Curtis Publishing v. Butts, 388 U.S. 130 (1967)

CURTIS PUBLISHING CO.
v.
BUTTS

No. 37
SUPREME COURT OF THE UNITED STATES

388 U.S. 130;
87 S. Ct. 1975;
1967 U.S. LEXIS 1084;
18 L.
Ed. 2d 1094;
1 Media L. Rep.1568

February 23, 1967, Argued
June 12, 1967, Decided *
* Together with No. 150, Associated Press v. Walker, on certiorari to the Court of Civil Appeals of Texas, 2d Supreme Judicial District.

PRIOR HISTORY: [***1]

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

DISPOSITION: No. 37, 351 F.2d 702, affirmed; No. 150, 393 S. W. 2d 671, reversed and remanded.

SYLLABUS: In No. 37, respondent brought a diversity libel action in federal court seeking compensatory and punitive damages for an article which was published in petitioner's magazine accusing respondent of conspiring to "fix" a football game between the University of Alabama and the University of Georgia, where he was privately employed as the athletic director. The article was based upon an affidavit concerning a telephone conversation between respondent and the Alabama coach which the affiant, Burnett, had accidentally overheard. Respondent challenged the truth of the article and claimed a serious departure by the magazine from good investigative standards of the accuracy of its charges amounting to reckless and wanton conduct. He submitted evidence at the trial showing, inter alia, that petitioner's magazine, which had instituted a policy of "sophisticated muckraking," knew that Burnett was on criminal probation but had published the story without any independent support for his affidavit; that [***2] it did not before publication view his notes (the information in which, if not valueless, would be readily available to any coach); that the magazine did not interview a person with Burnett when the phone call was overheard, view the game films, or check for any adjustments in Alabama's plans after the information was divulged; and that the magazine assigned the story to a writer not a football expert and made no effort to have such an expert check the story. The jury was instructed on the issue of truth as a defense and was also instructed that it could award punitive

damages and could assess the reliability and the nature of the sources of the magazine's information and its care in checking the assertions, considerations relevant to determining whether the magazine had proceeded with "wanton and reckless indifference." The jury returned a verdict of general and punitive damages which was reduced by remittitur. The trial court rejected the defense's new trial motion based on New York Times Co. v. Sullivan, 376 U.S. 254 (which was decided after the filing of the complaint in and trial of this case), holding that decision inapplicable to one like petitioner [***3] not a public official. It also held the evidence amply supported the conclusion that the magazine had acted in reckless disregard of whether the article was false or not. The Court of Appeals affirmed on the merits. It did not reach the constitutional claim based on New York Times, holding that petitioner had waived the right to make that challenge since some of its lawyers had been involved in the latter case, yet the defense was based solely on the issue of truth. In No. 150, petitioner, a news association, published a dispatch about a massive riot on the University of Mississippi campus attending federal efforts to enforce a court decree ordering a Negro's enrollment. The dispatch stated that respondent, a politically prominent figure whose statements on federal intervention had been widely publicized, had taken command of the violent crowd and led a charge against federal marshals trying to enforce the court's decree, had encouraged violence and given technical advice to the rioters. Respondent brought a libel action in the Texas state courts for compensatory and punitive damages. Petitioner's defense was based on truth and constitutional rights. The evidence showed [***4] that the dispatch had been made on the scene and almost immediately reported to the petitioner by a competent correspondent. There was no significant showing of improper preparation of the dispatch, or any prejudice by petitioner or its correspondent. The jury was instructed that compensatory damages could be awarded if the dispatch was not substantially true and that punitive damages could be added if the article was actuated by ill will or entire want of care. The jury returned a verdict for both compensatory and punitive damages. The trial court refused to enter an award for the latter. The court held New York Times inapplicable but that if applicable it would require a verdict for the petitioner since there was no evidence of malice. Both sides appealed. The Texas Court of Civil Appeals affirmed and the Texas Supreme Court denied review. Held: The judgment in No. 37 is affirmed. The judgment in No. 150 is reversed and the case remanded. Pp. 133-174.

