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Public Figures Revisited

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PUBLIC FIGURES REVISITED

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I. INTRODUCTION

Professor Schauer's reexamination of the doctrinal basis for the constitutional standards of proof applied in public figure libel cases is a useful exercise. When all is said and done, however, the rationale underlying the extension of the *New York Times Co. v. Sullivan*[1] actual malice test from public officials to public figures[2] remains sound and intact. Any lessening of that standard would ignore reality, be constitutionally unwarranted, and prove a disservice to the robust, uninhibited debate that distinguishes our society.[3]

Although existing law has made the recovery by public figures for libel difficult, public figures have not been denied an effective remedy by having to overcome the hurdles of the actual malice

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1. 376 U.S. 254 (1964).

2. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

3. *See* 376 U.S. at 270. Indeed the first amendment does not simply benefit institutions such as the press, but ensures that all of us can speak our minds. *See* Bose Corp. v. Consumers Union of United States, 104 S. Ct. 1949, 1961 (1984). Justice Brennan, architect of the *New York Times* actual malice standard, observed in Time, Inc. v. Hill, 385 U.S. 374 (1967):

> The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. . . . "Freedom of discussion, if it would fulfill its historic function in this nation, 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."
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> . . . Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

Id. at 388-89 (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)).

standard of *New York Times*[4]—despite what Professor Schauer would have us believe.[5] The justification for treating public figures in the same manner as public officials by requiring both to prove subjective awareness of falsity far outweighs the justification for any lesser standard.[6]

II. An Objective Test

My views on this issue are influenced greatly by a question which Professor Schauer considers only briefly: if the actual malice test is not applied to publications concerning public figures, what test will the courts apply as an alternative? Often, commentators suggest a purportedly objective test,[7] which would seek to determine that which the defendant *should have known* if it had observed some particular standard of behavior, to replace the purportedly subjective *New York Times* test, which seeks to determine what the defendant *actually did know* at the time of

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4. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970); Burnett v. National Enquirer, 7 Media L. Rep. (BNA) 1321 (Cal. Super. Ct. 1981), *modified*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 104 S. Ct. 1260 (1984); Nevada Indep. Broadcasting Co. v. Allen, 664 P.2d 337 (Nev. 1983).

5. *See* Schauer, *Public Figures*, 25 Wm. & Mary L. Rev. 905, 907-08 (1984).

6. "[D]ifferentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy." *Butts*, 388 U.S. at 163.

7. Some courts and commentators, including Professor Schauer, concerned with the difficulty of applying the subjective *New York Times* test in public figure cases, have hinted at rejecting the actual malice standard in favor of an objective test. The United States Court of Appeals for the Sixth Circuit, for example, noted that

> [i]f we convert these subjective "malice" standards into a more objective test, as suggested by Deans Prosser and Wade and Justice Harlan, we find no evidence that the defendant was guilty of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Orr v. Argus-Press Co., 586 F.2d 1108, 1116 (6th Cir. 1978) (quoting *Butts*, 388 U.S. at 155 (Harlan, J.)), *cert. denied*, 440 U.S. 960 (1979). *See also* Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 563 (E.D. Mich. 1979); Schauer, *supra* note 5, at 932-33; Wade; *The Communicative Torts and the First Amendment*, 48 Miss. L.J. 671, 686 (1977).

From my perspective, the idea that an objective test focuses on what the defendant should have known instead of what the defendant actually did know seems unusual. Nevertheless, to avoid confusion, I will adopt the terminology in this Article.

publication. In what is frequently and mistakenly identified as the majority opinion in *Butts*,[8] for example, Justice Harlan proposed that a public figure should not recover unless he or she could show "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[9] Like Professor Schauer, other courts and commentators have suggested variations on Justice Harlan's theme[10] and, in a number of cases the press has been held to such objective standards of conduct.[11]

These objective standards of conduct, however, are unworkable and have no foundation in the first amendment. The first major problem with any objective test is that objective standards simply do not exist. Responsible publishers do not have the generally recognized standards normally associated with traditional, learned professions. They possess no equivalent of generally accepted accounting principles, the Financial Accounting Standards Board statements, the American Institute of Architects' standards, or a Code of Professional Responsibility.

