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## Public Figures

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## PUBLIC FIGURES

FREDERICK SCHAUER\*

### I. INTRODUCTION

Legal doctrine plays an important role in locating the terrain on which legal battles are fought. Rules and principles derived from statutes and cases influence, even if not conclusively,<sup>1</sup> the domain of issues worth fighting about. Although changes in society or particularly strong feelings held by litigants may inspire litigation in the face of contrary precedent or deter litigation in the face of favorable precedent, it would be hard to deny that legal doctrine exerts some pressure on the framing of controversies. Doctrine may channel litigation toward certain questions at the same time that it channels litigation away from others.

This channeling phenomenon is particularly apparent in the law of defamation. The battlefields of the past, in large part the battlefields of the common law, although by no means irrelevant, are of substantially diminished importance in this post-*New York Times Co. v. Sullivan*<sup>2</sup> world. Scholars and practitioners of the law of defamation no longer are preoccupied with such issues as the distinction between libel and slander,<sup>3</sup> the difference between libel per se and libel per quod,<sup>4</sup> the niceties of numerous common law privileges,<sup>5</sup> and the determination whether a publication is "of and concerning" the plaintiff.<sup>6</sup> Although these issues are not without interest and importance for the serious student of contemporary

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1. Legal doctrine may channel the behavior of judges and those affected by the law, even if especially compelling circumstances may force conduct out of those channels. See generally Schauer, *Easy Cases*, 58 S. CAL. L. REV. — (1985).

2. 376 U.S. 254 (1964).

3. See RESTATEMENT (SECOND) OF TORTS § 568 (1977 & app. 1981).

4. See *id.* [ 569]; Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960).

5. See RESTATEMENT OF TORTS §§ 583-612 (1938).

6. See RESTATEMENT (SECOND) OF TORTS § 564 (1977).

American defamation law,<sup>7</sup> the issues have yielded much of their territory to questions made relevant only in the wake of *New York Times* and its progeny.

Perhaps the most significant of these new questions, and one that dominates modern libel litigation, is determining who is a public figure for purposes of applying the "actual malice" standard of liability.<sup>8</sup> The cases decided by the United States Supreme Court—*Gertz v. Robert Welch, Inc.*,<sup>9</sup> *Time, Inc. v. Firestone*,<sup>10</sup> *Hutchinson v. Proxmire*,<sup>11</sup> and *Wolston v. Reader's Digest Association*<sup>12</sup>—are but the tip of the iceberg. The issue of who is a public figure and who is not remains both problematic and hotly contested.<sup>13</sup>

Although questions about the definition of a public figure abound, the underlying principle that has spawned these questions remains firm and unchallenged. If an individual is found to be a public figure, then that individual may recover in a defamation action against the media<sup>14</sup> only upon proof of actual malice, in the

7. See Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983); see also Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

8. Actual malice requires either knowledge of falsity or reckless disregard of whether a statement is false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

9. 418 U.S. 323 (1974).

10. 424 U.S. 448 (1976).

11. 443 U.S. 111 (1979).

12. 443 U.S. 157 (1979).

13. See, e.g., Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35 (1982).

14. The applicability of the first amendment to some or all nonmedia defamation remains an open question. *Hutchinson v. Proxmire*, 443 U.S. 111, 133 n.16 (1979). Compare, e.g., *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688, 695-96 (1976) (applicable), with *Calero v. Del Chem. Corp.*, 68 Wis. 2d 487, 228 N.W.2d 737, 745 (1975) (inapplicable). The question was on the Supreme Court's docket for the October 1983 Term, but has been held over for reargument. See *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 52 U.S.L.W. 3937 (U.S. June 26, 1984). The Court instructed the parties to address the applicability of *New York Times* and *Gertz*, with respect to presumed and punitive damages, to nonmedia defendants, as well as to commercial or economic speech. See 52 U.S.L.W. at 3937. See generally Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978); Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 HARV. L. REV. 1876 (1982); Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants*, 47 S. CAL. L. REV. 902 (1974). Nothing in this Article turns on the resolution of this issue.

constitutional sense,<sup>15</sup> on the part of the publisher. Thus, the lesson of *Curtis Publishing Co. v. Butts*<sup>16</sup> and *Associated Press v. Walker*,<sup>17</sup> especially as subsequently clarified in *Gertz*,<sup>18</sup> is that, to succeed in a defamation action against the media, a public figure must show that the defendant published false and defamatory material with knowledge that the material was false or with reckless disregard of its falsity.<sup>19</sup> For purposes of the latter alternative, reckless disregard is not synonymous with common law recklessness or common law gross negligence, but rather requires proof that the publisher "in fact entertained serious doubts as to the truth of his publication."<sup>20</sup> Moreover, the preponderance of the evidence standard normally applicable in civil actions is not available to public figures in defamation actions; public figures must prove actual malice with "convincing clarity."<sup>21</sup>

Two features of the constitutional constraints that now surround defamation actions by public figures merit special attention. One is the general observation that a public figure, after *Butts* and *Gertz*, will experience extreme difficulty, verging on futility, in attempting to surmount such a formidable array of constitutionally inspired legal hurdles. Although the possibility that the plaintiff will not be

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15. Constitutional malice is importantly distinct from malice in the ill-will sense as used at common law. See *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 (1970); *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964); see also *supra* note 8.

16. 388 U.S. 130 (1967).

17. *Id.* The Supreme Court decided *Butts* and *Walker* together. See generally Kalven, *The Reasonable Man and the First Amendment*: Hill, Butts, and Walker, 1967 SUP. CT. REV. 267.

18. Not until *Gertz* did the Court clarify that a general-purpose public figure could hold that status without reference to the cause of the public figure's fame. Before *Gertz*, one possible reading of *Butts* and *Walker* had been that the courts would treat only those public figures involved in matters of public concern as if they were public officials. In *Gertz*, however, the Court concluded that some people are so famous that they will be considered public figures regardless of the public importance of the source of their fame. See generally Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and the First Amendment*, 26 HASTINGS L.J. 777, 793-94 (1975); Eaton, *supra* note 7, at 1425.

19. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164-65 (1967) (Warren, C.J.). Justices Black, Douglas, Brennan, and White joined this part of Chief Justice Warren's opinion, thus making it the holding of the Court on this issue. See Kalven, *supra* note 17, at 275 ("You Can't Tell the Players without a Score Card").

20. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

21. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964).

found to be a public figure is sufficient to ensure a steady supply of defamation plaintiffs,<sup>22</sup> few people who are found to be public figures ultimately prevail in defamation actions.<sup>23</sup> To say that present defamation law has denied public figures an effective remedy for false and defamatory statements made about them seems only a minor exaggeration.

The second and related observation is that the legal and constitutional standard applicable to public figures is exactly the same as that applied to public *officials*. Although I do not mean to discount the significance of the determination of who is a public figure and who is not, it remains significant that those found to be public figures are, as a consequence of that finding, dumped into the same legal hopper as public officials. Reggie Jackson, Michael Jackson, and Leonard Bernstein<sup>24</sup> are constrained in bringing defamation actions by the same rules that constrain Ronald Reagan, Jesse Helms, and Harold Washington.

The constitutional move from public officials to public figures—from *New York Times* to *Butts*, with *Gertz* to tie up the loose ends<sup>25</sup>—has engendered little controversy,<sup>26</sup> and is now an accepted part of the legal landscape. But is the move that easy? Especially in light of the particular justifications for *New York Times*—justifications that can be characterized broadly as embodying the special political need for virtually total freedom to question the acts and qualifications of political officials<sup>27</sup>—the ease of the slide from public officials to public figures seems surprising. Thus, my purpose here is to reopen the public figure question.

