Of Public Figures and Public Interest - The Libel Law Conundrum

Gerald G. Ashdown
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LIBEL LAW CONUNDRUM

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I. INTRODUCTION

From whatever source—whether a renewed interest in the self
and psychic damage,¹ loss spreading principles,² confusion,³ or sim-
ply a pronounced anitcorporate, antimedia bias—recent years have
seen a resurgence in the law of libel and libel litigation.⁴ If libel law
was dead following New York Times Co. v. Sullivan⁵ and its prog-
eny,⁶ it certainly has enjoyed a resurrection in the wake of Gertz v.

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1. See Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel,
2. Id. at 22-36; see also Ingber, Defamation: A Conflict Between Reason and Decency, 65
3. Smolla, supra note 1, at 47-63. In addition to suggesting that libel law has been rejuve-
nated by a heightened awareness of the inner self, strict liability principles, and doctrinal
confusion, Smolla argues that the coalescence of the entertaining and informing functions
has likewise contributed to the increase in defamation suits. Id. at 36-47.
4. See Jenkins, Chilly Days for the Press, STUDENT LAW., Apr. 1983, at 22; Kupfenberg,
ered: Time to Return to the “Central Meaning of the First Amendment,” 83 COLUM. L.
REV. 603, 603 (1983); LIBEL DEFENSE RESOURCE CENTER, BULL. NO. 4, SUMMARY JUDGMENT IN
LIBEL LITIGATION: ASSESSING THE IMPACT OF Hutchinson v. Proxmire (1982); LIBEL DEFENSE
RESOURCE CENTER, BULL. NO. 7, INDEPENDENT APPELLATE REVIEW IN LIBEL ACTIONS SINCE
mation cases in 1983, and the federal district courts reported fifty libel decisions last year.
The two most widely publicized recent libel cases were brought by General Westmoreland
and Carol Burnett. General Westmoreland sued CBS for broadcasting a 1982 documentary,
“The Uncounted Enemy: A Vietnam Deception,” which suggested Westmoreland’s involve-
ment in the underestimation of enemy troop levels in Vietnam. See Westmoreland v. CBS,
for $10 million over an article appearing in the tabloid suggesting that she traipsed around a
Washington restaurant while intoxicated, sharing her dessert, spilling wine, and arguing
with Henry Kissinger. She received a $1.6 million jury verdict reduced by the judge to
$800,000 on remittitur, and ultimately reduced on appeal to $200,000. See Burnett v. Na-
6. Although the Supreme Court has decided 18 defamation cases following New York
Times, I am here referring primarily to Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967),

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Robert Welch, Inc.\(^7\)

The resurrection of libel law has occurred, at least partially, because of the Supreme Court's recent solicitude for personal reputation. In a series of decisions beginning with *Gertz*, progressing through *Herbert v. Lando*,\(^8\) and culminating in *Keeton v. Hustler Magazine*\(^9\) and *Calder v. Jones*,\(^10\) the Supreme Court has progressively facilitated redress by both private and public plaintiffs for the publication of false information. This direct policy and doctrinal shift is not all that has affected libel litigation. Equally important are the more subtle policy and attitudinal notions emanating from the Court's latest libel decisions, which filter down and permeate the world of libel plaintiffs, juries, trial judges, and appellate courts. Both the jurisprudential shift and this concomitant psychological phenomenon, whether leading or combining with other factors,\(^11\) have produced the reemergence of the libel lawsuit.

It is from this perspective that reexamination of our constitutionally based libel rules should proceed. Any reconsideration or reformulation of legal doctrine should necessarily take as its reference point, not only the current state of the law, but also the doctrinal trends that have propelled legal rules into their present form and the underlying sociopolitical atmosphere—or psycho-emotional factor—that shape doctrinal developments. Only in this way can we avoid the natural inclination to jump on the bandwagon and follow the trend regardless of whether it is misguided or has become jurisprudentially saturated.\(^12\)

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\(^8\) 441 U.S. 153 (1979).


\(^11\) See supra notes 1-4 and accompanying text.

