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The Reasonable Man and the First Amendment: Hill, Butts, and Walker

Harry Kalven Jr.

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> While I agree with the results announced by Mr. Justice Harlan in both of these cases, I find myself in disagreement with his stated reasons for reaching those results. Our difference stems from his departure from the teaching of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), to which we both subscribed only three years ago.[1]

I. THEME

Since March, 1964, when the United States Supreme Court handed down its decision in *New York Times v. Sullivan*,[2] there has been much speculation about what would happen next. Would the Court take seriously the new idiom and work a general revolution in the thinking about the First Amendment? Or would it limit the new principles and rhetoric to cases involving libel of public officials and simply add one more special cluster of precedents to the many it had already created in the free speech area?[3] Whatever their view

Harry Kalven, Jr., is Professor of Law, The University of Chicago.

[1] Chief Justice Warren, concurring, in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

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

[3] This, for example, was the question on which I ended in Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REVIEW 191, 221.

See also Brennan, *The Supreme Court and the Meiklejohn Interpretation of the*

of the *New York Times* case, students of the Court were all deeply curious to see if, and how, it would grow. In the three intervening years, the law reports, state and federal,[4] have been rich in what Mr. Justice Harlan has called "*New York Times* . . . and its progeny."[5] After a few skirmishes with the *Times* rule,[6] in the 1966 Term, the

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First Amendment, 79 HARV. L. REV. 1 (1965); Pedrick, *Freedom of the Press and the Law of Libel; The Modern Revised Translation*, 49 CORNELL L.Q. 581 (1964); Pierce, *The Anatomy of an Historic Decision: New York Times v. Sullivan*, 43 N.C. L. REV. 315 (1965); Berney, *Libel and the First Amendment—a New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L. J. 234 (1966); Karst, *The First Amendment and Harry Kalven: An Appreciative Comment on the Advantages of Thinking Small*, 13 U.C.L.A. L. REV. 1 (1965); and *cf.* Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789 (1964).

[4] The cases are collected in Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir. 1966); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966); and in the Court's footnote in *Butts*, 388 U.S. at 134 n. 1.

[5] Time, Inc. v. Hill, 385 U.S. 374, 407 (1967).

[6] Garrison v. Louisiana, 379 U.S. 64 (1964); Henry v. Collins, 380 U.S. 356 (1965); Rosenblatt v. Baer, 383 U.S. 75 (1966); and see also Linn v. Plant Guard Workers, 383 U.S. 53 (1966). The cases appear more interesting in retrospect now that *Hill*, *Butts*, and *Walker* have come down than they did at the time.

For present purposes it is sufficient to note that *Garrison* involved criminal libel of judges who were unquestionably public officials, although the attack could be said to have concerned their private lives, and that the conviction was upset. The Court held that the *New York Times* principle applied to the crime of libel and reiterated that something more than "mere negligence" was required to convict, namely, knowing falsehood or reckless disregard for the truth.

In *Rosenblatt*, the statement in question was an oblique comment in a local newspaper column allegedly referring to and defaming the plaintiff, the former supervisor of a municipal ski resort. The case had been tried prior to the decision in *New York Times* and the Court reversed and remanded plaintiff's libel judgment for a new trial. The Court indicated that if the plaintiff were a public official, it was an error not to have applied the *New York Times* standard to the defendant. There was a strong implication that *New York Times* would not be relevant and the matter no longer of constitutional concern, if plaintiff were not a public official. It was this implication that is the most interesting point in *Rosenblatt* in view of the development in *Butts* and *Walker* of the concept of the "public figure."

The opinions in both cases were by Mr. Justice Brennan who wrote the opinion in *New York Times*. Justices Black and Douglas voiced their unhappiness in both cases about the *New York Times* formula, "so pale and tame." Mr. Justice Fortas made the point he later elaborated in *Hill*, that because the cases were tried prior to *New York Times* the granting of certiorari was improvident, and the verdicts should be allowed to stand. Mr. Justice Harlan did not foreshadow the major attack he was to make on the scope of the *Times* rule but confined himself to dissenting on the impersonal libel point in *Rosenblatt*. Mr. Justice Stewart, who was silent in the later cases but whose voting pattern is arresting (see note 28 *infra*), wrote

Court had two major confrontations with it and produced three new precedents: *Time, Inc. v. Hill*,[7] *Curtis Publishing Company v. Butts, Associated Press v. Walker*.[8]

The three new cases have yielded roughly 100 new pages of judicial writing on freedom of speech. But even with so substantial a gloss, it appears that the story has not yet run its course. *New York Times* has not yet become the dominant precedent in the law of free speech and has been applied only in cases not far removed from the issue of libel of public officials. On the other hand, it is showing vitality and is stirring formidable controversy within the Court. It may yet live up to its earlier billing.[9]

I said, in another context, that "the greatest fascination of law study is to watch some great event from the real world intersect with existing legal doctrine."[10] But there is also fascination in watching the centuries-old rigidities, complexities, and elegances of the Anglo-American law of defamation collide with a rapidly developing corner of American constitutional law. The one certain prediction I can make is that judicial review of the common law of defamation, launched by the *New York Times* case, is to be with us for a while to come.[11]

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a vigorous concurrence in *Rosenblatt*, stressing the large social values performed by the law of defamation.

Henry was a brief per curiam opinion in a civil action for libel of a county attorney and a chief of police. The sole issue went to the wording of the jury instructions concerning defendant's state of mind. The Court reversed judgments for the plaintiffs on the ground that the instructions might "have been understood to allow recovery on a showing of intent to inflict harm, rather than intent to inflict harm through falsehood."

Linn is tangential, since it involved libel in the course of a labor dispute, and the issue was one of federal preemption. Finally, it might be noted that *Times* was cited in Keyishian v. Bd. of Regents, 385 U.S. 589, 598 (1967), on "the dangers [inherent] in the word 'seditious,'" and in *Bond v. Floyd*, 385 U.S. 116 (1966), on whether the public official was to have as much protection as the citizen critic.

[7] 385 U.S. 374 (1967).

[8] *Butts* and *Walker* are reported together at 388 U.S. 130 (1967).

[9] "In brief compass, my thesis is that the Court, compelled by political realities of the case to decide it in favor of the *Times*, yet equally compelled to seek high ground in justifying its result, wrote an opinion that may prove to be the best and most important it has ever produced in the realm of freedom of speech." Kalven, *supra* note 3, at 193–94.

[10] KALVEN, THE NEGRO AND THE FIRST AMENDMENT 3 (Phoenix ed. 1965).

[11] One can only marvel at the law's capacity for growth here, and for growth in surprising directions. A decade or so ago I had occasion to look at the constitution-

There is one other point of special interest in the new sequence of cases. It centers on the role of Mr. Justice Harlan. A silent partner in the opinion of the Court in *New York Times*, he is the major voice in the current cases. Indeed, much of the intellectual interest in the new opinions is due to his writing. In *Hill* and in *Butts*, he made a major effort to limit the *New York Times* rule to the special problems of libel of public officials. He warned against attributing to *New York Times* "an unintended inexorability at the threshold of this new constitutional development."[12] Once again, he essayed his familiar role as the Justice who, in the aftermath of a fresh burst of energy by the Court, comes forward to tidy things up.[13]

II. The Facts in Hill, Butts, and Walker

Hill proves to be a somewhat complicated case to capture. It involved not libel but a new species of invasion of privacy, undreamed of by Warren and Brandeis: the so-called "false light"

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ality of the law of defamation and was hard put to get enough material together to round out a brief talk. Kalven, *Defamation and the First Amendment*, in Conference on Art, Publishing, and the Law (University of Chicago Conference Series, 1952).

The courts may soon get the problem in a new form. In April, 1967, the Federal Communications Commission issued a notice of a proposed rule to codify two phases of the "fairness" doctrine. 10 Pike & Fisher, Radio Reg. 2d 1911 (1967). The phase relevant here would provide in effect for a right of reply whenever a "personal attack" upon a group or individual had occurred during a broadcast relating to a controversial public issue. Various broadcasting groups have filed suit challenging the proposal as a violation of the *New York Times* rule. And see Red Lion Broadcasting Co. v. F.C.C., 10 Pike & Fisher, Radio Reg. 2001 (D.C. Cir. 1967).

It might be noted that of the six Supreme Court cases since *Times*, only *Henry* and *Walker* have any connection with issues generated by Negro protest. Whatever the ad hoc stimulus that was the occasion for *New York Times v. Sullivan*, it is apparent that it is now following a logic of its own.

[12] 388 U.S. at 148.

[13] *Compare, e.g.*, Watkins v. United States, 354 U.S. 178 (1957), *with* Barenblatt v. United States, 360 U.S. 108 (1959); and *compare* Lerner v. Casey, 357 U.S. 468 (1958), and Beilan v. Board of Education, 357 U.S. 399 (1958), *with* Slochower v. Board of Higher Education, 350 U.S. 551 (1956); and *compare* Konigsberg v. State Bar of California, 353 U.S. 252 (1957), *with* Konigsberg v. State Bar of California, 366 U.S. 36 (1961), and *In re* Anastaplo, 366 U.S. 82 (1961).

The movement, however, is by no means always in the same direction. See also Yates v. United States, 354 U.S. 298 (1957); Manual Enterprises Inc. v. Day, 370 U.S. 478 (1962).

case,[14] which has emerged in recent years as a rival to the traditional remedies in defamation.[15]

In September, 1952, James Hill and his wife and five children became the subjects of a national news story when they were held hostage for nineteen hours by three escaped convicts in their suburban home in Pennsylvania. It appears that the convicts in fact treated them courteously and departed leaving them unharmed. The Hills subsequently moved to Connecticut and made efforts to avoid the public spotlight.