MR. JUSTICE HARLAN, joined by MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS, concluded that:

1. Petitioner's failure in No. 37 to raise the constitutional defense before trial constituted no waiver [***5] of its right to do so after New York Times was decided. Pp. 142-145.

2. The New York Times rule prohibiting a public official from recovering damages for defamatory falsehood relating to his official conduct absent actual malice as therein defined, though necessary there to protect against prosecutions close to seditious libel for criticizing official conduct, should not be inexorably applied to defamation actions by "public figures" like those here, where different considerations are present. Pp. 148, 152-154.

3. A "public figure" who is not a public official may recover damages for defamatory falsehood substantially endangering his reputation on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily

adhered to by responsible publishers. P. 155.

4. In view of the court's instructions in No. 37, the jury must have decided that the magazine's investigation was grossly inadequate, and the evidence amply supported a finding of the highly unreasonable conduct referred to above. Pp. 156-158.

5. In No. 150, where the courts found the evidence insufficient to support more than a finding of even [***6] ordinary negligence, respondent is not entitled to damages. Pp. 158-159.

6. Misconduct sufficient to justify compensatory damages also justifies punitive damages; the same constitutional standards apply to both. Pp. 159-161.

THE CHIEF JUSTICE concluded that:

1. The New York Times standard applies to defamation actions by "public figures" as well as those by "public officials." Pp. 162-165.

2. The judgment in No. 150, being in clear conflict with New York Times, must be reversed. P. 165.

3. Retrial of No. 37 is not necessary since the jury's verdict therein in view of instructions which invoked the elements later held necessary in New York Times most probably was based on the requirement of reckless disregard for the truth enunciated in that case. Pp. 165-167.

4. The overlapping of counsel in No. 37 with counsel in New York Times and in a libel action against petitioner by the Alabama coach, in which a First Amendment defense was also made, compels the conclusion that the failure to defend on those grounds here was deliberate. Pp. 167-168.

5. The evidence shows that petitioner in No. 37 acted in reckless disregard for the truth. Pp. 168-170.

MR. JUSTICE BLACK, [***7] joined by MR. JUSTICE DOUGLAS, concluded that in order to dispose of No. 150 he concurs in the grounds stated by THE CHIEF JUSTICE which are summarized in paragraphs 1 and 2, supra, of THE CHIEF JUSTICE's conclusions but does not recede from his previously expressed views about the much wider press and speech freedoms of the First and Fourteenth Amendments. P. 170.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE WHITE, concluded that the grounds stated by THE CHIEF JUSTICE which are summarized in paragraphs 1 and 2, supra, of THE CHIEF JUSTICE's conclusions in No. 150 govern that case. P. 172.

COUNSEL: Herbert Wechsler argued the cause for petitioner in No. 37. With him on the brief was Philip H. Strubing. William P. Rogers argued the cause for petitioner in No. 150. With him on the briefs were Leo P. Larkin, Jr., Stanley Godofsky, Arthur Moynihan and J. A. Gooch.

Allen E. Lockerman and William H. Schroder argued the cause for respondent in No. 37. With them on the brief was Robert S. Sams. Clyde J. Watts argued the cause for respondent in No. 150. With him on the brief was William Andress, Jr.

Howard Ellis, Keith Masters, Don H. Reuben and Lawrence Gunnels filed a brief for [***8] the Tribune Company, as amicus curiae, urging reversal in No. 150.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Fortas

OPINIONBY: HARLAN

OPINION: [*133] [**1980] MR. JUSTICE HARLAN announced the judgments of the Court and delivered an opinion in which MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS join. + - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

+ Five members of the Court, while concurring in the result reached in No. 150, would rest decision on grounds other than those stated in this opinion. See separate opinions of THE CHIEF JUSTICE (post, p. 162), of MR. JUSTICE BLACK (post, p. 170), and of MR. JUSTICE BRENNAN (post, p. 172).