\(^12\) One certainly might argue that, in recent decisions exhibiting solicitude for personal reputation, the Supreme Court has retreated far enough from thorough first amendment protection. *Gertz* not only removed the *New York Times* sanctuary in the case of suits brought by private plaintiffs, but it also—along with *Firestone*, *Wolston*, and *Hutchinson*—narrowed considerably the definition of a public figure. Likewise, the recent jurisdictional decisions of *Calder v. Jones*, 104 S. Ct. 1482 (1984), and *Keeton v. Hustler Magazine*, 104 S. Ct. 1473 (1984), clearly favor recovery for libel over free press interests. Of recent cases, only *Bose Corp. v. Consumers Union of United States*, 104 S. Ct. 1949 (1984), holding
With this in mind, we can reexamine the status of public figures and determine whether we should place public figures in the “same legal hopper as public officials.”\(^{13}\) Although the public person category sounds generic, the Supreme Court in *Gertz, Time, Inc. v. Firestone,\(^{14}\) *Hutchinson v. Proxmire,\(^{15}\) and *Wolston v. Reader’s Digest Association,\(^{16}\) discovered that the category was not as homogeneous as *Curtis Publishing Co. v. Butts\(^{17}\) and *Associated Press v. Walker\(^{18}\) would have had us believe. In other words, we can identify both “public figures” and “public” figures, with only the former being made to suffer the same legal treatment as public officials when suing media defendants. The question here, of course, is when should media defendants—or anyone else for that matter—be entitled to the protection of the *New York Times* actual malice standard in a defamation action brought against them. This not only reopens the question of public figure status, but also reopens the larger constitutional question of what kind of first amendment protection ought to be available to media defendants threatened with libel litigation. Determination of the meaning of free speech and free press in this context cannot be restricted categorically to a reexamination of the issue of public figures alone.

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17. 388 U.S. 130 (1967).
18. *Id.*
19. Because Justice Powell’s majority opinion in *Gertz* spoke only of publishers and broadcasters, 418 U.S. at 340, one might argue that the *New York Times* rule applies only to media defendants. *See, e.g.*, Rowe v. Metz, 195 Colo. 424, 425-26, 579 P.2d 83, 84-85 (1978); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 364-71, 568 P.2d 1359, 1362-65 (1977); Calero v. Del Chem. Corp., 68 Wis. 2d 487, 499-506, 228 N.W.2d 737, 745-48 (1975). Most courts, however, have concluded that no distinction between defendants can be drawn because the first amendment protects freedom of speech as well as press. *See, e.g.*, Jacron Sales Co. v. Sindorf, 276 Md. 580, 590-94, 350 A.2d 688, 694-96 (1976); Ryder Truck Rentals v. Latham, 593 S.W.2d 334, 340 (Tex. Civ. App. 1979); *see also Restatement (Second) of Torts § 580B comment e (1977). Aside from the fact that the first amendment refers to both speech and press, drawing lines between free speech and free press based on the functions each serves in our society would be dangerous. Such a distinction would then require that “the press” be defined.
With this in mind, let me begin by exploring the public figure issue.

II. Of Public Figures

The preliminary question is the extent to which public figures actually are treated like public officials under the constitutionalized law of libel. Professor Schauer seems to assume that all public figures are treated alike and are always assimilated with public officials. In fact, this is not true because the constitutional term “public figures” is, after Gertz and its progeny, much narrower than might be supposed.

In Gertz and Time, Inc. v. Firestone, the first cases to signal retrenchment of first amendment protection for the press in libel cases, the Court defined public figures in the following way:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.

The Court thus developed two subcategories of this classification—the general public figure, and the specific or special public figure. The constitutional legitimacy of treating public figures like public officials for the purpose of protecting the media and freedom of the press from libel litigation can be determined only by examining separately the two categories.