In the spring of 1953 James Hayes published *Desperate Hours*, a novel that concerned the adventures of a family of four held hostage by three escaped convicts in their suburban home. In the Hayes story the convicts are not so polite; there is some violence against the father and son and "a verbal sexual insult" against the daughter. It appears that Hayes had collected news stories of comparable incidents and based his novel on a composite impression. The Hill news story had, however, "triggered" the writing of the novel. The Hills appear never to have taken exception to the novel.

In February, 1955, *Life* magazine ran a picture story about the fact that the novel was to be made first into a play and later into a movie. The very brief text[16] that accompanied the photos an-

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[14] This special category of privacy was christened by Dean Prosser in *Privacy*, 48 CALIF. L. REV. 383 (1960).

[15] It is examined in careful detail in Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962), and criticized in Kalven, *Privacy in Tort Law: Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROB. 326, 339–41 (1966). It seems that one consequence of the *Hill* case will be to retard substantially, if not altogether block, the tendencies of false light privacy to take over the field of defamation.

[16] The full text of the *Life* story as quoted by the Court, 385 U.S. at 377, read as follows:

"Three years ago Americans all over the country read about the desperate ordeal of the James Hill family, who were held prisoners in their homes outside Philadelphia by three escaped convicts. Later they read about it in Joseph Hayes' novel, *The Desperate Hours*, inspired by the family's experience. Now they can see the story re-enacted in Hayes' Broadway play based on the book, and next year will see it in his movie, which has been filmed but is being held up until the play has a chance to pay off.

"The play, directed by Robert Montgomery and expertly acted, is a heartstopping account of how a family rose to heroism in a crisis. LIFE photographed the play during its Philadelphia tryout, transported some of the actors to the actual house where the Hills were besieged. On the next page scenes from the play are re-enacted on the site of the crime."

nounced that the play was based on the novel that had "been inspired by the family's experience." It heralded the play as "a heart-stopping account of how a family rose to heroism in a crisis." The thrust of the story, however, was in the photos showing the play's cast re-enacting "scenes from the play" in the house that the Hills had occupied at the time of the incident.

The Hills' lawsuit was based on the *Life* article. The grievance was that it had given the false impression that the play "mirrored the Hill family's experience," and that it had sensationalized the story by adding the note of violence. Perhaps crucial was the disclosure at the trial that the text had originally stated the play was a "somewhat fictionalized" account of the incident and that in final editing these words had been dropped.

The plaintiff won a verdict for $50,000 compensatory damages and $25,000 punitive damages from a jury that had not been instructed on the issue of the defendant's state of mind. On appeal, a new trial was ordered solely on damages. At the retrial without a jury, plaintiff was awarded $30,000 compensatory damages. It was that award that was appealed.[17] In the Supreme Court, after the case had been argued twice,[18] the judgment for the plaintiff was reversed and the case remanded for a new trial under proper instructions.

The key facts about *Hill* were that it involved privacy and not libel; that the Hills were private citizens who involuntarily became subjects of public interest; that the magazine story was held actionable solely because under New York law the inaccuracies in *Life*'s reporting defeated the privilege *Life* otherwise would have had to report newsworthy events. It is perhaps also important to note that the case had been in litigation since 1955; that it was originally tried years before *New York Times* was decided; and that there is evidence in the record that *Life*'s handling of the story was sloppy. And finally, it may also be important that the Hills' grievance is not easy to perceive. The *Life* story did not show the Hills in an unfavorable light. Indeed, part of the inaccuracy was that it stressed their "heroism in a crisis." Whatever harm the story inflicted was not because of the falsity but because it once again exposed the Hills

[17] It appears that in the initial trial the wife also won a substantial verdict ($75,000 compensatory and $25,000 punitive), but the case "was apparently dismissed by stipulation." See 385 U.S. at 379 n. 2.

[18] It is perhaps of some interest to note that counsel for the Hills was Richard M. Nixon.

to the gaze of a national public. This is harm, however, for which New York law would have left the Hills without redress had the story been accurate.[19]

In contrast to *Hill*, in *Butts* the grievance is easy to grasp. The *Saturday Evening Post*, following a change of editorial policy designed to jack up sagging sales, decided to emphasize "sophisticated muckraking" articles. In keeping with the new policy it ran the article in question under the title "The Story of a Football Fix." A prefatory note from the editors set the tone and gave the gist of the piece:[20]

> "Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one. . . . Before the University of Georgia played the University of Alabama . . . Wally Butts . . . gave (to its coach) . . . Georgia's plays, defense patterns, all the significant secrets Georgia s football team possessed."

The text revealed that one George Burnett, an insurance salesman, had accidentally through an electronic error, overheard a telephone conversation between Butts and Paul Bryant, the Alabama coach, in which Butts disclosed the plays. Burnett had made notes and supplied specific instances of the plays for the article. The article went on to describe the dismayed reaction of the beleaguered Georgia players to the game and the presentation by Burnett of his notes to the Georgia coach which led to Butts's resignation as athletic director. The story ended on a note as unequivocal as the one on which it began:[21]

> The chances are that Wally Butts will never help any football team again. . . . The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure.

Butts brought a libel action against the *Post*. The principal defense at the trial was truth, but the jury found against the defendants on this point and awarded $60,000 compensatory damages and $3 million in punitive damages. On appeal the punitive damages were cut to $400,000. It was this judgment for Butts for $460,000 that was taken to the United States Supreme Court and affirmed.

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[19] See the discussion of newsworthy truthful reporting under New York law, text *infra*, at notes 32–34.

[20] 388 U.S. at 136.

[21] *Id.* at 137.

The jury had been instructed that punitive damages could be awarded on a finding of "actual malice," defined in part as "a wanton or reckless indifference or culpable negligence with regard to the rights of others."[22] The record showed little effort by the *Post* editors to check up on the story despite the gravity of the charges contained in it. As in *Hill*, the *Butts* trial had taken place before *New York Times* had come down.

Walker on its facts is somewhat similar to *Butts*. The communication in question was an AP dispatch reporting the activities of General Walker on the University of Mississippi campus on the night of September 30, 1962, when a riot erupted following the efforts of federal marshals to enroll James Meredith at the University pursuant to court order. The dispatch, an eyewitness account, stated that Walker had "assumed command" of the crowd and that "he had led a charge against the marshals." Walker brought a libel action against the Associated Press.[23] As in *Butts*, the defense of truth failed. This time the jury awarded $500,000 compensatory damages and $300,000 punitive damages. The trial judge, who could find no evidence of malice, struck the punitive damage award. He also found that *New York Times* would have required a verdict for the defendant but ruled that there were "no compelling reasons of public policy requiring additional defenses to libel" and that *New York Times* was not applicable. On appeal he was sustained on both rulings by the Texas courts. The United States Supreme Court reversed, directing a judgment for the defendant. It appeared that the Associated Press had assigned a young reporter to the Mississippi riot who had pretty much done the best he could to observe and note what had happened in the high excitement of the moment.

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[22] *Id.* at 173.

[23] Gen. Walker also brought a series of other libel actions against various newspapers which had printed the AP dispatch. See, for example, Walker v. Courier-Journal and Louisville Times Co., 246 F. Supp. 231 (W.D. Ky. 1965); Walker v. Associated Press, 417 P.2d 486 (Colo. 1966); Walker v. Kansas City Star, 406 S.W.2d 44 (Mo. 1966).

The opinion below in the instant case was reported in 393 S.W.2d 671 (Tex. App. 1965). The Texas court, in affirming Walker's judgment, found it unnecessary to mention *New York Times v. Sullivan*. In the other *Walker* cases, however, the courts agreed that *Times* controlled. Accordingly the *Courier-Journal* suit was dismissed, but the other two suits survived against a motion to dismiss on the view that General Walker had sufficiently pleaded malice to satisfy the *Times* standard.

III. You Can't Tell the Players without a Score Card

It has become a commonplace for the Supreme Court to resort to multiple opinions suggesting unseemly disagreement among the brethren. The combinations and permutations of positions in the three new cases, however, when combined with *New York Times*, are so spectacular as to justify a brief summary.

Only one of the four judgments survived constitutional scrutiny. In *Butts*, the plaintiff walked away from the Supreme Court with his judgment for $460,000 intact. In *Hill*, after eleven years of litigation and two arguments in the Supreme Court, the judgment was reversed and the case remanded for a new trial. In *Walker*, as in *New York Times*, the Court not only upset the judgment but directed a judgment for the defendant. The decisions in *New York Times* and *Walker* were unanimous. In *Hill*, the vote was 6 to 3 and in *Butts* it was 5 to 4. But the positions of the Justices are far more intricate than this pattern of votes would suggest, for the votes disclose little of the real pattern of disagreement.

In all four cases the Justices agreed that, to a considerable extent, state tort law is limited by First Amendment considerations. The disagreements arose over two other issues.[24] (1) There was disagreement about the level of privilege that a defendant is to be accorded.

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[24] There are at least four other subissues in the cases: (1) Whether some concessions should be made in the requirements for precision in the wording of the jury instructions in light of the fact that the litigation was begun before *New York Times* was decided and its rule had become manifest. (2) Whether, in *Butts*, the defendants had waived the constitutional issue by not raising it prior to trial. (3) When will an appellate court, making a *de novo* finding on the constitutional facts about defendant publisher's state of mind, accept a jury verdict? In *Butts* Mr. Justice Brennan, although finding enough in the record to support a verdict against the defendant, favored remand for a new trial so that a properly instructed jury could exercise its own judgment. (4) Whether in *Hill*, the Court could avoid holding the New York statute invalid on its face. By holding the statute valid but unconstitutionally applied, the Supreme Court seems to have ordered the New York court to change its construction of its own statute.

