cerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*.

The Supreme Court said, in *Michel* v. *Louisiana,* 350 U.S. 91, 99, 100 L. ed. 83, 76 S. Ct. 158 (1955), that "(t)he test (in making a claim to a constitutional right) is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the . . . court.'" It then cited the case of *Yakus* v. *United States,* 321 U.S. 414, 444, 88 L.ed. 834, 64 S.Ct. 660 (1944), for the proposition that "(n)o procedural principle is more [fol. 1629] familiar to this court than that a constitutional right may be forfeited . . . by the failure to make timely assertion of the right."[18]

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[18] Michel v. State of Louisiana, 350 U.S. 91, 76 S. Ct. 158, 100 L. ed. 83 (1955), involved a Louisiana statute requiring any challenge to the composition of a Grand Jury to be made before the end of the term of the Grand Jury, holding that the statute was not unconstitutional, and that since the petitioners had not, under that statute, made timely challenge to the constitutional composition of the Grand Jury, they waived any such right to so challenge the Grand Jury. The court announced that the test was whether the defendant had had a reasonable opportunity to have the issue as to the claimed right heard and determined by the court.

On the other hand, in the case of Reece v. State of Georgia, 350 U.S. 85, 76 S.Ct. 167, 100 L. ed. 77 (1955), decided at the same time as the Michel case, the state court had refused to consider the defendant's motion to quash the indictment filed before his arraignment on the ground of the composition of the Grand Jury, because, by Georgia practice, objections to the Grand Jury must be made before the indictment is returned. The court held that there had been no waiver there, and that due process had been violated, because defendant, a semi-illiterate Negro, had no counsel until the day after his indictment, pointing out that "the right to object presupposes an opportunity to exercise that right."

In Kewanee Oil and Gas Co. v. Mosshamer, (10th Cir. 1932), 58 F. 2d 711, where the constitutionality of a state statute was

[fol. 1630] It cannot be said that this case falls within the category of those cases cited by Curtis[19] which hold that if subsequent to a trial or hearing, but before a final decision by the trial or appellate court, the fundamental law is changed, it is the duty of the court to apply the law as amended. Those were "exceptional cases", where there was no waiver and the court was satisfied that to do otherwise would result in a "plain miscarriage of justice". In this case, however, even if it is assumed that the basic law has been changed, the situation is quite different. For whatever tactical or other reason[20] Curtis sat back and failed to carry the constitutional torch before verdict and judgment, the fact remains that it was charged with knowledge,

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raised on appeal, the court stated that "if the constitutionality of a statute is not raised in the pleadings ordinarily it may not be raised at the trial."

Other cases decided by district courts, and holding that constitutional questions ordinarily must be raised at the trial, are: Alexander v. Daugherty (D.C. Wyo. 1960), 189 F. Supp. 956 (only where failure to raise the constitutional question at the trial was due to ignorance, duress or other reason for which petitioner could not be held responsible, may redress be had, and then if "it is made to appear that there had been such gross violation of constitutional right as to deny the defendant the substance of a fair trial"); Houck v. Eastchester P.U. District (D.C. Alaska 1952), 104 F. Supp. 588; Mount Tivy Winery v. Lewis (N.D. Cal. 1942), 42 F. Supp. 636; and White Cleaners and Dyers v. Hughes (W.D. La. 1934), 7 F. Supp. 1017.

[19] Ziffrin, Inc. v. United States, 318 U.S. 73, 87 L. ed. 621, 63 S. Ct. 465 (1943); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 2 L. ed. 49 (1801); and Hormel v. Helvering, 312 U.S. 552, 85 L. ed. 1037, 61 S. Ct. 719 (1941), an unusual case in which the Supreme Court allowed the Tax Commissioner to assert for the first time on appeal in the Court of Appeals the taxability of income under another section of the code, but stated that "ordinarily an appellate court does not give consideration to issues not raised below . . . (but) there may be exceptional cases where injustice may otherwise result except where express waiver is given."

[20] Butts thinks it can be inferred that "defendant never considered plaintiff to be in any class of 'public men' so as to make the defense available."

through its interlocking battery of able and distinguished attorneys, of the issues involved in the *Times* case, and was afforded every reasonable opportunity to have those same issues heard and determined by the trial court in the case at bar. What the Supreme Court would, or might, hold in *Times* was not decisive. What was important was that Curtis had to invoke any constitutional claims in an appropriate way, and at an appropriate time. Considering the resources of Curtis, both practical and legal, and the contemporary awareness of constitutional rights pervading [fol. 1631] even problems of local jurisprudence, Curtis' complete and utter silence amounted to "an intentional relinquishment or abandonment of a known right or privilege." [21]

Without expressing any opinion as to whether *Times* fundamentally changed the substantive law applicable to libel cases, or whether the charge on malice given by the trial court was adequate under *Times*,[22] or whether Butts

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[21] Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L. ed. 1461 (1938).

[22] The trial court's charge on malice was, in part, as follows:

"At this point, I think it is well that I should explain to you the meaning of malice under the law of defamation. Malice, in the law of defamation, may be used in two senses. First, in a special or technical sense to denote absence of lawful excuse or to indicate absence of privileged occasion. Such malice is known as implied malice or malice in law. There is no imputation of ill will to injure with implied malice. Secondly, malice involving intent of mind and heart or ill will against a person is classified as express malice or malice in fact . . .

"Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred, and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others. The purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning

was the kind of "public official" contemplated by *Times,*[23] [fol. 1632] or whether a reversal might otherwise be required if the constitutional issues had been timely pre- [fol. 1633] sented, we hold that Curtis has clearly waived

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to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award. The plaintiff charges that the column was written and published both with actual malice and in utter and wanton disregard of his rights . . . ."

[23] In a second opinion dated April 7, 1964 (See Butts v. Curtis Publishing Company (N.D. Ga. 1964) .... F. Supp. ...., at ....), denying Curtis' motions under Rule 60(b), the trial judge gave the following as his views concerning Butts' status as a "public official":

"In the present motion at hand, the defendant contends that plaintiff's action comes under the Times ruling in that plaintiff was a public official, and that the verdict and judgment was awarded plaintiff as damages for injury to his reputation as a football coach on account of a publication made by the defendant concerning plaintiff's actions while acting as Director of Athletics at the University of Georgia. In the trial of the case, movant defended the action by entering a plea of justification, and no defense was made or evidence introduced concerning Butts' position as Athletic Director or as a public official. Georgia law provides under certain conditions communications concerning the acts of public men in their public capacity and reference therewith to be deemed privileged. Georgia Code Annotated, Section 105-107(6). Just where in the ranks of government employees the 'public official' designation extends, the Supreme Court in the Times case did not determine. The decision did determine that Sullivan, as an elected city commissioner of Montgomery, fitted into the category of public officials.

"Under Georgia law, members of the Board of Regents of the University System are public officials. Georgia Sessions Laws, 1931, Pages 7, 45. The evidence presented at the trial shows that plaintiff was Director of Athletics at the University for some two years prior to February, 1963, at which time he resigned. The article complained of was published in the defendant's issue of March 23, 1963. The Board of Regents at both the University of Georgia (located in Athens) and the Georgia School of Technology (located in

any right it may have had to challenge the verdict and judgment of any of the constitutional grounds asserted in *Times.*

Atlanta) control the athletic programs of the two institutions, but the details are handled at each institution by an athletic association composed of faculty members and alumni, and each is incorporated to facilitate such business transactions as improvement of athletic grounds and equipment at the two institutions. The schedule of athletic contests for each year is approved by the faculty and by the Regents. The separate athletic associations at both institutions are wholly under the control of the Regents and are their agents. For further details of the athletic setup, see Page v. Regents of University System of Georgia, 93 F. 2d 887, 891-892. As was stated in the Page case, the 'coaches' are also members of the faculty.

"Plaintiff Butts was Director of Athletics at the University. The Athletic Director, along with the various coaches in the Athletic Department, were employed by the separate incorporated athletic association. However, the defendant seeks by this motion to extend the category of 'public officials' to one employed as agent by the University of Georgia Athletic Department. Even if plaintiff was a professor or instructor at the University, and not an agent of a separate governmental corporation carrying on 'a business comparable in all essentials to those usually conducted by private owners' he would not be a public officer or official. Under Georgia law, the position of a teacher or instructor in a state or public educational institution is not that of a public officer or official, but he is merely an employee thereof. Regents of the University System of Georgia v. Blanion, 49 Ga. App. 602(4); Board of Education of Doerun v. Bacon, 22 Ga. App. 72. To hold plaintiff, an employee of the University Athletic Association, a public official would, in this court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of New York Times Company v. Sullivan, supra."

See also: Martin v. Smith, 239 Wis. 314, 1 N. W. 2d 163, 140 ALR 1063.

The case of Barr v. Matteo, 360 U.S. 564, 3 L. ed. 2d 1434, 79 S. Ct. 1335 (1959), cited in the Times case, held that in the reciprocal situation where two government employees were suing the director of an important United States Government agency for his alleged libelous conduct, the director, a public official, has absolute privilege, regardless of the existence of malice, in defense of the alleged

[fol. 1634] The Arguments of Counsel

Curtis contends that the jury arguments of Butts' counsel constituted "significant and fundamental errors which the court may notice without objection".

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libel, although his conduct was within the outer perimeter of his line of duty. The policy of this position is to aid in the effective functioning of government by assuring that government officials shall be free to exercise their duties without fear of damage suits with respect to acts done in the course of those duties.

In cases decided since the Times case, the "public official" designation has not been extended. The court, in the case of Garrison v. Louisiana, 379 U.S. 64, 13 L. ed. 2d 125, 85 S. Ct. 209 (Nov. 1964), in reversing the conviction of the New Orleans Parish District Attorney for the criminal defamation of eight judges of the Criminal District Court of the Parish of New Orleans, stated that "the rule protects . . . the free flow of information to the people concerning public officials, their servants . . . ", whatever touches upon "an official's fitness for office is relevant . . . . A candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office". Justice Goldberg, in his concurring opinion, stated that "libel on the official conduct of the governors (of the people) . . . can have no place in our Constitution."

The Second Circuit, in Pauling v. News Syndicate Company, Inc. (2nd Cir. 1964), 335 F. 2d 659, considered the possible extensions of the doctrine of the Times case, stating that a candidate for public office would seem an inevitable candidate for extension, and that once an extension is made, the participant in public debate on any issue of grave public concern would be next in line. Quoting the Times case, the court then said: " 'The profound issues should be uninhibited, robust, and wide-open', now applied to confer immunity on 'vehement, caustic, and sometimes unpleasant sharp attacks on government and public officials', may some day be found to demand still further erosion of the protection heretofore given by the law of defamation."

The Henry v. Collins and Henry v. Pearson cases, 380 U.S. 356 (1965), reversed a judgment for the plaintiffs on the ground that the lower court's charge to the jury on malice was error under the Times and Garrison cases, thus indicating that a County Attorney and a Chief of Police would come within the privilege. Justices Black, Douglas and Goldberg concurred, not due to the error in the charge, but on the ground that such a suit would violate the First and Fourteenth Amendments under the Times case, where the

The record reflects that Curtis was represented at the trial by several attorneys. One argument for each side was made on Friday and the remaining arguments were completed the following Monday. Much of the argument of which complaint is now made was offered on Friday. Yet, no objection to any portion of the arguments was raised until Curtis filed its motion for new trial nine days after the jury verdict was returned.
[fol. 1635] The trial court correctly disposed of this matter in the following language:

> "It is an elementary principle of federal law that a new trial will not be granted where a party seeks to raise for the first time, on a motion for a new trial, (the objection) that opposing counsel was guilty of misconduct in his argument to the jury, where such conduct was not excepted to during the trial." [24]

If, as Curtis' counsel now claim, the arguments were, among other things, "grossly improper and inflammatory", "intemperate and inexcusable", "appeals to passion and prejudice", "corruptions of the evidence", "completely unsupported by the evidence", and "unsworn testimony of counsel", it is inconceivable to us that they would have delayed so long without raising the slightest hint of an

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defendant published his criticism of the plaintiffs' performance of their public duties.

This court in Buckley v. The New York Times (5 Cir. 1964), 338 F. 2d 470, after deciding the case on procedural grounds, stated in dicta that "a judicial determination by this court of the proposition that the principles of (the Times case) should be extended to candidates for public office, must await an appropriate case."

For other cases decided by district courts, see: Smoot v. League of Women Voters of the Grand Traverse Area (W. D. Mich. 1964), 36 F.R.D. 4; and H. O. Merren & Co., Ltd. v. A. H. Belo Corp. (N.D. Tex. 1964), 228 F. Supp. 515.

[24] Supra note 6, at 922.

See also: Fidelity & Casualty Co. of N.Y. v. Williams (5th Cir. 1952), 198 F. 2d 128.

objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week end recess, and for nine days thereafter, leaves us with the conviction that they did not consider the arguments objectionable at the time they were delivered, but made their claim as an afterthought.

Furthermore, after carefully considering the entire record, we do not consider that the arguments belatedly objected to would have required a reversal, even if timely objections had been made. Some of the argument was in-[fol. 1636] vited, but the very nature of the case made it virtually impossible to discuss the evidence free of emotion or drama. The editor-in-chief of the Post set the tone and the stage for the attack. He openly boasted that the Post's new policy of "sophisticated muckraking" was the "final yardstick" of editorial achievement since it meant "we are hitting them where it hurts." It was no wonder that the author Graham was equally callous in admitting that he knew that "when this article was published that was the death of Wally Butts in his chosen profession" and that "Curtis Publishing Company knew that when that article was published it would ruin Coach Butts' career." The policy of the magazine so bluntly stated[25] was by itself

[25] In the deposition of Clay D. Blair, Jr., editor-in-chief, it was developed that for the first quarter of 1963, Curtis showed a loss of about $1.1 million, compared to a loss in 1962 for the same quarter of $4.7 million; that in 1960 the amount of advertising revenue was $106 million; that in 1961 the figure had dropped to $86 million; that Blair was made a vice-president of Curtis in June of 1962; that circulation is one of the factors that affects advertising revenues; that demography is important, because "all circulation in Russia would not be appealing to General Motors;" that Blair wrote a memo to his staff, which found its way to a national magazine, in which he was quoted as saying: "The final yardstick is the fact that we have about six lawsuits pending, meaning that we are hitting them where it hurts, with solid, meaningful journalism"; that he was not being facetious when he used the phrase "sophisticated muckraking"; that he meant it when he said it and when he testified; that he was correctly quoted as being

[fol. 1637] more than enough to inflame the jury. Counsel for Butts could only gild the lily.[26]

The Exclusion of Testimony

Butts was asked by Curtis' counsel on cross-examination if he recalled having made a statement over television, on a date prior to the institution of this action, that he "would never at any time and never . . . (had) done anything that would injure the University of Georgia". He responded that he had made a statement to that effect, but that "as far as my services at the University of Georgia are concerned that represents only my opinion". Proffered evi-

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"concerned with the image of the Post and in trying to get a new image, portray a different type of magazine"; that he did change the image of the Post; that the Butts issue was representative of the new type magazine Curtis was interested in publishing; that "we have perhaps come . . . 25 per cent of the way with this issue . . . toward the goal of the magazine that I envision"; that this issue is a step in the right direction; that he was acquainted with the term "muckraking" prior to using it in the interview which led to an article in Newsweek on November 19, 1962; that in the interview with Newsweek he stated that he intended to "restore the crusading spirit . . . the sophisticated muckraking, the expose in the mass magazines . . . to provoke people, make them mad"; that he further stated in the interview: "But careers will be ruined, that is sure", and he could not quarrel with the fact that Butts' career was one of the careers to which reference was made in that statement.

[26] The trial court also pointed out that Butts was unquestionably one of the leading figures in the national football picture; that responsible officials of the Post knew that after the article was published Butts' career would be ruined; that Butts, through his attorney, had notified Curtis before publication that the article was false; that one of Butts' daughters had telephoned long distance to a Post official with a plea that the article be withheld from publication; and that after publication Butts had, pursuant to Georgia law, requested a retraction from Curtis, which was refused. The court then commented that the jury was warranted in concluding from all the facts in the case, including "the persistent and continuing attitude of the officers and agents of the defendant that there was a wanton or reckless indifference of plaintiff's rights." Supra note 6 at 919.

dence which Curtis asserts "is replete with incidences of Butts' unfaithfulness and disloyalty to the University of Georgia", was excluded by the trial court. Curtis insists, however, that the evidence should have been admitted, not only to demonstrate Butts' true character, but to impeach his credibility as a witness.

[fol. 1638] We are in agreement with the trial court that proof of Butts' character could be made by reputation only, and that particular acts of misconduct are irrelevant.[27]

The rule that "a party may be cross-examined to bring out matters, even though they may be collateral, which are inconsistent with the testimony given by him",[28] is not applicable here. The answer given by Butts to the question asked by Curtis' counsel concerning a statement previously made out of court, was not such an affirmative profession of faithfulness and loyalty to the University of Georgia, made at the trial, as would open the door, for the purpose of impeachment, in mitigation of damages, or otherwise, to the admission of alleged incidents of "unfaithfulness and disloyalty" to that institution, either by cross-examination of Butts, or by direct evidence from other witnesses.

Complaint is made that Curtis was not permitted to show that Butts had refused to answer certain questions in his deposition, and that evidence offered as to purportedly false testimony given by Butts in his deposition was rejected. Butts' refusal to answer was on advice of counsel. The answers sought were subsequently supplied, but Curtis argues that because of the delay it was denied adequate discovery and thereby "lost valuable time in the preparation of its case".

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[27] Note 6, supra, at 921.

[28] 98 C.J.S. Witnesses, § 399; 3 Wigmore, Evidence (3d ed. 1940), § 1006(2).

The trial judge was clothed with broad discretion in controlling the extent of direct and cross-examination,[29] and [fol. 1639] we cannot say that he abused that discretion in excluding the proffered evidence.

Similarly, we do not think the trial court abused his discretion in refusing to admit evidence that the witness Carmichael, while a minor in Ohio, had been convicted of petty larceny in 1933. The ruling was based upon lapse of time.[30]

Curtis sought to introduce into evidence certain extra-judicial statements made by George Burnett, and statements made to him by third parties. These included inquiries made by Burnett of the telephone operator and her replies thereto,[31] a telephone conversation between Burnett and one Milton Flack, purportedly made immediately after Burnett had overheard a telephone conversation between Butts and Bryant,[32] Burnett's conversation with one Bob Edwards about the notes he had

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[29] See Roberson v. United States (5 Cir. 1957), 249 F. 2d 737; Carpenter v. United States (4 Cir. 1959), 264 F. 2d 565; Poliafico v. United States (6 Cir. 1956), 237 F. 2d 97.