According to the Court, the second category of public figure is the more common. Basically, the Court’s decisions demonstrate that visibility or involvement in public events does not make one a special public figure. Elmer Gertz, Mary Alice Firestone, Ron-

20. See Schauer, supra note 13, at 906-09.
22. Id. at 453 (quoting Gertz, 418 U.S. at 345).
23. See id.
publicity. The Supreme Court nevertheless held that they did not fall into the special public figure category. The Court rejected the notion that involvement in public events was sufficient, and concluded that, in order to become a public figure for a limited range of issues, the plaintiff had to thrust himself into a public controversy as substantial as a public debate. In other words, to become a special public figure, the plaintiff must voluntarily enter a public debate "in order to influence the resolution of [public] issues."

28. Although the Court in Gertz speculated that "someone [could] become a public figure through no purposeful action of his own," 418 U.S. at 345, the Court also stated that "instances of truly involuntary involvement public figures must be exceedingly rare." Id. The Court's subsequent decisions, however, have eliminated even this possibility. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court partly relied on Mary Alice Firestone's lack of voluntary involvement to hold that she was not a public figure. The Court stated that "re-"spondent [did not] freely choose to publicize issues as to the propriety of her married life. . . . That resort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court." Id. at 454 (quoting Boddie v. Connecticut, 401 U.S. 371, 376-77 (1971)).

Consistently, in Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), the Court held that failure to appear before a grand jury investigating Soviet espionage, and thus voluntarily engaging in criminal conduct, did not make the plaintiff a public figure. Id. at 166-69. The Court stated that a "private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." Id. at 167. Likewise, in Hutchinson v. Proxmire, 443 U.S. 111 (1979), the Court concluded that the receipt and benefit of public grants did not make one a public figure, and that "Hutchinson did not thrust himself or his views into public controversy to influence others." Id. at 135. The Court also stated that "[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." Id.

29. In Wolston, the Court concluded that the petitioner's failure to respond to a grand jury's subpoena was not designed to invite public comment or influence the public with respect to any issue of public concern. 443 U.S. at 168. In fact, at one point, the Court states that "[i]t is difficult to determine with precision the 'public controversy' into which petitioner is alleged to have thrust himself. Certainly, there was no public controversy or debate in 1958 about the desirability of permitting Soviet espionage in the United States; all responsible United States citizens understandably were and are opposed to it." Id. at 166 n.8 (emphasis added). Similarly, in Hutchinson, the Court concluded that "Hutchinson did not thrust himself or his views into public controversy to influence others" because no public controversy existed—a concern for general public expenditures is shared by most people. Id. at 135. See also Smolla, supra note 1, at 54-59.

Treating this type of plaintiff the same as public officials is constitutionally consistent even under a limited view of freedom of the press. Under this narrow view, both the public official and the person who tries to influence public issues lie at the core of the first amendment—the functioning of the democratic political process and influence on public affairs—and thus should be amenable to uninhibited media scrutiny.

The other category of public figure—the general public figure—is more difficult precisely because it establishes a generic group of individuals who are not, in the first amendment sense, completely fungible. This is where Professor Schauer spots trouble. He questions why the constitutional law of libel should treat Michael Jackson, Reggie Jackson, and Leonard Bernstein the same as Dan Rather, William F. Buckley, Jr., Jerry Falwell, and Lee Iacocca. Even though all of these people have "achiev[ed] . . . pervasive fame and notoriety," not all "occupy positions of . . . persuasive power and influence" over the determination of public policy. They do not lie, therefore, at the core of free press theory or the heart of New York Times Co. v. Sullivan.
This is not an argument for treating public figures differently from public officials, however, it is simply an argument for defining more narrowly who is a public figure in the general sense. Some prominent people are in a position, because of their particular type of prominence, to have persuasive power and sociopolitical impact—"the chairman of the board of General Motors; the president of the AFL-CIO; the archbishop of Boston; the publisher of the New York Times; [and] the anchorman of the CBS Evening News"—while other famous people have little impact on politics, government, or public issues. One could argue that this latter group—Professor Schauer's archetype seems to be the entertainer or professional athlete—should not be assimilated with the public official, special public figure, or politically influential general public figure, all of whom have direct or indirect influence on public policy. Thus, the Supreme Court's already narrowed definition might be limited even further to exclude those plaintiffs who are nonpolitical public personalities.

