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# Origins of the Public Figure Doctrine in First Amendment Defamation Law

Catherine Hancock
*Tulane Law School*

# ORIGINS OF THE PUBLIC FIGURE DOCTRINE IN FIRST AMENDMENT DEFAMATION LAW

CATHERINE HANCOCK*

> "[I]t is questionable whether in principle the [*Sullivan* actual malice requirement for libel plaintiffs] can be limited [to public officials]. A candidate for public office would seem an inevitable candidate for extension . . . . Once that extension was made, the participant in public debate on an issue of grave public concern would be next in line."[1]

## I. INTRODUCTION

Today it is not possible to think about the contours of First Amendment doctrine that regulates defamation actions without thinking immediately of the Supreme Court's endorsement of the great constitutional divide between "public figures" and "private figures." This doctrinal distinction is the basis for determining whether a plaintiff will be required, as a public figure, to prove a defendant's "actual malice," or "high degree of awareness of the probable falsity" of the defamatory speech that is alleged to harm the plaintiff's reputation.[2] Every plaintiff seeks to achieve the status

* Professor of Law, Tulane Law School. This article is dedicated to the memory of my colleague David Gelfand, who died tragically in Pensacola Beach during his evacuation from New Orleans after Hurricane Katrina. David was a constant source of intellectual camaraderie; his dedication to the First Amendment and his work to protect civil rights made him a legend among students and colleagues. I will miss David's inimitable persona and love of life, and mourn his sudden passing for a long time to come.

1. Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964). This article is a study of First Amendment libel law between 1964 and 1967 that served as a prelude to Curtis Publ'g Co. v. Butts and Associated Press v. Walker. *Butts* and *Walker* were consolidated for argument and decision, so references to *Walker* must be cited to the *Butts* opinion. *See* 388 U.S. 133 (1967). The terms "libel" and "defamation" are used interchangeably throughout the article.

2. *See* New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). *See infra* note 8 for later definitions of actual malice. *See also* Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1370-73 (1975). For a summary of defamation law before *Sullivan*, see, for example, WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 106-111, at 754-828 (3d

of a private figure in order to argue for liability based on negligence.[3] In spite of the complexities involved in making judicial assessments of public or private figure status,[4] the Supreme Court's commitment to the public figure doctrine has remained unwavering for over 30 years.[5]

The constitutional public figure concept first appeared in *Curtis Publishing Co. v. Butts,*[6] which was decided three years after *New York Times v. Sullivan*[7] established the actual malice standard as a First Amendment requirement for public official plaintiffs.[8] Judges

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ed. 1964); 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 5.1-5.30, at 349-473 (1959).

3. *See Butts*, 388 U.S. at 133 (extending actual malice standard to some public figure plaintiffs); Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (applying actual malice standard to "all-purpose" and "limited purpose" public figures but rejecting it for private figures). Lower courts interpreted *Gertz* as allowing private figures to prove only negligence to recover damages for actual injury to reputation, and the A.L.I. approved this position. *Compare* Alfred Hill, *Defamation and Privacy under the First Amendment*, 76 COLUM. L. REV. 1205, 1212 & n.25 (1976) (citing cases), *with* RESTATEMENT (SECOND) OF TORTS § 580B cmt. c (Tent. Draft No. 21, 1975). *Compare Gertz*, 418 U.S. at 349 (holding that private figure must show actual malice to obtain punitive damages for public concern speech), *with* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985) (holding that private figure may obtain punitive damages for private concern speech based on proof of negligence).

4. *See generally* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 2.12 et seq., at 2-22-2-151 (2d ed. 2003). *See also id.*, § 2.24, at 2-35 (deriving nine factors from overlapping standards used by lower courts); *id.*, § 2.23, at 2-34.1-2.34.2 (discussing examples).

5. For early holdings determining public figure status, see, for example, *Butts*, 388 U.S. at 133 (public figures); *Gertz*, 418 U.S. 323 (private figure); Greenbelt Cooperative Publ'g Ass'n v. Bresler, 398 U.S. 6 (1970) (public figure); Time, Inc. v. Firestone, 424 U.S. 448 (1976) (private figure); Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979) (private figure); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (private figure).

6. 388 U.S. 130 (1967) (Harlan, J., plurality). For an analysis of the complex voting patterns in *Butts* and *Walker*, see Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill, Butts *and* Walker, 1967 SUP. CT. REV. 267, 275-78.

7. 376 U.S. 254, 280-81 (1964). For monographs discussing *Sullivan* and its progeny, see, for example, W. WAT HOPKINS, ACTUAL MALICE: TWENTY-FIVE YEARS AFTER *Times v. Sullivan* 97-111 (1989); WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY (2003); ANTHONY LEWIS, MAKE NO LAW: THE *Sullivan* CASE AND THE FIRST AMENDMENT (1991); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL (1986); RODNEY A. SMOLLA, SUING THE PRESS (1986).

8. For evolving definitions of actual malice after *Sullivan*, see Garrison v. Louisiana, 379 U.S. 64, 79, 74 (1964) (explaining that actual malice depends "on reckless disregard for the truth," and requires "a high degree of awareness" of "probable falsity" of defamatory speech); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (noting that a showing of "awareness of probable falsity" is based on evidence that a defendant "in fact

in the post-*Sullivan*, pre-*Butts* era were preoccupied with the tasks of defining the "public official" category and deciding whether to extend the actual malice rule to any non-official plaintiffs. Some courts were willing to create such extensions, and the term "public figure," taken from privacy tort law, is one of several labels that judges used to describe their experimental categories of "actual malice" plaintiffs. Judges also used other labels, including, "public personage," "public man," "public person," and "person in public life."[9]

When the Supreme Court fixed upon the public figure label in *Butts*, in extending the protection of the First Amendment to libels of some non-official plaintiffs, different groups of justices offered two competing definitions of a public figure.[10] Each group used this label as a new First Amendment term of art to express formulas designed to interpret the policies of *Sullivan*; the justices differed as to how to explicate and enforce those policies.[11] In effect, the justices treated the public figure label as

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entertained serious doubts as to the truth" of defamatory speech); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986) (holding that plaintiff must prove both actual malice and falsity of defamatory speech by clear and convincing evidence). *See also* HOPKINS, *supra* note 7, at 97-111 (noting that *Sullivan* adopts a novel reckless disregard definition of actual malice that is different from all existing common law definitions); Coleman v. MacLennan, 78 Kan. 711, 713 (1908) (defining common law actual malice as not making "all reasonable effort to ascertain the facts before publishing the same" and not acting "in good faith"). *Compare* 1 HARPER & JAMES, *supra* note 2, at 350 (observing that speech is defamatory when it has a "tendency to harm" the plaintiff's reputation in the "eyes of a substantial number of respectable people in the community" in which the plaintiff lives) *with* PROSSER, *supra* note 2, at 758 (noting that defamatory epithets in pre-*Sullivan* case law include "a coward, a drunkard, a hypocrite, a liar, a scoundrel, a crook, a scandal-monger, an anarchist, a skunk, a bastard, a eunuch, or a 'rotten egg,' [being] unfair to labor, or [doing] a thing which is oppressive or dishonorable or heartless").

9. *See infra* note 194. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 392-98, 415 (1960) (describing pre-*Sullivan* public figure doctrine in privacy tort law).

10. *See Butts*, 388 U.S. 130, 154-55 (1967) (Harlan, J., plurality) (citing Spahn v. Julian Messner, Inc., 221 N.E.2d 543 (N.Y.), *vacated*, 387 U.S. 239 (1966), *aff'd on reargument*, 21 N.Y.2d 124 (1967) (referring to public figure definition in privacy law)). *See Butts*, 388 U.S. at 165 (Warren, C.J., concurring in the result) ("[T]he seven members of the Court who deem it necessary to pass upon the question agree that the [libel plaintiffs] in these cases are 'public figures' for First Amendment purposes.").

11. Justices Harlan's plurality includes Justices Clark, Stewart, and Fortas; it rejects the actual malice standard, arguing for the less demanding standard of liability for "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *See*

an empty shell and filled it with original blends of competing connotations derived from sources that included libel and privacy privilege doctrines, the Court's own precedents, and the experimental jurisprudence of the lower courts.[12] Soon after *Butts*, the Court divided over whether to extend the actual malice rule to speech about private figures in connection with matters of public concern.[13] Ultimately, the Court redefined the public figure formula in *Gertz v. Robert Welch, Inc.*[14] by restricting the actual malice requirement to public officials and public figures. The much-

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Kalven, *supra* note 6, at 301 (characterizing the Harlan standard as one of "gross negligence"). Justices Brennan and White join in Chief Justice Warren's opinion, supporting the actual malice standard; Brennan and White would have remanded for a new trial in *Butts* because of a jury instruction error, but otherwise support Warrren's reasoning. Justices Black and Douglas support absolute protection for libel defendants. Thus, five justices implicitly support the actual malice standard as the minimum level of privilege. *See Butts*, 388 U.S. at 155, 162, 170, 172. Only Justice Harlan's opinion, with four votes, may be termed a "plurality opinion." As a technical matter, there can be only one plurality opinion in any decision, which is why Chief Justice Warren's opinion, with three votes supporting most of its reasoning, is labeled a "concurrence." *See* BLACK'S LAW DICTIONARY 352 (4th ed. 1996) ("Plurality Opinion [is] one agreed to by less than a majority of the court but the result of which is agreed to by the majority.").

12. *See* discussion of the tort privileges *infra* Part II.A.; discussion of post-*Sullivan* precedents *infra* Part III.A.; discussion of lower court jurisprudence *infra* Part III.B., III.C.

13. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). *Compare id.* at 52 (plurality opinion of Brennan, J., joined by Warren, C.J., and Blackmun, J.) (requiring a private person to prove actual malice when libel involves matter of public concern), *with id.* at 78-80 (dissenting opinion of Marshall, J., joined by Stewart, J.) (advocating negligence standard for private persons because actual malice requirement for public concern speech will provide insufficient protection for reputation and dignity interests of libel plaintiffs).

14. 418 U.S. 323 (1974). According to *Gertz*, a plaintiff may be designated a public figure either "for all purposes" because of "pervasive fame or notoriety," or for a "limited purpose" because of "voluntarily inject[ing] himself [or herself] or [being] drawn into a particular public controversy" concerning "a limited range of issues." The *Gertz* Court describes the all-purpose public figures as persons who occupy positions of "persuasive power and influence," and limited-purpose public figures as persons who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Both types of public figures may "invite attention and comment" and may "assume special prominence in the resolution of public questions." *Id.* at 345, 351. The Court also noted that "it may be possible for someone to become a public figure through no purposeful action of his [or her] own, but the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 345.

debated *Gertz* formula remains a central feature of defamation law today.[15]

The *Sullivan* Court did not write upon a clean slate when it chose to address the problem of accommodating the freedoms of speech and the press within common law libel doctrine.[16] The need to protect those freedoms is the driving force behind the evolution of tort privilege defenses, which include the "fair comment" and "honest misstatement of fact" privileges in libel law and the "public figure" and "newsworthiness" privileges for the tort of "publicity."[17] From the outset, the Court has framed its constitutional libel doctrine in the vernacular of tort law because a majority of the Court is not prepared to create absolute First Amendment protection from libel suits.[18] As long as the machinery of libel litigation is allowed to grind on, it is necessary to design constitutional libel doctrines with a vocabulary and substantive content that will mesh with the gears of that machinery.[19] A study of the origins of

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15. For criticisms of *Gertz* and public figure holdings, see, for example, David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905 (1984); 1 SMOLLA, *supra* note 4, § 2.35, at 2-53-2-56.1; § 2.35.50 at 2-56.3-2-56.17. *See* JONES, *supra* note 7, at 363-70 (providing bibliography citing articles about *Gertz* and its progeny).

16. For scholars noting that the function of tort "privilege" defenses in libel and privacy tort suits is to protect constitutional freedoms of speech and press, see, for example, Kalven, *supra* note 6, at 290; Prosser, *supra* note 9, at 410; Hill, *supra* note 3, at 1255-56; William Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases?*, 18 UCLA L. REV. 371, 374 (1970). For pre-*Sullivan* commentary on free speech issues in libel and privacy law, see, for example, Marc A. Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963); Harry Kalven, Jr., *The Law of Defamation and the First Amendment*, in CONFERENCE ON THE ARTS, PUBLISHING, AND THE LAW 3 (Univ. of Chicago Law School Conference Series No. 10, 1952); Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875 (1949).

17. In this article the term "publicity" tort is used for the action that Prosser calls "public disclosure of private facts," Dobbs calls "publicizing private life," and Smolla calls the "publication of private facts." *See* Prosser, *supra* note 9, at 392; 1 DAN B. DOBBS, THE LAW OF TORTS §§ 425-428, at 1198-1211 (2001); 2 SMOLLA, *supra* note 4, § 10:37-10:54.50 (1997-2004). *See infra* note 23 for other privacy torts.

18. Absolute immunity from libel suits for critics of public officials is advocated by Justices Goldberg, Black, and Douglas in *Sullivan*, 376 U.S. at 293 (Black, J., concurring, joined by Douglas, J.); *id.* at 297 (Goldberg, J., concurring in the result, joined by Douglas, J.). *See infra* note 95.

19. For commentary on common law libel doctrine and *Sullivan*, see, for example, Eaton, *supra* note 2, at 1351-64; Rodney A. Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 64-94, 48 n.230 (1983).

the constitutional public figure concept in libel law reveals how tort privileges may be reconfigured into new doctrines that exhibit traces of the vocabulary and rationales that shaped their original identities. The Court's doctrinal uses of tort law are sufficiently unique and unpredictable that the era between *Sullivan* and *Butts* provides rich case law and commentary devoted to the difficulties of assessing the implications of those uses.[20] Like the tort privileges that preceded it, the "defeasible" First Amendment privilege,[21] created in *Sullivan* and its progeny, is based on "sociological guesses lightly made."[22]

In Part II.A. of this article, the privileges for the publicity tort are compared to the libel privileges of fair comment and honest misstatement of fact, in order to explain why the *Sullivan* Court selected the latter privilege as a source for a new actual malice requirement for public official plaintiffs. Part II.B. describes how some rationales in *Sullivan* are broad enough to justify absolute First Amendment protection of libelous speech concerning public officials, whereas the rationales explaining the merits of the actual malice requirement are less well-developed. The tension between these two narratives leads to confusion among lower court judges as to whether to interpret *Sullivan* to favor the extension of the actual malice rule to libel suits by non-official plaintiffs.

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20. *See* JONES, *supra* note 7, at 363-70 (providing bibliography citing articles about *Sullivan* doctrine); ROSENBERG, *supra* note 7, at 349-57 (same). For notable period commentary, see, for example, Jerome A. Barron, *Access to the Press – A New First Amendment Right*, 80 Harv. L. Rev. 1641 (1967); Arthur Berney, *Libel and the First Amendment – A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Cohen, *supra* note 16, at 371; Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Willard H. Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. Q. 581 (1964).

21. New York Times Co. v. Sullivan, 376 U.S. 254, 292 n.30 (1964). *See infra* Parts III.B. & C. for case law.

22. *Compare* Kalven, *supra* note 6, at 299 (referring in context to Justice Harlan's *Butts* opinion, and criticizing Harlan's assumed answers to empirical questions such as: "How free and robust is [the] press? How hardened are public officials to irresponsible publicity? Do they knowingly assume these risks? What are the relative possibilities for counterargument [by those officials or by so-called public figures]?"), *with* Richard A. Epstein, *Was* New York Times v. Sullivan *Wrongly Decided?*, 53 U. CHI. L. REV. 782, 817 (1986) (opining that "the great problem with [*Sullivan*] is that the choice of legal principles rests heavily on certain elusive, empirical issues," such as the "costs of error and of administration," "the incentives upon the press to investigate important matters of public affairs," and "the incentives for plaintiffs to participate in public affairs").

Part III of the article explains how the Court uses three post-*Sullivan* decisions to articulate conflicting hints and signals that ambiguously favor the extension of the actual malice requirement. After explaining how lower courts respond in contradictory ways to these signals, Part III concludes with a discussion of how the pro-extension courts apply the actual malice rule to cases where plaintiffs either play an active role as participants in public debates, or use their leadership or influence to seek to shape public opinion. These courts do not extend the actual malice rule to plaintiffs solely on the basis of their status as public figures, as defined by the publicity tort privilege, and some courts expressly reject arguments for such an extension.

Part IV of the article explains how two templates for a new First Amendment public figure privilege emerge in the *Butts* opinions. Chief Justice Warren's opinion emphasizes the need to extend the actual malice requirement to those figures who resemble public officials in their powers of leadership and influence. Justice Harlan advocates a less protective gross negligence privilege, and applies it to public figure plaintiffs who attract the interest of the public, yet play no role in public debates. Part IV.A. examines the defense of the *Sullivan* narratives reflected in the Warren opinion's public figure definition, and Part IV.B. describes the reworking of those narratives by the Harlan opinion. Justice Harlan's narratives defending his rejection of the actual malice rule prove to be more important than either his public figure definition or his gross negligence standard. Harlan's narratives detach *Sullivan*'s rationales from the actual malice rule they were designed to support, and replace them with alternate narratives that establish a legacy for the *Gertz* Court. To this day, the public figure label remains an empty shell, filled with a blend of connotations that serves the Court's continuing reinterpretations of the values protected by *Sullivan*.

## II. The Tort Law Context of the *Sullivan* Decision

### A. *Privacy and Libel Privileges in the Era Before* Sullivan

The *Sullivan* opinions do not mention the term "public figure," but by 1964 the public figure privilege is a well-established

doctrine in privacy law for the publicity tort.[23] The function of this privilege is to protect the defendant whose true speech[24] about "private facts"[25] is communicated to the public,[26] is offensive to persons of ordinary sensibilities,[27] and causes emotional harm to the plaintiff.[28] This privilege allows a defendant to avoid liability when a plaintiff qualifies for public figure status; the status attaches to "any one who has arrived at a position where public attention is focused upon him as a person."[29] More specifically, this status applies to "a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling" gives the public a "legitimate in-

23. *See* Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (the article widely credited as the impetus for the state court debate that led to the adoption of the publicity tort in case law and statute). Warren and Brandeis were law school classmates and law partners. Warren is said to have persuaded Brandeis to write the article when Warren became upset by newspaper publicity concerning his daughter's wedding. PROSSER, *supra* note 2, at 383. The purpose of their proposed publicity tort was to create liability for harms caused by true speech that neither qualifies as libel nor meets the requirements of the privacy torts of "false light," "appropriation" of personality, or "intrusion" upon private life. *See* Prosser, *supra* note 9, at 387-409 (comparing the privacy torts). R

24. Truth is not a defense to the publicity tort, which creates liability for true speech. False speech is an element of the libel tort and of the privacy tort of false light, which creates liability for false, non-defamatory but embarrassing publicity that is objectionable to the ordinary person. Examples of false light cases include unauthorized use in the mass media of a person's name or picture, erroneous descriptions of a person, or erroneous attributions of opinions or writings. *See* PROSSER, *supra* note 2, at 838-39.

25. *Compare* Prosser, *supra* note 9, at 394 (explaining that "private facts" do not include information that the plaintiff "leaves open to the public eye," such as her appearance in a public place and matters of public record) *with* Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that truthful publication of matter contained in public records is protected under First Amendment unless legal prohibition is "narrowly tailored to a state interest of the highest order").

26. *See* Harry Kalven, Jr., *Privacy in Tort Law: Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 333 (1966).

27. *Compare* Prosser, *supra* note 9, at 396-97 (noting that liability will exist for giving publicity to things "which the customs and ordinary views of the community will not tolerate") *with* Kalven, *supra* note 26, at 334 (concluding that "[t]he upshot" of using a mores test for the offensiveness standard is that "every unconsented-to reference in the press creates prima facie a cause of action that could take the plaintiff to the jury").