The waiver issue led Mr. Justice Harlan to the rueful public acknowledgment in *Butts* that the decision in *New York Times* may have come as something of a surprise to the bar. "Although our decision in *New York Times* did draw upon earlier precedents in state law, e.g., Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 ... and there were intimations in a prior opinion and the extra-judicial comments of one Justice, that some applications of libel law might be in conflict with the guarantees of free speech and press, there was strong precedent indicating that civil libel actions were immnne from general constitutional scrutiny." 388 U.S. at 143–44. See *supra* note 11.

(2) There was disagreement about the adequacy of the jury instructions sufficiently to safeguard the defendant's privilege.

Essentially it was the varied positions on jury instructions that account for the dissents.[25] In *New York Times* and *Walker*, all the Justices agreed that the instructions were inadequate. In these cases, they reversed the judgments and directed verdicts for the defendants. In *Hill*, the three dissenters, Justices Fortas and Clark and the Chief Justice, felt that the instructions were roughly satisfactory whatever the appropriate rule of law and that a remand for a new trial would be too harsh on the plaintiff. In *Butts*, Justices Brennan and White favored a remand for a new trial so that a properly instructed jury might pass on the matter.[26]

If the positions on the adequacy of jury instructions explain the votes, the positions on the level of privilege serve to account for most of the content of the opinions. Three basic views emerge. In the center there is Mr. Justice Brennan, who, in all three of the new cases, would apply the standard of privilege adopted in *New York Times*. The Chief Justice and Mr. Justice White joined him in this position, although, as noted, the Chief Justice disagreed with Justices Brennan and White in *Butts* about whether the jury instructions given at the trial adequately met this standard. To the left of the Brennan position, so to speak, were Justices Black and Douglas repeating the arguments they had made in *New York Times*[27] that the defendant's privilege in these cases should be absolute, a view they would apply equally in all three of the new cases. And to the other side of the Brennan position was Mr. Justice Harlan, who would give a lesser privilege to the defendant in *Butts* than in *New York Times*, and even a lesser privilege to the defendant in *Hill* than to the defendant in *Butts*. He appeared to be alone in *Hill*, but was joined by Justices Fortas, Clark, and Stewart in *Butts*.

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[25] Although no inconsiderable part of the opinions was concerned with the jury instruction issue, discussion of the merits of the instructions is beyond the scope of this essay. I reluctantly put to one side the lively debate between Mr. Justice Fortas and Justices Brennan and Harlan in *Hill* and thus forgo examining the hypothesis that the special sensitivity of the law to the protection of freedom of speech may include not only a distinctive emphasis regarding prior liceusing, ambiguity, challenge to statutes on their face, and inappropriate choice of means to an end, but also an exceptional regard for precision in the wording of instructions to the jury.

[26] There were four dissenting votes in *Butts*. The other two votes were those of Justices Black and Douglas, who wonld have directed a verdict for the defendant on the ground that he had an absolute privilege.

[27] And in *Garrison v. Louisiana* and again in *Rosenblatt v. Baer*. See note 6 *supra*.

The complexities thus derive from the combinations of the two sources of disagreement. For example, no one explicitly joined Mr. Justice Harlan in *Hill*, because Justices Fortas and Clark and the Chief Justice committed themselves only on the adequacy of the instructions and not on the issue of the privilege.

The sense of complexity is heightened when the positions of Justices Stewart and Harlan in *Hill* and *Butts* are compared. It will be remembered Mr. Justice Harlan would distinguish both cases from *New York Times*, and further would distinguish them from each other. So that although in neither case would the defendant be accorded as strong a privilege as in *New York Times*, the defendant would get a stronger privilege in *Butts* than in *Hill*. On the other hand, Mr. Justice Stewart joined with Mr. Justice Brennan to equate *Hill*, Harlan's least favored category of case, with *New York Times;* but he then agreed with Mr. Justice Harlan in distinguishing *Butts* from *New York Times*.[28]

Perhaps two other points are worth noting. First what might be called membership in the Harlan faction, that is, the Justices who are conservative on the scope of *New York Times*, can be viewed as going from zero to one to four, as we move from *Times* itself, to *Hill*, to *Butts*. The final oddity is the relation of *Butts* to *Walker*, decisions that came down on the same day. The opinion of the Court in *Butts* was written by Mr. Justice Harlan and adopted his refusal to extend the *New York Times* privilege. Chief Justice Warren concurred in the results in order to save the plaintiff's verdict, but he emphatically disagreed with Mr. Justice Harlan and would extend the *New York Times* privilege to the case. Chief Justice Warren was joined in his position on the privilege by Justices White and Brennan, thus making three Justices who were explicitly in favor of the *Times* privilege. Justices Black and Douglas, however, elected in *Butts* to file unqualified dissents. The upshot, therefore, was a 5 to 4 decision in *Butts*, but a 4 to 3 to 2 alignment on the privilege issue, although it is clear that Justices Black and Douglas must, as the lesser evil, prefer the *New York Times* rule to

[28] Mr. Justice Stewart may well see privacy and defamation as presenting different First Amendment issues, with, however, publishers deserving more protection against suits alleging invasions of privacy than in suits alleging defamation. He did not write a separate opinion in any of the three more recent cases, but his concurring opinion in *Rosenblatt* stressed that "the preventive effect of liability for defamation serves an important public purpose." 383 U.S. 75, 93 (1966).

the Harlan rule. Moreover, the 5 to 4 decision for the plaintiff in *Butts* was, in the end, simply a result of the desire of Chief Justice Warren, a strong supporter of an across-the-board application of *New York Times,* to avoid upsetting the verdict, because he thought in the particular circumstances the instruction under which the case had been tried had come close enough to the *New York Times* standard.

In *Walker,* however, Justices Black and Douglas elected to be more statesmanlike, since the judgment was to be reversed in any event. This time, therefore, they joined the Warren opinion, which thereby became the opinion of a bare majority of the Court.

After the dust has settled on this Balkan diplomacy, it becomes evident that, despite resistance, the *New York Times* rule *has won across the board.* This is not an impression that any quick or conventional reading of the decisions would leave!

It is apparent that behind all this judicial maneuvering lie substantial issues about how to reason by analogy from the *New York Times* case, and more important, some fresh theorizing, especially by Mr. Justice Harlan, about freedom of speech. Throwing away our score card, it is to such matters that I now turn.

It may be convenient to distinguish two closely related issues in applying *New York Times* to new situations. First, there is the question of the *ambit* of constitutional protection. To what situations, other than libel of public officials, does the bonus of constitutional scrutiny and protection extend? Second, there is the question already noted concerning the *level* of the protection. What kind of privilege does the Constitution require that the defendant be given? These seem to me quite distinct questions, although it is perhaps a prime strategy of Mr. Justice Harlan to link them together.

One would have thought that the first issue would be the focus of excitement in the debate and the second would reduce to a technical detail. Exactly the opposite proved to be the case. There was easy and almost casual consensus on the ambit of constitutional protection; there was intense controversy over the level of that protection.

IV. The Ambit of Constitutional Protection

The ambit question might be restated thus: At what point does the First Amendment no longer permit the states to afford tort remedies for harms caused by speech?

In *New York Times* the Court had fully confronted the fact that critical discussion of government actions would often involve not only impersonal criticisms of general policy but also, as an inextricable by-product, criticisms of individual persons who were the executors of that policy.[29] Since freedom to criticize government "robustly" was taken to be the crucial, the central freedom in the First Amendment,[30] it was necessary to subject to the closest scrutiny claims of any aggrieved individual officials. It was thought necessary to do so lest it should turn out that tort law would give to the official the power to censor or silence the citizen-critic of government.

Public discussion and debate other than criticisms of government action appear to have the same tendencies to implicate individuals. One question *New York Times* left for the future was whether First Amendment theory and rationale would require a comparable constitutional scrutiny of the censorial power of aggrieved individuals.

Conceivably, *New York Times* could be read as generating a narrow technical rule limited to government officials and analogous to the specific constitutional rule immunizing members of Congress from being "questioned in any other place" for their "speech or debate" on the floor of Congress. On this approach the question in each new case would be simply one of the classification of the plaintiff. Or it might be argued that the analogy fails here since the congressional immunity has its source in the specific provisions of Article 1, § 6, whereas the immunity rule of *New York Times* has its source in "the central meaning" of the First Amendment.

On their facts, the three new cases offered nice gradations, if a narrow approach were to be taken. In *Hill* the plaintiff was a private citizen who had involuntarily become newsworthy. In *Walker* the

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[29] The matter was especially obvious in *New York Times*, since the statement in question appeared on its face to refer only to general governmental policy and not to particular officials. Indeed it took considerable ingenuity on the part of the plaintiff to connect the statements to himself. The alternative grounds of the decision in *New York Times* provided an important new constitutional limitation on the state law of defamation regarding when defamation was sufficiently "of and concerning" the plaintiff. This is also a principal point in *Rosenblatt v. Baer*, *supra* note 6; see Kalven, *supra* note 3, at 209; GREGORY & KALVEN, CASES AND MATERIALS IN TORTS 968–73 (1959).

[30] That such avoidance of seditious libel as an offense was seen as the central freedom was the point of the special excitement displayed in Kalven, *supra* note 3.

plaintiff was a retired United States general of considerable national prominence and a potential leader of a third force in national politics. In *Butts* the plaintiff was a nationally known football coach, now athletic director at a state university, who was being paid not by the state but by the Athletic Alumni Association, a separate and private group.