The problem, however, is in trying to determine which public figures fall into such a category. Many people who have acquired public notoriety for their nonpolitical talents and activity become politically active and influential after their notoriety is established. Examples include Dick Gregory, Jane Fonda, and Paul Newman. Although one might argue that these cases are on the fringes instead of the poles, more cases may exist on the fringes than anywhere else. After all, we have an ex-actor President, an ex-astro-

of the New York Times malice test to public figures, had a much broader view of the first amendment. See id. at 170-72 (1967) (Black, J., concurring and dissenting); New York Times, 376 U.S. at 293-97 (Black, J., concurring). One should also note that a majority of the Court in Gertz assimilated public figures with public officials because public figures assume the risk of media exposure and have access to the channels of communication to counteract false statements. 418 U.S. at 344.

35. Certainly, the special public figure who has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved," Gertz, 418 U.S. at 345, and the general public figure with "persuasive power and influence," id., would fall within a narrow, politically oriented theory of freedom of the press and the New York Times standard.

36. Schauer, supra note 13, at 916.

37. See id. at 908, 917.


naut senator who wants to be president, and a senator and a congressman who are ex-professional athletes.

Another factor that blurs any attempt to segregate political public figures from nonpolitical ones is the realization that many public figures make political statements through their work. Such movies as "The China Syndrome," "War Games," "The Day After," and the Vietnam war films are obvious examples. Even "Terms of Endearment" speaks collectively about our culture. Thus, even under a narrow view of the first amendment in which free expression is restricted to political matters, ample justification exists for providing the media with New York Times protection in libel suits brought by public entertainers.

But however one views first amendment theory, and regardless of the original free press foundation of Butts and Walker, there are other considerations or counterpoints that argue for the application of the actual malice standard to the nonpolitical public figure. First, the Court in Gertz did not rest its decision distinguishing public figures from private individuals principally on a free press notion. The Court suggested that the state had a stronger interest in redressing harm to the reputation of private persons because they had not assumed the risk of publicity and because they lacked access to the channels of communication to counteract false statements. Whatever one thinks of the assumption of risk argument, the access argument is a first amendment notion—speech to contest speech—and thus, with respect to the availability of the media forum, the nonpolitical public figure is in the same category as other public figures recognized by Gertz. In fact, in terms of access, entertainers, prominent athletes, and other personalities may be in a more advantageous position than some minor public officials and special public figures. Also, the access notion is not necessarily limited to rebuttal. Public personalities attract constant media attention, and whatever damage a defamatory publication may cause is likely to be rebuilt by continual me-

43. "Coming Home"; "The Deer Hunter"; "Apocalypse Now."
44. See supra note 34.
45. 418 U.S. at 344-46.
dia exposure.46

Second, public figures, as well as other libel plaintiffs, are hardly in a litigational box. The decision in *Herbert v. Lando*47 permits the complaining party48 to spend countless hours and energy investigating the editorial process of the defendant to discover whether the story was published with knowledge of its falsity or in reckless disregard of the truth.49 The *Herbert* decision doubtlessly results in the suppression of much derogatory material about persons who can afford the expense of the discovery process, encourages settlements once libel litigation is initiated,50 and discourages summary judgment.51

Finally, regardless of the first amendment view one takes of the

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47. 441 U.S. 153 (1979).

48. The plaintiff is not the only party who might engage in extensive discovery in a libel action. In *Herbert*, for example, not only did Colonel Herbert's lawyers engage in exhaustive discovery against CBS, but Colonel Herbert also produced over 12,000 pages of documents at the request of CBS's lawyers. Lewis, supra note 4, at 611. Herbert, his literary agent, and his ghost writer were also deposed at length. Id.

49. The magnitude of the discovery problem is accurately revealed by *Herbert* itself. Barry Lando, the producer of the CBS documentary involved, was deposed over a period of more than a year in twenty-six sessions producing almost 3,000 pages of transcript and 240 exhibits. *Herbert* v. *Lando*, 568 F.2d 974, 982 (2d Cir. 1977), rev'd, 441 U.S. 153 (1979).