28. *Compare* Prosser, *supra* note 9, at 398 ("The interest protected is that of reputation, with the same overtones of mental distress that are present in libel.") *with* Kalven, *supra* note 26, at 334 ("Surely it is even more conjectural to price the emotional impact of a truthful nondefamatory statement" than to assess the impact of libel.).

29. Prosser, *supra* note 9, at 411.

terest in his doings, his affairs, and his character."[30] Various theories are invoked to justify the loss of privacy rights by a public figure. It is argued that a plaintiff's "waiver" of privacy rights may be inferred from her participation in activities that attract media attention,[31] and that no privacy loss is suffered from additional publicity about a person whose affairs are "already public."[32] The privilege also is justified as a means of insuring press freedom to "inform the public about those who have become legitimate matters of public interest."[33]

A closely related privilege arises for defendants in publicity cases, when plaintiffs effectively become "public figures for a season,"[34] even though they are not public figures generally, and do not seek publicity voluntarily. If a plaintiff comes to be caught up in the news, defined broadly to include "that indefinable quality of information which arouses public attention,"[35] then a "newsworthiness" privilege of "giving publicity to news and other matters of public interest" will defeat liability.[36] The newsworthiness and pub-

30. Prosser, *supra* note 2, at 844-45. *See* Prosser, *supra* note 9, at 410-11 (providing case law examples of public figures that include actors, sports figures, entertainers, public officers, inventors, explorers, and war heroes).

31. Prosser, *supra* note 9, at 410-11; Franklin, *supra* note 16, at 109 n.16.

32. Prosser, *supra* note 9, at 411. Three aspects of the public figure privilege for the publicity tort prefigure the *Gertz* definition of the First Amendment privilege. First, the tort privilege provides a defense to "additional publicity, as to matters reasonably within the scope of the public interest which [the public figure] has aroused." *Id.* at 411-12. Second, a defendant's publicity cannot create public figure status for a plaintiff because "public stature must already exist before there can be any privilege arising out of it. . ." *Id.* at 411. Third, a public figure may be characterized as a "celebrity," who by his "voluntary" efforts has "succeeded in placing himself in the public eye." *Id.* at 410. *See also supra* note 14 (summarizing the *Gertz* Court's definition of public figure).

33. Prosser, *supra* note 9, at 411.

34. *Id.* at 413. The newsworthiness privilege's role in changing the status of nonpublic figures into "involuntary" public figures echoes elements of the "limited public figure" concept in *Gertz*. *See also supra* note 14.

35. Prosser, *supra* note 9, at 412. *Compare* Cohen, *supra* note 16, at 380 (explaining that Warren and Brandeis "conceded a privilege to print news," but assumed that distinctions could be drawn "between protected 'matter which is of public or general interest' and [publicity about] trivial events or gossip" that would establish liability for the publicity tort) *with* Kalven, *supra* note 26, at 335-36 (observing that "since Warren and Brandeis wrote, it has been agreed that there is a generous privilege to serve the public interest in news" and so it may be that "the claim of privilege is [so] overpowering as to swallow the tort").

36. PROSSER, *supra* note 2, at 844. *See also* Franklin, *supra* note 16, at 115 (noting that "courts appear willing to accept most professional definitions of 'news'" and that

lic figure privileges are "so merged as to become inseparable," even though, technically speaking, the public figure privilege protects publicity about a person and the newsworthiness privilege protects the reporting of an event.[37] Both privileges protect true speech that appeals to the public interest,[38] and proof of a defendant's ill will or actual malice will not defeat these defenses.[39]

Before the *Sullivan* decision, it does not appear that the public figure privilege migrated into defamation law, in which the older privileges of fair comment[40] and honest misstatements of fact[41] are embedded. The public figure term does not appear in connection with libel law analysis in well-known treatises of the day[42] and appears infrequently in case reports involving libel claims.[43] Even when the term is mentioned in a libel case, the reference does not mean that the defendant invoked the public figure privilege.[44] Doctrinal reasons explain why the publicity privileges are incompatible with the libel privilege of fair comment, which is "grudgingly granted" and "narrowly construed."[45] In the pre-*Sullivan* era, some

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"once an event is determined to be news the individuals involved are inevitably subject to coverage").

37. *Compare* Prosser, *supra* note 9, at 413 n.254 *and* PROSSER, *supra* note 2, at 844, *with* Kalven, *supra* note 6, at 280 (merging the two publicity privileges by describing them as a privilege in privacy tort for "newsworthy events or people").

38. *See* Cohen, *supra* note 16, at 380 n.46 (observing that the publicity privileges have been "so greatly expanded that few of the cases allowing recovery on a privacy theory rest upon mass media disclosure of true facts" and citing supporting cases whose holdings are obsolete because of modern precedents). *See supra* note 25.

39. *See*, *e.g.*, Sidis v. F-R Publ'g Corp., 113 F.2d. 806 (2d Cir. 1940) (noting that truthful, non-libelous publicity, even if malicious, does not create liability for privacy tort).

40. *See generally* PROSSER, *supra* note 2, at 812-16; 1 HARPER & JAMES, *supra* note 2, at 456-63.

41. *See* PROSSER, *supra* note 2, at 815; 1 HARPER & JAMES, *supra* note 2, at 449-50.

42. *See*, *e.g.,* RESTATEMENT OF TORTS § 606 (1938); PROSSER, *supra* note 2, at 812-16; 1 HARPER & JAMES, *supra* note 2, at 456-64.

43. A Lexis search for libel cases before 1964 yields few cases where the term public figure appears in the same opinion as the word libel. *See*, *e.g.*, Flanagan v. Nicholson Publ'g Co., 137 La. 588 (1915), *cited in Butts*, 388 U.S. at 154 (Harlan, J., plurality).

44. *See Flanagan*, 137 La. at 600 (where the court's analysis rests on the fair comment privilege). *See also* Prosser, *supra* note 9, at 415-16 (emphasizing that the public figure and newsworthiness privileges apply only to the publicity tort, so "that either the public figure or the man in the news can maintain an action" for the other three privacy torts).

45. Cohen, *supra* note 16, at 375. *See infra* text accompanying notes 49-55.

courts seek to expand the narrow boundaries of the latter privilege in order to protect misstatements of fact about public officials. The actual malice component of this privilege becomes a source for the First Amendment privilege established in *Sullivan*. In turn, *Butts* implants the public figure label, though not the public figure privilege, into *Sullivan*'s doctrine, and thereby into defamation law.

Compared to the publicity tort privileges, the fair comment privilege for libel is narrower and more complex.[46] One premise for the latter privilege is that the expression of opinion relating to matters of "public concern" should be protected in a "democratic society that enjoys the tradition of free speech."[47] This idiom of public concern echoes the public interest[48] element of the publicity privileges, but the fair comment privilege displays a unique doctrinal framework that revolves around a definition of protected "opinion." Liability for libel may attach to a statement of opinion as well as a statement of fact,[49] and only an opinion that can satisfy numerous technical requirements may qualify as privileged comment. More specifically, protected opinion must be based only "upon a true or privileged statement of fact."[50] The opinion must not directly (but only indirectly)[51] imply "facts truly stated or otherwise known" or "readily accessible."[52] The opinion must be susceptible

46. *See* PROSSER, *supra* note 2, at 795-812 (providing illustrations of other libel privileges not relevant here).

47. 1 HARPER & JAMES, *supra* note 2, at 456. *See also* Noel, *supra* note 16, at 877 (arguing that the fair comment privilege is meant to encourage "free public discussion" as a "means of combating abuses and corrupting influences, and of aiding the public to form a sound judgment on matters of public interest").

48. *See, e.g.*, PROSSER, *supra* note 2, at 812, 844-45 (using the terms public concern and public interest interchangeably in fair comment analysis and using the term public interest more consistently in analysis of publicity privileges).

49. *See* RESTATEMENT OF TORTS § 566 (1938) (providing that "[a] defamatory communication may consist of a statement of opinion based upon facts known or assumed by both parties to the communication"). The concept of a false opinion is recognized in English libel law. The original benefit of the fair comment privilege is to allow a defendant to escape liability when his or her opinion is not based on a false fact and is honestly held. Without the fair comment privilege as a defense, a defendant's avoidance of liability would require proof of the truth of a factual statement, or proof of the correctness of an opinion. *See* HARRY STREET, THE LAW OF TORTS 312-13, 332 (1963).

50. 1 HARPER & JAMES, *supra* note 2, at 456.

51. *See id.* at 458.

52. *See id.* at 458-59. *See* Herbert W. Titus, *Statement of Fact Versus Statement of Opinion — A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962) (criticizing the

"of being drawn from the implied or known facts"[53] and must be uttered by the speaker as her "actual honest opinion" for "the purpose of giving to the public the benefit of the opinion."[54] Finally, even if a defamatory opinion satisfies all these requirements, the plaintiff's proof of actual malice, defined as negligence, will defeat this libel defense.[55] Notably, the fair comment privilege does not effectively protect speech that occupies the domain of libel. That domain encompasses false and defamatory speech[56] and the fair comment privilege only provides an elaborate and restricted defense of truth.[57] By contrast, the publicity privileges protect all true information in the public interest. This speech domain falls squarely within a large part of the territory of actionable speech for the publicity tort.

The honest misstatement of fact privilege develops when some courts decide to stretch the boundaries of the fair comment privilege beyond the zone of "opinion based on true fact" into the realm of "false statements of fact."[58] The refusal of most courts to protect that realm under the fair comment privilege is justified originally by the concern that "desirable candidates" would be "deterred from seeking office" if they were subjected to criticisms containing misrepresentations of fact.[59] This rationale is expanded later to justify the inapplicability of the fair comment privilege to other misstatements of fact.[60] As early as the 1840s, some scholars argue that a "conditional privilege" should be created for libelous statements of fact about public officials or political candidates, in the absence of a

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opinion requirements); Noel, *supra* note 16, at 877-88 (discussing the fair comment defense).

53. 1 HARPER & JAMES, *supra* note 2, at 460.

54. RESTATEMENT OF TORTS § 606 cmt. d (1938).

55. *See* Cohen, *supra* note 16, at 375 ("[T]he plaintiff could avoid an unfavorable summary judgment or directed verdict with evidence of malice, in the sense of either negligence or ill will.").

56. *See* 1 HARPER & JAMES, *supra* note 2, at 350; PROSSER, *supra* note 2, at 758.

57. *See Sullivan*, 376 U.S. at 267. *See, e.g.*, Franklin, *supra* note 16 (explaining the history of the truth defense). *See also* STREET, *supra* note 49, at 312-13, 332.

58. Each reference to "false statements of fact" in the text is meant to include "opinions based on false statements of fact," and other opinions that do not qualify for the definition of "opinion" protected by the fair comment privilege. These false statements and "false opinions" are necessarily defamatory.

59. PROSSER, *supra* note 2, at 814.

60. *Id.*

plaintiff's showing of actual malice.[61] The new privilege also becomes known as the privilege for honest misstatement of fact, and it attracts a following among a minority of state courts.[62] The members of the American Law Institute debate the desirability of adopting this privilege when drafting the first Restatement of Torts. But they reject this course of action when the opponents of the reform argue that it is a "revolutionary," "dangerous and unwarranted departure from the whole doctrine of libel," and that it would give the press "unbridled license" to defame public officials and candidates.[63]

Both the fair comment and honest misstatement of fact privileges protect only speech that relates to a matter of public concern.[64] That concept is defined through two overlapping branches of doctrine, one of which relates to the plaintiff's status and the other to the plaintiff's conduct.[65] Under the status branch, opinions about individuals are deemed to relate to the public concern if the person is a public official, a candidate for public office, or a

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61. *See* ROSENBERG, *supra* note 7, at 160-61 & n. 19. One famous proponent of this new privilege was Judge Thomas Cooley of the Michigan Supreme Court, author of treatises on constitutional law and torts. *Id.* at 168-69, citing THOMAS COOLEY, TREATISE ON THE LAW OF TORTS 217 (1879). *See also Sullivan*, 376 U.S. at 280 n.20 (citing Cooley's 1903 constitutional law treatise).

62. *See*, *e.g.*, Coleman v. MacLennan, 78 Kan. 711, 729-32 (1908). *Compare* Berney, *supra* note 20, at 8 (declaring that the *Coleman* opinion "raised and considered almost every argument that has ever been mustered for or against liberalization" of the fair comment privilege but "[n]otwithstanding [its] sound analysis," *Coleman*'s adoption of the actual malice rule garnered "only a meager following"), *with* HOPKINS, *supra* note 7, at 76 (arguing that a "careful examination of case law" reveals that in 1964, the "so-called minority position [of *Coleman*] was not a minority position at all"; the *Coleman* rule was adopted by more states than rejected it, and the miscount by scholars and judges of the states supporting *Coleman* occurred because of "changes in the law that were not reflected in the literature").

63. ROSENBERG, *supra* note 7, at 219-20. The A.L.I. defeated the reform proposal in May 1937 by a vote of 98-22, with Judges Learned Hand, Augustus Hand, and Van Vechten Veeder opposing the new privilege, and torts professors John Hallen of Texas and Fowler Harper of Yale supporting it, along with Judge Rousseau Burch, the author of *Coleman*. *Contra* John E. Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 72 (1929) (predicting that the new privilege "will probably become, in time, the prevailing view in this country").

64. *See* PROSSER, *supra* note 2, at 812.

65. These two categories overlap when members of the status category, such as public officials, engage in conduct that qualifies them for the second category.

person in charge of a public institution.[66] The privileges cover "the public acts of a public man,"[67] using the rationale that, as one catchphrase puts it, public men are "public property."[68] Under the conduct branch of the doctrine, opinions are privileged if they relate to works that the plaintiff submits to the public for approval.[69] Similarly, if a plaintiff submits his ideas to the public through the "taking [of] a belligerent or controversial position," thereby inviting public controversy, then a defendant's opinion about those ideas or positions also qualifies as privileged.[70] Like public men who become public property through the fiction of implied consent to fair comment, a plaintiff's public works and positions may also undergo this transformation.[71]

The vocabulary, definitions, and rationales of the libel privileges intersect and overlap with those of the publicity tort privileges, even though the libel privileges neither create a right "to comment on matters merely because they [are] of news value,"[72] nor protect comments about all persons who are public figures by virtue of being the object of public attention.[73] The categories of public men and public figures overlap because the activities of plaintiffs in the public men category can make them objects of public interest, thereby creating public figure status. Similarly, the professions of entertainers or sports figures require them to submit their performances for public comment, thus establishing the fame

66. 1 HARPER & JAMES, *supra* note 2, at 456-67. *See Developments in the Law of Defamation,* 69 HARV. L. REV. 875, 925-26 (1956) (noting that "usually [fair] comment concerns public officers, political candidates, leaders of influential private groups, and persons who have taken a public position on matters of wide interest").

67. 1 HARPER & JAMES, *supra* note 2, at 461. *See also Coleman*, 78 Kan. at 736 (citing Post Publ'g Co. v. Hallam, 59 Fed. 530 (1893), citing Davis v. Shepstone, 11 App. Cas. 187 (P.C. 1886)).

68. 1 HARPER & JAMES, *supra* note 2, at 461. *See* ROSENBERG, *supra* note 7, at 169 (citing THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 455-56 n.4 (1868) (referring to the public man concept)).

69. *See* PROSSER, *supra* note 2, at 813-14 (providing examples that include literary and artistic works, musical or theatrical performances, television and radio programs, sports events and other entertainment, and scientific discoveries).

70. *Id.* at 814.

71. 1 HARPER & JAMES, *supra* note 2, at 457.

72. Cohen, *supra* note 16, at 375. *See* Franklin, *supra* note 16, at 112 n.29.

73. *See* Prosser, *supra* note 9, at 411-12.

necessary to create public figure status based on their calling.[74] Another intersection of the libel and publicity privileges is reflected in the similarity of the rationales used to justify them. For example, public figure plaintiffs lose the right to bring a publicity suit because of voluntary or involuntary exposure of their activities that attract media attention. Similarly, the plaintiff class composed of public men, entertainers, and participants in public controversies, loses the right to sue for libel when subjected to privileged opinions; by exposing works or ideas to the public, they subject themselves to the consequences of public scrutiny and criticism. The fictional character of the four privileges' rationales makes it easy to transfer each rationale from one privilege to another.[75] Although the publicity and libel privileges are different in scope and effect, they share enough common ground to allow for the potential intermingling of their vocabulary and rationales.

In theory, the honest misstatement of fact privilege applies to the same categories of public concern speech as the fair comment privilege.[76] But in practice, it appears that among the courts that recognize the new privilege, few courts extend the actual malice requirement beyond cases where the plaintiff is a public official or candidate.[77] Thus, on the eve of *Sullivan*, only limited inroads have

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74. *See supra* note 30 and text accompanying notes 29-30.

75. For example, Restatement commentary describing the rationale for the publicity tort echoes the language of the rationales for the fair comment privilege in libel. Under Section 867, the Restatement creates liability for the publicity tort for a "person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the [public]." The relevant commentary explains that if a person "submits himself or his work for public approval, as does a candidate for public office, a public official, an actor, an author or a stunt aviator," he or she "must necessarily pay the price of even unwelcome publicity through reports upon his private life" because he or she is "subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims." RESTATEMENT OF TORTS, *supra* note 42, § 867 cmt. c (1938).

76. *See*, *e.g.*, *Coleman*, 78 Kan. 711, 732 (1908) (observing that the honest misstatement of fact privilege "must apply to all officers and agents of government [and] to the management of all public institutions, educational, charitable, and penal; the conduct of all corporate enterprises affected with a public interest, transportation, banking, insurance; and to innumerable other subjects involving the public welfare").

77. *See* Case Comment, *Constitutional Law — First Amendment Requires Qualified Privilege to Punish Defamatory Misstatements about Public Officials,* 113 U. PA. L. REV. 284, 289 & 289 n.36 (1964) (citing cases from four jurisdictions with non-official plaintiffs where *Coleman* rule is used, and dicta from two others). *But see* Samuel Gray McNamara, Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18

been made into the domain of libel through the use of the honest misstatement of fact privilege to protect false and defamatory speech. In time, this privilege might have grown to create a larger field of protection for libelous speech, by moving into the categories of libels about public men and persons who submit their works or ideas to the public.

But the potential evolution of the honest misstatement of fact privilege is interrupted by the surprising event of the *Sullivan* decision, which endorses a modified version of that privilege as First Amendment doctrine. The "nationalizing" effect of the new privilege raises the question whether the public concern concept for the libel privileges will be adopted as the compass for the First Amendment privilege. If not, then an alternate compass could be constructed out of other tort privileges. Before *Sullivan*, the public figure category overlaps with the category of persons whose status or activities make them subject to the fair comment privilege.[78] After *Sullivan*, the courts must find vocabulary and doctrines to define the scope and meaning of the *Sullivan* privilege, and the public figure concept exhibits a number of assets that make it useful for such purposes.

First, the public figure concept is not weighed down with doctrinal baggage in the arena of common law libel that could interfere with its use as part of the machinery of the constitutional privilege. Second, its definition as a publicity privilege is so broad that a narrower constitutional definition may be invented without disturbing its broad original meaning. Third, the public figure label possesses a rhetorical resonance with the public man label, in

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VAND. L. REV. 1429, 1436 (1965) (noting that honest misstatement of fact privilege "is restricted to criticism of government or public officials").

