in the *Butts* v. *Curtis* case" we say again is most incredible. Does it stand to reason that the firm of Beddow, Embry & Beddow and Mr. T. Eric Embry of that firm who actively handled the libel case of *Sullivan* v. *Times* and its pleadings therein in the Alabama Courts and raised constitutional issues of the First and Fourteenth Amendments in that case *would have no discussions whatsoever* with Mr. Strubing about having raised those issues in the *Times* case when they jointly with Mr. Strubing made those same defenses in the *Bryant* v. *Curtis* cases?

How in the name of common sense did the issues of the First and Fourteenth Amendments get in the pleadings brought jointly by counsel for Curtis in the *Bryant* v. *Curtis* cases as grounds for dismissal under Rule 12(b)6, if there was no discussion by such counsel as to whether such issues should be asserted in the case?

[fol. 1763] Mr. Strubing states in his affidavit that Mr. T. Eric Embry and Mr. Roderick Beddow, Jr. of the firm of Beddow, Embry and Beddow did in fact attend the trial of the *Butts* v. *Curtis* case in Atlanta, "but only as spectators," that they had not commenced active preparation of the Paul Bryant case. Again we ask the question, does it stand to reason that able trial counsel from Birmingham in the cases of *Bryant* v. *Curtis Publishing Company* would spend two weeks in idle attendance as mere curious spectators at the *Butts* v. *Curtis* trial in Atlanta growing out of the same libelous article? Appellee says that the obvious answer is that Messrs. Embry and Beddow were on the payroll of Curtis Publishing Company for the two weeks they spent at the Curtis counsel table at the Butts trial in Atlanta and that such attendance was a part of active preparation for the *Bryant* v. *Curtis* trial soon to come up in Alabama. For Curtis to now contend that there was no discussion between its mutually interested interlocking counsel in the *Butts* and *Bryant* cases concerning questions and issues in the *Butts* v. *Curtis* case is most incredible. If such matters were not discussed then what was the function, responsibility and duty of joint counsel in such im-

portant litigation? Can it be believed that Messrs. Embry, Beddow and Strubing played the role of ostrich and buried their heads in the sand throughout the two weeks that Messrs. Cody, et al. tried the *Butts* case in Atlanta?

In its brief, Curtis relies upon *Hormel* v. *Helvering,* 312 U.S. 552 for the proposition that the majority refused to consider *Hormel* when passing upon the question of waiver. A review of *Hormel* clearly indicates the reliance is misplaced. In *Hormel,* the Commissioner of Internal Revenue [fol. 1764] had issued a tax deficiency against the taxpayer for his failure to include income from three trusts created by him in 1934, each of which was revocable at will. The Board of Tax Appeals decided the income was not taxable, however, this decision was reversed by the Circuit Court of Appeals which held the income was taxable under the subsequent decision of *Helvering* v. *Clifford,* 309 U.S. 331. In *Hormel* the Supreme Court held that when the Commissioner makes an express waiver of Section 22(a), as he did in *Helvering* v. *Wood,* 309 U.S. 334, he could not present in that Court an entirely new issue concerning the applicability of Section 22(a). *Hormel* is clearly distinguishable from our situation in that there the trusts involved were substantially identical to the trust in *Clifford.* In fact, the Supreme Court held that was no controlling distinction at all between the two cases of *Clifford* and *Hormel. Hormel* went on to hold that as a general rule an appellate court should confine itself to the issues properly and timely raised below and that the only exception which would be recognized was where the obvious result would be a plain miscarriage of justice.

Curtis further states that the majority's decision is in direct conflict with *Cobb* v. *Balkcom,* 339 F. 2d 95. This Court is well aware that *Balkcom* involved the trial of a defendant for murder in the Superior Court of Jasper County, Georgia. The question involved was whether the defendant had waived his right to challenge the composition of the jury. This Court held that it was well settled that a Negro defendant in a criminal case is entitled to an indict-

ment by grand jury and trial before a traverse jury from which Negroes have not been systematically excluded. A conviction cannot stand where such exclusion is established [fol. 1765] because it constitutes a denial of due process and the equal protection of the laws. The crux of the waiver rule as set out in *Balkcom* and in the majority of the other cases relied upon by Curtis is that the federal court in the administration of its habeas corpus jurisdiction may go beyond state court procedural confines. We fail to see any similarity between those cases and the decision in this case.

In summary, it is clear that Curtis elected to raise but a single defense to this action and that was a plea of justification. It is further clear that at the time this defense was filed Curtis well knew of the availability to it of the defense of the First Amendment and decided to ignore it. It thereby elected *not* to defend on constitutional grounds in Georgia but elected to do so in Alabama. The reasons are of no importance. What is important though is that Curtis should be held to this election. It made it with its eyes wide open and with full knowledge that it was at the same time defending on First Amendment grounds in the *Bryant* cases in Alabama.

Curtis attempts to persuade this Court that *Times* did, in fact, radically change the substantive law previously applicable to libel cases. This just isn't true and is recognized as such throughout the decision in *Times*. No attempt will be made here to quote those statements in the decision in detail since it is felt that the following excerpts illustrate our point:

> "Respondent relies heavily, as did the Alabama courts, on statements of this Court to the effect that the Constitution does not protect libelous publications. [fol. 1766] Those statements do not foreclose our inquiry here. *None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.*" (*Times*, 11 L. Ed. 2d 686 at 699)

* * * * * * *

"The general proposition that freedom of expression upon public questions is secured by the First Amendment has *long been settled* by our decisions." (11 L. Ed. 2d 700)

* * * * * * *

"Thus, we consider this case against the background of a 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." (11 L. Ed. 2d 701)

* * * * * * *

"The fight of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government." (11 L. Ed. 2d 703)

* * * * * * *

"An oft-cited statement of a like rule (prohibiting a [fol. 1767] public official from recovering damages unless he proves actual malice), which has been adopted by a number of state courts, (the court here cites decisions from over a dozen state supreme courts and adds that 'the consensus of scholarly opinion apparently favors the rule that is here adopted.') is found in the Kansas case of *Coleman* v. *MacLennan,* 78 Kan. 711, 98 P. 281 (1908)." (11 L. Ed. 2d 706, 707) (Emphasis added)

We think these illustrative quotations should lay to rest the assertion by Curtis that *Times* "radically changed the substantive law previously applicable to libel cases."