“Also produced by CBS were videotapes and transcripts of all interviews done for the program, notes of interviews conducted with 130 people, all of Lando's files, all documents in CBS's files from the relevant period relating to Colonel Herbert, whether or not Lando and the others connected with the program ever saw them, and transcripts and tapes of all of Herbert's radio and television appearances form 1971 to 1981.” Lewis, supra note 4, at 611 (footnotes omitted).

50. See Franklin, *Suing Media for Libel: A Litigation Study*, 1981 Am. B. Found. Research J. 795, 800 & n.12; Smolla, supra note 1, at 6. Examples of recent settlements are ABC's reported payment of $1.25 million in a suit brought against it by Synanon, a California communal organization, see Jenkins, supra note 4, at 25, and CBS's reported settlement of between $250,000 and $400,000 in a suit filed by Mayor William J. Green of Philadelphia, see N.Y. Times, Oct. 24, 1982, § 4, at 8, col. 4.

51. Although defendants are continuing to use the summary judgment procedure successfully, see Libel Defense Resource Center, Bull. No. 4, Summary Judgment in Libel Litigation: Assessing the Impact of *Hutchinson v. Proxmire* (1982), the availability of extensive discovery into the editorial process would certainly forestall the effectiveness of this device. More troublesome, a good editorial process might actually discourage summary judgment because internal questioning and criticism might be some evidence of negligence or recklessness.
publication of material about public personalities, that view has to be balanced against the potential cost of defamation. In other words, the question of regulating expression—through the law of libel in this case—can be resolved only by considering the justification for the regulation. In order to arrive at an appropriate constitutional standard, the first amendment chill must be balanced against injury to reputation.\textsuperscript{52}

This is really the other side of the libel debate, and has received somewhat less attention than the first amendment issue.\textsuperscript{53} The focus, of course, is on the harm to personal reputation caused by the publication of false material. In most cases, the injury is entirely psychic and no tangible damage is inflicted.\textsuperscript{54} What actual injury\textsuperscript{55} did retired General Edwin Walker suffer in \textit{Associated Press v.}
Walker, what tangible loss did Carol Burnett suffer at the hands of the National Enquirer, and what specific injury was inflicted on General Westmoreland by the CBS news department? The absence of actual loss is especially notable in the case of public entertainers for whom the stories, whether true or not, represent cultivated publicity. If the material becomes too caustic and the humiliation too great, recovery generally can be obtained under the New York Times malice standard.

When harm to reputation from a defamatory publication is scrutinized under an economic analysis, the results are even more vivid. Primary costs—the costs directly associated with the injury—are usually nonexistent, unless one views emotional injury as an intangible, actual cost. Even then, this type of loss is non-transferable and thus the imposition of liability on a defendant results in a double accounting. Similarly, secondary costs—those associated with the economic impact of the injury—are generally nonexistent in the absence of liability, but can become quite high when a court shifts them to a defendant publisher. Additionally, tertiary costs—the costs of administering our current liability system—are significant in the case of libel litigation.

I do not mean to suggest that mental anguish or emotional injury should never be compensated. In many cases, there may be no

56. 388 U.S. 130 (1967).
58. The best example is the Carol Burnett case. See supra note 4.
59. This is probably why, until recently, such tabloids as the National Enquirer have rarely been sued.
61. See Ingber, supra note 2, at 812-13, 824.
62. Id. at 820-21, 824.
63. Id. at 813-14. Libel insurance, however, can decrease secondary costs when liability is imposed. See id. at 813-14.
64. See G. Calabresi, supra note 61, at 26-28.
major countervailing policy consideration.\textsuperscript{66} But when the chilling effect that libel litigation and judgments have on freedom of expression is recognized, the case for psychic damages loses much of its strength, regardless of one's view of first amendment theory. This factor distinguishes libel from other kinds of regulated speech where the abuse and threat are more real.\textsuperscript{67} Adding libel to the list that includes obscenity, contempt, disturbing the peace, and "fighting words" does not remove it from careful first amendment analysis.\textsuperscript{68}