78. 376 U. S. at 269. After *Sullivan*, some commentators note that the libel privilege of fair comment was applicable to cases involving public figures. *See, e.g.*, Kalven, *supra* note 6, at 290-91 (observing that "[f]air comment [doctrine may rely on] differences between comment by way of literary criticism and comment on public officials, candidates for office, or other public figures"); Robert A. Melin, Note, *Torts: Trial Court Difficulties in Applying the New Rule of Fair Mistake to Civil Libel*, 48 MARQUETTE L. REV. 128, 133 n.34 (1964) ("It is universally agreed that the rule of fair comment applies to public figures, not simply political figures."); McNamara, *supra* note 77, at 1436 (noting that fair comment doctrine uses the public figure concept). These commentators do not explain the function of the public figure concept in fair comment doctrine, but it is evident that the fair comment plaintiff categories overlap with the public figure category. *See supra* text accompanying note 74.

the same way that the public interest and public concern labels appear to be related. Finally, the public figure privilege is associated with rationales for the loss of privacy rights that resemble the rationales of the libel privileges.[79] When the constitutional public figure privilege makes its first appearance in *Butts*, the story of the official migration of the public figure concept from privacy law into libel law begins to unfold. The potential directions of that unfolding may be discerned through a study of *Sullivan* and its progeny, and of the pre-*Butts* decisions of lower court judges who attempted to read the tea leaves of the Supreme Court's opinions.

### *B. The Construction of a First Amendment "Privilege in Progress" in* Sullivan

When the *Sullivan* Court announces that libel has no "talismanic immunity" from First Amendment scrutiny,[80] its endorsement of an actual malice requirement for libels concerning the public conduct of public officials instantly establishes a national law of libel.[81] Contemporary observers recognize that *Sullivan* is a landmark civil rights case,[82] and some express pleasure as well as

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79. *See supra* note 75 and text accompanying notes 31-38, 66-71, 73-75.

80. *See* LEWIS, *supra* note 7, at 124 (explaining that First Amendment scrutiny is a dramatic development because "the Supreme Court had said many times that libel was outside the protection of the First Amendment"). Professor Herbert Wechsler of Columbia Law School authors the brief and argues the case for the *Times*. Wechsler persuaded the *Times* executives to challenge the verdict on First Amendment grounds because, "if the *Times* didn't make this argument, in what was overall a very sympathetic case, who could be expected to make it?," and because "the scope of the First Amendment had been progressively expanded by the Supreme Court in recent years," so that almost "every one of the old shibboleths" about unprotected speech had been abandoned. *Id.* at 107.

81. *See* cases cited *supra* note 8. *See also* Pedrick, *supra* note 20, at 586, 587 (observing that because of *Sullivan* "the law of libel . . . has been nationalized to a considerable if somewhat uncertain extent"); Harry Kalven, Jr., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 68 (1988) (noting that after *Sullivan*, "the Court has been forced to rewrite and federalize a considerable part of the state common law of libel").

82. *See* Kalven, *supra* note 20, at 200 ("Alabama somehow pounced on [the] opportunity to punish the *Times* for its role in supporting the civil rights movement in the South."). *See also* William O. Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 657, 660 (1966); Lewis C. Green, *The* New York Times *Rule: Judicial Overkill*, 12 VILL. L. REV. 730, 734 (1967); Pedrick, *supra* note 20, at 588; Samuel R. Pierce, Jr., *The Anatomy of a Historic Decision:* New York Times v. Sullivan, 43 N. C. L. REV. 315 (1965); Michael A. Macchiaroli, Note, *Libel — Public Official — Recovery for Libel of a Public Official Requires*

surprise at the decision,[83] while others express fear that the actual malice rule provides too much protection for libelous criticism of officials.[84] It is apparent that the complexities of the *Sullivan* opinion create ambiguities concerning the scope of its holding and its implications. At the center of this ambiguity is the tension created by the Court's endorsement of rationales that are broad enough to justify absolute First Amendment protection for libels of public officials, coupled with the articulation of narrower rationales that limit such protection to libels made without actual malice.[85] Other

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*Proof of Actual Malice*, 9 VILL. L. REV. 534, 539 (1964); Note, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 204 (1964).

83. *See*, *e.g.*, Pedrick, *supra* note 20, at 587 ("To argue . . . that the established majority common-law rule, sanctioned by the Restatement of Torts, the law of England, and the countries of the Commonwealth, was an abridgement of . . . the first amendment called for a certain temerity, a certain boldness of spirit [in which counsel for the *Times*] . . . succeeded brilliantly."); Kalven, *supra* note 20, at 221 n.125 (opining that *Sullivan* is "an occasion for dancing in the streets").

84. *See*, *e.g.,* Barron, *supra* note 20, at 1657 (arguing that *Sullivan* will "serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate"); Berney, *supra* note 20, at 57 ("If defamation of public officials was a major weapon in the rise to power of the Nazis, what is to redress the balance after [*Sullivan*] should reactionary groups gain control of a significant segment of the press?"); Green, *supra* note 83, at 731; Shelmerdeane Miller, Note, *Constitutional Law Law — Freedom of Press — Misstatement of Fact Held Privileged in Libel Action by Public Official*, 14 DEPAUL L. REV. 181, 183-84 (1964); Michael J. Rubin, Note, *Torts — Defamation — Constitutional Requirement of Actual Malice* — New York Times Co. v. Sullivan, 14 AM. U. L. REV. 71, 74 (1964).

85. *Sullivan*, 376 U.S. at 281-83 & 292 n.30 (citing *Coleman v. MacLennan*, 78 Kan. 711 (1908)). *See* cases cited *supra* note 8. The *Sullivan* Court held that the plaintiff's evidence did not satisfy the actual malice standard. Police Commissioner Sullivan of Montgomery, Alabama, sued the *Times* for libel because of a full-page advertisement entitled, *Heed Their Rising Voices*, which describes the treatment of Dr. Martin Luther King and student protestors in Montgomery by "police," "state authorities," and "Southern violators." The ad appeals for support of the Committee to Defend Martin Luther King and the Struggle for Freedom in the South, and lists the names of over 80 people as supporters. *Id.* at 257-58. The plaintiff joined four named ministers with the *Times* as defendants, presumably to create diversity jurisdiction. Barry Mason, Comment, *Defamation of Public Officials — Free Speech — the Constitutional Standard*, 12 UCLA L. REV. 1420, 1422 n.15 (1965). The ad contains false statements of fact, which the Court characterizes as minor, in finding that it was reasonable for the *Times* staff to think that the ad was "substantially correct." *Sullivan*, 376 U.S. at 286. The Court reverses Sullivan's judgment of $500,000, holding that the failure of the *Times* to check the accuracy of the ad's statements did not constitute actual malice, and reverses the same judgment against the ministers for lack of actual malice evidence. *See id.* at 287-88. The Court also reverses the judgment against the *Times* because the statements in the ad are not "of and concerning" Sullivan, who is not named in the ad, thereby establishing a First

sources of ambiguity include the Court's revision of the actual malice definition used for the honest misstatement of fact privilege, and its silence concerning the relevance of other elements of that privilege to First Amendment analysis.[86] After *Sullivan*, the Court's new actual malice doctrine could be called a privilege in progress, and its rationales appear to be moving targets.

One of *Sullivan*'s prominent rationales relies on the theory that the Sedition Act of 1798[87] violated the First Amendment, as recognized "in the court of history,"[88] and that therefore, as one scholar put it, "defamation of the government is an impossible notion for a democracy."[89] This rationale supports constitutional scrutiny of legal restraints upon "criticism of government and public officials," including scrutiny of criminal and civil liability rules for libel.[90] A "free debate" narrative further explains the need for First Amendment protection for such libels, and includes a cluster of rationales: effective "debate on public issues should be uninhibited, robust and wide-open,"[91] erroneous statement is "inevitable in

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Amendment requirement that a false statement must refer to the plaintiff as an individual, and not merely to unspecified government employees whom the plaintiff supervises. *Id.* at 283-84, 291-92.

86. *See* cases cited *supra* note 8; *supra* note 79.

87. *See Sullivan*, 376 U.S. at 273-74 (describing how the Act made it a crime to "write, utter, or publish" any "false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress [or] the President [with] intent to defame [or] to bring [them] into contempt or disrepute; or to excite against them [the] hatred of the good people of the United States").

88. *Id.* at 275. *See* Lewis, *supra* note 7, at 115-18 (noting the "boldness" of Wechsler's strategy in making this argument because "in 1963 hardly anyone was familiar with the history of the Sedition Act [and] the constitutional-law texts of the time drew no lessons from that episode for the meaning of the First Amendment"); Kalven, *supra* note 20, at 207 ("[F]or over 150 years it was not thought necessary to establish the status of the [Sedition] Act as a first step in getting to the meaning of the First Amendment.").

89. Kalven, *supra* note 20, at 205. *See* ROSENBERG, *supra* note 7, at 241 (crediting Kalven's article, *supra* note 16, with identifying issues that would be addressed in *Sullivan*, such as the constitutionality of the Sedition Act of 1798 and the chilling effect of defamation laws).

90. *Sullivan*, 376 U.S. at 276.

91. 376 U.S. at 271. The term "free debate" narrative is the author's, as are other labels for clusters of rationales that form a narrative discussed in the text.

free debate,"[92] and the fear of "virtually unlimited" libel judgments for erroneous statements creates the chill of "self-censorship" that "dampens the vigor and limits the variety of public debate."[93] These rationales explain why the truth defense for libel provides inadequate First Amendment protection by creating a form of strict liability through the requirement that a "critic of official conduct" must "guarantee the truth of all his factual assertions."[94] Yet these rationales also could be used to support absolute First Amendment protection for libels of government officials, as advocated by the concurring justices.[95] Moreover, the Court's free debate narrative does not explain why its new reckless disregard definition of actual malice is superior to a negligence definition.[96] Implicitly, the Court

92. *Id.* at 271-72 (declaring that erroneous statement "must be protected [if] freedoms of expression are to have the 'breathing space' that they 'need to survive'" (citing NAACP v. Button, 371 U.S. 415, 422 (1963)).

93. *Id.* at 279 ("[C]ritics may be deterred from voicing their criticism, even though [it] is in fact true, because of doubt whether it can be proved in court for fear of the expense of having to do so."); *id.* at 277-78 (declaring that chilling effect of civil libel is "markedly greater" than that of criminal prosecutions, especially where a succession of costly judgments is threatened). *See* Lewis, *supra* note 7, at 161 (revealing that Sullivan's lawyer later observed that it was hard to win in the Supreme Court because of "the amount of the verdict [and] the proliferation of contemporaneous lawsuits brought by others"). *See also Sullivan*, 376 U.S. at 278 n.18 (observing that the verdict for $500,000 for Sullivan was followed by an identical verdict for another plaintiff); *id.* at 294 (noting that eleven libel suits are pending in Alabama by state and local officials against the *Times* seeking $5.6 million dollars).

94. *Id.* at 279. The *Sullivan* Court invalidated the Alabama rule that "general damages" could be presumed. Before *Sullivan*, defamation has a history of strict liability, which "long antedated the development of general negligence law." 2 DOBBS, *supra* note 17, § 401, at 1119. Defamation law is never "assimilated in nineteenth century tort theory and keyed to liability limited to negligence," and so "[t]he great role of the common-law privileges in defamation is to abate the harshness of the strict liability principle . . . ." Kalven, *supra* note 6, at 291.

95. *See* Lewis, *supra* note 7, at 146-47 (observing that Justice Brennan's majority "opinion seemed to be heading [toward] absolute immunity for criticism of officials" but then "suddenly" turned and adopted the actual malice rule instead). For criticisms of the absolute immunity argument, see, for example, Pedrick, *supra* note 20, at 596 (fearing that "[f]abricated charges of embezzlement of public funds, of bribery, of espionage for a foreign power, could be made freely and without legal accountability"); McNamara, *supra* note 77, at 1455 (opining that the public official who "assumes the cloak of office [should] not forfeit his right to some recourse against the malicious lie"). *But see* Berney, *supra* note 20, at 48-57 (defending absolute immunity).

96. *See* Coleman v. MacLennan, 78 Kan. 711, 741 (1908) (actual malice defined as negligence); *Sullivan*, 376 U.S. at 279-80 (actual malice defined as reckless disregard). *See* cases cited *supra* note 8.

makes a sociological guess that the negligence standard would excessively chill robust debate. Explicitly, the Court finds it necessary to enhance the anti-chill properties of the actual malice rule by imposing the safeguards of the "convincing clarity" evidence standard[97] and *de novo* appellate review of plaintiffs' libel judgments.[98]

The Court relies on other rationales to construct a narrower defense of the actual malice rule, pointing to the rule's support by "scholarly consensus,"[99] and its resemblance to the "guilty knowledge" mens rea requirement for criminal prosecutions of the sale of obscenity.[100] One possible explanation for the brevity of this actual malice narrative is that counsel for the New York Times argued at length for absolute immunity, noting only briefly that the actual malice rule would protect the press better than the strict liability rules of Alabama defamation law.[101] This fall back argument identifies a tort idiom that becomes an enduring constitutional cornerstone, even though the Court's subsequent narratives concerning that idiom evolve in ways that are not prefigured in the *Sullivan* opinion.[102]

Any attempt to summarize the rationales in the *Sullivan* opinion cannot do justice to them.[103] The accordion-like quality of its narratives is exposed by the intellectual distance between the Court's position that "seditious libel cannot be made the subject of government sanction,"[104] and the Court's implicit invitation to ex-

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97. *Sullivan*, 376 U.S. at 285-86. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 30 (1971) (interpreting the "convincing clarity" standard as a "clear and convincing evidence" standard).

98. *Sullivan*, 376 U.S. at 285 (citing Edwards v. South Carolina, 372 U.S. 229, 235 (1963)).

99. *Id.* at 280 n.20 (citing cases from ten states, four law review articles, and two treatises).

100. *Id.* at 278-79 (citing Smith v. California, 361 U.S. 147, 153-154 (1959)).

101. *See* Brief for Petitioner *Times* at 54, New York Times v. Sullivan, 376 U.S. 254 (1964) (citing *Coleman*, 78 Kan. 711).

102. *See infra* Parts III.A., IV.B.

103. *See Sullivan*, 376 U. S. at 265-92. The effort of lower courts and commentators to interpret the rationales of *Sullivan* is complicated by the Court's reliance on over 30 First Amendment opinions from many fields, and on sources as varied as the history of the Sedition Act of 1798, the writings of John Stuart Mill, John Milton, and Justice Brandeis, numerous state libel precedents, the doctrine of official immunities, and various articles and treatises. The free debate narrative and the actual malice narrative are only two of many that may be identified.

104. Kalven, *supra* note 20, at 208.

tend the First Amendment protection to libels relating "to matters in the public domain."[105] The clarity of this invitation is blurred by doctrinal threads that create a special tie between the actual malice requirement and public official plaintiffs. For example, the Court observes that it is fair to impose this requirement upon such plaintiffs because of the immunities they enjoy as defendants when sued for their own libels.[106] The same special tie is exhibited in the Court's argument that public officials should be inured to criticism as "men of fortitude, able to thrive in a hardy climate."[107] Yet a broader scope for the new actual malice rule is suggested by the Court's references to the public concern concept, and to its coverage of speech about public men, as the root of the honest misstatement of fact privilege.[108] The broad scope of the fair comment privilege is also referenced in the Court's comment that "public men are, as it were, public property."[109]

The Court's most noticeable silence in *Sullivan* concerns the definition of the types of public officials and official conduct that will be subject to the actual malice standard.[110] This silence makes

105. *Id.* at 221. *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 16-17 (1965) (citing Kalven approvingly for these assessments of Brennan's *Sullivan* opinion). *See* ROSENBERG, *supra* note 7, at 241-42 (noting that Kalven "sought to reintroduce lawyers to the legacy of *Coleman*" and foreshadowed *Sullivan*'s reliance on that non-mainstream defamation tradition (citing Kalven, *supra* note 6)).

106. *Sullivan*, 376 U.S. at 282 (citing Barr v. Matteo, 360 U.S. 564, 571 (1959)).

107. *Id.* at 273 (citing Craig v. Harney, 331 U.S. 367, 376 (1947)).

108. *Id.* at 281-82 (observing that the privilege "extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office" (citing Coleman v. MacLennan, 78 Kan. 711, 723 (1908)). The only *Coleman* rationale cited in *Sullivan* is the argument that the social benefit of discussions of the "character and qualifications" of candidates for office outweighs the "occasional injury to the reputations of individuals," which must "yield to the public welfare." *Id.*

109. *Id.* at 268.

110. LEWIS, *supra* note 7, at 172 (explaining that Justice Brennan's papers reveal that footnote 23 was included because Justice Harlan asked Brennan to add a footnote "to the effect that we are not called upon to delineate at this stage how far down the line of public officials this new constitutional doctrine would reach," because "I would not want to foreclose a cop, a clerk, or some other minor public official from ordinary libel suits without a great deal more thought"). The public official and official conduct concepts receive definitions in post-*Sullivan* precedents. *See* Garrison v. Louisiana, 379 U.S. 64, 77 (1964); Rosenblatt v. Baer, 383 U.S. 75, 85-86 (1966). Over time, the public official label is applied to officials and candidates for "the most obscure office for which a public election is prescribed." JONES, *supra* note 7, at 39. *See* 1 SMOLLA, *supra* note 4,

it difficult to determine which non-official plaintiffs covered by the libel privileges may be covered by the *Sullivan* privilege in a future case.[111] Another notable silence appears in one of *Sullivan*'s most famous passages, which articulates the principles that "debate on public issues should be uninhibited, robust and wide-open" and "that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[112] The question unanswered by these linked images of debate is whether robust debate on public issues will require First Amendment protection for libels of non-official plaintiffs. Possible answers to that question leak out in a steady stream of speculative dicta in three Supreme Court decisions during the pre-*Butts* era. Those decisions also bring new narratives into discussions of the actual malice rule. Thinly veiled hints in these decisions maintain a sense of suspense about the future scope of the *Sullivan* doctrine, by continually injecting contradictory signals into the prevailing trend of comments favoring expansion of the actual malice rule.

## III. The Road from *Sullivan* to *Butts*: The Actual Malice Rule and Non-Official Plaintiffs

### *A. Supreme Court Hints after* Sullivan *about Future Directions for the Actual Malice Rule*

During the three years between *Sullivan* and *Butts*, the Court uses its libel decisions concerning public official plaintiffs to plant hints about the possible future extension of the actual malice standard to suits involving non-official plaintiffs.[113] Some of these hints appear as cryptic footnote references that stand out because they are only tangentially related to the issue under consideration. Usually they are accompanied by the caveat that the Court does not intend to intimate any view about a particular question. One exam-

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§ 2:100, at 2-122.1 (noting that there are "relatively few examples of government-related defamation plaintiffs who are held not to be public officials" and usually these plaintiffs have only "a peripheral or transient connection to governmental activity, or are extremely low in the organizational hierarchy").

111. *See supra* text accompanying notes 65-71.

112. *Sullivan*, 376 U.S. at 271. *See infra* note 171.

113. These hints are planted in opinions authored by Justice Brennan. *See Garrison*, 379 U.S. 64; *Rosenblatt*, 383 U.S. at 75; Time, Inc. v. Hill, 385 U.S. 372 (1967).

ple appears in *Garrison v. Louisiana*,[114] where the Court applies the actual malice requirement to a criminal prosecution for libel of public officials, noting that, "different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned."[115] This observation may imply that the actual malice rule should be applied to speech about public affairs, but not to speech about other issues.[116] Or, it may be an ambiguous musing that provides little guidance about the future direction of the *Sullivan* doctrine.[117] A more important type of hint in the Court's pre-*Butts* opinions takes the form of new rationales that supplement or alter *Sullivan's* narratives. These additional rationales provide ammunition for lower courts on both sides of the extension debate.