Furthermore, I doubt that universal standards could be adopted by the press. Aside from the constitutional problems inherent in adopting even self-imposed rules of professional conduct for journalists, nothing suggests that the profession could reach a consensus on the issue. Every press room has an established mode of operation and a set of journalistic ethics that is unique. Guidelines in one organization are not even an issue for discussion in another. The famous two-source rule from the Watergate days is a procedure that was followed by one group of reporters, on one story, at

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8. "Although Mr. Justice Harlan announced the result in [*Butts*], a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials'." Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974). *See* Schauer, *supra* note 5, at 907 & n.19.

9. 388 U.S. at 155. Justice Harlan's opinion is not a correct statement of law. As the Supreme Court has stated, this formulation was rejected in favor of the actual malice rule in public figure cases. *See supra* note 8.

10. *See supra* note 7.

11. *See, e.g.*, Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) ("[W]here the content of the article is arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition, the party defamed may recover [if he can establish] that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.").

one newspaper.[12] It is not a universal standard of conduct in newsrooms across the country. To my knowledge, it is not widely followed anywhere.

The lack of standards has not been remedied by the courts. In *Butts*, Justice Harlan's only reference to the standards of investigation and reporting of responsible publishers was a speech delivered in 1947 by Arthur Hays Sulzberger, then publisher of the *New York Times*.[13] The speech does not outline a code of ethics for journalists, however—it is distinctly an inspirational and aspirational speech setting out goals that no newspaper could meet on a daily basis.

From a litigation perspective, objective tests suggest that the activities of a defendant will be compared to the conduct of other publishers. Because judges and jurors probably will have no firsthand knowledge of media practices, factfinders will be required to examine newsroom practices in other organizations. Full exploration and comparative analysis of other publishers' conduct, however, might not withstand constitutional scrutiny. The unique facts surrounding each story also preclude the accurate comparison of conduct necessary for establishing a standard. The question of whose imprecise practices will become the standard by which all others are measured, therefore, must also be resolved. Absent a generally accepted standard of care, any attempt to provide litigation and newsroom legal advice based on the notion that objective standards actually exist is unrealistic.

The second problem with objective tests is that they may stifle the freedom of speech and press that the first amendment was adopted to ensure. Journalists spend a great amount of time working with material that is not subject to practical empirical verification. Like *In a Grove*,[14] the Japanese short story in which each of the protagonists told a different story about the same event, news events are not subject to precise replication and impressions of the events are inherently subjective. In many cases, journalists obtain

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12. *See* C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN 79 (1974) ("Gradually, an unwritten rule was evolving: unless two sources confirmed a charge involving activity likely to be considered criminal, the specific allegation was not used in the paper.").

13. 388 U.S. at 155 (Harlan, J.) (citing Sulzberger, *Responsibility and Freedom*, in FREEDOM OF THE PRESS FROM HAMILTON TO THE WARREN COURT 409 (Nelson ed. 1967)).

14. R. AKUTAGAWA, *In A Grove*, in RASHOMON AND OTHER STORIES 19 (1970).

their information from observers who simply happened to be at the scene of an event, or from observers who are interested in the event and may thus have a bias that may not be obvious to a reporter. Based on these sources, reporters and editors have to make immediate judgments about the reliability of their sources and the way in which to describe the observed events.

Just as no objective standards specify how events should be observed, no generally agreed upon standard specifies how events ought to be described. To some, the statement that "truckloads of police armed with shotguns and tear-gas ringed the Alabama State College campus,"[15] or that sound moved "about the room,"[16] may accurately describe an event. To others, these statements may seem inaccurate enough to support libel claims. The problem is that objective standards of observation and expression do not exist and, in light of first amendment considerations, cannot be created.

Journalism may be unique in this respect. Unlike the testing of prescription drugs[17] or airplane parts, we cannot examine a thousand samples of journalists' observations and reporting techniques and make a statistical table of the results. Even if we could poll all of the observers, we could not be certain that the majority would perceive what actually happened. Moreover, the first amendment rests on the assumption that someone may have a unique perception or manner of expression that ultimately proves to be correct.[18]

Finally, objective tests are defective because of the significance of time constraints. Time is a critical element in any objective decision about the treatment of a news story and is important in de-

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15. New York Times Co. v. Sullivan, 376 U.S. 254, 257 (1964).

16. Bose Corp. v. Consumers Union of United States, 104 S. Ct. 1949, 1953 (1984).

17. *Cf.* Schauer, *supra* note 5, at 927 (analogizing commentary about public figures to the development and manufacture of pharmaceuticals).

