee, the *New York Times* stringer in Montgomery, claimed to be an agent under § 188, Alabama Code of 1940, title 7 (Appendix A, *infra,* pp. 91-92), and by delivery to the Secretary of State under § 199(1), the "long-arm" statute of the State (Appendix A, *infra,* pp. 92-95). Petitioner, appearing specially and only for this purpose, moved to quash the service on the ground, among others, that the subjection of *The Times* to Alabama jurisdiction in this action would transcend the territorial limitations of due process in violation of the Fourteenth Amendment, impose a burden on interstate commerce forbidden by the Commerce Clause and abridge the freedom of the press (R. 39, 43-44, 47; see also, *e.g.,* R. 129).

The evidence adduced upon the litigation of the motion (R. 130-566) established the following facts:

Petitioner is a New York corporation which has not qualified to do business in Alabama or designated anyone to accept service of process there (R. 134-135). It has no office, property or employees resident in Alabama (R. 146, 403-404, 438-439). Its staff correspondents do, however, visit the State as the occasion may arise for purposes of newsgathering. From the beginning of 1956 through April, 1960, nine correspondents made such visits, spending, the courts below found, 153 days in Alabama, or an average of some thirty-six man-days per year. In the first five months of 1960, there were three such visits by Claude Sitton, the staff correspondent stationed in Atlanta (R. 311-314, 320, Pl. Ex. 91-93, R. 1356-1358) and one by Harrison Salisbury (R. 145, 239, Pl. Ex. 117, R. 1382). *The Times* also had an arrangement with newspapermen, employed by Alabama journals, to function as "stringers", paying

them for stories they sent in that were requested or accepted at the rate of a cent a word and also using them occasionally to furnish information to the desk (*e.g.*, R. 175, 176) or to a correspondent (R. 136-137, 140, 153, 154). The effort was to have three such stringers in the State, including one in Montgomery (R. 149, 309) but only two received payments from *The Times* in 1960, Chadwick of *South Magazine,* who was paid $155 to July 26, and McKee of *The Montgomery Advertiser,* who was paid $90, covering both dispatches and assistance given Salisbury (R. 140, 143, 155, 159, 308-309, 441). McKee was also asked to investigate the facts relating to respondent's claim of libel, which he did (R. 202, 207). The total payments made by petitioner to stringers throughout the country during the first five months of 1960 was about $245,000 (R. 442). Stringers are not treated as employees for purposes of taxes or employee benefits (R. 439-440, 141-143).

The advertisement complained of in this action was prepared, submitted and accepted in New York, where the newspaper is published (R. 390-393, 438). The total daily circulation of *The Times* in March, 1960, was 650,000, of which the total sent to Alabama was 394 — 351 to mail subscribers and 43 to dealers. The Sunday circulation was 1,300,000, of which the Alabama shipments totaled 2,440 (Def. Ex. No. 4, R. 1981, R. 401-402). These papers were either mailed to subscribers who had paid for a subscription in advance (R. 427) or they were shipped prepaid by rail or air to Alabama newsdealers, whose orders were unsolicited (R. 404-408, 444) and with whom there was no contract (R. 409). *The Times* would credit dealers for papers which were unsold or arrived late, damaged or incomplete, the usual custom being for the dealer to get the irregularities certified by the railroad baggage man upon a card

provided by *The Times* (R. 408-409, 410-412, Pl. Ex. 276-309, R. 1751-1827, R. 414, 420-426), though this formality had not been observed in Alabama (R. 432-436). Gross revenue from this Alabama circulation was approximately $20,000 in the first five months of 1960 of a total gross from circulation of about $8,500,000 (R. 445). *The Times* made absolutely no attempt to solicit or promote its sale or distribution in Alabama (R. 407-408, 428, 450, 485).

*The Times* accepted advertising from Alabama sources, principally advertising agencies which sent their copy to New York, where any contract for its publication was made (R. 344-349, 543); the agency would then be billed for cost, less the amount of its 15% commission (R. 353-354). The New York Times Sales, Inc., a wholly-owned subsidiary corporation, solicited advertisements in Alabama, though it had no office or resident employees in the State (R. 359-361, 539, 482). Two employees of Sales, Inc. and two employees of *The Times* spent a total of 26 days in Alabama for this purpose in 1959; and one of the Sales, Inc. men spent one day there before the end of May in 1960 (R. 336-338, Def. Ex. 1, R. 1978, 546, 548-551). Alabama advertising linage, both volunteered and solicited, amounted to 5471 in 1959 of a total of 60,000,000 published; it amounted to 13,254 through May of 1960 of a total of 20,000,000 lines (R. 342-344, 341, Def. Ex. 2, R. 1979). An Alabama supplement published in 1958 (R. 379, Pl. Ex. 273, R. 1689-1742) produced payments by Alabama advertisers of $26,801.64 (R. 380). For the first five months of 1960 gross revenue from advertising placed by Alabama agencies or advertisers was $17,000 to $18,000 of a total advertising revenue of $37,500,000 (R. 443). The gross from Alabama advertising and circulation during this period was $37,300 of a national total of $46,000,000 (R. 446).

On these facts, the courts below held that petitioner was subject to the jurisdiction of the Circuit Court in this action, sustaining both the service on McKee as a claimed agent and the substituted service on the Secretary of State and rejecting the constitutional objections urged (R. 49, 51-57, 1139, 1140-1151). Both courts deemed the news-gathering activities of correspondents and stringers, the solicitation and publication of advertising from Alabama sources and the distribution of the paper in the State to constitute sufficient Alabama "contacts" to support the exercise of jurisdiction (R. 56-57, 1142-1147). They also held that though petitioner had appeared specially upon the motion for the sole purpose of presenting these objections, as permitted by the Alabama practice, the fact that the prayer for relief asked for dismissal for "lack of jurisdiction of the subject matter" of the action, as well as want of jurisdiction of the person of defendant, constituted a general appearance and submission to the jurisdiction of the Court (R. 49-51, 1151-1153).

## Summary of Argument

### I

Under the doctrine of "libel per se" applied below, a public official is entitled to recover "presumed" and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general supervision if a jury thinks the publication "tends" to "injure" him "in his reputation" or to "bring" him "into public contempt" as an official. The publisher has no defense unless he can persuade the jury that the publication is entirely true in all its factual, material particulars. The

doctrine not only dispenses with proof of injury by the complaining official, but presumes malice and falsity as well. Such a rule of liability works an abridgment of the freedom of the press.

The court below entirely misconceived the constitutional issues, in thinking them disposed of by the propositions that "the Constitution does not protect libelous publications" and that the "Fourteenth Amendment is directed against State action and not private action" (R. 1160). The requirements of the First Amendment are not satisfied by the "mere labels" of State law. *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 429 (1963); see also *Beauharnais* v. *Illinois,* 343 U. S. 250, 263-264 (1952). The rule of law and the judgment challenged by petitioner are, of course, state action within the meaning of the Fourteenth Amendment.

If libel does not enjoy a talismanic insulation from the limitations of the First and Fourteenth Amendments, the principle of liability applied below infringes "these basic constitutional rights in their most pristine and classic form." *Edwards* v. *South Carolina,* 372 U. S. 229, 235 (1963). Whatever other ends are also served by freedom of the press, its safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U. S. 476, 484 (1957). It is clear that the political expression thus protected by the fundamental law is not delimited by any test of truth, to be administered by juries, courts, or by executive officials. *N. A. A. C. P.* v. *Button, supra,* at 445; *Cantwell* v. *Connecticut,* 310 U. S. 296, 310 (1940). It also is implicit in this Court's decisions that speech or publication which is critical of governmental or official action may not be repressed upon the ground that

it diminishes the reputation of those officers whose conduct it deplores or of the government of which they are a part.

The closest analogy in the decided cases is provided by those dealing with contempt, where it is settled that concern for the dignity and reputation of the bench does not support the punishment of criticism of the judge or his decision, whether the utterance is true or false. *Bridges* v. *California,* 314 U. S. 252, 270 (1941); *Pennekamp* v. *Florida,* 328 U. S. 331, 342 (1946); *Wood* v. *Georgia,* 370 U. S. 375 (1962). Comparable criticism of an elected, political official cannot consistently be punished as a libel on the ground that it diminishes his reputation. If political criticism could be punished on the ground that it endangers the esteem with which its object is regarded, none safely could be uttered that was anything but praise.

That neither falsity nor tendency to harm official reputation, nor both in combination, justifies repression of the criticism of official conduct was the central lesson of the great assault on the short-lived Sedition Act of 1798, which the verdict of history has long deemed inconsistent with the First Amendment. The rule of liability applied below is even more repressive in its function and effect than that prescribed by the Sedition Act: it lacks the safeguards of criminal sanctions; it does not require proof that the defendant's purpose was to bring the official into contempt or disrepute; it permits, as this case illustrates, a multiplication of suits based on a single statement; it allows legally limitless awards of punitive damages. Moreover, reviving by judicial decision the worst aspect of the Sedition Act, the doctrine of this case forbids criticism of the government as such on the theory that top officers, though they are

not named in statements attacking the official conduct of their agencies, are presumed to be hurt because such critiques are "attached to" them (R. 1157).

Assuming, without conceding, that the protection of official reputations is a valid interest of the State and that the Constitution allows room for the "accommodation" of that interest and the freedom of political expression, the rule applied below is still invalid. It reflects no compromise of the competing interests; that favored by the First Amendment has been totally rejected, the opposing interest totally preferred. If there is scope for the protection of official reputation against criticism of official conduct, measures of liability far less destructive of the freedom of expression are available and adequate to serve that end. It might be required, for example, that the official prove special damage, actual malice, or both. The Alabama rule embraces neither mitigation. Neither would allow a judgment for respondent on the evidence that he presents.

The foregoing arguments are fortified by the privilege the law of libel grants to an official if he denigrates a private individual. It would invert the scale of values vital to a free society if citizens discharging the "political duty" of "public discussion" (Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357, 375 [1927]) did not enjoy a fair equivalent of the immunity granted to officials as a necessary incident of the performance of official duties.

Finally, respondent's argument that the publication is a "commercial advertisment", beyond the safeguard of the First Amendment, is entirely frivolous. The statement was a recital of grievances and protest against claimed abuse dealing squarely with the major issue of our time.

## II

Whether or not the rule of liability is valid on its face, its application in this case abridges freedom of the press. For nothing in the evidence supports a finding of the type of injury or threat to the respondent's reputation that conceivably might justify repression of the publication or give ground for the enormous judgment rendered on the verdict.

Complaining broadly against suppression of Negro rights throughout the South, the publication did not name respondent or the Commission of which he is a member and plainly was not meant as an attack on him or any other individual. Its protests and its targets were impersonal: "the police", "the state authorities", "the Southern violators". The finding that these collective generalities embodied an allusion to respondent's personal identity rests solely on the reference to "the police" and on his jurisdiction over that department. But the police consisted of too large a group for such a personal allusion to be found. The term "police" does not, in fact, mean all policemen. No more so does it mean the Mayor or Commissioner in charge. This fatal weakness in the claim that the respondent was referred to by the publication was not cured by his own testimony or that of his six witnesses; they did no more than express the opinion that "police" meant the respondent, because he is Commissioner in charge. These "mere general asseverations" (*Norris* v. *Alabama,* 294 U. S. 587, 595 [1935]) were not evidence of what the publication said or what it reasonably could be held to mean.

Even if the statements that refer to "the police" could validly be taken to refer to the respondent, there was nothing in those statements that suffices to support the

judgment. Where the publication said that "truckloads" of armed police "ringed the Alabama State College Campus", the fact was that only "large numbers" of police "were deployed near the campus" upon three occasions, without ringing it on any. And where the statement said "They have arrested him seven times", the fact was that Dr. King had been arrested only four times. That these exaggerations or inaccuracies cannot rationally be regarded as tending to injure the respondent's reputation is entirely clear. The advertisement was also wrong in saying that 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." Only a few students refused to re-register and the dining hall was never padlocked. But none of these erroneous assertions had a thing to do with the police and even less with the respondent. It was equally absurd for respondent to claim injury because the publication correctly reported that some unidentified "they" had twice bombed the home of Dr. King, and to insist on proving his innocence of that crime as the trial court permitted him to do.

That the respondent sustained no injury in fact from the publication, the record makes entirely clear.

Even if there were in this record a basis for considering the publication an offense to the respondent's reputation, there was no rational relationship between the gravity of the offense and the size of the penalty imposed. A "police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive." Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357, 377 (1927). The proposition must apply with special force when the "harsh" remedy

has been explicitly designed as a deterrent of expression. Upon this ground alone, this monstrous judgment is repugnant to the Constitution.

## III

The assumption of jurisdiction in this action by the Circuit Court, based on service of process on McKee and substituted service on the Secretary of State, transcended the territorial limits of due process, imposed a forbidden burden on interstate commerce and abridged the freedom of the press.