[30] Supra note 6, at 921.

[31] Curtis says this was offered only to show that a telephone conversation between Butts and Bryant had actually taken place. Butts, however, contends no such limitation was placed on this testimony.

[32] Burnett testified that he had been trying to contact Milton Flack by telephone when he intercepted the alleged call between Butts and Bryant, after which he says he hung up the phone and sat for about twenty or thirty seconds before picking up the phone and again calling Flack's number. Curtis wanted to prove that Burnett asked Flack: "Is Wally Butts in your office now Milt", to which Flack is supposed to have replied that Butts was at that time in his office making a telephone call. The court allowed Burnett to state that he called Flack, but excluded as hearsay anything he might have said to Flack.

taken;[33] Burnett's statements at meetings with officials of [fol. 1640] the University of Georgia; and statements of these university officials made in checking Burnett's story at meetings with him.[34] All of these incidents had been reported in the article.

It was, of course, important from Curtis' standpoint that it show its good faith in publishing the article. The proffered evidence would have tended to show that these statements as set forth in the article had, in fact, been made, and we think the trial court should have admitted it for that limited purpose only. However, the full import of most, if not all, of that evidence got before the jury in some form before the trial was concluded.

In any event, none of the testimony involved related to the real "sting of the libel", and we do not consider that substantial error was committed in its exclusion. Curtis had the burden to show more than nominal error to secure reversal for rulings of evidence,[35] and this it has failed to do.

The Jury Instructions

Complaint is made that the trial court committed plain and prejudicial error in instructing the jury. No objections

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[33] Bob Edwards was division manager of the company with which Burnett was connected. Burnett testified that he had a conversation with Edwards on January 4, 1963 about the notes he had taken on September 13, 1962. The court sustained an objection to the conversation itself on the ground that it was hearsay. On cross-examination, Burnett testified that he did not have his notes with him when he first talked with Edwards on January 4, 1963, but did show them to Edwards some two weeks later.

[34] Curtis contends that the investigation conducted by the officials of the University of Georgia would support Burnett's credibility, because it demonstrated his willingness to cooperate, and to have his story questioned.

[35] Rule 61, F.R.Civ.P.; Jennings v. United States (5 Cir. 1934), 73 F. 2d 470, 471.

[fol. 1641] to any instructions were made at the trial of the case.[36] Rule 51, F.R.Civ.P., provides in part that:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objections out of the hearing of the jury."

Full opportunity was afforded counsel for Curtis to make any objections before the jury was permitted to consider its verdict. Under Rule 61, F.R.Civ.P., all errors which could not change the result of the trial, or which did not affect the substantial rights of the parties, are harmless and must be disregarded. No action taken by the court with respect to any instruction now under attack appears inconsistent with substantial justice, or to have affected the substantial rights of the parties, and we agree with the trial court that Curtis may not now complain.[37]

The Refusal to Give Requested Instructions

There is no merit to Curtis' contention that the trial court erred either in refusing to charge the jury that it should construe Butts' testimony most strongly against him, or in refusing to charge the jury that it should disregard the entire testimony of any witness whom it found to have knowingly and wilfully testified falsely.

[fol. 1642] The court's charge fully covered the general rules relating to the credibility of witnesses. The question concerning the credibility of any witness, and whether or not he had been successfully impeached, was left entirely to the jury. There was no showing that any witness had knowingly and wilfully testified falsely, and the evidence

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[36] The claim that certain of the jury instructions violated constitutional rights of Curtis is dealt with in this opinion under the heading "Curtis' Constitutional Rights". See notes 15-23, supra.

[37] Supra note 6, at 922.

was more than adequate to support the verdict, even if the jury had completely disregarded the alleged equivocal testimony of Butts.

The "Newly Discovered Evidence"

In its motion for new trial under Rule 60(b) (2), F.R. Civ.P., Curtis contended that new evidence discovered since the trial conclusively demonstrates the falsity of the testimony of two of Butts' witnesses, Dr. Frank A. Rose and Coach Paul "Bear" Bryant, and strongly supports the defense of justification.

The trial court rejected this contention because (1) Curtis had not exercised reasonable diligence, (2) the evidence would merely tend to affect the weight and credibility of the testimony of Dr. Rose, and (3) the evidence would not have changed the verdict in this case.[38]

We are in accord with the trial court's conclusions, and do not find that he has abused his discretion.

[fol. 1643] Punitive Damages

The trial judge gave his reasons for requiring the remittitur of all punitive damages in excess of $400,000.[39] There is not the slightest suggestion that he thought, or even intimated, that the larger award was based on passion or prejudice. On the contrary, fully aware of the distinction between a verdict excessive in amount which may be reduced by remittitur, and one resulting from improper influences such as passion and prejudice which may not be corrected in this way, the judge necessarily rejected the idea that this verdict had been infected by such destructive elements.

The Georgia Code expressly provides for punitive damages.[40] Under Georgia law, three things are left for the

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[38] In his opinion dated April 7, 1964 the trial court fully discussed this matter. (See supra note 23, at 16.)

[39] Supra note 6, at 919.

[40] Ga. Code Ann. § 105-2002: "In every tort there may be aggravating circumstances, either in the act or the intention, and

jury to determine: (1) "when punitive damages shall be allowed"; (2) "the amount of such damages"; and (3) the purpose of the award as "either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." [41] Obviously there are, and can be, no precise standards for these determinations. Not for the first time in the common law tradition, the law turns to the jury. And Georgia prescribes that "(t)he [fol. 1644] measure of . . . punitive damages . . . is to be fixed by the enlightened conscience of an impartial jury." [42] What the "enlightened conscience" of one impartial jury might consider to be fair may not satisfy another impartial jury with an equally enlightened conscience. A wide variance in the amounts of such awards is inescapably inherent in any submission of the issue of punitive damages.

But, of course, no one would suppose that it is left wholly and solely to the jury. As with every other issue traditionally for jury resolution, the trial judge must still determine whether, as a matter of law, the verdict comports with law. The law recognizes that an award of any type of damages—compensatory or punitive—made by a jury free of bias, may be too small or too large. When that occurs—when the judge concludes that the law regards the verdict as too small or too large—then appropriate action must be taken by the court. Reviewing the amount of the verdict and reaching the conclusion that it is more than the law would permit is not, therefore, the equivalent of the judge's determination that excessiveness is due to a runaway jury, under the spell of passion or bias.

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in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff." Also see National Association for the Advancement of Colored People v. Overstreet, ... Ga. ......, ... S.E. 2d ...... (No. 22814, April 20, 1965, as modified May 7, 1965). See Division 4, subd. (b) of opinion.

[41] National Association for the Advancement of Colored People v. Overstreet, supra, note 40.

[42] Id.

The trial judge had the duty of determining whether as a matter of law (a) any allowance for punitive damages could be made, and (b) what the maximum would be. As to (a), the trial court not only expressed the opinion that the article was extremely defamatory, and that the jury had no choice other than to find Curtis liable, but he also thought that there was "ample evidence from which a jury could have concluded that there was reckless disregard by [fol. 1645] defendant of whether the article was false or not."[43] Upon determining (b) he had then to decide whether to grant a new trial or require a remittitur as to the excess.[44] The latter is a permissible course and does

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[43] The trial court said, in its April 7, 1964 opinion (see supra note 23, at 16), that:

> "If it were conceded that plaintiff Butts was a 'public official', the case of New York Times Company v. Sullivan would not permit the vacating of this court's previous judgment, as the ruling in the Times case does not prohibit a public official from recovering for a defamatory falsehood where he proves 'actual malice'—that is, with knowledge that it was false *or with reckless disregard of whether it was false or not.* (Italics supplied.) In the trial of this case, there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not. See the court's ruling on defendant's motion for a new trial dated January 14, 1964. Butts v. Curtis Publishing Company, 225 F. Supp. 916."

[44] State Farm Mutual Automobile Insurance Company v. Scott (5 Cir. 1952), 198 F. 2d 152.

Curtis cites Crowell-Collier Publishing Company v. Caldwell (5th Cir. 1948), 170 F. 2d 941, where this Court held that the refusal to set aside a libel verdict of $237,500 was an abuse of discretion. Judge Hutcheson found that "litigants, witnesses, lawyers and jury seemed to regard the contest as a sporting event, a wager by battle, in which the best battler ought to and would win"; that the trial judge "held himself a little too aloof from the trial . . . , with the result that the trial got out of hand;" and that "when counsel for defendant made vigorous objections to the argument as highly improper, inflammatory, and prejudicial, and requested the court to instruct the jury to disregard them, the court said merely: 'Objection overruled. Request denied. Exception noted' ". Obviously, the same circumstances were not present

not infringe upon the Seventh Amendment's guaranty of a jury trial.[45] In making his determination as to (b), he [fol. 1646] pursued the correct standard of keeping the verdict "within reasonable bounds considering the purpose to be achieved as well as the corporate defendant's wanton or reckless indifference to the plaintiff's rights."[46] Obviously, in deciding the matter the judge had to pick a dollar figure beyond which the law would not go. He selected the sum of $400,000 as the maximum which the law would accept to deter Curtis from repeating the trespass or to compensate the wounded feelings of Butts.[47] Although the reduction required, and the sum remaining, were each substantial, there was ample basis for the trial court's judgment.

To have granted a new trial might appear to have been an easier way out. But that is really no solution. On a retrial, the judge could not instruct the next jury as to the dollar maximum of any such verdict. So that jury would

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in the instant case, where the judge was in complete control, the trial was conducted in an orderly, efficient and proper manner, and no objections whatever were made to the conduct of the trial, or to the arguments of counsel.

[45] Arkansas Valley Land & Cattle Co. v. Mann, 1889, 130 U.S. 69, 9 S.Ct. 458, 32 L. ed. 854; International Paper Co. v. Busby (5 Cir. 1950), 182 F. 2d 790; United States v. Certain Parcels of Land in Rapides Parish, La. (5 Cir. 1945), 149 F. 2d 81, 83.

[46] Supra note 6, at 920.

[47] Supra note 6, at 919. Butts, in arguing that the district court was far more lenient to Curtis in reducing the award than was justified, said: "The jury in the case at bar recognized that a 100 million dollar corporation with a circulation of between six and seven million copies and a readership of approximately 22,000,000 persons can be deterred by no less than three million dollars as a charge for its misuse of a cherished American freedom —the freedom of every man to live unthreatened by calumny. This jury believed that anything less than this amount would merely add to the audacious course of 'sophisticated muckracking' upon which the Curtis Publishing Company has admittedly set its sights." See also note 26, supra.

be pretty much on its own, under the unavoidably vague, elastic standards prescribed in the Code, as measured by the enlightened conscience of an impartial jury.[48] The trial judge, on the second trial, would then be forced to repeat the process of testing for (a) and (b). If, as urged [fol. 1647] by Curtis, the determination by the judge that the amount is too much, necessarily means a new trial, it is quite possible that the case would never end. Georgia has prescribed the "punishment" for aggravated willful torts. The law ought not to frustrate the vindication of that policy by an unrealistic procedure. The jury verdict, as reviewed and reduced by the trial judge, is the tort-feasor's assurance that such damages will not exceed that which the law would tolerate to achieve the Georgia objective of deterring repetition or compensating wounded feelings.

Conclusion

This is no ordinary libel case. The publication of the article by the Post, in the face of several specific appeals that it refrain from doing so, was part and parcel of a general policy of callousness, which recognized from the start that Butts' career would be ruined. The trial judge's appraisal of the evidence, with which we are in complete accord, was that it was sufficiently strong to justify the jury in concluding that what the Post did was done with reckless disregard of whether the article was false or not.

The case was fully developed during extensive pre-trials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. We have given full consideration to the entire record, as well as to the more than 650 pages of briefs submitted by both parties, the numerous authorities cited therein, and the oral arguments of counsel. We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial.

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[48] See notes 40 and 41, supra.

[fol. 1648] Believing and so finding that the trial was fair, and that the judgment of the trial court was correct and proper in all respects, it is Affirmed.

In view of our holding, we have given no consideration to Butts' cross appeal.

RIVES, Circuit Judge, dissenting:

Wallace Butts, former Athletic Director of the University of Georgia, instituted this diversity action in the district court against the Curtis Publishing Company, publishers of *The Saturday Evening Post.* The complaint demanded $5,000,000 general and $5,000,000 punitive damages for an alleged libel contained in an article entitled, "The Story of a College Football Fix," which was published in the March 23, 1963, issue of the *Post.* The action resulted in a jury verdict against the defendant for $60,000 general damages and $3,000,000 punitive damages. The district court granted the defendant's motion for a new trial, conditioned upon the failure of the plaintiff to remit that portion of the award of punitive damages in excess of $400,000. The district court was of the opinion that the award of $60,000 for actual damages was not excessive, but the court concluded that the award for punitive damages was "grossly excessive." Pursuant to the district court's order, the plaintiff filed a remittitur and thereafter the district court overruled the defendant's motion for a new trial and entered judgment for the plaintiff in the amount of $460,000. Approximately six weeks after the district court entered judgment, the Supreme Court decided *New York* [fol. 1649] *Times Co.* v. *Sullivan,*[1] and the defendant filed its motion for new trial under Rule 60(b) of the Federal Rules of Civil Procedure. The defendant contended that the previous judgment should be vacated and a new trial ordered in light of the *New York Times Co.* case. The district court denied the motion.

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[1] 376 U.S. 254 (1964). See, generally, Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va.L.Rev. 1 (1965).

It is my view that the district court erred in not granting a new trial in light of *New York Times Co.* If mistaken in that view, I am nonetheless convinced that the part of the judgment awarding $400,000 in punitive damages cannot stand in the light of the first, fifth and seventh amendments to the Constitution.

First, however, let me say that this record makes clear beyond controversy that the questions of fact are for the jury's determination. The district court denied the plaintiff's motion for a directed verdict. Plaintiff's counsel insisted and the following colloquy ensued:

> "Mr. Lockerman: —on the point that the defendant had not, under the evidence that it has shown, proven the truth under the burden that it had of the things that it has said against the plaintiff in this article.
>
> "The Court: Mr. Lockerman, I think it would [be] in error for this Court to withdraw that issue from the Jury."

[fol. 1650] In ruling on the motion for a new trial, however, the district court commented: "The guilt of the defendant was so clearly established by the evidence in the case so as to have left the jury no choice but to find the defendant liable." The majority opinion quotes that comment and adds its "Amen" thus: "We heartedly agree with that appraisal." I do not think that any such appraisal should be made. Even a casual reading of the record demonstrates that the questions of fact should be left to the jury.

I. *Sullivan* v. *New York Times Co.* necessitates reversal of the judgment in toto.

The Supreme Court in *New York Times Co.* v. *Sullivan* held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement made with "actual malice," that is with knowledge that it was false or with reckless disregard of whether it

was false or not.[2] The district court did not think the *New York Times Co.* case governed the present action for the reason that the present plaintiff was not a "public official" as contemplated by the *New York Times* rule, and for the reason that ample evidence existed from which a jury could have concluded that there was reckless disregard by the defendant of whether the article was false or not. [R., pp. 1467-68.] The district court stated that "to hold plaintiff, an employee of the University Athletic Association, a public official would, in this Court's opinion, be extending the 'public official' designation beyond that contemplated by the ruling in the case of *New York Times* [fol. 1651] *Company* v. *Sullivan. . . .*" [R., p. 1467.] The plaintiff held to be a "public official" in *New York Times Co.* was Commissioner of Public Affairs, one of three elected Commissioners of the City of Montgomery, Alabama. His duties involved the supervision of the Police Department, Fire Department, Department of Cemetery and Department of Scales.[3] The Supreme Court noted:

> "We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo,* 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the 'official conduct' concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department." [4]

[2] 376 U.S. 254, 279-80 (1964); Garrison v. Louisiana, 379 U.S. 64, 67 (1964).

[3] See New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 256.

[4] *Id.* at 283, n. 23.

It is clear that "public officials" as contemplated by *New York Times Co.* are not limited to elected officials. In *Garrison* v. *Louisiana,*[5] decided subsequent to *New York Times Co.,* the District Attorney for Orleans Parish, Louisiana, was convicted of criminal libel for issuing a statement disparaging the judicial conduct of the eight judges of the Criminal District Court. The Supreme [fol. 1652] Court's decision, which brought the District Attorney's statement within the purview of criticism of the official conduct of "public officials" and entitled to the benefit of the *New York Times Co.* rule, did not hinge on whether the eight judges were elected officials. No mention was made of how the judges obtained their positions. Moreover, it is clear from the Court's statement in *New York Times Co.,* quoted above, that the rule applies to "government *employees.*" The question reserved by the Court was *"how far down* into the lower ranks of government employees the 'public official' designation would extend . . . ."[6] A precise formula for designation of "public officials" for the purpose of the *New York Times* rule was not attempted. Indeed, it is clear from the background and reasons for the rule that to fashion and apply a precise formula for designation of "public officials" for the purpose of the *New York Times* rule would be a formidable, if not impossible, task.[7]

The first amendment secures freedom of expression upon public questions. The constitutional safeguard, the Supreme Court has said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[8] Similarly, "[I]t is

[5] 379 U.S. 64 (1964).

[6] New York Times Co. v. Sullivan, 376 U.S. 254, 283, n. 23 (emphasis supplied).

[7] Cf. Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 722 (state responsibility under the Equal Protection Clause).

[8] Roth v. United States, 1957, 354 U.S. 476, 484.

a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions."[9] Mr. Justice Brandeis has stated that "those who [fol. 1653] won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government."[10] *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 269-70. As was said in *Garrison* v. *Louisiana,*[11] the First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' *New York Times Co.* v. *Sullivan* . . . ." It was against this background that the Supreme Court in *New York Times Co.* stated that the newspaper advertisement, which contained an inaccurate description of events occurring in Montgomery in connection with the civil rights movement, was an expression of grievance and protest on one of the major public issues of our time and would seem clearly to qualify for the constitutional protection.[12]

It is therefore necessary to examine the facts and weigh the circumstances to determine whether the allegedly defamed plaintiff is involved in the "conduct of the public business"[13] to an extent which attains constitutional significance.

The plaintiff held his position of Athletic Director of The University of Georgia by reason of a contract with the Board of Regents of the University System of Georgia, which hired him as an employee. [Brief for Appellee, p.

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[9] Bridges v. California, 1941, 314 U.S. 252, 270.