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In New York Times Co. v. Sullivan, 376 U.S. 254, 279-280, this Court held that "the constitutional guarantees [*134] [of freedom of speech and press] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual [***9] malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." We brought these two cases here, 385 U.S. 811, 385 U.S. 812, to consider the impact of that decision on libel actions instituted by persons who are not public officials, but who are "public figures" and involved in issues in which the public has a justified and important interest. The sweep of the New York Times rule in libel actions brought under state law was a question expressly reserved in that case, 376 U.S., at 283, n. 23, and while that question has been involved in later cases, Garrison v. Louisiana, 379 U.S. 64; Rosenblatt v. Baer, 383 U.S. 75; Time, Inc. v. Hill, 385 U.S. 374, it has not been fully settled.

The matter has, however, been passed on by a considerable number of state and lower federal courts and has produced a sharp division of opinion as to whether the New York Times rule should apply only in actions brought by public officials or whether it has a longer reach. Compare, e. g., Pearson v. Fairbanks Publishing [**1981] Co., 413 P. 2d 711 [***10] (Alaska), with Clark v. Pearson, 248 F.Supp. 188. n1 [*135] The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the New York Times rule become a talisman which gives the press constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication. These two libel actions, although they arise out of quite different sets of

circumstances, provide that opportunity. We think they are best treated together in one opinion.

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n1 See also Afro-American Publishing Co. v. Jaffe, 125 U. S. App. D. C. 70, 366 F.2d 649; Washington Post Co. v. Keogh, 125 U. S. App. D. C. 32, 365 F.2d 965; Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188; Pape v. Time, Inc., 354 F.2d 558; Pauling v. News Syndicate Co., Inc., 335 F.2d 659; Fignole v. Curtis Publishing Co., 247 F.Supp. 595; Walker v. Courier-Journal & Louisville Times Co., 246 F.Supp. 231; United Medical Labs v. CBS, Inc., 258 F.Supp. 735; Klahr v. Winterble, 4 Ariz. App. 158, 418 P. 2d 404; Walker v. Associated Press, Colo. , 417 P. 2d 486; Powell v. Monitor Publishing Co., Inc., 107 N. H. 83, 217 A. 2d 193; Eadie v. Pole, 91 N. J. Super. 504, 221 A. 2d 547; State v. Browne, 86 N. J. Super. 217, 206 A. 2d 591; People v. Mager, 25 App. Div. 2d 363, 269 N. Y. S. 2d 848; Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N. Y. S. 2d 823; Krutech v. Schimmel, 50 Misc. 2d 1052, 272 N. Y. S. 2d 261; Cabin v. Community Newspapers, Inc., 50 Misc. 2d 574, 270 N. Y. S. 2d 913; Pauling v. National Review, 49 Misc. 2d 975, 269 N. Y. S. 2d 11; Block v. Benton, 44 Misc. 2d 1053, 255 N. Y. S. 2d 767; Fegley v. Morthimer, 204 Pa. Super. 54, 202 A. 2d 125; Tucker v. Kilgore, 388 S. W. 2d 112 (Ky.).

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I.

No. 37, Curtis Publishing Co. v. Butts, stems from an article published in petitioner's Saturday Evening Post which accused respondent of conspiring to "fix" a football game between the University of Georgia and the University of Alabama, played in 1962. At the time of the article, Butts was the athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program. Georgia is a state university, but Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself. n2 Butts had previously served as head [*136] football coach of the University and was a well-known and respected figure in coaching ranks. He had maintained an interest in coaching and was negotiating for a position with a professional team at the time of publication.

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n2 In Allen v. Regents of the University System of Georgia, 304 U.S. 439, this Court described the Athletic Association as a body carrying on "a business comparable in all essentials to those usually conducted by private owners." Id., at 451. Section 32-153 of the Georgia Code specifically provides that athletic associations are not to be considered agencies of the State.