There was no basis for the holding by the courts below that petitioner forfeited these constitutional objections by making an involuntary general appearance in the cause. The finding of a general appearance was based solely on the fact that when petitioner appeared specially and moved to quash the attempted service for want of jurisdiction of its person, as permitted by the Alabama practice, the prayer for relief concluded with a further request for dismissal for "lack of jurisdiction of the subject matter of said action." That prayer did not manifest an intention to "consent" or to make "a voluntary submission to the jurisdiction of the court", which the Alabama cases have required to convert a special into a general appearance. *Ex parte Cullinan,* 224 Ala. 263, 266 (1931). The papers made entirely clear that the sole ruling sought by the petitioner was that it was not amenable to Alabama jurisdiction, as a New York corporation having no sufficient contact with the State to permit the assertion of jurisdiction *in personam* in an action based upon a publication in New York.

Moreover, even if petitioner could validly be taken to have made an involuntary general appearance, that appear-

ance would not bar the claim that in assuming jurisdiction of this action the state court imposed a forbidden burden on interstate commerce or that it abridged the freedom of the press. *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312 (1923); *Michigan Central R. R. Co.* v. *Mix,* 278 U. S. 492, 496 (1929); *Denver & R. G. W. R. Co.* v. *Terte,* 284 U. S. 284, 287 (1932).

The decisions of this Court do not support the holding that the sporadic newsgathering activities of correspondents and stringers of *The Times* in Alabama, the occasional solicitation and publication of advertising from Alabama sources and the minuscule shipment of the newspaper to subscribers and newsdealers in the State constitute sufficient Alabama contacts to satisfy the requirements of due process.

The petitioner's peripheral relationship to Alabama does not involve "continuous corporate operations" which are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *International Shoe Co.* v. *Washington,* 326 U. S. 310, 318 (1945); *Perkins* v. *Benguet Mining Co.,* 342 U. S. 437 (1952). Hence, if the jurisdiction is sustained, it must be on the ground that the cause of action alleged is so "connected with" petitioner's "activities within the state" as to "make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there." *International Shoe Co.* v. *Washington, supra,* at 319, 317. There is no such connection. Here, as in *Hanson* v. *Denckla,* 357 U. S. 235, 252 (1958), the "suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised in" the State.

The liability alleged is not based on any activity of correspondents or stringers of *The Times* in covering the news in Alabama; and such activity does not rest on a privilege the State confers, given the rights safeguarded by the Constitution. Nor is this claim connected with the occasional solicitation of advertisements in Alabama. Finally, the negligible circulation of *The Times* in Alabama does not involve an act of the petitioner within the State. Copies were mailed in New York to Alabama subscribers or shipped in New York to newsdealers who were purchasers, not agents of *The Times*.

Even if the shipment of the paper may be deemed an act of the petitioner in Alabama, it does not sustain the jurisdiction here affirmed. The standard of *International Shoe* is not "simply mechanical or quantitative"; its application "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure" (326 U. S. at 319). Measured by this standard, a principle which would require, in effect, that almost every newspaper defend a libel suit in almost any jurisdiction of the country, however trivial its circulation there may be, would not further the "fair and orderly administration of the laws". To the extent that this submission prefers the interest of the publisher to that of the plaintiff, the preference is one supported by the First Amendment. It also is supported by the fact that the plaintiff's grievance rests but fancifully on the insubstantial distribution of the publication in the forum, as distinguished from its major circulation out of state.

The decision in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957) does not govern the disposition here.

The contract executed in *McGee* constituted a continuing legal relationship between the insurer and the insured within the State, a relationship which the States, with the concurrence of Congress, have long deemed to require special regulation. *Hanson* v. *Denckla, supra,* at 252; *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643 (1950). *Scripto* v. *Carson,* 362 U. S. 207 (1960), relied on by respondent, is totally irrelevant to the problem of judicial jurisdiction.

The need for reciprocal restraints upon the power of the States to exert jurisdiction over men and institutions not within their borders is emphasized in our society by the full faith and credit clause of the Constitution. An Alabama judgment in this case would have no practical importance were it not enforceable as such in States where the petitioner's resources are located. Thus jurisdictional delineations must be based on grounds that command general assent throughout the Union. No standard worthy of such general assent sustains the jurisdiction here.

If negligible state circulation of a paper published in another state suffices to establish jurisdiction of a suit for libel threatening the type of judgment rendered here, such distribution interstate cannot continue. So, too, if the interstate movement of correspondents provides a factor tending to sustain such jurisdiction, as the court below declared, a strong barrier to such movement has been erected. In the silence of Congress, such movement and distribution are protected by the commerce clause against burdensome state action, unsupported by an overriding local interest. Such a burden has been imposed here.

Newsgathering and circulation are both aspects of the freedom of the press, safeguarded by the Constitution.

Neither can continue unimpaired if they subject the publisher to foreign jurisdiction on the grounds and of the scope asserted here. Accordingly, the jurisdictional determination is also repugnant to the First Amendment.

## Argument

The decision of the Supreme Court of Alabama, sustaining the judgment of the Circuit Court, denies rights that are basic to the constitutional conception of a free society and contravenes a postulate of our federalism.

We submit, first (Points I and II), that the decision gives a scope and application to the law of libel so restrictive of the right to protest and to criticize official conduct that it abridges the protected freedom of the press.

We argue, secondly (Point III), that in requiring petitioner to answer in this action in the courts of Alabama, the decision violates the territorial restrictions that the Constitution places on State process, casts a forbidden burden on interstate commerce and also abridges freedom of the press.

## I

### The decision rests upon a rule of liability for criticism of official conduct that abridges freedom of the press.

Under the law of libel as declared below, a public official is entitled to recover "presumed" and punitive damages for a publication found to be critical of the official conduct of a governmental agency under his general supervision if a jury thinks the publication "tends" to "injure" him "in his reputation" or to "bring" him "into public contempt"

as an official. The place of the official in the governmental hierarchy is, moreover, evidence sufficient to establish that his reputation has been jeopardized by statements that reflect upon the agency of which he is in charge. The publisher has no defense unless, as respondent noted in his Brief in Opposition (p. 18, n. 10), he can persuade the jury that the publication is entirely true in all its factual, material particulars. *Ferdon* v. *Dickens,* 161 Ala. 181, 185, 200-201 (1909); *Kirkpatrick* v. *Journal Publishing Company,* 210 Ala. 10, 11 (1923); *Alabama Ride Company* v. *Vance,* 235 Ala. 263, 265 (1938); *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 495 (1960). Unless he can discharge this burden as to stated facts, he has no privilege of comment. *Parsons* v. *Age-Herald Pub. Co.,* 181 Ala. 439, 450 (1913). Good motives or belief in truth, however reasonable, are relevant only in mitigation of punitive damages if the jury chooses to accord them weight. *Johnson Publishing Co.* v. *Davis, supra,* at 495. A claim of truth which is regarded as unfounded affords evidence of malice, fortifying the presumption that applies in any case (R. 1178).

We submit that such a rule of liability works an abridgment of the freedom of the press, as that freedom has been defined by the decisions of this Court.

*First: The State Court's Misconception of the Constitutional Issues.* The reasons assigned by the Court below give no support to its rejection of petitioner's constitutional objections.

The accepted proposition that "[t]he Fourteenth Amendment is directed against State action and not private action" (R. 1160) obviously has no application to the case. The petitioner has challenged a State rule of law applied

by a State court to render judgment carrying the full coercive power of the State, claiming full faith and credit through the Union solely on that ground. The rule and judgment are, of course, State action in the classic sense of the subject of the Amendment's limitations. See *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449, 463 (1958); *Barrows* v. *Jackson,* 346 U. S. 249, 254 (1953); *Shelley* v. *Kraemer,* 334 U. S. 1, 14 (1948).

There is no greater merit in the other reason stated in the Court's opinion, that "the Constitution does not protect libelous publications." Statements to that effect have, to be sure, been made in passing in opinions of this Court. See *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 49 (1961); *Times Film Corporation* v. *City of Chicago,* 365 U. S. 43, 48 (1961); *Roth* v. *United States,* 354 U. S. 476, 486 (1957); *Beauharnais* v. *Illinois,* 343 U. S. 250, 266 (1952); *Pennekamp* v. *Florida,* 328 U. S. 331, 348-349 (1946); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942); *Near* v. *Minnesota,* 283 U. S. 697, 715 (1931). But here, no less than elsewhere, a "great principle of constitutional law is not susceptible of comprehensive statement in an adjective." *Carter* v. *Carter Coal Co.,* 298 U. S. 238, 327 (1936) (dissenting opinion of Cardozo, J.).

The statements cited meant no more than that the freedom of speech and of the press is not a universal absolute and leaves the States some room for the control of defamation. None of the cases sustained the repression as a libel of expression critical of governmental action or was concerned with the extent to which the law of libel may be used for the protection of official reputation. The dictum in *Pennekamp* that "when the statements amount to defamation, a judge has such remedy in damages for libel as do

other public servants'' left at large what may amount to defamation and what remedy a public servant has. *Beauharnais* alone dealt with the standards used in judging any kind of libel, sustaining with four dissenting votes a state conviction for a publication held to be both defamatory of a racial group and ''liable to cause violence and disorder''. Mr. Justice Frankfurter's opinion took pains to reserve this Court's ''authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel''—adding that ''public men are, as it were, public property,'' that ''discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'' 343 U. S. at 263-264. Those reservations, rather than the judgment, are apposite here.

Throughout the years this Court has measured by the standards of the First Amendment every formula for the repression of expression challenged at its bar. In that process judgment has been guided by the meaning and the purpose of the Constitution, interpreted as a ''continuing instrument of government'' (*United States* v. *Classic,* 313 U. S. 299, 316 [1941]), not by the vagaries or ''mere labels'' of state law. *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 429 (1963). See also Mr. Chief Justice Warren in *Trop* v. *Dulles,* 356 U. S. 86, 94 (1958). Hence libel, like sedition, insurrection, contempt, advocacy of unlawful acts, breach of the peace, disorderly conduct, obscenity or barratry, to name but prime examples, must be defined and judged in terms that satisfy the First Amendment. The law of libel has no more immunity than other law from the supremacy of its command.

*Second: Seditious Libel and the Constitution.* If libel does not enjoy a talismanic insulation from the limitations

of the First and Fourteenth Amendments, the principle of liability applied below, resting as it does on a "common law concept of the most general and undefined nature" (*Cantwell* v. *Connecticut,* 310 U. S. 296, 308 [1940]), infringes "these basic constitutional rights in their most pristine and classic form." *Edwards* v. *South Carolina,* 372 U. S. 229, 235 (1963).

Whatever other ends are also served by freedom of the press, its safeguard, as this Court has said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States,* 354 U. S. 476, 484 (1957). Its object comprehends the protection of that "right of freely examining public characters and measures, and of free communication among the people thereon," which, in the words of the Virginia Resolution, "has ever been justly deemed the only effectual guardian of every other right." 4 *Elliot's Debates* (1876), p. 554. The "opportunity for free political discussion" and "debate" secured by the First Amendment (*Stromberg* v. *California,* 283 U. S. 359, 369 [1931]; *DeJonge* v. *Oregon,* 299 U. S. 353, 365 [1937]; *Terminiello* v. *Chicago,* 337 U. S. 1, 4 [1949]), extends to "vigorous advocacy" no less than "abstract" disquisition. ***N.A.A.C.P.*** v. *Button,* 371 U. S. 415, 429 (1963). The "prized American privilege to speak one's mind, although not always with perfect good taste," applies at least to such speech "on all public institutions." *Bridges* v. *California,* 314 U. S. 252, 270 (1941). "To many this is, and always will be, folly; but we have staked upon it our all." L. Hand, J., in *United States* v. *Associated Press,* 52 F. Supp. 362, 372 (S. D. N. Y. 1943). That national commitment has been affirmed repeatedly by the decisions of this Court, which have recog-

nized that the Amendment "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow" (*Bridges* v. *California, supra,* at 263); and that its freedoms "need breathing space to survive". *N. A. A. C. P.* v. *Button, supra,* at 433.

It is clear that the political expression thus protected by the fundamental law is not delimited by any test of truth, to be administered by juries, courts, or by executive officials, not to speak of a test which puts the burden of establishing the truth upon the writer. Within this sphere of speech or publication, the constitutional protection does not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *N. A. A. C. P.* v. *Button, supra,* at 445. See also *Speiser* v. *Randall,* 357 U. S. 513, 526 (1958). The Amendment "pre-supposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States* v. *Associated Press, supra,* at 372. As Mr. Justice Roberts said in *Cantwell* v. *Connecticut,* 310 U. S. 296, 310 (1940):

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But 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, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

These affirmations are the premises today of any exploration of the scope of First Amendment freedom undertaken by this Court. It is implicit in those premises that speech or publication which is critical of governmental or official action may not be repressed upon the ground that it diminishes the reputation of the officers whose conduct it deplores or of the government of which they are a part.