The *Garrison* opinion marks the moment when the Court's first allusion to the public figure concept occurs in a *Sullivan* progeny case. This allusion follows an unremarkable summary of *Sullivan*'s view that, "where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest [in] the dissemination of truth."[118] In the more remarkable footnote to this point, the Court adds that, "even the [tort] law of privacy," which evolved to provide some protection against unwanted publicity, "recognizes severe limitations where public figures or newsworthy facts are concerned."[119] The "limitations" here refer to the public figure and newsworthiness privileges, and the *Garrison* footnote does not explain why these privileges should be viewed as relevant to the libel tort with its different privilege traditions. If the Court means to draw an implicit analogy by association between the two torts, then this foot-

114. *Garrison*, 379 U.S. 64, 72 n.8 (1964).

115. *Id.*

116. *Id.* (accompanying the *Garrison* caveat with a warning that the Court means to intimate no views "as to the impact of the constitutional guarantees in the discrete area of purely private libels").

117. *See* Clark v. Pearson, 248 F. Supp. 188, 192 (D.D.C. 1965) (rejecting extension of *Sullivan* to non-official plaintiffs, observing, "we must resist a common temptation to read a judicial opinion as though it were a chapter in a treatise, and as though the text of the opinion expounded the law" and "[w]hile dicta may be treated with respect, they cannot be regarded as part of a statement of the law").

118. *Garrison*, 379 U.S. 64, 72-3 (1964).

119. *Id.* at 73 n.9 (citing Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809-10 (2d Cir. 1940)).

note may suggest that the privacy privileges provide a relevant model for resolving the conflict between the public interest in information and the private interests at stake in a libel suit.

Other Supreme Court hints about the potential extension of the actual malice rule appear in *Time, Inc. v. Hill*,[120] where the Court holds that the rule applies to a "false light" privacy suit concerning non-defamatory reports of matters of public interest.[121] The *Hill* plaintiff is not a public official, merely a private citizen who had "involuntarily become newsworthy";[122] the false speech in question is a fictionalized account of a headline news event.[123] Some of the *Hill* Court's rationales resemble *Sullivan*'s free debate narrative, and so *Hill*'s reasoning could be used to justify the extension of *Sullivan* to a non-official libel plaintiff.[124] The *Hill* opinion predictably includes caveats that this result is not dictated by the opinion.[125] Yet instead of couching these caveats in one-line com-

120. 385 U.S. 374 (1967).

121. *Id.* at 387-88. *See* Kalven, *supra* note 6, at 281 (inferring that *Hill* premise is "that the First Amendment requires that the truthful reporting of newsworthy events and people not be subject to liability"). *But see* Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) ("Nor need we accept [the] invitation to hold broadly that truthful publication may never be punished consistent with the First Amendment.").

122. Kalven, *supra* note 6, at 279.

123. Time, Inc. v. Hill, 385 U.S. at 377-79. The Hill family was held hostage by escaped convicts, and became the subject of front-page news; thereafter, Robert Hayes wrote a novel and a play, both entitled THE DESPERATE HOURS, which mixed the facts of the Hill hostage story with those of others. In publicizing the play, *Life* magazine inaccurately described it as a re-enactment of the Hill family's experience, and not as a fictionalized account. After 11 years of litigation, Hill obtained $30,000 in compensatory damages after a second trial on his false light claim. *Id.* at 396-97 (reversing the lower court judgment because the jury instructions did not accurately describe the actual malice requirement, while noting that a properly instructed jury could have found actual malice on the facts). The reargument that led to the reversal of fortune for the plaintiff was a result of sharp disagreements on the Court. *See* BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 289-90 (1985) (6 to 3 vote to affirm changed to majority vote to reverse), cited in Leonard Garment, *Annals of the Law: The* Hill *Case*, The New Yorker, at 90-110 (April 17, 1989) (litigation history).

124. *Hill*, 385 U.S. at 388-89 (basing the actual malice requirement on concerns for the inevitability of false statement in comment about matters of public interest, for the need for freedom of discussion to embrace all issues, and for the need for "breathing space" for negligently false comment in order for the expression of truth to survive (quoting *Sullivan*, 376 U.S. at 272)).

125. *See id.* at 384 n.9 ("Our decision today is not to be taken to decide any constitutional questions which may be raised in [libel] actions involving publication of matters of public interest, or in libel actions where the plaintiff is not a public official."); *id.*

ments, the *Hill* Court embarks upon a detailed but ambiguous discussion of distinctions between public officials and private individuals in libel law. This discussion may imply that the *Sullivan* rule should not be applied to private individuals,[126] or that it should be applied to some individuals but not others.[127] The Court also discusses the public figure privilege, even though this privilege does not apply to the false light tort at issue in *Hill*.[128] These comparisons call attention to the similarities between the interests protected by libel and privacy torts,[129] and arguably suggest that the public figure concept may be useful in constitutional analysis of libel actions.[130]

The clearest hints about the extension of *Sullivan* appear in *Rosenblatt v. Baer*,[131] where Justice Brennan articulates the vortex concept that later becomes an element of Justice Harlan's public figure definition in *Butts*.[132] The *Rosenblatt* Court notes that *Sullivan* recognizes both a "strong interest in debate on public issues," and a "strong interest in debate about persons who are in a position

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at 390-91 ("[A]lthough the First Amendment principles pronounced in [*Sullivan*] guide our conclusion, we reach that conclusion only by applying these principles in this discrete context.").

126. *See id.* at 391 ("Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved.").

127. *See id.* (noting that if the suit were a libel action "[d]ifferent considerations might arise concerning the degree of 'waiver' of the protection the State might afford. But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us."). These caveats express the *Hill* Court's unwillingness to address arguments in Harlan's dissent in *Hill*. *See supra* notes 125 and 126; *infra* text accompanying notes 150-54.

128. *See id.* at 380-88. The context of the discussion of public figures was an analysis of New York precedents that established that truthful reporting of "newsworthy persons and events" was protected under the state statute that supplied the *Hill* plaintiff's "false light" cause of action. *See Hill*, 385 U.S. at 382, 384 & 386 n.8. *Compare* Prosser, *supra* note 9, at 413 n.254, *and* Prosser, *supra* note 2, at 844, *with* Kalven, *supra* note 6, at 280.

129. *See Hill*, 385 U.S. at 386 n.9.

130. The lower courts had little opportunity to notice these hints because *Hill* was decided only six months before *Butts* and *Walker*. *But see* Comment, *Privacy, Defamation, and the First Amendment: The Implications of* Time, Inc. v. Hill, 67 Colum. L. Rev. 926, 946-52 (1967) (analyzing *Hill*'s implications for libel law).

131. 383 U.S. 75 (1966).

132. *Id.* at 86 n.12. Justice Brennan's dicta in *Hill* does not treat the thrusting of oneself into a vortex of discussion as a method for earning public figure status. *But see Butts*, 388 U.S. at 154 (Harlan, J., plurality) (implying this equivalence).

significantly to influence the resolution of those issues."[133] The Court then observes that the *Rosenblatt* plaintiff might satisfy both elements identified in *Sullivan*, because of his public position as a government employee, and because of the public interest in his conduct.[134] This observation is qualified in a footnote by the caveat that the Court intimates "no view whatever" as to "whether there are other bases for applying the *Sullivan* standard."[135] The Court then provides an example of a case where such other bases might exist, where "the interests in reputation are relatively insubstantial, because the subject of discussion has thrust himself into the vortex of the discussion of a question of pressing public concern."[136] The Court's language echoes the public concern element of the fair comment privilege, which protects libelous opinions about plaintiffs who invite controversy through their public positions.[137] The vortex imagery also calls to mind the rationale of the public figure privilege, which negates the privacy rights of those who engage in activities that attract public attention.[138] In a second footnote, the *Rosenblatt* Court emphasizes that, "[t]he public interests protected by the [*Sullivan*] rule are interests in discussion, not retaliation," and rejects "any suggestion" that "we have tied the [*Sullivan*] rule to the rule of official privilege."[139] This comment serves as a dramatic

133. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

134. *Id.* The Court's definition of public official requires that "the public has an independent interest in the qualifications and performance of the person [holding a government position] beyond the general public interest in [these two characteristics] of all government employees." *Id.* at 86. The *Rosenblatt* suit was tried before *Sullivan*, and the Court's remand for a new trial allows the plaintiff to address the "substantial argument" that he was a public official (as the supervisor of a county-owned ski resort) and present evidence on actual malice. *Id.* at 87.

135. *Id.* at 86 n.12. In context, one interpretation of this language is that there may be a basis for applying *Sullivan* to a case where the element of public interest exists, and not the element of public position.

136. *Id.* The vortex metaphor does not appear in the cases cited by Justice Brennan as support for the *Rosenblatt* caveat. *See infra* nn.185-87 and text accompanying note 184.

137. *See supra* text accompanying notes 70-71.

138. *See supra* notes 31-32 and accompanying text.

139. *Rosenblatt*, 383 U.S. at 84 n.10. This disclaimer relates to the *Sullivan* rationale that the "citizen-critic" of public officials should have the "fair equivalent" of the immunity from libel suits "granted [to] officials themselves." *Sullivan*, 376 U.S. at 282-83. This equivalence is justified on the grounds that it "is as much [the citizen-critic's] duty to criticize as it is the official's duty to govern," and that given the libel immunity enjoyed by officials when speaking "within the outer perimeter" of their duties, the lack of

retraction of the *Sullivan* rationale that the actual malice rule was especially appropriate for public officials because of their own libel immunities.[140] Thus, this retraction opens the doctrinal door even further for the future extension of that rule to some non-official plaintiffs.[141]

Other clues in *Garrison*, *Rosenblatt*, and *Hill* take the form of new narratives with second thoughts about *Sullivan's* meaning. One example of such a narrative is the *Garrison* Court's declaration that "calculated" defamatory falsehood should not enjoy First Amendment immunity because it is "a tool . . . at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."[142] Unlike the libels protected by *Sullivan*, namely false "utterances honestly believed," which "contribute to the free interchange of ideas and the ascertainment of truth," the "deliberate lie" is "no essential part of any exposition of ideas."[143] This "calculated falsehood" narrative in *Garrison* alludes to the harms caused by the Nazis' political use of defamation, and to harms during the McCarthy era, when "reckless falsehood" was used to "unseat the public servant or even topple an administration."[144] This narrative

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immunity for citizen-critics from libel suits would "give public servants an unjustified preference over the public they serve." *Id*. at 282 (citing Barr v. Matteo, 360 U.S. 564 (1959)). *See supra* text accompanying note 106.

140. *See* Pedrick, *supra* note 20, at 590-91 (criticizing *Sullivan*'s official privilege rationale and approving its repudiation in *Rosenblatt*).

141. For courts relying on *Sullivan*'s official privilege rationale to reject extension of the actual malice rule to non-official plaintiffs, compare Clark v. Pearson, 258 F. Supp. 188, 193 (D.D.C. 1965); Lorillard v. Field Enter., Inc., 213 N.E.2d 1, 7 (Ill. App. Ct. 1965); Fignole v. Curtis Publ'g Co., 247 F. Supp. 595, 597-98 (S.D.N.Y. 1965), with Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966) (noting *Rosenblatt*'s repudiation of the official privilege rationale); Case Comment, *Defamation of the Public Official*, 61 Nw. U. L. Rev. 614, 620-621 (1966) (same).

142. *Garrison*, 379 U.S. at 75. *But see Sullivan*, 376 U.S. at 279 n.19 (observing that "a false statement may be deemed to make a valuable contribution to public debate").

143. *Garrison*, 379 U.S. at 73, 75 (citing Chaplinsky v. New Hampshire, 315 U.S 568, 572 (1942)).

144. *Id*. at 75. The McCarthy era, like World War II, is a formative experience for the judges of the *Sullivan* era. *See*, *e.g.*, *Rosenblatt*, 383 U.S. at 88 (Douglas, J., concurring) ("Those of us alive in the 1940's and 1950's witnessed the dreadful ordeal of people in the public service being pummeled by those inside and outside government, with charges that were false, abusive, and damaging to the extreme."); *id*. at 94 (Stewart, J., concurring) ("Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society."). For *Garrison*'s

adds an extra strand to strengthen the actual malice narrative of *Sullivan*, and also serves as a rebuttal to the justices who continue to argue for absolute protection of libels of public officials.[145]

In *Rosenblatt* and *Hill*, some justices break from their silent agreement with the *Sullivan* majority,[146] proposing new arguments to compete with *Sullivan*'s rationales; their proposals, in turn, spark new commentary on *Sullivan* from the Court majority. Justice Stewart's concurrence in *Rosenblatt* argues in favor of a constitutional status for the tort of libel because the right to protection of reputation is "at the root of any decent system of ordered liberty."[147] In response, a narrative of concession appears in *Rosenblatt*, with the Court's acknowledgments that there are "important social values which underlie the law against defamation," and that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."[148] Yet *Rosenblatt*'s deferential bow to the value of the libel remedy is overshadowed by its broad definition of public officials, which reveals the Court's willingness to extend the actual

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implicit reference to the Nazis, see 379 U.S. at 75 (citing David Riesman, *Democracy and Defamation: Fair Game and Fair Comment*, 42 COLUM. L. REV. 1085, 1088-1111 (1942)). *See also* David Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282 (1942); David Riesman, *Control of Group Libel*, 42 COLUM. L. REV. 727 (1942). *See* ROSENBERG, *supra* note 7, at 219 (noting that Riesman "cited the Nazis' campaigns of calculated libels against opposition politicians and their use of defamation suits as reasons for their ultimate success").

145. *See supra* note 94. Additionally, Justices Black and Douglas continue to advance the argument for absolute protection in *Garrison*, 379 U.S. 64; *Rosenblatt*, 383 U.S. 75; and *Butts*, 388 U.S. 133.

146. *See* LEWIS, *supra* note 7, at 164 ("Justice Brennan had great difficulty marshaling a majority and holding it."); *id.* at 170-81 (noting that Justices Harlan, Clark and White objected to aspects of Justice Brennan's draft opinions, while Chief Justice Warren and Justice Stewart supported Brennan's views throughout the drafting process). Some justices who joined the *Sullivan* and *Garrison* majorities later declined to join Justice Brennan's majority opinions in *Rosenblatt* and *Hill*. *See Rosenblatt*, 383 U.S. at 88 (Justice Stewart concurred, Justice Clark concurred only in the result, and Justice Harlan concurred in part and dissented in part); Time, Inc. v. Hill, 385 U.S. 374, 411 (1967) (Fortas, J. dissenting, joined by Chief Justice Warren and Justice Clark; Justice Harlan concurred in part and dissented in part). Justice Fortas took Justice Goldberg's seat on the Court and dissented in *Rosenblatt* and *Hill*. For the positions of the justices in *Butts*, 388 U.S. 130, see *supra* note 11.

147. *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring) ("The protection of private personality . . . is left primarily to the individual States under the Ninth and Tenth Amendments" and it is entitled to "recognition by this Court as a basic of our constitutional system."). *See also Gertz*, 418 U.S. at 341 (citing Justice Stewart's concurrence).

148. *Id.* at 86.

malice rule "down into the lower ranks of government employees."[149] The *Rosenblatt* Court's interpretation of *Sullivan* also conveys a latent blueprint for the type of non-official plaintiffs who could be subjected to the actual malice requirement. Implicitly, as the scope of the definition of a public official grows, the significance of that status becomes more debatable and less meaningful. *Rosenblatt* extends the actual malice rule to speech about two types of official persons: those who "are in a position significantly to influence the resolution" of "public issues" and those who "invite public scrutiny and discussion."[150] If some non-official persons also fit these two categories, then First Amendment protection of libels about these persons arguably serves the same ends as protection of libels of similar officials.

No narrative of concession appears in *Hill* as a response to Justice Harlan's dissent, which condemns the court's extension of *Sullivan*'s principles. Harlan advocates a negligence standard for non-official plaintiffs who are involuntarily exposed to irresponsible publicity whose subject matter is not "at the center of public debate." Harlan argues that the press needs only "limited breathing space,"[151] because the state's interest in sanctioning even non-defamatory false speech is weightier than the First Amendment interest in protecting a robust press from chilling effect. Harlan reasons that the lack of public interest in the speech disables the operation of the marketplace of ideas, and denies the plaintiff a forum for "refutation" of false speech in the media. Then the actual malice rule operates to deny "easily injured," "powerless," and deserving

149. *Id.* at 85 (quoting *Sullivan*, 376 U.S. at 283 n.23).

150. *Id.* at 85, 86 n.13 (requiring that "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy"). *But see* Eaton, *supra* note 2, at 1377 & 1377 n.121 (finding that the *Rosenblatt* distinction between "scrutiny of the position occupied and scrutiny occasioned by the particular charges in controversy has been all but ignored").

151. *Hill,* 385 U.S. at 405-07. Justice Harlan concurs in the need for reversal, but his opinion in other respects is a dissent. Notably, he disagrees with the Court's brief finding that the subject of the *Life* article, "the opening of a new play linked to an actual incident," was a matter of public interest. *Id.* at 388. Harlan opines that when facts are of "limited public interest [and] intimate and potentially embarrassing to an individual," the State may sanction speech to deter its publication; he determines that the public had no "independent interest" in the relationship between the *Hill* incident and the play covered in the *Life* article. *Id.* at 404, 407.

plaintiffs a remedy in court.[152] The *Hill* Court does not rise to Harlan's bait, except to argue that in a false light suit, only the actual malice rule will provide sufficient protection for speech about matters of public interest. This is because the non-defamatory content of false light speech "affords no warning of prospective harm to another through falsity," and because a negligence test would leave the press "with the intolerable burden of guessing how a jury might assess the reasonableness of steps taken [to] verify the accuracy of every reference to a name, picture or portrait."[153] This rebuttal is insufficient to prevent Harlan's ideas from attracting support for his *Butts* plurality from additional justices, and later the *Gertz* Court refashions Harlan's "broken marketplace" narrative into rationales that redefine those of *Sullivan*.[154]

The *Hill* Court adds a new strand to the *Sullivan* narrative concerning the value of protecting speech about public issues, by reasoning that "[f]reedom of discussion . . . must embrace all issues about which information is needed," not merely "political expression" or comment about "public affairs."[155] This comment is yet another sign that the Court may be preparing to extend the actual malice rule beyond the context of public officials.[156] Another implicit theme in this narrative embraces the principles that the public aspects of "published matter which exposes persons to public view" are "interlaced inextricably with comments on individuals," and that "mixed utterance"[157] speech "is vast and of high importance to civilized life."[158] The importance of this new *Hill* narrative is clouded, however, by the opinion's cautions regarding its unknown implications for libel suits.[159] Given the conflicting signals

152. *Id.* at 407-10.

153. *Id.* at 389.

154. *See infra* note 302 (referencing arguments that public officials have a greater opportunity to correct false statements in *Sullivan* and *Rosenblatt* than do private individuals).

155. *Hill*, 385 U.S. at 388 (citing Thornhill v. Alabama, 310 U.S. 88, 102 (1940), concerning the scope for freedom of discussion).

156. *See* Kalven, *supra* note 6, at 282-83 (opining that *Sullivan* is a "silent partner" in the *Hill* decision).

157. *Id.* (citing U.S. v. Dennis, 183 F.2d. 201, 207 (2d Cir. 1959)).

158. *Id.* ("The risk [of] exposure [of the self to others] is an essential incident of life in a society which places a primary value on freedom of speech and press." (citing *Hill*, 385 U.S. at 388)).