We say, therefore, that contrary to the contention urged by Curtis in this section of its brief, the Supreme Court in *Times* did not enunciate a completely new rule of law that can be used by Curtis as an excuse for its deliberate and intentional refusal to raise as a defense to this action the

point that its First Amendment guarantees were involved and would be violated if the action was permitted to proceed.

Curtis can get small consolation from those decisions cited by it in its brief in an attempt to excuse its waiver of fundamental constitutional rights. Each of these decisions dealt with the alleged failure by an ignorant and indigent Negro defendant in a criminal case who was denied his basic constitutional rights. The case Curtis cites most often, *Johnson* v. *Zerbst,* 304 U.S. 458, 464, 82 L. Ed. 1461 [fol. 1768] (1938), is in this same category. There, the defendant was bound over to await action of the United States Grand Jury and was kept in jail due to his inability to give bail. Later he was indicted; taken to court and there first given notice of the indictment; immediately was arraigned, tried, convicted and sentenced that day to four and one-half years in the penitentiary. The Supreme Court found that:

> "Upon arraignment, both pleaded not guilty, said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of Counsel." (82 L. Ed. 1464)

Continuing, the Supreme Court stated:

> "(The Sixth Amendment) embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned Counsel." (82 L. Ed. 1466)

Certainly, Curtis would not put itself in the category of this type of a defendant—not with the experienced and learned counsel employed by it.

Continuing, the Court stated:

> "The determination of whether there has been an in-
> [fol. 1769] telligent waiver of the right to Counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. * * * The *Patton* case (281 U.S. 276) noted approvingly a state court decision pointing out that the humane policy of modern criminal law had altered conditions which had existed in the 'days when the accused could not testify in his own behalf, and was not furnished Counsel,' and which had made it possible to convict a man when he was 'without money, without counsel, without ability to summon witnesses and not permitted to tell his own story.'
>
> "The constitutional right of an accused to be represented by Counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropri-
> [fol. 1770] ate for that determination to appear upon the record." (82 L. Ed. 1466, 1467)

Certainly, Curtis would not have this Court believe that it was in a position similar to that of these indigent and ignorant defendants in those cases cited by it in its brief. On the contrary, it is abundantly clear from what has already been said that Curtis was represented by highly skilled, competent and able attorneys who were thoroughly cognizant of its right to plead the First Amendment and who went so far as to do this in one instance and refused to do it in the other. Could there be any clearer example of a waiver of a known right? As the majority panel 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) and, we might add, in the *Bryant* cases.

As the majority concluded:

> "For whatever tactical or other reason Curtis sat back and failed to carry the constitutional torch before verdict and judgment, the fact remains that it was charged with knowledge, 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 [fol. 1771] *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 even problems of local jurisprudence, Curtis' complete and utter silence amounted to 'an intentional relinquishment or abandonment of a known right or privilege.'" (Dec. P. 15-16)

Even Judge Rives in his dissent recognizes that Curtis must not have intended to raise this issue before verdict and judgment when he commented upon Curtis' failure even to offer the defense under Georgia law (Ga. Code Ann., Section 105-709(6)) which provides that communication concerning the "acts of public men in their public capacity" are deemed privileged under certain conditions. He states:

> "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' appears as broad, if not broader, than the 'public official'

> as contemplated by *New York Times Co.,* the plaintiff recognizes that the Georgia case law results in a narrow application of the privilege and the present plaintiff is not covered." (Dec. P. 44)

[fol. 1772] Of course, what Judge Rives had to say about what the plaintiff Butts and his attorneys recognize about this law is immaterial insofar as the point is concerned. Suffice it to say, had Curtis meant to rely upon the First Amendment and/or Georgia Code Section 105-709(6), which, as Judge Rives says, is even "broader than the 'public official' as contemplated by *New York Times Co.",* both were clearly available to it and, just as clearly, Curtis knew of their existence and availability. It raised *both* defenses in *Bryant*!

We might point out here that the reference by Judge Rives to *Henry* v. *Collins,* 380 U.S. 356, is of no help because the question of waiver was not raised in that case and, therefore, was not considered by the Supreme Court.

In its brief, Curtis has the temerity to state that "the majority declined to review the evidence which unquestionably demonstrates the lack of actual malice on the part of the Post." (P. 3) Curtis then proceeds to give its own summary of what it says was the evidence in the case. The fact remains, however, that in spite of what Curtis has said, the majority did review the evidence in detail and so stated more than once. For example, the majority held at Page 32:

> "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 [fol. 1773] 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 pretrials, and in a jury trial lasting two weeks. The record itself comprises 1613 pages. *We have given full consideration to the entire record . . .*"

Again, the majority stated at Page 6:

> "As the trial judge saw it: 'The article was clearly defamatory and extremely so . . . 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.' *We wholeheartedly agree with that appraisal.*" (Emphasis added)

The above two quotations might well lead one to ask what possible benefit Curtis could hope to get if a rehearing was granted as requested. It is abundantly clear from its decision that, had it ruled precisely on that point, it would have concluded that "actual malice" had been proven beyond a doubt and, therefore, the limitations of *Times* would have no effect. We think the last two quoted portions of the majority's decision substantiates this beyond any doubt.

[fol. 1774] II.

The Points Urged by Curtis in This Section of Its Brief Are Merely a Repetition of Points Previously Rejected Both by the Trial Court and the Majority Decision in This Court.