The closest analogy in the decided cases is provided by those dealing with contempt.* It is settled law that concern for the dignity and reputation of the bench does not support the punishment of criticism of the judge or his decision (*Bridges* v. *California, supra,* at 270), though the utterance contains "half-truths" and "misinformation" (*Pennekamp* v. *Florida, supra,* 328 U. S. at 342, 343, 345). Any such repression must be justified, if it is justified at all, by danger of obstruction of the course of justice; and such danger must be clear and present. See also *Craig* v. *Harney,* 331 U. S. 367, 373, 376, 389 (1947); *Wood* v. *Georgia,* 370 U. S. 375, 388, 389, 393 (1962). We do not see how comparable criticism of an elected, political official may consistently be punished as a libel on the ground that it diminishes his reputation.** The supposition that judges are "men of fortitude, able to thrive in a hardy climate" (*Craig* v. *Harney, supra,* at 376) must apply to commissioners as well.

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* *Cf.* Kalven, *The Law of Defamation and the First Amendment,* in *Conference on the Arts, Publishing and the Law* (U. of Chi. Law School), p. 4: "It is exactly correct to regard seditious libel, which has been the most serious threat to English free speech, as defamation of government and government officials. It is at most a slight extension of terms to regard contempt of court by publication as a problem of defamation of the judicial process."

** Statements about officials dealing with purely private matters unrelated to their official conduct or competence might raise different questions, not presented here.

These decisions are compelling not alone for their authority but also for their recognition of the basic principle involved. If political criticism could be punished on the ground that it endangers the esteem with which its object is regarded, none safely could be uttered that was anything but praise.

The point was made in classic terms in Madison's Report on the Virginia Resolutions (4 *Elliot's Debates,* p. 575):

> ". . . it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures; because those who engage in such discussions, must expect and intend to excite these unfavorable sentiments, so far as they may be thought to be deserved. To prohibit the intent to excite those unfavorable sentiments against those who administer the government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct. . . ."

If criticism of official conduct may not be repressed upon the ground that it is false or that it tends to harm official reputation, the inadequacy of these separate grounds is not surmounted by their combination. This was the basic lesson of the great assault on the short-lived Sedition Act of 1798, which first crystallized a national awareness of the

central meaning of the First Amendment. See, *e.g.,* Levy, *Legacy of Suppression* (1960), p. 249 *et. seq.;* Smith, *Freedom's Fetters* (1956).

That Act declared it a crime "if any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . ., or the President . . ., with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States. . . ." It specifically provided that the defendant might "give in evidence in his defence, the truth of the matter contained in the publication charged as a libel", a mitigation of the common law not achieved in England until Lord Campbell's Act in 1843. It also reserved the right of the jury to "determine the law and the fact, under the direction of the court, as in other cases", accepting the reform effected by Fox's Libel Act of 1792. Act of July 14, 1798, Secs. 2, 3; 1 Stat. 596. These qualifications were not deemed sufficient to defend the measure against a constitutional attack that won widespread support throughout the nation.

In the House debate upon the bill, John Nicholas of Virginia warned that a law ostensibly directed against falsehood "must be a very powerful restriction of the press, with respect to the publication of important truths." Men "would be deterred from printing anything which should be in the least offensive to a power which might so greatly harass them. They would not only refrain from publishing anything of the least questionable nature, but they would be afraid of publishing the truth, as, though true, it might not always be in their power to establish the truth to the satisfaction of a court of justice." 8 *Annals of*

*Congress* 2144. Albert Gallatin delineated the same peril, arguing that "the proper weapon to combat error was truth, and that to resort to coercion and punishments in order to suppress writings attacking . . . measures . . ., was to confess that these could not be defended by any other means." *Id.* at 2164. Madison's Report reiterates these points, observing that some "degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." 4 *Elliot's Debates,* p. 571. Summing up the position in words that have echoed through the years, he asked (*ibid.*):

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

Though the Sedition Act was never passed on by this Court, the verdict of history surely sustains the view that it was inconsistent with the First Amendment. Fines levied in its prosecutions were repaid by Act of Congress on this ground. See, *e.g.*, Act of July 4, 1840, c. 45, 6 Stat. 802 (fine imposed on Congressman Matthew Lyon refunded to his heirs).* Its invalidity as "abridging the freedom of

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* The Committee reporting the bill described its basis as follows (H.R. Rep. No. 86, 26th Cong., 1st Sess., p. 3 (1840)): "All that now remains to be done by the representatives of a people who condemned this act of their agents as unauthorized, and transcending their grant of power, to place beyond question, doubt, or cavil, that mandate of the constitution prohibiting Congress from abridging the liberty of the press, and to discharge an honest, just, moral, and honorable obligation, is to refund from the Treasury the fine thus illegally and wrongfully obtained from one of their citizens. . . ."

See also Acts of June 17, 1844, cc. 136 and 165, 6 Stat. 924 and 931.

the press'' was assumed by Calhoun, reporting to the Senate on February 4, 1836, as a matter ''which no one now doubts.'' Report with Senate bill No. 122, 24th Cong., 1st Sess. p. 3. The same assumption has been made upon this Court. Holmes, J., dissenting in *Abrams* v. *United States,* 250 U. S. 616, 630 (1919); Jackson, J., dissenting in *Beauharnais* v. *Illinois,* 343 U. S. 250, 288-289 (1952). See also Cooley, *Constitutional Limitations* (8th ed. 1927), p. 900; Chafee, *Free Speech in the United States* (1941), pp. 27-29. These assumptions reflect a broad consensus that, we have no doubt, is part of present law.

Respondent points to Jefferson's distinction between the right of Congress ''to control the freedom of the press'', which Jefferson of course denied, and that remaining in the States, which he admitted. Brief in Opposition, p. 19; see *Dennis* v. *United States,* 341 U. S. 494, 522, n. 4 (1961) (concurring opinion). That distinction lost its point with the adoption of the Fourteenth Amendment and the incorporation of the First Amendment freedoms in the ''liberty'' protected against state action. See, *e.g., Bridges* v. *California,* 314 U. S. 252, 268 (1941); *Edwards* v. *South Carolina,* 372 U. S. 229, 235 (1963). The view that there may be a difference in the stringency of the commands embodied in the two Amendments (Jackson, J., in *Beauharnais* v. *Illinois, supra,* 343 U. S. at 288; Harlan, J., concurring in *Alberts* v. *California,* 354 U. S. 476, 501, 503 [1957]) has not prevailed in the decisions of this Court. Even if it had, we think it plain that there could be no reasonable difference in the strength of their protection of expression against ''frontal attack or suppression'' (Harlan, J., dissenting in *N. A. A. C. P.* v. *Button, supra,* 371 U. S. at 455) of the kind with which we are concerned.

The rule of liability applied below is even more repressive in its function and effect than that prescribed by the Sedition Act. There is no requirement of an indictment and the case need not be proved beyond a reasonable doubt. It need not be shown, as the Sedition Act required, that the defendant's purpose was to bring the official "into contempt or disrepute"; a statement adjudged libelous *per se* is *presumed* to be "false and malicious", as the trial court instructed here (R. 824). There is no limitation to one punishment for one offensive statement, as would be required in a criminal proceeding. Respondent is only one of four commissioners, including one former incumbent, not to speak of the former Governor, who claim damages for the same statement. The damages the jury may award them if it deems the statement to apply to their official conduct are both general and punitive—the former for a "presumed" injury to reputation (R. 1160) and the latter "not alone to punish the wrongdoer, but as a deterrent to others similarly minded" (R. 1176). Such damages, moreover, are fettered by "no legal measure" of amount (R. 1177). It does not depreciate the stigma of a criminal conviction to assert that such a "civil" sanction is a more repressive measure than the type of sentence the Sedition Act permitted for the crime that it purported to define. Here, as in *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70 (1963), the "form of regulation . . . creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."

It should be added that the principle of liability, as formulated by the Supreme Court of Alabama, goes even further than to punish statements critical of the official conduct of individual officials; it condemns the critique of government as such. This is accomplished by the declaration

that it is sufficient to sustain the verdict that in "measuring the performance or deficiencies" of governmental bodies, "praise or criticism is usually attached to the official in complete control of the body" (R. 1157). On this thesis it becomes irrelevant that the official is not named or referred to in the publication. The most impersonal denunciation of an agency of government may be treated, in the discretion of the jury, as a defamation of the hierarchy of officials having such "complete control". A charge, for example, of "police brutality", instead of calling for investigation and report by supervising officers, gives them a cause of action against the complainant, putting him to proof that will persuade the jury of the truth of his assertion. Such a concept transforms the law of defamation from a method of protecting private reputation to a device for insulating government against attack.

When municipalities have claimed that they were libeled, they have met the answer that "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." *City of Chicago* v. *Tribune Co.,* 307 Ill. 595, 601 (1923). See also *City of Albany* v. *Meyer,* 99 Cal. App. 651 (1929). That answer applies as well to converting "libel on government" into libel of the officials of whom it must be composed. The First Amendment, no less than the Fifteenth, "nullifies sophisticated as well as simple-minded modes" of infringing the rights it guarantees. *Lane* v. *Wilson,* 307 U. S. 268, 275 (1939); *Bates* v. *Little Rock,* 361 U. S. 516, 523 (1960); *Louisiana ex rel. Gremillion* v. *N. A. A. C. P.,* 366 U. S. 293, 297 (1961).

If this were not the case, the daily dialogue of politics would become utterly impossible. That dialogue includes,

as Mr. Justice Jackson said, the effort "to discredit and embarrass the Government of the day by spreading exaggerations and untruths and by inciting prejudice or unreasoning discontent, not even hesitating to injure the Nation's prestige among the family of nations." *Communications Assn.* v. *Douds,* 339 U. S. 382, 423 (1950) (opinion concurring and dissenting in part). Sound would soon give place to silence if officials in "complete control" of governmental agencies, instead of answering their critics, could resort to friendly juries to amerce them for their words. Mr. Justice Brewer, in calling for the "freest criticism" of this Court, employed a metaphor that is apposite: "The moving waters are full of life and health; only in the still water is stagnation and death." *Government by Injunction,* 15 Nat. Corp. Rep. 848, 849 (1898). The First Amendment guarantees that motion shall obtain.

*Third: The Absence of Accommodation of Conflicting Interests.* For the reasons thus far stated we contend that an expression which is critical of governmental conduct is within the "core of constitutional freedom" (*Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 689 [1959]) and may not be prohibited directly to protect the reputation of the government or its officials. A threat to such reputation is intrinsic to the function of such criticism. It is not, therefore, a "substantive evil" that a State has power to prevent by the suppression of the critical expression (*cf., e.g., Schenck* v. *United States,* 249 U. S. 47, 52 [1919]; *Dennis* v. *United States,* 341 U. S. 494, 506-507, 508-510 [1951]); nor does the protection of such reputation provide one of those "conflicting governmental interests" with which the protected freedom must "be reconciled" or to which it may validly be made to yield. *Konigsberg* v.

*State Bar,* 366 U. S. 36, 50 n. 11 (1961); *Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539, 546 (1963).

If this submission overstates the scope of constitutional protection, it surely does so only in denying that there may be room for the accommodation of the two "conflicting interests" represented by official reputation and the freedom of political expression. But even under a standard that permits such accommodation, the rule by which this case was judged is inconsistent with the Constitution.

This conclusion follows because Alabama's law of libel *per se,* as applied to the criticism of officials as officials, does not reconcile the conflicting interests; it subordinates the First Amendment freedom wholly to protecting the official. It reflects no compromise of the competing values which we assume, *arguendo,* a State may validly attempt to balance. The interest favored by the First Amendment has been totally rejected, the opposing interest totally preferred. But here, as elsewhere in the area which is of concern to the First Amendment, the breadth of an abridgment "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U. S. 479, 488 (1960); *Speiser* v. *Randall,* 357 U. S. 513 (1958); *cf. Dean Milk Co.* v. *City of Madison,* 340 U. S. 349, 354 (1951). If there is room for the protection of official reputation against criticism of official conduct, measures of liability far less destructive of the freedom of expression are available and adequate to serve that end.

The Court of Appeals for the District of Columbia adopted such a standard as its version of the common law of libel in *Sweeney* v. *Patterson,* 128 F. 2d 457 (1942), dismissing a complaint based on a statement charging a Con-

gressman with anti-Semitism in opposing an appointment. Judge Edgerton, joined by Judges Miller and Vinson, noted that "the cases are in conflict" but declared that "in our view it is not actionable to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and views of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results. Such a publication is not 'libelous per se.'" The position was placed upon the ground that "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." 128 F. 2d at 458. These are, we argue, grounds which are of constitutional dimension.

The same position was taken by Judge Clark, dissenting in *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F. 2d 288 (2d Cir. 1941), affirmed by an equal division of this Court. 316 U. S. 642 (1942). Deprecating the "dangerous . . . rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous per se," he concluded that "the common-law requirement of proof of special damages gives" the commentator "the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements." 122 F. 2d at 291, 292.