There were five opinions in *Hill,* by Justices Brennan, Black, Douglas, Harlan, and Fortas. Yet there was no debate and remarkably little discussion of the ambit of constitutional scrutiny of state tort law.[31]

The *Hill* case, it will be remembered, involved invasion of privacy and not libel, and it is in this circumstance, I suspect, that we find the key to the structure of Mr. Justice Brennan's opinion. Traditionally, invasions of privacy have involved statements that are true, in distinction to defamation where the statement is presumed to be false. It was a special complication of the *Hill* case that it concerned a "false light" privacy claim. Since the tort law of privacy deals primarily with true statements, there has grown up under the common-law rules a defendant's privilege quite different from anything found in the common law of defamation.[32] The general rule is that if defendant's statement deals with newsworthy events and people, it is privileged, that is, it cannot be made the predicate for tort liability.[33]

The first step in Mr. Justice Brennan's opinion was to establish that under the New York privacy statute "truth is a complete defense in actions under the statute based upon reports of newsworthy people or events."[34] Indeed this was one of the two points on which the Court had requested reargument in the *Hill* case. Mr. Justice Brennan, however, worded the point so as to jar the ear of a teacher of torts. The point really is not so much that truth is a defense as that newsworthiness is a defense.

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31 There had been some discussion of the ambit issue in *Rosenblatt,* turning on whether the plaintiff, supervisor at a ski resort, could be regarded as a "public official" in the sense of the *New York Times* rule; see note 6 *supra;* and see especially the Court's footnote, 383 U.S. at 86 n. 12.

32 Kalven, *supra* note 15, at 336–38.

33 In defamation there has been no analogous concept. Rather there are a series of specific privileges for "public" discussion, such as record libel and fair comment. See generally GREGORY & KALVEN, *supra* note 29, at 1022–64; Franklin, *supra* note 3; and discussion in the text *infra* at notes 62–70.

34 385 U.S. at 383.

The apparently elliptical quality in the Brennan opinion, then, arises because circumstances have made it unnecessary to make explicit the key premise. That premise is that the First Amendment requires that the truthful reporting of newsworthy events and people not be subjected to liability.[35] The premise did not call for argument because there was the ready consensus on all sides that the New York privacy statute protects newsworthy reporting when there is no issue of falsity. What this quick consensus has concealed from view is that the ambit of "constitutionally scrutinizable" speech is measured by newsworthiness. Or to put this in McLuhanese, newsworthiness measures the ambit. The newsworthy is a kind of speech which is public enough so that its protection cannot be left entirely to state policy. Presumably, had this point been challenged in *Hill,* we would have been given the explicit statement of why this category of speech requires constitutional protection.

Having established the newsworthiness privilege under New York law, the Brennan opinion traced with care via the *Spahn* case[36] the New York law about reports that were newsworthy but

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[35] "There is a possibility that the newsworthiness privilege in privacy will acquire constitutional status and thus become independent of state policy." Kalven, *supra* note 15, at 336 n. 57. The Court in quoting from this article in *Hill,* 385 U.S. at 383 n. 7, omits the observation that "today since *New York Times v. Sullivan* the privilege may arguably bave some constitutional status."

[36] Spahn v. Messner, 18 N.Y.2d 324 (1966). The Supreme Court granted certiorari in *Spahn* and remanded it for a new trial in light of *Hill.* 387 U.S. 239 (1967).

The difficulties with the New York rule go not only to the point that concerned the United States Supreme Court, namely, that it imposes strict liability for "false light" privacy invasions, but also to the fact that the New York courts have been so preoccupied with the role of "falsity" in erasing the newsworthy privilege that they have not looked to see if there was a prima facie invasion of privacy in the first place that required the protection of a privilege to avoid liability. That is, the falsity, although not defamatory (and in *Hill,* arguably laudatory), has somehow magnified what would otherwise appear to be a trivial grievance.

The triviality of the grievance in *Hill* was of course not a proper consideration for the United States Supreme Court, but rather for the New York Court of Appeals. (Fuld, J., dissented in the *Hill* case in the New York Court of Appeals, 15 N.Y.2d 986 [1965].) The reactions of the Jnstices to the facts in *Hill,* however, are curious. Mr. Justice Black saw it as "at most a mere understandable and incidental error," 385 U.S. at 400; Mr. Justice Harlan spoke of the "severe risk of irremediable harm," *id.* at 410; Mr. Justice Fortas wrote of "reckless and irresponsible assault upon himself and his family," *id.* at 411.

Possibly, the case does involve a very subtle form of defamation in the circumstance that one item of "falsity" was the portrayal of the father making a "brave try" to save his family.

not totally accurate. The opinion then announced the relevant principle:[37]

> If this [the view of the New York Court of Appeals in *Spahn* that "fictionalized" biography is not within constitutional protection] is meant to imply that the proof of knowing or reckless falsity is not essential to a constitutional application of the statute in these cases, we disagree with the Court of Appeals. We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

The argument offered in support of this conclusion was notably brief. First, we were told that the "guarantees for speech and press are not the preserve of political expression or comment on public affairs, essential as those are to healthy government."[38] The point left implicit, presumably, is that while the avoidance of seditious libel may be the central purpose of the First Amendment, it is not its only purpose. *New York Times v. Sullivan* gave an invaluable perspective to free speech analysis; it did not, however, attempt to set the outermost boundaries of First Amendment protection.

Second, Mr. Justice Brennan took judicial notice of "the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press."[39] We were being reminded, as I see it, that newsworthiness defines the ambit of constitutional concern and that this is so even though the public aspects of such communications are interlaced inextricably with comments on individuals. Names make news, but they do not thereby take it out of the public domain. For the moment, as the argument moved, it did not crucially matter whether the statements in question were true or false. What mattered was that they were in some sense public and that the domain of "mixed utterance,"[40] speech that has both public and individual aspects, is vast and of high importance to civilized life.[41]

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[37] 385 U.S. at 387–88. [38] *Id.* at 388. [39] *Ibid.*

[40] *Cf.* United States v. Dennis, 183 F.2d 201, 207 (2d Cir. 1959), where Judge Learned Hand spoke of utterances which have a "double aspect; *i.e.*, when persua-

It remained for the Brennan opinion to take only one further step —to add the minor premise—and the argument about ambit would be completed. "We have no doubt," the opinion reads, "that the subject of the *Life* article, the opening of a new play linked to an actual incident is a matter of public interest."[42]

This then is the Brennan thesis: Newsworthiness defines the ambit of constitutional concern. The *Life* report in the instant case was newsworthy. It is therefore within the sphere in which state-law remedies for aggrieved individuals are subject to judicial review under the First Amendment. All that remained was to determine what level of privilege the Constitution required state law to afford the defendant publisher.

The most striking thing about Mr. Justice Brennan's opinion is that he apparently reached his result without reasoning by analogy from *New York Times*. In fact he found it unnecessary to mention *Times* in this part of his argument. Yet *Times* would seem to be a silent partner in the decision. What it did was to illuminate for the Court the possibilities for censorship, by individual libel actions, of criticism of government operation and policy. It thus set the perspective the Court took toward the events in *Hill*. The individual tort action, albeit in privacy, carries a comparable threat of censorship over valued, albeit less urgently valued, public speech. Thus although *Hill* with its mild entertainment news value was on its facts a world removed from *New York Times* on its grim facts about Negro protests, the two cases were seen to fall within a common sphere—speech affecting individuals that is of public interest.

One other point clamors for attention before I turn to the other four opinions. Although it was not necessary in *Hill* to delineate the outer boundaries of the newsworthy, the Court may be surprised by the extent of its commitment. The tort law of privacy has wrestled with the matter for some years now; and it is a rough generalization that the courts will not, and indeed cannot, be arbiters of what is

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sion and instigation were inseparably confused." The inextricable linking of "bad" speech with "good" is a charateristic also of the obscenity problem. See Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUPREME COURT REVIEW 1, 11–12.

41 The Court quotes the following from Thornhill v. Alabama, 310 U.S. 88, 102 (1940): "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."

42 385 U.S. 374, 388 (1967).

newsworthy. Newsworthiness will almost certainly become a descriptive and not a normative term.[43] In brief, the press will be the arbiters of it and the Court will be forced to yield to the argument that whatever the press prints is by virtue of that fact newsworthy. This has been pretty much the experience with the common-law policy. It is not clear that the matter will prove more tractable if we try it as constitutional policy. The upshot, and it is an important one, is that the logic of *New York Times* and *Hill* taken together grants the press some measure of constitutional protection for anything the press thinks is a matter of public interest.

There is little to discuss in the other four opinions as they bear on the ambit issue. The Justices were saving their fire for other issues.

Mr. Justice Black, as would be expected, had no quarrel with the newsworthiness criterion. He devoted his opinion to repeating his complaint that the protection given the press was not absolute. In the final sentences of his opinion, however, one can detect his full agreement that the press *qua* press be given constitutional protection for whatever it sees fit to print:[44]

> One does not have to be a prophet to foresee that judgments like the one we here reverse can frighten and punish the press so much that publishers will cease trying to report news in a lively and readable fashion as long as there is—and there always will be—doubt as to the complete accuracy of the newsworthy facts. Such a consummation hardly seems consistent with the clearly expressed purposes of the Founders to guarantee the press a favored spot in our free society.