18. Even if we could develop objective standards for the press, we most likely would defeat the first amendment's ability to preserve "uninhibited, robust, and wide-open" debate on public issues. *New York Times*, 376 U.S. at 270. Objective standards would straitjacket a free press and result in a monolithic presentation of the news, allowing little room for debate. Far more acceptable is the notion "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *Id.* at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). *See also* Time, Inc. v. Hill, 385 U.S. 374, 388-89 (1967). Like the answer to the philosophical question whether the glass is half full or half empty, the correct observation and expression of an event is often a matter of perception, and more than one view may be accurate.

termining whether a publisher was sufficiently careful. News must be disseminated quickly—that is how news distinguishes itself from history. Time is at the root of most newsroom decisions about further investigation and rewriting. Given adequate time, one can always find one more source to check, one more person to call, a slightly more articulate or accurate way to state a fact or opinion.

The time factor is complicated, and the importance of prompt dissemination can easily be forgotten once litigation has commenced. One cannot conceive of a libel case in which the plaintiff's counsel would be unable or unwilling to suggest that additional facts should have been checked. And, once such a suggestion is made, a factfinder cannot reconstruct and evaluate correctly the objective adequacy of an investigation that did not include the additional facts, even if those facts did not occur to anyone at the time. The additional facts assume increased importance during litigation and the factfinder loses sight of that which was actually done to prepare the story. The passage of time obscures the impact of time pressure on an investigation in a way that almost always favors libel plaintiffs at the expense of the media. The Court identified the problem of objective tests in *Time, Inc. v. Hill*[19] when it observed that "[a] negligence test [or any other objective test] would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait."[20]

III. Why Treat Public Figures Like Public Officials?

The previous discussion pertains equally to any sort of libel plaintiff. Professor Schauer, therefore, properly asks what makes

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19. 385 U.S. 374 (1967).

20. *Id.* at 389. Moreover, in reviewing the history and precedents for its opinion, the Court noted that "[w]e create a grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles. . . . Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity. . . .

In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society." *Id.*

public figures different. He refers to two archetypal public figures—political public figures who are in a position to influence public policies and political decisionmaking, and nonpolitical public figures, such as entertainers or personalities.[21] Although Professor Schauer seems to agree that *New York Times* ought to apply to the former,[22] he questions whether the same doctrinal considerations apply to the latter.

I am not persuaded that the Court did rule, as Professor Schauer seems to think, that mere personalities are subject to the *New York Times* test.[23] For three reasons, however, sound first amendment doctrine ought to include them under the same actual malice rubric as public officials and political public figures.

A. The Political-Nonpolitical Dichotomy

Even if political matters lie at the core of the first amendment,[24] "politics" should not be defined narrowly. People and institutions

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21. Although I have adopted Professor Schauer's political-nonpolitical dichotomy for convenience, *see* Schauer, *supra* note 5, at 916-17, the potentially appealling theoretical distinction has no basis in reality. *See infra* text accompanying notes 24-31.

22. *See* Schauer, *supra* note 5, at 918, 931-32, 934-35 (suggesting that courts might be able to subdivide the class of public figures, applying *New York Times* to some public figures, and some lesser standard to others).

23. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), identified two types of public figures—those who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes [and, m]ore commonly, those [who] have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. Although we typically refer to the all-purpose public figure and assume that the category includes movie stars, television entertainers, and baseball players, the formulation actually adopted by the Court is firmly rooted in a concept of power and influence, not just notoriety. Later cases demonstrate that general notoriety is not enough. Elmer Gertz had been active in a variety of "community and professional affairs" and had written several books and articles, 418 U.S. at 351, and Mary Alice Firestone had abundant notoriety, *see* Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976), but neither was held to be a public figure, *see Time*, 424 U.S. at 455; *Gertz*, 418 U.S. at 352. *See also* National Found. for Cancer Research v. Council of Better Business Bureaus, 705 F.2d 98, 101 (4th Cir.), *cert. denied*, 104 S. Ct. 108 (1983); Fitzgerald v. Penthouse Int'l, 691 F.2d 666, 668 (4th Cir. 1982), *cert. denied*, 103 S. Ct. 1277 (1983); Woy v. Turner, 573 F. Supp. 35, 38 (N.D. Ga. 1983); Tavoulareas v. Washington Post Co., 8 Media L. Rep. 2262, 2266 (D.D.C. 1982); Ali v. Daily News Publishing Co., 540 F. Supp. 142, 145-46 (D.V.I. 1982); Rood v. Finney, 418 So. 2d 1 (La. Ct. App.), *cert. denied*, 420 So. 2d 979 (La. 1982), *cert. denied*, 103 S. Ct. 1254 (1983); Lawrence v. Bauer Publishing & Printing Ltd., 89 N.J. 451, ___, 446 A.2d 469, 475-76, *cert. denied*, 459 U.S. 999 (1982); Howard v. Buffalo Evening News, 89 A.D.2d 793, 453 N.Y.S.2d 516 (1982).