Other courts have shown solicitude for the freedom to criticize the conduct of officials by requiring that the ag-

grieved official prove the critic's malice, abrogating the presumptions and strict liability that otherwise obtain.* This approach draws a line between expression uttered with the purpose of harming the official by an accusation known to be unfounded, and expression which is merely wrong in fact, with denigrating implications. It thus makes an essential element of liability an intent similar to that which elsewhere has been deemed necessary to sustain a curb on utterance (see, *e.g., Dennis* v. *United States, supra,* at 516; *Smith* v. *California,* 361 U. S. 147 [1959]; *cf. Wieman* v. *Updegraff,* 344 U. S. 183 [1952]) and relieves the defendant of an evidential and persuasive burden of a kind that has been held to be excessive (*Speiser* v. *Randall,* 357 U. S. 513 [1958]), assimilating the criteria of libel law in both respects to those demanded by the Constitution in related fields.

Whether either of these mitigated rules of liability for criticism of official conduct, or both in combination, would conform to First Amendment standards, need not be deter-

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* *Gough* v. *Tribune-Journal Company,* 75 Ida. 502, 510 (1954); *Salinger* v. *Cowles,* 195 Iowa 873, 890-891 (1923); *Coleman* v. *MacLennan,* 78 Kan. 711, 723 (1908) (frequently cited as a leading case); *Bradford* v. *Clark,* 90 Me. 298, 302 (1897); *Lawrence* v. *Fox,* 357 Mich. 134, 142 (1959); *Ponder* v. *Cobb,* 257 N.C. 281, 293 (1962); *Moore* v. *Davis,* 16 S.W. 2d 380, 384 (Tex. Civ. App. 1929). Applying the same rule to candidates for public office, see *Phoenix Newspapers* v. *Choisser,* 82 Ariz. 271, 277 (1957); *Friedell* v. *Blakeley Printing Co.,* 163 Minn. 226, 231 (1925); *Boucher* v. *Clark Pub. Co.,* 14 S.D. 72, 82 (1900). And *cf. Charles Parker Co.* v. *Silver City Crystal Co.,* 142 Conn. 605, 614 (1955) (same privilege against private corporation allegedly libeled in political broadcast). Scholarly opinion, while describing as still a "minority view" in libel law this reqirement that a plaintiff officer or candidate prove actual malice, has favored it with substantial unanimity. See, *e.g.,* 1 Harper and James, *The Law of Torts* (1956), pp. 449-450; Noel, *Defamation of Public Officers and Candidates,* 49 Col. L. Rev. 875, 891-895 (1949); *cf. Developments in the Law: Defamation,* 69 Harv. L. Rev. 875, 928 (1956).

mined in this case. The Alabama rule embraces neither mitigation. Neither would allow a judgment for respondent on the evidence on which he rests his claim.

*Fourth: The Relevancy of the Official's Privilege.* The arguments we have made are fortified by recollection of the privilege the law of libel grants to an official if he denigrates a private individual. In *Barr* v. *Matteo,* 360 U. S. 564, 575 (1959), this Court held the utterance of a federal official absolutely privileged if made "within the outer perimeter" of the official's duties. The States accord the same immunity to statements of their highest officers, though some differentiate their lowlier officials and qualify the privilege they enjoy, taking the position urged by the minority in the *Matteo* case. But all hold that all officials are protected unless actual malice can be proved.*

The ground of the official privilege is said to be that the threat of damage suits would otherwise "inhibit the fearless, vigorous, and effective administration of policies of government", that, in the words of Judge Learned Hand (*Gregoire* v. *Biddle,* 177 F. 2d 579, 581 [2d Cir. 1949]), " 'to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its out-

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* *E.g.,* according absolute privilege, *Catron* v. *Jasper,* 303 Ky. 598 (1946) (county sheriff); *Schlinkert* v. *Henderson,* 331 Mich. 284 (1951) (member of liquor commission); *Hughes* v. *Bizzell,* 189 Okla. 472, 474 (1941) (president of state university); *Montgomery* v. *Philadelphia,* 392 Pa. 178 (1958) (deputy commissioner and city architect). Limiting officers below state cabinet rank to a qualified privilege, see, *e.g., Barry* v. *McCollom,* 81 Conn. 293 (1908) (superintendent of schools); *Mills* v. *Denny,* 245 Iowa 584 (1954) (mayor); *Howland* v. *Flood,* 160 Mass. 509 (1894) (town investigating committee); *Peterson* v. *Steenerson,* 113 Minn. 87 (1910) (postmaster). See generally, 1 Harper and James, *The Law of Torts* (1956), pp. 429-30; *Prosser on Torts* (2d ed., 1955), pp. 612-13; *Restatement, Torts,* § 591.

come, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' '' *Barr* v. *Matteo, supra,* at 571. Mr. Justice Black, concurring, also related the official privilege to the sustenance of ''an informed public opinion,'' dependent on ''the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.'' 360 U. S. at 577.

It would invert the scale of values vital to a free society if citizens discharging the ''political duty'' of ''public discussion'' (Brandeis, J., concurring in *Whitney* v. *California,* 274 U. S. 357, 375 [1927]) did not enjoy a fair equivalent of the immunity granted to officials as a necessary incident of the performance of official duties. The threat of liability for actionable statement is assuredly no less of a deterrent to the private individual (*cf. Farmers Union* v. *WDAY,* 360 U. S. 525, 530 [1959]), who, unlike the official, must rely upon his own resources for defense. And, as Madison observed in words that are remembered, ''the censorial power is in the people over the Government, and not in the Government over the people.'' 4 *Annals of Congress* 934. See also *Report on the Virginia Resolutions* (1799), 4 *Elliot's Debates* (1876), pp. 575-576. ''For the same reason that members of the Legislature, judges of the courts, and other persons engaged in certain fields of the public service or in the administration of justice are absolutely immune from actions, civil or criminal, for libel for words published in the discharge of such public duties, the individual citizen must be given a like privilege when he is acting in his sovereign capacity.'' *City of Chicago* v. *Tribune Co.,* 307 Ill. 595, 610 (1923). The citizen acts in his ''sovereign capacity'' when he assumes to censure the officialdom.

*Fifth: The Protection of Editorial Advertisements.* Though the point was not taken by the court below, respondent argues that the fact that the statement was a paid advertisement deprives it of protection "as speech and press". Brief in Opposition, p. 19. The argument is wholly without merit.

The decisions invoked by respondent have no bearing on this case. *Breard* v. *Alexandria,* 341 U. S. 622 (1951), dealt with a regulation of the place, manner and circumstances of solicitation of subscriptions, not with the repression of a publication on the basis of its content, the ideas that are expressed. *Valentine* v. *Christensen,* 316 U. S. 52 (1942), involved a handbill soliciting the inspection of a submarine which its owner exhibited to visitors on payment of a stated fee. An ordinance requiring a permit for street distribution of commercial advertising was sustained as applied to him. It is merely cynical to urge that these determinations bar protection of the statement involved here.

The statement published by petitioner was not a "commercial" advertisement, as it is labeled by respondent. It was a recital of grievances and protest against claimed abuses dealing squarely with the major issue of our time. The fact that its authors sought to raise funds for defense of Dr. King and his embattled movement, far from forfeiting its constitutional protection, adds a reason why it falls within the freedom guaranteed. *Cf. N. A. A. C. P.* v. *Button, supra,* 371 U. S. at 429-431, 439-440. That petitioner received a payment for the publication is no less immaterial in this connection than is the fact that newspapers and books are sold. *Smith* v. *California,* 361 U. S. 147, 150 (1959); *cf. Bantam Books Inc.* v. *Sullivan,* 372 U. S. 58, 64, n. 6 (1963).

It is, of course, entirely true that the published statement did not represent or purport to represent assertions by petitioner, but rather by the sponsoring Committee and the individuals whose names appeared. But since the publisher is held no less responsible than are the sponsors, it must surely have the same protection they enjoy. *Cf. Barrows* v. *Jackson,* 346 U. S. 249 (1953). The willingness of newspapers to carry editorial advertisements is, moreover, an important method of promoting some equality of practical enjoyment of the benefits the First Amendment was intended to secure. *Cf. Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Schneider* v. *State,* 308 U. S. 147 (1939); *Talley* v. *California,* 362 U. S. 60 (1960). The practice encourages "the widest possible dissemination of information from diverse and antagonistic sources", which the First Amendment deems "essential to the welfare of the public". *Associated Press* v. *United States,* 326 U. S. 1, 20 (1945). It has no lesser claim than any other mode of publication to the freedom that the Constitution guarantees.

## II

**Even if the rule of liability were valid on its face, the judgment rests on an invalid application.**

Assuming, *arguendo,* that the freedom of the press may constitutionally be subordinated to protection of official reputation, as it would be by the rule of liability declared below, the rule is nonetheless invalid as applied, upon the record in this case. Nothing in the evidence supports a finding of the type of injury or threat to the respondent's reputation that, on the assumption stated, justifies repression of the publication. And even if there were a basis

for discerning such a threat, there was no ground for the enormous judgment rendered on the verdict.

*First: The Scope of Review.* These submissions fall within the settled scope of review by this Court when it is urged that a federal right has been denied "in substance and effect" by a state court. *Norris* v. *Alabama,* 294 U. S. 587, 590 (1935). If the denial rests on findings of fact which are in law determinative of the existence of the federal right, those findings must be adequately sustained by the evidence. *Norris* v. *Alabama, supra; Fiske* v. *Kansas,* 274 U. S. 380 (1927); *Herndon* v. *Lowry,* 301 U. S. 242, 259-261 (1937). If the denial rests on a conclusion or evaluation governing the application of controlling federal criteria, this Court will make its own appraisal of the record to determine if the facts established warrant the conclusion or evaluation made. *Bridges* v. *California,* 314 U. S. 252, 263, 271 (1941); *Pennekamp* v. *Florida,* 328 U. S. 331, 335, 345-346 (1946); *Craig* v. *Harney,* 331 U. S. 367, 373-374 (1947); *Watts* v. *Indiana,* 338 U. S. 49, 50 (1949) (plurality opinion); *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 708 (1959) (concurring opinion); *Wood* v. *Georgia,* 370 U. S. 375, 386 (1962); *Edwards* v. *South Carolina,* 372 U. S. 229 (1963).

The decision below that the publication libeled the respondent does not, therefore, foreclose the questions whether, on the facts established by the record, it contained a statement "of and concerning" the complainant and, if so, whether such statement injured or jeopardized his reputation to an extent that, as a matter of the First Amendment, justified its punitive repression by the judgment rendered in the Circuit Court. *Bridges* v. *California, supra.* As in the contempt cases, this Court "must weigh the impact of the words against the protection given by the prin-

ciples of the First Amendment. . . ." *Pennekamp* v. *Florida, supra,* at 349.

*Second: The Failure to Establish Injury or Threat to Respondent's Reputation.* An appraisal of this record in these terms leaves no room for a determination that the publication sued on by respondent made a statement as to him, or that, if such a statement may be found by implication, it injured or jeopardized his reputation in a way that forfeits constitutional protection.

The publication did not name respondent or the Commission of which he is a member and it plainly was not meant as an attack on him or any other individual. Its protests and its targets were impersonal: "the police", the "state authorities", "the Southern violators". The finding that these collective generalities embodied an allusion to respondent's personal identity rests solely on the reference to "the police" and on his jurisdiction over that department. See pp. 7, 9, 10-14, 23-24, *supra.* But the police consisted of a force of 175 full-time officers, not to speak of a Chief responsible for the direction of their operations. See p. 10, *supra.* Courts have not hitherto permitted the mere designation of a group so large to be regarded as a reference to any member, least of all to one related to it only by an ultimate responsibility for its control or management.* While this result may well involve an element

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* See, *e.g., Service Parking Corp.* v. *Washington Times Co.,* 92 F. 2d 502 (D. C. Cir. 1937); *Noral* v. *Hearst Publications, Inc.,* 40 Cal. App. 2d 348 (1940); *Fowler* v. *Curtis Publishing Co.,* 182 F. 2d 377 (D. C. Cir. 1950); *McBride* v. *Crowell-Collier Pub. Co.,* 196 F. 2d 187 (5th Cir. 1952); *Neiman-Marcus* v. *Lait,* 13 F.R.D. 311, 316 (S. D. N. Y. 1952); *cf. Julian* v. *American Business Consultants, Inc.,* 2 N. Y. 2d 1 (1956); *Weston* v. *Commercial Advertiser Assn.,* 184 N. Y. 479, 485 (1906). See also *Restatement of Torts,* § 564, Comment *c; Prosser on Torts* (2d ed. 1955), pp. 583-584.

of judgment as to policy, regardful of "the social interest in free press discussion of matters of general concern" (*Service Parking Corp.* v. *Washington Times Co.*, 92 F. 2d at 505), it rests as well upon a common sense perception of the safety that numbers afford against a truly harmful denigration. The term "police" does not in fact mean all policemen. No more so does it mean the Mayor or Commissioner in charge.