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22. See generally Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RESEARCH J. 795.

23. The most prominent contemporary exception is *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). This case, however, should not be viewed as denying the difficulty of prevailing in the face of an actual malice requirement. See generally Franklin, *supra* note 22; Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RESEARCH J. 455.

24. I am thinking of Leonard Bernstein simply as a conductor, and not as an occasional commentator on the affairs of the world.

25. See *supra* note 18.

26. Occasionally, there has been disagreement with the extension. See, e.g., Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521, 578.

27. See generally Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965).

Taking *New York Times* as a given, I want to reconsider whether application of the *New York Times* principles to public figures is necessary, or even desirable, without doctrinally considering what appear to be "commonsense differences"<sup>28</sup> between the typical public official and the typical public figure.

## II. OF COSTS AND BENEFITS

In engaging in this inquiry, I accept the underlying empirical and behavioral presuppositions of *New York Times Co. v. Sullivan*. Crucial not only to *New York Times*, but also to such other landmarks of contemporary first amendment jurisprudence as *Speiser v. Randall*<sup>29</sup> and *Smith v. California*,<sup>30</sup> is recognition of the phenomenon of excess deterrence, or the "chilling effect."<sup>31</sup> Identifying excess self-censorship as a first amendment harm of overriding importance,<sup>32</sup> decisions such as *New York Times* embody a strategy of granting too much protection to speech as the only alternative to granting too little.<sup>33</sup>

Accepting the Court's premises with respect to self-censorship acknowledges that any diminution in the protection available to the media in reporting on the activities of public figures will have as a behavioral consequence a diminution in the amount of material—some of it both accurate and important—appearing in the media with respect to public figures. To the extent that changes in existing law make defamation remedies more available to public figures, those same changes inevitably will lessen the quantity of accurate reporting about public figures. The protections provided by *New York Times* are strategic,<sup>34</sup> immunizing some falsity from the reach of the law to encourage the dissemination of the maximum amount of truth. If that strategic protection is weakened, the

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28. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976).

29. 357 U.S. 513 (1958).

30. 361 U.S. 147 (1959).

31. See generally Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978).

32. See generally Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975).

33. See Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 213; Schauer, *supra* note 31, at 705-14.

34. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); see also *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring).

dissemination of truth is reduced commensurately.

Implicit in the strategic protection of *New York Times*, therefore, is the strategic sacrifice of some deserving plaintiffs to the more important, at least to society as a whole, goals of the first amendment. This sacrifice is nowhere more apparent than in *Ocala Star-Banner Co. v. Damron*.<sup>35</sup> In *Damron*, Leonard Damron had been the mayor of a small city and a candidate for tax assessor. During this time his brother, James Damron, with whom Leonard Damron had no official or business connections, was indicted for perjury in a local court. The editor of the newspaper, new to his job and new to the area, had never heard of James Damron. The editor thus mistakenly assumed that it was Leonard who was to be tried for perjury, and published the story accordingly. As a result, the newspaper published a report about Leonard Damron that had absolutely no basis in fact, and that injured him considerably. He lost the election for county tax assessor, and his allegations with respect to the harm to his business seem plausible.<sup>36</sup> Damron recovered a substantial judgment against the newspaper, but the judgment was vacated by the Supreme Court. Because the false and defamatory article related to the qualifications of both a public official and a candidate for public office,<sup>37</sup> the article fell plainly within the scope of the *New York Times* privilege. Although the newspaper clearly was extremely negligent, the absence of constitutionally defined actual malice was equally clear, thus leaving Leonard Damron with no remedy.

Not all defamation actions brought by public officials present the appealing factual situation—from the plaintiff's perspective—that existed in *Damron*. Indeed, *New York Times* itself is every bit as appealing from the defendant's perspective as *Damron* is from the plaintiff's. Moreover, *New York Times* is also extremely appealing from a first amendment perspective. Not only was the advertisement at issue in *New York Times* exactly the kind of political criticism that lies within at least one core<sup>38</sup> of the

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35. 401 U.S. 295 (1971).

36. See *id.* at 297.

37. Candidates for public office are within the compass of *New York Times*. *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971).

38. I do not assume that the first amendment has only one core or only one theoretical justification. See Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 Sup.

first amendment, but the action of Sullivan in bringing the libel action also is precisely the kind of retributive and punitive use of the common law remedy of defamation that so resembles the crime of seditious libel.<sup>39</sup>

Thus, implicit in *New York Times* is a determination that factual situations of the *New York Times* variety will far outnumber factual situations of the *Damron* variety, or that, regardless of the numbers involved, the harms to society of tolerating the opposite result in *New York Times* are far greater than the harms involved in tolerating the opposite result in *Damron*.<sup>40</sup> Most likely, the Court premised *New York Times* on both of these determinations, but it is the latter justification that dominates the opinion. Because use of defamation law by the Sullivans of the world to stifle criticism of official actions goes to the heart of the first amendment,<sup>41</sup> courts must guard against these consequences, even at the cost of occasionally sacrificing the worthy *Damron*.

That *New York Times* properly skewed the evaluation of first amendment rights and reputational harms in favor of first amendment rights and away from compensating reputational harms does not mean that reputational harms do not exist, nor does it mean that reputational harms should receive no weight on the scales. The behavioral lesson of *New York Times* could have been taken one step further, for only by eliminating all remedies for defamatory statements can the law completely maximize the dissemination of truth.<sup>42</sup> Yet, the fact that this step was not taken, even with respect to comment on the official conduct of public officials, demonstrates that maximizing the dissemination of truth does not enjoy a lexical priority over all other societal values.<sup>43</sup> Although some might favor such a step,<sup>44</sup> society has not been willing to relinquish

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CT. REV. 285, 313; see also F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 13-14 (1982).

39. See generally Kalven, *supra* note 33; Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603 (1983); Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 COLUM. L. REV. 91 (1984).

40. See Schauer, *supra* note 31, at 701-05.

41. See *supra* note 39.

42. See Schauer, *supra* note 31, at 709 n.112.

43. See F. SCHAUER, *supra* note 38, at 15-30.

44. See, e.g., F. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* (1981); see also New York



completely its commitment to the seemingly obvious proposition that the publication of untruths about people can hurt those people, often quite severely.<sup>45</sup> Although we might be willing to sacrifice the Damrons of the world in order to foster open criticism of public officials, we have been unwilling to take that commitment one step further by denying a remedy when the defendant has inflicted the injury knowingly and intentionally, rather than merely negligently.

The question, then, is whether this same balance between individual costs and societal benefits<sup>46</sup> is as appropriate for commentary about public figures as it is for commentary about public officials. Implicit in the existing rule, treating public figures the same as public officials, is the premise that the empirical assumptions and normative conclusions that governed the treatment of public officials in *New York Times* are equally applicable to the treatment of public figures.

In considering this question, one must bear in mind not only the price paid by public officials such as Damron, but also the equivalent price paid by public figures. Take, for example, the recent Louisiana case of *Rood v. Finney*.<sup>47</sup> Floyd Rood is a professional golfer who has devoted much of his career and adult life to youth assistance—in particular through an activity called “highway golf.” Highway golf involved a cross-country golfing tour to raise money to combat drug abuse by young people. Rood’s dream was to raise enough money to have fifty trailers with antidrug

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*Times Co. v. Sullivan*, 376 U.S. 254, 293 (1964) (Black, J., concurring).