[10] Whitney v. California, 274 U.S. 357, 375-76 (1927) (concurring opinion).

[11] 379 U.S. 64, 75 (1964).

[12] See 376 U.S. at 271.

[13] Garrison v. Louisiana, 1964, 379 U.S. 64, 73.

[fol. 1654] 67.] The plaintiff supervised the scheduling and location of games, planned and budget, attended to the addition of new athletic facilities, supervised ticket sales and prepared plans for band trips and performances. Moreover, he generally supervised "the entire athletic program of the school." [R., pp. 654-55; Brief for Appellee, pp. 69-70.] The education of youth in the State of Georgia is unquestionably a matter of public concern. By his position the plaintiff is intricately involved with a significant public issue, that is, the education of the youth who attend The University of Georgia—a public institution. According to the Duke of Wellington, "The battle of Waterloo was won on the playing fields of Eton." The ever-increasing difficulties to be faced by this nation require the utmost integrity in the training of its youth. I think the plaintiff is a "public official" as contemplated by the *New York Times Co.* decision.

The article, which the defendant published under the subtitle, "How Wally Butts and Bear Bryant Rigged a Game Last Fall," concerned alleged information on Georgia plays given by Wallace Butts to Coach Paul Bryant relating to the University of Alabama and the University of Georgia football game played in Birmingham in September 1962. The article charged Wallace Butts with being corrupt and with betraying his players. It charged that the players were forced into the game like "rats in a maze" and "took a frightful physical beating." In an italicized preface to the article, "The Editors" stated that Wallace Butts and Coach Bryant were participants in the greatest and most shocking sports scandal since that of the Chicago White Sox in the 1919 World Series. In the same preface, [fol. 1655] Wallace Butts was relegated to a status worse than that of "disreputable gamblers" and a corrupt person who, employed to "educate and guide young men," betrays or sells out his pupils. [See R., pp. 88-89 (order granting motion for new trial.)]

I think it clear that the defendant's statements are within the purview of criticism of the official conduct of

public officials. As stated by the Supreme Court, "the public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.[14]

The district court charged the jury that general damages were recoverable absent proof of actual malice. The plaintiff argues that even if the *New York Times* rule is applicable, the district court's failure to charge that malice is a prerequisite for actual damages is harmless error since the district court charged that actual malice was required for an award of punitive damages and the jury awarded punitive damages. I do not agree that the district court's charge complies with the *New York Times* rule.

In dealing with the question of punitive damages, the district court charged the jury:

> "Where it is established that the defendant was inspired by actual malice in the publication of the defamatory matter, the jury, in its discretion, may, but [fol. 1656] is not required, to award punitive damages. As previously stated to you, actual malice encompasses the notion of ill will, spite, hatred and an *intent to injure one.* Malice also denotes a wanton or reckless indifference *or culpable negligence with regard to the rights of others.*" [R., p. 1356] (Emphasis supplied.)

I think it clear that the district court's charge does not embrace the *New York Times Co.* definition of actual malice, which is with knowledge that *the statement* was false or with reckless disregard of whether it was false or not. The *New York Times* rule emphasizes "the knowingly false

[14] Garrison v. Louisiana, 1964, 379 U.S. 64, 76-77.

statement and the false *statement* made with reckless disregard of the truth," [15] and not merely intent to injure the individual or negligent disregard of the rights of others. The necessary requisite to a showing of actual malice under the *New York Times* standard is proof that "the lie . . . [is] knowingly and deliberately published about a public official" or published "with reckless disregard of the truth." [16]

Since the jury might well have understood the district court's charge to allow recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than intent to inflict harm through falsehood, the charge does not comply with the *New York Times* standard.[17]

The majority of this Court have held that the defendant "has clearly waived any right it may have had to challenge [fol. 1657] the verdict and judgment on any of the constitutional grounds asserted in *Times*." While I respect the judgment of the majority, I do not share that judgment.[18] In short, I do not think the defendant may be said to have waived by "silence" a constitutional right not enunciated at the time; it was not even enunciated by the counsel who petitioned for certiorari in the *New York Times Co.* decision.

In the *New York Times Co.* case, the trial judge charged that the portions of the advertisement in issue were "libelous *per se*," that "general damages need not be alleged or proved but are presumed," that the plaintiff was entitled to recover both such "presumed" and punitive

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[15] *Id.* at 75 (emphasis supplied).

[16] *Ibid.*

[17] Henry v. Collins, 1965, 380 U.S. 356; see Garrison v. Louisiana, 1964, 379 U.S. 64, 73.

[18] It seems to me that to constitute such a waiver there must have been "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 1938, 304 U.S. 458, 464; Fay v. Noia, 1963, 372 U.S. 391, 439.

damages if the jury decided that the words related to and concerned him and that the damages awarded were not excessive. The jury awarded damages of $500,000. The questions presented to the Supreme Court in the petition for a writ of certiorari dealt with the *award* of $500,000, the *sufficiency of the evidence* and the lack of proof of *special damages* in light of the first amendment as embodied in the fourteenth.[19] Conspicuously absent is any suggestion [fol. 1658] that the first amendment, as embodied in the fourteenth amendment, requires that a public official must prove *actual malice* against critics of his official conduct.[20]

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[19] In detail, the questions presented were:

"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, without proof of special damage, statements critical of the conduct of a department of the City Government under his jurisdiction which are inaccurate in some particulars.

"2. Whether there was sufficient evidence to justify, consistently with the guarantee of freedom of the press, the determination that statements, naming no individual but critical of the Police Department under the jurisdiction of the respondent as an elected City Commissioner, were defamatory as to him 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 abridgement of the freedom of the press."

Petition for Writ of Certiorari, p. 2, New York Times Co. v. Sullivan, 1964, 376 U.S. 254.

[20] In three of the 105 pages of their petition for certiorari, counsel dealt with "the doctrine espoused by the court below . . . that a public official is entitled to recover 'presumed' and punitive damages for a publication critical of the official conduct of a governmental agency under his general supervision, if that publication tends to 'injure' him 'in his reputation' or to 'bring' him 'into public contempt' as an official—unless a jury is persuaded that it is entirely true." Except for the statement of the case and facts, malice was mentioned in one sentence. See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 13, New York Times Co. v. Sullivan.

Apparently this is due to the fact that the defendant's objections in the trial court were directed to the absence of a requirement of proof of special damages.[21] Only by looking at the *New York Times Co.* case in retrospect can it be said that the defendant has waived the great constitutional rights contemplated by the *New York Times* rule. But applying the same "retrospective look" to the present case,[22] it is also clear that had the defendant contended the same as did the defendant in the *New York Times* case, *i.e.,* that the first and fourteenth amendments were "infringed by holding the publication libelous and actionable without proof of special damage,"[23] it would not have affected the trial of the present action; for the district [fol. 1659] court ruled, in dealing with the motion for new trial, that the *New York Times* rule was not applicable to the present plaintiff. [R., p. 1467.]

The fact that the present defendant offered no defense under Georgia law, which provides that communications concerning the "acts of public men in their public capacity" are deemed privileged under certain conditions, cannot be said to constitute a waiver of a defense that the plaintiff is a "public official" under the *New York Times* standard. As recognized by the plaintiff, members of the athletic department are, like members of the faculty, "employees" under Georgia law and are not considered in "public office" or "officers."[24] Thus, although the Georgia statute which grants a privilege to "comments upon the acts of public men in their public capacity and with reference thereto"[25] appears as broad, if not broader, than the "public official" as contemplated by *New York Times Co.,*

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[21] See Petition for a Writ of Certiorari to the Supreme Court of Alabama, p. 8, New York Times Co. v. Sullivan.

[22] In football jargon, "by being Monday morning quarterbacks."

[23] *Ibid.*

[24] Brief for Appellee, pp. 67-69.

[25] Ga. Code Ann., § 105-709(6).

the plaintiff recognizes that the Georgia case law results in a narrow application of the privilege and the present plaintiff is not covered.

Moreover, I think that *Henry* v. *Collins*,[26] reflects that the Supreme Court does not intend to allow the great constitutional rights inherent in the *New York Times* rule to be ignored in a case such as the present one.

In *Henry* v. *Collins,* the most recent Supreme Court decision interpreting the *New York Times* rule, the Court reversed per curiam the judgments obtained by a county [fol. 1660] attorney and a chief of police in their libel actions against the petitioner. The petitioner had charged that his arrest for disturbing the peace was the result of "a diabolical plot." The trial judge had charged "that malice does not necessarily mean hatred or ill will, but that malice may consist merely of culpable recklessness or a wilful and wanton disregard of the rights and interests of the person defamed." The Supreme Court reversed since the trial judge's instructions concerning malice did not comply with the *New York Times* rule. The trial of the plaintiff's suit and the decision of the Mississippi Supreme Court affirming the judgments occurred shortly before the Supreme Court handed down *New York Times Co.* Like the present defendant, the defendant in *Henry* raised his first amendment question by a motion for a new trial. However, the defendant in *Henry* filed a motion for a directed verdict at the same time which also raised the first amendment question. Both motions were overruled. Significant is the fact that the constitutional questions raised by the motions were raised for the first time after the close of the plaintiffs' case.[27]

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[26] 1965, 380 U.S. 356.

[27] See Petition for Writ of Certiorari to the Supreme Court of Mississippi, Henry v. Pearson, p. 6. Henry v. Pearson and Henry v. Collins were decided together. See Henry v. Collins, 1965, 380 U.S. 356.

Since the majority of this Court are not of the opinion that the judgment must be reversed, considerations of effective judicial administration do not require me to review the evidence in the present record to determine whether it could constitutionally support a judgment for the plaintiff should the plaintiff seek a new trial.[28]
[fol. 1661] In summary, I think the present diversity action was brought by a public official for criticism of his official conduct; therefore, he was limited to an award of damages for a false statement made with "actual malice" —that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The present action was tried on a definitely stated theory which was fundamentally and constitutionally deficient. The present action should be tried on the theory set forth by the Supreme Court's decision supervening the district court's judgment, that is, *New York Times Co.* v. *Sullivan.* In such a situation, it has been held, as far back as 1937, that the duty of the district court is to grant the motion for a new trial.[29]

II. That part of the Judgment awarding $400,000 punitive damages violates the defendant's rights under the first, fifth and seventh amendments.

On the question so far discussed, that is, whether *New York Times* v. *Sullivan* necessitates reversal of the judgment in toto, I would concede that there is a debatable issue of waiver on which I differ from the majority. The questions hereafter discussed had their genesis in the jury's verdict and are unquestionably preserved for review by the defendant's first motion for new trial (R., pp. 46-48).

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[28] New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 284-85.

[29] Sulzbacher v. Continental Cas. Co., 8 Cir. 1937, 88 F.2d 122.
It should be noted that the learned district judge in the present case did not deny the defendant's motion for a new trial on the basis that the defendant had "waived" the constitutional rights defined in *New York Times Co.*, but, instead, considered the motion for new trial on its merits. [R. pp. 1464-68.]

[fol. 1662] As to the questions now to be considered, there can be no issue of waiver.

The punitive damages, either as found by the jury or as fixed by the court, are many times greater in amount than the general damages. Under the court's instructions to the jury, the general damages included compensation "for the mental anguish, pain, mortification, and humiliation he has experienced as a result of the publication." (R. 1354) The punitive damages included no element to which the plaintiff was entitled by way of compensation, but, according to the court's instruction to the jury, "the purpose of punitive damages is to deter the defendant from a repetition of the offense and is a warning to others not to commit a like offense. It is intended to protect the community and has an expression of ethical indignation, although the plaintiff receives the award." (R. 1356) The statute which allows the jury to impose punitive damages is Georgia Code Annotated § 105-2002, which reads:

> "In every tort there may be aggravating circumstances, either in the act or the intention, and in that event the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for the wounded feelings of the plaintiff."

In the present case "compensation for the wounded feelings of the plaintiff" had been included in the general damages. [See R., p. 1354, quoted *supra.*] The trial court expanded considerably on the alternative purpose "to deter [fol. 1663] the wrongdoer from repeating the trespass"; it included also "a warning to others not to commit a like offense," the protection of "the community," and "an expression of ethical indignation." [See R., p. 1356, quoted *supra.*] The jury was bound to observe the instructions of the court. For the purpose of considering whether the jury's award of punitive damages exceeded constitutional bounds, it is of no moment that it may also have exceeded

the limits set by the statute.[30] The court further instructed the jury that, ". . . if you decide to award punitive damages, the sum you award need have no relationship to any amount that you may award for general damages. It may be greater or it may be less. That is a matter which rests in your sole discretion." [R., p. 1356.] The jury could reasonably infer that no limit was placed on the exercise of its discretion.

If the defendant corporation had been tried under the Georgia criminal libel statute,[31] it might have been punished by a fine "not to exceed $1,000." [32] As it is, the defendant stands subjected to a judgment of $400,000 for punitive damages, four hundred times the maximum fine for criminal libel. Evidently, the $400,000 sufficed to express the trial judge's sense of "ethical indignation" while that of the jurors swelled to $3,000,000—3,000 times the [fol. 1664] maximum fine which could have been imposed in a criminal prosecution.

Further, in a criminal proceeding, the defendant was subject to *no* fine unless proved guilty beyond a reasonable doubt, while here the judge charged the jury that ". . . the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true . . . ." (R., p. 1347.)

I would not imply that the return of punitive damages in the ordinary case is constitutionally suspect, for more than a century ago the Supreme Court commented:

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[30] According to the brief of the appellee, plaintiff (p. 86): "It is apparent that the purpose of this Code section in cases of defamation is to deter the defendant from republishing this one particular libel at a later date. It does *not* prevent the defendant from publishing any *other* matter, whether thought libelous of the plaintiff or not." (Emphasis the appellee's.)

[31] Ga. Code Ann. § 26-2101.

[32] Ga. Code Ann. § 26-2101.

"It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured."

Day v. *Woodworth,* 1851, 54 U.S. (13 How.) 362, 370-71. [fol. 1665] The theory of punitive damages involves a blending of the interests of society in general with those of the aggrieved individual in particular.[33] There can be no serious question but that the Georgia statute permitting "additional damages" [34] is constitutional upon its face.

However, as that statute was applied by (1) the court's instructions to the jury, (2) the jury's verdict, and (3) the reduced judgment ultimately entered by the court on motion for new trial, the award of punitive damages in the present case is tantamount to a criminal fine or penalty. As said in the very recent case of *United States* v. *Archie Brown,* U.S. Oct. Term, 1964, No. 399, decided June 7, 1965:

"It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several pur-

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[33] Bryson v. Bramlett, Tenn. 1958, 321 S.W. 2d 555, 557; Margaret Ann Super Markets v. Dent, Fla. 1953, 64 So.2d 291-92; Pratt v. Duck, Tenn. Ct.App. 1945, 191 S.W.2d 562, 564-65; Foster v. Bourgeois, Tex.Civ.App. 1923, 253 S.W. 880, 885, aff'd 259 S.W. 917; 15 Am.Jur. Damages, §266; 25 C.J.S. Damages, §117.

[34] Ga. Code Ann. § 105-2002, quoted *supra,* p. 47.

poses: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."

Similarly, in *Trop* v. *Dulles,* 1958, 356 U.S. 86, 96, it was said:

"In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose [fol. 1666] of the statute.[18] If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal.[19] But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[20]

" [18] Of course, the severity of the disability imposed as well as all circumstances surrounding the legislative enactment is relevant to this decision. See, generally, Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand.L.Rev. 603, 608-610; 64 Yale L.J. 714, 722-724.

" [19] E.g., *United States* v. *Lovett, supra* [328 U.S. 303]; *Pierce* v. *Carskadon,* 16 Wall. 234; *Ex parte Garland,* 4 Wall. 333; *Cummings* v. *Missouri,* 4 Wall. 277.

" [20] E.g., *Mahler* v. *Eby,* 264 U.S. 32; *Hawker* v. *New York,* 170 U.S. 189; *Davis* v. *Beason,* 133 U.S. 333; *Murphy* v. *Ramsey,* 114 U.S. 15."

Footnote 18 to the text just quoted makes clear that the enormity of the verdict and even of the final judgment are relevant factors to be considered in determining whether the punitive damages amount to a criminal fine.

I submit that there is no difference in substance between the punitive damages imposed in the present case and criminal punishment—an ex post factor punishment 400 times as great as the defendant could have anticipated [fol. 1667] from the criminal libel statute,[35] and imposed without any of the procedural safeguards which are required in criminal proceedings by due process.[36]

If there should be any doubt that the award of $400,000 in damages strictly punitive violates the due process clause for lack of the safeguards required in criminal proceedings, there can be none, I submit, that it amounts to a prior restraint upon freedom of the press. The rule as announced in *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 277-78, has clear application to the facts of this case:

> "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago* v. *Tribune Co.,* 307 Ill. 595, 607, 139 N.W. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution 'any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously importing the commission by such person of a felony, or any other indictable offense involving moral turpitude,' and which allows as punishment upon conviction a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, §350. Presumably a person [fol. 1668] charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a rea-

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[35] Ga. Code Ann. § 26-2101; compare art. 1, sec. 9, clause 3 of the Constitution.

[36] See amendment 5 to the Constitution.

sonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70." [37]

For yet another reason the award of $3,000,000 by the jury, or of $400,000 by the court, as punitive damages is unconstitutional and void. There was no semblance of definite standard or controlling guide to govern the award.[38] Can any standard be more vague or arbitrary than "an [fol. 1669] expression of ethical indignation" first on the part of the jury and then on the part of the trial judge? It must be remembered that stricter standards of permissible vagueness are applicable to a rule having a potentially inhibiting effect on freedom of the press than are applicable to rules relating to less important subjects.[39]

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[37] See also Cantwell v. Connecticut, 1940, 310 U.S. 296, 306; Near v. Minnesota, 1931, 283 U.S. 697, 713-14, 720-23.

[38] Staub v. City of Baxley, 1958, 355 U.S. 313, 322.

[39] Smith v. California, 1959, 361 U.S. 147, 151; Crump v. Board of Public Instruction, 1961, 368 U.S. 278, 287.