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The article was entitled "The Story of a College Football Fix" and prefaced by a note from the editors stating: "Not since the Chicago White Sox threw the 1919 World Series has there been a

sports story as shocking as this one. . . . Before the University of Georgia played the University of Alabama . . . Wally Butts . . . gave [to its coach] . . . Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed." The text revealed that one George Burnett, an Atlanta insurance salesman, had accidentally overheard, because of electronic error, a telephone conversation between Butts and the head coach of the University of Alabama, Paul Bryant, which took place approximately one week prior to the game. Burnett was said to have listened [**1982] while "Butts outlined Georgia's offensive plays . . . and told . . . how Georgia planned to defend . . . . Butts mentioned both players and plays by name." The readers were told that Burnett had made notes of the conversation, and specific examples of the divulged secrets were set out.

The article went on to discuss the game and the players' reaction to the game, concluding that "the Georgia players, their [***13] moves analyzed and forecast like those of rats in a maze, took a frightful physical beating," and said that the players, and other sideline observers, were aware that Alabama was privy to Georgia's secrets. It set out the series of events commencing with Burnett's later presentation of his notes to the Georgia head coach, [*137] Johnny Griffith, and culminating in Butts' resignation from the University's athletic affairs, for health and business reasons. The article's conclusion made clear its expected impact:

"The chances are that Wally Butts will never help any football team again. . . . The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure."

Butts brought this diversity libel action in the federal courts in Georgia seeking $ 5,000,000 compensatory and $ 5,000,000 punitive damages. The complaint was filed, and the trial completed, before this Court handed down its decision in New York Times, and the only defense raised by petitioner Curtis was one of substantial truth. No constitutional defenses were [***14] interposed although Curtis' counsel were aware of the progress of the New York Times case, and although general constitutional defenses had been raised by Curtis in a libel action instituted by the Alabama coach who was a state employee.

Evidence at trial was directed both to the truth of the article and to its preparation. The latter point was put in issue by the claim for punitive damages which required a finding of "malice" under Georgia law. The evidence showed that Burnett had indeed overheard a conversation between Butts and the Alabama coach, but the content of that conversation was hotly disputed. It was Butts' contention that the conversation had been general football talk and that nothing Burnett had overheard would have been of any particular value to an opposing coach. Expert witnesses supported Butts by analyzing Burnett's notes and the films of the game itself. The Saturday Evening Post's version of the game and of the players' remarks about the game was severely contradicted.

[*138] The evidence on the preparation of the article, on which we shall focus in more detail later, cast serious doubt on the adequacy of the investigation underlying [***15] the article. It was Butts' contention that the magazine had departed greatly from the standards of good investigation and reporting and that this was especially reprehensible, amounting to reckless and

wanton conduct, in light of the devastating nature of the article's assertions.

The jury was instructed that in order for the defense of truth to be sustained it was "necessary that the truth be substantially portrayed in those parts of the article which libel the plaintiff." The "sting of the libel" was said to be "the charge that the plaintiff rigged and fixed the 1962 Georgia-Alabama game by giving Coach Bryant [of Alabama] information which was calculated to or could have affected the outcome of the game." The jury was also instructed that it could award punitive damages "to deter the wrong-doer from repeating the trespass" in an amount within its sole discretion if [**1983] it found that actual malice had been proved. n3

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n3 Actual malice was defined by the charge as encompassing "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 jury was told that whether "actual malice or wanton or reckless indifference has been established must be determined from all of the evidence in the case." The trial court then directed the jury's attention to the circumstances of preparation. The impact of the charge is considered in more detail at 156-158, infra.

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The jury returned a verdict for $ 60,000 in general damages and for $ 3,000,000 in punitive damages. The trial court reduced the total to $ 460,000 by remittitur. Soon thereafter we handed down our decision in New York Times and Curtis immediately brought it to the attention of the trial court by a motion for new trial. The trial judge rejected Curtis' motion on two grounds. He [*139] first held that New York Times was inapplicable because Butts was not a public official. He also held that "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."