45. F. SCHAUER, *supra* note 38, at 10-12, 167-68; see also Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 VA. L. REV. 785 (1979). Indeed, even those commentators properly skeptical of many claims of harm to reputation in particular contexts are quite willing to concede the capacity of words to cause specific and compensable harm to defamed individuals. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

46. I do not view self-expression or other similar speaker-oriented values as being central, or even significant, to the theory of the first amendment. Schauer, *Must Speech Be Special?*, 78 NW. U.L. REV. 1284 (1983). But even those who believe that speaker-oriented values, rather than listener or general societal values, undergird most of the first amendment still consider the value of the press to be a societal, rather than an individual, benefit. Dworkin, *Is the Press Losing the First Amendment?*, N.Y. REV. BOOKS, Dec. 4, 1980, at 34; Dworkin, *The Rights of Myron Farber*, N.Y. REV. BOOKS, Oct. 26, 1978, at 3.

47. 418 So. 2d 1 (La. Ct. App.), *cert. denied*, 420 So. 2d 979 (La. 1982), *cert. denied*, 103 S. Ct. 1254 (1983).

abuse exhibits travelling throughout the country. Although Floyd Rood may not be a saint, he certainly seems much closer to being one than most of us are likely to get.

In a factual situation in some ways reminiscent of *Damron*, a press release prepared by Rood had described highway golf as a sport designed by Rood to "help solve *the* drug addiction problem."<sup>48</sup> Rood gave this release to a UPI reporter, who then transmitted the story to various newspapers, including the *Houston Chronicle*. When the story appeared in the *Chronicle*, however, it referred to Rood, to highway golf, and to the sport "he invented to help solve *his* drug addiction problem."<sup>49</sup> One word was negligently changed, and Floyd Rood was converted from self-sacrificing philanthropist to drug addict.

The significance of this story, of course, is that Rood brought an action for defamation, was held to be a public figure, and thus lost his case at the summary judgment stage.<sup>50</sup> Because Rood could not show anything more than the *Chronicle's* negligence, he could not meet the stringent standard for public figures that exists after *Butts*, *Walker*, and *Gertz*.

We accept the sacrifice of public officials like *Damron* because of the pressing importance of almost completely uninhibited commentary about public officials, their qualifications, and their deeds. If we also are to accept the sacrifice of Rood and others like him, the goals to be served by doing so must be equally important. But what are those goals? Are they as important as the goals identified in *New York Times*? Are the easy answers provided by Chief Justice Warren's opinion in *Butts* and *Walker* that easy? It is to these questions that I now turn.

### III. SELECTING THE ARCHETYPES

Rules are not designed in a factual vacuum. The designer of a rule invariably imagines a particular circumstance or set of circumstances toward which the rule is directed. The rule is then tailored to fit the problem presented by the particular archetype imagined by the rulemaker. At times the rulemaker may create a narrow

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48. 418 So. 2d at 2.

49. *Id.*

50. *Id.* at 2-3.

rule, encompassing little more than the specific factual situation represented by the archetype. More commonly, however, the rule is somewhat broader than the archetype, implicitly representing the judgment that changing circumstances, or limitations in the foresight or imagination of the rulemaker, justify inclusion of possibilities that are similar, but not identical, to the archetype.<sup>51</sup> Whether the rule is broad or narrow, precise or intentionally vague, however, some hypothesized set of facts still provides the background against which the rulemaker designs the rule.

It should be apparent that it is particularly important for a rulemaker, including a court, to be accurate in the selection of the archetype that shapes the rulemaking process. If the factual circumstances perceived by the rulemaker are not reflected in reality, the resultant imperfect fit of the rule will, to that extent, render the rule ineffective.

I mention these rather general observations only because the problem of the mistaken archetype appears quite clearly in Chief Justice Warren's opinion in *Butts* and *Walker*.<sup>52</sup> Because the opinion provided the foundation for the current conflation of public figures with public officials, the reasoning deserves close scrutiny. If the foundation of the contemporary approach to public figures is shaky, a reexamination of the approach that rests on that foundation may be especially appropriate.

Even a cursory reading of the Warren opinion in *Butts* and *Walker* demonstrates that the archetype that shaped the opinion was the public figure who was closely analogous to a public official or who had some significant effect on the determination of public policy. Indeed, the particular facts of both *Butts* and *Walker* prompt this view of public figures. Walker was a former public official, and a prominent one at that.<sup>53</sup> Additionally, the case arose out of Walker's involvement in a matter of major public and political concern.<sup>54</sup> Moreover, Walker's particular prominence as a public

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51. See generally H.L.A. HART, *THE CONCEPT OF LAW* 119-32 (1961).

52. See *supra* note 19.

53. General Walker "had pursued a long and honorable career in the United States Army before resigning to engage in political activity" and, more significantly, had "been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957." 388 U.S. at 140 (Harlan, J.).

54. The Associated Press dispatch at issue in the litigation alleged that Walker, in the

official, as commander of the federal troops in Little Rock, Arkansas, was directly relevant to the controversy—school desegregation in Mississippi. Walker, therefore, although not a public official at the time, was undoubtedly prominently and influentially involved in the very same public issues that formed the agenda for public officials in the same geographic area.

Similar considerations apply to *Butts*, even if one indulges in the patently erroneous assumption that University of Georgia football is not an issue of public importance in Georgia. Although Butts technically was employed by a privately funded athletic foundation instead of the University of Georgia or its athletic department, he nevertheless served as “athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program.”<sup>55</sup> Butts thus occupied a position of prominence and influence in a major public institution. Indeed, the technical source of his salary notwithstanding, the conclusion that Butts should not have been designated a public official is by no means clear.<sup>56</sup> Although the Court did not take this path, the argument is far from frivolous. As a result, one can conclude that Butts, like Walker, shared many of the characteristics of the public official already en-

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context of the federal efforts to enroll James Meredith as a student at the University of Mississippi, “had taken command of the violent crowd and had personally led a charge against federal marshals.” *Id.* Whatever the truth of the particular allegations that Walker had “‘assumed command of the crowd’ and . . . led a charge against [federal] marshals,” *id.* at 141 n.4, little doubt exists that Walker was a prominent participant in the events surrounding Governor Barnett’s resistance to the federal court order to admit James Meredith to the University of Mississippi. *See id.* at 159 n.22.

55. *Id.* at 135.

56. The *New York Times* concept of public official was explicated in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), in which the Court said that “the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Id.* at 85 (footnote omitted). Arguably prompted by the “at the very least” wording of *Rosenblatt*, however, lower courts have often found that those who are not government employees are public officials. *See generally* *Eaton, supra* note 7, at 1375-81. Although the Court in *Gertz* noted that the cases recognize no such concept as that of the “de facto public official,” 418 U.S. at 351, this statement must be read in the context of the claim made in *Gertz* that lawyers could become public officials solely by virtue of being officers of the court. One might ask, in the context of *Butts*, whether a court would consider actions taken by Wally Butts as state action for purposes of the fourteenth amendment. Parallels could be drawn with *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), as well as with *Smith v. Allwright*, 321 U.S. 649 (1944).

compassed specifically by *New York Times*.

The particular situations of both Butts and Walker appear to explain partially the entire tenor of Chief Justice Warren's opinion, which repeatedly reminds us of those kinds of public figures who influence the resolution of public policy matters.

Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.<sup>57</sup>

This description of a public figure immediately calls to mind certain types of individuals: 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*; the anchorman of the CBS Evening News; the chairman of the Democratic National Committee; the president of Harvard University; the head of the Ford Foundation; and so on. In each of these and in innumerable other cases, a nominally private person exercises as much, if not more, influence on the determination of public policy issues as do many public officials. This phenomenon undoubtedly led the Chief Jus-

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57. 388 U.S. at 163-64.

tice to refuse to distinguish between public officials and public figures.