Curtis, in Part II of its brief, complains that the punitive damage award, as reduced, violates its rights under the Constitution and could not be cured by remittitur.

Part II of Curtis' brief deals primarily with four points:

1. The punitive damage award, four hundred times the Georgia criminal libel fine, amounts to criminal punishment without the procedural safeguards of due process.

2. No definite standard or guide governed the award.

3. The award cannot stand because it was a result of the jury's passion and prejudice.

4. The remittitur invades Curtis' right to trial by jury under the Seventh Amendment of the Constitution.

This is nothing more than a repetition of Curtis' argument on this point in its previous briefs to this Court and the trial court.

Point one emphasized by Curtis can be disposed of by referring this Court to the decision of *Reynolds* v. *Pegler,* 123 F.Supp. 36 (D.C.N.Y. 1954), and the New York Criminal Libel Law, *N.Y. Unconsol. Laws Art.* 126 §1340, §1341, §1937 (McKinney, 1944).

The jury in *Reynolds* v. *Pegler, supra,* awarded $100,000 punitive and $1.00 compensatory damages against the author of the article. The Second Circuit, in *Reynolds* v. *Pegler,* 223 F.2d 429 (2d Cir. 1955) affirmed, holding, at page 434, the amount of punitive damages to be awarded [fol. 1775] is peculiarly within the province of the jury:

> "It is not our function to calculate what any or all of the defendants should be required to pay by way of punishment . . . "

At this point it is well to note that under §1341 of New York Law, supra, criminal libel is punishable as a misdemeanor, and §1937 of New York Law provides one convicted of a misdemeanor may be fined not more than $500.00.

The United States Supreme Court denied certiorari in the *Reynolds* case, supra, in 350 U.S. 846. The award of punitive damages in *Reynolds* v. *Pegler* was two hundred times the maximum fine which could have been imposed in a criminal prosecution in New York, and one hundred thousand times the amount of compensatory damages awarded by the jury.

The most obvious defect in Curtis' argument becomes apparent when the true purpose of punitive damages is

considered. They were allowable at common law to deter the defendant from any such wrong in the future, and as a proof of the detestation of the jury for the act itself. Clearly, the amount awarded could be many times the maximum fine for a misdemeanor.

Curtis, in its second point, complains that no definite standard or controlling guide was given the jury to govern the award.

The court in *George Knapp & Co.,* 21 Mo. 655, 112 S.W. 474 (1908), was of the opinion that so many considerations enter into the awarding of damages by a jury in a libel case that the courts approach to the question of excessiveness of a verdict with great reluctance. The court added [fol. 1776] that in such a case, the question of damages was peculiarly within the province of the jury and apart from prejudice or corruption the verdict would not be interfered with.

Defendant's contentions relative to due process would all but abolish punitive damages. Such contentions appear to have escaped the notice of counsel and the courts for one hundred years since the passage of the Fourteenth Amendment.

The standard in Georgia, which rests upon the enlightened conscience of the jury, applies alike to an award for pain and suffering. Such rule rests on the fact that by the very nature of the tort it is impossible to set up any other standard to guide the jury.

The third point raised by defendant is that the verdict was the result of passion and prejudice.

It is well settled that the trial court's determination, as to whether a verdict is the result of passion or prejudice, will not be disturbed unless the determination is clearly erroneous. 6 *Moore's Federal Practice* ¶59.05[3], p. 3746 (2d. Ed.).

In *Bradley Mining Company* v. *Boice,* 194 F. 2d 80 (9th Cir. 1957) cert. den. 343 U.S. 941, it was held that a federal appellate court could consider only whether a verdict was

grossly excessive or monstrous, while the trial judge might set aside the verdict if he thought it was against the weight of evidence. The trial judge is so familiar with the atmosphere of the trial and sensible of imponderables, the appellate court should hesitate to interfere. The reason why a trial court's decision as to whether a verdict is the result [fol. 1777] of passion and prejudice will stand is obvious. The trial judge's familiarity with the atmosphere and personalities of the case allows the judge to give a well-considered determination of whether or not passion or prejudice prevailed.

The fourth point raised by Curtis was that the reduction by Judge Morgan of the punitive damage verdict to $400,000.00 constituted an invasion of defendant's right to trial by jury on the issue of damages guaranteed by the Seventh Amendment.

Professor Moore disagrees. Moore states that remittitur practice in the federal courts in jury cases has become widespread following Justice Story's decision, sitting on circuit, in *Blunt* v. *Little,* 3 Fed. Cas. 760 (C.C.D. Mass. 1822). Some have criticized the granting of remittitur in jury cases as violating the Seventh Amendment, however:

> ". . . its use has become so universal in the trial and even in the appellate courts and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without uprooting of precedent akin to that effected by *Erie* v. *Tompkins.*" 6 *Moore, Federal Practice,* ¶59.05[3], p. 3740 (2d. Ed.).

This Court approved the use of the remittitur in *Greyhound Corporation* v. *Dewey,* 240 F. 2d. 898 (5th Cir. 1957).

Curtis further makes the point that there is no standard for the amount to be remitted.

In fact most courts have not articulated any definite standard by which to determine the amount of the remittitur. *Moore, supra,* p. 3743. The majority of the remittitur

[fol. 1778] cases fix the amount at a figure the court believes a proper functioning jury should have found. This position gives the defendant the benefit of the full supervisory power of the court. Such a position effects a fair and practicable adjustment. *Moore, supra,* p. 3745.

In conclusion to Part II of Curtis' brief, it here has *raised again* points which have no merit and have previously been argued time and time again. Punitive damages cannot be equated to a penal fine for misdemeanors. Of necessity the jury has no algebraic formula for calculating the amount of punitive damages. Such a determination must be made by the enlightened consciences of impartial jurors. The trial judge's determination of whether the verdict is a result of passion and prejudice should be allowed to stand. It is settled beyond any serious argument that the remittitur practice does not violate rights guaranteed by the Seventh Amendment.