Mr. Justice Douglas was equally happy with the ambit of protection and equally unhappy with its level. He stated explicitly that the First and Fourteenth Amendments protect the press "where the discussion concerns matters in the public domain."[45] And he went on to draw flatly the analogy to the *New York Times* case. "Here a private person is catapulted into the news by events over which he had no control. He and his activities are then in the public domain as fully as the matters at issue in *New York Times* v. *Sullivan*."[46]

Mr. Justice Harlan in his interesting and complex opinion took issue only with the level of protection that the Court gave. Indeed, he was more explicit than was Mr. Justice Brennan that if the story

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[43] See Kalven, *supra* note 15; *cf.* Franklin, *A Constitutional Problem in Privacy Protection: Legal Inhibitions on Reporting of Fact*, 16 STAN. L. REV. 107 (1963).

[44] 385 U.S. at 400–01. [45] *Id.* at 401. [46] *Ibid.*

had been true it would require protection.[47] He agreed, too, that some degree of protection was constitutionally required for the falsity involved in the *Hill* case. And he joined in reversing the judgment for the failure of the state law to provide the requisite degree of protection. It might, however, be closer to the spirit of his opinion to read him as taking issue with the possibility of separating ambit from level as sharply as I have done. His whole approach is to vary the level of protection as the speech in question moves away from matters of central public concern—and he is willing to calibrate exceedingly fine to work out his design.

Mr. Justice Fortas in a spirited opinion came closest to open quarrel on the ambit issue. His principal point, however, as I have noted, was that the instructions given at the *Hill* trial were close enough to the Court's standards to make it wasteful and indecent to remand the eleven-year-old case for another trial. But before he turned to his analysis of the instructions, he spoke out vigorously for privacy as "a basic right" and suggested that it belonged in the top drawer of "great and important values in our society" along with those "reflected in the First Amendment."[48] Although he did not quite join issue on the point, it is apparent that for him newsworthiness would not invariably and inflexibly outweigh privacy. Then in a telling passage he observed:[49]

> I have no hesitancy to say, for example, that where political personalities or issues are involved or where the event as to which the alleged invasion of privacy occurred is in itself a matter of current public interest, First Amendment values are supreme and entitled to at least the types of protection that this Court extended in *New York Times* v. *Sullivan.*

Yet, in the end, his opinion remains unclear. I cannot tell whether he was complaining that the *Life* story was not a matter of public interest or about the degree of falsity he found in it. I suspect that had the *Life* story been fully accurate Mr. Justice Fortas, too, would have yielded the claims of the Hills for privacy to the public interest in news.

It may be worth risking some repetition to underscore once again what seems to have happened in *Hill.* Although a bare five of the nine Justices were amenable to upsetting Mr. Hill's hard-won verdict, the four who disagreed with the Court's handling of the case

[47] *Id.* at 404. [48] *Id.* at 412. [49] *Id.* at 415.

somehow dissipated their attack and failed to provide any effective or central criticism of the key fact that the Court had now extended constitutional scrutiny of state tort law to whatever is newsworthy. Moreover the Court had taken this giant step without being forced to an explicit justification for it and without openly invoking *New York Times.*

In retrospect it appears that the Court may have been handicapped by the sequence in which the cases came to it. *Hill* was a curiously difficnlt case to handle so soon after *New York Times.* The Court's task might have been easier had the more obvious problems of *Butts* and *Walker* been disposed of first. In any event, I turn now to those two cases and to the Court's response to the ambit issue.

Butts and *Walker* were decided just six months after *Hill,* and this time there were four opinions: those of the Chief Justice and Justices Harlan, Black, and Brennan. In the opinions of Warren and Harlan there was full recognition of the ambit issue.

If it was a puzzle why in *Hill* the Court did not draw openly on *New York Times,* it is equally a puzzle in *Butts* and *Walker* why the Court did not see the relevance of *Hill,* which had arguably foreclosed the ambit issue. Instead it now went back to *New York Times* for guidance on the extent of constitutional protection.

The Harlan opinion in *Butts* opens with a sketch of the contentions of opposing counsel. On the one hand, it was argued that because Butts was in a sense a minor public official in his role as athletic director at a state university and because General Walker had "thrust himself into the vortex"[50] of public controversy, the two cases were literally within the *Times* holding. On the other hand, it was stressed tliat these cases were far removed from "seditious libel prosecutions." Quoting *Buckley v. New York Post,*[51]

[50] The "vortex" metaphor originated in Mr. Justice Brennan's opinion in *Rosenblatt v. Baer,* 383 U.S. at 86 n. 12; see also Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188, 195 (2d Cir. 1966).

[51] 373 F.2d 175, 182 (2d Cir. 1967). The quotation is from the opinion of Judge Friendly. Judge Friendly was discussing whether the First Amendment offered an obstacle to the claim of Connecticut to jurisdiction in a libel action over the defendant newspaper, a Delaware corporation with its principal place of business in New York. He was not discussing what risks of tort liability are to be placed on publishers. The rest of the sentence reads: ". . . and injured persous should not be relegated to forums so distant as to make collection of their claims difficult or impossible unless strong policy considerations demand." Cf. 388 U.S. at 147. On the precise issue of how far *New York Times* extends, see Judge Friendly's opinion in

plaintiffs urged that "Like other enterprises that inflict damage in the course of performing services highly useful to the public" the press "must pay the freight."

The force of these competing considerations requires, we were told, "an accommodation between them . . . not only in these cases but in all libel actions arising from a publication concerning public issues."[52] Then Mr. Justice Harlan squarely confronted the ambit issue:[53]

> From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question, a rational distinction "cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of . . . policy will be less important to the public interest than will criticism of public officials."

It was thus *New York Times* and not *Hill* that provided the touchstone for Mr. Justice Harlan. The ambit of constitutional concern was to be measured not by a concept of newsworthiness but less sweepingly by step-by-step analogies to public officials. The ambit of protection had been extended, to use the Justice's idiom, from public officials to "public figures." The conclusion was "that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguards."[54]

This summary does not do justice, however, to Mr. Justice Harlan's complex and fresh theorizing in *Butts* and *Walker* about free speech because his expressed interest was not so much in the extent to which state law is "overridden" by constitutional considerations as in the precise level of safeguard the Constitution will require for the speech. In brief his thesis is that *New York Times* may set the ambit of protection, but it emphatically does not set the level of protection. It does not incorporate "the only appropriate accommodation of the conflicting interests at stake."[55]

The other explicit discussion of ambit in *Butts* is found in the

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Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964), readily extending it to Dr. Linus Pauling, a private citizen engaged in public controversy.

[52] 388 U.S. at 147.

[53] *Id.* at 147–48. Mr. Justice Harlan was quoting from Judge Blackmun, in Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188, 196 (8th Cir. 1966)

[54] 388 U.S. at 155. [55] *Ibid.*

opinion of Chief Justice Warren. "All of us agree," he stated, "that the basic considerations underlying the First Amendment require that some limitations be placed on the application of state libel laws to 'public figures' as well as 'public officials.' "[56]

Then in a passage with arresting overtones of contemporary sociology he argued that there is no longer a sharp difference in modern life between the governmental and the private:[57]

> To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

The minor premise—the application of the "public figure" formula to the facts in *Butts* and *Walker*—did not detain the Justices for long. And, for this purpose at least, the Court saw no difference between Wally Butts and General Walker. Mr. Justice Harlan stated:[58]

> We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*. And both Butts and Walker commanded a substantial amount of

[56] *Id.* at 162. [57] *Id.* at 163–64. [58] *Id.* at 154–55.

> public interest at the time of the publications; both in our opinion would have been labeled "public figures" under ordinary tort rules. . . . Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.

Chief Justice Warren, after noting that both cases involved "public figures," was explicit only with respect to General Walker: "Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest."[59]

There is little basis for complaint about the logic by which the Court has expanded the range of protected speech in *Butts* and *Walker*. It has done exactly what would have been predicted from *New York Times*, radiating outward gradually by analogy[60] from the core protection in *Times*. What is difficult to fit in is the response to the *Hill* precedent. We ask again why did *Hill* not make an a fortiori case for some constitutional protection in *Butts* and *Walker?* Why was it necessary in *Butts* and *Walker* to make a fresh argument on the ambit issue? Are we to conclude that, for the moment, there are two ambits of constitutionally protected speech, one appropriate only for false statements about individuals treated as privacy actions, the other reserved for false statements about individuals treated as libel actions? If Mr. Hill had been defamed, would he have met no constitutional obstacles to his recovery? Or is he too a "public figure"?[61]

If the cases had come to the Court in the opposite order, I suspect the Court would have "worried" the issue whether Mr. Hill was sufficiently a public figure, and very likely would have decided he

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[59] *Id.* at 165.

[60] And what was easily done by the courts of appeals in the *Pauling* cases. Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966); Pauling v. News Syndicate Co., 335 F.2d 659 (2d Cir. 1964); and foreshadowed in *Rosenblatt v. Baer*, 383 U.S. at 86 n. 12.

[61] Despite all this, it is difficult to down the impression that the Court's silence about *Hill* was deliberate and that it has seen the two cases as presenting problems it wishes to keep separate. Perhaps its point is that it does not wish to inhibit libel actions as much as it does privacy actions, since the former reflect a more serious and more traditional form of harm. But this can scarcely be the thesis of Justices Harlan, Fortas, and Clark, since their proposal was to give the plaintiff more protection in *Hill* than in *Butts* by giving the defendant publisher a less generous privilege; see note 28 *supra*.

was not. Since it seems to me that the *Hill* case was rightly decided and that the Court now has in hand a single coherent doctrine for handling the problem of false statements about individuals that interlace public discourse, perhaps the sequence of the cases was a benign accident.

V. The Level of Constitutional Protection

We come at last to the issue on which the Justices fall out among themselves in lively and sharp debate: granted that, because of the public interest in his communication, the defendant cannot be left to the mercy of state policy, just how much protection does the First Amendment require that he be given?