One who reads the Warren opinion in *Butts* and *Walker* comes away with the sense that people such as those on the foregoing list constitute the entire domain of public figures. But is this assumption correct? Is the Chief Justice's archetype an accurate characterization of the various types of people likely to occupy the field described by the term "public figure"—a field encumbered by the special burdens of *New York Times*? A close look indicates that this archetype is only a part, and perhaps only a comparatively small part, of the domain of public figures. The universe of public figures includes many people whose involvement in or influence on public policy matters is either attenuated or nonexistent.

Imagine the kinds of people who, although not involved in the determination of questions of public policy, nevertheless have that "general fame or notoriety in the community"<sup>58</sup> that makes them public figures, at least after *Gertz*. The list would include actors, singers, musicians, professional athletes, comedians, game show hosts, painters, sculptors, poets, authors of mystery novels, dancers, television chefs, and that amorphous category referred to as "personalities." On occasion, some of these people may have some direct or indirect influence on public policy, but such instances are aberrational. For the most part, the individuals in this class, however public they may be,<sup>59</sup> have little, if any, effect on questions of politics, public policy, or the organization and determination of societal affairs.

That people like Monty Hall and Julia Child are not significantly similar to public officials with respect to their involvement in public policy does not end the inquiry, nor does the dissimilarity

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58. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351-52 (1974). See also *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 165 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976). This discussion takes place in the context of the all-purpose public figure. *Gertz*, 418 U.S. at 345. Despite its protestations to the contrary, see 424 U.S. at 456, the Court in *Time, Inc. v. Firestone* seems to have expressed a somewhat greater willingness in the context of limited purpose public figures to draw distinctions based on the legitimate public interest in the matters that were the subject of the defamation. To that extent, *Firestone* provides some support, admittedly attenuated, for the broader thesis of this Article.

59. The Court has never had an "entertainer" case, but the accepted wisdom after *Gertz* is that famous entertainers and similar people are clearly public figures. See, e.g., *Carson v. Allied News Co.*, 482 F. Supp. 406, 407 (N.D. Ill. 1979).

force the conclusion that any or all varieties of public figures should be treated differently from public officials. The omission of such a substantial group from consideration in *Butts* and *Walker*, however, does at least mandate reopening the question of the public figure. A more accurately formulated description of the class of public figures might lead the courts to subdivide the class in terms of legal doctrine, or perhaps to treat the entire class differently.

Moreover, this fuller description of the class calls into question the extension of the public official rationale to public figures in light of the particular reasoning that undergirds *New York Times Co. v. Sullivan*. *New York Times* is premised on a politically oriented theory of the first amendment, drawing heavily on notions of self-government,<sup>60</sup> the special historical problem of seditious libel,<sup>61</sup> and the need in a democratic society for a mechanism to hold public officials accountable to the electorate.<sup>62</sup> Democratic theory justifications for the first amendment are not without theoretical and practical difficulties.<sup>63</sup> And even if the theories are valid, they are not necessarily the *exclusive* theories of the first amendment—an amendment that probably encompasses a number of relatively distinct justifications.<sup>64</sup> These other considerations are largely beside the point, however, because democratic theory and official accountability justifications, whatever their validity or ex-

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60. See A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), reprinted in A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 1-89 (1965); Brennan, *supra* note 27; Kalven, *Mr. Alexander Meiklejohn and the Bar-enblatt Opinion*, 27 U. CHI. L. REV. 315 (1960).

61. See *supra* note 39.

62. "Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). See generally Blasi, *supra* note 26.

63. See F. SCHAUER, *supra* note 38, at 35-46; Schauer, *Free Speech and the Argument from Democracy*, in *LIBERAL DEMOCRACY* 241 (J. Pennock & J. Chapman ed. 1983).

64. This view, see *supra* note 38, is distinct from views that the first amendment has several justifications, all of which can be combined into a unitary principle. See, e.g., Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). To the extent that we recognize the existence of a plurality of values, the likelihood that those values will coalesce around a single principle involving no conflicts among the first order values seems miniscule. See generally Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983). Least plausible, or at least less useful, are those theories of the first amendment that are premised on one very general principle. See, e.g., Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). For a fuller version of my critique of such theories, see Schauer, *supra* note 38, at 310-14.

clusivity, are still the justifications of *New York Times*. And there is little in democratic theory and official accountability justifications to explain the constitutional move from public officials to public figures, especially in the context of public figures not significantly involved in matters of public policy.<sup>65</sup> One might argue that other aspects of the first amendment justify protection for erroneous statements about rock stars and linebackers that is equal to the protection available for erroneous statements about senators and judges. Such an argument, however, can be found neither in *New York Times* nor in an extension of *New York Times* premised on the inevitable or predominant involvement of some public figures in the same types of decisions made by public officials.

The problem of the mistaken archetype may pervade not only the perception of the types of individuals that fit within the term "public figures," but also the perception of the types of publications likely to be protected by the *Butts* and *Walker* principle. As with *Butts* and *Walker*, the distortion of perception may be partially attributable to the particular publications before the Court in the most prominent cases of the 1960's. At issue in *New York*

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65. See *supra* note 58. The purpose of this Article is not to make highly specific doctrinal recommendations. Worth mentioning, however, are two broad approaches that are consistent with the theme of this Article. One approach would hew more or less to the current definition of public figures, but would treat those public figures as governed by rules at least slightly different from those that govern public officials. Admittedly, this approach paints with a broad brush, replacing existing anomalies with new ones. Aberrations in particular cases, however, are inherent in any decision to deal with a legal problem by a relatively broad categorial approach. The question is whether the new anomalies—distinguishing Ralph Nader and Jerry Falwell from Edward Koch and Dianne Feinstein—are preferable to the existing anomalies, which fail to distinguish between Patrick Ewing and Ronald Reagan, or between Boy George and Harold Washington.

The second approach substitutes complexity for anomaly. This approach would subdivide the category of public figures on the basis of the nature of the fame or notoriety of the public figure. Those public figures whose fame or notoriety relates to matters of public concern in a relatively broad, but admittedly normative, sense—how we run the government is more important than who is the starting center for the Boston Celtics—will be more susceptible to attack than those whose fame or notoriety is related to nothing more than celebrity status. This approach consequently would produce four categories—public officials, public interest public figures, celebrity public figures, and private individuals—and each category would be governed by its own standard of liability. Although close cases would still exist at the boundaries between the categories, this definitional problem is an inevitable feature of any legal category. The question is not whether close cases that test the edges of the categories might be imagined, but rather whether the consequent complexity of the approach is manageable. And as to this, trial and error is the best guide.



*Times*, *Butts*, and *Walker*, as well as in the contemporaneous "false light" case of *Time, Inc. v. Hill*,<sup>66</sup> were major national publications containing substantial proportions of political, public policy, or news material: the *New York Times*; *Time* magazine; the *Saturday Evening Post*; and the Associated Press. For publications such as these, the vision of the press as a forum for "uninhibited debate about . . . public issues and events"<sup>67</sup> is accurate. But would the Justices in *Butts* and *Walker* have operated on the same assumptions and reached the same conclusions if their archetypes for publications had been based, not on what is sold at the newsstand closest to the Supreme Court building, nor on what is delivered every morning to the doorsteps of the Justices, but rather on the kinds of publications sold at supermarket checkout counters? One's views of the role of the press or the media or even public speech are probably a function of whether the headlines one reads are "Hart takes New Hampshire" and "Meese's nomination in jeopardy," on the one hand, or "Liz and Jackie: their secret passion" and "Texas man survives face-to-face encounter with rabid llama," on the other.