III. THE BACK SIDE OF THE FIRST AMENDMENT

Professor Schauer's "back side" argument is based on the notion that we cannot trust certain interests to the majoritarian process—primarily legislatures and, to some extent, common law courts. Because legislatures have been notoriously insensitive to such interests as free speech and free press, the constitutional process must intervene in order to protect these values. Although the legislative process is capable of adequately dealing with such things as food, drugs, and government revenue, free expression historically has been too intangible and amorphous to rely on legislative protection.\textsuperscript{69}

Professor Schauer detects the special relevance of this notion to the distinction in constitutional libel law between public officials and public figures. He argues that, as public officials, legislators are self-interested, and thus will be less inclined to enact provisions protecting the press from libel actions brought by the group of which they are members.\textsuperscript{70} With respect to public officials, there-

\textsuperscript{66} Generally, the only countervailing policy consideration to the recovery of damages for mental disturbance in cases of negligence is the risk of vexatious suits and fraudulent claims. This is basically the reason for the rule limiting recovery for mental distress to cases of physical injury or impact. See W. Prosser, Handbook of the Law of Torts § 54, at 328 (4th ed. 1971).


\textsuperscript{68} See Lewis, supra note 4, at 605.

\textsuperscript{69} In fact, the courts have consistently been required to scrutinize legislative enactments in order to protect first amendment interests. See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Garrison v. Louisiana, 379 U.S. 64 (1964).

\textsuperscript{70} See Schauer, supra note 13, at 926.
fore, the majoritarian process cannot be trusted to properly balance the competing interests.

At least two facts regarding libel law make this suggestion misleading. First, legislatures rarely have been active in the defamation area.\textsuperscript{71} Thus, little reason exists to suspect that they would ever act to protect the press from any kind of libel plaintiff—public or private. Second, in the one noteworthy exception to legislative inaction in the libel area—the retraction statute—no distinctions have been drawn between public officials and public figures or private persons. These provisions typically limit a libel plaintiff's recovery to special damages if he has failed to request a retraction or if a satisfactory retraction has been printed upon request.\textsuperscript{72} Retraction statutes are designed to protect the publication process and are noncategorical in their application.

Perhaps Professor Schauer's real point is that legislative bodies are unlikely to be active in the libel area precisely because they could not legitimately resolve the conflict between free press and libel awards without including public officials within any restrictions imposed on the recovery of libel judgments. Legislatures surely would not attempt to restrict libel actions brought by plaintiffs other than public officials while leaving themselves alone to roam free in the libel arena. Such blatant preferential treatment is especially irrational and unlikely given the obvious first amendment interest in the discussion of those who hold public office.

If this is the nature of the back side notion, it is not a justification for constitutionally distinguishing public figures from public officials;\textsuperscript{73} it is an argument for relegating the balance to some other authority—obviously the courts. But judges, also as public officials, would be equally disinclined, under either a constitutional

\textsuperscript{71} In fact, legislative bodies historically have been inactive in the tort field until relatively recently. The only exception with respect to defamation is the retraction statute in existence in a number of states. \textit{See} W. Prosser, \textit{supra} note 66, \S\ 116, at 800-01.


\textsuperscript{73} One could argue that, if the libel rights of legislators as public officials have already been restricted by constitutional decision, the legislators might be more inclined to act to protect the press from other kinds of plaintiffs. Such an argument appears tenuous, however, in light of the general legislative apathy with respect to first amendment interests.
or common law rationale, to protect the media from libel actions brought by this group. Carrying the argument this far suggests the need for a definitive constitutional ruling from an altruistic Supreme Court insulating members of the media from libel suits brought by public officials, and allowing the common law courts to work out the remainder of the balance.

This conclusion is syllogistic, however, because it ignores two considerations—one jurisprudential, the other historical. First, even assuming the validity of the back side argument, it is only one criteria among a host of others in the free press and libel equation. In deciding the questions of whether, when, and to what extent we should protect the press from libel suits, the functioning of the majoritarian process is only one among a number of variables, some of which have been mentioned previously, that must be weighed in reaching an appropriate resolution. Theorizing about the inability of legislatures and common law courts to weigh objectively and sensitively the relevant variables in the case of defamation of public officials should not somehow bootstrap this one factor into special significance.