159. *Hill*, 385 U.S. at 391. *See also supra* notes 125-130.

supplied by the Court's ambiguous hints and complicating narratives in *Garrison*, *Rosenblatt*, and *Hill*, it is not surprising that the predictions about the future scope of the *Sullivan* rule are almost as numerous as the commentators making the predictions.[160]

### *B. The Favorable and Unfavorable Camps of Lower Court Opinion Concerning the Extension of the Actual Malice Rule*

After *Sullivan* creates the new First Amendment libel privilege, attorneys press arguments for the application of the actual malice rule to plaintiff officials of high and low degree,[161] to candidates for public office,[162] to associates of such officials and candidates,[163] to

160. For predictions about the types of cases to which the *Sullivan* rule will be extended, see, for example, Pedrick, *supra* note 20, at 592 (to "issues where the public judgment can make itself felt through official or unofficial communication" so that "it can be said that the matter is one of proper public concern"); Bertelsman, *supra* note 82, at 661-62 (to cases where plaintiffs are "those who take an active part in public controversy" because of a "legitimate public interest" in their conduct); Robert E. Dineen, Note, *Constitutional Law — Proof of Actual Malice Required in Libel Action for Defamatory Falsehood Related to Official Conduct*, 16 SYRACUSE L. REV. 132, 135 (1964) (to create "a qualified privilege for misstatements of fact in discussion of public issues, equal to that of the fair comment rule"); McNamara, *supra* note 77, at 1444 ("only [to] those persons closely connected with government"); Note, *The Scope of First Amendment Protection for Good Faith Defamatory Error*, 75 YALE L. J. 642, 652 (1966) (to cases where libel involves "a private trait which is sufficiently relevant to the public role" of the plaintiff "to make that trait a public issue"); Note, *Defamation of the Public Official*, *supra* note 141, at 620 (when subject matter of the statement is one of "legitimate public concern"); John M. Huggins, *Constitutional Law—Freedom of the Press — Libel — State Law Allowing Libel Suit by Public Official Without Proof of Malice Held Unconstitutional* — New York Times v. Sullivan, 42 TEX. L. REV. 1080, 1084 (1964) (to those who "exert a strong influence on the operations of the government and affect an unusually large number of people"); Case Comment, *Constitutional Law — First Amendment Requires Qualified Privilege to Punish Defamatory Misstatements about Public Officials*, *supra* note 77, at 289 (to "individuals who set the policies" of "political parties, large corporations, labor unions, and lobbying groups").

161. For cases applying *Sullivan*, see, for example, Fegley v. Morthimer, 202 A.2d 125 (Pa. Super. Ct. 1964) (school board member); McNabb v. Tennessean Newspapers, Inc., 400 S.W.2d 871 (Tenn. Ct. App. 1965) (chair of county Democratic primary board). *See* 19 A.L.R.3d 1361, 1371-78 (1968).

162. For cases applying *Sullivan* to candidates, see, for example, Block v. Benton, 255 N.Y.S.2d 767, 768-69 (N.Y. App. Div. 1964); State v. Browne, 206 A.2d 591 (N.J. Super. Ct. App. Div. 1965). *See also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 271 (1971) (applying *Sullivan* to candidate for U. S. Senate); Ocala Star-Banner v. Damron, 401 U.S. 295, 299-300 (1971) (finding defeated candidate for tax assessor made insufficient showing of actual malice). *See* 19 A.L.R.3d 1361,1378-89 (1968).

famous persons,[164] to active participants in public debate on issues of "grave public concern,"[165] and to those whose conduct becomes the subject of public controversy.[166] Some courts find that "[t]here is not the slightest implication in the [*Sullivan*] opinion that the [actual malice rule] should be extended to persons who are not public officials."[167] These courts recognize a unique value in protecting the right to criticize government officials,[168] because of its link to the right to criticize government, which is indispensable for the operation of a democracy.[169] For such courts, criticism of non-official plaintiffs is not related to debates about government policy or to the practices of self-government.

Other courts recognize that the refusal to extend the actual malice rule will negate the spirit of the *Sullivan* opinion.[170] These pro-extension courts assume that the purpose of protecting criti-

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163. *Compare* Gilberg v. Goffi, 251 N.Y.S.2d 823 (N.Y. App. Div. 1964) (applying *Sullivan* to law partner of mayor) *with* Clark v. Pearson, 248 F. Supp. 188 (D.D.C. 1965) (not applying *Sullivan* to lawyer associating with Congressman). *See* 19 A.L.R.3d 1361, 1379-84 (1968).

164. *See* Dempsey v. Time, Inc., 252 N.Y.S.2d 186 (N.Y. Sup. Ct. 1964) (rejecting *Sullivan* in libel suit because plaintiff is famous boxer, not public official). Defendants' counsel also sought the application of *Sullivan* to privacy suits. *See, e.g.,* Youssoupoff v. Columbia Broad. Sys., Inc., 265 N.Y.S.2d 754 (N.Y. Sup. Ct. 1965); *Spahn*, 221 N.E.2d 543. *See infra* note 206.

165. *See, e.g.*, Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964); Pauling v. Nat'l Review, 269 N.Y.S.2d 11, 17 (N.Y. Sup. Ct. 1966).

166. For refusals to extend *Sullivan* to non-official plaintiffs, see, for example, Pearson v. Fairbanks Publ'g Co., 248 F. Supp. 188 (D. Alaska 1965); Lorillard v. Field Enter., Inc., 213 N.E.2d 1 (Ill. App. Ct. 1965).

167. *Lorillard*, 213 N.E.2d at 7. *See also Clark*, 248 F. Supp. at 195; *Spahn*, 221 N.E.2d at 545-46; *Dempsey*, 252 N.Y.S.2d at 756. *Compare* Prosser, *supra* note 2, at 815 ("[T]he [*Sullivan*] decision provides no clue as to whether [a constitutional privilege will be created for] comment on other matters of public concern").

168. *See Clark*, 248 F. Supp. 195 (arguing that the right to criticize the government "is regarded as indispensable in a popular form of government" but "this theory has no logical application to criticisms or attacks" on others); *Youssoupoff*, 265 N.Y.S.2d 754, 758 (opining that public officials need constant scrutiny to stop "[e]xcesses of power and [misconduct] that can only be remedied by a public aroused through information imparted to them by unfettered sources of news").

169. *Clark*, 248 F. Supp. at 195.

170. Walker v. Courier-Journal & Louisville Times Co., 246 F. Supp. 231, 233-34 (W.D. Ky. 1965) (arguing that "to have any meaning the [*Sullivan*] protections must be extended to other categories of individuals or persons [who] have become involved in matters of public concern"), *rev'd on other grounds*, 368 F.2d 189, 190 (6th Cir. 1966) (noting the "motivating force behind [*Sullivan*] compels its applicability" to such cases).

cism of public officials is to serve the greater goal of protecting the "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust and wide open."[171] They consider the use of the actual malice rule essential to the achievement of this goal, as long as debate about non-official plaintiffs may be connected to debate about public issues. For these courts and for some commentators, the position of the anti-extension courts seems to have at least two weaknesses. First, it seems artificial to limit the actual malice rule to suits by public officials because this category includes only a small portion of all libels related to debates about public issues.[172] Second, this limitation produces the arbitrary result that libels concerning minor public officials are given more protection than those concerning important non-officials who play a role in these debates.[173] As one court opines, "the right to criticize a public agent engaged in public activities" should not depend upon that person being "arbitrarily labeled a public official."[174]

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171. *Sullivan*, 376 U.S. at 270 (emphasis added) ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."). The reference to "public officials" is interpreted by some pro-extension courts as merely one type of debate about "public issues," while some anti-extension courts interpret that reference as an exclusive illustration of the type of debate to be covered by the *Sullivan* rule. *See*, *e.g.*, Gilligan v. King, 264 N.Y.S.2d 309, 313-14 (N.Y. Sup. Ct. 1965) (emphasizing "public issues" term in ruling that police officer is "public official").

172. *See* Pedrick, *supra* note 20, at 591 (observing that to limit free discussion to "the official conduct of public officials" seems "quixotic if weight is given to the function in democratic society served by the press and other media"); Note, *The Scope of First Amendment Protection for Good Faith Defamatory Error, supra* note 160, at 644-45 (noting that issues in which "the public has a genuine concern are not confined to an official level").

173. *See*, *e.g.*, Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966) (arguing that criticism of private citizen-leaders is not less important than criticism of government officials, especially compared to criticism of "comparatively minor public officials"); Bertelsman, *supra* note 82, at 659 (opining that the "analysis of who is and who is not a public official" is "sterile and mechanistic"); Gerard B. Rickey, Note, *Constitutional Law—Freedom of Speech and of the Press—Criminal Liability for Criticism of Public Officers*, 19 Sw. L. J. 399, 407 (1965) ("[P]rotection of statements against all public officials . . . seems unnecessary, while protection of statements against some controversial public figures seems highly desirable.").

174. *See*, *e.g.*, *Pauling*, 362 F.2d at 195 (citing Rosenblatt v. Baer, 383 U.S. 75, 95 (1966) (Black, J., dissenting)).

Yet no court seems to doubt that some libels should remain outside the *Sullivan* standard.[175] The *Rosenblatt* narrative concerning the "important social value" of the libel remedy strikes a chord with judges who declare that, "[t]he law of libel [is] one of the branches of law that [protects] individual civil rights" and "should not be whittled away."[176] Other judges express support for pre-*Sullivan* libel law by opining that an expansion of the actual malice rule to cover all plaintiffs "would radically alter the law of libel and too severely limit the class of libels for which redress would lie."[177] These affirmations reveal that lower court judges continue to view the libel remedy as a tradition to be preserved. This view exists despite the perception that the *Sullivan* Court has "shifted the balance sharply in favor of the freedom of public discussion" and away from "the safeguarding of individual reputation."[178] Few courts express concern, however, that *Sullivan* requires either a restriction of the broad definition of defamatory speech[179] or modification of the various libel privileges.[180]

One of the earliest suggestions that *Sullivan* could not be limited to suits by public officials appears in an opinion by Judge Henry Friendly[181] in a libel suit brought by Dr. Linus Pauling[182]

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175. *See*, *e.g.*, Afro-American Publ'g Co. v. Jaffe, 366 F.2d 649, 658 (D.C. Cir. 1966). Lower courts generally treat the absolute protection argument of Justices Black, Douglas and Goldberg in *Sullivan* with silence.

176. Clark v. Pearson, 248 F. Supp. 188, 195 (D.D.C. 1965). *See Afro-American*, 366 F.2d at 657 (citing *Rosenblatt*, 383 U.S. at 92-93 (Stewart, J., concurring)).

177. *Afro-American*, 366 F.2d at 664.

178. Pauling v. Nat'l Review, Inc., 269 N.Y.S.2d 11, 15 (N.Y. Sup. Ct. 1966).

179. *Compare* Clark v. Allen, 204 A.2d 42, 47-48 (Pa. 1964) (taking guidance from *Sullivan* to promote free discussion in order to bring "home to the American people" the "menace and dangers of Communism," and thus, holding that being accused of a voting record with "Communist tendencies" is not libelous) *with* PROSSER, *supra* note 2, § 106, at 761 (concluding that accusation of Communist affiliation or sympathy in 1964 "is all but universally regarded as clearly defamatory").

180. *But see* Pearson v. Fairbanks Publ'g Co., 413 P.2d 711, 713-14 (Alaska 1966) (modifying honest misstatement of fact privilege to incorporate *Sullivan* definition of actual malice).

181. Judge Henry J. Friendly is a distinguished jurist who clerked for Justice Brandeis and served from 1959 to 1986 on the U.S. Court of Appeals for the Second Circuit. *See* Erwin N. Griswold, *In Memorian: Henry J. Friendly*, 99 HARV. L. REV. 1720, 1720-22 (1986); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973); HENRY J. FRIENDLY, BENCHMARKS: SELECTED PAPERS BY AN EMINENT FEDERAL JUDGE (1967); HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

against the *New York Daily News*.[183] Judge Friendly initially observes in dicta that it would seem "questionable" whether "in principle" the *Sullivan* decision might be limited to the case of public officials; he concludes that once the rule is extended to a "candidate for public office," then "the participant in public debate on an issue of grave public concern would be next in line."[184] While some courts hesitate to embrace this conclusion,[185] other courts agree with Judge Friendly's dicta and cite his "participant in the public debate" concept,[186] along with Justice Brennan's vortex metaphor,[187] in extending the actual malice rule to plaintiffs who fit these hypothetical categories.[188]

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182. Pauling is "a man of international repute," a Cal Tech professor who won the Nobel Prize in Chemistry and the Nobel Peace Prize; his "publicly expressed views on many questions" are "contrary to those expressed by [the] right wing elements" in the country. Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 189 (8th Cir. 1966).

183. Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964). A *News* editorial criticized Pauling, who had been "agitating against nuclear weapons and weapon tests," for "profess[ing] to be horrified by Khrushchev's announcement of Soviet resumption of nuclear weapon tests," and then merely "record[ing] a plea to his friend the Kremlin to reconsider." *Id.* at 661 n.1. Pauling argued that the editorial libeled him as being pro-Communist, but the jury verdict for the *News* was affirmed on appeal, and the court found no need to rely on *Sullivan*. *Id*. at 663.

184. *Id.* at 671.

185. For courts noting Friendly's dicta but not extending *Sullivan*, see, for example, Afro-American Publ'g Co. v. Jaffe, 366 F.2d 649, 658-59 (D.C. Cir. 1966); Fignole v. Curtis Publ'g Co., 247 F. Supp. 595, 597 (S.D.N.Y. 1965); *Pearson*, 413 P.2d at 714, 714 n.15; Nusbaum v. Newark Morning Ledger Co., 206 A.2d 185, 197 (N.J. Super. Ct. 1965); State v. Browne, 206 A.2d 591, 599 (N.J. Super. Ct. 1965); Youssoupoff v. Columbia Broad. Sys., Inc., 265 N.Y.S.2d 754, 758 (N.Y. Sup. Ct. 1965).

186. For courts citing Friendly's dicta with approval, see, for example, *Pauling*, 362 F.2d at 197; Walker v. Courier-Journal, 246 F. Supp. 231, 234 (W.D. Ky. 1965), *rev'd*, 368 F.2d 189 (6th Cir. 1966); Pauling v. Nat'l Review, Inc., 269 N.Y.S.2d 11, 17 (N.Y. Sup. Ct. 1966).

187. For courts citing the *Rosenblatt* vortex in extending *Sullivan*, see, for example, *Pauling*, 362 F.2d at 195-98; *Pauling*, 269 N.Y.S.2d at 15-17.

188. Some lower courts interpret footnote 23 of *Sullivan*, 376 U.S. at 284 n.23, as implying that the actual malice rule could extend to non-officials because the Court refuses to "specify categories of persons" who will or will not be defined as public officials. *See*, *e.g., Walker*, 246 F. Supp. at 233; *Pauling*, 269 N.Y.S.2d at 14. But the Court had other reasons for footnote 23. *See supra* note 110.

### C. *A Libel Privilege for Public Persons: The Lower Courts Formulate Boundaries and Rationales*

For pro-extension courts, the most cautious extension of the actual malice rule requires a formula that may be linked by close analogy to the doctrines of *Sullivan*. The public figure privilege does not fit that requirement, and so it is not surprising that courts reject the public figure status of a plaintiff as the sole justification for applying the actual malice rule.[189] Even counsel for the media defendant in *Butts* fails to mention the public figure concept in his Supreme Court brief, which suggests that this concept is not viewed as a ready-made tool for constructing an extension of *Sullivan*.[190] By contrast, the vocabulary of the Friendly and Brennan formulas appeals to the judges who correctly anticipate that the Court will extend *Sullivan* to some non-official plaintiffs. These formulas encompass plaintiffs who actively seek the public stage for their opinions, and do not encompass all newsworthy persons or all unknown persons caught up in newsworthy events. As it happens, however, the formulas proposed by the *Butts* opinions are not endorsed in the pre-*Butts* extension precedents.[191]

In their analyses of the extension issue, judges emphasize both the nature of the speech about the libel plaintiff and the plaintiff's characteristics. This intellectual double helix mimics the variables used by the *Sullivan* Court for the actual malice holding that covers "debate on public issues" relating to official conduct of a public

189. *See infra* note 206.

190. Herbert Wechsler, counsel for the *Times* in *Sullivan*, represented the publisher of the *Saturday Evening Post* in the *Butts* case, and neither Wechsler nor opposing counsel in *Butts* mentioned the public figure concept in their briefs. Counsel for Respondent Walker argued that the actual malice rule should not be extended to plaintiffs based on their public figure status alone, citing lower court precedents, but counsel for the Petitioner Associated Press did not argue for such an extension. *See* Brief for Resp't at 41-44, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (No. 150) [hereinafter Brief for Resp't Walker]; Brief for Pet'r at 31-42, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (No. 150) [hereinafter Brief for Pet'r Associated Press]. *See infra* note 245. For brief references to the term public figure in the *Walker* briefs, see Brief for the Tribune Co. as Amicus Curiae at 4, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (No. 150) [hereinafter Amicus Brief for Tribune Co.] (arguing that the Court should ground its decision on "a broader base than the doctrine of 'public official' or 'public figure'"); Brief for Pet'r Associated Press at 41, (quoting an excerpt from Walker v. Associated Press, 417 P.2d 486, 490 (Colo. 1966), which mentions the term); *id.* at 28, 29, 30.

191. *See infra* text accompanying notes 202-09; *infra* notes 203, 204, 206.

official.[192] Courts on both sides of the extension debate borrow the *Sullivan* vocabulary of public concern, echoing the libel privileges, to describe the speech topic to be protected in an extension case.[193] But for vocabulary to describe the plaintiff's characteristics, judges rely on the libel and publicity privileges, and even their own phrases. They use the labels of "public man," "public person," "person in public life," "public personage," "public figure," or more than one of these labels together, without referring to the specialized connotations of these terms.[194] Yet neither Justice Brennan nor Judge Friendly choose to attach such status labels to their formulas. Instead, they use their own words to describe the characteristics of the participant plaintiff, or the plaintiff who thrusts her personality into the vortex.[195] Although they follow the lower court tradition of borrowing the public concern idiom of *Sullivan* and the libel privileges,[196] they narrow the scope of the protected speech topic to issues of "grave" or "pressing" concern.[197]

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192. *Sullivan*, 376 U.S. at 271 (observing that the *Times* advertisement qualifies "for constitutional protection" because it is "an expression of grievance and protest on one of the major public issues of our time"); *id.* at 279 (holding that the actual malice rule applies to libels relating to "official conduct" of a "public official").

193. For cases extending *Sullivan* and citing public concern, see, for example, cases cited *supra* notes 183, 186. For cases rejecting extension and citing public concern, see, for example, cases cited *supra* note 175 and *infra* note 207.

194. *See*, *e.g.,* Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 197 (8th Cir. 1966) (public figure); Walker v. Courier-Journal, 246 F. Supp. 231, 234 (W.D. Ky. 1965), *rev'd*, 368 F.2d 189 (6th Cir. 1966) (public man); Walker v. Associated Press, 417 P.2d 486, 490 (Colo. 1966) (public personage); Clark v. Pearson, 248 F. Supp. 188, 195 (D.D.C. 1965) (public person).

195. Brennan draws support for his vortex metaphor from the libel privilege tradition. *See Rosenblatt*, 383 U.S. at 86 n.12 (citing Peck v. Coos Bay Times Publ'g Co., 259 P. 307, 311-312 (Or. 1927)); *Peck*, 259 P. at 312 ("When a man enters the political arena, even though not a candidate, he must not be too sensitive about criticism. There are generally blows to receive as well as to give.").