Again, the existence of a distorted archetype does not of itself necessitate the conclusion that *Butts*, *Walker*, and *Gertz* were decided wrongly. Quite possibly, society and its laws can protect the *New York Times* and *60 Minutes* only by also protecting publications whose primary function seems to be reporting the latest rumors about the marital status of Elizabeth Taylor and Richard Burton.<sup>68</sup> But drawing lines between publications is not a priori inconceivable, just as we now draw lines between public figures and private individuals.<sup>69</sup> It is also possible that a different mix of pub-

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66. 385 U.S. 374 (1967). See generally Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

67. *Butts*, 388 U.S. at 164.

68. Publications such as these thus may be said to receive only strategic protection, analogous to the strategic protection given to falsity. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340-42 (1974).

69. Not everyone would agree that the line between public figures and private individuals realistically can be drawn. See, e.g., Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645 (1977). The inevitable alternative to drawing lines based on status, however, is drawing lines based on subject matter, as in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). See Christie, *Injury to Reputation and the Consti-*

lications within the class from that imagined by the Court in *Butts* and *Walker* might justify striking a different balance between protecting reputation and protecting the functions of the press, even if the price of the reworked balance is some deterrence of the material that even the *New York Times* might publish about public figures. Answering these largely empirical questions is not my purpose here, however, as I want to do little more than suggest possibilities not now commonly considered. My message is only that, if the language in the cases can be taken as probative, our current treatment of commentary about public figures seems based on a distorted perception of the class of public figures and an equally distorted view of the class of protected publications. To the extent that this is true, a serious reexamination of the public figure question is necessary.

#### IV. THE BACK SIDE OF THE FIRST AMENDMENT

Thus far, I have argued that a significant failure exists in the empirical and analytical props supporting the Supreme Court's move from commentary about public officials to commentary about public figures. But let us put aside the problem of the public figure who has no impact on public policy, as well as the problem of the publication whose contribution to public debate about current issues is negligible. Even if we assume that the problem of the mistaken archetype is not dispositive, theoretical problems remain with the Court's assumption that commentary about public figures requires the same protection against state legislation and state adjudication as commentary about public officials. In order to appreciate these problems, we must modify our usual focus and examine a different side of the first amendment.

Nearly all of the Supreme Court's defamation decisions focus on the positive or "front side" of the first amendment. That is, the Court formulates rules to protect a particularly important value served by the kind of speech at issue. Thus, *New York Times* emphasizes the special functions served in a democratic society by

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tution: *Confusion amid Conflicting Approaches*, 75 MICH. L. REV. 43, 54-56 (1976); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1214-19 (1976). Thus, the dispute is not about the judicial ability to draw lines, but rather the substantive question of which lines the courts should draw.

speech about public officials, public policy, and public institutions.<sup>70</sup> Chief Justice Warren's opinion in *Butts* follows a similar theme, reminding us of the "crucial" role played by commentary about public figures who are involved in public issues and events.<sup>71</sup>

When looking at the front side of the first amendment, we look at the value performed by the particular category of speech. Even from the front side, the necessity of the move from *New York Times* to *Butts* is not altogether clear. As the Court becomes increasingly willing to draw lines based on the comparative importance of classes of speech,<sup>72</sup> it might wish to embody in constitutional doctrine the admittedly rough, but nevertheless real, distinction between political speech and other types of important speech. To undergird such a distinction, the Court would have to determine that of the valuable kinds of speech, political speech is the most valuable of all.<sup>73</sup> Hints of accepting a greater value for political speech are surfacing more frequently in the Court's opinions,<sup>74</sup> and the gradations now drawn with respect to commercial speech,<sup>75</sup> offensive speech,<sup>76</sup> and child pornography<sup>77</sup> may signal

70. See *supra* note 60. See also BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

71. 388 U.S. at 164.

72. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). See generally Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Schauer, *supra* note 38; Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) [hereinafter cited as Schauer, *Categories*]; Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

73. See *supra* notes 60 & 70.

74. See, e.g., *Connick v. Myers*, 103 S. Ct. 1684 (1983); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290 (1981); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

75. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557 (1980).

76. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Young v. American Mini Theatres*, 427 U.S. 50 (1976). The status of offensiveness remains in a state of flux. See *Bolger v. Youngs Drug Prods. Corp.*, 103 S. Ct. 2875 (1983); *Consolidated Edison Co. v. Public Serv. Comm.*, 447 U.S. 530 (1980).

the Court's increased willingness to draw lines between political speech and other types of speech. But because such trends are at least slightly troublesome,<sup>78</sup> I want to avoid reliance on this theme. I want to avoid evaluating the comparative value of different types of speech here, no matter how obvious it is that some types of speech are simply more important than others.<sup>79</sup> To avoid making these kinds of evaluations, we must examine another side of the first amendment, a side that I want to call the "back side" of the first amendment.

In referring to the back side of the first amendment, I do not mean to suggest anything seamy. Rather, I merely want to reverse the perspective from which we normally view free speech theory. Traditionally, in looking at the front side of the first amendment, we consider the ways in which speech in general, or certain types of speech, might have some special value that explains its particular constitutional protection.<sup>80</sup> Yet such an approach seems troubling because many things that seem very important—every bit as important as speech, if not more so—do not share the first amendment's special protection against majoritarian adjustment. Eating, sleeping, working, and sex come immediately to mind, and many

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77. *New York v. Ferber*, 458 U.S. 747 (1982).

78. See Schauer, *supra* note 38; Schauer, *Categories*, *supra* note 72.

79. With respect to claims such as this, the "where do you draw the line?" issue is most confusing. I willingly and baldly assert that discussion about the qualifications of Ronald Reagan, Gary Hart, Jesse Jackson, Walter Mondale, and Harold Stassen for the presidency is more important than discussion of whether Dave Righetti should be a starting pitcher or a short reliever for the New York Yankees. Equally baldly and willingly, I generalize from this point to assert that political discussion is more important than sports discussion. The likely responses to this assertion fall into three classes: (a) the assertion is incorrect as a matter of the underlying philosophical theory of the first amendment; (b) the assertion is correct, but the distinction is impossible or dangerous to embody in a legal rule because of the risks of misapplication in close cases—risks that are magnified because of the special values underlying the first amendment; (c) you cannot distinguish politics from sports—what if Dave Righetti decides to run for Congress? The first response is interesting, important, and erroneous; the second is interesting and important, and must be considered carefully in drawing any first amendment rule; and the third is, quite simply, nonresponsive. Unfortunately, the third response is the most common. We will have made significant progress when we realize that problems of conceptual distinction and problems of institutional line-drawing are not one and the same.

80. Traditionally, the most prominent examples of this special value have been the relationship between speech and the discovery of truth, and the relationship between speech and self-government. See generally F. SCHAUER, *supra* note 38.

others can be imagined, depending on one's priorities.<sup>81</sup> Why should *speech*, admittedly crucially important, enjoy a special constitutional priority over a wide range of other crucially important activities? The answer cannot be discovered by looking for something special about speech, for such an inquiry is likely to be futile.<sup>82</sup>

If this premise is true, then what explains the first amendment? The most likely answer is that the first amendment is a protection against a certain danger—a particularly likely form of governmental overreaching.<sup>83</sup> The premise is not that speech is especially good, but that its regulation is especially dangerous. This perspective—focusing on the special dangers of governmental regulation of speech, dangers that led to the adoption of the first amendment—is what I refer to as the “back side” of the first amendment.