Still further, I submit that the remittitur violates the defendant's rights under the seventh amendment. The trial judge concluded "that the award for punitive damages in this case was grossly excessive. It is the court's considered opinion that the maximum sum for punitive damages that should have been awarded against Curtis Publishing Company should be $400,000.00." [R., p. 95] In another part of his opinion on motion for new trial, the district judge commented: "The award for punitive damages in the case under consideration is more than seventeen times larger than the highest award for punitive damages ever sustained." [R., p. 93.] The district judge's opinion is silent as to the underlying reason for such a grossly excessive verdict. The majority opinion says that ". . . the judge necessarily rejected the idea that this verdict had been infected by such destructive elements [as passion or prejudice]." [Majority opinion, p. 28.] With deference, I submit that that conclusion is not based on the record or on anything said by the trial judge. To the contrary, in colloquy with counsel, the judge may well have disclosed his view as to why the judgment was excessive: "Suppose the court should determine that probably a certain portion of the argument was improper, and [fol. 1670] therefore the verdict was excessive, and grant you a new trial on that ground, and then it was tried again . . . . " [R., p. 1373.]

The majority of this Court labors under a different impression. It several times refers to the defendant's new policy of "sophisticated muckraking" without benefit of what the defendant claimed that it meant by that expression [R., pp. 37-38, 1019.]:

> "Defendant admits that beginning in the latter part of 1962, The Saturday Evening Post adopted an editorial policy of 'sophisticated muckraking' in the sense of printing the truth about the grave dangers facing the country, including the threat from outside the country and the deterioration of moral values within the country." [R., pp. 37-38.]

It was, of course, for the jury to say whether the defendant's explanation was true. In any event, I agree with the majority that the expression "was by itself more than enough to inflame the jury." [Opinion, pp. 21-22.] If, as is impliedly conceded, the jury was "inflamed," then was not passion and prejudice the most probable cause for its grossly excessive verdict? The majority continues, "Counsel for Butts could only gild the lily." [Opinion, p. 22.] I am tempted to facetiously comment on their plentiful supply of "gilt," but, in a more serious vein, I must express my shock and surprise that this Court will leave standing what amounts to severe criminal punishment of the defendant in the face of the highly improper and prejudicial argument of plaintiff's counsel.

[fol. 1671] The majority says that "some of the argument was invited . . .," but is not more specific as to the particular argument of defendant's counsel which amounted to an invitation. However, the appellee's brief (p. 93) refers to the following:

> "Mr. Cody's exact words were: (R. 1267)
>
> > " 'The point I want to make is that a man [plaintiff] that will go to one of your public officials [Comptroller General], *bet* enough to start into this business and a lot of other businesses while he is charged with the duty of Athletic Director, but it is worse, in order to obtain the license to do that, to misrepresent your financial condition.' (Emphasis added)."

In response, there is attached to appellant's reply brief as Exhibits A and B, the affidavit of Mr. Cody supported by the affidavit of Rufus L. Hixon, the official court reporter. The court reporter's affidavit is to the effect that "after deponent had examined his stenotype notes, he telephoned Mr. Bondurant to state that the word 'bad' had been used by Mr. Cody in his closing argument but that the word 'bet' had been erroneously transcribed." [Exhibit B, p. 8a, Appellant's Reply Brief.]

In addition, I would note that in beginning his argument, counsel for the defendant referred to his attachment to the University of Georgia and to the fact that the trial judge, opposing counsel, and he had received their training in that institution. The arguments of counsel are set forth in the record (pp. 1257-1341). They do not, in my opinion, [fol. 1672] disclose any invitation or provocation to justify or excuse the improper and inflammatory argument of plaintiff's counsel. The following excerpts are only samples of the objectionable parts of that argument, but, I submit, that they speak so loudly as not to require comment:

> "Since he talked to you about the University of Georgia and when he was there, I think I likewise have a right to mention to you briefly that I probably have known Wally Butts longer than any man in this case. I was at Mercer University with Wally Butts when he played end on the football team there. He was in some respects a small man in stature, but he had more determination and more power to win than any man that I have ever seen in my life. I would not stand before you in this case today arguing in his behalf if I thought that Wally Butts would not tell you the truth when he raises his hand on this stand and swears to Almighty God that what he is going to tell you is the truth. [R., p. 1289]
>
> ". . .
>
> "Somebody has got to stop them. There is no law against it, and the only way that type of, as I call it, yellow journalism can be stopped is to let the Saturday Evening Post know that it is not going to get away with it today, tomorrow, or any more hereafter, and the only way that lesson can be brought home to them, Gentlemen, is to hit them where it hurts them, and the only thing they know is money. They write about human beings; they kill him, his wife, his three lovely [fol. 1673] daughters. What do they care? They have got money; getting money for it.
>
> ". . .

"I am looking to you for my protection. Heavens (sic) knows, if you let them out of this case for five million dollars or less, and boy, it's been worth it to them, I may be next, because they are not going to stop with that. You may be next; my wife; my children; yourself. We have got to stop them now, and you are the only twelve in the world that can stop them. [R., p. 1319.]

". . .

"I say, Gentlemen, this is the time we have got to get them. A hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him? Would a fifty cent assessment on each of the twenty-three million issues which they wrote about him there, would that be a strain or a burden on them? I think it would teach them that we don't have that kind of journalism down here, and we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now.

". . .

"My time is up, I have done the best I can. I have lived in agony with this man since I got the first notice that this was what was going to happen, this Post article was coming out. I have seen him deteriorating even since it came out, and I have lived in agony along [fol. 1674] with him, and it may be that the personal first-hand knowledge that I have had since almost living with him and his family every day, I may have said some things or done some things or conducted myself in some manner that was displeasing to you. All I can say, I have done my best, and if I have done any of those things, don't hold it against Wallace Butts.

"You know, one of these days, like everyone else must come to, Wallace Butts is going to pass on. No one can bother him then. The Saturday Evening Post can't get at him then. And unless I miss my guess,

> They will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: 'Glory, Glory to old Georgia.'" [R., pp. 1321-22.]

If this dissent serves no other purpose, it will at least preserve for posterity the colorful peroration last quoted. Seriously, it seems to me that "the public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." *N.Y. Central R.R. Co.* v. *Johnson,* 1929, 279 U.S. 310, 318. That would be true even if the prejudicial argument had not been followed by a grossly excessive verdict. I submit that the $3,000,000 punitive damage verdict was so clearly the result of passion and prejudice that it could not be cured by remittitur.[40]

[fol. 1675] It is difficult in any case to reconcile the practice of remittitur with the constitutional right of a defendant to trial by jury.[41] The logic of Professor Carlin's article on Remittiturs and Additurs (1942), 49 W.Va. LQ 1, 17, 18, quoted in 6 Moore F.P. (2d ed.) 3738-39, seems to me unanswerable.[42]

That logic is peculiarly applicable to the circumstances of this case, where only punitive damages are reduced and there is no rule or standard by which the judge can separate any good part of the verdict from the bad. In effect, the remittitur from $3,000,000 to $400,000 represents nothing more specific than the difference between the jury's

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[40] Minneapolis, St.P. & S.S.M. Ry. Co. v. Moquin, 1931, 283 U.S. 520; Brabham v. State of Mississippi, 5 Cir. 1938, 96 F.2d 210; Ford Motor Co. v. Mahone, 4 Cir. 1953, 205 F.2d 267; National Surety Co. v. Jean, 6 Cir. 1932, 61 F.2d 197.

[41] See Dimick v. Schiedt, 1935, 293 U.S. 474, 482-87.

[42] See 6 Moore, F.P. (2d ed.) ¶ 59.05(3); 3 Barron & Holtzoff, ¶ 1305.1; 30 Am.Jur. New Trial, §§ 209, et seq.; 66 C.J.S. New Trial, §§ 209, et seq.

and the judge's sense of "ethical indignation." The jury's verdict cannot be recognized in the final judgment.

I appreciate that in the federal courts the right to a jury trial is to be determined as a matter of federal law in diversity as well as other actions.[43] It is, however, both interesting and instructive to refer to Georgia law. The statute permitting the award of punitive damages,[44] says that " . . . *the jury* may give additional damages . . . . " (Emphasis supplied.) Another statute prescribes: "The question of damages being one for the jury, the court should [fol. 1676] not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." Ga. Code Ann. § 105-2015.

It has long been the law of Georgia that "the trial judge has no power to order that, as a condition to the refusal of a new trial, a portion of the verdict shall be written off as excessive, except where from the application of the law to the evidence, the excess can be accurately ascertained." Syllabus 4 by the Court, *Central of Ga. Ry. Co.* v. *Perkerson,* 1901, 112 Ga. 923, 38 S.E. 365. That action was for the death of a railroad employee. The plaintiff recovered a verdict for $10,833.33. The trial court ordered a new trial conditioned on the plaintiff's consent to a remittitur of the part of the verdict in excess of $8,500.00, and, upon plaintiff's consent, entered judgment for that amount. On defendant's appeal, the Supreme Court of Georgia reviewed the authorities at length and reversed. A part of its opinion reads:

> "It is manifest that the verdict for $8,500 was rendered by the judge, and not by the jury, and it is im-

[43] Simler v. Conner, 1963, 372 U.S. 221-22; Ammons v. The Franklin Life Ins. Co., 5 Cir., No. 21418, decided June 28, 1965. Nonetheless, it does seem anomalous for the federal courts to require the state courts to accord the strictest guaranty of jury trial when indicated by a federal statute (*e.g.*, the Federal Employers' Liability Act), and then, in a diversity case to refuse to recognize the requirement of jury trial imposed by a state statute.

[44] Ga. Code Ann. § 105-2002, quoted *supra* p. 47.

possible to ascertain from the evidence in the case how he arrived at that exact amount. It is evident from his order that he was dissatisfied with the verdict, as to the amount of damages found, and that, if he had not thought he had the power of remitting a portion of the damages, he would have set the verdict aside and granted a new trial upon the ground that the verdict was excessive. The judge may have the power to determine that a verdict is grossly excessive, and for that cause to order it set aside, and yet have [fol. 1677] no power to fix the exact amount for which it should stand. 'The power to control does not include the power to find. Like the executive veto, it arrests, but does not by its exercise bestow the power to enact.' "

Even more pertinent is a very recent case where the trial court, with plaintiff's consent, reduced the exemplary or punitive damages awarded by the jury from $4,000 to $1,500. The conditional judgment for new trial was reversed with directions that a new trial be granted. The Court said:

"In determining punitive or exemplary damages it is impossible to lay down any fixed rules for a precise mathematical calculation; 'and in every such case the amount of the finding must be largely in the power of the jury, who have no other guide but their enlightened consciences. To say, therefore, in such cases that this finding should not have exceeded a certain sum, is to invade their peculiar province, and to assume their functions; and to require a portion of the amount so found by them to be remitted, and the balance to stand as their verdict, seems to us unauthorized either by the words of the law, or by the precedents and practice in such cases.' Savannah, Florida & Western Ry. v. Harper, 70 Ga. 119, 123-124 [citing many other authorities].

> "It is our wish to make it clear that nothing held here or in any of the authorities cited is subject to the inference that a trial judge is restricted in the [fol. 1678] exercise of his exclusive discretion to grant or deny a motion for new trial on the general grounds. We do emphasize that where the determining of the amount of a particular class of damages lies exclusively with the jury, the trial court must either grant or deny a new trial on the basis of the jury's award. The trial judge cannot condition the exercise of his discretion in granting or denying a new trial on an acceptance by the parties of a different sum selected by him."

City Motor Exchange v. *Ballinger,* Ga. App. 1964, 138 S.E. 2d 925, 926-27.

The seventh amendment guarantees a right of trial by jury to the defendant as well as to the plaintiff. I cannot escape the conviction that by the remittitur in this case that right has been denied to the defendant.

Both because *New York Times* v. *Sullivan* is convincing that this case was tried upon fundamentally erroneous principles of law, and because the enormous award of punitive damages and the remittitur violate the defendant's constitutional rights, I would reverse the judgment of the district court. I therefore respectfully dissent.

[fol. 1680]

In the United States Court of Appeals

For the Fifth Circuit

October Term, 1964

No. 21491

D. C. Docket No. 8311–Civil Action

Curtis Publishing Company, Appellant-Appellee,

versus

Wallace Butts, Appellee-Appellant.

(And Reverse Title)

Appeals from the United States District Court for the Northern District of Georgia.

Before Rives and Brown, Circuit Judges, and Spears, District Judge.

Judgment—July 16, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant-appellee, Curtis Publishing Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Rives, Circuit Judge, dissents.

Issued as Mandate:

[fol. 1681]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

PETITION FOR REHEARING EN BANC AND BRIEF IN SUPPORT THEREOF—Filed August 4, 1965

[fol. 1683] Appellant Curtis Publishing Company respectfully moves the Court to grant a rehearing *en banc* upon the unusually important questions presented and to secure uniformity in the decisions of the Court for the following reasons:

1.

The majority of the panel of this Court found that the Appellant Curtis Publishing Company knowingly and intentionally waived basic rights under the First Amendment even before they were announced by the Supreme Court in *The New York Times Company* v. *Sullivan,* [fol. 1684] 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964). The *Times* decision for the first time extended the protection of the First Amendment to libel. Not even the New York Times' counsel who prepared the petition for certiorari anticipated the grounds on which the Supreme Court ultimately decided the *Times* case. The refusal of the majority to consider these basic constitutional issues is in direct conflict with the decisions of the Supreme Court in *Hormel* v. *Helvering,* 312 U.S. 552, 61 Sup. Ct. 719, 85 L. Ed. 1037 (1941) and *Helvering* v. *Richter,* 312 U.S. 561, 61 Sup. Ct. 723, 85 L. Ed. 1043 (1941), and that of this Circuit in *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964) and the cases cited therein.

[File endorsement omitted]

2.

The refusal of the majority of this Court to consider the important constitutional principles announced in *The New York Times Company* v. *Sullivan* is based upon a deciding vote by District Judge Spears. Since Judge Rives' opinion conflicts directly with that of Judge Brown on this issue affecting basic rights under the First Amendment, a rehearing *en banc* should be granted in order that uniformity in the decisions of this Court may be insured. "[I]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States,* 353 U.S. 901, 77 Sup. Ct. 633, 1 L. Ed. 2d 658 (1957). Rehearings *en banc* have been granted by this Court in many cases in which there was a strong dissent and even without a District Judge casting the deciding vote on the panel. See e.g., *Noah* v. *Liberty Mutual Insurance Company,* 267 F.2d 218 (5th Cir. 1959); *Howard* v. *United States,* 232 F.2d 274 (5th Cir. 1956).

[fol. 1685]

3.

The applicability of the new First Amendment principles of *The New York Times* case to the plaintiff as a "public official" is a question of major importance which has been expressly left by the Supreme Court to be decided by the lower federal courts in the first instance and should be decided by this Court *en banc* in order that the trial courts in this Circuit may be guided thereby.

4.

The affirmance of the unprecedented and excessive award of punitive damages violates Appellant's constitutional rights:

(a) The granting of a remittitur rather than a new trial where the $3,000,000 verdict for punitive damages has been held by the trial court to be "grossly excessive" violated the defendant's right to trial by a fair

and impartial jury, which is guaranteed by the Seventh Amendment.

(b) The award of punitive damages in such an excessive amount is tantamount to a penal sanction which, under *The New York Times Company* v. *Sullivan* case and others, cannot constitutionally be imposed without the procedural safeguards which are required in criminal proceedings and sufficient standards for jury guidance.

5.

The Court incorrectly allowed an excessive jury verdict, which was the product of erroneous trial rulings [fol. 1686] and instructions, as well as passion and prejudice, to stand.

Respectfully submitted,

Welborn B. Cody, Harold E. Abrams, Emmet J. Bondurant, Thomas E. Joiner.

Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303.

Philip H. Strubing

Of Counsel:

Pepper, Hamilton & Scheetz, Fidelity-Philadelphia Trust Building, Philadelphia, Pennsylvania 19109.

Certificate of Counsel

I, Harold E. Abrams, one of the attorneys for the Appellant Curtis Publishing Company, certify that this Petition is presented in good faith, that it is not interposed for a delay, and that in my judgment it is well founded.

This .... day of August, 1965.

Harold E. Abrams, 1045 Hurt Building, Atlanta, Georgia 30303, Attorney for Appellant, Curtis Publishing Company.

[fol. 1687] Certificate of Service

It is hereby certified that a copy of this Petition has been served upon counsel for the opposing party in the foregoing matter by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon.

This .... day of August, 1965.

Harold E. Abrams, 1045 Hurt Building, Atlanta, Georgia 30303, Attorney for Appellant, Curtis Publishing Company.

[fol. 1695] Brief in Support of Petition for a Rehearing En Banc

I.

The Refusal of the Majority to Consider the Fundamental Constitutional Issues Presented Under the First and Fourteenth Amendments on the Basis of the Subsequent Decision of the Supreme Court in The New York Times Company v. Sullivan Because of the Alleged Waiver of These Basic Rights by the Defendant is Clear Error and Directly Conflicts With the Decision of the Supreme Court in Hormel v. Helvering.

[fol. 1696] In *The New York Times Company* v. *Sullivan,* 376 U.S. 254, 84 Sup. Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court for the first time extended the protection of the First Amendment to libel cases. These new constitutional principles, under which false statements, as well as those which are true, received constitutional protection, unless shown by the plaintiff to have been made with "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," radically changed the substantive law previously

applicable to libel cases.[1] Until the decision in the *Times* case, the Supreme Court had repeatedly stated that "libelous utterances are not within the area of constitutionally protected speech." *Roth* v. *United States,* 354 U.S. 476, at 483-84, 77 Sup. Ct. 304, 1 L.Ed.2d 1498 (1957); *Beauharnais* v. *Illinois,* 343 U.S. 250, at 266, 72 Sup. Ct. 725, 96 L.Ed.2d 919 (1952); *Near* v. *Minnesota,* 283 U.S. 697, 51 Sup. Ct. 625, 75 L.Ed. 1357 (1931).

Despite the clear applicability of these new constitutional [fol. 1697] principles,[2] the majority refuses to apply them

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[1] The *Times* case forbids the recovery of general or punitive damages unless the plaintiff proves with "convincing clarity," not only that the statements were false, but that they were published with knowledge that they were false or with reckless disregard of whether they were false or not. In the *Times* case, the failure of the New York *Times* to check information in its own files which would have disclosed the falsity of its charges was held insufficient to prove reckless disregard of truth with "the convincing clarity which the constitutional standard demands." In *Garrison* v. *Louisiana,* 379 U. S. 64, 85 Sup. Ct. 209, 13 L. Ed. 2d 125 (1964), proof that the libelous charges were made "without a reasonable belief in their truth" was held insufficient under the *Times* case. It cannot be seriously argued that these decisions did not drastically change the constitutional principles heretofore applicable in libel cases.

