

4-1-1988

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Recommended Citation

Carol Rasnic, *Fumble: Bear Bryant, Wally Butts and the Great College Football Scandal* by James Kirby, 5 U. Miami Ent. & Sports L. Rev. 117 (1988)

Available at: <http://repository.law.miami.edu/umeslr/vol5/iss1/7>

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BOOK REVIEW

FUMBLE: BEAR BRYANT, WALLY BUTTS AND THE GREAT COLLEGE FOOTBALL SCANDAL by James Kirby. Harcourt Brace Jovanovich, New York, New York. 1986. 242 pp. \$16.95.

REVIEWED BY CAROL RASNIC*

To most college football fans, the name of former Alabama head coach Paul "Bear" Bryant generates an image of a sports-world demigod. Wallace Butts, former Georgia head coach and athletic director, is both less well-known and less revered. James Kirby's book, *Fumble: Bear Bryant, Wally Butts and the Great College Football Scandal*, paints a different portrait of Bryant, and does little to change that of Butts. *Fumble* examines how college football, the press, and the law came together and contributed to an ignoble chapter in their histories. The book is an account of the 1962 *Saturday Evening Post* article that led to multi-million dollar libel suits which Butts won and Bryant settled. Frank Graham, Jr.'s article entitled "*The Story of a College Football Fix (A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged a Game Last Fall)*," particularized Butts's telephone call to Bryant eight days before Alabama beat Georgia 35-0. Graham concluded that the information Butts divulged to Bryant was both confidential and influential in Alabama's crushing defeat of Georgia. His article compared these actions to the 1919 "Chicago Black Sox" scandal, where Chicago White Sox players' involvement with gambling led them to throw the World Series.

Kirby, a University of Tennessee professor of law, writes articulately and intriguingly from a unique perspective: he attended the Butts trial as a "special observer" for the Southeastern Conference Executive Committee to determine whether conference sanctions against either of the plaintiffs or their schools were merited.¹

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1. The SEC had to determine what to do if Butts lost his suit. If he did, and the

His knowledge of libel law and the judicial procedures affecting the outcomes of the trial and his instructive, lucid explanation of the technicalities of the game are complementary, rendering the book comprehensible to both lawyer and layman, avid fan and one not versed in football jargon.

The first of the three institutions analyzed is college football. Kirby begins by describing the coaches in human terms. He details Bryant's spartan childhood in rural Arkansas where the dominant figure in his life was the strict disciplinarian mother whom he revered. His personal drive and methodical climb up the ranks of college football are reviewed, from assistant positions at Vanderbilt to head coaching appointments at the University of Maryland and Kentucky. His remarkable memory is noted, as is the fact that it was conspicuously absent regarding the notorious phone call.² Other sides of Bryant's character are also displayed: his unwillingness to assume secondary stature to the Wildcats' legendary basketball coach Adolph Rupp led to his departure from the University of Kentucky.³ Bryant's often brutal training methods are also described, as is his knowledge of alumni payments to his athletes. His willingness to take risks in order to succeed may explain many of these aspects.⁴

As the pivotal figure in the action, Butts's life is also summarized. In his Georgia military school days, he conceived the lifelong slogan, "You can win if you pay the price,"⁵ that would later come to haunt him. His turbulent coaching and athletic director positions at the University of Georgia, detailed in Chapter Two, set the stage for the infamous phone call.

Both men's financial difficulties, presumably an enticement for the "fix," and Butts's well-publicized and prolonged involvement with a mistress whom Kirby calls "Evelyn" are elaborated upon. The significance of the latter was Butts's undisputed and flagrant use of University of Georgia funds to subsidize the affair, using a university credit card for phone calls, hotel rooms, and plane tickets for "Evelyn." Evidence of such activity that would blemish

collusion between the coaches was established, should Alabama be instructed to terminate Bryant? If the SEC required such an action, and the university administration refused to comply, should Alabama be ousted from the conference? J. KIRBY, *FUMBLE: BEAR BRYANT, WALLY BUTTS, AND THE GREAT COLLEGE FOOTBALL SCANDAL* 89-90 (1986).