An inquiry from the back side of the first amendment looks quite different from a more conventional first amendment inquiry. A back side inquiry begins with the assumption that the legislature or other majoritarian body normally decides when and how to regulate the behavior of individuals to serve the broader public interest, and when and how to protect people from harms caused by others.<sup>84</sup> We also start with the assumption, one that I have considered extensively elsewhere,<sup>85</sup> that speech is capable of causing the types of consequences that are commonly taken as sufficient to justify governmental intervention.<sup>86</sup> The question, then, from the back side of the first amendment, is why a certain class of activities should be specifically immune from the normal principles of majoritarian control. What characteristic of this particular class of activities explains why generally governing presuppositions about

81. See REPORT OF THE COMMITTEE ON OBSCENITY AND FILM CENSORSHIP, CMD. 7772, at 53-60 (1979).

82. F. SCHAUER, *supra* note 38; Schauer, *supra* note 46.

83. See F. SCHAUER, *supra* note 38, at 80-86; see also Blasi, *supra* note 26.

84. See, e.g., Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); United States v. Carolene Prods. Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502 (1934). See generally J. ELY, DEMOCRACY AND DISTRUST (1980).

85. See F. SCHAUER, *supra* note 38, at 10-12, 25-30, 61-67, 167-77.

86. See Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972); Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105 (1979).

legislative decisionmaking are inapplicable?<sup>87</sup>

This question can be tailored more narrowly to the issue of defamation. Regardless of how controversial questions relating to harm may be with reference to many forms of speech,<sup>88</sup> the assumption that speech can have harmful consequences is well grounded in the context of defamation.<sup>89</sup> Childhood rhymes notwithstanding, names can hurt people. Doubters should reconsider the cases of Leonard Damron<sup>90</sup> and John Henry Faulk,<sup>91</sup> or their own likely reaction if, for example, the *National Law Journal* were to disclose that they were under investigation by their law school for having plagiarized their last seven law review articles.

To note that careers and lives can be jeopardized or damaged because of what is said about people in the media is not by itself an argument for more stringent defamation liability, but is merely an observation that preventing people from suffering the kinds of harms suffered by Damron and Faulk, among others,<sup>92</sup> is precisely the kind of responsibility we normally entrust to legislatures or to the process of common law development, and is what was done in the field of defamation before *New York Times Co. v. Sullivan*.<sup>93</sup> The question, reformulated, is whether any reason exists to doubt the abilities of legislatures or common law courts to assess the appropriate balance between protecting people against harm and promoting the undeniably valuable institution of the press.<sup>94</sup>

87. See *supra* note 84.

88. I am thinking primarily of claims relating to offensive speech, and also of plainly exaggerated estimates of the effect of speech on national security. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

89. See, e.g., Feinberg, *Limits to the Free Expression of Opinion*, in *PHILOSOPHY OF LAW* 135, 137 (J. Feinberg & H. Gross ed. 1975); Ingber, *supra* note 45.

90. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295 (1971).

91. *Faulk v. Aware, Inc.*, 35 Misc. 2d 302, 231 N.Y.S.2d 270 (Sup. Ct. 1962), *modified*, 19 A.D.2d 464, 244 N.Y.S.2d 259 (1963), *aff'd as modified*, 14 N.Y.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), *cert. denied*, 380 U.S. 916 (1965).

92. Damron and Faulk were injured by falsity, but reputational injury is largely independent of falsity. Society has important interests in the dissemination and discovery of truth—interests embodied in the first amendment and thus taken to limit the ability of people to recover for their injuries. Recognition of these societal interests, however, does not mean that people cannot be hurt by truths told about them.

93. Before *New York Times*, courts considered libel wholly outside the coverage of the first amendment. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

94. The common law, unconstrained by the first amendment, nevertheless created numerous rules and privileges premised on the importance of the press and the importance of the

In dealing with public officials, strong reasons support the belief that this particular balancing process is best removed from the control of legislatures.<sup>95</sup> Legislatures are composed of legislators, who are themselves public officials. Moreover, legislators are committed to the actions they take, and thus also committed in some way to the larger class of public officials. Quite simply, government hardly can be expected to be blind to the special interests of the governors who enjoy the power, prestige, and perquisites of public office. Thus, to leave in the hands of the governors the extent to which people may challenge the governors' policies, qualifications, and personalities has the distinct smell of the lamp.<sup>96</sup>

With respect to attacks on public officials, therefore, we have strong reason to doubt that policies enacted or enforced by—or even available to—those public officials can be conceived and used in ways that cast no suspicions on the formulators of those policies. From the perspective of the back side of the first amendment, there is indeed a particular reason to distrust our normal assumptions regarding majoritarian representative control. As a result, we substitute judicial intervention in the name of the first amendment, premised on the special dangers of biased or otherwise distorted legislative balancing of the interests involved.

From this perspective, the constitutional move from public officials to public figures is substantially more difficult than appears from reading *Butts*, *Walker*, and *Gertz*. Reformulating the problem of the public figure, we have, on the one hand, the possibility that certain people will be damaged by the negligent<sup>97</sup> actions of others and, on the other hand, a class of individuals or entities act-

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dissemination of truth. Most noteworthy, of course, is the defense of fair comment. *See, e.g.*, *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891); *Hunt v. Star Newspaper Co.*, [1908] 2 K.B. 309 (C.A.). *See generally* G. GATLEY, *LIBEL AND SLANDER* 300-05 (R. McEwen & P. Lewis 7th ed. 1974); W. PROSSER, *HANDBOOK OF THE LAW OF THE TORTS* § 118, at 819-20 (4th ed. 1971); Boyer, *Fair Comment*, 15 OHIO ST. L.J. 280 (1954); Hallen, *Fair Comment*, 8 TEX. L. REV. 41 (1929).

95. Differences exist between legislatures and common law courts, of course, but the extent to which the law of defamation is largely judge-made would seem to suggest *more* reluctance to constitutionalize the area in the name of the first amendment.

96. *See* F. SCHAUER, *supra* note 38, at 80-83. "Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out." J. ELY, *supra* note 84, at 106.

97. I incorporate the negligence standard of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), although even nonnegligent actions of publishers may cause damage.

ing negligently while performing a function that is important to society. An analogy to the development and manufacture of pharmaceuticals is not totally inapt. Sometimes people are harmed by drugs, especially when there is negligence in testing, labelling, warning, or manufacturing.<sup>98</sup> But medicinal drugs and the research activity that surrounds their creation, production, and marketing are generally beneficial.

This analogy, simple as it is, has some surface appeal. The conclusion is not intuitively obvious that penicillin is less valuable than the *New York Times*, and many of the behavioral presuppositions found in *New York Times*—self-censorship and the phenomenon of the chilling effect—could be transferred easily to the manufacture of pharmaceuticals. To the extent that society imposes costs for negligence, and to the extent that courts might determine negligence erroneously,<sup>99</sup> a manufacturer of pharmaceuticals might choose to avoid the risk-creating activity, choosing instead to manufacture only aspirin and acne cream.<sup>100</sup> If this happened, society would risk not discovering the penicillins of the future. Yet still we place our faith in the ability of the normal legislative process to balance these various risks, and to make the determination of costs and benefits. Why should the same treatment not apply to defamation of public figures? The argument is not that the balance ought to be the same as it would be in the pharmaceutical example. Indeed, various characteristics of the respective industries probably would lead a legislature to treat newspapers and drug companies differently. Rather, the argument is an argument from allocation of

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98. People also may be harmed in the absence of negligence. The question is partly one of how the loss should be allocated. Insurance is relevant to this question, as well as to the question of how much an insured defendant is deterred or chilled by the prospects of liability. Surprisingly, defamation literature rarely mentions the increasingly prevalent institution of libel insurance. An important recent exception is Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. 1, 18-22 (1983).