[2] Since Judge Rives was prevented by considerations of judicial administration from reviewing the evidence in the present record to determine whether it could constitutionally support a judgment, and since the majority declined to review the evidence which unquestionably demonstrates the lack of actual malice on the part of the *Post*, the following summary is necessary:

> The defamatory charge in the instant case was that Butts, while Athletic Director of the University of Georgia, gave information about the Georgia football team to the Alabama Coach, Paul Bryant, prior to the Georgia-Alabama game, which was calculated to affect the outcome of the game. There is no evidence to show that the persons in the *Post* organization having responsibility for the publication of the article "knew" that the charges contained in "The Story of a College Football Fix" were false, either at the time of its publication or at any other time. Indeed, the evidence is clearly to the contrary, and it convincingly demonstrates the belief of the

to the present case because of what the majority asserts to be a waiver of these rights by the defendant. This waiver is based on alleged facts, most of which are outside the record, and a consequent finding that Curtis was repre-

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Editors of the *Post* in the truth of the article. (R. 945-46, 957, 1014-15).

Nor is there evidence that the *Post* article was published "with reckless disregard of whether it was false or not." From the outset, *Post* had been interested only in getting the truth of the entire story. (R. 957). *Post* employed Frank Graham, an experienced sports writer, to make a *complete investigation.* (R. 952, 954, 957). Graham was *instructed to* be careful, that this was a big story. (R. 957). He was to proceed with the *utmost thoroughness* (R. 954, 957), to dig to get all available facts (R. 952-53), and to *verify* the story. (R. 926). After Graham had completed the article, he submitted it to Davis Thomas, Managing Editor of the *Post.* (R. 1021). Because of the nature of the charges made in the article, Thomas reviewed the article to make certain great care had been exercised (R. 1015, 1021) and that every significant source of information had been checked in advance of publication. (R. 1014-15). In approving the article for publication, Thomas attached prime significance to the *affidavit* executed by Burnett, which confirmed Thomas' belief in the truth of statements contained in the article. (R. 1015). The article was then submitted to Clay Blair, Editor-in-Chief of Curtis Pub- [fol. 1698] lishing Company, for his approval. Blair was careful to see that the article had been checked thoroughly as to its truth. (R. 945-46). The article was approved for publication only after Blair was satisfied that the statements contained in the article were true and accurate. (R. 945-46).

The *Post* relied on information given it by George Burnett in which he described in detail the substance of the September 13 call between Wallace Butts and Paul Bryant. This information was reaffirmed in a sworn affidavit signed by Burnett at *Post's* request. (R. 494, 508, 1015). The *Post* also knew that the September 13 call had been confirmed by *long distance records of the telephone company.* (R. 909). The defendant knew that the person who was best able to evaluate this information, Georgia Head Coach Johnny Griffith, had stated his opinion that if such information had been given to Coach Bryant prior to the Georgia-Alabama game, it *could have affected the outcome.* (R. 219, 317, 901). Burnett's story was further confirmed by the knowledge that the

sented in Alabama by the same attorneys who had [fol. 1699] represented the New York Times in the lower courts. On the basis of this novel "finding" the majority imputed knowledge of the yet unannounced constitutional principles of the *Times* case to Curtis' trial counsel.[3] The majority thus held that the constitutional protections afforded by the *Times* case to have been knowingly and in-

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whole matter had *been thoroughly investigated by the University* of Georgia and the Board of Regents. (R. 911). The *Post* knew that in the course of this investigation, Burnett had voluntarily taken and passed a *lie detector* test administered by a recognized expert. (R. 908). The Editors of the *Post* were also aware that Butts, when confronted with the information disclosed by the University's investigation, had *refused to submit to a lie detector test,* and had abruptly *resigned* on the following day. (R. 879).

Further confirmation of the story was provided by the discovery that an outstanding local sports writer, *Furman Bisher,* investigating this matter independently from different sources, had reached substantially the same conclusions. (R. 494). As an additional precaution, however, Bisher was employed to complete the investigation, particularly in talking to University authorities with whom he had more entrees. (R. 494). The final story was later submitted to Bisher, who made no corrections. (R. 518).

It is hardly necessary to argue that appellant's refusal to retract the article on demand was "not evidence of malice for constitutional purposes." 376 U.S. at 286. Indeed, the Supreme Court expressed doubt that a refusal to retract could ever constitute such evidence; certainly it cannot amount to such evidence when other uncontradicted evidence demonstrates affirmatively that the publisher justifiably believed in the truth of the defamatory statement.

The evidence outlined above makes it quite clear that no finding of malice on the part of the *Post* can be sustained under the principles of the *New York Times* and *Garrison* cases.

[3] Appellate courts do not allow a party to depart from the record on appeal by becoming an unsworn witness for his client. See *Lawn* v. *United States,* 355 U.S. 339, 78 Sup. Ct. 311, 2 L.Ed.2d 321 (1958) ("we must look only to the certified record in deciding questions presented"). The obvious reason for such a rule is that the court may be misled to an unsound conclusion. Such is the instant case in which the majority has concluded from unsup-

tentionally waived by the defendant's failure to raise them in a timely manner at the trial.

The majority seeks to attribute knowledge of the unannounced constitutional principles of the *Times* case to Curtis based upon "its interlocking battery" of counsel, one of whom also represented the Times in the Alabama courts. Yet, as Judge Rives has emphasized, even the petition for certiorari filed by Herbert Wechsler, the eminent constitutional authority and lead counsel for the New York Times, did not enunciate the constitutional principles which [fol. 1700] were ultimately *decided* by the Supreme Court. Thus, it was impossible for trial counsel to predict the outcome of the *Times* case.

The tortuous theory of "waiver" found by the majority to preclude review is in direct conflict with the decisions of the Supreme Court in *Hormel* v. *Helvering,* 312 U.S. 552, 61 Sup. Ct. 719, 85 L.Ed. 1037 (1941), and *Helvering* v. *Richter,* 312 U.S. 561, 61 Sup. Ct. 723, 85 L.Ed. 1043 (1941). In *Hormel* v. *Helvering,* supra, the taxpayer sought review before the Board of Tax Appeals of a deficiency which had been assessed against him on the basis of income from a family trust. The Commissioner defended the assessment solely on the basis of Sections 166 and 167 of the Internal Revenue Code. In that proceeding, the Commis-

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ported statements in Butts' brief, which for the most part are not true, that there was "full communication among Curtis' counsel" in regard to the possible applicable constitutional decision in the *Times* case, which led to Curtis' intentional relinquishment or abandonment of a known right." As is shown by the attached affidavits of Mr. Philip H. Strubing, Curtis General Counsel; Mr. Welborn B. Cody, leading trial counsel in the Butts case; and Mr. Eric Embry, Curtis counsel in the Bryant libel action in Birmingham, Alabama, the Alabama counsel attended the Butts trial merely as spectators and at no time were they consulted in regard to trial strategy. More important, at no time prior to or during the trial were they asked to, nor did they suggest, the raising of any constitutional defenses. None of Curtis' counsel intended to waive any constitutional defense which Curtis may have had in the Butts case. It is certainly shocking that a party can be deprived of basic constitutional rights upon such a tenuous basis.

sioner was represented by W. Frank Gibbs. Four months prior to the *Hormel* case, the Commissioner, represented by the *same* attorney, W. Frank Gibbs, had successfully asserted a deficiency against income from a similar trust under Section 22(a) of the Internal Revenue Code. *George B. Clifford, Jr.,* 38 B.T.A. 1532, CCH Decision 110,446-B. Notwithstanding this fact, however, no claim under Section 22(a) was made by Mr. Gibbs before the Board of Tax Appeals in the *Hormel* case. On January 31, 1939, the Board of Tax Appeals rejected the Commissioner's position under Sections 166 and 167. *Hormel* v. *Comm'r.,* 39 B.T.A. 244 (1939). Six months thereafter, on July 19, 1939, the *Clifford* decision was reversed by the Eighth Circuit [*Clifford* v. *Helvering,* 105 F.2d 586 (8th Cir. 1939)] and the Commissioner petitioned for certiorari.

On February 26, 1940, while the Commissioner's appeal in the *Hormel* case under Sections 166 and 167 was [fol. 1701] pending before the Eighth Circuit, the Supreme Court decided the *Clifford* case and held the trust income to be taxable under Section 22(a). *Helvering* v. *Clifford,* 309 U.S. 331, 60 Sup. Ct. 554, 84 L.Ed. 788 (1940). Because of the change in judicial interpretation of the *Clifford* case, the Commissioner was permitted to assert liability under Section 22(a) for the first time in the Court of Appeals, notwithstanding the fact that Section 22(a) had not been relied upon before the Board of Tax Appeals. *Helvering* v. *Hormel,* 111 F.2d 1 (8th Cir. 1940). Affirming the decision of the Eighth Circuit, the Supreme Court held, "*[W]e are of the opinion that the Court below should have given and properly did give consideration to Section 22(a) in determining petitioner's liability.*" 312 U.S. at 559. (Emphasis added.)

Said the Court:

> "These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose

sight of the fact that such *appellate practice should not be applied where the obvious result would be a plain miscarriage of justice. Analogous in principle is the philosophy which underlies this Court's decisions with relation to appellate practices in other cases: . . . [particularly] those in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result.* Whether articulated or not, the philosophy underlying the exceptions [fol. 1702] to the general practice is in accord with the statutory authority given to courts reviewing decisions . . . *[d]ecisions not in accordance with law should be modified, reversed or reversed and remanded 'as justice may require.'*" 312 U.S. 552, at 557-59 (Emphasis added).

In the companion case, *Helvering* v. *Richter,* 312 U.S. 561, 61 Sup. Ct. 723, 85 L.Ed. 1043 (1941), the refusal of the Third Circuit to consider the applicability of Section 22(a) under *Clifford* on grounds that it had not been raised by the Commissioner before the Board of Tax Appeals was reversed by the Supreme Court. See also *Uebersee Finanz-Korporation, A.G.* v. *McGrath,* 343 U.S. 205, 212-13, 72 Sup. Ct. 618, 96 L.Ed. 888 (1952). These decisions make it clear beyond dispute that the failure of the defendant to raise the then unannounced constitutional principles of the *Times* case at the trial is not a basis for this Court's refusal to consider these new constitutional issues on appeal. In view of the *a fortiori* decisions of the Supreme Court in the *Hormel* and *Richter* cases, the refusal of the majority to consider these issues is clearly untenable.

The Supreme Court has repeatedly held that, whenever a fundamental change of law occurs between the trial of a case and the appeal, it is the duty of the appellate court to follow the later decision, even though the issue was not raised in the trial court. *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103; 2 L.Ed. 49

(1801); *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538, 61 Sup. Ct. 347, 35 L.Ed. 327 (1941); *Hormel* v. *Helvering,* 312 U.S. 552, 61 Sup. Ct. 719, 85 L.Ed. 1037 (1941); *Zeffrin, Inc.* v. *United States,* 318 U.S. 75, 63 Sup. Ct. 465, 469, 87 L.Ed. 621 (1943); *Standard Oil Co. of Kansas* v. [fol. 1703] *Angle,* 128 F.2d 728, 730 (5th Cir. 1942); *United States* v. *Alabama,* 362 U.S. 602, 80 Sup. Ct. 923, 4 L.Ed.2d 92 (1960).

The duty of the appellate court under such circumstances is not discretionary. As Chief Justice John Marshall said in *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103; 2 L.Ed. 49 (1801):

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But, *if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.*" 5 U.S. at 110 (Emphasis added).

Only last term the force of these decisions was recognized and applied by the Supreme Court. *Hamm* v. *City of Rock Hill,* 379 U.S. 306, 85 Sup. Ct. 384, 13 L.Ed.2d 300 (1964); see *Linkletter* v. *Walker,* —— U.S. ——, 85 Sup. Ct. 1731 at 1735-36, —— L.Ed.2d —— (1964).

The majority has thus imposed the impossible burden upon trial counsel of raising constitutional defense in the trial court even before its enunciation by the Supreme Court. The most counsel could have said is that, "I object because the procedure in this case violates some constitutional principle which may be decided by the Supreme Court in the *Times* case." He could do no more. Since under Rule 46 of the Federal Rules of Civil Procedure [fol. 1704] the grounds for an objection must be specifically stated, such an objection would present no issue upon which the trial court might rule and would be woefully inadequate to preserve any issue for purposes of an appeal.

As the Supreme Court has said, "The rule is universal that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailable on appeal . . ." *Noonan* v. *Caledonia Gold Min. Co.*, 121 U.S. 393, 7 Sup. Ct. 911, 915, 30 L.Ed. 1061 (1887); *Knight* v. *Loveman, Joseph & Loeb,* 217 F.2d 717 (5th Cir. 1954); 2B Barron & Holtzoff, *Federal Practice and Procedure* §1021; 5 Moore, *Federal Practice* ¶46.02.

The authorities are in agreement that the purpose of the requirement of objection in the trial court is two-fold: "(1) to apprise the Court of the litigant's position so that the Court in the furtherance of justice might correct its ruling where shown to be in error; and (2) to permit an opponent to obviate the defect where possible." 5 Moore, *Federal Practice* ¶46.02, page 1902; 2B Barron & Holtzoff, *Federal Practice and Procedure* §1021, at page 310. It is clear that these purposes are not served by the requirement of an objection in the present case. Since the constitutional principles applicable to libel cases had not yet been enunciated by the Supreme Court, there was no occasion to present them to the District Judge for a ruling. Indeed, had any First Amendment question been presented, the District Judge would have been obligated to find, under the prior Supreme Court decisions which were then controlling, that "libelous utterances are not within the area of constitutionally protected speech" (*Roth* v. *United States,* supra), for there was no other authority under the First [fol. 1705] Amendment. As the Fourth Circuit emphasized in *Walker* v. *Peppersack,* 316 F.2d 119 (4th Cir. 1963):[4]

> "Had timely objection been made to the admission of the illegally obtained evidence when it was offered, there is nothing to indicate that the trial court would have excluded it simply because the searching officers had no warrant. Nor is there any reason to believe that Walker would have been successful had he raised the

[4] Overruled on other grounds, *Linkletter* v. *Walker,* —— U.S. ——, 85 Sup. Ct. 1731, —— L.Ed.2d —— (1965).

> point on direct appeal. Under the Maryland rule of law, no search warrant was required but this rule was in direct and violent conflict with the later decision in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (June 19, 1961).
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> "The classic statement on waiver of constitutional rights is found in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938): 'A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.' *At the time of Walker's trial and first appeal, it is clear that he did not intentionally abandon a known right since there was then no such right for him to abandon.* That was before the Supreme Court's decision in Mapp." 316 F.2d at 127-28. (Emphasis added).

The Court is not required to speculate as to the possible effect which an objection might have had upon the [fol. 1706] trial in the present case. After the decision of the Supreme Court in the *Times* case, the defendant moved immediately for a new trial based upon that decision. Although the plaintiff argued waiver, the District Judge recognized that there had been no waiver of the defendant's rights under the First Amendment by the failure to make an objection at the trial and considered the constitutional defenses under the *Times* case on the merits. Even though the constitutional principles of the *Times* decision were then known and were specifically stated by counsel, Judge Morgan rejected them on the ground that Butts, the Athletic Director of the University of Georgia, was not a "public official" within the meaning of the *Times* case.

Thus, the defendant has been deprived of a determination of controlling constitutional issues of paramount importance solely on the purely technical basis of its failure to make a formal objection at the trial on the unknown constitutional grounds, even though it is clear from Judge Morgan's later ruling after *Times*, that any such objection would have been completely futile.

Such a rigid adherence to procedural technicalities was condemned by the Supreme Court in *Hormel* v. *Helvering,* supra:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which [fol. 1707] had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." 312 U.S. 552, at 557.

As the Supreme Court recently emphasized in *Fay* v. *Noia,* 372 U.S. 391, 83 Sup. Ct. 822, 849, 9 L.Ed.2d 837 (1963):

> "The classic definition of waiver enunciated in *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 Sup. Ct. 1019, 1023, 82 L.Ed. 1461—'an intentional relinquishment or abandonment of a *known* right or privilege'—furnishes the controlling standard." (Emphasis added).

And it has been repeatedly recognized that *"courts indulge every reasonable presumption against waiver of fundamental constitutional rights." Johnson* v. *Zerbst,* 304 U.S. 458, 464, 58 Sup. Ct. 1019, 1023, 82 L.Ed. 1461 (1938).

The question of "waiver" presented here is the very antithesis of *Michel* v. *Louisiana,* 350 U.S. 91, 99, 76 Sup. Ct. 158, 100 L.Ed. 83 (1955), relied upon by the majority. The constitutional claim there involved of systematic exclusion of Negroes from juries had been established for more than three-quarters of a century.[5] The defendant's failure to invoke this *established* constitutional right at the trial was [fol. 1708] held to preclude its assertion for the first time

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[5] *Strauder* v. *West Virginia,* 100 U.S. (10 Otto) 303; 25 L.Ed. 664 (1879). See *Norris* v. *Alabama,* 294 U.S. 587, 55 Sup. Ct. 597; 79 L.Ed. 1074 (1935).

on appeal. However, in a series of decisions, this Court, notwithstanding the absence of objections, has repeatedly refused to find a knowing waiver of this established constitutional right. See Judges Rives, Bell and Spears in *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964); Judges Tuttle, Wisdom and Carswell in *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964); Judges Rives, Brown and Wisdom in *United States* v. *Wiman,* 304 F.2d 53 (5th Cir. 1962), cert. den., 372 U.S. 915, 83 Sup. Ct. 717, 9 L.Ed.2d 722 (1963); Judges Rives, Brown and Wisdom in *United States* v. *Harpole,* 263 F.2d 71 (5th Cir. 1958), cert. den., 361 U.S. 838, 80 Sup. Ct. 58, 4 L.Ed.2d 78 (1959). The unwillingness of this Court to find an intentional waiver of established constitutional rights which characterizes these cases is impossible to reconcile with the attenuated theory of waiver which the majority utilizes to bar its consideration of the principles of *The New York Times Company* v. *Sullivan.*

Further, even if the majority were correct in concluding that the defendant had been guilty of some technical procedural default, the *New York Times* case makes it clear not only that the rules of law which were applied by the trial court were unconstitutional, but also that the result reached by the jury is a patently unconstitutional result which cannot, consistently with the First Amendment, be permitted to stand. As Judge Rives emphasized:

> "The present action was tried on a definitely stated theory which was fundamentally and constitutionally deficient. The present action should be tried on the theory set forth by the Supreme Court's decision super- [fol. 1709] vening the district court's judgment, that is, *New York Times Co.* v. *Sullivan.* In such a situation, it has been held, as far back as 1937, that the duty of the district court is to grant the motion for a new trial." [6]

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[6] Nor can a waiver of defendant's rights under the First Amendment be inferred from its failure to plead fair comment under

[fol. 1710] II.