24. *See* Schauer, *supra* note 5, at 918-19, 930.

in our society may be organized, challenged, or restructured in ways other than through governmental processes. In some cases, such as religion, we have prohibited governmental involvement. The process is nevertheless political, however, because speech concerning religious ideas profoundly affects the way society is organized. In other cases, such as literature, distinguishing political and nonpolitical speech is almost impossible. *Richard III*[25] and *The Marriage of Figaro*,[26] now thought of as art or entertainment, were highly political when written. Unlike Professor Schauer,[27] I do not believe that a broad definition jeopardizes protection of true political speech. Political speech is no more than a specific application of a broader principle.

Both the Court and commentators frequently have recognized that the core of the first amendment is much broader than legislative or elective politics:

> Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government. The commitment of the country to the institution of private property, protected by the Due Process and Just Compensation Clauses in the Constitution, places in private hands vast areas of economic and social power that vitally affect the nature and quality of life in the Nation. Our efforts to live and work together in a free society not completely dominated by governmental regulation necessarily encompass far more than politics in a narrow sense. "The guarantees for speech and press are not the preserve of political expression or comment upon public affairs."[28]

Authors, actors, television chefs, singers, athletes, and other public figures probably have as much influence on politics in the broad sense as public officials. On matters of style, food, the use of drugs, religion, and scores of other topics, personalities shape our society

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25. W. SHAKESPEARE, THE TRAGEDY OF KING RICHARD THE THIRD (1593).

26. P. DE BEAUMARCHAIS & W. MOZART, THE MARRIAGE OF FIGARO (1786).

27. *See* Schauer, *supra* note 5, at 930-31.

28. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971) (Brennan, J.) (quoting Time, Inc. v. Hill, 385 U.S. 374, 388 (1967)). *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, 147 (1967) (Harlan, J.); Thornhill v. Alabama, 310 U.S. 88, 101-02 (1940); Emerson, *The State of the First Amendment as We Enter "1984"*, 2 Com. Law. 3, 5 (1984); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976).

much more than public officials.

Furthermore, if we limit the reach of *New York Times* to public officials and to those Professor Schauer would call "political" public figures,[29] and apply a new standard to nonpolitical public figures, the impact on what could be reported would be enormous. The number of pure political cases to which Professor Schauer would apply actual malice standards is small in comparison to the number of public figure cases involving broad economic and social issues—many of which involve the free debate that lies at the heart of the first amendment. I do not think anyone would deny that Jesse Jackson and Walter Mondale are public figures for whom the *New York Times* doctrine ought to apply.[30] What about Carl Sagan, William Buckley, Linus Pauling, Jane Fonda, Lee Iacocca, and Jerry Falwell? None are public officials, but presumably all would fall into the category of public figures. These are all individuals who influence public opinion, contemporary society, and the way we think, although not necessarily in a political way.

Using Reggie Jackson, Carol Burnett, and Clint Eastwood as archetypal personalities to suggest that commentary about personalities should be less protected than commentary about public officials and public figures involved in political decisionmaking is fraught with danger. Construing the first amendment to encourage the press to report on Patrick O'Keefe, Deputy Assistant Secretary for Employment and Training for the Department of Labor, or Frank Swaine, the Small Business Administration's Chief Counsel for Advocacy, or even a recreation supervisor in New Hampshire[31] while requiring greater circumspection in reporting the activities of Jerry Falwell would be ironic.