Second, the back side argument ignores the historical reaction of the common law courts. Like the limited legislative action in this area, court decisions have not distinguished between plaintiffs in libel rulings. Broadly speaking, neither absolute nor qualified common law privileges have any direct reference to the status of the plaintiff. More specifically, the two common law privileges most closely associated with the news reporting process—fair comment and reports of public proceedings—are most likely to apply in a case in which the plaintiff is a public official. In fact, Coleman v. MacLennan, the case that foreshadowed the constitutional privilege by extending the common law privilege of fair comment beyond statements of opinion to misstatements of fact, was brought

74. See supra text accompanying notes 39-68.
75. See supra note 71 and accompanying text.
76. Generally, the absolute common law privileges apply to proceedings, occasions, or relationships, and the qualified privileges attach when the publication is made in the discharge of some public or private duty or in the defendant's own legitimate interest. See W. Prosser, supra note 66, §§ 114-115.
77. See id. §§ 115, 118, at 792, 822-23, 830-33.
78. 78 Kan. 711, 98 P. 281 (1908).
by the Attorney General of Kansas.

The foregoing analysis of the impact of the back side notion suggests that it has little relevance to libel law. Although a breakdown in the majoritarian process in other areas may justify constitutional intervention, the possible malfunction in the defamation area is too theoretical and hardly justifies a constitutional distinction between public officials and other libel plaintiffs.

IV. OF PUBLIC INTEREST

The less than compelling nature of the back side argument revives the front side of the first amendment, and from this perspective, categorizing plaintiffs has at least some superficial appeal in terms of first amendment theory. If the constitutional law of libel were to draw further distinctions between political and nonpolitical public figures, however, the result would be an untidy constitutional morass. Although lawyers and scholars covet finely drawn jurisprudential categories, distinguishing public officials, political public figures, nonpolitical public figures, and private individuals—and conditioning rules of recovery and first amendment protection on the group to which a libel plaintiff belongs—does not strike me as the kind of breathing space a healthy notion of free expression can tolerate.

The problem is that the current constitutional focus is askew. Even under a narrow view of the first amendment, limiting fully protected discussion to matters concerning public policy or governmental operations, the focus should be on the subject matter discussed instead of the character or notoriety of the persons involved. In at least this sense, the decision in Rosenbloom v. Metromedia, Inc. was the more sensitive and sensible approach, and would have avoided the quagmire that Gertz and its progeny have created.

Regardless of one's taste for the breadth of the actual holding in Rosenbloom, its subject matter perspective retains constitutional

79. Race relations is an obvious example.
80. 403 U.S. 29 (1971).
81. Justice Brennan's plurality opinion in Rosenbloom extended the New York Times malice standard to any statement concerning a matter of public interest. 403 U.S. at 41-43. Although Brennan's opinion spoke only for a plurality of three, the reasoning of Justices
consistency and integrity. Even with the scope of the subject matter inquiry restricted to matters that directly affect self-government, it is essentially a one-issue approach independent of fastidious categorization based on the status of the potential libel plaintiff. If an article or story involves public policy or the functioning of government, it should be protected by the New York Times actual malice standard.\textsuperscript{82} Although resolution of this issue will not always be clear,\textsuperscript{83} this standard of analysis gives the media
the greatest protection in precisely those cases that lie at the philosophical heart of freedom of the press. A publisher would be free to release a story about matters of public concern without fear of vindictive or vexatious retaliation by a plaintiff whose status is uncertain. At the same time, a public figure might be able to recover under a more lenient standard than *New York Times* when false accusations are made about his or her private life.

The cases of *Gertz v. Robert Welch, Inc.*, *Hutchinson v. Proxmire*, and *Wolston v. Reader's Digest Association*, for example, all involved plaintiffs who were found to be private individuals. The defendants in these cases, therefore, lost the protection of the *New York Times* standard. Under a subject matter approach, however, all would have received the protection of the actual malice rule—*Gertz* involved the discussion of communism, *Hutchinson* involved federal spending, and *Wolston* involved Soviet espionage. Even under a narrow first amendment view, each deserved strict constitutional protection.