The Exorbitant Award of Punitive Damages Even as Reduced by the Trial Court Was So Grossly Excessive as to Violate Defendant's Rights Under the Federal Constitution and Could Not Be Cured by Remittitur.

At the close of the evidence, in the present case, the plaintiff moved for a directed verdict on the issue of liability

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Georgia law. In addition to the deficiencies pointed out by Judge Rives, it is clear that the Georgia fair comment rule added little to this defense of truth. In this respect, the Georgia fair comment was identical to that of Alabama, which was held to be constitutionally insufficient in the *Times* case. Prior to the *Times* case, the law of Georgia, like that of many states, afforded no protection for factual misstatements or errors no matter how innocently such errors may have been made. Under Georgia law, the statutory defense of "fair comment" protected only nonmalicious comments which were *based on facts which were proven to be true*. If any of the underlying facts were untrue, the defense of fair comment was inapplicable and afforded the publisher absolutely no protection, irrespective of his good faith. See e.g., *Barwick* v. *Wind,* 203 Ga. 827, 831, 48 S.E.2d 523 (1948); *Holmes* v. *Clisby,* 121 Ga. 241, 249, 48 S.E. 934 (1904); *Kirkland* v. *Constitution Publishing Co.,* 38 Ga. App. 632, 635, 144 S.E. 821 (1928) (4); Ga. Code Ann. §105-709; Restatement, *Torts* §606. In *Barwick* v. *Wind,* 203 Ga. 827, 831, 48 S.E.2d 523 (1948), the Supreme Court of Georgia said:

> "Section 105-709 declares that 'comments upon the acts of public men in their public capacity and with reference thereto' are deemed privileged communications. However, a *publication of and concerning the acts of public officials, if untrue and libelous, is not afforded immunity under this section of the Code.* While the acts and conduct of public officials are subject to just criticism and comment by the press, the exercise of such right should be unrestricted only where the statements made in the publication are supported by the facts. A public officer has the same right to protection against newspaper libel as a private citizen. Freedom and 'liberty of the press' do not give a publisher the right to publish libelous statements. *Lowe* v. *News Publishing Co.,* 9 Ga. App. 103 (5) (70 S.E. 607); *Horton* v. *Georgian Company,* 175 Ga. 261 (165 S.E. 443)." (Emphasis added).

upon grounds that the defendant had not "proven the truth under the burden it had" of its charges against Butts. Judge Morgan overruled this motion on the express ground that "it would [be] error for this Court to withdraw that issue from the Jury." This contemporaneous ruling of the trial judge and, in the language of Judge Rives, "even a casual reading of the record," demonstrate, beyond dispute, that the issues of fact were properly submitted to the jury which might have found the Post's charges to have been true. Under those circumstances, the jury's award of $3,-000,000 in punitive damages, even as reduced by the trial court, is so grossly excessive as to constitute a violation of defendant's rights under the First, Fifth, Seventh, and Fourteenth Amendments. Judge Rives has expressed it far more eloquently than can counsel:

> " . . . The questions hereafter discussed had their genesis in the jury's verdict and are unquestionably preserved for review by the defendant's first motion [fol. 1711] for new trial (R., pp. 46-48). As to the questions now to be considered, there can be no issue of waiver."

Notwithstanding the absence of any such waiver, however, the majority declined to even discuss the following constitutional questions emphasized by Judge Rives:

> "If the defendant corporation had been tried under the Georgia criminal libel statute, it might have been punished by a fine 'not to exceed $1,000.' As it is, the defendant stands subjected to a judgment of $400,000 for punitive damages, four hundred times the maximum fine for criminal libel. Evidently, the $400,000 sufficed to express the trial judge's sense of 'ethical indignation' while that of the jurors swelled to $3,000,000—3,000 times the maximum fine which could have been imposed in a criminal prosecution.
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> "Further, in a criminal proceeding, the defendant was subject to no fine unless proved guilty beyond a

reasonable doubt, while here the judge charged the jury that ' . . . the defendant, Curtis Publishing Company, has the burden of proving by a preponderance of the evidence that the statements contained in this article are true. . . . ' " (R., p. 1347).

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"[t]he enormity of the verdict and even of the final judgment are relevant factors to be considered in determining whether the punitive damages amount to [fol. 1712] a criminal fine. I submit that there is no difference in substance between the punitive damages imposed in the present case and criminal punishment—an ex post facto punishment 400 times as great as the defendant could have anticipated from the criminal libel statute, and imposed without any of the procedural safeguards which are required in criminal proceedings by due process.

"If there should be any doubt that the award of $400,000 in damages strictly punitive violates the due process clause for lack of the safeguards required in criminal proceedings, there can be none, I submit, that it amounts to a prior restraint upon freedom of the press. The rule as announced in *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 277-78, has clear application to the facts of this case:

> 'What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. See *City of Chicago* v. *Tribune Co.,* 307 Ill. 595, 607, 139 N.W. 86, 90 (1923). Alabama, for example, has a criminal libel law which subjects to prosecution "any person who speaks, writes, or prints of and concerning another any accusation falsely and maliciously . . . " and which allows as punishment upon convic-

tion a fine not exceeding $500 and a prison sentence of six months. Alabama Code, Tit. 14, §350. Pre-[fol. 1713] sumably a person charged with violation of this statute enjoys ordinary criminal-law safeguards such as the requirements of an indictment and of proof beyond a reasonable doubt. These safeguards are not available to the defendant in a civil action. The judgment awarded in this case—without the need for any proof of actual pecuniary loss—was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act. And since there is no double-jeopardy limitation applicable to civil lawsuits, this is not the only judgment that may be awarded against petitioners for the same publication. Whether or not a newspaper can survive a succession of such judgments, *the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive. Plainly the Alabama law of civil libel is "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the* criminal law." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70.' (Emphasis supplied).

"For yet another reason the award of $3,000,000 by the jury, or of $400,000 by the court, as punitive damages is unconstitutional and void. There was no semblance of definite standard or controlling guide to govern the award. Can any standard be more vague [fol. 1714] or arbitrary than 'an expression of ethical indignation' first on the part of the jury and then on the part of the trial judge? It must be remembered that stricter standards of permissible vagueness are applicable to a rule having a potentially inhibiting effect on freedom of the press than are applicable to rules relating to less important subjects.

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> " . . . I must express my shock and surprise that this Court will leave standing what amounts to severe criminal punishment of the defendant in the face of the highly improper and prejudicial argument of plaintiff's counsel."

The majority concedes that if the unprecedented $3,000,000 punitive damage verdict which Judge Morgan found to be "grossly excessive" was the result of "improper influences such as passion and prejudice," it could not be corrected by remittitur but only by a new trial.

The majority also recognizes that Judge Morgan found the $3,000,000 punitive damage verdict to be "grossly excessive" and that it exceeded by more than six times the $400,000 "maximum which the law would accept." Although Judge Morgan made no finding as to the reason for the gross excessiveness of the verdict, as Judge Rives has emphasized:

> " . . . in colloquy with counsel, the judge may well have disclosed his view as to why the judgment was excessive: *'Suppose the court should determine that probably a certain portion of the argument was im-* [fol. 1715] *proper, and therefore the verdict was excessive,* and grant you a new trial on that ground, and then it was tried again. . . . ' [R., p. 1373]."

The cause of the jury's passion and prejudice is not of importance. What is of paramount importance is that, whatever the cause, "no verdict can be permitted to stand which is in any degree the result of appeals to passion and prejudice." *Minneapolis, St. P. & S.S.M. Ry. Co.* v. *Moquin,* 283 U.S. 520, 51 Sup. Ct. 501, 75 L.Ed. 1243 (1931).

As this Court held in *Brabham* v. *Mississippi,* 96 F.2d 210, at 213 (5th Cir. 1938):

> "Verdicts made excessive by the passion and prejudice springing from indulgence in the jury room in such

feelings cannot be cured by a remittitur, but only by a new trial."

While the majority blandly asserts that "there is not the slightest suggestion that [the trial judge] thought, or even intimated, that the [$3,000,000] award was based on passion and prejudice" it points to no other basis for this unprecedented award. In *Ford Motor Co.* v. *Mahone,* 205 F.2d 267 (4th Cir. 1963), Judge Parker held the refusal of the trial court to grant a new trial after finding a $234,330 personal injury verdict to be excessive by $100,000, to be an abuse of discretion. He said:

> "Verdicts of juries must be kept above suspicion and a judge should not hesitate to set a verdict aside where it is so grossly excessive as to be explained only on [fol. 1716] the basis of sympathy or prejudice. . . . *Nothing else in the record explains the size of the verdict* which was more than nine times the maximum amount allowed by law of the state for wrongful death." 205 F.2d at 272-73. (Emphasis supplied)

Indeed, the Sixth Circuit considered precisely this situation in *National Surety Co.* v. *Jean,* 61 F.2d 197 (6th Cir. 1932), in which the trial court made a similar finding of excessiveness. After the jury had returned a verdict of $25,000, the trial court ordered a remittitur of $5,000 and overruled the defendant's motion for a new trial. The Sixth Circuit held that in view of the trial court's finding of excessiveness, a new trial, and not remittitur, was the only proper remedy. Said the Court:

> "[A]fter a rather full discussion touching the elements of damage involved, the court concluded that its conscience would rest easy if it should suggest a remittitur of $5,000. The memorandum continued: 'I believe if a remittitur of $5,000.00 be entered I will overrule the motion for a new trial.'

"This was a definite, though indirect, holding that the verdict was excessive, and, although the memorandum contains no specific statement to that effect, we infer that the court ascribed the error to passion, prejudice or caprice as these were the only causes urged as a basis for its action or mentioned in the memorandum. Indeed, an examination of the record discloses no other reasonable explanation for the holding. [fol. 1717] The suggested remittitur was accepted, judgment for $20,000 was entered, and the motion for a new trial was overruled. Appellant excepted and assigned error.

"The granting or denial of the motion was in the sound discretion of the trial court, and is not reviewable except for a clear abuse of discretion [citations omitted], but *we do not find it necessary to determine whether there was such abuse in the present case since the trial court itself evidently found that the excessive verdict was the result of passion, prejudice, or caprice. Our question is whether after such finding the trial court may correct the mistake by the suggestion and acceptance of a remittitur and the answer is that it could not.* See Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 51 Sup. Ct. 501, 75 L. Ed. 1243; Schendel v. Bradford, 106 Ohio St. 387, 394, 140 N.E. 155. The remedy is a new trial." (Emphasis supplied) 61 F.2d at 198.

As Judge Rives concluded:

" . . . it seems to me that 'public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice.' *N.Y. Central R.R. Co.* v. *Johnson,* 1929, 279 U.S. 310, 318. That would be true even if the prejudicial argument had not been followed by a grossly excessive verdict. I submit that the $3,000,000 punitive damage

verdict was so clearly the result of passion and prejudice that it could not be cured by remittitur.

[fol. 1718] Even if the majority were correct in attributing the unprecedented $3,000,000 punitive damage verdict to some other cause, it is, nevertheless, clear that the attempt of the trial court to arbitrarily fix damages at $400,000, without any semblance of a standard to guide it, constitutes a direct invasion of the defendant's right to trial by a fair and impartial jury on the issue of damages which is guaranteed by the Seventh Amendment. As the Supreme Court has said, such a "calculation . . . can be little better than speculation as to the extent of the wrong inflicted upon [the defendant]" *Minneapolis, St. P. & S.S. M. Ry. Co.* v. *Moquin,* 283 U.S. 520, 521-22, 51 Sup. Ct. 501, 75 L.Ed. 1243 (1931). This fact was emphasized by Judge Rives:

> "It is difficult in any case to reconcile the practice of remittitur with the constitutional right of a defendant to trial by jury. The logic of Professor Carlin's article on Remittiturs and Additurs (1942), 49 W.Va. LQ 1, 17, 18, quoted in 6 Moore F.P. (2d ed.) 3738-39, seems to me unanswerable.
>
> "That logic is peculiarly applicable to the circumstances of this case, where only punitive damages are reduced and there is no rule or standard by which the judge can separate any good part of the verdict from the bad. In effect, the remittitur from $3,000,000 to $400,000 represents nothing more specific than the difference between the jury's and the judge's sense of 'ethical indignation.' The jury's verdict cannot be recognized in the final judgment."

It is, of course, no answer to suggest that to grant a [fol. 1719] new trial on grounds of gross excessiveness will result in a second trial at which the question may again be presented. As Judge Rives said:

"The seventh amendment guarantees a right of trial by jury to the defendant as well as to the plaintiff. I cannot escape the conviction that by the remittitur in this case that right has been denied to the defendant.

"Both because *New York Times* v. *Sullivan* is convincing that this case was tried upon fundamentally erroneous principles of law, and because the enormous award of punitive damages and the remittitur violate the defendant's constitutional rights, I would reverse the judgment of the district court. I therefore respectfully dissent."

III

The Majority Has Sanctioned an Excessive Verdict—the Product of Erroneous Trial Rulings and Impassioned Pleas Which Effectively Prevented Defendant From Presenting Its Defense of Truth and Good Faith Position to the Jury.

Throughout the entire trial the Court entered vital rulings against the defendant and allowed Butts' counsel to inflame the jury, all to the prejudice of Curtis and its right to a fair trial on the merits. The detrimental effect upon Curtis' case is apparent when the central [fol. 1720] issue in the case and the parties' contentions in regard thereto are analyzed.

The defendant's liability centered upon the question of whether Butts gave Bryant information about the Georgia football team which could have affected the outcome of the Georgia-Alabama game. George Burnett, the defendant's principal witness, testified that he overheard a telephone conversation between Butts and Bryant during which Butts gave Bryant significant information concerning the Georgia team, and that Butts was going to give further information to Bryant in a telephone conversation to take place a few days later. Records of the telephone company established that these two telephone conversations actually took place.

Although Butts did not deny that the telephone calls took place, he did profess to be unable to recall the nature and substance of them. He even testified that on being shown Burnett's notes he stated that "such a telephone call might have been overheard." (R. 634). His only hope then of successfully negating the Burnett evidence that he gave improper information to Bryant was to convince the jury that he did not do such a thing because of his loyalty and devotion to the University of Georgia. This defense or theme was developed and emphasized throughout the trial by Butts' own testimony,[7] by his own witnesses,[8]

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[7] "Q. Coach Butts, hasn't the University of Georgia been pretty good to you over the years?

> "A. Yes, sir; they have given me a wonderful opportunity, and I appreciate it very much, and I might add, I will always be loyal to the University of Georgia, regardless." (R. 685-6).
>
> "Q. Coach Butts, do you recall a statement that you made over television on March the 29th, 1963, as follows:
>
> > " 'Gentlemen, I came over here today to see the Attorney General of the State of Georgia, Mr. Gene Cook. My express purpose was to check with him things that I had read in the papers and heard on T.V., that in some respects might imply that I had at some time or another been connected with gambling interests. I assured Mr. Cook that I never had been interested in gambling. I have never been interested in associating with people that were known gamblers, and that I would like to repeat that what I have said many times before. My greatest love of all and interest is in the University of Georgia, and I would never at anytime and never have done anything that would injure the University of Georgia, and that is all I have to say.'
>
> "Did you make that statement?
>
> "A. Mr. Cody, I have heard so many statements, and been around you lawyers so much, might be a few words out of line there, but I made a statement to that effect. I would like to say that as far as my services at the University of Georgia are concerned, that represents only my opinion." (R. 692).

As this latter statement was made a mere four days after suit was filed, it shows the early point at which Butts and his counsel conceived their defense.

[8] When John Carmichael, plaintiff's chief witness, was asked on direct examination about his calling Butts in Philadelphia to

[fol. 1721] by the cross examination of defendant's wit-
[fol. 1722] nesses,[9] and, as Judge Rives emphasizes, by his

inform him of Burnett's report of the Butts-Bryant telephone conversation, Carmichael stated that Butts said there was nothing to the matter because he "would never do anything to hurt Georgia." (R. 345). Carmichael's testimony was:

> "Q. What conversation took place between you can [sic] Coach Butts when he called you back?
>
> "A. Well, I didn't know whether Coach Butts would know who I was or not, at first, so I told him over the phone who I was, and I asked him if he remembered me, and he said: 'Yes, I do, John.' And so then I told the Coach what Mr. Burnett told me on the morning of September the 13th, when he received the telephone call, and I told the Coach what Mr. Burnett had told me that morning on January 30th, what he had done, and the Coach said to me, he said: 'Well, John, I appreciate your calling me, but,' he said, 'I'll tell you this,' he said: 'I am sure there is nothing to it, because I don't know whether I called Coach Bryant or not, but I will tell you this,' he said, 'I talk to a lot of coaches, and I don't remember making a call on that particular day, but if I did,' he says, *'I will assure you there was nothing to it, because I would never do anything to hurt Georgia.'* And he thanked me for calling him, and it was a very short conversation. It only lasted three or four minutes at the most, and that was all there was to that conversation." (Emphasis added.) (R. 845).

Similarly, when plaintiff's witness, William Hartman, was asked on cross-examination whether Butts denied the telephone call, he volunteered:

> "The only thing he denied was that he had ever done anything to hurt Georgia and he repeated that several times." (R. 998).

Seizing upon this opportunity, Butts' counsel, upon redirect examination, questioned Hartman:

> "Q. He [Butts] didn't deny that [he never did anything to hurt Georgia]; he asserted it, did he not?
>
> "A. He asserted it." (R. 999).

[9] After defendant's witness, Dr. Aderhold, had testified that upon being shown Burnett's notes, Butts "indicated that the call was made, and that these items [in the notes] were probably discussed" (R. 1102), Butts' counsel asked Dr. Aderhold:

[fol. 1723] counsel in their closing arguments.[10] It was obvious therefore, that the crucial prop for Butts' case was the proposition that he had always been loyal to and had never done anything to hurt his University.[11] The trial court's refusal to permit cross-examination of the plaintiff or the introduction of evidence to contradict this false

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"Q. Let me put it this way. You did testify he told you and the others he would never do anything that would hurt the University of Georgia, didn't he?

"A. He said, 'I didn't do anything that I thought would hurt the University of Georgia and I never would,' or something to that effect.

"Q. All right, sir. These notes that he had there in his hand, if they contained information that might have helped an opposing coach, that would have hurt the University of Georgia, wouldn't it?