The common law of defamation, yielding slowly to the policies favoring a free press, worked out an elaborate series of accommodations for the competing interests, and as a complement thereto an elaborate gradation of privileges for false statements about individuals. There is the absolute privilege of judge, legislator, and executive when at work, a privilege indefeasible whatever the state of mind of the defendant.[62] There is the qualified privilege for the useful, private communication, such as the employee character reference.[63] And here there is a split of authority, some states holding the privilege defeasible only by proof of malice, recklessness, or knowing falsity, other states holding that ordinary negligence is enough.[64] To complicate matters further, there are the two sets of privileges for "public" communications: fair comment and record libel. The record libel privilege covers the repeating of defamation contained in a public record and is probably not defeasible at all so long as the statement accurately reports what the public record contains.[65] Fair comment, as the Court discovered in *New York Times*, is mysterious doctrine relying heavily on distinctions between fact and opinion and the degree of disclosure of underlying fact.[66] And there may be still further differences between com-

[62] Barr v. Matteo, 360 U.S. 564 (1959).

[63] See, *e.g.*, Watt v. Longsdon, [1930] 1 K.B. 130.

[64] See the note in Gregory & Kalven, *supra* note 29, at 1018–21

[65] See, *e.g.*, Cresson v. Louisville Courier-Journal, 299 Fed. 487 (6th Cir. 1924); and see Gregory & Kalven, *supra* note 29, at 1023–32.

[66] See, *e.g.*, Eickhoff v. Gilbert, 124 Mich. 353 (1900); and see Noel, *Defamation of Public Officers and Candidates*, 49 Colum. L. Rev. 875 (1949); Gregory & Kalven, *supra* note 29, at 1032–58; Veeder, *Freedom of Public Discussion*, 23 Harv. L. Rev. 413 (1910).

ment by way of literary criticism and comment on public officials, candidates for office, or other public figures. And as to public officials or figures there have been at least two rules of fair comment. One imposes strict liability for accuracy in statements of fact but affords a privilege to the expressions of opinion, as did the Alabama law in *New York Times*. The other broadens the privilege so as also to protect error in the underlying statements of fact if made in good faith. And arguably "good faith" in this formula might mean either the absence of negligence or something more. It was into this bramble bush of distinctions that the Court jumped in *New York Times*.

There is one other principle of the common law of defamation that needs to be noted. The normal basis of liability in defamation, in sharp and puzzling contrast to most of the rest of the law of torts, is strict liability. In the ordinary case it does not matter how innocent the defendant is if his communication can be read as defaming the plaintiff.[67] The great role of the common-law privileges in defamation has been, therefore, to abate the harshness of the strict liability principle rather than to give exceptional protection to a particular category of communication. Arguably, if defamation had been assimilated in nineteenth-century tort theory and keyed to liability limited to negligence, no doctrines of privilege would have ever developed. And finally as a footnote to *Hill*, I would note that under the New York statute, "false light" privacy is also a matter of strict liability.[68]

As Mr. Justice Harlan acutely notes in *Butts*, the common law of defamation "originated in soil entirely different from that which nurtured these constitutional values."[69] It began with a perception of the harms to individuals and only very gradually yielded to any competing perception of the public interest in speech. We need only remember that it was not until *Wason v. Walter*[70] in 1868

[67] The classic analysis is Smith, *Jones v. Hulton: Three Conflicting Judicial Views as to a Question in Defamation*, 60 U. PA. L. REV. 365 (1912).

[68] In sharp contrast to defamation, there has been little discussion of the basis of liability in privacy; see Kalven, *supra* note 15, at 334–35.

[69] 388 U.S. at 151.

[70] L.R. 4 Q.B. 73 (1868). Lord Cockburn observed: "It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our con-

that English law recognized a privilege in the press voluntarily to republish proceedings in Parliament. If, however, one begins in the opposite corner with the First Amendment and with a perception of the public interest in free public discourse, the question is whether such a common-law calculus of interests is the appropriate model.

Against this common-law backdrop the question in the three new cases is whether there is any middle ground on which Mr. Justice Brennan and his allies can stand. The Black and Douglas position, that any risk of liability whatsoever must somewhat inhibit speech on matters of public interest and hence be a violation of the First Amendment, and the Harlan position, that more than a public interest in speech and press is involved and that no single formula can accommodate sensibly the competing interests, appear on the surface to occupy the two possible intellectual positions. Is the Brennan position, then, simply a matter of political expediency, a compromise impeachable by both the right and the left as lacking in principle? Can Mr. Justice Brennan resist the Black and Douglas absolutism without finding he has embraced Harlan; and conversely can he argue against Harlan's elaborate calculus without finding he has embraced Black and Douglas?

This time the three cases can conveniently be read together. Mr. Justice Brennan made the argument in *Hill* and it was restated by Chief Justice Warren in *Butts*. Justices Black and Douglas each stated their argument in *Hill* and Mr. Justice Black stated it once again for their side in *Butts*. Finally, Mr. Justice Harlan made an

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fidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secrecy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large?" *Id.* at 89. See also Stockdale v. Hansard, 9 Ad. & E. 1 (1839), and the delightful account of this historic conflict between court and Parliament, in DEAN, HATRED, RIDICULE AND CONTEMPT 202–11 (1953).

elaborate and careful argument for his position in *Hill*, and again in *Butts*.

The Black and Douglas opinions in *Hill* understandably have a somewhat tired sound. The Justices had made their point originally in *New York Times* and repeated it in *Rosenblatt v. Baer*.[71] A variety of points were put forward this time: "[R]eckless disregard of the truth" will prove, Mr. Justice Black argued, little protection for defendants in the world of real trials. The "*New York Times*' dilution of First Amendment rights,"[72] they prophesied, will be shown by experience to be as inadequate as the rule of *Betts v. Brady*. The defeasible privilege of the majority would not be arrived at "without using the recently popularized weighing and balancing formula."[73]

Turning to the case itself, Mr. Justice Black noted: "*Life*'s conduct here was at most a mere understandable and incidental error of fact in reporting a newsworthy event."[74] Since the majority reversed only to remand for a new trial and did not on this record direct for the defendant, we get, he implied, a clue to what a slender reed the majority's criterion of "malice" will prove to be.

The point is sharpened by Mr. Justice Douglas in *Hill*. Speaking of the "knowing or reckless falsity" test, he said:[75]

> Such an elusive exception gives the jury, the finder of the facts, broad scope and almost unfettered discretion. A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances, for emotions and prejudices often do carry the day.

The acerbity increased in Mr. Justice Black's restatement of the theme in *Butts*. He saw the reversal in *Walker* and the affirmance in *Butts* as "quite contradictory action"[76] depending on the Court's subjective judgments about the offensiveness of the libel and the quality of the reporting, and went on to argue solemnly that the Court's involvement with questions of fact under the *New York Times* test is "in flat violation of the Seventh Amendment."[77] He then delivered what must be the unkindest cut of all—he stated that

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71 383 U.S. 75 (1966).

72 385 U.S. at 399.

73 *Ibid.*

74 *Id.* at 400.

75 *Id.* at 402.

76 388 U.S. at 171.

77 *Ibid.*

the Court was getting itself into the same "quagmire" in libel as it had in obscenity.[78] He once again predicted that *New York Times* will go the way of *Betts v. Brady* and concluded with the point-blank challenge: "I think it is time for this Court to abandon *New York Times* v. *Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments."[79]

The Black-Douglas argument does not seem to me to deepen in repetition. We are not told whether it is only the press who are to be the beneficiaries of an immunity from libel. Are other communicators to be left to its rules? We are not told whether the only reason for making the protection absolute is a distrust of the capacity of the legal system to discriminate or whether there is some value in the circulation of knowing falsehood.[80] There seems to be no sense of surprise at finding out after all these years that all or most of the law of defamation has been wholly unconstitutional. There is no recognition that counterspeech cannot be the remedy for this evil.[81] Again there is no recognition that the countervalue to the speech this time is the risk of harm to individuals. What, for example, would the Black and Douglas position say about a libel judgment such as that in *Faulk v. Aware, Inc.*?[82] The special weakness of the legal system in libel, its use of the jury, is a point that certainly would have ironic overtones as a matter of history. Finally, in calling for the abandonment of the *New York Times* rule, there is a sense of not knowing who one's friends are.

Nevertheless there is a point to their thesis. One might develop a free-speech theory on the premise that we must overprotect speech in order to protect the speech that matters. At least then it would be clear what the argument was and was not about. Moreover, once it has been conceded, as all Justices do in *Hill* and *Butts*, that the speech in question is within the ambit of some constitutional protection, there is admittedly bite in the Black-Douglas challenge

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[78] *Ibid.*

[79] *Id.* at 172.

[80] As, so notably, John Stuart Mill had argued in *On Liberty*.

[81] See, however, discussion of Mr. Justice Harlan's reliance on counterspeech in these cases, text *infra*, at notes 99–100.

[82] 244 N.Y. S.2d 259 (1963). The dramatic history of the case is recounted in FAULK, FEAR ON TRIAL (1964), and again in NIZER, THE JURY RETURNS 225–438 (1966).

of how we can permit constitutionally significant speech to be inhibited—a challenge, it hardly needs stating, that will be felt most acutely by Mr. Justice Brennan and his allies.

The argument that the Court has not given enough protection to speech was aired in *New York Times*. New ground was broken, however, by the challenge from Mr. Justice Harlan and his colleagues that the Court is now giving too much protection to speech, a position no one had argued for in *New York Times*.