III.

In This Section Curtis Is Again Merely Relying Upon Points Previously Rejected in the Trial Court and by the Majority in This Court, None of Which Are the Basis for Granting a Rehearing Under Rule 25(a) of This Court.

In Section III of its brief in support of its motion for rehearing en banc, Curtis has lumped together some nine claimed procedural errors. All of these deal with various rulings during the trial as to the admissibility of evidence, the propriety of Appellee's argument and the correctness of the court's instructions.

In this shotgun attack, Curtis has completely overlooked [fol. 1779] the basis for a motion for a rehearing en banc. Rule 25(a) of this Circuit's Rules clearly provides that "ordinarily, a hearing or rehearing en banc is not ordered except: (1) when necessary to secure or maintain uniformity or conformity in the decisions of the Court, or (2) when unusually important or novel questions are to be decided."

> "En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charged with the administration and development of the law of the circuit." *U. S.* v. *American-Foreign S.S. Co.,* 363 U.S. 685, 4 L. Ed. 2d. 1491, 80 S. Ct. 1336 (1960).

The mere fact that the decision here under review was by a divided court gives no justification for a rehearing. *Shreveport* v. *Holmes,* 125 U.S. 694. To suggest that a rehearing en banc should be granted because a District Judge participated in the decision does not speak favorably for counsel for Curtis.

There has been no intimation by Curtis with respect to the points here raised that the Court overlooked or misconstrued any controlling authority, that the decision is in anywise contrary to any prior decision of this Court, or that any of these points are unusually important or novel. Rather, Curtis has simply taken the position that the contentions it made initially were sound and should have been sustained. These points were considered very thoroughly and at length by the Court. The entire court should not be burdened with this task merely because of the disappointment of Curtis. Needless to say, Appellee should not [fol. 1780] be faced with any more delay than he has met thus far.

The first point raised deals with the refusal of the court to permit evidence of alleged specific acts of misconduct. This is nothing but a continuing attempt by Curtis to assassinate Appellee's character without any justification. They have reiterated their patently false assertions that Appellee's entire case revolved around his loyalty to the University. In our main brief (pp. 99-108), this point was dealt with extensively. Suffice it to say that Appellee never testified that he had done nothing to hurt the University. The fact that he had made such a statement prior to the trial was elicited by counsel for Curtis for the sole purpose

of trying to lay the groundwork to introduce evidence relating to alleged specific acts of misconduct.

The authorities cited in our main brief show without question that the courts uniformly reject such evidence. The case of *Cox* v. *Strickland,* 101 Ga. 482 (5), 28 S.E. 655 (1897) clearly held that under Georgia law in a libel suit, the defendant has the right to show the plaintiff's bad character "but cannot in so doing, go into proof of special acts."

The article in question dealt only with the alleged fixing of the Georgia-Alabama football game and not with the private life of either Coach Butts or Coach Bryant. The complaint dealt solely with his reputation in the football coaching profession, which Curtis admitted was good before it published the article which it knew would kill that reputation. Under this state of the evidence and the law, there was clearly no error in rejecting this type of evidence.

Curtis goes on to say that the court erred in refusing to allow it to cross-examine Appellee with respect to certain testimony given by him in his deposition and with respect [fol. 1781] to his refusal to answer certain questions on his deposition. The alleged "false testimony" (relating to whether he knew anyone who went by the name of E. C. Lindsey) was not relevant to any issue in the case and was but another attempt by Curtis to evade the court's ruling that evidence of alleged specific acts was not admissible. (pp. 101-102, Brief of Appellee) The refusal of Appellee to answer certain questions was based on advice of counsel, and subsequently they were answered in detail. No possible harm was suffered by Curtis by this delay, and hence there was no prejudicial error (See pp. 109-112, Brief of Appellee).

Curtis next urges that it was improperly prevented from impeaching witness Carmichael by proof of a 30 year old conviction of a childhood misdemeanor and by proof that he had made mis-statements in applications for licenses to sell beer many years before the trial.

The rule is well settled that a federal trial judge has the discretion of admitting or rejecting proof of an ancient conviction. See cases cited at pp. 113-115 of Appellee's main brief and particularly *Goddard* v. *U. S.,* 131 F. 2d. 220 (5th Cir., 1942), a case arising in Georgia. Although Curtis relies on *Woodward* v. *State,* 197 Ga. 60, 28 S.E. 2d. 480 (1943), this case merely held that it was not error for the trial judge to admit a 23 year old felony connection; the case is not authority for the proposition that a 30 year old misdemeanor conviction must be admitted. Whether such a conviction is admissible lies entirely within the discretion of the trial court.

With respect to Curtis' claim that Carmichael had a "propensity to give false statements," the authorities are decidedly against the admissibility of this type of evidence. As this Court very clearly held in *Roberson* v. *U. S.,* 249 [fol. 1782] F. 2d. 737 (5th Cir., 1957) an attempt to impeach a witness cannot be made by showing wrongful conduct or even the commission of a crime for which there has been no conviction. The general rule is that "a witness cannot be impeached by evidence showing particular instances in which he has been untruthful." 98 C.J.S. Witnesses §512, p. 417. See pp. 115-119 Appellee's main brief.

The next claimed error relates to the refusal of the court to permit witness Burnett to testify as to conversations he had with the telephone operator and Milton Flack (who was not called by Curtis as a witness) to corroborate his asertion that there was in fact a telephone conversation between the two coaches. As the majority of this Court pointed out (and there was no dissent on this point), "the full import of most, if not all, of that evidence got before the jury." Indeed, there was never any contention that there was no telephone conversation. Butts didn't deny it. The only thing in dispute was whether the contents of that conversation were correctly reported by Burnett, and no amount of self-serving, extrajudicial assertions by Burnett would be admissible to corroborate his patently fictitious story.