B. The Personal Freedom to Express Ideas

Unfortunately, in some quarters of the academic community, proposals to restrict coverage of the first amendment to the political process still are being pressed.[32] I do not accept the political

29. *See* Schauer, *supra* note 5, at 916-17.
30. *See* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971).
31. *See* Rosenblatt v. Baer, 383 U.S. 75 (1966).
32. The attempt by the academic community to formulate rules of law that will give realistic protection to the First Amendment rights has not moved forward.

process rationale as the only core of first amendment concerns, although the unanimous consensus is that the amendment covers at least that much.[33] In his strategic retreat from his principal premise, Professor Schauer recognizes the importance of nonpolitical concerns.[34] Personal freedom seems equally important, if not more so. The Court has frequently recognized this point, most recently in *Bose Corp. v. Consumers Union of United States*:[35] "The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."[36] The value of the first amendment

> "is not merely the cultivation of uninhibited expression with a view to the potential contribution of such expression to the common good, but more fundamentally the protection of the speaker from governmental restraint—a sense that the speaker has a right to be let alone in the absence of compelling reason to the contrary."[37]

The same point, moreover, was tacitly recognized in *Time, Inc. v. Hill*,[38] a case that arose from a story about a play.[39] The core of the first amendment is not politics alone, but the discussion of ideas.

Thus, no relevant first amendment difference appears to exist between public officials and personalities. By voluntarily seeking public recognition, acclaim, and support, both invite public discussion of their activities.[40] Both public officials and public figures also typically have access to the media, and thus are presumptively

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> On the contrary, theories of limitation are being advanced in some quarters. Thus, proposals to restrict coverage of the First Amendment to "political expression," that is, participation in the affairs of government, are still being pressed.

Emerson, *supra* note 28, at 5.

33. Mills v. Alabama, 384 U.S. 214, 218 (1966).

34. *See* Schauer, *supra* note 5, at 929-30.

35. 104 S. Ct. 1949 (1984).

36. *Id.* at 1961. *See also supra* note 3.

37. Hill, *supra* note 28, at 1208. *See also* R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 16-17 (1980).

38. 385 U.S. 374 (1967).

39. *See supra* note 20.

40. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

able to rebut publications that they consider inaccurate.[41]

C. *The Potential for Distortion*

Finally, I am not persuaded that Professor Schauer's back side analysis focuses on the right process.[42] Although some states have codified their libel laws, rarely do I worry that a potential libel plaintiff will influence the outcome of a case through the legislative process; generally, libel law is made by judges and juries. Of greater concern is the factfinders' ability to confuse easily the popularity of a person at a particular time and place with the truth of statements made by or about that person. Statistics concerning the trial of libel cases suggest that this happens frequently; juries return a high proportion of verdicts for plaintiffs, which are then overturned in an equally high proportion by judges.[43]

Politicians expertly organize support for themselves and their ideas within the community. The danger is that they will use their abilities to persuade the jury to suppress unpopular, but truthful, statements. Entertainers, athletes, and other personalities may not have any direct governmental power to affect the rules of law by which cases are decided, but they certainly have the same ability to organize public opinion and present precisely the same danger as politicians: that they also might persuade juries to mistake popularity for truth and punish the unpopular.

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41. *Id.* at 344.

42. *See* Schauer, *supra* note 5, at 921-29.

43. LIBEL DEFENSE RESOURCE CENTER, BULL. NO. 7, INDEPENDENT APPELLATE REVIEW IN LIBEL ACTIONS SINCE *New York Times v. Sullivan* (1983). A statistical analysis of the appeals of rulings on the adequacy of proof of actual malice in defamation cases revealed that

> 70% of appeals of the defendants with respect to findings or rulings about actual malice led to reversals. When analysis is confined to review after a trial, 71% of defendants' appeals in cases involving rulings on actual malice have led to reversals.
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> Given the fact that only 19% of all civil cases heard by federal Courts of Appeals not involving the United States are reversed, the strikingly high reversal rates in actual malice cases and particularly in cases in which actual malice was held to exist at the trial court level are themselves persuasive evidence of the need for the careful appellate scrutiny of actual malice determinations.

Brief for the New York Times Company as Amicus Curiae at 17, Bose Corp. v. Consumers Union of United States, 104 S. Ct. 1949 (1984).

IV. Conclusion

Commentary about public figures is "a concomitant of life in a civilized community."[44] If we confine the actual malice standard to commentary about public officials and public figures involved in political decisionmaking, thereby sacrificing a broadly defined freedom of the press, we will have eliminated "the 'breathing space' that [the freedoms of expression] 'need . . . to survive.' "[45] I agree with Chief Justice Warren's conclusion in *Butts*, therefore, that "differentiation between 'public figures' and 'public officials' and adoption of separate standards of proof for each have no basis in law, logic, or first amendment policy."[46]

44. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).
45. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).
46. 388 U.S. at 163.