196. *Sullivan*, 376 U.S. at 280-83. Some courts resort to the idiom of the libel privileges in their extension debate opinions. *See*, *e.g.*, Afro-American Publ'g Co. v. Jaffe, 366 F.2d 649, 658-59 (D.C. Cir. 1966) (finding that actual malice rule should not be extended to a plaintiff who does not qualify for libel privilege); Pauling v. Nat'l Review, Inc., 269 N.Y.S.2d 11, 16 (N.Y. Sup. Ct. 1966) (observing that "'public men, are, as it were, public property'" (quoting *Sullivan*, 376 U.S. at 268)).

197. See *supra* text accompanying notes 136, 184.

The failure of these two judges to attach the public figure label to their formulas is understandable,[198] given the number of ways in which the public figure privilege does not match the contours of the *Sullivan* framework. First, unlike the *Sullivan* privilege, the public figure privilege is not limited to speech regarding debate on public issues, but extends to speech regarding all subjects of public curiosity.[199] Second, the actual malice rule embraced in *Sullivan* is irrelevant to the public figure privilege.[200] Third, the public official category in *Sullivan* is not analogous to the public figure categories of newsworthy persons, persons who are "public figures for a season,"[201] or persons who are passive objects of public fascination. In short, Brennan's vortex plaintiff and Friendly's participant plaintiff occupy subcategories in the public figure class that have no label, and so the attachment of the generic public figure label to these characters would serve only to blur their distinctive profiles. Brennan and Friendly prefer to use new vocabulary to describe active plaintiffs whose activities are most analogous to those of public officials, whose active conduct is required in order to win elections or secure government employment.[202]

Even so, lower court judges see no impediment to mixing the Brennan and Friendly labels with other public person labels in their

198. Moreover, when Friendly announces his prediction in 1964 that *Sullivan* would extend to participants in public debates, he does not have the benefit of the Court's later hints in *Garrison*, *Rosenblatt* and *Hill*. *See supra* Part III.A.

199. The protection of speech in the public interest is a purpose of both the public figure and newsworthiness privileges, but this concept is not synonymous with speech about "debate about public issues" in *Sullivan*. Prosser, *supra* note 9, at 412-14. The territory of the public figure privilege covers only "matters reasonably within the scope of the public interest which they have aroused," including depictions of the family of a public figure. *Id.* at 412, 414. The newsworthiness privilege covers all kinds of information, including "interesting phases of human activity in general." *Id.* at 413. *See supra* text accompanying notes 29-37; *infra* note 124. One limit on the public figure privilege is decency. *See* Sidis v. F-R Publ'g Corp., 113 F.2d. 806, 809 (2d Cir. 1940), *cited* in Franklin, *supra* note 16, at 109-10, 110 n. 18; PROSSER, *supra* note 2, at 837. *See also* Irwin O. Spiegel, *Public Celebrity v. Scandal Magazine — The Celebrity's Right to Privacy*, 30 SO. CAL. L. REV. 280, 302-08 (1957).

200. See *supra* note 39 and accompanying text.

201. Prosser, *supra* note 9, at 413.

202. *See supra* note 30 (examples of public figures); *supra* note 76 (examples of public men). The plaintiffs who fit the Brennan or Friendly categories occupy a niche that is smaller than either the plaintiff class subject to the libel privileges, or the class of public figures who are either newsworthy persons or persons caught up in newsworthy events.

opinions. The public figure term may be found in two different contexts in opinions on the extension issue.[203] First, the label is mentioned by some pro-extension courts, along with other factors, as a reason for imposing the actual malice rule on a non-official plaintiff. These other factors usually include the variables articulated in the Brennan and Friendly formulas,[204] and the libel privilege status of plaintiffs who are public men or submit their controversial opinions to the public.[205] In a second context, the public figure label appears whenever a defendant argues that public figure status alone is a sufficient reason for the application of the actual malice rule. Courts reject this argument in both libel and privacy cases where defendants are sued by a public figure who does not fit the Brennan or Friendly formulas and belongs only to the public figure class of celebrity objects of public interest.[206]

The requested extension of *Sullivan* to all public figures seems extreme to these courts because the public figure category is so broad. For example, in a libel suit brought by Jack Dempsey, the famous heavyweight boxing champion, the defendant argues that the plaintiff's status as a public figure gives the public a "legitimate interest in [being] able to evaluate" statements of fact "about the public affairs of [a] public hero."[207] The court refuses to accept this argument because its "net effect" would be to extend the actual malice rule "to all public figures," and thereby expose such figures "to naked libel" simply "because of the mere fact" that they are

203. The public figure term does not appear at all in some decisions on the extension issue. *See*, *e.g.*, Walker v. Courier-Journal, 246 F. Supp. 231, 234 (W.D. Ky. 1965), *rev'd*, 368 F.2d 189 (6th Cir. 1966); Gilberg v. Goffi, 251 N.Y.S.2d 823, 831-32 (N.Y. App. Div. 1964). In other decisions, the public figure label is mentioned only in a reference taken from another decision, and not in the court's own analysis. *See*, *e.g.*, Afro-American Publ'g Co. v. Jaffe, 366 F.2d 649, 658 (D.C. Cir. 1966).

204. *See*, *e.g.*, Pauling v. Nat'l Review, Inc., 269 N.Y.S.2d 11, 18 (N.Y. Sup. Ct. 1966); Walker v. Associated Press, 417 P.2d 486, 490 (Colo. 1966). Most of the pro-extension cases involve Pauling and Walker, who made bad law for themselves by filing multiple suits and establishing pro-extension precedents that influenced the rulings in their other suits. *See*, *e.g.*, *Pauling*, 269 N.Y.S.2d at 17 (citing Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964)); *Walker*, 417 P.2d at 490 (citing *Walker*, 246 F. Supp. at 231).

205. *See supra* note 196.

206. For rejections in libel cases, see, for example, Clark v. Pearson, 248 F. Supp. 188, 195 (D.D.C. 1965). *See also* cases cited *supra* note 164.

207. Dempsey v. Time, Inc., 252 N.Y.S.2d 186, 188 (N.Y. Sup. Ct. 1964).

"public individual[s]."[208] Another court voices this concern while rejecting the actual malice rule for public figure plaintiffs in a privacy suit for "appropriation of personality" because the rule would subject both "private citizens" and public figures to "a broadside invasion of their rights of privacy."[209] The idea that a narrower First Amendment definition of public figures could be created does not occur to lower court judges. They find it challenging enough to interpret the Supreme Court's constitutional reconfigurations of common law doctrine without inventing their own.[210]

The pro-extension courts need to articulate rationales for their formulations of cautious analogies to the double helix of public debate speech and public official plaintiffs; one popular strategy for some courts is to reaffirm the relevance of the original *Sullivan* narratives to support their extension holdings. The free debate narrative is broad enough to justify the actual malice rule for non-official plaintiffs,[211] as one pro-extension court recognizes in opining that, "democratic government is best served when citizens" may "freely speak out on a question of public concern, even if thereby some individual be wrongly calumniated."[212] Another court observes that the dangers of self-censorship exist for critics of "a private person who publicly, prominently, actively" leads "a public discussion."[213] This sentiment is echoed in the declaration by another court that public debate will not be "'uninhibited, robust and wide open' if the news media are compelled to stand legally in awe of error in

208. *Id.* (rejecting extension of actual malice rule in libel suit where story reported information from Dempsey's deceased manager that Dempsey won his championship title forty-five years earlier by the use of "loaded gloves"). *See also Clark*, 248 F. Supp. at 197 ("The fact that some persons are better known than others should not lead to any far-reaching distinction in their [libel] rights.").

209. Youssoupoff v. Columbia Broad. Sys., Inc., 265 N.Y.S.2d 754, 758 (N.Y. Sup. Ct. 1965).

210. *See* Eaton, *supra* note 2, at 1371 (citing, *e.g.,* Henry v. Collins, 380 U.S. 356 (1965)) (noting that some courts mistakenly approve erroneous jury instructions that require reversal); *id.* at 1381, 1386-88 (finding that some courts erroneously assume that *Sullivan* requires actual damages to be proved once actual malice is established, but this rule is required later only in libel actions arising out of labor disputes).

211. For the free debate narrative, see *supra* text accompanying notes 87-95; *supra* text accompanying notes 106-07; *supra* note 171.

212. Gilberg v. Goffi, 251 N.Y.S.2d 823, 832 (N.Y. App. Div. 1964).

213. Pauling v. Nat'l Review, Inc., 269 N.Y.S.2d 11, 16 (N.Y. Sup. Ct. 1966).

reporting the words and actions of persons of national prominence and influence."[214]

Lower courts on both sides of the extension debate articulate a second theme related to the *Sullivan* rationale that public officials should be "men of fortitude" who are able to "thrive in a hardy climate"[215] by tolerating false and defamatory criticism in the course of their political careers. Some courts see how this expectation may be imposed upon plaintiffs who are not professional politicians but who inhabit the territory of political debates with its accompanying hostile climate. These courts describe a vision of life in Brennan's vortex where defamation injuries are the norm. According to different courts who share this view, in the "give-and-take of public debate," even non-official persons must expect to encounter "sharp and coarse comment,"[216] and to "endure exposure to the vicissitudes of argument,"[217] while those involved in political campaigns must expect to be maligned by "mudslinging, half truths and outright lies."[218] Moreover, for those who take their opinions to the "public stage," an "error in reported occurrence is more apt to become the rule rather than the exception."[219] Thus, those who seek the spotlight must be prepared "to accept the errors of the searching beams of the glow thereof, for only in such rays can [the] public know what role" they play.[220] These observations arguably imply that even libel remedies before *Sullivan* did not effectively alter the libelous climate of the vortex. Therefore, since these conditions are inevitable, the active participants on the "stage of public

214. Walker v. Courier-Journal, 246 F. Supp. 231, 234 (W.D. Ky. 1965), *rev'd*, 368 F.2d 189 (6th Cir. 1966).

215. *See supra* note 107 and accompanying text.

216. Afro-American Publ'g Co. v. Jaffe, 366 F.2d 649, 657 (D.C. Cir. 1966).

217. *Gilberg*, 251 N.Y.S.2d at 832 (further observing that "half-truths, misinformation, and worse, are not uncommon in the furor and in the tempo of a political campaign").

218. Clark v. Allen, 204 A.2d 42, 44 (Pa. 1964) (also noting that "[i]t is deplorable but true that during a political campaign, candidates and their supporters often indulge in gross exaggeration, invectives, distorted statements, . . . [and] prophecies of war and doom if the opponent is elected").

219. *Walker*, 246 F. Supp. at 234.

220. *Id.* (further opining that a nationally prominent person must realize that his active advocacy is likely to attract the press and magnify "the chance that his activities would be erroneously reported").

prominence"[221] must recognize that the bruises of libel will accompany the benefits of the spotlight.

One variation upon the formulas of Brennan and Friendly appears in Judge Blackmun's analysis in another suit by Pauling, in which the latent *Rosenblatt* blueprint is used to apply the actual malice rule to a plaintiff without government portfolio who is in a position to influence public issues.[222] Blackmun creates a variety of descriptions for such a plaintiff, as someone possessing "a capacity for influencing public policy" either because of prominence or unofficial power, and seeking "to realize" upon it so as "to influence the resolution" of important issues.[223] This focus on the latent power and potential impact of some influence-seeking plaintiffs serves as a reminder that *Sullivan* singles out public officials for the actual malice rule for a reason, presumably because their status carries the inherent power to play a leadership role concerning the public issues of the day. Blackmun concludes that there is no rational distinction between the critics of his leader-influencer citizens "who seek to lead in the determination of national policy" and the critics of public officials, in terms of their needs for First Amendment protection.[224]

The boundaries of the concepts articulated by Brennan, Friendly, and Blackmun support the exclusion of certain plaintiffs and speech topics from the actual malice rule. For example, Brennan's vortex and Friendly's participant concepts exclude plaintiffs who do not seek to become involved in public debates, those who

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221. *Id.*

222. Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 194 (8th Cir. 1966) (citing Rosenblatt v. Baer, 383 U.S. 75 (1966)). *See supra* text accompanying notes 151-52; *supra* note 182. In the post-*Butts* era, Justice Blackmun supports the *Rosenbloom* extension of *Sullivan* to speech about matters relating to the "public or general concern," but later joins the *Gertz* majority in repudiating that position. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 44 (Brennan, J., plurality), *with* Gertz v. Robert Welch, Inc., 418 U.S. 323, 354 (1974) (Blackmun, J., concurring) (noting that his vote is needed to create a majority and avoid doctrinal "uncertainty," and predicting that the difference between the *Rosenbloom* and *Gertz* rules will have little practical effect on journalists).

223. *Pauling*, 362 F.2d at 195-96. Blackmun's sources for his pro-extension decision includes Friendly's participant concept, Brennan's vortex idea, and the *Rosenblatt* footnote retracting *Sullivan*'s official privilege rationale. *See id.* at 194, 196-97.

224. *Id.* at 196. Blackmun's examples of such private leader-influencer citizens include "[a] lobbyist, a person dominant in a political party, the head of any pressure group, or any significant leader." *Id.*

are involuntarily swept into them, and those who are engaged only in a discussion of private issues. Blackmun implicitly approves of the latter limitation by noting that "there is no comparable need [for public discussion] as to the attributes of private citizens," including even those who "succeeded in acquiring" public attention.[225] He also opines that it is understandable that anti-extension courts reject the actual malice rule in "cases where the subject, although perhaps a public figure, did not conduct himself or speak out on a matter of public import."[226] Public figure status could be acquired involuntarily according to publicity tort doctrine, and so this status does not match the active role envisioned by the judges who prefer to use the participant, vortex, and leader-influencer concepts.[227]

When the Supreme Court agrees to review one of retired Major General Edwin Walker's suits,[228] it appears to present an easy case for a cautious expansion of *Sullivan* beyond the public official context. Walker claims to be libeled by a press release concerning the riot at the University of Mississippi in response to James Meredith's attempt to enroll there. An AP report states that Walker "assumed command" of a crowd of protesters and led a charge against federal marshals during their attempt to protect Meredith.[229]

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225. *Id.*

226. *Id.* at 197 (citing cases cited *supra* note 164). Blackmun otherwise ignores the public figure term in his analysis and describes Pauling as a person who "projected himself into the arena of public policy, public controversy, and 'pressing public concern.'" *Id.* at 197.

227. For a decision citing Blackmun's *Pauling* opinion, see Reaves v. Foster, 200 So.2d 453, 459 (Miss. 1967).

228. The Court granted review of Curtis Publ'g Co. v. Butts, 351 F.2d 701 (5th Cir. 1965) and Associated Press v. Walker, 393 S.W.2d 671 (Tex. Civ. App. 1965). *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 134 (1967). The trials in *Butts* and *Walker* occurred before *Sullivan*, but *Rosenblatt* applies the actual malice standard to such trials. *See Rosenblatt*, 383 U.S. at 87-88. The Court affirms the *Butts* verdict and reverses the *Walker* verdict. *Butts*, 388 U.S. at 140, 142. For the positions of the justices on the public figure issue, see *supra* note 11; for the positions of the justices on the actual malice issue, see *supra* note 10.

229. *Butts*, 388 U.S. at 141 n.4 (Harlan, J., plurality). Two people died in the riot at Ole Miss, at least fifty were injured, 160 were arrested, and sixteen cars were destroyed. Brief for Pet'r Associated Press at 15. Walker testified that he had urged the protestors on the scene to use restraint and to conduct a peaceful protest. *Butts*, 388 U.S. at 141. The AP press release is defamatory because it accuses Walker of criminal conduct. *See* Brief for Resp't Walker at 4-5. Walker resigned from the Army to enter politics and run for Governor of Texas. Brief for Pet'r Associated Press at 6. After commanding federal

Three lower courts extend the actual malice rule to Walker based on the criteria of one or more of the leading formulas. Walker is a participant in a debate about a matter of grave public concern, namely federal intervention to aid integration;[230] his press conferences and appearance at the demonstration show that he "voluntarily thrust himself into the vortex of public discussion" of integration;[231] and his repeated publicity-seeking efforts demonstrate an attempt to use his "leadership and influence" to "mold public thought and opinion."[232] Walker's public life is also well known, and could be labeled as that of a public figure; or based on his Army career and political activities,[233] he could be labeled a public man.[234] A press release is understandably vulnerable to error as an "on the spot" dispatch from the scene of violent and fast moving events.[235] The number of Walker's multiple suits brought

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troops in Little Rock "during the school segregation confrontation," Walker became opposed to federal intervention in conflicts over integration. *Butts*, 388 U.S. at 140. During appearances before the riot, Walker advocated "defiance of court orders and federal power," called for "violent vocal protest," and urged people to "[r]ise to stand beside Governor Ross Barnett at Jackson, Mississippi." *Id.* at 159 n.22. In radio broadcast comments, Walker stated, "We have talked, listened and been pushed around far too much by the anti-Christ Supreme Court," and, "This [use of federal troops] today is a disgrace to the Nation in 'Dire Peril' – a disgrace beyond the capacity of anyone except its enemies." Brief for Pet'r Associated Press at 11, 13. Walker's judgment of $500,000 in compensatory damages is reversed by the Supreme Court in *Butts* for lack of actual malice evidence; his punitive damages award of $300,000 is reversed by lower courts on the same ground under state law. *Butts,* 388 U.S. at 140-42, 158-59. For an overview of the legal aspects of the events surrounding James Meredith's enrollment, see Joel William Friedman, Biography of John Minor Wisdom ch. 7 (May 2005) (unpublished manuscript, on file with Prof. Friedman of Tulane University Law School).

230. Walker v. Associated Press, 417 P.2d 486, 490 (Colo. 1966); Walker v. Courier-Journal, 246 F. Supp. 231, 234 (W.D. Ky. 1965), *rev'd on other grounds*, 368 F.2d 189 (6th Cir. 1966).

231. *Walker*, 417 P.2d at 490.

232. *Walker*, 246 F. Supp. at 234.

233. *Id.* at 233-34.

234. *Walker*, 417 P.2d at 490 (describing Walker as a "public personage"); *Walker*, 246 F. Supp. at 234 (finding that Walker has "become a 'public man'" and "interwoven his personal status into that of a public one").

235. *See* Amicus Brief for Tribune Co. at 11 (arguing that "on-the-spot" news reporting is prone to error, especially on the scene of "sudden, violent, or tragic happenings"); *id.* at 8-9 (citing examples of errors in press reports, such as the reported assassination of several members of Lincoln's Cabinet at Ford's Theatre, the report that all the passengers on the Titanic had survived, and the report that Japanese advance troops had landed in California when Pearl Harbor was attacked).

against the Associated Press exceeds the number brought against the New York Times for its *Sullivan* advertisement,[236] and Walker's suits are similarly filed in Southern or border states, presumably in order to reap the benefit of regional jury sympathy for Walker's support of segregation.[237] The AP brief in the Supreme Court argues that "[i]f ever there was a case which . . . requires the extension of the *Sullivan* doctrine, this is that case."[238]

But when the Court decides to review the *Butts* suit together with *Walker*, the extension issue becomes more complicated because Wally Butts possesses only one of General Walker's attributes. Butts is known to the public by virtue of his position as Athletic Director at the University of Georgia[239] and his past activities as the Georgia football coach.[240] Unlike Walker, Butts did not voluntarily become involved in a debate about a matter of public concern. Before being accused of fixing a college football game,[241] he is not

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236. *See Sullivan*, 376 U.S. at 278 n.18. *See supra* note 93. For other litigation by Walker based on the news story involved in the *Butts* litigation, see cases cited in note 233 and Walker v. Kansas City Star, 406 S.W.2d 44 (Mo. 1966). *See also* Brief for Pet'r Associated Press at 43-44 (Walker's verdict in Louisiana is upheld on appeal, based on a finding of actual malice, but the judgment for $3 million dollars is reduced to $75,000).