Error, to be reversible, must be harmful. As held by this Court in *State Farm Mutual Auto Insurance Co.* v. *Bourne,* 220 F. 2d. 921, 923-924 (5th Cir., 1955):

> "Appellate courts do not sit to review claims of procedural errors where it is plain, as here, that no substantial prejudice could possibly have resulted and the questions, therefore, are mere abstractions."

The next three points concern the court's instructions regarding the construction to be placed upon Appellee's testimony, the credibility of witnesses and the presumption [fol. 1783] that Appellee had a good reputation. These points are of such little present consequence and have been covered so fully in Appellee's main brief (pp. 147-161), that further comment is unwarranted.

Contrary to Curtis' argument next urged, the trial court correctly charged the jury that the article was libelous per se, that is, as a matter of law. In its answer, Curtis admitted that Butts had a good reputation in his chosen profession. At the trial, Curtis successfully urged that it had filed a valid "plea of justification" which, under Georgia law, is the admission of a prima facie case in favor of the plaintiff. Thus, the Post made a solemn admission *in judicio* that Butts was a member of the football coaching profession, that his previously good reputation had been injured, that the article was written with malice and that it was false. Under these admissions, as well as the undisputed evidence, the court, following the rule laid down in *Walker* v. *Sheenan,* 80 Ga. App. 606, 54 S.E. 2d. 628 (1949) to the effect that statements tending to injure one in his trade are libelous per se, correctly charged that the article was libelous as a matter of law.

Curtis concludes its many-faceted attack by claiming that counsel for Appellee were allowed to make improper arguments to the jury. If objection had been made, the trial court would have been in a position to stop any improper argument and to take such corrective measures as were

necessary, including instructing the jury to disregard it and rebuking counsel. None of Curtis' numerous attorneys participating in the trial thought that this was needed, hence they sat silently by. Assuming purely for the purpose of this brief that the argument was improper (although we agree with the majority which held to the contrary), the matter is aptly put to rest by this Court's holding that "they did not consider the arguments objectionable at the time they were delivered, but made their claim as an after-thought." (P. 20)

[fol. 1784] Conclusion

It is clear that Curtis Publishing Company has shown no basis for this Court to grant its request for a rehearing en banc. The decision of the majority should be allowed to stand.

Respectfully submitted,

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[fol. 1785] CERTIFICATE OF SERVICE (omitted in printing).

[fol. 1786]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21491

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.

ON PETITION FOR REHEARING

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

OPINION—October 1, 1965

Per Curiam: As Curtis' petition for rehearing asserts that the waiver found by us is based on "alleged facts, most of which are outside the record", and upon "unsup-
[fol. 1787] ported statements in Butts' brief, which for the most part are not true", we deem additional comment appropriate.

The burden of Curtis' brief, elaborated in the petition for rehearing, is that *Times* came like a bolt out of the blue, and no one either knew of, or could anticipate, that a state-created libel damage action was subject to or could be controlled by First Amendment freedom of speech

constitutional limitations. Therefore, the argument runs, until *Times* there was no reason to assert the constitutional claim, and consequently it should not be held to the usual appellate consequence of failing properly to preserve the point.

Obviously this Court is not required to accept the mere assertions of Curtis. This Court has the duty of determining whether this contention of Curtis was well founded. While this partakes of factual evaluation in a sense, the question of waiver is a law problem—i.e., whether skilled counsel would reasonably think the contention to be plausible. Since Curtis did not seek to raise the constitutional issues before verdict and judgment, it was entirely proper to look to the sources discussed in our original opinion in order to ascertain the pertinent facts. Until the filing by Curtis of its petition for rehearing, the statements in Butts' brief, referred to by Curtis, had not really been disputed. And now, after having given full consideration to the affidavits and to all other matters presently submitted by Curtis, we are still of the firm opinion that when all of the acts and conduct of Curtis' [fol. 1788] attorneys are tested in the light of reason, Curtis cannot sustain the proposition that its counsel were ignorant of a constitutional claim so as to be totally excused for the complete absence of any timely assertion of it.

To its petition for rehearing, Curtis attaches affidavits made by Philip H. Strubing, whose Philadelphia, Pennsylvania law firm of Pepper, Hamilton & Scheetz, is general counsel for Curtis; by T. Eric Embry, whose Birmingham, Alabama law firm represented the New York Times Company in the case brought against it by Sullivan (*Times* case), and also represented Curtis in the related libel cases brought against it in the United States District

Court by Coach Paul Bryant;[1] and by Welborn B. Cody, who was lead trial counsel for Curtis in the *Butts* case. In general, the affidavits assert that Mr. Embry and his partner, Roderick Beddow, Jr., attended the trial of this *Butts* case as spectators only, were not consulted concerning trial strategy, and did not advise Mr. Cody concerning the constitutional questions they had raised in *Times*. Mr. Cody stated that "he was not aware of the constitutional issues being urged in (the *Times*) case."

There is no dispute that the lawyers who sat together at the Curtis counsel table during the Butts trial were representing Curtis either in this case or in the related Bryant libel suits pending in Alabama, so presumably they were all on Curtis' payroll. Unusual as it would be for them not to consult with one another concerning strategy and tactics during the two-week trial, we accept the statement [fol. 1789] that neither Mr. Embry nor Mr. Beddow informed Mr. Cody of the constitutional questions being raised in the *Times* case.

But what about Mr. Strubing? In his affidavit he stated that he participated actively in the preparation of the *Butts* case for trial, and that he also worked actively with Mr. Embry in the preparation of the related *Bryant* cases. He is also on the brief in our case and participated in the arguments.