Curtis appealed to the Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court by a two-to-one vote. The majority there did not reach the merits of petitioner's constitutional claim, holding that Curtis had "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times," 351 F.2d 702, 713, on the basis of Michel v. Louisiana, 350 U.S. 91. It found Curtis chargeable with knowledge [***17] of the constitutional limitations on libel law at the time it filed its pleadings below because of its "interlocking battery of able and distinguished attorneys" some of whom were involved in the New York Times litigation. This holding rendered the compensatory damage decision purely one of state law and no error was found in its application. Turning to the punitive damage award, the majority upheld it as stemming from the "enlightened conscience" of the jury as adjusted by the lawful action of the trial judge. It was in "complete accord" with the trial court's determination that the evidence justified the finding "that what the Post did was done with reckless disregard of whether the article was false or not." 351 F.2d, at 719.

Judge Rives dissented, arguing that the record did not support a finding of knowing waiver of constitutional defenses. He concluded that the New York Times rule was applicable because

Butts was involved in activities of great interest to the public. He would have reversed because "the jury might well have understood the district court's charge to allow recovery on a showing of [*140] intent to inflict harm or even the culpably [***18] negligent infliction of harm, rather than the intent to inflict harm through falsehood . . . ." 351 F.2d, at 723.

Rehearing was denied, 351 F.2d, at 733, and we granted certiorari, as indicated above. For reasons given below, we would affirm.

II.

No. 150, Associated Press v. Walker, arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical [**1984] advice on combating the effects of tear gas.

Walker was a private citizen at the time of the riot and publication. He had pursued a long and honorable career in the United States Army [***19] before resigning to engage in political activity, and had, in fact, been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957. He was acutely interested in the issue of physical federal intervention, and had made a number of strong statements against such action which had received wide publicity. Walker had his own following, the "Friends of Walker," and could fairly be deemed a man of some political prominence.

Walker initiated this libel action in the state courts of Texas, seeking a total of $ 2,000,000 in compensatory and punitive damages. Associated Press raised both the [*141] defense of truth and constitutional defenses. At trial both sides attempted to reconstruct the stormy events on the campus of the University of Mississippi. Walker admitted his presence on the campus and conceded that he had spoken to a group of students. He claimed, however, that he had counseled restraint and peaceful protest, and exercised no control whatever over the crowd which had rejected his plea. He denied categorically taking part in any charge against the federal marshals.

There was little evidence relating to the [***20] preparation of the news dispatch. It was clear, however, that the author of this dispatch, Van Savell, was actually present during the events described and had reported them almost immediately to the Associated Press office in Atlanta. A discrepancy was shown between an oral account given the office and a later written dispatch, but it related solely to whether Walker had spoken to the group before or after approaching the marshals. No other showing of improper preparation was attempted, nor was there any evidence of personal prejudice or incompetency on the part of Savell or the Associated Press.

The jury was instructed that an award of compensatory damages could be made if the dispatch was not substantially true, n4 and that punitive damages could be added if the article was

actuated by "ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

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n4 Two particular statements were at issue, the remark that "Walker assumed command of the crowd," and the accusation that Walker led a charge against the marshals.

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A verdict of $ 500,000 compensatory damages and $ 300,000 punitive damages was returned. The trial judge, however, found that there was "no evidence to support the jury's answers that there was actual malice" [*142] and refused to enter the punitive award. He concluded that the failure further to investigate the minor discrepancy between the oral and written versions of the incident could not "be construed as that entire want of care which would amount to a conscious indifference to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice." (Emphasis in original.) The trial judge also noted that this lack of "malice" would require a verdict for the Associated Press if New York Times were applicable. But he rejected its applicability since there were "no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense."

Both sides appealed and the Texas Court of Civil Appeals affirmed both the award of compensatory damages and the striking of punitive damages. It stated [***22] [**1985] without elaboration that New York Times was inapplicable. As to the punitive damage award, the plea for reinstatement was refused because "in view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in the light of all the evidence, we hold that appellee failed to prove malice . . . ." 393 S. W. 2d 671, 683.