Mr. Justice Harlan announced at the outset of his opinion in *Hill* that he expressed disagreement only "after finding much with which I agree in the opinion of the Court."[83] He then proceeded to restate the areas of agreement: the instructions under which the case was tried cannot, as Mr. Justice Fortas valiantly argued, be read as providing any privilege for unintentional falsity; the *Life* story was within the ambit of constitutional concern—"an article of this type could have been prepared without liability."[84] He was then ready for his principal point: "Having come this far with the Court's opinion, I must part company with its sweeping extension of the principles of *New York Times* v. *Sullivan*."[85]

The problem, as he lucidly stated it, is what impact falsity is to have on otherwise constitutionally protected speech. *New York Times*, he recognized, said in effect that "mere falsity" would not remove the constitutional protection. But the protection of falsity, he ably argued, is strategic; the Court "has never found independent value in false publications nor any reason for their protection except to add to the protection of truthful communication."[86] But the strategy must vary, depending on the exact need for the "overprotection" in a given context and on the countervalue the state is seeking to protect.

In the special circumstances of *New York Times*, as he saw it, there were two factors that made it appropriate to afford the privilege to make false statements about individuals. First, there was, because of public interest in the official's behavior, some chance for counterspeech to challenge and correct false impression. Second, the aggrieved individuals had, as public officials, to some extent

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[83] 385 U.S. at 402. [84] *Id.* at 404. [85] *Id.* at 405.

[86] This understated Mill's point on behalf of falsity; but Mill was concerned with the utility of false doctrine, not false fact about individuals. See text *infra*, at notes 99–100.

assumed the risk of false publicity, thus reducing the state's interest in protecting them.

In the *Hill* case, however, neither of these factors was present. Mr. Hill was involuntarily a newsworthy figure; he was not hardened to the vicissitudes of publicity; and he could not be said to have assumed its risks. There was, therefore, "a vast difference in the state interest in protecting individuals like Mr. Hill from irresponsibly prepared publicity and the state interest in similar protection for a public official."[87]

Mr. Justice Harlan also saw significant differences in the opportunities for counterspeech in the two cases. In cases of public officials there could be "a competition among ideas" that would reduce the harm from the falsity left uncorrected by legal means. But in *Hill* "such a competition is extremely unlikely." "It would be unreasonable to assume," we are told in a remarkable sentence, "that Mr. Hill could find a forum for making a successful refutation of the *Life* material or that the public's interest in it would be sufficient for the truth to win out by comparison as it might in that area of discussion central to a free society."[88]

These two distinctions drawn, the argument moved quickly to its conclusion. The "knowing or reckless disregard" standard of *New York Times* strikes the wrong balance here where private persons, involuntarily newsworthy, are involved. In this context it is a poor strategy and it leaves an undue risk of harm from falsehood. Therefore the Constitution should be satisfied if the state grants the press a qualified privilege defeasible upon a showing of negligence. This difference in state of mind between negligence[89] and reckless disregard, then, is for Mr. Justice Harlan the appropriate measure of the relevant differences in the two contexts of communications, albeit each involves a matter of public interest.

There are three interesting addenda to the Harlan argument. If it is argued that this rule will unduly inhibit the press in dealing with what are avowedly matters of public interest, the Harlan

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[87] 385 U.S. at 408.

[88] *Id.* at 407–08.

[89] It must be acknowledged that Mr. Justice Harlan did not state explicitly at any one place in his opinion the precise formula for the standard. On page 409, he talked of holding the press "to a duty of making a reasonable investigation of the underlying facts." On page 410 the phrasing shifted to creating "a severe risk of irremediable harm," and again on page 410 he referred to the duty he would impose as "this minimal responsibility."

answer "from a pragmatic standpoint" is that the New York press has been operating under the more inhibiting rules of the New York privacy statute and "has certainly remained robust."[90] We are also admonished, in a sentence that matches Mr. Justice Black in tone, that if even this minimal responsibility cannot under *New York Times* constitutionally be imposed on the press, that case "will prove in its long range impact to have done a disservice to the true values encompassed in the freedoms of speech and press."[91] (It is hard not to say, borrowing from W. C. Fields, that a case that is so vigorously condemned from both left and right cannot be altogether bad.) And finally, in an arresting aside, we are reminded that "other professional activity of great social value is carried on under a duty of reasonable care and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example."[92]

Mr. Justice Harlan returned to this argument in *Butts*. This time it was somehow less elegant and less concise. After acknowledging that the communications about Butts and Walker as public figures were within the ambit of constitutional protection, he went back to his principal interest—showing that *New York Times* does not represent the only accommodation between the conflicting interests. But, as on the ambit issue, there was again a curious reluctance to utilize directly what was said in *Hill*. Instead we are given a somewhat lengthy essay on the history of free speech and then a shorter essay on the quite different soil from which the law of defamation sprang, underscoring the consequent tension between these two legal traditions.

After this preface, Mr. Justice Harlan took up the cases at hand. One might have thought, he said, that truth would mark the boundary between protected and unprotected speech, but the Court was committed to giving some protection to inadvertent falsity. This was the lesson of *New York Times*.[93] *Times*, however, is to be sharply distinguished. It lay close to seditious libel and nothing of that was present in the instant cases. Plaintiffs were not public officials. There was, however, one similarity: both Butts and Walker

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[90] *Id.* at 409–10. [91] *Id.* at 410–11. [92] *Id.* at 410.

[93] "In any event, the *Times* opinion is as great a contribution to the issue of the relevance of truth to protected speech as it is to the issue of the relevance of the doctrine of seditious libel." Kalven, *supra* note 3, at 213.

"commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehoods and fallacies' of the defamatory statements."[94] The cases were, therefore, like *Times* in some respects and unlike it in others. There was no mention of their relationship to *Hill*. In any event the appropriate balance of competing interests this time would be struck if defendant publishers were accorded a privilege defeasible on a showing not of mere negligence but of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers,"[95] in brief, gross negligence.

The full scheme is indeed elaborate. We have first public officials, public figures, and the involuntarily newsworthy. The cases are now being scaled by three factors: (1) proximity to seditious libel; (2) assumption of risk of publicity by plaintiff; and (3) possibility of counterargument to correct falsity. *New York Times* scores a plus in all three categories. *Butts* and *Walker* score only in the last two categories, and *Hill* scores in none of the categories. Accordingly maximum legal protection is given the speech in *Times*, minimum protection in *Hill*, and medium-range protection in *Butts* and *Walker*. And this is done by moving the condition of the privilege down from malice to gross negligence to negligence. And if we add to the roster *Barr v. Matteo*[96] on the absolute privilege of high-level public officials as defendants, we get still a fourth level of protection.

This was not quite all, however. In the course of the argument Mr. Justice Harlan turned again to the comparison of communication to other worthwhile activities in the society. *New York Times* being inapposite, "we are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to judicial shifting of loss."[97]

This, then, was the Harlan position. In contrast to the stark sim-

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[94] 388 U.S. at 155.

[95] *Ibid.*

[96] 360 U.S. 564 (1959).

[97] 388 U.S. at 154.

plicity of the Black and Douglas absolute privilege, it offers momentarily a refreshingly elaborate edifice of privileges. In the end the thesis was built on two lines of analysis. First, an insistence that the *Times* privilege should be restricted to the quite special facts of *Times* and that a reliance on a close calculus of competing interests and risks was needed to work out privileges for other situations. Second, a simple but forceful challenge to the proposition that the press needs to be distinguished from other useful services in terms of criteria for liability. Why, he demanded, could not publishers, too, be required to act like reasonable men?

For a moment, but only for a moment, the scheme carries the promise of an original rethinking of the problems of free speech. The cardinal difficulty is that it appears to lack constitutional dimensions. It makes at a constitutional level more discriminations than two centuries of tort law has worked out at the common-law level! If policies are to be weighed on scales this exquisite, surely it is the function of the legislature to do the weighing. Is the difference between "reckless disregard" of *Times* and the gross negligence of *Butts* and *Walker* a constitutional difference? Moreover there is perhaps a special embarrassment in this for Mr. Justice Harlan. In the obscenity cases he opted for a time for a "two tier" view of the First Amendment, arguing that it applied less stringently to the states through the Fourteenth Amendment than it did to the federal government in its own right.[98] But if the states are to be left any discretion in these matters, must they not be left the very judgments Mr. Justice Harlan would here take away from them?

There is a kindred difficulty. The scheme rests to a surprising degree on sociological guesses lightly made. How free and robust is the New York press? How hardened are public officials to irresponsible publicity? Do they knowingly assume these risks? What are the relative possibilities for counterargument in the various situations? If we are to deal in conjectures and rough guesses of this sort about human behavior, is it not again the task of the legislature and not the Court to do the guessing? Or, at least, the business of the states?

The more one contemplates the scheme the less secure it seems. It is a doubtful reading of *New York Times* to see it resting so

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[98] See Kalven, *supra* note 40, at 21–23.

heavily on a concern with counterargument. Indeed the whole discussion of competition of ideas and counterargument seems to me misplaced in this context. These are, to be sure, key principles when we are talking about doctrines and ideas. Here, with Mr. Justice Brandeis,[99] we look to counterargument as the correct remedy for the mischief of false and pernicious ideas and doctrine. And we grant an absolute privilege to false doctrine. All this is well understood, widely shared, and invaluable.[100]

But these notions sound only the faintest echo when we turn to false statements of fact about individuals. For centuries it has been the experience of Anglo-American law that the truth never catches up with the lie, and it is because it does not that there has been a law of defamation. I simply do not see how the constitutional protection in this area can be rested on the assurance that counterargument will take the sting out of the falsehoods the law is thereby permitting. And if this premise is not persuasive, the whole Harlan edifice tumbles.