Butts' response to the petition for rehearing refers us to the records of this Court, of which, of course, we may also take judicial notice. In Cause No. 21,152, *The Curtis Publishing Company* v. *Honorable H. H. Grooms, United States District Judge for the Northern District of Alabama,* Curtis sought a writ of mandamus to compel Judge Grooms to vacate his orders denying Curtis' motion for change of venue. That record reflects that on February 26, 1963 (one month before the Butts suit was filed) Mr. Strubing's law

[1] Civil Actions Nos. 63-2-W and 63-166, brought in the Western and Southern Divisions respectively, of the Northern District of Alabama.

firm, together with the firm of which Mr. Embry and Mr. Beddow are members, signed and filed in the Alabama District Court a motion to dismiss the related libel action instituted by Bryant, on the grounds, among others, that:

> "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 . . .
> [fol. 1790] "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 . . ."

In a later suit filed against Curtis by Bryant the same two law firms made identical contentions in a motion to dismiss signed and filed by each of them in the District Court on April 30, 1963, still more than three months before the trial of the *Butts* case.

If the First and Fourteenth Amendments were thought by Mr. Strubing and his law firm to be valid grounds for dismissal of the related *Bryant* cases in Alabama, why did they not assert them in the *Butts* case? By his own statement Mr. Strubing was an *active* participant in all three cases, so he certainly should have known what the rights of Curtis were. Although he now says that he was not aware of the constitutional defenses articulated by *Times* until that case was decided by the Supreme Court some six months after the trial of the *Butts* case, neither he nor his local counsel (Mr. Embry) considered a final decision in *Times*—or for that matter any other case—a necessary prelude to raising in the related *Bryant* cases, the constitutional claim previously asserted by Mr. Embry in *Times*.[2]

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[2] That these constitutional claims were well preserved by these counsel in *Times* without the learning which was to come several years later through the words of the *Times* opinion is recognized

And for good reason, at least ever since June 1962 when [fol. 1791] those who wished could see the handwriting on the wall, certainly as the moving finger followed the voice of Mr. Justice Black's celebrated "First Amendment 'Absolutes'; A Public Interview".[3]

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by the Court itself: "The (Alabama trial) judge rejected petitioner's contention that his rulings abridged the freedoms of speech and of the press that are guaranteed by the First and Fourteenth Amendments." 376 U.S. 254, 263.

The Alabama Supreme Court also recognized the assertion of these constitutional claims for it "rejected petitioner's constitutional contentions with the brief statements that "the First Amendment of the U.S. Constitution does not protect libelous publications * * * 14 So.2d at 40." 376 U.S. 254, 264.

[3] Justice Black and First Amendment "Absolutes"; A Public Interview, Edmond Cahn and Mr. Justice Hugo L. Black, 37 NYU Law Review 549 (June 1962). The background of the interview was the Justice's lecture entitled "the Bill of Rights", delivered at the New York University School of Law, February 17, 1960, published at 35 NYU Law Review 865 (1960). See, e.g.:

> "CAHN: Do you make an exception in freedom of speech and press for the law of defamation? That is, are you willing to allow people to sue for damages when they are subjected to libel or slander?
>
> "JUSTICE BLACK: My view of the First Amendment * * * is that it said Congress should pass none of these kinds of laws. * * * I have no doubt myself that the provision * * * intended that there should be no libel or defamation law in the United States under the United States Government, just absolutely none so far as I am concerned. * * * " (557)
>
> " * * *
>
> "My belief is that the First Amendment was made applicable to the states by the Fourteenth. I do not hesitate, so far as my own view is concerned, as to what should be and what I hope will sometime be the constitutional doctrine that just as it was not intended to authorize damage suits for mere words as distinguished from conduct as far as the Federal Government is concerned, the same rule should apply to the states.
>
> " * * *
>
> "I am for the First Amendment from the first word to the last. I believe it means what it says, and it says to me, '* * * Government shall not attempt to control the ideas a man has. * * * Government shall not abridge freedom of

[fol. 1792] Granted that the extra-judicial statements of a single Justice do not an opinion make,[4] the Court itself in *Times* treats this newly announced rule as a natural development of the constitutional propositions long recognized by its extensive writings on First Amendment freedom of speech rights.[5] Thus, it emphasized that the "general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions." 376 U.S. 254, 269. Announcing its rule, it referred to the "oft-cited statement of a like rule * * * adopted by a number of state courts * * * found in the Kansas case of Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908)"—a decision then nearly half a century old.

Whatever may have been the reasons for invoking the First Amendment claim in the Alabama suits while remaining silent in Georgia, Curtis cannot sustain the proposition that it was unaware that a defendant in a libel action might assert the constitutional claim as a defense. Counsel for Butts make a persuasive suggestion that Curtis elected to defend this case on its plea of justification, rather than raise the jurisdictional, constitutional and other affirmative defenses[6] it had raised in the Alabama *Bryant* cases,

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the press or speech. It shall let anyone talk in this country.' * * * Let them talk! In the American way, we will answer them." (563)

[4] They were shortly to be announced *ex cathedra* in his concurring opinion in *Times*, 376 U.S. 254, 293, joined by Mr. Justice Douglas and substantially echoed by Mr. Justice Goldberg (with Justice Douglas), 376 U.S. 254, 297.

[5] See the extended annotations, The Supreme Court and the Right of Free Speech and Press, 11 L.Ed. 2d 1116-1175; 2 L.Ed. 2d 1706; 93 L.Ed. 1151.

[6] These would include the conditional privilege recognized by §105-709(6) of the Georgia Code concerning published statements relating to the "acts of public men in their public capacity". See Note 20, 376 U.S. 254 at 280.

[fol. 1793] in order to get the right to open and close the arguments.