"A. Well, presumably so." (R. 1139).

Plaintiff's witness, J. D. Bolton, was similarly utilized by Butts' counsel on cross-examination to re-emphasize the same point:

"Q. Going back to the topic I was questioning you about at the beginning of this examination, I have in my hand a transcript prepared by the Court Reporter here of your testimony when you were on the stand last week. This question—I ask you if you remember this question being asked you by Mr. Cody: 'Could you recall for the Jury what comment he did make,' referring to Wallace Butts? Answer by Mr. Bolton: It got down—'It's just conversation, ordinary football talk among coaches, and that you know I would not give Old Bryant anything to help him and hurt Georgia, and I wouldn't do anything to hurt Georgia.' Do you remember giving that answer?" (R. 1160).

[10] Butts' counsel completed the theme of Butts' loyalty to the University when in his emotionally charged argument to the jury which described Butts as "Mr. Georgia" (R. 1300), and concluded with:

" . . . they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: 'Glory, Glory to Old Georgia.' " (R. 1322).

[11] In addition, the plaintiff interjected his "integrity" into the case by his own pleading. See pages 167-68 of Appellant's principal brief.

theme of Butts' unswerving loyalty to the University was clearly error.

The evidence which the defendant offered and which was excluded would have clearly shown that Butts had committed frauds upon the University, and that he was disloyal to the public trust which the University had reposed in him. Every specific act of misconduct offered by Curtis involved a fraud upon the University of Georgia, of which Butts was Athletic Director. Certainly, a man who had charged more than $2,800 of personal telephone calls to his University over a period of approximately sixteen months was not one who had never done anything to hurt the University. Similarly, could a man who carried on an open and notorious relationship with a woman not his wife (and charged a substantial part of the cost of that relationship to his University) be the University's loyal servant who set a fine example for his pupils? As is explained in [fol. 1724] more detail on pages 154 and 155 of Appellant's principal brief and in the Record at pages 822-840, Curtis was denied the right to cross-examine Butts in regard to many instances which would have clearly shown that his principal defense to the Post charge—that he had always been loyal to and had never done anything to harm his university—was false.

The Appellant was also denied its fair right to cross-examine Butts in regard to his deliberate false testimony upon deposition (See Point IV B of Appellant's principal brief) and as to his and his counsel's policy of evasiveness and concealment by Butts' refusal to answer relevant questions on deposition (See Point IV E of Appellant's principal brief). These prejudicial effects were multiplied when Butts' counsel was allowed to "testify" in closing argument as to his good character and truthfulness (R. 1289, 1321) and imply that other witnesses had similarly testified (R. 1290, 1305,[12] 1309.[13])

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[12] "Seated there with him throughout for two weeks has been his lovely wife, Winnie and his three daughters. That is a glowing

Defendant was similarly prevented from attacking the credibility of plaintiff's principal witness, John Carmichael, in regard to his prior convictions and his propensity to give false statements to public officials (Point IV F of Appellant's principal brief). Butts' counsel subsequently stated that it made little difference whether John Carmichael had previously been convicted of crimes and [fol. 1725] given false statements in evaluating his credibility, but at the same time they claimed that the Post officials should not have believed George Burnett, whom they termed a "hot check artist" (Br. 7) and a "man who is always one step ahead of the Sheriff" (R. 1297), because he had been arrested for passing two bad checks. Similarly, the majority infers that Burnett, "who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he claimed to have listened in on the conversation," was not trustworthy.[14] It was, of course, Carmichael who directly contradicted Burnett's testimony in several crucial respects. See Appellant's principal brief at pp. 189-90.

The trial court's totally unjustified refusal upon hearsay grounds to allow Burnett to testify in regard to vital checkpoints in his story bore directly upon the liability as well as the punitive damage aspects of the case.

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tribute, as glowing a tribute as were those four boys coming over here, and the trainer, Sam Richwine, and Charlie Trippi and John Gregory coming over here and showing you what they thought of Wallace Butts."

[13] "Sam Richwine, old Sam, I had never seen him before; he is a trainer over there; he is still working there and in the face of Dr. Aderhold and Bolton. He came over here and stood up and was counted for Wallace Butts."

[14] The majority upheld the exclusion of Carmichael's prior convictions upon a "lapse of time" theory, which is directly contrary to Georgia law. *Woodward* v. *State,* 197 Ga. 60, 28 S.E.2d 480 (1943) ("the fact that the conviction of the crime took place twenty years previously, would not affect the admissability of the evidence"); *Daggett* v. *Sims,* 79 Ga. 253, 4 S.E. 909 (1888). See Appellant's principal brief pages 184-86.

The fact that Burnett took the time and trouble to call back the operator to ascertain that he was connected with the Athletic Department at the University of Alabama and to call Milton Flack to establish for himself that Wallace Butts was in Flack's office shows that Burnett was amazed by the telephone conversation between Butts and Bryant which he had just overheard and desired to check upon it. If Burnett had merely overheard a telephone conversation between these two individuals relating to "rules" or "tickets" he would have probably hung up in the middle of it, or at least not have been concerned enough to double [fol. 1726] check its authenticity. These extrajudicial statements by Burnett could not by any stretch of the law be hearsay, and his report of statements made by the operator and by Flack were not introduced for the truth of the matter asserted, but merely to show that the statements were made. Whether or not the operator and Flack told the truth is unimportant, but the fact that Burnett received such information from them is important to the jurors who had to evaluate his credibility and the Post officials' reasonableness and good faith in believing Burnett. Even though the majority recognized that the trial court should have admitted this evidence because it was "important from Curtis' standpoint that it show its good faith in publishing the article," it in the same breath dismissed the point with the comment of "nominal error."

Instructions given by the trial court to the jury not only protected the plaintiff and his witnesses again and again, but practically amounted to a directed verdict for Butts. Although the defendant specifically requested an instruction to the effect that if Butts' testimony was contradictory, vague or equivocal, it must be construed most strongly against him and subsequently objected to the court's failure to give such charge, the trial court cavalierly dismissed defendant's objection with the statement that it believed it had given the charge in different wording. (R. 1368). A review of the entire charge discloses no language bearing any similarity to the request. See Point VII of Ap-

pellant's principal brief. In this same context, defendant requested the well-recognized and proper instruction that the jury must disregard the entire testimony of any witness whom it finds to have knowingly and wilfully testified falsely. Although the defendant entered proper objec-[fol. 1727] tion at the conclusion of the court's charge in this regard, the court refused to recharge the jury properly (R. 1367-68). See Point VIII of Appellant's principal brief. Even though the plaintiff's reputation was the basis for the recovery of the general damages he sought, and the defendant introduced the testimony of six members of the University's Athletic Board, including the President of the University, that plaintiff's reputation was bad and that they would not believe him under oath, the trial court, in spite of the fact that the plaintiff offered no evidence of his good reputation, instructed the jury that the plaintiff was presumed to have a good reputation and was "entitled to reply upon his presumption of good reputation." (R. 1355). See Point VI E of Appellant's principal brief. The authorities there cited clearly disclose the rule that in such a situation the presumption vanishes.

The trial court practically directed a verdict for Butts when it informed the jury, not only improperly, but needlessly, that the Post article was "libelous per se" (R. 1348, 1353). This, from a layman's standpoint, left in the jurors' minds only the question of "how much" the damages should be. See Point I B of Appellant's principal brief and Point VII of Appellant's reply brief. The authorities there cited clearly disclose that in a libel action it is never proper (except when a crime is charged, if then) to instruct the jury that a publication is libelous per se. The effect of such a charge in the present case was to instruct the jury that the plaintiff was in the coaching profession at the time of the publication, that he was injured therein, that the publication was false, and that there was malice. Certainly if the meaning of such a charge could be so construed by the jury (even though it could reasonably be construed [fol. 1728] otherwise), it was erroneous, and because it in-

volved a crucial point in the case, it constituted reversible error. This was another part of the charge to which counsel for the defendant entered a proper objection (R. 1366).

Finally, the court allowed the case to go to the jurors with Butts' counsel's ringing improper arguments in their ears. Not only were counsel allowed to testify as to Butts' good character, truth and veracity, and state that others had similarly done so, but they were allowed to inject improper measures of damages into the case (the Post received a "hundred million dollars in advertising, would ten percent of that be fair to Wallace Butts for what they have done to him?" (R. 1321), and "You could return a verdict for Wally Butts in this case of ten million dollars, and it would be the greatest merchandising bargain the Saturday Evening Post ever got" (R. 1296), and if "you let them out of this case for five million dollars or less, and boy, it's been worth it to them" (R. 1319), as well as incorrect standards for the imposition of punitive damages ("We have got to stop them now, and you are the only twelve in the world that can stop them" (R. 1319), and "I may be next . . . You may be next; my wife; my children; yourself" (R. 1319), and "There are just thousands and thousands of people who are mad about it" (R. 1297).[15]

On the inflammatory side, as Judge Rives noted, counsel were allowed to introduce such prejudicial remarks as "they kill him, his wife, his three lovely daughters. What do they care? They have got money; getting money for it" (R. 1319); "I think it would teach them that we don't have that kind of journalism down here, and [fol. 1729] we don't want it down here, and we don't want it to spread from 666 Fifth Avenue any further than that building right now" (R. 1321); and "Somebody has got to stop them. There is no law against it, and the only way that type of . . . yellow journalism can be stopped

[15] Counsel were aided in having the jury utilize incorrect standards for punitive damages by the court's erroneous instructions. See Points IV A, B and C of Appellant's principal brief.

is to let the Saturday Evening Post know that it is not going to get away with it." (R. 1319). See Point III of Appellant's principal brief.

Thus, the above, as well as the other prejudicial errors which are discussed in detail in Appellant's principal brief, certainly could cause the jury to return a verdict against Curtis upon the question of liability as well as for punitive damages in an outrageous amount. The trial judge clearly recognized this to be the fact, as he held the verdict to be "grossly excessive." He sought to cure these errors then by granting a new trial unless the plaintiff remitted all punitive damages in excess of $400,000. The fatal error in the trial court's action in this regard is that the errors committed during the trial cannot be corrected by a mere remittitur. These errors, as is shown above and in Appellant's other briefs, went to the question of liability in this case and, more specifically, whether the jurors believed George Burnett or Wallace Butts and John Carmichael, and the halo which Butts erected to protect his case, as well as to stimulate and inflate punitive damages. These series of circumstances prevented defendant from effectively presenting its defense of truth and its good faith position to the jury.

Respectfully submitted,

Welborn B. Cody, Harold E. Abrams, Emmet J. Bondurant, Thomas E. Joiner.

[fol. 1731] Of Counsel:

Kilpatrick, Cody, Rogers, McClatchey, & Regenstein, 1045 Hurt Building, Atlanta, Georgia 30303.

Philip H. Strubing.

Of Counsel:

Pepper, Hamilton & Scheetz, Fidelity-Philadelphia Trust Bldg., Philadelphia, Pa. 19109.

Attorneys for Appellant.

Certificate of Service (omitted in printing).

[fol. 1732]

State of Pennsylvania
County of Philadelphia

AFFIDAVIT

Personally appeared before the undersigned officer duly authorized to administer oaths, Philip H. Strubing, who, having been duly sworn, deposes on oath and says as follows:

I am a member of the Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, general counsel for Curtis Publishing Company. I have read the opinion of the United States Court of Appeals for the Fifth Circuit in the case of *Curtis Publishing Company* v. *Wallace Butts,* No. 21491, dated July 16, 1965, and am making this affidavit because of the following erroneous factual statements and conclusions in the majority's opinion:

> "While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

As general counsel for Curtis Publishing Company, I participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein in the preparation of this case for trial. Later, I also worked actively with Mr. [fol. 1733] T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Paul Bryant* v. *Curtis Publishing Company* in the United

States District Court for the Northern District of Alabama. Mr. Embry and Mr. Roderick Beddow, Jr. attended the trial of the *Butts* v. *Curtis* case in Atlanta, but only as spectators. They were not consulted concerning the trial strategy of the *Butts* case. Since the *Bryant* v. *Curtis* case was to be tried some months after the *Butts* v. *Curtis* case, we had not at that time commenced active preparation of the *Bryant* case. There were no discussions between Messrs. Embry and Beddow and me in regard to the constitutional questions being alleged by the New York Times Company in the case of *New York Times Company* v. *Sullivan,* 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964), and there was no suggestion by these attorneys that any constitutional issues be raised in the *Butts* v. *Curtis* case. Furthermore, the constitutional questions "vigorously asserted in *Times*" were not those which Curtis now argues. I certainly did not intend to waive any constitutional defense of Curtis in the *Butts* v. *Curtis* case, and was not aware of the constitutional defense provided by *New York Times Company* v. *Sullivan* until that case was decided by the Supreme Court on March 9, 1964, some six months after the trial of the *Butts* case.

Philip H. Strubing.

Sworn to and subscribed before me, this 2nd day of August, 1965.

John S. Raum, Notary Public.

[fol. 1734]
State of Alabama
County of Jefferson

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths, T. Eric Embry, who, having been duly sworn, deposes on oath and says as follows:

I am a partner in the Birmingham, Alabama law firm of Beddow, Embry & Beddow. I have read the opinion

of the United States Court of Appeals for the Fifth Circuit in the case of *Curtis Publishing Company* v. *Wallace Butts,* No. 21491, dated July 16, 1965, and am making this affidavit because of the following erroneous factual statements and conclusions in the opinion of the majority:

> "While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

My firm represented the New York Times Company in [fol. 1735] the case brought against it by L. B. Sullivan (*New York Times Company* v. *Sullivan,* 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964)) and Curtis Publishing Company in the libel cases brought by Paul Bryant in the United States District Court in Birmingham. I was the member of my firm who handled the representation of these clients in all of these cases. Although Roderick Beddow, Jr. performed some services in the *Bryant* v. *Curtis* case, primarily during my illness in 1963, neither Roderick Beddow, Jr. nor Roderick Beddow, Sr. had any part in the *New York Times* litigation, as Roderick M. MacLeod and I were the only attorneys in our firm who worked on this case. Roderick Beddow, Jr. and I did attend the trial of the *Butts* v. *Curtis* case in Atlanta. However, we did so only as spectators to prepare ourselves for the trial of the *Bryant* v. *Curtis* case which was to be held at a subsequent date. At no time prior to or during the trial did we consult with Curtis' general counsel, Mr. Philip H. Strubing, or with Curtis' trial counsel, Mr. Welborn

B. Cody, or any other attorney representing Curtis in regard to trial strategy or the constitutional questions which we were urging before the United States Supreme Court in the *New York Times* case. We were not asked for our opinion concerning constitutional questions in the *Butts* v. *Curtis* case, and did not volunteer any opinion or suggestion to Curtis' counsel that any constitutional questions be raised in the *Butts* case.

Our principal contentions in the petition for writ of certiorari to the Supreme Court of the United States in the *New York Times* case were (1) that the New York Times Company was not doing business in Alabama, and (2) that since the statements which Times printed referred [fol. 1736] to no individual by name, but simply criticized the Montgomery Police Department which was under the direction of Mr. Sullivan, an elected City Commissioner, such statements could not be considered libelous without violating freedom of the press guaranteed by the First and Fourteenth Amendments. The requirement of the *New York Times* case that general damages could not be awarded without the necessity of proof of actual malice on the part of the defendant was not specifically presented in the Alabama courts nor in the petition for certiorari to the United States Supreme Court.

T. Eric Embry.

Sworn to and subscribed before me, this 30th day of July, 1965.

Mary B. Weatherly, Notary Public.

[fol. 1737]
State of Georgia
County of Fulton

AFFIDAVIT

Personally appeared before the undersigned officer authorized to administer oaths, Welborn B. Cody, who, having been duly sworn, deposes on oath and says as follows:

I am a partner in the Atlanta, Georgia law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein. I have represented Curtis Publishing Company in the case of *Curtis Publishing Company* v. *Wallace Butts* since that case was filed in the United States District Court for the Northern District of Georgia. I have read the opinion of the United States Court of Appeals for the Fifth Circuit in this case (No. 21491) and am making this affidavit because of the following erroneous factual statements and conclusions in the majority's opinion:

> "While it is true that the Supreme Court did not decide the *Times* case until March 9, 1964, it would be contrary to reason and common sense to assume that there had not been, at all times during the pendency of this case, full communication among Curtis' counsel, particularly concerning trial strategy. The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."

[fol. 1738] At no time during the preparation or trial of this case did I consult with Mr. Roderick Beddow or Mr. T. Eric Embry, or any member of the law firm of Beddow, Embry & Beddow, in regard to the constitutional questions being raised in the case of *New York Times Company* v. *Sullivan,* 376 U.S. 254, 84 Sup. Ct. 710, 11 L. Ed. 2d 686 (1964), nor was I informed of the constitutional issues raised in that case. My only conversations and communications with members of that law firm pertained to factual questions and the taking of depositions in Alabama. Although Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. attended the trial of the *Butts* v. *Curtis* case in Atlanta, they did so merely as spectators, and not as a part of the trial team in that case, and were not consulted with respect to the trial strategy of the case.

I did not read the petition for writ of certiorari filed by the New York Times in the United States Supreme Court at any time prior to or during the trial of *Butts* v. *Curtis* and was not aware of the constitutional issues being urged in that case. I certainly did not intend to waive any constitutional rights Curtis Publishing Company may have had in its defense of *Butts* v. *Curtis*.

Welborn B. Cody.

Sworn to and subscribed before me this 2nd day of August, 1965.

Julia H. Wooten, Notary Public.

[fol. 1739]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

RESPONSE TO PETITION FOR REHEARING EN BANC—Filed August 23, 1965

[fol. 1740] Comes now Wallace Butts, Appellee, and submits this response to the Petition for Rehearing En Banc heretofore filed by Curtis Publishing Company, Appellant.

1.

In Ground 1 of its petition Curtis contends that the majority of the panel of this Court erred in finding that Curtis waived its right to raise the constitutional defense that plaintiff's action was barred by the First Amendment.