This fatal weakness in the allegation that respondent was referred to by the publication was not cured by his own testimony or that of his six witnesses, four of whom first saw the publication in the office of his counsel. See p. 14, *supra*. We have detailed that testimony in the Statement (*supra*, pp. 11-14) and shall not repeat it *in extenso* here. It was at best opinion as to the interpretation of the writing. No witness offered evidence of an extrinsic fact bearing upon the meaning of an enigmatic phrase or the identity of someone mentioned by description. *Cf., e.g., Hope* v. *Hearst Consolidated Publications, Inc.*, 294 F. 2d 681 (2d Cir. 1961). The weight of the testimony does not, therefore, transcend the ground of the opinions, which was no more than the bare *ipse dixit* that "police" meant the respondent, since he is Commissioner in charge.

Respondent's own conception of the meaning of the language went beyond this, to be sure. His view was that if one statement in a paragraph referred to the police, the other statements must be read to make the same allusion. Thus he considered that the declaration "They have bombed his home" meant that the bombing was the work of the police, because the paragraph contained the statement that "[t]hey have arrested him seven times"; and arrests are made by the police. See pp. 9, 11, *supra*.

We think it is enough to say that these "mere general asseverations" (*Norris* v. *Alabama,* 294 U. S. 587, 595 [1935]) were not evidence of what the publication said or what it reasonably could be held to mean. The problem, on this score, is not unlike that posed in *Fiske* v. *Kansas, supra,* where in determining the "situation presented" on the record, this Court read the crucial document itself to see if it possessed the attributes that had produced its condemnation (274 U. S. at 385). So read, this publication was a totally impersonal attack upon conditions, groups and institutions, not a personal assault of any kind.

Even if the statements that refer to "the police" could validly be taken to refer to the respondent, there was nothing in those statements that suffices to support the judgment. Assertions that were shown to have been accurate by the respondent's evidence cannot be relied on to establish injury to his official or his private reputation; if the truth hurts that surely is a hurt the First Amendment calls on him to bear.* Hence, the whole claim of libel rests on two discrepancies between the material statements and the facts. Where the publication said that "truckloads" of armed police "ringed the Alabama State College Campus", the fact was that only "large numbers" of police "were

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* This is recognized in part by Alabama law itself, despite the strictness of the rule respecting truth as a defense, since evidence of truth must be received in mitigation under the general issue. Ala. Code of 1940, title 7, § 909; see *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 490 (1960). The problem has been met in England by enlarging the defense. See Defamation Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 66, § 5: "In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges." See also *Report of the Committee on the Law of Defamation* (1948) cmd. 7536, p. 21.

deployed near the campus'' upon three occasions, without ringing it on any. See p. 8, *supra.* And where the statement said ''They have arrested him seven times'', the fact was that Dr. King had been arrested only four times. Three of the arrests had occurred, moreover, before the respondent came to office some six months before the suit was filed. See pp. 9, 10, *supra.* That the exaggerations or inaccuracies in these statements cannot rationally be regarded as tending to injure the respondent's reputation is, we submit, entirely clear.

None of the other statements in the paragraphs relied on by respondent helps to make a colorable case. The advertisement was wrong in saying that 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.'' This was, indeed, the gravamen of the resentment that the publication seems to have inspired in Montgomery. See p. 9, *supra.* A majority of students did engage in the protest against the expulsions, but only a few refused to re-register, the dining hall was never ''padlocked'' and, perforce, there was no ''attempt to starve'' the students ''into submission''. See p. 8, *supra.* But none of these admittedly erroneous assertions had a thing to do with the police and even less with the respondent. He testified himself that ''as far as the expulsion of students is concerned, that responsibility rests with the State Department of Education'' (R. 716). If that was so, as it clearly was, it must have been no less the responsibility of the ''State authorities'', who are alone referred to in the offending sentence, to have padlocked the dining hall, as it alleged. There certainly is no suggestion, express or implied, that the imaginary padlock was attached by the police.

The statement that "the Southern violators have answered Dr. King's peaceful protests with intimidation and violence" was thought by the respondent to refer to himself only because "it is contained in a paragraph" which also referred to arrests (R. 717-718), a point on which his testimony is, to say the least, quite inexplicit, totally ignoring the fact that the paragraph did not even fix the time of the events recited or purport to place them in Montgomery. But whatever the respondent brought himself to think, or badgered Aaronson to say on cross-examination (see p. 17, *supra*), the statement cannot reasonably bear such a construction. The term "Southern violators of the Constitution" was a generic phrase employed in the advertisement to characterize all those whose alleged conduct gave rise to the grievances recited, whether private persons or officials. There was no suggestion that the individuals or groups were all the same, any more than that they were the same in Orangeburg as in Atlanta or Montgomery.

For the same reason, there was no basis for asserting that the statement that "they" bombed his home, assaulted him and charged him with perjury pointed to respondent as the antecedent of the pronoun, though the trial court pointedly permitted him to prove his innocence upon these points. See p. 10, *supra*. There was, to be sure, disputed evidence respecting a police assault but this related to an incident occurring long before respondent was elected a Commissioner (see pp. 9-10, *supra*). Beyond dispute, there were two bombings of King's home and he was charged with perjury. Indeed, to raise funds to defend him on that charge, which proved to be unfounded, was the main objective of the publication. See p. 6, *supra*.

It is, in sum, impossible in our view to see in this mélange of statements, notwithstanding the inaccuracies

noted, any falsehood that related to respondent and portended injury to his official reputation. That he sustained no injury in fact was made entirely clear by his own evidence. The most that his witnesses could say was that they would have thought less kindly of him *if* they had believed the statements they considered critical of his official conduct. They did not in fact believe them and respondent did not fall at all in their esteem. In Alabama, no less than in Virginia, "the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community," as this Court said in *N. A. A. C. P.* v. *Button, supra,* 371 U. S. at 435. This publication was, upon its face, made on behalf of sympathizers with that movement. That such a statement could have jeopardized respondent's reputation anywhere he was known as an official must be regarded as a sheer illusion, not a finding that has any tangible support. In the real world, the words were utterly devoid of any "impact" that can weigh "against the principles of the First Amendment." *Pennekamp* v. *Florida, supra,* 328 U. S. at 349.

Respondent adduced as an aspect of his grievance that *The Times* made a retraction on demand of Governor Patterson but failed to do so in response to his demand. See pp. 18-22, *supra.* It is enough to say that if the statement was protected by the Constitution, as we contend it was, no obligation to retract could be imposed. Beyond this, however, there was an entirely reasonable basis for the distinction made. Petitioner selected Governor Patterson as "the proper representative" of Alabama to be formally assured that *The Times* did not intend the publication to reflect upon the State. It also took account of the fact that the Governor was chairman ex-officio of the State Board of

Education; and that the "state authorities" had been referred to in the sentence claiming that the dining hall was padlocked. See pp. 21-22, *supra*. A distinction based upon those grounds was not invidious as to respondent. Far from exacerbating any supposed injury to him, as the court below believed (R. 1178), the retraction was a mollifying factor, weakening, if not erasing, the statement as to anyone who thought himself concerned.

*Third: The Magnitude of the Verdict.* Even if we are wrong in urging that there is no basis on this record for a judgment for respondent, consistently with the protection of the First Amendment, the judgment of $500,000 is so shockingly excessive that it violates the Constitution.

That judgment was rendered, as we have shown, without any proof of injury or special damage. General damages simply were "presumed" and the jury was authorized to levy damages as punishment in its discretion. The trial court refused to charge that the jury should—or even could in its discretion—separately assess compensatory and punitive damages (R. 847, 864, Nos. 59 and 60). Since there was no rational foundation for presuming any damages at all,* it is both legally correct and factually realistic to regard the entire verdict as a punitive award. *Cf. Stromberg* v. *California,* 283 U. S. 359, 367-368 (1931).

Viewing the publication as an offense to the respondent's reputation, as we do for purposes of argument, there was no rational relationship between the gravity of the

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* It is relevant in this connection to recall that the entire circulation of *The Times* in Alabama was 394 copies, 35 in Montgomery County (R. 836). Even on the theory of the court below, the reference to "police" could hardly have been read to refer to respondent anywhere but in Montgomery, or at most in Alabama.

offense and the size of the penalty imposed. *Cf. Crowell-Collier Pub. Co.* v. *Caldwell,* 170 F. 2d 941, 944, 945 (5th Cir. 1948). The court below declined, indeed, to weigh the elements of truth embodied in the publication in appraising the legitimacy of the verdict, contrary to its action in a recent case involving charges that a private individual was guilty of grave crimes. *Johnson Publishing Co.* v. *Davis,* 271 Ala. 474, 490 (1960). It chose instead to treat petitioner's assertion of belief in the substantial truth of the advertisement, so far as it might possibly have been related to respondent, as evidence of malice and support for the size of the award. See pp. 22, 24, *supra.*

The judgment is repugnant to the Constitution on these grounds. As Mr. Justice Brandeis said, concurring in *Whitney* v. *California,* 274 U. S. 357, 377 (1927), a "police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive." The proposition must apply with special force when the "harsh" remedy has been explicitly designed as a deterrent of expression. It is, indeed, the underlying basis of the principle that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut,* 310 U. S. 296, 304, 308 (1940). That principle has been applied by this Court steadily in recent years as measures burdening the freedoms of expression have been tested by "close analysis and critical judgment in the light of the particular circumstances" involved. *Speiser* v. *Randall,* 357 U. S. 513, 520 (1958). See also, *e.g., Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936); *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958); *Smith* v. *California,* 361 U. S. 147, 150-151 (1959); *Bates* v.

*Little Rock,* 361 U. S. 516 (1960); *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *cf. Winters* v. *New York,* 333 U. S. 507, 517 (1948).

Even when the crucial freedoms of the First Amendment have not been at stake, this Court has made clear that a penalty or money judgment may deprive of property without due process where it is "so extravagant in amount as to outrun the bounds of reason and result in sheer oppression." *Life & Casualty Co.* v. *McCray,* 291 U. S. 566, 571 (1934). A statutory penalty recoverable by a shipper has not been permitted to "work an arbitrary, unequal and oppressive result for the carrier which shocks the sense of fairness the Fourteenth Amendment was intended to satisfy . . . ." *Chicago & N. W. Ry.* v. *Nye Schneider Fowler Co.,* 260 U. S. 35, 44-45 (1922). See also *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340, 350-351 (1913); *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams,* 251 U. S. 63, 66-67 (1919). The idea of government under law is hardly older than the revulsion against "punishment out of all proportion to the offense. . . ." Douglas, J., concurring in *Robinson* v. *California,* 370 U. S. 660, 676 (1962). Such punishment was inflicted here, compounding the affront this judgment offers to the First Amendment.

It is no hyperbole to say that if a judgment of this size can be sustained upon such facts as these, its repressive influence will extend far beyond deterring such inaccuracies of assertion as have been established here. This is not a time—there never is a time—when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the tensest issues that confront the country or to forego the dissemination of its publications in the areas where tension is extreme.

Respondent argued in his Brief in Opposition (pp. 25-26) that the Seventh Amendment bars this Court from considering the size of an award based on the verdict of a jury. The very authorities he cites make clear that any insulation of a verdict from review does not extend to situations where it involves or reflects error of law. See, *e.g., Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 483-485 (1933); *Chicago, B. & Q. Railroad* v. *Chicago,* 166 U. S. 226, 246 (1897). See also *Dimick* v. *Schiedt,* 293 U. S. 474, 486 (1935); *A. & G. Stevedores* v. *Ellerman Lines,* 369 U. S. 355, 364, 366 (1962). Abridgment of the freedom of the press is surely such an error; and in determining if an abridgment has occurred, it makes no difference what branch or agency of the State has imposed the repression. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 463 (1958); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 68 (1963). Indeed, the current of authority today regards the Seventh Amendment as inapplicable generally to appellate review of an excessive verdict, viewing the denial of relief below as an error of law. See, *e. g., Southern Pac. Co.* v. *Guthrie,* 186 F. 2d 926, 931 (9th Cir. 1951); *Dagnello* v. *Long Island Rail Road Company,* 289 F. 2d 797, 802 (2d Cir. 1961); *cf. Affolder* v. *New York, Chicago & St. L. R. Co.,* 339 U. S. 96, 101 (1950); 6 *Moore's, Federal Practice* (2d ed. 1953), pp. 3827-3841. That general problem is not presented here because this excess contravenes the First Amendment.

## III

**The assumption of jurisdiction in this action by the Courts of Alabama contravenes the Constitution.**

In sustaining the jurisdiction of the Circuit Court, the courts below held that petitioner made an involuntary general appearance in this action, subjecting its person to the

jurisdiction and forfeiting the constitutional objections urged. They also rejected those objections on the merits, holding that petitioner's contacts with Alabama were sufficient to support State jurisdiction in this cause, based either on the service of process on McKee as a purported agent or on the substituted service on the Secretary of State. The decision is untenable on any ground.