2. *Id.* at 15-16.

3. In one of the many ironies surrounding this case, Bryant earlier left his coaching position at Texas A & M because of the occasionally hostile press there. He felt that the press would be more supportive when he was at Alabama. *Id.* at 12.

4. *Id.* at 16.

5. *Id.* at 22.

one's character would normally be relevant in a defamation case where damage to reputation is alleged, but was not admitted in this case.⁶

Butts's social life and Bryant's obsession with winning are placed in perspective in Chapter Six. Kirby discusses the impact and importance of football on academic institutions and the surrounding community. He does so to demonstrate what was at stake in the trial beyond the personal and professional integrity of the coaches. Graham's article is characterized as more than a smear of Butts and Bryant because "it struck at the soul and character of [the] entire state"⁷ of Alabama. One can rightly question how it is that a game played by nineteen year old children can rise to a level of such prominence. Kirby's primary answer is that success in school sports programs ties into success in other areas for both the school and community. College football also fills a social and economic vacuum, thus serving the collective needs of the general community.⁸

The phone call Butts made to Bryant from an Atlanta office where Butts had business connections was the beginning of the trouble for all concerned. A chance cross-connection of telephone lines allowed a Georgia insurance salesman, George Burnett, to unintentionally overhear the conversation. Burnett took notes during the call which purportedly detailed Georgia's planned offense for the upcoming game. He took the information to the *Saturday Evening Post* on the advice of a lawyer when University of Georgia officials were hostile to him after being shown the notes. The notes eventually provided the source for Graham's article as well as for a Georgia State Attorney's investigation of the incident.⁹

Kirby also gives close scrutiny to the role of the press in the scandal. He reviews some of the choices made by the magazine that eventually led to their downfall. The *Saturday Evening Post* had adopted a new, aggressive style of journalism in response to

6. Kirby agrees with the trial court's decision to exclude the evidence because a libel plaintiff "should not be forced to put his whole life on trial in order to sue. . . ." *Id.* at 175. See also District Judge Morgan's ruling on the Post's motion for a new trial in *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, 920-21 (N.D. Ga. 1964), *reh'g denied*, 242 F. Supp. 390 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967).

7. J. KIRBY, *supra* note 1, at 81.

8. *Id.* at 89.

9. The state attorney's investigation was at the personal request of Georgia Governor Carl Sanders. A friend of Butts's had challenged the governor in a recent election with Butts's support. The report did not find any criminal wrongdoing, but did find that the phone call was "unethical and improper, and unsportsmanlike . . . and might well have affected the outcome of the game in points and margin of victory." *Id.* at 73.

falling revenues. The editor-in-chief wanted to provoke controversy and boasted in his deposition of having six lawsuits pending against the *Post*.¹⁰ The choice of author was suspect as Graham had previously demonstrated bias against big-time college athletics.¹¹ The magazine's haste and secrecy in the publication of the story, its failure to verify factual accuracy, and the absence of expected journalistic objectivity resulted in the publication of virtual hearsay. The parent corporation of the *Post*, Curtis Publishing Company, thus was made a prime candidate for the libel actions which followed.¹² In another ironic twist, the *Post* saw this article as a way to gain leverage against Bryant in his earlier suit.¹³

In examining the role of the law in this case, Kirby points out the seemingly simple questions that Curtis's counsel had to resolve in its favor: (1) did the phone call actually occur? (2) if so, what actually was said? (3) how, if at all, did the call affect the outcome of the game? It was on the third issue, Kirby feels, that Curtis's counsel woefully failed their client. He criticizes their failure to explain to the jury the importance in gambling of the pointspread.¹⁴ This left the jury to conclude that favored Alabama would have won despite any "help" from Butts, and resulted in their absolving him of any betrayal of his school.