237. Brief for Pet'r Associated Press at 42.

238. *Id.* at 44. The Supreme Court briefs in *Walker* include heated rhetoric on both sides. *Compare* Brief for Resp't Walker at 46-47 (noting that the Warren Commission found that Lee Harvey Oswald attempted to kill Walker with a mail order rifle and that it is "a fair inference" that AP reports about Walker were "a contributing factor" in Oswald's attempt), *with* Brief for Pet'r Associated Press at 44, 47 (asserting that Walker's suits are examples "of the technique of converting the libel laws into weapons" by "hard core segregationists, in public office and out, to perpetuate a system of racial segregation").

239. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154-55 (Harlan, J., plurality). *See supra* note 234.

240. *See* Kalven, *supra* note 6, at 280.

241. *Butts*, 388 U.S. at 154 (Harlan, J., plurality). Butts sued the publisher of the *Saturday Evening Post* for a story accusing him of having "fixed" the 1962 football game in which Alabama defeated Georgia. The *Post*'s source overheard a telephone conversation between Butts and Paul (Bear) Bryant, the head coach of Alabama, during which Butts gave Bryant Georgia's plays and defensive patterns. Several people quoted in the *Post* story testified that they had been quoted falsely, and expert witnesses and players contradicted the *Post*'s claim that the Alabama team members played in a way that revealed their knowledge of Georgia's play secrets. The *Post* author testified that he knew the article would ruin Butts's coaching career. Butts received a verdict for $60,000 in general damages and $3 million in punitive damages, which was reduced to $460,000 by remittitur. The Supreme Court affirmed the judgment. *Id.* at 135-38, 156-58. *See generally* JAMES KIRBY, FUMBLE: BEAR BRYANT, WALLY BUTTS AND THE GREAT COLLEGE FOOT-

a participant in public debate, or a vortex plaintiff, or a person who sought to use his leadership and influence to mold public thought and opinion. Nor does he meet the criteria of the libel privileges.[242] Thus, the *Butts* suit provides the Court with the opportunity to consider whether the actual malice rule should apply to a plaintiff solely on the basis of public figure status.[243] Justice Harlan's plurality opinion declares that that the Court's purpose in reviewing the judgments in *Butts* and *Walker* is to "consider the impact" of *Sullivan* on libel actions by "public figures" involved in issues of important public interest.[244] However, the failure of the publisher's counsel in *Butts* to address this issue suggests that the Court's readiness to employ the public figure concept could not be easily discerned from pre-*Butts* precedents or commentary.[245]

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BALL SCANDAL 189, 213 (1986) (concluding that although the *Post* did not publish with knowledge of falsity but with good faith and corroboration of various kinds, the jury was misled by "false testimony, lawyers' failures to offer evidence, the judge's exclusion of evidence that [had] been offered, and various tricks by lawyers," as well as numerous strategic errors by counsel for the *Post*).

242. Butts does not qualify as a person who submitted a controversial position to the public before the *Post* published the "football fix" story about him. Butts arguably is a public man, based on his role in the management of a public educational institution, but few courts would extend the honest misstatement of fact privilege beyond public officials and candidates. *See supra* notes 76-77.

243. 388 U.S. at 134. Harlan also notes a conflict among lower courts about the scope of *Sullivan*, but does not describe the complexity of the lower courts' rulings. *See infra* text accompanying notes 293-94.

244. *Butts*, 388 U.S. at 134.

245. *See supra* note 190. Wechsler argues that the actual malice rule should extend to all subjects of "important and legitimate" "public concern," such as the *Post* story about a "fixed" football game, and that Wally Butts qualifies for the actual malice rule as a public official, given his position as the Athletic Director at the University of Georgia. *See* Brief for Pet'r Curtis Publ'g Co. at 51-60; *Butts*, 388 U.S. at 146 (noting but not addressing these arguments). Counsel for the AP argues that Walker qualifies for the actual malice rule because he fits the Brennan vortex and Friendly participant formulas, as well as the *Rosenblatt* criteria for a person "in a position significantly to influence the resolution" of public issues, who is "actively attempting through use of their leadership and influence" to "mold public opinion." *See* Brief for Pet'r Associated Press at 32-41; Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). *See supra* text accompanying notes 197-201. For commentary on lower court decisions, compare, for example, John A. DeVault & Alan T. Geiger, Note, *Constitutional Law — The Expanding Right to Criticize: A Post-*Times *Analysis,* 19 U. FLA. L. REV. 700, 707 (1967); Donald R. Adair, Note, *Free Speech and Defamation of Public Persons: The Expanding Doctrine of* New York Times v. Sullivan, 52 CORNELL L.Q. 419, 423 (1967); Rubin, *supra* note 84, at 133; McNamara, *supra* note 77, at 1449.

## IV. Two Visions for a Public Figure Privilege in *Butts* and the Emergence of Counter-Narratives to Challenge *Sullivan*

*Butts* is a landmark decision because it marks both the arrival of the public figure libel privilege in First Amendment law and the open rebellion by a Court plurality against expanding *Sullivan's* actual malice rule in libel cases. Although four justices are willing to provide a lesser First Amendment privilege to defendants sued by public figures, they argue that such defendants do not deserve protection when engaging in "highly unreasonable" conduct constituting an "extreme departure" from ordinary standards of investigation and reporting.[246] This privilege offers an original solution to the extension debate. It is accompanied by other doctrinal surprises in the Harlan opinion, including a reworking of the *Sullivan* narratives to justify a shift in First Amendment libel doctrine. Harlan's repudiation of the actual malice rule requires that he articulate an alternate rule, as well as new narratives, either to explain the irrelevance of *Sullivan's* reasoning to the *Walker* and *Butts* cases, or to distinguish and limit *Sullivan*'s scope.

As the designated standard bearer for the expansion of the *Sullivan* doctrine, Chief Justice Warren's opinion accepts the public figure label as a tool for identifying the new arena of litigation in which the actual malice rule will govern. Rather than engaging in prolonged rebuttal to Harlan's revisionist offerings, Warren briefly opines that the latter's "unusual and uncertain formulation" can neither guide a jury nor afford adequate protection for the free speech and debate required by society.[247] Then he sets about the task of constructing a public figure concept that is connected to the *Sullivan* narratives rather than detached from them. Justice Harlan's opinion studiously ignores both Warren's interpretation of precedent and his public figure definitions, and Warren's opinion responds silently in kind. When the dust settled in *Butts*, War-

246. *Butts*, 388 U.S. at 155 (Harlan, J., plurality). *Compare* Kalven, *supra* note 6, at 299 (criticizing Harlan's version of a gross negligence standard for making "at a constitutional level more discriminations than two centuries of tort law has worked out at the common law level"), *with* J. Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 Tex. L. Rev. 630, 641 (1968) (approving Harlan's standard for plaintiff who is not defamed about a "political question").

247. *Butts*, 388 U.S. at 163 (Warren, C.J., concurring).

ren has narrowly won the standoff over the extension of the actual malice rule to public figures. But his opinion defending this position is brief and cryptic, and Harlan's more developed interpretations of *Sullivan*'s narratives lays the groundwork for their future alteration and for continued judicial wrangling over the premises behind the constitutional protection of libel.

### *A. The Public Figure Concept of Chief Justice Warren and Its Roots in* Sullivan

The Warren opinion displays a meditative, even disembodied, tone, which derives from its failure to cite or discuss authorities of any kind.[248] In its silence, much is omitted, as though the three-year interlude between *Sullivan* and *Butts* belongs to a legal culture resembling Brigadoon, which has vanished and left no residue of lower court opinions, Supreme Court precedents, or accumulated scholarly commentary. Yet the traces of some of these sources may be detected in the language of the opinion, as they make their invisible contributions to Warren's definition of a public figure for First Amendment purposes.[249] Notably, certain signature features taken from *Sullivan* and its progeny appear in Warren's opinion, including the double helix, the free debate narrative, the *Rosenblatt* blueprint, and Blackmun's leader-influencer concept. Warren's meaningful silences concerning Brennan's vortex plaintiff and Friendly's participant figure are also noteworthy.[250] Evidence of Warren's purposes for his broad and abstract criteria for public figure status is supplied by his rejection of the concession narrative of *Rosenblatt*, his use of the libel privilege vocabulary of the public

248. *See id.* at 162-65.

249. The Warren justices support the Court majorities in *Sullivan*, *Garrison*, and *Rosenblatt*; but after Chief Justice Warren leaves the Court, Justice White later rejects Justice Brennan's views, first in *Rosenbloom* and then in *Gertz*. *Compare* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 29 (1971) (Brennan, J., plurality), *and* Gertz v. Robert Welch, Inc., 418 U.S. 323, 361 (Brennan, J., dissenting), *with Rosenbloom*, 403 U.S. at 57 (White, J., concurring), *and Gertz*, 418 U.S. at 369 (White, J., dissenting).

250. For an explanation of these concepts, see *supra* text accompanying notes 136-38 (Brennan's vortex figure); *supra* text accompanying notes 183-88 (Friendly's participant figure).

man,[251] and his avoidance of any recognition of the relevance of the privacy tort privileges to an expansion of the actual malice rule. Warren's preference for relying on uncredited sources, while concealing the originality of some of his arguments, cannot conceal the links between *Sullivan's* principles and the shape and purpose of his public figure definitions.

Chief Justice Warren begins his defense of the expansion of *Sullivan* with his goal firmly in mind, which is to explain why libelous speech about some public figure plaintiffs must be protected in the same manner as libelous speech about public officials under *Sullivan*.[252] He takes for granted the value of the *Rosenblatt* blueprint, and borrows its premise that the actual malice rule should protect libelous statements regarding people who are "involved in the resolution of important public questions."[253] He holds firmly to the framework of the double helix, as he describes how speech about public issues and events may focus on "those who do not hold public office," when they have the equivalent positions and power of those who do.[254] Warren points to the logic of recognizing that the same "concern to the citizen" exists regarding the "views and actions" of a public figure and the "attitudes and behaviors" of a public official, whenever both characters are involved in the same issues or events.[255] Then Warren shifts to an endorsement of *Hill*'s principle that freedoms of speech and press are not "the preserve of political expression or comment upon public affairs," but extend to "freedom of discussion" that "must embrace all

251. *See Butts*, 388 U.S. at 164 (Warren, C.J., concurring) (echoing *Rosenblatt*'s language, in a new context, in referring to people who are "in a position significantly to influence the resolution" of "public issues"). *See supra* text accompanying notes 150-53.

252. The Warren opinion repeatedly qualifies his observations about public figures to make it clear that he means to refer to a sub-group and not to all public figures as defined by the publicity privilege. For example, he states that "many" of them have the power to be "involved" in resolving public questions or to "shape events," but implicitly, not all; he also notes that "often" such people "play an influential role in ordering society," but implicitly, not always. *Butts*, 388 U.S. at 164 (Warren, C.J., concurring).

253. *Id.*

254. *Id.*

255. *Id.* at 162. Warren's argument reflects Blackmun's appeal to the absence of a "rational distinction" between criticism of those who "lead in the determination of national policy" and criticism of government officials, given the same public interest in both types of speech. *See* Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966).

issues about which information is needed."[256] Thus, Warren ties *Sullivan*'s free debate narrative to the "rights of the press and the public to inform and be informed."[257] He argues that public opinion performs the same function in restraining the influence of public figures as that performed by popular elections where the "restraints of the political process" may be used by the public to influence the conduct of public officials.[258] In effect, Warren treats public opinion itself as a democratic good.

In the spirit of *Sullivan*, Warren derives his First Amendment definition of a public figure from the public need for uninhibited debate about the activities and opinions of those with informal political and social power. Like Blackmun, Warren recognizes that such power may be derived from either position or fame.[259] Warren also observes that such power provides "ready access" to the "mass media of communication." This access creates the power to "influence policy" and to "counter criticism" of the "views and activities" of the power wielder.[260] Unlike the Harlan opinion, which emphasizes that a public figure's power of access to the media is a

256. *Butts*, 388 U.S. at 164 (Warren, C.J., concurring); Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) (quoting Thornhill v. Alabama, 310 U.S. 88, 102 (1940)). *Cf. Sullivan*, 376 U.S. at 272 ("'The protection of the public requires not merely discussion, but information.'" (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (D.C. Cir. 1942)).

257. *Butts*, 388 U.S. at 164-65 (Warren, C.J., concurring). *See supra* text accompanying notes 91-96.

258. *Butts*, 388 U.S. at 164 (Warren, C.J., concurring) (observing that public figures "are not amenable to restraints of the political process," so that "public opinion may be the only instrument by which society" can influence them). This reference to the political process connects Warren's express recognition of the political power of some public figures to the *Sullivan* narratives concerning the value of speech about politics and government. *Cf. Sullivan*, 376 U.S. at 270 (declaring that "'public discussion is a political duty'" and "'this should be a fundamental principle of American government'") (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

259. *See Butts*, 388 U.S. at 163-64 (Warren, C.J., concurring). *Cf.* Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966) (identifying "prominence" as a source of "influence" in the resolution of public issues, as well as positions that create the "capacity" to "guide public policy").

260. *Butts*, 388 U.S. at 164 (Warren, C.J., concurring). *See also id.* at 163 (further recognizing that "the distinctions between governmental and private sectors are blurred," so that "power" to make "policy determinations," once channeled through "political institutions," now originates with and is "implemented" through private sector groups, "some only loosely connected with Government").

tool for rebutting libels,[261] the Warren opinion views that access as the means for a public figure to advertise and defend her power and opinions. Warren does not connect his vision of public figures to Brennan's influence seeker who thrusts herself into the vortex of public controversy, or to Friendly's participant in public debate.[262] Warren's public figure is not a player in a high-stakes controversy of grave or pressing public concern, but only a subject of "legitimate and substantial" public interest.[263] Warren creates no requirements that a public figure must enter a debate or attract public notice.[264] Instead, Warren articulates criteria for a public figure in abstract generalities, referring to a person's latent power to play a "role in ordering society," "shape events in areas of concern to society," or be involved "in public issues and events."[265]

Warren's opinion takes on a more emphatic tone in describing the virtues of the actual malice rule as applied to his concept of public figures. Warren gives no quarter to Justice Stewart's plea in *Rosenblatt* for the Court's recognition of the constitutional status of the reputation interests of libel plaintiffs. Instead, Warren revises the concession narrative of *Rosenblatt* by downgrading its valuation of society's "pervasive and strong interest" in "redressing attacks upon reputation" through the libel remedy.[266] He characterizes that interest as a merely "legitimate" one that is "balanced to a proper degree" by the actual malice rule, which functions as "an

261. *See id.* at 155 (Harlan, J., plurality) (finding that public figures command "sufficient continuing public interest" to expose the fallacies of defamation through their access to the media).

262. Warren's failure to equate Brennan's vortex figure with public figures is not surprising because Brennan did not make this connection in his *Rosenblatt* footnote. *See supra* text accompanying notes 201-05. Moreover, Harlan's use of the vortex concept without attribution to Brennan, and Harlan's declaration that a vortex plaintiff attains public figure status as reflected in "ordinary tort law principles," provide Warren with additional reasons to cede the vortex metaphor to Harlan. *See Butts*, 388 U.S. at 154-55 (Harlan, J., plurality).

263. *Butts*, 388 U.S. at 164-65 (Warren, C.J., concurring).

264. *Compare supra* text accompanying notes 206-08, *with supra* notes 225-230 (analysis of pro-extension courts). Notably, Warren's definition of a public figure obscures the question whether public figure status is almost always "voluntarily" assumed, or whether it may be "involuntarily" acquired, as recognized in *Gertz*. *See supra* note 14.

265. *Butts*, 388 U.S. at 164 (Warren, C.J., concurring). Warren recognizes that the *Walker* and *Butts* plaintiffs are public figures according to his definition. *Id.* at 165.

266. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). *Cf. supra* text accompanying notes 148-50.

important safeguard" to afford "the necessary insulation for the fundamental interests" of First Amendment rights.[267]

Warren's failure to refer to the publicity privileges is a sign of his intention to defend the actual malice rule, and to guard its narratives against the influence of the Harlan opinion's reinterpretation of *Sullivan*.[268] Instead of validating Harlan's reference to the privacy tort definition of a public figure, Warren treats the public figure label as a First Amendment term that must be defined using *Sullivan*'s rhetorical tradition. To this end, Warren uses the code language of the libel privileges employed in *Sullivan* in describing Walker as a public man and in arguing that the actual malice rule will protect First Amendment interests when evenly applied to cases involving public men.[269] Warren also refrains from mentioning any of the various hints in *Sullivan*'s progeny cases concerning the usefulness of the publicity privileges as a potential source of free speech protection.[270] Warren's public figure definition is designed to fit the *Sullivan* narratives like a carefully tailored glove. The Harlan opinion's definition is not designed for that purpose, and so Warren discreetly avoids using the doctrinal source material used by Harlan.

Given the inherent ambiguity of the Warren opinion's silences concerning presumptively relevant case law, commentators disagree about the implications of the *Butts* opinions.[271] Warren describes Walker as a "public man in whose public conduct society and the press [have] a legitimate and substantial interest."[272] Some observ-

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267. *Butts*, 388 U.S. at 165 (Warren, C.J., concurring).

268. *See infra* text accompanying notes 293-313.

269. *Butts*, 388 U.S. at 165 (Warren, C.J., concurring). *See supra* text accompanying notes 67-68, 109.

270. *See supra* text accompanying notes 114-41.

271. *Cf., e.g.*, Comment, *Privacy, Defamation, and the First Amendment: The Implications of* Time, Inc. v. Hill, *supra* note 130, at 951, 952 n.178 (asserting that the *Butts* Court is retreating from *Hill*); Jerome Lawrence Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 404 (1969) (arguing that Warren's opinion incorporates *Hill*'s expansion of *Sullivan*); Kalven, *supra* note 6, at 286 (finding that it is a puzzle why the Court ignores *Hill* in *Butts* and goes "back to *Sullivan* for guidance").

272. *Butts*, 388 U.S. at 165 (Warren, C.J., concurring). Warren's opinion does not explain how Wally Butts fit Warren's public figure criteria. For criticism of the *Butts* definitions of public figures as vague, see, for example, Note, *Public Official and Actual Malice Standards: The Evolution of* New York Times v. Sullivan, 56 IOWA L. REV. 393, 396 (1967) [hereinafter *Public Official and Actual Malice Standards*]; Philip S. DiMatteo, Note,

ers notice that Warren's vocabulary could be detached from his public figure concept and used to extend the actual malice rule to all plaintiffs involved in subjects of legitimate public interest.[273] The first lower court to take this step issues its ruling soon after *Butts* is decided,[274] and four years later, a short-lived plurality in *Rosenbloom v. Metromedia, Inc.*[275] endorses this position. *Gertz* soon erases *Rosenbloom* and revives the public figure concept as the boundary for the actual malice territory[276] in a doctrinal milestone that marks the end of the first decade of the *Sullivan* regime. With the benefit of hindsight, it is not difficult to read the Warren opinion in *Butts* as a stepping stone toward *Rosenbloom*'s temporary abandonment of the public figure category. But even if Warren's opinion is not read this way, it is impossible not to notice the commitment of the opinion to the sociological guesses and First Amendment values of *Sullivan*.[277]

### *B. Justice Harlan's Public Figure Concept Based on "Ordinary Tort Rules" and a Reworking of the Narratives in* Sullivan

Justice Harlan embarks upon a more complicated challenge in *Butts* than that faced by the anti-extension courts, which had no need to define the public figure concept in order to reject the ap-

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Times *Marches On: The Court's Continuing Expansion of the Application of the Actual Malice Standard*, 47 NOTRE DAME L. REV. 153, 158 (1971).