*First: The Finding of a General Appearance.* The motion to quash stated explicitly that petitioner appeared "solely and specially for the purpose of filing this its motion to quash attempted service of process in this cause and for no other purpose and without waiving service of process upon it and without making a general appearance and expressly limiting its special appearance to the purpose of quashing the attempted service upon it in this case . . ." (R. 39, 47). The grounds of the motion related to no other issue than that of petitioner's amenability to Alabama jurisdiction in this action as a New York corporation, neither qualified to do nor doing business in the State (R. 40-45, 47). The prayer for relief (R. 45-46) was not, however, limited to asking that the service or purported service of process be quashed and that the action be dismissed "for lack of jurisdiction of the person" of petitioner. It concluded with a further request for dismissal for "lack of jurisdiction of the subject matter of said action" (R. 46). That prayer, the courts held, converted the special appearance into a general appearance by operation of the law of Alabama (R. 49-51, 1151-1153).

This ruling lacks that "fair or substantial support" in prior state decisions that alone suffices to preclude this Court's review of federal contentions held to be defeated by a rule of state procedure. *N. A. A. C. P.* v. *Alabama,* 357

U. S. 449, 455-457 (1958). The governing principle of Alabama practice was declared by the court below in *Ex parte Cullinan,* 224 Ala. 263 (1931), holding that a request for "further time to answer or demur or file other motions", made by a party appearing specially, did not constitute a general appearance waiving constitutional objections later made by motion to quash. Noting that a non-resident's objection to the jurisdiction "is not a technical one . . . but is an assertion of a fundamental constitutional right", the court said the question involved was one "of consent or a voluntary submission to the jurisdiction of the court", an issue of "intent as evidenced by conduct", as to which "the intent and purpose of the context as a whole must control." 224 Ala. at 265, 266, 267. See also *Ex parte Haisten,* 227 Ala. 183, 187 (1933); *cf. Sessoms Grocery Co.* v. *International Sugar Feed Company,* 188 Ala. 232, 236 (1914); *Terminal Oil Mill Co.* v. *Planters W. & G. Co.,* 197 Ala. 429, 431 (1916). For a waiver to be inferred or implied, when the defendant appears specially to move to set aside service of process, he must have taken some "action in relation to the case, disconnected with the motion, and which recognized the case as in court." *Lampley* v. *Beavers,* 25 Ala. 534, 535 (1854).

Petitioner's prayer for relief neither "recognized the case as in court" nor evidenced "consent or voluntary submission" to the jurisdiction. On the contrary, the papers made entirely clear that the sole ruling sought by the petitioner was that it was not amenable to Alabama's jurisdiction, as a New York corporation having no sufficient contact with the State to permit the assertion of jurisdiction *in personam* in an action based upon a publication in New York.

The doctrine of *Ex parte Cullinan* has not been qualified by any other holding of the court below before the instant case. It is, on the other hand, confirmed by cases in which a defendant appearing specially has joined a motion to quash for inadequate service with a plea in abatement challenging the venue of the action—without the suggestion that the plea amounted to a general appearance, though the question that it raised was characterized by the court below as one of "jurisdiction of the subject matter." *St. Mary's Oil Engine Co.* v. *Jackson Ice and Fuel Co.*, 224 Ala. 152, 155, 157 (1931). See also *Seaboard Air Line Ry.* v. *Hubbard*, 142 Ala. 546, 548 (1904); *Dozier Lumber Co.* v. *Smith-Isburg Lumber Co.*, 145 Ala. 317 (1905); *cf. Johnson Publishing Co.* v. *Davis*, 271 Ala. 474, 490 (1960); *Ex parte Textile Workers Union of America*, 249 Ala. 136, 142 (1947). Indeed, the precise equivalent of the prayer of the motion in this case was used in *Harrub* v. *Hy-Trous Corporation*, 249 Ala. 414, 416 (1947), without arousing an objection to adjudication of the issue as to jurisdiction of the person, raised on the special appearance. Beyond this, the late Judge Walter B. Jones, who presided in this case at Circuit, reproduced these very motion papers in the 1962 supplement to his treatise on Alabama practice, as a form of "Motion to Quash Service of Process by Foreign Corporation", without intimation that the prayer addressed to lack of jurisdiction of the subject matter waived the point respecting jurisdiction of the person. 3 Jones, *Alabama Practice and Forms* (1947) § 11207.1a (Supp. 1962).

There is, moreover, a persuasive reason why a foreign corporation challenging its amenability to suit in Alabama by substituted service on the Secretary of State should con-

ceive of its objection as relating in a sense to jurisdiction of the subject matter of the action. The statute (Ala. Code of 1940, title 7, § 199[1]) itself speaks in terms of the sufficiency of service on the Secretary "to give to any of the courts of this state jurisdiction over the cause of action and over such non-resident defendant" (Appendix A, *infra,* p. 94). Hence a contention that the statute is inapplicable or invalid as applied goes, in this sense, to jurisdiction of the cause as well as jurisdiction of the person.* *Cf. St. Mary's Oil Engine Co.* v. *Jackson Ice & Fuel Co., supra,* at 155; *Boyd* v. *Warren Paint & Color Co.,* 254 Ala. 687, 691 (1950). The one conclusion is implicit in the other, not the product of a separate inquiry involving separate grounds.

Against all these indicia of Alabama law, ignored in the decisions of the courts below, the authorities relied on are quite simply totally irrelevant. None involved the alleged waiver of a constitutional objection. Except for *Blankenship* v. *Blankenship,* 263 Ala. 297, 303 (1955), where the court specifically declined to consider whether the appearance had been general or special, deeming the issue immaterial upon the question posed, none involved a special

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* It should be noted also that prior to the enactment of Ala. Code, title 7, § 97 in 1907, Alabama denied her courts jurisdiction over actions against foreign corporations which did not arise within the State. See *McKnett* v. *St. Louis & San Francisco Ry., 292* U. S. 230, 231 (1934). The bar to foreign causes was raised, however, only to suits "in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state." The claim that McKee was not an "agent" for purposes of service under Ala. Code, title 7, § 188 (Appendix A, *infra,* p. 92), if valid, thus implied a defect of subject matter jurisdiction of this cause of action, which petitioner submitted arose at the place of publication in New York. Compare the statement by the court below upon this point (R. 1179) with *New York Times Company* v. *Conner,* 291 F. 2d 492, 494 (5th Cir. 1961).

appearance. In *Thompson* v. *Wilson,* 224 Ala. 299 (1932), the defendant, a resident of Alabama, had not even purported to appear specially or attempted to question the court's jurisdiction of his person; his sole objection, taken by demurrer, was to the court's competence to deal with the subject matter of the action and to grant relief of the type asked. In *Vaughan* v. *Vaughan,* 267 Ala. 117, 120, 121 (1957), referred to by the Circuit Court, the movant failed to limit her appearance, leading the court to distinguish *Ex parte Haisten, supra,* on this ground. The additional decisions cited by respondent (Brief in Opposition, p. 36) are no less irrelevant. Neither *Kyser* v. *American Surety Co.,* 213 Ala. 614 (1925) nor *Aetna Insurance Co.* v. *Earnest,* 215 Ala. 557 (1927) involved a special appearance or dealt with a challenge to service of process on constitutional grounds.

The California and North Carolina cases cited and quoted below (*Olcese* v. *Justice's Court,* 156 Cal. 82 [1909]; *Roberts* v. *Superior Court,* 30 Cal. App. 714 [1916]; *Dailey Motor Co.* v. *Reaves,* 184 N.C. 260 [1922]) and the similar decisions referred to in the annotation cited (25 A.L.R. 2d 838-842), to the extent that they treated a challenge to the jurisdiction of the subject matter as a general appearance, all involved situations where the defendant's objection was deemed to ask for relief inconsistent with the absence of jurisdiction of the person or to raise a separate "question whether, considering the nature of the cause of action asserted and the relief prayed by plaintiff, the court had power to adjudicate concerning the subject matter of the class of cases to which plaintiff's claim belonged." *Davis* v. *O'Hara,* 266 U. S. 314, 318 (1924); *cf. Constantine* v. *Constantine,* 261 Ala. 40, 42 (1954). That no such ques-

tion was presented here the motion papers make entirely clear.

The situation is, indeed, precisely analogous to that presented in the *Davis* case. There the defendant, Director General of Railroads, appeared specially for the purpose of objecting to the jurisdiction of the district court "over the person of the defendant and over the subject matter of this action," on the ground that in the circumstances the Director was immune to suit in the county where action was brought. The Nebraska courts treated the reference to subject matter as a general appearance, waiving the immunity asserted. *O'Hara* v. *Davis,* 109 Neb. 615 (1923). This Court reversed, holding that there "was nothing in the moving papers to suggest that the Nebraska court had no jurisdiction to try and determine actions, founded on negligence, to recover damages for personal injuries suffered by railway employees while engaged in the performance of their work" (266 U. S. at 318). So here, there was nothing in the papers to suggest that the petitioner questioned the competence of the Circuit Court to "exercise original jurisdiction . . . of all actions for libel. . . ." (Ala. Code, title 13, § 126). The point was only that petitioner, because it is a foreign corporation having only a peripheral relationship to Alabama, was immune to jurisdiction in the action brought.

For the foregoing reasons, we submit that the decision that petitioner made an involuntary general appearance does not constitute an adequate state ground, barring consideration of the question whether Alabama has transcended the due process limitations on the territorial extension of the process of her courts. *Cf. Wright* v. *Georgia,* 373 U. S. 284 (1963); *N. A. A. C. P.* v. *Alabama, supra; Staub* v. *City of Baxley,* 355 U. S. 313 (1958); *Davis* v. *Wechsler,*

263 U. S. 22 (1923); *Ward* v. *Love County,* 253 U. S. 17 (1920).*

Moreover, even if petitioner could validly be taken to have made an involuntary general appearance by the prayer for dismissal on the ground of lack of jurisdiction of the subject matter, that appearance would not bar the claim that in assuming jurisdiction of this action the state court has cast a burden upon interstate commerce forbidden by the Commerce Clause. That point is independent of the defendant's amenability to process, as this Court has explicitly decided in ruling that the issue remains open, if presented on "a seasonable motion", notwithstanding the presence of the corporation in the State or its appearance generally in the cause. *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312 (1923); *Michigan Central R. R. Co.* v. *Mix,* 278 U. S. 492, 496 (1929). See also *Denver & R. G. W. R. Co.* v. *Terte,* 284 U. S. 284, 287 (1932) (attachment); *Canadian Pacific Ry. Co.* v. *Sullivan,* 126 F. 2d 433, 437 (1st Cir.), *cert. denied,* 316 U. S. 696 (1942) (agent designated to accept service); *Zuber* v. *Pennsylvania R. Co.,* 82 F. Supp. 670, 674 (N. D. Ga. 1949); *Pantswowe*

* It should be noted that the Circuit Court also found a waiver of petitioner's special appearance in its application for mandamus to review an order directing the production of documents demanded by respondent to show the extent of petitioner's activities in Alabama. R. 50-51; see also R. 29-39, Pl. Ex. 311-313, R. 1835-1858. The Supreme Court's opinion is silent on this point, presumably in recognition of the proposition that an action must be "disconnected" with the motion to support an inference of waiver. *Lampley* v. *Beavers, supra; cf. Ford Motor Co.* v. *Hall Auto Co.,* 226 Ala. 385, 388 (1933). It would obviously thwart essential self-protective measures if an effort to obtain review of an allegedly abusive ancillary order were regarded as a waiver of the prime submission. *Cf. Ex parte Spence,* 271 Ala. 151 (1960); *Ex parte Textile Workers of America,* 249 Ala. 136 (1947); *Ex parte Union Planters National Bank and Trust Co.,* 249 Ala. 461 (1947). See *Fay* v. *Noia,* 372 U. S. 391, 432, n. 41 (1963).

*Zaklady Graviozne* v. *Automobile Ins. Co.,* 36 F. 2d 504 (S. D. N. Y. 1928) (commerce objection relates to jurisdiction of subject matter); 42 Harv. L. Rev. 1062, 1067 (1929); 43 *id.* 1156, 1157 (1930). For the same reason, we submit, an implied general appearance would not bar the litigation of petitioner's contention, seasonably urged upon the motion, that by taking jurisdiction in this action, the courts below denied due process by abridging freedom of the press; that also is an issue independent of the presence of petitioner in Alabama or its amenability to process of the court.

*Second: The Territorial Limits of Due Process.* The courts below held that the sporadic newsgathering activities of correspondents and stringers of *The Times* in Alabama, the occasional solicitation and publication of advertising from Alabama sources and the minuscule shipment of the newspaper to subscribers and newsdealers in the State (*supra,* pp. 25-27) constitute sufficient Alabama contacts to permit the exercise of jurisdiction in this action, without transcending the territorial limits of due process.

This assertion of state power finds no sanction in this Court's decisions governing the reach of state authority, despite the relaxation in the limits of due process that we recognize to have occurred in recent years. Neither the "flexible standard" of *International Shoe Co.* v. *Washington,* 326 U. S. 310 (1945), as it was called in *Hanson* v. *Denckla,* 357 U. S. 235, 251 (1958), nor any of its later applications, sustains, in our submission, the extreme determination here.