Although the focus of the book is the Butts trial in Atlanta, Bryant's flamboyance and the awe he inspired in football fans make him an integral part of the book.¹⁵ In addition to his own suits,¹⁶ Bryant was the key witness for Butts in a case having emotional appeal comparable to the 1925 Scopes "Monkey Trial" in Tennessee.¹⁷ His testimony was so persuasive, dramatic and instrumental that Kirby viewed him as the "single most awesome figure this writer has ever seen in a courtroom, including lawyers and

10. *Id.* at 134.

11. *Id.* at 61. Graham never saw the notes on which the article was based. *Id.* at 62, 64.

12. The *Post*'s lack of professionalism in this regard is detailed in Chapter 4.

13. J. KIRBY, *supra* note 1, at 59, 63.

14. The pointspread is a betting mechanism. A team that is favored by seven points must win by eight to beat the spread. A bettor choosing the favored team needs the team to beat the spread for his bet to pay off. Some bettors will try to influence the players or coaches to shave points in order to miss or beat the spread.

15. Kirby characterizes the then prevailing concept of an atheist in Alabama as anyone who "doesn't believe in Bear Bryant." J. KIRBY, *supra* note 1, at 31.

16. Bryant actually filed two suits against Curtis: the one based on the *Post* article, and an earlier one filed in January, 1962, arising from an article written by Furman Bisher, sports editor of the Curtis-owned Atlanta Journal. This column attributed injuries sustained by Georgia Tech's halfback in its game with Alabama to Bryant's aggressive coaching techniques. The inference was that he encouraged winning through violence.

17. J. KIRBY, *supra* note 1, at 80.

judges.”¹⁸ Using a chalkboard to outline football strategy for the captivated jury, he essentially undermined the value to Alabama of anything Butts may have told him, never really even admitting that the call had occurred. His explanation of the pro-set formation and his sworn testimony that Georgia’s use of it was both surprising to him and effective against his team was convincing to the jury.

The effect of Bryant’s testimony is demonstrated in Chapter Eight, where additional work by Curtis’s new counsel encouraged Bryant to settle his second libel suit. The new work would have discredited both Bryant and University of Alabama president Frank Rose’s testimony. Curtis’s acceptance of the settlement offer was not surprising because of its enormous exposure due to Bryant’s popularity. Butts, at the nadir of his popularity in Georgia, won a \$3.6 million jury verdict. Bryant, at the peak of his career in Alabama, easily could have surpassed that award.

Kirby vividly portrays the histrionics of the trial: Butts’s tearful testimony necessitating a five minute recess during which Butts’s wife and three daughters, as well as many observers, joined the weeping; and the unrealistic portrait of Butts by his counsel as a kindly, amiable soul unswervingly dedicated to the University of Georgia.¹⁹ The procedure at the time of the Butts suit requiring the defendant in a libel trial relying on truth of the publication as a defense is also explained: though the burden of proof in civil litigation is usually on the plaintiff, in these actions the burden then rested with the defendant to make an initial proof of truth.²⁰

Curtis’s defense was based on three points: (1) Butts’s character; (2) his gambling connections; and (3) his credibility. Kirby scathingly reviews the defense, attributing the resulting verdict of \$3 million in punitive damages and \$60,000 in compensatory damages largely to Curtis’s lawyers’ ineptness. Indeed, Curtis’s lead counsel’s direct examination of Georgia head coach Johnny Griffith revealed an embarrassing lack of a basic knowledge of football.²¹ The author marvels at their inexplicable violation of the “cardinal

18. *Id.* at 120-21.

19. Butts’s lead counsel, William Schroder, predicted that “they will put Wallace Butts in a red coffin with a black lid, and he will have a football in his hands, and his epitaph will read something like this: ‘Glory, Glory to old Georgia.’” *Id.* at 146.

20. *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, 918 (N.D. Ga. 1964).