On the other hand, some material now protected by the *New York Times* standard would lose its favored status under a subject matter rule. Although Carol Burnett is a public figure, her traipsing around a Washington restaurant, sharing her dessert, and spilling wine is not a public issue under even the broadest of definitions. Although any information about public officials arguably could satisfy the subject matter rule, the Burnett example dem-

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87. Although the plaintiffs in these cases were not typical private individuals, the Supreme Court held them to be private individuals under its narrow definition of "public figure." Elmer Gertz, for example, had written extensively, represented famous clients, and made television and radio appearances, had been the subject of over forty articles in Chicago newspapers, and had served as an officer of local civic groups and various professional organizations. *See Ashdown, supra* note 38, at 680.
88. 418 U.S. at 325-26.
89. 443 U.S. at 114-17.
90. Id. at 159-63.
92. Even information about the private lives of public officials may be relevant to their
nenstrates that much published information about public figures, as well as private persons, would not qualify for strict free press protection.

V. Conclusion

The constitutional trouble with a true subject matter approach is that the Supreme Court's current classification scheme does not permit subject matter consideration with respect to public figures. All material about public officials is arguably of public concern, and the Supreme Court in *Gertz* has allowed the states to determine whether to apply a subject matter test to private individuals. With respect to public figures, however, the *New York Times* malice standard applies regardless of whether the matter discussed has public policy implications.

As I have argued earlier in this Article, this is not problematic. The status of a public figure attracts public attention, often cultivated and more than occasionally used for political ends. Additionally, the public personality attracts continuing interest, which usually offsets any harm done by a defamatory publication. Thus, the absence of a subject matter test for public figures is not constitutionally critical.

The real need for a subject matter formula resides in the area where the actual malice test is not now constitutionally mandated—publications about nonpublic persons. Some courts have applied the *Rosenbloom* subject matter test here, but many have accepted the *Gertz* invitation to adopt a negligence standard for plaintiffs who are considered private individuals. The reaction of

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94. See supra notes 39-68 and accompanying text.
the latter group of courts may be due, in part, to an insensitivity to first amendment theory and a concomitant failure to make a critical distinction within the subject matter formula. A subject matter standard obviously needs to be given content. In considering the Gertz option to adopt a more lenient standard of liability in the case of private plaintiffs, however, many courts may have considered only the broad public interest notion of Rosenbloom and rejected it without careful first amendment analysis. A subject matter approach limited to core first amendment interests—that is, material concerning public policy, politics, and governmental operations—would be entirely consistent with a politically-oriented theory of free press.

Although the Rosenbloom public interest analysis provides greater breathing space for free expression, courts should at least recognize the constitutional need for New York Times protection for the discussion of public policy matters. Evidently, this confusion over the necessary scope of a subject matter approach has led some courts to adopt a negligence standard for defamatory publications about private individuals without solicitude for first

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97. Even if one does not subscribe to the Rosenbloom theory of the first amendment that the guarantees of speech and press extend not only to comments about public officials, public affairs, and public personalities, but to all relevant information necessary to enable a person to cope with a complex society, Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41-43 (1971), the public interest standard nevertheless provides insulation for the unfettered discussion of public policy and governmental operations, which are at the core of free expression.
amendment values.98

After Gertz, the states have been at liberty to abandon the actual malice rule for private plaintiffs. Judges should hesitate, however, before applying a negligence standard to all publications involving private individuals. Much of this material is at the core of self-government,99 and deserves New York Times protection to ensure robust, wide-open discussion. Even if one eschews the broader concept of Rosenbloom v. Metromedia, Inc.,100 the New York Times test should nevertheless protect material dealing with socio-political and public policy matters. At least in this narrower sense of public interest, a subject matter standard is needed.

98. See supra note 96.

100. 403 U.S. 29 (1971).