It is plain, initially, that the petitioner's peripheral relationship to Alabama does not involve "continuous corpo-

rate operations'' which are ''so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.'' *International Shoe Co.* v. *Washington, supra,* at 318. The case bears no resemblance to *Perkins* v. *Benguet Mining Co.,* 342 U. S. 437 (1952), where the central base of operations of the corporation, including its top management, was in the State where suit was brought. It hardly can be argued that *The New York Times* has such a base in Alabama, where, according to this record, it enjoys 6/100ths of one per cent of its daily circulation and 2/10ths of one per cent of its Sunday circulation and where the sources of 46/1000ths of one per cent of its advertising revenue are found (R. 402, 444-445). The occasional visits of correspondents to the State to report on events of great interest to the nation places *The Times* in Alabama no more than in Ankara or Athens or New Delhi, where, of course, similar visits occur.

Hence, if the jurisdiction here asserted is sustained, it must be on the ground that the alleged cause of action is so ''connected with'' petitioner's ''activities within the state'' as to ''make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there.'' *International Shoe Co.* v. *Washington, supra,* at 319, 317. See also *Blount* v. *Peerless Chemicals (P. R.) Inc.,* 316 F. 2d 695, 700 (2d Cir. 1963); *L. D. Reeder Contractors of Ariz.* v. *Higgins Industries, Inc.,* 265 F. 2d 768, 774-775 (9th Cir. 1959); *Partin* v. *Michaels Art Bronze Co.,* 202 F. 2d 541, 545 (3d Cir. 1953) (concurring opinion).

There is, in our view, no such connection. Here, as in *Hanson* v. *Denckla, supra,* at 252, the ''suit cannot be said

to be one to enforce an obligation that arose from a privilege the defendant exercised in'' the State. The liability alleged by the respondent certainly is not based on any activity of correspondents or stringers of *The Times* in covering the news in Alabama; and neither entering the State for such reporting, nor the composition nor the filing of reports rests on a privilege the State confers, given the rights safeguarded by the Constitution. Nor is this claim of liability connected with the occasional solicitation of advertisements in Alabama. The advertisement in suit was not solicited and did not reach *The Times* from anyone within the State. There remains, therefore, only the negligible circulation of *The Times* in Alabama on which to mount an argument that this suit relates to the exercise by the petitioner of ''the privilege of conducting activities within'' the State. *International Shoe Co.* v. *Washington, supra,* at 319.

We contend that this circulation did not involve the exercise of such a privilege. Copies of the paper were mailed to subscribers from New York or shipped from there to dealers who were purchasers, not agents of *The Times.* Such mailing and shipment in New York were not activity of the petitioner within the State of Alabama. See, *e.g., Putnam* v. *Triangle Publications, Inc.,* 245 N. C. 432, 443 (1957); *Schmidt* v. *Esquire, Inc.,* 210 F. 2d 908, 915, 916 (7th Cir. 1954), *cert. denied,* 348 U. S. 819 (1954); *Street & Smith Publications, Inc.* v. *Spikes,* 120 F. 2d 895, 897 (5th Cir.), *cert. denied,* 314 U. S. 653 (1941); *Cannon* v. *Time, Inc.,* 115 F. 2d 423, 425 (4th Cir. 1940); *Whitaker* v. *Macfadden Publications, Inc.,* 105 F. 2d 44, 45 (D. C. Cir. 1939); *Buckley* v. *New York Times Co.,* 215 F. Supp. 893 (E. D. La. 1963); *Gayle* v. *Magazine Man-*

*agement Co.*, 153 F. Supp. 861, 864 (M. D. Ala. 1957); *Brewster* v. *Boston Herald-Traveler Corp.*, 141 F. Supp. 760, 761, 763 (D. Me. 1956); *cf. Erlanger Mills* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502 (4th Cir. 1956); *L. D. Reeder Contractors of Ariz.* v. *Higgins Industries, Inc.*, 265 F. 2d 768 (9th Cir. 1959); *Trippe Manufacturing Co.* v. *Spencer Gifts, Inc.*, 270 F. 2d. 821, 823 (7th Cir. 1959). Whether Alabama may, upon these facts, declare the petitioner responsible for an Alabama "publication" by causing or contributing to the dissemination of those papers in the State is not, of course, the issue. That is a problem of the choice of law* which is entirely distinct from the question here presented: whether by its shipment in and from New York petitioner "avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla, supra,* at 253. A State may be empowered to apply its law to a transaction upon grounds quite insufficient to establish "personal jurisdiction over a non-resident defendant", as *Hanson* (*ibid.*) makes clear. If this were not the case, each of the individual non-resident signers of the advertisement might also be amenable to Alabama's long-

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* Courts have been no less perplexed than commentators by the conflicts problems incident to multi-state dissemination of an alleged libel; and some have sought to solve them by a "single publication" rule, fixing the time and place of the entire publication when and where the first and primary dissemination occurred. See, *e.g., Hartmann* v. *Time, Inc.*, 166 F. 2d 127 (3d Cir. 1947), *cert. denied*, 334 U. S. 838 (1948); *Insull* v. *New York, World-Telegram Corp.*, 273 F. 2d 166, 171 (7th Cir. 1959), *cert. denied*, 362 U. S. 942 (1960); *cf. Mattox* v. *News Syndicate Co.*, 176 F. 2d 897, 900, 904-905 (2d Cir.), *cert. denied*, 338 U. S. 858 (1949). See also, *e.g.*, Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 (1953); Leflar, *The Single Publication Rule*, 25 Rocky Mt. L. Rev. 263 (1953); Note, 29 U. of Chi. L. Rev. 569 (1962).

arm process, not to speak of every author of a publication sold within the State. See *Calagaz* v. *Calhoon,* 309 F. 2d 248, 254 (5th Cir. 1962). That would, indeed, entail the "demise of all restrictions on the personal jurisdiction of state courts", an eventuality that this Court has declared the trend of its decisions does not herald. *Hanson* v. *Denckla, supra,* at 251. The avoidance of that outcome calls, at least, for a sharp line between a liability based on an act performed within the State and liability based on an act without, which merely is averred to have an impact felt within.* Surely the papers mailed to subscribers were delivered to them by petitioner when they were posted in New York. *Cf.* 1 *Williston on Contracts* (3d ed. 1957) § 81, p. 268. So, too, the delivery to carriers in New York for shipment to Alabama dealers, pursuant to their orders, can at most be said to have contributed to sales made by the dealers, but

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* *Cf.* L. Hand, J., in *Kilpatrick* v. *Texas & P. Ry. Co.,* 166 F. 2d 788, 791-792 (2d Cir. 1948): "It is settled that, given the proper procedural support for doing so, a state may give judgment in personam against a non-resident, who has only passed through its territory, if the judgment be upon a liability incurred while he was within its borders. That, we conceive, rests upon another principle. The presence of the obligor within the state subjects him to its law while he is there, and allows it to impose upon him any obligation which its law entails upon his conduct. Had it been possible at the moment when the putative liability arose to set up a piepowder court pro hac vice, the state would have had power to adjudicate the liability then and there; and his departure should not deprive it of the jurisdiction in personam so acquired. On the other hand, in order to subject a non-resident who passes through a state to a judgment in personam for liabilities arising elsewhere, it would be necessary to say that the state had power so to subject him as a condition of allowing him to enter at all, and that for this reason his voluntary entry charged him generally with submission to the courts. As a matter of its own law of conflicts of law, no court of one country would tolerate such an attempt to extend the power of another; and, as between citizens of states of the United States, constitutional doubts would arise which, to say the least, would be very grave . . . ."

those sales were not the acts of the petitioner in Alabama. *Cf. United States* v. *Smith,* 173 Fed. 227, 232 (D. Ind. 1909). That is a matter to be judged in terms of a "practical conception" of the needs of our federalism, not "the 'witty diversities' . . . of the law of sales." Holmes, J., in *Rearick* v. *Pennsylvania,* 203 U. S. 507, 512 (1906).

Assuming, however, that the shipment of *The Times* to Alabama may be deemed an act of the petitioner within that State, we still do not believe the jurisdiction here affirmed can be sustained. In *International Shoe* this Court made clear that the new standard there laid down was not "simply mechanical or quantitative" and that its application "must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure" (326 U. S. at 319). See also *Hanson* v. *Denckla, supra,* at 253. The opinion left no doubt that, as Judge Learned Hand had previously pointed out (*Hutchinson* v. *Chase & Gilbert,* 45 F. 2d 139, 141 [2d Cir. 1930]), an "'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection" (326 U. S. at 317). Measured by this standard, a principle which would require, in effect, that almost every newspaper defend a libel suit in almost any jurisdiction of the country, however trivial its circulation there may be, would not further the "fair and orderly administration of the laws." The special "inconvenience" of the foreign publisher in libel actions brought in a community with which its ties are tenuous need not be elaborated. It was perspicuously noted by the court below in a landmark decision more than forty years ago, confining venue to the county where the news-

paper is "primarily published". *Age-Herald Publishing Co.* v. *Huddleston,* 207 Ala. 40, 45 (1921). This record surely makes the "inconvenience" clear.

We do not blink the fact that this submission focuses upon the hardship to the foreign publisher and that the plaintiff faces hardship too in litigating far from home. But if these conflicting interests call for balance in relation to the "orderly administration of the laws", there are substantial reasons why the interest of the publisher ought here to be preferred. In the first place, it is the forum which is seeking to extend its power beyond its own borders, carrying the burden of persuasion that the "territorial limitations on the power of the respective states" (*Hanson* v. *Denckla, supra,* at 251) are respected in the extension made. Secondly, the burden cast upon the publisher can only operate to thwart the object of the First Amendment by demanding the cessation of a circulation that entails at best no economic benefit—depriving the state residents who have an interest in the foreign publication of the opportunity to read. Thirdly, the plaintiff's grievance rests but fancifully on the insubstantial distribution of the publication in the forum, as distinguished from its major circulation out of state. If that grievance is to be assigned a locus, it is hardly where 394 copies were disseminated when the full 650,000 were regarded as relevant to the *ad damnum* (R. 2, 3, 601, 945) and a reason for sustaining the award (R. 1176, 1179). The difficulties presented by libel actions based on multi-state dissemination are notorious enough (see, *e.g., Zuck* v. *Interstate Publishing Corp.,* 317 F. 2d 727, 733 [2d Cir. 1963]), without permitting suit against a foreign publisher in every jurisdiction where a copy of the allegedly offending publication has been sold. Finally, but

not the least important, this is not an action merely seeking redress for an injury allegedly inflicted on the plaintiff. Its dominant object is to punish the defendant, as the damages demanded made quite clear. Hence, the considerations that would be decisive against "long-arm" jurisdiction in a criminal proceeding ought to be persuasive here.

The courts below thought the foregoing arguments against the jurisdiction answered by the decision of this Court in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957), where suit on an insurance contract was sustained in California against a non-resident insurer, based on the solicitation and the consummation of the contract in the State by mail. But that decision certainly does not control the disposition of this case. The contract executed in *McGee* constituted a continuing legal relationship between the insurer and the insured within the State, a relation which the States, with the concurrence of Congress (15 U. S. C. §§ 1011-1015, 59 Stat. 33), have long deemed to require special state regulation. *Hanson* v. *Denckla, supra,* at 252; *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643 (1950). The liability asserted here derives from no such continuing relationship with someone in the State; and newspaper publication, including circulation (*Lovell* v. *Griffin,* 303 U. S. 444 [1938]; *Talley* v. *California,* 362 U. S. 60 [1960]), far from being exceptionally subject to state regulation, is zealously protected by the First Amendment.

Respondent also relies heavily on *Scripto* v. *Carson,* 362 U. S. 207 (1960) (Brief in Opposition, pp. 39, 41) but the reliance plainly is misplaced. That decision dealt with the minimum connection necessary to permit a State to impose on an out-of-state vendor the compensated duty to collect

a use tax due from purchasers on property shipped to them in the State. It held the duty validly imposed where sales were solicited within the State, deeming *General Trading Co.* v. *State Tax Comm'n.,* 322 U. S. 335 (1944) controlling though the salesmen were "independent contractors" rather than employees of the vendor. No issue of judicial jurisdiction was involved. This "familiar and sanctioned device" (322 U. S. at 338) of making the distributor the tax collector for the State he exploits as a market plainly casts no burden comparable to the exercise of jurisdiction *in personam,* with the implications such a jurisdiction has. If the problems were analogous, the relevant decision here would be *Miller Bros. Co.* v. *Maryland,* 347 U. S. 340 (1954), where the imposition of the duty was invalidated because there was "no invasion or exploitation of the consumer market" (*id.* at 347) by the out-of-state vendor. The *New York Times* does not solicit Alabama circulation (*supra,* p. 27); it merely satisfies the very small, local demand.