21. Welborn Cody’s elementary questioning laboriously established the game’s object as being to advance 10 yards on four downs. J. KIRBY, *supra* note 1, at 109. Kirby does point out that the trial judge’s scheduling gave the parties only four and a half months to prepare for trial. *Id.* at 92.

rule of corporate representation"²² of failing to examine or have present at the trial anyone from Curtis Publishing. This left the jury with the impression that the anonymous corporate defendant regarded the suit as trivial. Further, Curtis's attorneys failed to raise many germane points during the trial, in particular, whether Butts should be held to the relatively more difficult standard of a "public figure," requiring him to prove actual malice on the part of the defendant.²³ They had been remiss by failing to take advantage of obvious discovery opportunities in Tuscaloosa,²⁴ and they had failed to call several key witnesses. He categorizes the trial as "[a] mismatch in performance by lawyers . . . comparable to the mismatch between John Griffith's [Georgia's head coach] and Bear Bryant's football teams."²⁵ As a striking contrast, Butts's counsel was skilled, schooled in football terminology and able to paint an exaggerated view of Butts's character as esteemed and beyond reproach, without objection from Curtis's counsel.

Kirby credits the verdict either to the jury's belief that the telephone call was not influential on the resulting score, or the feeling that the *Post* deserved punishment for the manner in which the article had been produced and for its exaggerations. The relatively low compensatory damage figure (\$60,000) in proportion to the punitive damages (\$3 million) is perhaps indicative of the jury's acceptance of Butts's reputation as already tarnished, strengthening the theory that the *Post* was indeed being castigated for its "sophisticated muckraking."²⁶

The author's legal analysis continues with the post-trial developments. He explains the effect of the remittitur²⁷ ordered by the

22. *Id.* at 97. The plaintiff read the depositions of Curtis's employees into the record. The manner in which this was done portrayed the company in a less than positive light. Two Curtis employees eventually did attend the trial.

23. The landmark decision establishing this rule of law, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was not announced until March 9, 1964. Curtis's counsel attempted to interject it on appeal, arguing that the *New York Times* standard could not have been waived since the Supreme Court had not articulated it at the time of trial.

24. Kirby refers to their "fatally inadequate" pretrial preparation. J. KIRBY, *supra* note 1, at 199. This included not interviewing John Carmichael, one of the first people Burnett told about the Butts-Bryant phone conversation. Carmichael's testimony was that the notes were a fabrication on the part of Burnett. "Fix or Fiction?," Chapter Ten's review of the evidence, leads Kirby to conclude that this testimony was untrue. *Id.* at 205.

25. *Id.* at 189.

26. This was the official editorial policy of the *Post*, as announced by editor-in-chief Clay Blair in his deposition. *Id.* at 133.

27. A remittitur is appropriate when the court deems a verdict to have been excessive. A defendant's motion for a new trial would be denied if the plaintiff accepts the lower figure.

judge, reducing the \$3 million punitive damage award to \$400,000.²⁸ Butts accepted this amount rather than go through a new trial. Curtis's motion for a new trial based on its contention that Butts should be held to the "public figure" standard was denied because the court found him not to qualify as what the Supreme Court envisioned in *New York Times*²⁹ as a "public figure."³⁰ Even if he were so regarded, the court stated in dicta that Curtis had in fact acted in reckless disregard of the truth of the contents of the article and that Butts proved the required malice.³¹ On cross-appeals, a split panel of the Fifth Circuit affirmed.³² A lengthy dissent disagreed with the majority view that Curtis waived the right to rely upon *New York Times* by failing to raise the issue at trial.³³