The Supreme Court of Texas denied a writ of error, and we granted certiorari, as already indicated. For reasons given below, we would reverse.

III.

Before we reach the constitutional arguments put forward by the respective petitioners, we must first determine whether Curtis has waived its right to assert such arguments by failing to assert them before trial. As our dispositions of Rosenblatt v. Baer, 383 U.S. 75, [*143] and other cases involving constitutional questions indicate, n5 the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to [***23] raise them at a proper time, Michel v. Louisiana, supra, at 99, n6 but an effective waiver must, as was said in Johnson v. Zerbst, 304 U.S. 458, 464, be one of a "known right or privilege."

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n5 See Tehan v. Shott, 382 U.S. 406, 409, n. 3; Linkletter v. Walker, 381 U.S. 618, 622-629; Griffin v. California, 380 U.S. 609; White v. Maryland, 373 U.S. 59.

n6 See also Ackermann v. United States, 340 U.S. 193, 198.

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Butts makes two arguments in support of his contention that Curtis' failure to raise constitutional defenses amounted to a knowing waiver. The first is that the general state of the law at the time of this trial was such that Curtis should, in the words of the Fifth Circuit majority, have seen "the handwriting on the wall." 351 F.2d, at 734. We cannot accept this contention. Although our decision in New York Times did draw [***24] upon earlier precedents in state law, e. g., Coleman v. MacLennan, 78 Kan. 711, 98 P. 281, and there were intimations in a prior opinion and the extra-judicial comments of one Justice, n7 that some applications of libel law might be in conflict with the guarantees of free speech and press, there was strong precedent indicating that civil libel actions [*144] were immune from general constitutional scrutiny. n8 Given the state of the law prior [**1986] to our decision in New York Times, we do not think it unreasonable for a lawyer trying a case of this kind, where the plaintiff was not even a public official under state law, to have looked solely to the defenses provided by state libel law. Nor do we think that the previous grant of certiorari in New York Times alone indicates a different conclusion. The questions presented for review there were premised on Sullivan's status as an elected public official, and elected officials traditionally have been subject to special rules of libel law. n9

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n7 In Beauharnais v. Illinois, 343 U.S. 250, the Court had upheld an Illinois group libel statute but the majority had warned that "'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." Id., at 263-264. There were also four vigorous dissenters to the holding in that case. An article appearing in the June 1962 New York University Law Review had quoted MR. JUSTICE BLACK as believing that "there should be no libel or defamation law in the United States . . . ." Cahn, Justice Black and First Amendment "Absolutes": A Public Interview, 37 N. Y. U. L. Rev. 549, 557. [***25]

n8 In Robertson v. Baldwin, 165 U.S. 275, 281, the Court said: "Thus, the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation . . . ." That sentiment was repeated in a number of cases including Beauharnais v. Illinois, supra, n. 7. See Near v. Minnesota, 283 U.S. 697, 715; Chaplinsky v. New Hampshire, 315 U.S. 568.

n9 See, e. g., Sweeney v. Patterson, 76 U. S. App. D. C. 23, 128 F.2d 457; Hendrix v. Mobile Register, 202 Ala. 616, 81 So. 558.

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Butts' second contention is that whatever defenses might reasonably have been apparent to the average lawyer, some of Curtis' trial attorneys were involved in the New York Times litigation and thus should have been especially alert to constitutional contentions. This was the argument which swayed the Court of Appeals, but we do not find it convincing. [***26]

First, as a general matter, we think it inadvisable to determine whether a "right or privilege" is "known" by relying on information outside the record concerning the special legal knowledge of particular attorneys. Second, even a lawyer fully cognizant of the record and briefs in the New York Times litigation might reasonably have expected the resolution of that case to have no impact [*145] on this litigation, since the arguments advanced there depended so heavily on the analogy to seditious libel. We think that it was our eventual resolution of New York Times, rather than its facts and the arguments presented by counsel, which brought out the constitutional question here. We would not hold that Curtis waived a "known right" before it was aware of the New York Times decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in New York Times was prompt.