Nor, as suggested in Judge Rives' dissenting opinion on denial of rehearing, do we consider that our action is at all inconsistent with the principle of law expressed for the Court by Judge Wisdom in *Commissioner of Internal Revenue* v. *Chase Manhattan Bank,* 5 Cir., 1958, 259 F.2d 231, 238, cert. denied, 359 U.S. 913.[7]

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[7] Actually, in this tax case the theory later developed for the first time in this court had been raised in the bank's petition filed in the lower court and agreed upon by both parties at the trial. The Court, in deciding to consider the development of the theory, stated that the "tax liability as to the testamentary trust depends on whether Daniel's will put Marie to an election. *The question is in the case.* A just determination of the appeal requires us to decide it." (Emphasis supplied). This case involved the gift tax liability under three trusts created by the decedent, "Daniel", one of which was a testamentary trust of his residuary estate from which his wife, Marie, was to receive the income for life, the remainder to be divided among Daniel's descendants. In the Tax Court, the bank's petition stated that "the estate was still under administration and that 'no determination has yet been made as to whether or not the said Marie Elizabeth Moran has elected to take under the will' . . . that Marie's motive 'in not taking against the will was to benefit herself' ". At the trial the Commissioner and the bank agreed to assume that Daniel's will put Marie to an election and that Marie's receipt of income from the trust was sufficient to show that she had elected to take under the will. They differed only as to whether the effect of the election was that she had made a taxable gift. The Tax Court held that Daniel's will put Marie to an election and that Marie's "acquiescence" in the testamentary trust constituted a taxable gift. On appeal, for the first time in the case, the defendant made the assertion that Daniel's will did not purport to dispose of Marie's share and therefore she was not put to an election, thereby denying that Marie transferred her share of the community estate to the trust. In answer to the Commissioner's objection to the bank's new argument that Marie was not put to an election, and its contention that the taxpayer is not at liberty to urge as a ground for reversal a point not raised in the court below, the court states that "indeed, . . . the taxpayer invited error . . . worse, the invitation was accepted. But an appellant has no vested right in an opponent's error of law in the lower court—especially when the protesting appellant is the Commissioner of Internal Revenue

[fol. 1794] In that case the legal theories developed in this Court for the first time could be fairly disposed of on the record, and the opposing party was not prejudiced by the use of other theories.[8] However, here Curtis seeks a reversal so that a new record based on different theories may be made at another trial. The wholesome desire "to secure the just * * * determination of every action", neither [fol. 1795] dispenses with the rules of procedure, nor forecloses the applicability of the doctrine of waiver when all of the elements which constitute that doctrine are present, as in the present case.

. . . (who) owes a duty to all taxpayers . . . to see that the tax law is applied justly. . . . Federal procedure is moving away from what Pound calls 'the sporting theory of justice', Wigmore the 'instinct of giving the game fair play', and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a court 'to secure the just * * * determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U.S.C.A. Daniel's will is in the record and speaks for itself. '(W)here, as here, the case below was tried, not upon any misapprehension of the facts, but upon a misapprehension of the effects of those facts in law, appellant may not be prevented from pressing here for the application, to the proven facts, of the correct principles of law.' . . . 'We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties.' "

See also Jack Ammann Photogrammetric Engineers, Inc. v. Commissioner of Internal Revenue (5th Cir. 1965) 341 F. 2d 466, a tax case citing Commissioner of Internal Revenue v. Chase Manhattan Bank, in determining that since legal theories were there being urged "that can be fairly disposed of on the record before us. We do not consider that we should refuse to consider them merely because they were not urged in the Tax Court."

[8] See Glavic v. Beechie (5th Cir. 1964), 340 F. 2d 91. The majority refused to consider a question not presented for determination in the District Court. Judge Wisdom in his concurring opinion stated, in opposing this decision, that he "would allow either party on appeal to advance a new theory or to change his theory of the case—if: (1) all the relevant evidence is before the court, (2) the opposing party has had adequate time to brief the point, and (3) the opposing party is not prejudic(ed) by not having introduced evidence below that would have militated against the validity or effect of the new theory."

As to all other contentions in the petition for rehearing and supporting brief, we adhere without further comment to the holdings in our original opinion. Finding no error, see Rule 25(a) of this Court, the petition for rehearing is denied.

Petition Denied.

RIVES, Circuit Judge, Dissenting:

The majority undertakes to bolster its holding "that Curtis has clearly waived any right it might have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times." [1]

I.

As suggested in my earlier dissent,[2] that is not true as to the holding in *Times* that a state law of civil libel which sustains the imposition of extremely large awards of damages in libel actions may constitute a prior restraint on freedom of expression forbidden by the First and Fourteenth Amendments. *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 277, 278.

The enormous amount of the verdict in the present case could not have been anticipated. Curtis raised the point [fol. 1796] seasonably as a ground for its first motion for new trial.[3]

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[1] Slip Opinion, pp. 17 and 18.

[2] Slip Opinion, pp. 46, 47, 52 and 53.

[3] "That portion of the jury's verdict awarding the plaintiff $3,000,000 punitive damages, violates and abridges and cannot be sustained without violating and abridging the right of freedom of speech and of the press guaranteed by the First and Fourteenth Amendments of the United States Constitution because:

". . . . . .

"(e) The amount of punitive damages, in the circumstances of this case, was so excessive as to violate and abridge through excessiveness alone, the guarantees of free speech and press." (Record, pp. 46, 47.)

In ruling on that motion the district court recognized that: "As far as this Court can ascertain, the largest award ever sustained for punitive damages by the Appellate Courts was an award of $175,000.00 in the case of *Reynolds* v. *Pegler,* D.C., 123 F.Supp. 36; 2 Cir., 223 F.2d 429." 225 F.Supp. 916, at 919. Nonetheless, after the plaintiff filed his remittitur, the district court entered judgment against Curtis for $400,000 punitive damages plus $60,000 general damages, or a total of $460,000. Since that time, Curtis has lost no opportunity to insist that the $460,000 award, if sustained, is so large as to constitute a prior restraint upon freedom of the press within the rule announced in the *Times* decision. On that issue, there is, I submit, no debatable question of waiver. For reasons expressed in my prior dissent,[4] I would rule with Curtis on that issue.