Kirby feels that the Fifth Circuit's subsequent refusal to rehear was erroneous. The inclusion by Curtis's counsel of a first amendment claim in the Bryant suit does not necessarily support the inference that Butts's counsel intentionally waived the issue. He comments that only three of thirteen federal judges considering the issue found waiver by Curtis's failure to raise this not-yet-pronounced rule at trial. The case also presents the "ultimate irony . . . the rarest of judicial miscarriages: southern segregationist Wally Butts was the beneficiary of the aberrant judicial behavior of Chief Justice Earl Warren, the principal architect of *Brown v. Board of Education*, which laid the foundation for the desegregation of America's public schools."³⁴ Butts was victorious at all three judicial levels: even though the United States Supreme Court held 8-1 for Curtis on the waiver issue and allowed it to rely on the *New York Times* standard, the Court found 5-4 for Butts, holding that he had proved actual malice.³⁵

Applying today's law of libel, Kirby does not believe Butts would prevail if his case were tried now³⁶ for the following reasons:

28. *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916, 920 (N.D. Ga. 1964).

29. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See *supra* note 23 and accompanying text for a discussion of the "public figure" standard.

30. *Butts v. Curtis Publishing Co.*, 242 F. Supp. 390, 394 (N.D. Ga. 1964).

31. *Id.* at 395.

32. *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965).

33. The minority did not think it conceivable that one could, by silence, waive a constitutional right not even yet enunciated. *Id.* at 723-24.

34. J. KIRBY, *supra* note 1, at 188. The Chief Justice was the only member of the panel who found that Curtis waived the first amendment issue. He joined the plurality to affirm the Fifth Circuit.

35. 388 U.S. 130, 154-59 (1967).

36. This conclusion presumes that the defendants would retain more prepared counsel

(1) the Supreme Court has refined the *New York Times* standard so that there is no distinction between a "public figure" and a "public official." There is little doubt that today Butts would be considered a "public figure" required to meet the greater burden of proving malice. The trial judge's comment that he had done so was actually dictum, rather than part of the holding; (2) the burden of proof is now on the plaintiff to prove actual falsity, rather than on the defendant to prove truth; (3) this proof now must be by clear and convincing evidence,³⁷ a stricter standard than the usual requirement of proof by a preponderance of the evidence; (4) the instructions to the jury would be greatly different to reflect these changes;³⁸ and (5) statistics show a high rate of appellate success for libel defendants in their efforts to prevent jury verdicts from being the final decision. The author expresses doubt that a case such as Butts's would even go to a jury today.

Although Bryant mellowed in his treatment of players after the *Post* article and the well-publicized litigation, he remained a "role model for coaches . . . unmatched in his ability to get the most out of athletes."³⁹ His football finale contradicts the prediction in the *Post* article that "Bear Bryant may well follow [Butts] into oblivion—a special hell for that grim extrovert—for in a very real sense he betrayed the boys he was pledged to lead."⁴⁰

Fumble provides a provocative picture of trial techniques at their shoddiest, and a jaded college football — a sport more susceptible to gambling influence than professional football because of the relative number of games played. In contemporary college football, winning remains the singular most important result. Despite the increasing imposition of disciplinary sanctions by the NCAA⁴¹ and individual conferences, as Wally Butts was fond of saying, "you can still win if you pay the price." Kirby's concluding aphorism assesses the Bryant-Butts scandal as having "put three of

whose representation would capitalize more on the obvious casuistic elements of what the plaintiff had done.

37. *Bose v. Consumers of U.S.*, 466 U.S. 485, 513 (1984).

38. For example, Ariel Sharon's suit against Time Magazine was unsuccessful even though he proved falsity because he was unable to prove malice on the part of the defendant.

39. J. KIRBY, *supra* note 1, at 214. Bryant retired at the end of the 1982 season with 323 major college victories, then a record. He died only a few weeks after his retirement. Chapter Eleven describes the lives of all major figures in the case following the suit.

40. *Id.* at 241.

41. In June, 1985, the NCAA added harsher penalties including suspension of coaches, loss of players' eligibility, suspension of programs up to two years, and external financial audits for schools violating the association's rules.

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America's most revered institutions—big-time college football, the law, and the press—to the test. All three fumbled.”⁴²

42. J. KIRBY, *supra* note 1, at 229.