Viewed in these terms, a different question might be posed if it were shown that the petitioner engaged in activities of substance in the forum state, designed to build its circulation there. *Cf.* Mr. Justice Black, dissenting in part in *Polizzi* v. *Cowles Magazines, Inc.,* 345 U. S. 663, 667, 670 (1953); see also *WSAZ, Inc.* v. *Lyons,* 254 F. 2d 242 (6th Cir. 1958). That would involve a possible analogy to other situations where a foreign enterprise exploits the forum as a market and the cause of action is connected with such effort (*Hanson* v. *Denckla, supra,* at 251-252), though the punitive nature of the action and the special situation of the press must still be weighed. It also would confine the possibilities of litigation to places where the foreign publisher

has had the opportunity to build some local standing with the public. No such activities, effort or opportunity existed here.

In a federated nation such as ours, the power of the States to exert jurisdiction over men and institutions not within their borders must be subject to reciprocal restraints on each in the interest of all. *Cf.* L. Hand, J., in *Kilpatrick* v. *Texas & P. Ry. Co.*, p. 81, footnote, *supra.* The need for such restraints is emphasized in our system by the full faith and credit clause of the Constitution. If Alabama stood alone it would be impotent in such a case as this to render any judgment that would be of practical importance to petitioner. What makes this judgment vitally important is the fact that if it is affirmed it is enforceable as such in States where the petitioner's resources are located. Thus jurisdictional delineations must be based on grounds that command general assent throughout the Union; otherwise full faith and credit will become a burden that the system cannot bear. No standard worthy of such general assent sustains the assumption of jurisdiction in this cause.

*Third: The Burden on Commerce.* In forcing the petitioner to its defense of this case in Alabama, the state court has done more than exceed its territorial jurisdiction. It has also cast a burden on interstate commerce that the commerce clause forbids.

It takes no gift of prophecy to know that if negligible state circulation of a paper published in another state suffices to establish jurisdiction of a suit for libel, threatening the type of judgment rendered here, such distribution interstate cannot continue. So, too, if the interstate movement of correspondents provides a factor tending to sustain such jurisdiction, as the court below declared, a strong bar-

rier to such movement has been erected. Both the free flow of interstate communications and the mobility of individuals are national interests of supreme importance. In the silence of Congress, their protection against burdensome state action, unsupported by an overriding local interest, is the duty of the courts. *Fisher's Blend Station* v. *Tax Commission,* 297 U. S. 650, 654-655 (1936); *Edwards* v. *California,* 314 U. S. 160 (1941). In neither area may a State "gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world." *Id.* at 173. An attempt to isolate a State from strangers or their publications is no less offensive to the commerce clause than the attempts at economic isolation which have been repeatedly condemned. See, *e.g., Minnesota* v. *Barber,* 136 U. S. 313 (1890); *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 527 (1935); *H. P. Hood & Sons* v. *DuMond,* 336 U. S. 525 (1949); *Dean Milk Co.* v. *City of Madison,* 340 U. S. 349 (1951).

This Court has not hitherto considered a case where the mere assumption of jurisdiction in a transitory action threatened an embargo of this kind. It has, however, held that the subjection of a carrier to suit, whether *in personam* or *in rem,* in a jurisdiction where it is engaged in insubstantial corporate activities may impose an excessive burden upon commerce, because of the special inconvenience and expense incident to the defense of litigation there. *Davis* v. *Farmers Co-operative Co.,* 262 U. S. 312 (1923); *Atchison, Topeka & Santa Fe Ry.* v. *Wells,* 265 U. S. 101 (1924); *Michigan Central R. R. Co.* v. *Mix,* 278 U. S. 492 (1929); *Denver & R. G. W. R. Co.* v. *Terte,* 284 U. S. 284, 287 (1932); *cf. International Milling Co.* v. *Columbia Transportation Co.,* 292 U. S. 511 (1934). See also *Sioux Remedy*

*Co.* v. *Cope,* 235 U. S. 197 (1914); *Erlanger Mills* v. *Cohoes Fibre Mills, Inc.,* 239 F. 2d 502 (4th Cir. 1956); *Overstreet* v. *Canadian Pacific Airlines,* 152 F. Supp. 838 (S. D. N. Y. 1957). The burdens deemed excessive in those cases were as nothing compared to the burden imposed here, for which, as we have shown above (pp. 83-84), there is no overriding local interest.

Respondent argued in his Brief in Opposition (p. 42) that the cases holding that jurisdiction may be an excessive burden became moribund with the pronouncement in *International Shoe.* His contention finds no support in that opinion and ignores *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 781 (1945), where a few months before the *Shoe* decision Chief Justice Stone alluded to the *Davis* and like cases, otherwise affirming the protective principle for which they stand. The need for that protective principle has, indeed, been increased by the progressive relaxation in due process standards. For the considerations leading to that relaxation have to do with the appropriate relationship between a State and foreign enterprise and individuals. They are entirely inapposite in the situation where an interest of the Nation is impaired.

*Fourth: The Freedom of the Press.* We have argued that the jurisdictional determination violates the Constitution, judged by standards that apply to enterprise in general under the constitutional provisions limiting state power in the interest of our federalism as a whole. We need not rest, however, on those standards. Newsgathering and circulation are both aspects of the freedom of the press, safeguarded by the Constitution. Neither can continue unimpaired if they subject the publisher to foreign jurisdiction on the grounds and of the scope asserted here. The decision is, accordingly, repugnant to the First Amendment.

This Court has often held state action inconsistent with the First Amendment, as embodied in the Fourteeenth, when it has "the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it" (*Smith* v *California,* 361 U. S. 147, 151 [1959])—though the action is otherwise consistent with the Constitution. Scienter is not generally deemed a constitutional prerequisite to criminal conviction, but a measure of liability for the possession of obscene publications was invalidated on this ground in *Smith* because of its potential impact on the freedom of booksellers. The allocation of burden of proof in establishing a right to tax-exemption fell in *Speiser* v. *Randall,* 357 U. S. 513 (1958) because it was considered in the circumstances to "result in a deterrence of speech which the Constitution makes free." *Id.* at 526. Compulsory disclosure requires a showing of a more compelling state interest when it tends to inhibit freedom of association than in other situations where disclosure may be forced (see, *e.g., Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539 [1963]; *Talley* v. *California,* 362 U. S. 60 [1960]); and its extent may be more limited. *Shelton* v. *Tucker,* 364 U. S. 479 (1960). Regulation of the legal profession that would raise no question as applied to the solicitation of commercial practice must comply with stricter standards insofar as it inhibits association for the vindication of fundamental rights. *N. A. A. C. P.* v. *Button,* 371 U. S. 415 (1963).

The principle involved in these familiar illustrations plainly applies here. If a court may validly take jurisdiction of a libel action on the basis of sporadic newsgathering by correspondents and trivial circulation of the publication in the State, it can and will do so not only when the plaintiff has a valid cause of action but also when the claim is as unfounded and abusive as the claim presented here. The

burden of defense in a community with which the publication has no meaningful connection and the risk of enormous punitive awards by hostile juries cannot be faced with equanimity by any publisher. The inevitable consequence must be the discontinuance of the activities contributing to the assumption of the jurisdiction. The interest of a State in affording its residents the most convenient forum for the institution of such actions cannot justify this adverse impact on the freedom that the First Amendment has explicitly secured. See also pp. 83-84, *supra*. The occasional solicitation of advertising in the State, being wholly unrelated to respondent's cause of action, does not augment the interest of the State in providing the forum challenged here.

## CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Alabama should be reversed, with direction to dismiss the action.

Respectfully submitted,

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# APPENDIX A

## Constitutional and Statutory Provisions Involved

## CONSTITUTION OF THE UNITED STATES

ARTICLE I, SECTION 8:

The Congress shall have power * * *

To regulate Commerce with foreign Nations, and among the several States * * *.

* * * * *

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.

## ALABAMA CODE OF 1940 TITLE 7

**§ 188. How corporation served.**—When an action at law is against a corporation the summons may be executed by the delivery of a copy of the summons and complaint to the

president, or other head thereof, secretary, cashier, station agent or any other agent thereof. The return of the officer executing the summons that the person to whom delivered is the agent of the corporation shall be prima facie evidence of such fact and authorize judgment by default or otherwise without further proof of such agency and this fact need not be recited in the judgment entry. (1915, p. 607.)

* * * * *

**§ 199(1). Service on non-resident doing business or performing work or service in state.**—Any non-resident person, firm, partnership, general or limited, or any corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall do any business or perform any character of work or service in this state shall, by the doing of such business or the performing of such work, or services, be deemed to have appointed the secretary of state, or his successor or successors in office, to be the true and lawful attorney or agent of such non-resident, upon whom process may be served [in any action accrued or accruing from the doing of such business, or the performing of such work, or service, or as an incident thereto by any such non-resident, or his, its or their agent, servant or employee.]* Service of such process shall be made by serving three copies of the process on the said secretary of state, and such service shall be sufficient service upon the said non-resident of the state of Alabama, provided that notice of such service and a copy of the process are forthwith sent

* Following the decision in *New York Times Company* v. *Conner* 291 F. 2d 492 (5th Cir. 1962) the statute was amended by substituting the following language for the bracketed portion: [in any action accrued, accruing, or resulting from the doing of such business, or the performing of such work or service, or relating to or on an incident thereof, by any such non-resident, or his, its or their agent, servant or employee. And such service shall be valid whether or not the acts done in Alabama shall of and within themselves constitute a complete cause of action.] The amendment applied "only to causes of action arising after the date of the enactment" and therefore has no bearing on this case.

by registered mail by the secretary of the state to the defendant at his last known address, which shall be stated in the affidavit of the plaintiff or complainant hereinafter mentioned, marked "Deliver to Addressee Only" and "Return Receipt Requested", and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said non-resident, or the secretary of state shall be advised by the postal authority that delivery of said registered mail was refused by said non-resident; and the date on which the secretary of state receives said return receipt, or advice by the postal authority that delivery of said registered mail was refused, shall be treated and considered as the date of service of process on said non-resident. The secretary of state shall make an affidavit as to the service of said process on him, and as to his mailing a copy of the same and notice of such service to the non-resident, and as to the receipt of said return receipt, or advice of the refusal of said registered mail, and the respective dates thereof, and shall attach said affidavit, return receipt, or advice from the postal authority, to a copy of the process and shall return the same to the clerk or register who issued the same, and all of the same shall be filed in the cause by the clerk or register. The party to a cause filed or pending, or his agent or attorney, desiring to obtain service upon a non-resident under the provisions of this section shall make and file in the cause, an affidavit stating facts showing that this section is applicable, and stating the residence and last known post-office address of the non-resident, and the clerk or register of the court in which the action is filed shall attach a copy of the affidavit to the writ or process, and a copy of the affidavit to each copy of the writ or process, and forward the original writ or process and three copies thereof to the sheriff of Montgomery county for service on the secretary of state and it shall be the duty of the sheriff to serve the same on the secretary of state and to make due return of such service. The court in which the cause is pending may order such

continuance of the cause as may be necessary to afford the defendant or defendants reasonable opportunity to make defense. Any person who was a resident of this state at the time of the doing of business, or performing work or service in this state, but who is a non-resident at the time of the pendency of a cause involving the doing of said business or performance of said work or service, and any corporation which was qualified to do business in this state at the time of doing business herein and which is not qualified at the time of the pendency of a cause involving the doing of such business, shall be deemed a non-resident within the meaning of this section, and service of process under such circumstances may be had as herein provided.

The secretary of state of the state of Alabama, or his successor in office, may give such non-resident defendant notice of such service upon the secretary of state of the state of Alabama in lieu of the notice of service hereinabove provided to be given, by registered mail, in the following manner: By causing or having a notice of such service and a copy of the process served upon such non-resident defendant, if found within the state of Alabama, by any officer duly qualified to serve legal process within the state of Alabama, or if such non-resident defendant is found without the state of Alabama, by a sheriff, deputy sheriff, or United States marshal, or deputy United States marshal, or any duly constituted public officer qualified to serve like process in the state of the jurisdiction where such non-resident defendant is found; and the officer's return showing such service and when and where made, which shall be under oath, shall be filed in the office of the clerk or register of the court wherein such action is pending.

Service of summons when obtained upon any such non-resident as above provided for the service of process herein shall be deemed sufficient service of summons and process to give to any of the courts of this state jurisdiction over the cause of action and over such non-resident defendant, or defendants, and shall warrant and authorize personal

judgment against such non-resident defendant, or defendants, in the event that the plaintiff prevails in the action.

The secretary of state shall refuse to receive and file or serve any process, pleading, or paper under this section unless three copies thereof are supplied to the secretary of state and a fee of three dollars is paid to the secretary of state; and no service shall be perfected hereunder unless there is on file in the office of the secretary of state a certificate or statement under oath by the plaintiff or his attorney that the provisions of this section are applicable to the case. (1949, p. 154, §§ 1, 2, appvd. June 23, 1949; 1951, p. 976, appvd. Aug. 28, 1951; 1953, p. 347, § 1, appvd. Aug. 5, 1953.)