Our rejection of Butts' arguments is supported by factors which point to the justice of that conclusion. See Hormel v. Helvering, 312 U.S. 552, 556-557. Curtis' constitutional points were raised early enough so that this Court has had the benefit [***27] of some ventilation of them by the courts below. The resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below. n10 Finally the constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327. Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling. Cf. New York Times Co. v. Connor, 365 F.2d 567, 572.

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n10 Even after our decision in New York Times was before him, the trial judge held it inapplicable. It is almost certain that he would have rebuffed any effort to interpose general constitutional defenses at the time of trial. See Comment, Waiver of a Previously Unrecognized Defense: Must Lawyers Be Seers?, 114 U. Pa. L. Rev. 451.

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[*146] IV.

We thus turn to a consideration, on the merits, of the constitutional claims raised by Curtis in Butts and by the Associated Press in Walker. Powerful arguments are brought to bear for the extension of the New York Times rule in both cases. In Butts it is contended that the facts are on all fours with those of Rosenblatt v. Baer, supra, since Butts was charged with the important

responsibility of managing the athletic affairs [**1987] of a state university. It is argued that while the Athletic Association is financially independent from the State and Butts was not technically a state employee, as was Baer, his role in state administration was so significant that this technical distinction from Rosenblatt should be ignored. Even if this factor is to be given some weight, we are told that the public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials.

A similar argument is raised in the Walker [***29] case where the important public interest in being informed about the events and personalities involved in the Mississippi riot is pressed. In that case we are also urged to recognize that Walker's claims to the protection of libel laws are limited since he thrust himself into the "vortex" of the controversy.

We are urged by the respondents, Butts and Walker, to recognize society's "pervasive and strong interest in preventing and redressing attacks upon reputation," and the "important social values which underlie the law of defamation." Rosenblatt v. Baer, supra, at 86. It is pointed out that the publicity in these instances was not directed at employees of government and that these cases cannot be analogized to seditious libel prosecutions. Id., at 92 (STEWART, J., concurring). We are [*147] told that "the rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes," Afro-American Publishing Co. v. Jaffe, 125 U. S. App. D. C. 70, 81, 366 F.2d 649, 660, [***30] and that:

"Newspapers, magazines, and broadcasting companies are businesses conducted for profit and often make very large ones. Like other enterprises that inflict damage in the course of performing a service highly useful to the public . . . they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand." Buckley v. New York Post Corp., 373 F.2d 175, 182.

We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but in all libel actions arising from a publication concerning public issues. In Time, Inc. v. Hill, 385 U.S. 374, 388, we held that "the guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . ." and affirmed that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." Thornhill v. Alabama, 310 U.S. 88, 102. [***31] This carries out the intent of the Founders who felt that a free press would advance "truth, science, morality, and arts in general" as well as responsible government. Letter to the Inhabitants of Quebec, 1 Journals of the Continental Cong. 108. From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational [*148] distinction "cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of government officials." Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 196.

On the other hand, to take the rule found appropriate in New York Times to [**1988] resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility, Rosenblatt v. Baer, supra, at 86, as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of New York Times an unintended [***32] inexorability at the threshold of this new constitutional development. In Time, Inc. v. Hill, supra, at 390, we counseled against "blind application of New York Times Co. v. Sullivan" and considered "the factors which arise in the particular context." Here we must undertake a parallel evaluation. n11

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n11 The majority opinion in Time, Inc. v. Hill, 385 U.S. 374, was limited to the consideration of nondefamatory matter. Id., at 391.