99. See generally Schauer, *supra* note 31, at 694-701.

100. Professor Anderson argues that the products liability analogy, see also *Buckley v. New York Post Corp.*, 373 F.2d 175, 182 (2d Cir. 1967), fails because the press has less incentive to engage in risky activity. Anderson, *supra* note 32, at 432 n.52. His argument, however, presupposes the lack of any competitive reasons for newspapers to engage in risky activity. *Id.* at 433. Now that more television stations operate as a result of cable broadcasting, and now that every newspaper has a competitor (*USA Today*), I question Professor Anderson's empirical assumptions. Moreover, incentives other than money may be sufficient to prompt risky activity. The most obvious example is a good faith sense of mission.



responsibility. If society can trust the legislature to balance the loss of penicillin against the harm to individuals occasioned by negligent manufacture, why not trust that same legislature to balance the loss of truth about public figures against the harm to those public figures caused by negligent publication?

Thus, the argument from the back side of the first amendment is that something special about the particular governmental power of public officials may justify a special exception from our normal assumptions about how decisions should be made in our society. But this "something special" does not appear to carry over to public figures, not even to those whose public prominence is in some way related to important public policy issues. The question is not whether public figures are saying or doing something important and worthy of discussion and commentary, but rather whether those public figures—or the class of public figures—have some special access to or influence on the legislative process that is likely to cause their interests to be overprotected. As long as this overprotection does not occur, as it does not now seem to be occurring,<sup>101</sup> then an important difference remains between public officials and public figures.

I see no special reason to doubt the ability of a legislature or a common law state court to strike the appropriate balance between, to take the most prominent recent example, Carol Burnett and the *National Enquirer*.<sup>102</sup> Different forms of this balance will hurt different interests in different ways and in different amounts. Some of these accommodations may be more socially desirable than others; some may simply be wrong. The question, however, is not whether the legislature or the common law process will achieve the

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101. One reason for the lack of overprotection is that the press is hardly impotent in protecting its own interests against legislative action. This power may be more or less effective in different cases, but one can hardly imagine significant restrictions on the press going unnoticed.

102. *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). This case, of course, raises the spectre of the enormous damage award, capable of causing an uninsured defendant to go out of business because of one story. Excessive awards are a problem, and I am not uncomfortable, therefore, with the general thrust of Professor Anderson's contribution to this Symposium. See Anderson, *supra* note 45. See also *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 64 (1971) (Harlan, J., dissenting); *id.* at 83 (Marshall, J., dissenting).

best solution. The question is whether the process that produces those results is suspect. Although the legislative and the common law processes *are* suspect with respect to public officials, no reason for suspicion appears to exist with respect to public figures<sup>103</sup>—and, a fortiori, with respect to private individuals.<sup>104</sup> Thus, no reason exists for not casting our lot, for better or worse, with the same processes used throughout society to make decisions and to balance competing interests.

## V. DRAWING LINES

The previous section presented the argument against the *Butts* move in its starkest form, a form that intentionally disregarded some necessary subtlety and sophistication. My primary goal was to question the ease with which the Court has moved from public officials to public figures in extending the reach of *New York Times Co. v. Sullivan*. But clearly the issue is not this simple, and I am not advocating the immediate and wholesale return to 1965 that is implicit in the preceding argument.

One reason for making this strategic retreat is that many of the lines are more blurred than I have indicated. For example, the particular biases of legislators, and the consequent distortion of the decisionmaking process, might carry over to those public figures who represent official policies closely associated with legislatures. The most obvious example would be someone like the chairman of the Democratic National Committee or an influential former public official, such as an ex-President.

More importantly, however, the suggestion that looking at the back side of the first amendment is useful does not deny that the first amendment has a front side as well. I have suggested only that, from one perspective, the problems associated with commentary about public officials seem distinct from, and substantially more serious than, the problems associated with commentary about public figures. From other perspectives, however, some of which can be seen only from the front side of the first amendment, public figures and public officials may appear to be so similar that

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103. Obviously, there are exceptions to this conclusion, but no one can claim to produce a rule without fuzzy edges. See *supra* note 79.

104. I would retain the negligence standard of *Gertz* for this category of plaintiffs.

they should be treated alike.

Thus, this distinction between the front side and the back side of the first amendment, although useful, should not be allowed to obscure a larger and more important point. To view the first amendment as being grounded in one and only one theoretical justification is a mistake. Instead, there may be several theoretical foundations for the first amendment, occasionally mutually exclusive, but more often just compatibly different.<sup>105</sup> If this is the case—that the first amendment serves multiple purposes, and that those purposes are not congruent with each other—then we should not be surprised to find that several of those purposes might coalesce around a particular grouping of circumstances. We also should not be surprised to find that, in other cases, only one of the justifications for the first amendment might apply.

Perhaps now we have found the right window through which to view the problem of the public figure. To apply a political or democratic theory justification of the first amendment to most public figures and to most publications seems quite attenuated. In many instances in which untrue statements are made about public figures, there is no discussion of public policy or the qualifications and performance of those who hold power, no utility of the statements as checks on governmental abuse of authority,<sup>106</sup> and no reason why the accommodation of interests is likely to be distorted by the biases of legislators or judges. I recognize that for many theorists of the first amendment, most prominently Alexander Meiklejohn<sup>107</sup> and Harry Kalven,<sup>108</sup> a political core of the first amendment ultimately was extended to encompass far more than the political—including art, literature, and related subjects.<sup>109</sup> Such an extension, however, jeopardizes most of the force of a politically oriented justification. No one could deny that literature,

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105. See *supra* note 64 and accompanying text.

106. Thus, Professor Blasi concludes that his "checking value" supports entirely the result in *New York Times*, but not the subsequent extension of *New York Times* to public figures. Blasi, *supra* note 26, at 581-82.

107. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

108. Kalven, *supra* note 33, at 221 ("dialectic progression").

109. See BeVier, *supra* note 70. Unlike Meiklejohn and Kalven, Professor BeVier makes the extension from the political justification for pragmatic, rather than theoretical, reasons. *Id.* at 322.

even light literature, has some bearing on issues of public policy; but so does every other aspect of our lives. If we include too much within the notion of the political, we run a serious risk of losing the perception of the special features of speech that justify special protection.<sup>110</sup>

The problem confronting theorists such as Meiklejohn and Kalven is that it seems counterintuitive, at least for someone with strong free speech instincts, to deny first amendment protection to art, literature, and commentary about the Chicago Cubs. Protection of such matters is not incompatible with a political justification for the first amendment, however, if we understand that such a justification need not be the *only* justification for the first amendment. Several justifications, or cores, of the first amendment may exist. In addition to the political or democratic theory core, there may be relatively distinct reasons to protect art and literature, scientific inquiry, and other areas. Thus some but not all of the justifications for the first amendment may protect or value commentary about public figures. If that is the case, then the untenability of the political justification in this context does not necessarily mean that the first amendment is irrelevant to the question of public figures.

We can now identify two reasons for granting special first amendment protection to commentary about public figures. One reason is that some first amendment values other than the political might justify open discussion about even those public figures who have no plausible connection to public policy matters. The other reason is that there might be sufficient overlap at the fringes between commentary about public figures and commentary about political or governmental matters, including some commentary about public officials,<sup>111</sup> to necessitate some measure of strategic protection for political speech. The special importance of political speech may justify some protection of nonpolitical speech solely to ensure a sufficiently large buffer zone around political speech.<sup>112</sup>

Neither of these reasons for protecting commentary about public

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110. See Schauer, *supra* note 46.

111. For example, this commentary would include the frequent events in which both public figures and public officials are involved. Applying two different standards to reporting one meeting between a governor and the head of the United Auto Workers would seem odd.