Appellee specifically denies this contention and, in his supporting brief, will demonstrate beyond any doubt that Curtis was fully aware of the existence of and its right to

[File endorsement omitted]

plead the First Amendment as a defense to this libel action and of its obligation to plead it timely if it wished to [fol. 1741] preserve the point on appeal. This is conclusively demonstrated by the fact that Curtis affirmatively raised the First Amendment defense in pleadings filed by it in the trial court in the libel cases of *Bryant* v. *Curtis Publishing Company* pending in the United States District Court, Birmingham, Alabama, in which cases it was represented by the same general counsel who participated so actively in the instant case and whose firm, Pepper, Hamilton & Scheetz, signed those pleadings in *Bryant*. (See subparagraphs 3(f) and 3(h) of Exhibit "A" and sub-paragraphs 2(f) and 2(h) of Exhibit "B" attached hereto, each of which is by reference incorporated herein and made a part hereof.) In view of Curtis' latest (and really quite sophomoric) argument that it had no earthly idea "libelous utterances are within the area of constitutionally protected speech" when the *Butts* case was tried, it should be of more than passing interest to note that Curtis, through its same general counsel, first asserted this constitutional defense in *Bryant* on February 26, 1963, which was *one month* before suit was even filed in the *Butts* case. Curtis asserted this First Amendment defense in the second *Bryant* libel suit less than three weeks after it filed its defenses in *Butts* and more than three months prior to trial.

Furthermore, as found by the majority, these same constitutional grounds were raised in the *Times* v. *Sullivan* case by Curtis' local counsel in *Bryant* long before the petition in *Butts* was even filed. (Dec. P. 12) As the majority stated:

> "The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13)

[fol. 1742] For some reason known only by Curtis, it did not avail itself of the right to raise this issue in the instant case but, instead, and notwithstanding its knowledge that both the *Bryant* and the *Butts* cases were practically identical, intentionally and deliberately concluded to allow the *Butts* case to go to verdict and judgment without raising this constitutional question.

The truth of the matter is that Curtis was so determined to defend the *Butts* case on its plea of justification (thereby admitting a prima facie case) and thereby getting the right to open and conclude the arguments, that Curtis elected to and did waive all other defenses available to it including the constitutional grounds, the Georgia statutory privilege of commenting "upon the acts of public men in their public capacity and with reference thereto" (Ga. Code Ann., Section 105-709(6)), lack of jurisdiction, and numerous other affirmative defenses, all of which it raised in *Bryant*. If Curtis' determination to try this case on its plea of justification wasn't behind all this, then what explanation could there possibly be for what the majority found to be so significant when it said:

> "Curtis chose not to use as a witness either the author of the article or any of its editors who had made contributions to the article after it had been submitted. Nor did it use the Atlanta sports editor who had assisted in the preparation of the story. As one of its principal witnesses it called upon George Burnett, who was known by Curtis to have been convicted of writing bad checks, and to be on probation at the time he [fol. 1743] claimed to have listened in on the conversation." (Dec. P. 4-5)

Indeed, if Curtis wasn't so positive as to its theory as to how to try this case that it didn't want to clutter up the pleadings by raising the additional affirmative defenses, including the First Amendment, which it raised in *Bryant* (where it wasn't so determined—in fact, so leery of victory

was Curtis in Alabama that it paid that plaintiff $300,000 (R. 1456) not to go to trial), how can one account for the following curious conduct by Curtis as described by the majority:

> "If, as Curtis' counsel now claim, the arguments were, among other things, 'grossly improper and inflammatory', 'intemperate and inexcusable', 'appeals to passion and prejudice', 'corruptions of the evidence', 'completely unsupported by the evidence', and 'unsworn testimony of counsel', it is *inconceivable* to us that they would have delayed so long without raising the slightest hint of an objection. Leeway must often be allowed counsel in objecting to argument lest the objection itself magnify the harm. But to say nothing during argument, the extended week end recess, and for nine days thereafter, leaves us with the conviction that they did not consider the argument objectionable at the time they were delivered, *but made their claim as an afterthought.*" (Dec. P. 20) (Emphasis added)

[fol. 1744] Curtis also contends in Ground 1 of its petition that "the *Times* decision for the first time extended the protection of the First Amendment to libel." Appellee specifically denies this. In the body of its decision the Supreme Court points out that the rule prohibiting a public official from recovering damages in a libel action unless he proves actual malice "had been adopted by the highest courts of numerous states" and "is supported by the consensus of scholarly opinion." *Times* v. *Sullivan,* 11 L. Ed. 2d. 686 at 706-707. As a matter of fact, the decision quoted with approval by the Supreme Court was decided in 1908 (see 11 L. Ed. 2d. 707).

2.

In this ground of its petition Curtis contends that Judge Spears, being a District Court Judge, a rehearing *en banc*

should be granted in order that uniformity in the decisions of this Court may be insured. Appellee specifically denies this contention and shows that:

(1) In this contention Curtis is again back at its old habit in this case of waiting until after the verdict and judgment is rendered against it to make objections or allege constitutional errors. This case was argued before this Court on October 8, 1964, and Judge Spears was sitting as a member of the panel. Mr. Philip H. Strubing, General Counsel of Curtis and Welborn Cody and various other trial counsel of Curtis were present and participated in the argument before this Court on October 8th. They made no objection then to the case being argued before Judge Spears although surely they knew he was a District Court Judge. Apparently being willing to take their chances with [fol. 1745] Judge Spears they submitted their case to the panel. The case was under consideration by Judges Spears, Brown and Rives from October 8, 1964 to July 16, 1965, when a decision was rendered and during that time, over nine months, Curtis raised no objection to its appeal being ruled on by Judge Spears. Now that Judge Spears is one of the majority of the Court that decided the case against it, Curtis in effect claims error and wants a hearing by a court composed only of active Circuit Court of Appeals Judges and all of them at that. As said by the majority in its decision, page 32:

> "We think that Curtis has had its day in court. It apparently thought so too until the jury verdict was returned. This is attested by the fact that practically all of its present complaints were not even raised until after the trial."

(2) To contend now that the mere fact that the majority included a properly designated and impanelled district judge requires a rehearing *en banc* would mean that in every appeal considered by any panel of this Court consisting of a district judge would require a rehearing *en*

banc if a decision was a split decision with one of the circuit judges dissenting. It is shocking indeed for Curtis to be so intemperate as to suggest that Judge Spears' participation in the decision affords any basis whatsoever for a rehearing.

(3) *Wisniewski* v. *United States,* 353 U.S. 901 cited by Curtis for the proposition that uniformity in the decisions of this Court requires a rehearing *en banc* is inapplicable since the court in that case was dealing with two separate [fol. 1746] panels of the Court of Appeals as distinguished from this case where Curtis is complaining about two judges on one panel. The uniformity of decisions discussed in *Wisniewski* quite apparently is uniformity among the panels of the Court and not the judges of one panel of that Court.

3.

Under this ground of its petition Curtis contends that the applicability of the "new" First Amendment principles of *Times* is a question "of major importance which has been expressly left by the Supreme Court to be decided by the lower federal courts in the first instance . . ." In response to this ground, Appellee asserts that (1) *Times,* as heretofore pointed out, did not for the first time extend the protection of the First Amendment to libel; and (2) the contention in this ground would presuppose Curtis had timely raised the defense of the First Amendment as it well knew it had the right and obligation to do in order to preserve same and not wait until after verdict and judgment.

4.

In this ground Curtis contends that the "affirmance of the unprecedented and excessive award of punitive damages" is in violation of its constitutional rights and then sets forth two arguments in support thereof. Appellee specifically denies the contentions set forth in this ground and as will be more fully hereinafter developed in his sup-

porting brief, Appellee points out that (1) the same points were raised in the application for writ of certiorari in [fol. 1747] *Aware, Inc.* v. *Faulk,* 202 N.E. 2d. 372, cert. den. 380 U.S. 916, 13 L. Ed. 2d. 801 (1965), recently filed and summarily denied by the United States Supreme Court wherein a jury award of three and one-half million dollars had been reduced by the state court on remittitur to $550,000; and (2) this same Curtis Publishing Company paid Paul Bryant $300,000 (R. 1456) to settle his companion libel suit in Alabama growing out of the same article, with no claim that it amounted "to a penal sanction."

5.

In this ground Curtis contends that "the Court incorrectly allowed an excessive jury verdict, which was the product of erroneous trial rulings and instructions, as well as passion and prejudice, to stand." This contention is specifically denied and, as will be more fully developed in his supporting brief, Appellee shows that once again Curtis failed, as it did time and time again throughout the trial, to interpose objections to the matters now complained of as it was required to do under FRCP 51.

Wherefore, Appellee prays that the petition be denied.

Respectfully submitted,

William H. Schroder, Allen E. Lockerman, Robert L. Pennington, Milton A. Carlton, Jr., Gerald P. Thurmond, Attorneys for Wallace Butts, Appellee.

Of Counsel:

Troutman, Sams, Schroder & Lockerman, 1600 William-Oliver Building, Atlanta, Georgia 30303.

[fol. 1747a] Certificate of Service (omitted in printing).

[fol. 1748]

EXHIBIT "A" TO RESPONSE TO PETITION FOR REHEARING

[Stamp—Filed in Clerk's Office, Northern District of Alabama—Feb 26 1963—William E. Davis, Clerk, U. S. District Court, By Jewel M. Massey, Deputy Clerk.]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

WESTERN DIVISION

Civil Action No. 63-2-W

PAUL BRYANT,

Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, A Corporation, and FURMAN BISHER,

Defendants.

MOTION OF DEFENDANT, THE CURTIS PUBLISHING COMPANY, A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a Corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action inasmuch as the same is brought improperly in the Western Division of the Northern District of Alabama.

3. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

[fol. 1749] (f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a

personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW

By /s/ T. ERIC EMBRY
T. Eric Embry, Attorneys for The Curtis Publishing Company, A Corporation

[fol. 1750]

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This 26th day of February, 1963.

/s/ T. ERIC EMBRY
Of Counsel

[Stamp—A True Copy—William E. Davis, Clerk, U. S. District Court, Northern District of Alabama, By M. Claire Parsons, Deputy Clerk.]

[fol. 1751]

[Stamp—Filed in Clerk's Office, Northern District of Alabama—Apr 30 1963—William E. Davis, Clerk, U. S. District Court, By (Signature Illegible), Deputy Clerk.]

EXHIBIT "B" TO RESPONSE TO PETITION FOR REHEARING

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

Civil Action No. 63-166

PAUL BRYANT,

Plaintiff,

vs.

THE CURTIS PUBLISHING COMPANY, A Corporation,

Defendant.

MOTION OF DEFENDANT, THE CURTIS PUBLISHING COMPANY, A Corporation, TO DISMISS

Comes the defendant, The Curtis Publishing Company, a corporation, and moves the Court as follows:

1. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss this action because the complaint fails to state a claim against this defendant upon which relief can be granted in the following particulars, separately and severally:

(a) For that the magazine article complained of is not libelous as a matter of law.

(b) The magazine article complained of is not libelous per se and there is no allegation of special damages.

(c) Part of the magazine article complained of and relied upon as libelous is not of and concerning the plaintiff.

(d) Part of the magazine article complained of and relied upon as libelous is alleged out of the context of the entire magazine article which is not libelous as a matter of law.

(e) To subject this defendant to liability in the circumstances complained of would impose an unreasonable burden upon interstate commerce in violation of Article 1, Section 8 of the Constitution of the United States.

[fol. 1752] (f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment to the Constitution of the United States.

(g) To subject this defendant to liability in the circumstances complained of would be repugnant to Article 1, Section 6 of the Constitution of the State of Alabama in denying to this defendant due process of law.

(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

(i) The magazine article complained of is not libelous as a matter of law in that it is fair comment concerning a personality who is famous throughout the United States and abroad.

PEPPER, HAMILTON & SCHEETZ
BEDDOW, EMBRY & BEDDOW

By /s/ T. ERIC EMBRY
T. Eric Embry, Attorneys for The Curtis Publishing Company, A Corporation

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing Motion on Messrs. Pritchard, McCall and Jones, Attorneys for Plaintiff in this cause, by mailing a copy of same to them at their office at the Frank Nelson Building, Birmingham, Alabama, United States postage prepaid.

This the 30th day of April, 1963.

/s/ T. ERIC EMBRY
Of Counsel

[Stamp—A True Copy—William E. Davis, Clerk, U. S. District Court, Northern District of Alabama, By M. Claire Parsons, Deputy Clerk.]

[fol. 1753]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,491

[Title omitted]

BRIEF IN SUPPORT OF APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

[fol. 1757] I.

Curtis' Defenses of the First and Fourteenth Constitutional Amendments as Made by It in the Companion Libel Cases of Paul Bryant v. Curtis Publishing Company and Its Failure to Raise Those Defenses in This Case Shows a Clear Intent to Waive Them.

Under Point I of its brief, Curtis complains of the "refusal of the majority to consider the fundamental constitutional issues presented under the First and Fourteenth Amendments on the basis of the subsequent decision of the

Supreme Court in the *New York Times Co.* v. *Sullivan* because of the alleged waiver of these basic rights by the [fol. 1758] defendant." Curtis then argues that *Times* "radically changed the substantive law previously applicable to libel cases."

In its brief (P. 5) Curtis asserts "the majority seeks to attribute knowledge of the unannounced constitutional principles of the *Times* case to Curtis based upon its interlocking battery of counsel, . . . " and then proceeds to state in the footnote on this page that " . . . the majority has concluded from unsupported statements in Butts' brief, which for the most part are not true, that there was 'full communication among Curtis' counsel' in regard to the possible applicable constitutional decision in the *Times* case, which led to Curtis' intentional relinquishment or abandonment of a known right."

Curtis, in an effort to circumvent this fatal situation, has seen fit to attach to its brief affidavits of its attorneys participating in the companion cases of *Bryant* and *Butts* which were filed because of the same Saturday Evening Post article. In his said affidavit, Mr. Philip H. Strubing, Curtis' general counsel, stated on oath that he was "a member of the Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, general counsel for Curtis Publishing Company. . . As general counsel for Curtis Publishing Company, I participated actively with Mr. Welborn B. Cody and other attorneys in the Atlanta law firm of Kilpatrick, Cody, Rogers, McClatchey & Regenstein in the preparation of this case for trial. Later, I also worked actively with Mr. T. Eric Embry of the Birmingham law firm of Beddow, Embry & Beddow in the preparation of the case of *Paul Bryant* v. *Curtis Publishing Company* in the United States District Court for the Northern District of Alabama." Mr. Strubing further states in his affidavit that he "did not intend to waive any constitutional defense of Curtis in the *Butts* v. *Curtis* case."

[fol. 1759] With this affidavit before us, and comparing it with sub-paragraphs (f) and (h) of Exhibits "A" and "B"

attached to Appellee's Response to Curtis' Motion For Rehearing, let us examine just what Curtis' general counsel did by way of timely raising the First Amendment defense in the *Bryant* cases and not raising this or any other constitutional defense in the *Butts* case which was filed *after* Curtis' general counsel had filed pleadings in the first *Bryant* case:

On February 26, 1963 (one month before suit was filed in the *Butts* case) Curtis' general counsel, Pepper, Hamilton & Scheetz, (Mr. Strubing) signed pleadings in the case of *Paul Bryant* v. *The Curtis Publishing Company, et al,* Civil Action No. 63-2-W, in the United States District Court for the Northern District of Alabama (Exhibit "A" to Response), wherein Curtis moved (as a defense under Rule 12(b)6 FRCP) to dismiss a libel action instituted by Bryant because of another article appearing in its Saturday Evening Post on the grounds, among others, that:

> "3(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States . . .
>
> "(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. . ."

[fol. 1760] Thereafter, the same plaintiff, Paul Bryant, filed another suit against Curtis because of the article published in the Saturday Evening Post, which formed the basis of this suit by Butts, being Civil Action No. 63-166 in the United States District Court for the Northern District of Alabama. (Exhibit "B" to Appellee's Response) Again, in that case, Curtis' general counsel, Pepper, Hamilton & Scheetz (Mr. Strubing), signed pleadings in which it moved to dismiss the action for, among others, the reason that:

"2(f) To subject this defendant to liability in the circumstances complained of would abridge the freedom of speech and of press in violation of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment to the Constitution of the United States. . .

"(h) To subject this defendant to liability in the circumstances complained of would be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. . ."

This pleading was filed on April 30, 1963.

It might be added here that the above-quoted pleading filed for Curtis in Bryant's case No. 63-2-W was Exhibit "D" to the petition for mandamus filed in both *Bryant* cases by Curtis' general counsel (Mr. Strubing) in the United States Court of Appeals for the Fifth Circuit and was part of the record in Case No. 21,152 in that court. It was also part of the printed petition for writ of certiorari [fol. 1761] filed in January, 1964, for Curtis in the United States Supreme Court.

Thus, we have Curtis' general counsel "actively participating" with local counsel (Beddow, Embry & Beddow—T. Eric Embry) in the *Bryant* cases in Birmingham, as well as with local counsel in the *Butts* case in Atlanta. In *Bryant* Curtis' general counsel demonstrated its awareness of its right to defend against libel suits under the First Amendment by raising this defense in a timely fashion. In spite of this awareness, Curtis remained absolutely silent as to any constitutional defenses in the *Butts* case. For Curtis to argue now in its petition for rehearing that it could not have been expected to raise the First Amendment defense in *Butts* because it could not have been expected to know how *Times* would be decided is fantastic. Curtis had not needed that information in order to raise the First Amendment defense in *Bryant*. Furthermore, as found by the majority, these same constitutional grounds were raised in the *Times* v. *Sullivan* case by Curtis' local counsel in

Bryant long before the petition in *Butts* was even filed. (Dec. P. 12) As the majority stated:

> "The facts more than justify our conclusion that Curtis was fully aware when this suit was instituted, and certainly no later than the beginning of trial, that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*." (Dec. P. 13)

We have always thought it was horn-book law that if one wanted an appellate court to rule upon a given defense and, particularly, one based upon the violation of a defendant's constitutional rights, it was necessary to raise the issue before verdict and judgment, thereby preserving the point for decision by the appellate court.

If the First and Fourteenth Constitutional Amendments were thought by Mr. Strubing to be valid issues and grounds [fol. 1762] for dismissal of the *Bryant* cases in the United States District Court in Alabama, then why, if they did not intend to waive those grounds, did they not assert them in the *Butts* libel case growing out of the same article which was pending in the United States District Court in Georgia. For Curtis and its general counsel, Philip H. Strubing, to now claim that he "did not intend to waive any constitutional defense of Curtis in the *Butts* v. *Curtis* case" when he was contemporaneously asserting the First and Fourteenth Amendments as grounds for dismissal in the companion libel case of Paul Bryant in the United States District Court of Alabama growing out of the same Saturday Evening Post article, *is to say the least incredible.*

For Mr. Philip H. Strubing to now represent to this Court that "there was no discussion between Messrs. Embry and Beddow and me in regard to the constitutional questions being alleged by the New York Times Company in the case of *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and there was no suggestion by these attorneys that any constitutional issues be raised