As to the punitive damage award, the section of the Georgia Code quoted in my earlier dissent[5] and the oral [fol. 1797] charge to the jury,[6] make clear that the very purpose of punitive damages is to act as a deterrent to future conduct, which, in libel cases, means a prior restraint on freedom of expression. When that deterrent or restraint assumes proportions of the jury's verdict, $3,000,000, or even of the award made by the district court, $400,000, I submit that it is forbidden by the First and Fourteenth Amendments.[7]

The part of the *Times* opinion relating to prior restraints on freedom of expression was certainly not "new law."

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[4] Slip Opinion, pp. 51, 52 and 53.

[5] Section 105-2002, Georgia Code Annotated.

[6] "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."

[7] See Bantam Books, Inc. v. Sullivan, 1963, 372 U.S. 58, 70, cited in *Times* (376 U.S. at 278).

Nor was that part of the opinion limited to public officials. Clearly, I submit, whether Butts was a public official or not, the enormous award of damages must be set aside.

II.

The specific holding in *Times,* which had not theretofore been generally recognized, was that a State cannot under the First and Fourteenth Amendments award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice"—that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false. It was that principle to which I referred in my earlier dissent,[8] when I said "it was not even enunciated by the [fol. 1798] counsel who petitioned for certiorari in the *New York Times Co.* decision."[9] Now on petition for rehearing, counsel makes affidavit that: "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."

In order properly to object[10] to the district court's instructions allowing recovery of general damages without proof of malice, and recovery of punitive damages on a definition of malice at variance with that prescribed in *Times,* counsel must have anticipated that specific holding of the *Times* decision.

Judge Morgan, the District Judge in the present case, recognized, at least impliedly, that Curtis had not waived

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[8] Slip Opinion, p. 42.

[9] An opinion which I had reached from an examination of the petition and briefs on certiorari.

[10] "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." Rule 51, Fed.R.Civ.P.

that constitutional right by its failure to insist upon it at the trial, when, in denying the motion for new trial under Rule 60(b), Fed.R.Civ.P., he considered and ruled on the defense on its merits. *Butts* v. *Curtis Publishing Co.,* N.D. Ga. 1964, 242 F.Supp. 390.

Based largely on facts dehors the present record, the majority held that Curtis' trial counsel had knowingly and intentionally waived the constitutional protections af- [fol. 1799] forded by the *Times* case, by failing to raise them at the trial. In response to that holding, three of Curtis' attorneys have filed with this Court their sworn affidavits.[11] Now the majority goes still further beyond the present record and considers another case shown by the records of this Court but of which Judge Morgan could not have taken judicial notice when he considered and ruled on Curtis' section 60(b) motion. With deference, I submit that it is the function of this Court simply to review the ruling of the district court on the record before that court.

If, however, we are to resort to evidence outside the record and to bolster our judicial notice from records in other cases, those extraneous matters do not impugn the integrity and veracity of Curtis' trial counsel. It seems clear to me that, at the time of trial, counsel had no notice of the *specific* holding thereafter made in *Times.* It is impossible for me to believe that, if counsel had any such notice, they would have knowingly and intentionally waived the specific constitutional protection afforded by the *Times* case "in order to get the right to open and close the arguments," as suggested in the majority opinion.

It is too much to hold counsel to the duty of anticipating the specific holding of *Times,* because of general assertions of First Amendment defenses in other cases, or even because of Mr. Justice Black's view that the First Amendment ". . . intended there should be no libel or defama-

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[11] Ethically permissible "when essential to the ends of justice." A.B.A. Canons of Prof. Ethics No. 91.

tion of law in the United States under the United States [fol. 1800] Government, just absolutely none so far as I am concerned . . . ." [12] The majority paints with such a broad brush as to require the assertion of a First Amendment defense in *every* libel or defamation case hereafter litigated.

With deference, I submit that it is the outworn sporting theory of justice[13] which leads the majority to convert this appeal into an unseemly trial of Curtis' lawyers. The function of this Court is not to decide a contest, but to administer justice. Curtis, not its lawyers, stands mulcted in damages to the extent of $460,000 as the result of a trial conducted on a fundamentally and constitutionally deficient theory of law.

The resulting damage extends far beyond the monetary loss to Curtis. This Court's refusal to consider and decide whether constitutional standards were observed in adjudging Curtis liable is a grave reflection upon the administration of justice itself. Permitting such a libel judgment to stand will cause " . . . the pall of fear and timidity [to be] imposed upon those who would give voice to public criticism in an atmosphere in which the First Amendment freedoms cannot survive." [14]

[fol. 1801] A just determination requires this Court to consider and decide this appeal on its merits.[15] The altered

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[12] Quoted in footnote 3 to the majority opinion on rehearing.

[13] "Federal procedure is moving away from what Pound calls 'the sporting theory of justice,' Wigmore the 'instinct of giving the game fair play,' and Arthur Vanderbilt the theory of procedure as 'a contest between two legal gladiators'. We are a Court 'to secure the just * * * determination of every action'. Rule 1, Federal Rules of Civil Procedure, 28 U.S.C.A." Commissioner of Int. Rev. v. Chase Manhattan Bank, 5 Cir. 1958, 259 F.2d 231, 238.

[14] New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 278.

[15] Hormel v. Helvering, 1941, 312 U.S. 552, 556, 557.

situation created by the intervening decision of the Supreme Court makes that a compelling duty.[16]

I, therefore, respectfully dissent.

[fol. 1802] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1803]

SUPREME COURT OF THE UNITED STATES

No. 37—October Term, 1966

CURTIS PUBLISHING COMPANY, Petitioner,

v.

WALLACE BUTTS.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and one and one half hours are allotted for oral argument. The case is set for oral argument immediately following No. 150.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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[16] The Peggy, 1801, 5 U.S. (1 Cranch) 103, 110; Connor v. New York Times Co., 5 Cir. 1962, 310 F.2d 133, 135, and cases there cited.