273. *See*, *e.g.*, Henry v. Nickel, Note, *The* New York Times *Rule and Society's Interest in Providing a Redress for Defamatory Statements*, 36 GEO. WASH. L. REV. 424, 429 (1967) (predicting that the Warren opinion's position "logically cannot be restricted to any class of persons" if free discussion of public issues is the guide); Merin, *supra* note 271, at 419 (recognizing that the definition of public figure might become so broad that "any member of the public who becomes of general interest" will qualify). *See supra* note 14.

274. United Med. Labs., Inc. v. Columbia Broad. Sys., Inc. 258 F. Supp. 735 (D.C. Or. 1966), *aff'd*, 404 F.2d 706 (9th Cir. 1968) (extending the *Sullivan* rule to libelous speech related to "public health" issues). *See Public Official and Actual Malice Standards*, *supra* note 272, at 398 n.33 (citing eleven cases extending *Sullivan* rule to suits concerning libelous speech related to public interest).

275. 403 U.S. 29, 43-46 (Brennan, J., plurality) (holding that plaintiffs should have to prove actual malice when libelous speech involves matter of "general or public concern"). *See supra* note 13.

276. *See* Gertz v. Robert Welch, Inc., 413 U.S. 323 (1974).

277. *See* Kalven, *supra* note 6, at 289 (opining that the Court "has done exactly what would have been predicted from *Sullivan*, radiating outward gradually by analogy from the core protection" of that decision).

plication of the actual malice rule to libel suits by non-official plaintiffs. Justice Harlan's opinion reveals that he views his two most important tasks as interconnected ones: to establish a limitation upon *Sullivan* by restricting the application of its actual malice rule to suits by public officials, and to create a new First Amendment pedigree for a gross negligence standard to be used in place of that rule. As part of the latter task, Harlan must define the plaintiff class to be covered by the new standard and link that definition to the pedigree for that standard. The Warren opinion's public figure definition, with its references to the public man and its links to the principles of *Sullivan*, is not suited to the Harlan's purposes. By contrast, the publicity tort definition of the public figure concept has no links to *Sullivan* or to Warren's opinion. By citing that definition, Harlan also can highlight the need to look outside *Sullivan* to ordinary tort law principles for a replacement for the actual malice rule and a definition of the public figure concept. Harlan's discussion of his public figure formula is focused on the attributes of the plaintiffs in *Walker* and *Butts*, and his formula is linked to complex reinterpretations of *Sullivan*. Thus, Harlan's narratives establish enduring intellectual building blocks for the Court's subsequent libel jurisprudence.

During the course of his analysis, Harlan repeatedly uses the term "public figure" without defining it clearly for First Amendment purposes. This convenient strategy is also adopted by Warren, whose definition of the term emerges only gradually in his opinion, as expressed through his reasoning concerning the modern political power of actors in the private sector.[278] By contrast, Justice Harlan's definition appears in a brief and cryptic passage, at the end of a long survey of the history of First Amendment law and libel law, and an overview of carefully selected rationales from *Sullivan*.[279] He notes that both Walker and Butts "commanded a substantial amount of independent public interest," and hence "would

278. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163-64 (Warren, C.J., concurring). *See* Kalven, *supra* note 6, at 288 (observing that "with arresting overtones of contemporary sociology [Warren] argued that there is no longer a sharp difference in modern life between the governmental and the private").

279. *Butts*, 388 U.S. at 146-54 (Harlan, J., plurality).

have been labeled 'public figures'" under "ordinary tort rules."[280] He opines that Wally Butts "may have attained that status by position alone" because of his job as Athletic Director at Georgia,[281] whereas Walker attained that status "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy" during the Ole Miss demonstration.[282] In his concluding words on the subject, Harlan observes that both men "commanded sufficient continuing public interest and had sufficient access to the means of counterargument 'to expose through discussion the falsehood and fallacies' of the defamatory statements."[283]

Even when Harlan's public figure definition is evaluated in a vacuum, it is evident that he is inventing a new First Amendment concept out of disparate ideas from different sources, rather than putting a First Amendment label on a set of pre-existing, interrelated tort law elements.[284] When Justice Brennan coined the vortex expression in his *Rosenblatt* opinion, he did not equate a vortex plaintiff with a public figure.[285] When courts created the public figure privilege for publicity suits, that privilege was not justified on the grounds that the plaintiff could seek media access for the "means of counterargument" to publicize the truth; such plaintiffs

280. *See id.* at 154-55 (citing *Spahn*, 221 N.E.2d 543, *remanded on other grounds*, 387 U.S. 239 (1966)). *See also Spahn*, 221 N.E.2d at 545, *aff'd on reargument*, 233 N.E.2d 840 (equating public figures with "newsworthy persons," and declaring that a public figure, "whether he be such by choice or involuntarily, is subject to the often searching beam of publicity," so that "the law affords his privacy little protection"). On rehearing, the Court of Appeals in *Spahn* affirmed the statutory privacy tort verdict for Warren Spahn for damages based on publication of fictionalized biography. Spahn v. Julian Messner, Inc., 233 N.E.2d 840 (N.Y. 1967). *See also supra* note 23.

281. *Butts*, 388 U.S. at 154 (Harlan, J., plurality).

282. *Id.*

283. *Id.* (quoting Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., dissenting)). Harlan's descriptions of the different sources of public figure status for Walker and Butts lead commentators to speculate that different proof requirements may be created for different types of public figures. *See, e.g.*, James R. Carpenter, Jr., Note, *Constitutional Law—Defamation under the First Amendment—The Actual Malice Test and "Public Figures*," 46 N.C. L. REV. 392, 398 (1967); Merin, *supra* note 271, at 421.

284. *Cf.* Time, Inc. v. Hill, 385 U.S. 374, 403 (Harlan, J., dissenting) (blending First Amendment analysis for libel and false light torts with original definitions of public interest concept and negligence standard). *See supra* note 151 and *supra* text accompanying notes 151-52.

285. 383 U.S. at 86 n.12. *See supra* text accompanying notes 198-202.

wanted no publicity in the first place, which is why they sought damages for harm occasioned by the publicity of true facts.[286] Justice Harlan's endorsement of a public figure privilege only for public interest speech about public figures reveals that his constitutional definition is more limited than ordinary tort law rules, which granted a publicity privilege for all news or information that arouses public attention."[287] Finally, Harlan's analysis includes observations that seem redundant from a torts perspective, such as his emphasis on Walker's vortex activities, when Walker would have earned his public figure status in a publicity suit from prior life accomplishments that made him a subject of public interest.[288]

When Harlan's public figure definition is taken out of a vacuum and considered in the context of his entire *Butts* opinion, it becomes more obvious that his distinctive amalgam of definitional elements is attached to a similar amalgam of rationales. Harlan's narratives in *Butts* combine elements of *Sullivan*'s narratives with new elements that reshape *Sullivan*'s commitment to the actual malice rule. As Harlan reconfigures the narratives of *Sullivan*, it becomes easier for him to argue that the actual malice rule should be limited to public officials, and to propose that other sources of law should fill the void left by the shrinkage of *Sullivan* as a resource for determining the standard to govern suits by non-official plaintiffs. For Harlan, these sources provide the justifications for adopting the gross negligence standard. They include First Amendment clear and present danger cases, precedents involving press rights, common law libel doctrines, criminal law statutes, and ordinary tort law principles.

Justice Harlan begins his opinion by sidestepping the lower courts' extension jurisprudence, while noting that "a sharp division of opinion" exists among lower courts as to whether *Sullivan* is limited to public officials or "has a longer reach."[289] Harlan's decision

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286. *See supra* text accompanying notes 23-28.

287. *See supra* notes 35-38 and accompanying text.

288. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 140 (Harlan, J., plurality) (observing that Walker "could fairly be deemed a man of some political prominence"). *Cf.* Walker v. Courier-Journal, 246 F. Supp. 231, 233 (W.D. Ky. 1965), *rev'd*, 368 F.2d 189 (6th Cir. 1966) (taking judicial notice that Walker's "public life is generally well known to the people of this Nation").

289. *Butts*, 388 U.S. at 134 (Harlan, J., plurality).

to ignore the substance of the lower court decisions is understandable, given their lack of support for either his gross negligence privilege or his decision to detach his public figure formula from Warren's sources.[290] In more subtle gestures of cleaning the historical slate, Harlan incorporates the ideas of Friendly, Brennan, and Blackmun into his introductory analysis. But he does this without explaining that all of them favored extension of the actual malice rule, and that none of them employed a public figure concept rooted in the privacy tort tradition.[291] Harlan explains that his fresh inquiry into "the relationship between libel law and the freedom of speech and press"[292] is required in order to avoid granting the press either too much or too little immunity "for the infliction of needless injury upon honor and reputation through false publication."[293] Contrary to the Warren opinion's judgment that the actual malice rule achieves the proper balance between free speech interests and tort interests,[294] Harlan's opinion concludes that the

290. *See supra* notes 161-174 and accompanying text. Harlan's gross negligence privilege is not an option that lower court judges consider before *Butts*; they assume that the extension debate concerns the "all or nothing" issue as to whether to extend the actual malice rule to public figures. Lower courts consistently reject the argument that a plaintiff's public figure status is enough alone to trigger the actual malice rule. *See supra* text accompanying notes 204-06. Harlan would have agreed with that point of view because of his rejection of the actual malice rule, but his opinion envisions that a person's public figure status is enough alone to trigger his proposed gross negligence privilege. *See Butts*, 388 U.S. at 155 (Harlan, J., plurality).

291. Harlan's allusions to Friendly's position are the most misleading ones. *See* Kalven, *supra* note 6, at 286-87 n.51 (noting that Harlan quotes an observation by Friendly that makes it appear that he is discussing the "risks of tort liability [that] are to be placed on publishers," when the context of the comment relates to a jurisdictional issue; Harlan also ignores Friendly's support for using the actual malice rule for a nonofficial "participant in a debate on an issue of grave public concern"); *Butts*, 388 U.S. at 147 (Harlan, J., plurality) (citing Buckley v. New York Post Corp., 373 F.2d 175, 182 (2d Cir. 1967)). Harlan's citation to Blackmun's view is taken out of the context of Blackmun's *Pauling* opinion so as to ignore Blackmun's conclusions. *See id*. at 148 (stating that criticism of private leader figures and public officials is equally important to the public interest) (citing Pauling v. Globe-Democrat Publ'g Co., 362 F.2d 188, 196 (8th Cir. 1966)). Harlan's use of Brennan's vortex concept ignores the fact that Brennan never equated his concept with the public figure term. *Compare id*. at 155, with *supra* text accompanying notes 198-202.

292. *Butts*, 388 U.S. at 135 (Harlan, J., plurality).

293. *Id.*

294. *Id*. at 164 (Warren, C. J., concurring).

actual malice standard should not be granted an "unintended inexorability" or "blind application."[295]

Harlan's central moment of engagement with the Warren opinion comes with his declaration that "none of the particular considerations involved" in *Sullivan* are present in *Butts* because suits by public figures are not analogous "to prosecutions for seditious libel," because libel judgments for public figures do not vindicate "governmental policy," and because public figures do not enjoy a "special privilege" protecting their utterances "against accountability in libel."[296] This set of distinctions exemplifies three of Harlan's strategies for reworking the *Sullivan* narratives. One of those strategies is to select a *Sullivan* rationale and then to prune away other rationales so as to deprive them of doctrinal significance. Here Harlan isolates the Sedition Act narrative from other narratives that apply equally to official and non-official plaintiffs, in order to portray *Sullivan* as possessing only a few core rationales instead of a web of multiple justifications.[297] A second strategy is to implant a non-*Sullivan* rationale into a discussion of actual rationales from *Sullivan*; here, the vindication of government policy that might be discerned in a public official's favorable libel verdict is a new argument for limiting the *Sullivan* privilege to critics of officials. When Harlan, like Warren, remains silent about the provenance of rationales, their novelty is concealed. A third technique used by Harlan is to ignore the Court's interpretations of *Sullivan* in the progeny cases, which is what Harlan does in rejecting, without citation, *Rosenblatt*'s retraction of the official privilege rationale.[298] Harlan's amalgam of rationales creates a "public official" narrative that can serve, in its simplicity, as a distilled version of a re-

295. *Id.* at 147-48 (Harlan, J., plurality). *Id.* at 147 (declaring that an "accommodation" between the interests of the press and libeled plaintiffs is necessary "in all libel actions arising from a publication concerning public issues"). *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974) (opining that "we believe that the [*Sullivan*] rule states an accommodation between [the interest of the press and broadcast media] and the limited state interest present in the context of libel actions brought by public persons").

296. *Butts*, 388 U.S. at 154.

297. *See supra* text accompanying notes 85-112; *supra* note 103.

298. *See supra* text accompanying notes 130-41; *supra* note 223.

imagined *Sullivan* doctrine in which other narratives recede into invisibility without explicit rejection.[299]

Harlan exercises care in selectively citing *Sullivan* narratives that support a limitation on the actual malice rule, as illustrated by his omission of references to *Sullivan*'s narratives concerning self-censorship, free debate, and the libelous climate in the arena of robust debate about public issues.[300] Yet occasionally Harlan's opinion incorporates an idea that could be used to argue for the similarity of public officials and public figures, rather than for their differences. Harlan's most significant contributions to libel jurisprudence include the arguments in his *Hill* dissent that "access to the means of counterargument" through publicized rebuttals to libel may serve as an alternate libel remedy, and that those who lack media access therefore have a greater need of generous liability rules for libel actions.[301] Harlan was not the first to recognize that public counterargument could be viewed as a real or symbolic alternative to a libel action for plaintiffs who could not satisfy the actual malice standard.[302] But Harlan deserves some credit for the *Gertz* Court's adoption of the argument that it is unfair to impose the actual malice rule on private figures who lack access to the means of exposing the falsity of libels about them.[303] However, when

299. *See supra* text accompanying notes 167-68.

300. These are the very rationales that led some of the lower courts to extend the actual malice rule to some non-official plaintiffs. *See supra* text accompanying notes 211-21.

301. *See supra* text accompanying note 152.

302. *See*, *e.g.*, *Sullivan*, 376 U.S. at 304-05 (Goldberg & Douglas, JJ., concurring) (arguing that "counterargument" is a "weapon available to expose" falsity and a "public official certainly has equal if not greater access than most private citizens to media of communication"); Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) (Douglas, J., concurring) (noting that many people who were damaged by "false, abusive" charges in the "1940's and 1950's," "unlike the officials in *Sullivan* who ran for election, rarely had opportunity for rejoinder"). *See also* Lewis, *supra* note 7, at 132 (observing that at oral argument in *Sullivan*, Wechsler reminded the Court that public officials may rely on their privilege to make speeches to answer libelous charges).

303. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-45 (1974). *Contra* Kalven, *supra* note 6, at 299-300 (criticizing Harlan's idea because "[i]t is a doubtful reading of [*Sullivan*] to see it resting so heavily on a concern with counterargument," since "we look to counterargument as the correct remedy for the mischief of false and pernicious ideas and doctrine" but "these notions sound only the faintest echo when we turn to false statements of fact about individuals"); Cohen, *supra* note 16, at 377-77 (opining that public officials and public figures cannot fully protect their reputations without

Harlan adopts the element of "access to counterargument" as a criterion for his public figure definition, he overlooks the logical consequence of imposing his own *Hill* theory on the *Butts* and *Walker* plaintiffs. If access to counterargument is a justification for imposing the actual malice rule on public officials, who presumably have media access, then the actual malice rule should be imposed similarly on public figures with media access, rather than Harlan's gross negligence standard.

Harlan prefers to ignore rationales from the *Sullivan* progeny cases that do not fit the goal of his "public official" narrative to create a restraining boundary around the actual malice rule. For example, Harlan notes that *Rosenblatt* applied the actual malice rule to a plaintiff who had a position in which the public had an independent interest, and then he argues that the actual malice rule is not appropriate for public figures because they do not have positions in the way that public officials do.[304] But Harlan does not mention the existence of the *Rosenblatt* blueprint, which can be used to make analogies between public figures and officials when both types of plaintiffs "are in a position significantly to influence the resolution" of "public issues."[305] In effect, Harlan interprets *Rosenblatt* narrowly in order to reduce its potential as a doctrinal resource for addressing the extension of *Sullivan* to public figures. He applies a similar shrinking process to *Sullivan*'s theory for the constitutional protection of false speech. Harlan again borrows from his *Hill* dissent, in emphasizing that false speech does not deserve First Amendment protection, except insofar as its protection might aid the protection of true speech.[306] This observation downplays *Sullivan*'s finding that even false and defamatory speech must be protected through the availability of a defense "for erroneous

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using libel suits, and that "the obscure citizen" has no greater need "for a forum to vindicate his reputation").

304. *Butts*, 388 U.S. at 153-54 (Harlan, J., plurality) (citing *Rosenblatt*, 383 U.S. at 86).

305. *See Rosenblatt*, 383 U.S. at 85 (observing that the actual malice rule is required for persons who "are in a position significantly to influence the resolution" of "public issues").

306. 385 U.S. at 405 (citing *Rosenblatt*, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1964)). *See supra* text accompanying notes 142-43. *Accord Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact" but we must "protect some falsehood in order to protect speech that matters.").

statements honestly made."[307] Harlan omits this point because he wishes to portray the "misconduct" of all false critics as being the same, and to argue that the characteristics of public officials and public figures justify different "balances" between reputation interests and free speech interests.[308] Different balances can lead conveniently to confinement of the actual malice rule to the sphere of libel actions by public officials.

Once Harlan defines his public figure formula as an amalgam that has little connection with *Sullivan*, then his search outside *Sullivan* for a proof standard for public figures is evidently necessary. To this end, Harlan looks to the backdrop of law that is left untouched by *Sullivan*, such as judicial "loss shifting" rules, "neutral" and "generally applicable regulatory measures,"[309] theft statutes, and common law doctrines that classify libel "in the same class with the use of explosives or the keeping of dangerous animals."[310] Harlan invokes First Amendment precedent to express sentiments that represent the antithesis of the spirit of *Sullivan*: the publisher of a newspaper "has no special privilege to invade the rights and liberties of others."[311] Yet none of his sources point directly to the correctness of Harlan's novel standard allowing damages for public figures based on "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[312] Any gap between Harlan's rationales and their connection to his chosen proof standard can be filled by relying on sociological guesses lightly made.

## CONCLUSION

The historical reasons for the public figure definitions in First Amendment libel doctrine, as established in the *Butts* opinions, are largely invisible in our era. Warren and Harlan duel sharply over

307. 376 U.S. at 272-73.

308. *Butts*, 388 U.S. at 154 (Harlan, J., plurality). *Id.* at 153 ("[I]mproper conduct should result in impositions that strike a fair balance between a plaintiff's interest in recompense and society's interest in freedom of speech.").

309. *Id.* at 152-54.

310. *Id.* at 152 (quoting PROSSER, *supra* note 2, § 108, at 72).

311. *Id.* at 150 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).

312. *Id.* at 155.

the nuances between speech concerning public interest issues about a public figure who commands substantial public interest, and speech about public issues and events that relate to public figures who are involved in public questions. The conflict among the *Butts* justices may seem almost indecipherable to modern legal eyes, but an understanding of the libel and publicity privileges, as well as an examination of lower court jurisprudence and pre-*Butts* precedent, go some way toward bringing the differences between Warren and Harlan to light. The broad tort connotation of a public figure has remained a part of the legal vernacular over the decades since *Sullivan*, even as the particulars of its constitutional meaning evolved during the era between *Butts* and *Gertz*, and continue to evolve in modern post-*Gertz* law. Given the richness and elusiveness of the public figure concept, it seems destined to vacillate in its meaning, as a permanent moving target, as long as it retains the role of expressing hotly contested compromises over the clash of free speech interests and the ancient interest in reputation protected by libel law.