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The modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right. From the fountainhead opinions of Justices Holmes and Brandeis in Schenck, Abrams, and Whitney, n12 which considered the problem when the disruptive effects of speech might strip the protection from the speaker, to our recent decision in Adderley v. Florida, 385 U.S. 39, where we found freedom of speech not to include a freedom to trespass, the Court's [***33] primary concern has been to determine the extent of the right and the surrounding safeguards necessary to give it "breathing space." NAACP v. [*149] Button, 371 U.S. 415, 433. That concern has perhaps omitted from searching consideration the "real problem" of defining or delimiting the right itself. See Freund, Mr. Justice Black and the Judicial Function, 14 U. C. L. A. L. Rev. 467, 471.

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n12 Schenck v. United States, 249 U.S. 47 (Holmes, J.); Abrams v. United States, 250 U.S. 616, 624 (Holmes, J., dissenting); Whitney v. California, 274 U.S. 357, 372 (Brandeis, J., concurring).

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It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for redress of grievances in the text of the First Amendment, the principles of which are carried to the States by the Fourteenth Amendment. It partakes of the nature of both, [***34] for it is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community, see Holt, Of the Liberty of the Press, in Nelson, Freedom of the Press from Hamilton to the Warren Court 18-19, as it is a social necessity required for the "maintenance of our political system and an open society." Time, Inc. v. Hill, supra, at 389. It is because of the personal nature of this right that we have rejected all manner of prior restraint on publication, Near v. Minnesota, 283 U.S. 697, despite strong arguments that if the material was unprotected the time of suppression was immaterial. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640. The dissemination of the individual's opinions on matters of public interest is

for us, in the historic words of the Declaration of Independence, an "unalienable right" that "governments are instituted among men to secure." History shows us that the Founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us" n13 but that they firmly [***35] adhered to the proposition that the "true liberty of the press" permitted "every man to publish [*150] his opinion." Respublica v. Oswald, 1 Dall. 319, 325 (Pa.).

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The [**1989] fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." Associated Press v. Labor Board, 301 U.S. 103, 132-133. Federal securities regulation, n14 mail fraud statutes, [***36] n15 and common-law actions for deceit and misrepresentation n16 are only some examples of our understanding that the right to communicate information of public interest is not "unconditional." See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191. However, as our decision in New York Times makes explicit, while protected activity may in some respects be subjected to sanctions, it is not open to all forms of regulation. The guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . ." 2 Cooley, Constitutional Limitations 886 (8th ed.). Our touchstones are that acceptable [*151] limitations must neither affect "the impartial distribution of news" and ideas, Associated Press v. Labor Board, supra, at 133, nor because of their history or impact constitute a special burden on the press, Grosjean v. American Press Co., Inc., 297 U.S. 233, nor deprive our free society of the stimulating benefit [***37] of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

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n14 E. g., 48 Stat. 82, as amended, 15 U. S. C. @ 77k (penalizing negligent misstatement).

n15 18 U. S. C. @ 1341.

n16 See Traylor Engineering & Mfg. Co. v. National Container Corp., 45 Del. 143, 70 A. 2d 9; Restatement, Torts @ 525 (deceit); Nash v. Minnesota Title Ins. & Trust Co., 163 Mass. 574, 40 N. E. 1039 (negligent misrepresentation).

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The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a [***38] proof of truth might prevent recovery in a civil action, this limitation is more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication. The same truthful statement might be the basis of a criminal libel action. See Commonwealth v. Clap, 4 Mass. 163; see generally Veeder, The History and Theory of the Law of Defamation, 3 Col. L. Rev. 546, 4 Col. L. Rev. 33.

The law of libel has, of course, changed substantially since the early days of the Republic, and this change is "the direct consequence of the friction between it . . . and the highly cherished right of free speech." State v. Browne, 86 N. J. Super. 217, 228, 206 A. 2d 591, 597. The emphasis has shifted from criminal to civil remedies, from the protection of absolute social values to the safeguarding of valid personal interests. Truth has become an absolute defense in almost all cases, n17 and privileges [**1990] designed to foster free communication are almost universallnotes- - - -