112. See generally BeVier, *supra* note 70.

figures, however, requires that commentary about public figures be placed in the same analytical pigeonhole as commentary about public officials. Commentary about public figures, even if covered by the first amendment,<sup>113</sup> does not necessarily need to be protected as stringently as commentary about public officials. Given that at least some of the justifications applicable to public officials are either inapplicable or less applicable to public figures, commentary about public figures seemingly should be less protected than commentary about public officials. One possibility would be to follow the suggestion of Justice Harlan in *Butts*. Speaking for four members of the Court, he proposed that public figures who are not public officials be permitted to recover, consistent with the first amendment, for defamatory falsehoods if the public figure plaintiffs could prove a "substantial danger to reputation"<sup>114</sup> as well as "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."<sup>115</sup> This standard closely resembles the common law notion of recklessness or gross negligence,<sup>116</sup> and would fit somewhere between the *New York Times* actual malice standard and the negligence standard applied to commentary about private individuals.<sup>117</sup>

I am not suggesting that Justice Harlan's particular standard necessarily be adopted, nor even that a gross negligence approach is in general the best course to follow. Other alternatives exist as well. It would be possible, for example, to distinguish between the public figure involved in matters of public policy and the public figure whose fame relates to nothing more than his ability to throw a football or play the violin. The point is simply that rigorous protection for commentary about public figures can be provided with-

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113. I incorporate here the distinction between coverage and protection. That which is covered is not necessarily protected, but coverage ensures that a court will test the reasons for restriction against first amendment standards. This distinction is examined at length in F. SCHAUER, *supra* note 38, at 89-92; Schauer, *Can Rights Be Abused?*, 31 PHIL. Q. 225 (1981); Schauer, *supra* note 38; Schauer, *Categories*, *supra* note 72.

114. 388 U.S. at 155 (Harlan, J.).

115. 388 U.S. at 155 (Harlan, J.).

116. See Wade, *The Communicative Torts and the First Amendment*, 48 Miss. L.J. 671 (1977).

117. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), established the negligence standard.

out treating that commentary as identical for all purposes to commentary about public officials.

Of course, drawing distinctions between public figures and public officials, or between some public figures and others, requires the drawing of legal lines. Apart from the Court's apparently increasing willingness to draw lines within the first amendment,<sup>118</sup> a development that is a direct consequence of broadening the first amendment,<sup>119</sup> line-drawing has been an accepted feature of defamation law for some time, even and perhaps especially in its constitutionalized form. If we can draw a distinction between public figures and private individuals,<sup>120</sup> between matters that are of public importance and those that are not,<sup>121</sup> and between matters that are newsworthy and those that are not,<sup>122</sup> then drawing a line between some public figures and others, or between public figures and public officials, does not seem so difficult. Indeed, with reference to the distinction between public figures and public officials, the special identifying characteristics of the public official, who must have some particular governmental mandate or warrant,<sup>123</sup> makes the line between public official and public figure one of the easiest to draw in all of first amendment jurisprudence.<sup>124</sup>

118. See *supra* notes 72-78 and accompanying text.

119. The phenomenon of line-drawing is most apparent with respect to commercial speech, for it would be implausible to imagine that commercial speech could be protected in the same way and with the same strength as political speech. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 n.24 (1976); see also Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 294-300 (1978).

120. I recognize that many people would deny this proposition. See *supra* note 69.

121. Justice Brennan would have drawn this distinction in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). *Rosenbloom* did not remain the law long enough for much content to be given to its "public or general interest" standard. See *id.* at 45-48 (Brennan, J.).

122. This distinction now exists with respect to invasion of privacy. See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975). But see *Regan v. Time, Inc.*, 104 S. Ct. 3262 (1984) (rejecting a newsworthiness standard as impermissible content regulation).

123. This characterization does not deny the existence of borderline cases. See, e.g., *Turley v. W.T.A.X., Inc.*, 94 Ill. App. 2d 377, 236 N.E.2d 778 (1968) (architect of county building). Some concepts, however, have more core and less fringe than others. Even as precise a designation as "ivory-billed woodpecker" is potentially vague, but the potential vagueness does not mean that "ivory-billed woodpecker" is not a more precise term than "nice," "thing," or "equal protection of the laws."

124. Because the courts now treat public officials and public figures in the same manner, no occasion has arisen to test this assumption in litigation.

Even from the viewpoint of the press, there may be some tactical advantages in distinguishing between commentary about public officials and commentary about public figures. No extraordinary insight is required to perceive that the reputation of the press is not now in a period of ascendancy—whether with the Supreme Court, with other courts, with legislatures or other governmental bodies, or with the public at large. Much of this attitude is or can be reflected in a desire to recapture some of the rigor of the common law of defamation. This approach treated newspapers, as well as other forms of the spoken and written word, as dangerous instrumentalities, legally equivalent to explosives and wild animals,<sup>125</sup> and thus subject to the constraints of strict liability.<sup>126</sup> I think it unlikely that we will return to such a state of nature. *New York Times Co. v. Sullivan* is too fixed a feature of the legal landscape to permit such a change, and its principles have some influential protectors.<sup>127</sup> But it is certainly conceivable that some aspects of *New York Times* could be weakened. Perhaps the most obvious candidate for weakening is the “reckless disregard” alternative, especially as clarified in *St. Amant v. Thompson*.<sup>128</sup> It would not take much to return to the common law meaning of recklessness, and such a return would encompass *both* commentary about public figures *and* commentary about public officials.

The point of this is to note that, given the present state of the law, a weakening in the amount of constitutional protection available to the press in its commentary about game show hosts, place kickers, and soap opera stars inevitably would weaken the amount of protection available to the press in commenting about governmental officials. From the perspective of the press, conjoining public officials and public figures may have strategic advantages in a period of legal expansion of press prerogatives. But in a period of retrenchment, as seems now to exist, separating the public figure from the public official may be the optimal way for the press to

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125. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 152 (1967) (Harlan, J.) (quoting W. PROSSER, *supra* note 94, § 108, at 792 (3d ed. 1964)); W. PROSSER, *supra* note 94, § 113, at 773.

126. “Historically, the law of defamation has been characterized by a strict liability as severe as anything found in the law.” Eaton, *supra* note 7, at 1352.

127. For example, the appellant.

128. 390 U.S. 727 (1968).

minimize its losses. For much of society, commentary about public officials and their performance is simply more important than most of the commentary about public figures that appears in the popular press. If society must sacrifice some protection of the latter in order to ensure maximum protection for the former, then the price seems well worth paying.

## VI. CONCLUSION

Legal categories are rarely neat. They have fuzzy edges, and they spill over into each other. Because of this problem, the easy path is to focus on the problems at the edges, thus ignoring significant differences between the categories. Just as the existence of dusk does not render useless the distinction between day and night, and just as the existence of people with thinning hair does not make incomprehensible the distinction between being bald and having a full head of hair, so too should the existence of close cases at the edges of legal categories not lead us to ignore important and obvious differences between the predominant portions of legal categories.

The need to focus on the center rather than the edges seems to apply with particular force to the distinction between public officials and public figures. Of course, problem cases exist at the borderlines of the categories, and of course we will confront difficult cases in applying the distinction. Some commentary about public figures should get all the protection that *New York Times Co. v. Sullivan* has to offer and, conversely, some commentary about public officials seems only remotely related to the grand purposes of *New York Times*—public officials, after all, are hardly absent from the pages of the publications sold at supermarket check-out counters. But if every fringe case led to rejection of a legal category, we would have hardly any law at all.<sup>129</sup> Important factual and theoretical differences exist between commentary about public figures and commentary about public officials. If we ignore this distinction in designing the constitutional rules that constrain actions for defamation, we may discover only too late that we have overprotected the less important, and underprotected the more important.

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129. See generally H.L.A. HART, *supra* note 51, at 121-50.