Again, there is a special puzzle about the discrimination between *Butts* and *Walker*, and *Times*. In *Butts* and *Walker* the two factors that set *Times* apart in *Hill* are present: there is said to be chance for counterargument and plaintiffs as public figures could be said to have assumed the risks of publicity. Yet *Times* is thought inapposite because there are no overtones of seditious libel, a point Mr. Justice Harlan did not bother to make in *Hill*. This is of course a real difference between the cases, but it is not easy to see what relevance it has for the level of the privilege, unless the implication is that we are to scale the value of the speech too. But Mr. Justice Harlan is quite firm that the public interest in this speech "is not less than that involved in *New York Times*."[101]

And still again, if one is to use golden scales, why not consider the gravity of the comment about the aggrieved individual? Might we not ask for more care from a man risking the remark that Wally Butts had been a dishonest athletic director than from a man risking the apparently innocuous remark that Mr. Hill had heroically come to the aid of his beleaguered family? Or might we not change the

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[99] Concurring in Whitney v. California, 274 U.S. 357 (1927).

[100] The classic statement is by Mr. Justice Stewart in Kingsley Pictures v. Regents, 360 U.S. 684, 688–89 (1959).

[101] 388 U.S. at 154.

rank by weighing the fact that the *Hill* story was merely entertainment whereas the other stories were "serious" news? Not the least of the troubles with the scaling game is that there are so many ways to play it. At least this time in his long debate with Mr. Justice Harlan, Mr. Justice Black seems to be correct: balancing has run riot.

In many ways the most arresting part of the Harlan argument is the effort to bring the reasonable man into free speech. It poses a fresh version of the preferred-position problem. If a service as useful to society as medicine can be subjected to liability for professional malpractice, why cannot the press be held to a comparable standard?[102] If the risk of jury judgments under a negligence standard is not too inhibiting for other useful activity, why is it so undue a burden on communication? The question is a good one and the answer is not that we think communication will be inhibited more than the other activity, but simply that we are less willing to have it inhibited. It is a special kind of activity in our society. That, in brief, is what the traditions of the First Amendment are all about—a special sensitivity to the risks of inhibiting communications activity and services.

Moreover, Mr. Justice Harlan has not, fortunately, had the courage of his conviction. Although he appeals most fully to the reasonable man standard in *Butts*, he is unwilling to use it there and exacts a privilege defeasible only by gross negligence. Also, in *Times* itself he concurred in exacting an even stronger privilege. Why, to repeat his question, cannot the communication activities in both those cases survive under the standard we apply to the useful services of doctors?

Further, the premise that the rules of tort liability that have been found appropriate for other activity are presumptively appropriate too for communication activities could lead to some unanticipated results. It is no longer true, if it ever was, that negligence represents the single consensus of society regarding the point at which losses are to be shifted. There is the doctrine of strict liability for extra hazardous activities enshrined in § 519 of the *Restatement of Torts*.

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[102] The press might not oppose the malpractice standard if they could be assured that, like the doctors, they would be presumed to have met professional standards *unless* there was explicit *expert* testimony that they had not. Given the famous conspiracy of silence by the press in reporting libel actions against fellow newspapers, it would be interesting indeed to hear them testify about each other's professionalism.

Perhaps more important there is today the explosion of strict liability in the field of products liability. In these cases, to put it as Mr. Justice Harlan has, the society has judged that these useful activities[103]—excavating for foundations, operating oil wells, exterminating pests, and the manufacturing and distributing of food, automobiles, knit wear, power tools—would not be unduly burdened by shifting all losses to them. Would he then follow the tort law and impose strict liability on communications for the risk of falsity?

It is tempting, although perhaps unfair, to push the logic one step further. Since communication activity is equated with other useful activity for purposes of selecting an appropriate rule of liability; and since in *Hill* Mr. Justice Harlan finds strict liability an unconstitutional burden on communications, we would appear to get to the delightful conclusion that the rule of § 519 of the *Restatement of Torts* itself is unconstitutional!

The Harlan observations raise, however, a question of genuine depth not only for the theory of free speech but also for the theory of tort liability. When we juxtapose communication as a risk-creating activity alongside all other risk-creating activity, it may look as though we have selected communication from other useful activity in the society in order to overprotect it. Or the analogy may move us in the other direction and it may look as though we elsewhere have underestimated the inhibiting impact of tort liability, have seen it clearly only for speech, and therefore have been underprotecting other activity.[104]

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[103] Ironically, the special rationale of the *Restatement* would emphasize how valuable the extrahazardous activity is to society. Thus, the defendant is not said to be negligent in engaging in it, and we do not aim to inhibit him by imposing liability. See Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959).

[104] What is specially arresting, given this moment in the debate about tort theory, is the evaluation of the impact of liability insurance in the two contexts. It has become a commonplace of tort talk to argue that insurance eliminates any deterrent impact of tort liability. See CONARD, MORGAN, *et al.*, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (1964). There is, however, no intimation in any of the Justices' opinions that there is such a thing as libel insurance.

For a sample of current tort debate see KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965); Calabresi, *Fault, Accidents and the Wonderful World of Blum and Kalven*, 75 YALE L.J. 216 (1965); Blum & Kalven, *The Empty Cabinet of Dr. Calabresi—Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967).

The possibilities are rich indeed. One might build a Calabresi argument for strict

My appetite for generalization is not up to an effort to unify tort theory and speech theory. The two traditions are too different. My preference, in this novel context at least, is to accord to speech and press "a preferred position" among useful activities or services. In a profound sense the commitment to free speech is quixotic and gallant; it is not a matter for prudence. Mr. Justice Brennan captured the flavor exactly in *New York Times* when he mentioned "the principle that debate on public issues should be uninhibited, robust, and wide-open."[105] I suspect that, properly viewed, there is in the world of the First Amendment no place for "the reasonable prudent man."

So much then for the extremes. It remains to observe what Justices Brennan and Warren make of the middle position. The logic of Mr. Justice Brennan in *Hill* combines a favorite thesis of his about the dangers of stimulating self-censorship with a thesis suggestive of his two-level approach to obscenity in *Roth*. In contrast to the approach of Mr. Justice Harlan, the principal question for him is the risk of inhibiting what is admittedly speech on matters of public interest. He is very clear about the gravity of this risk, under the special facts of the *Hill* case:[106]

> We create grave risk of serious impairment of the indispensable service of a free press in a free society, if we saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person's name, picture, or portrait, particularly as related to non-defamatory matter. Even negligence would be a most elusive standard, especially when the content of the speech itself affords no warning of prospective harm to another through falsity.

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liability in communications in order to capitalize on general deterrence of communications "accidents," or build a Jamies argument in order to spread the losses of communications accidents, or, with Mr. Justice Harlan, stick to nineteenth-century liability for fault theory, or, with Mr. Justice Brennan, limit liability in effect to intentional torts ouly, or finally, with Justices Black and Douglas, eliminate liability altogether.

It should be noted, however, that the proponents of strict liability in tort have generally been eager to eliminate liability for pain and suffering and to leave such losses on the victim. Arguably, that is the most relevant tort analogy here. See KEETON & O'CONNELL, *supra;* GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958); and BLUM & KALVEN, PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM 34–36 (1965).

[105] 376 U.S. at 270.

[106] 385 U.S. at 389.

He then goes on to point up the uncertainty of jury performance in such cases under a negligence standard, and then to stress the invitation to the press to censor themselves, and thus not to exercise their "constitutional guarantees" fully: "Fear of large verdicts in damage suits for innocent or mere negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer far wider of the unlawful zone.' "[107]

This then was the answer to the Harlan position. It has the special virtue of paying some attention to the peculiarity of the grievance in *Hill*. And it left the door open just a little for a different response in *Butts* and *Walker*, where the statement carried notice of its risk on its face.

But having stressed so much in reply to Harlan the dangers of inhibiting public speech, Brennan still had to answer to Justices Black and Douglas. The answer, it appears, had already been given in *Garrison v. Louisiana*[108] from which he quoted heavily. It turned on the special disutility of "calculated falsehood" and on the ease of avoiding it. A publisher does not have to "steer far wider" to avoid calculated falsehood; hence liability keyed to it does not risk triggering a chain of self-censorship. Moreover, the calculated falsehood falls into that bottom drawer of speech which, in the formula of *Chaplinsky*, is "no essential part of any exposition of ideas."[109] We are back once again in the family of *Chaplinsky*, *Beauharnais*,[110] and *Roth*.[111] We have a form of speech which is beneath contempt, or at least beneath constitutional concern. Calculated falsehood is, after all, a kind of pornography. And whatever the difficulties of the two-level theory as applied to alleged obscenity, it does have a considerable appeal here.[112]

There emerged then a coherent statement of position nicely keyed to the concerns of free speech: Speech on matters of public interest is within the ambit of First Amendment scrutiny. Such speech remains of public interest and serves a public purpose even though it will from time to time deal with individuals. There is danger in exposing such speech to tort actions by aggrieved individ-

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107 *Ibid.*

108 379 U.S. 64 (1964).

109 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

110 Beauharnais v. Illinois, 343 U.S. 250 (1952).

111 Roth v. United States, 354 U.S. 476 (1957).

112 See Kalven, *supra* note 40.

uals because the chance of inadvertent falsity cannot be avoided in active "robust" communication, and because fear of liability will engender self-censorship and cause publishers to "steer far wider of the unlawful zone." To key liability to calculated falsehood, however, will not engender self-censorship and in any event it is singularly worthless speech.[113]

The clarity and coherence of the position as theory are dimmed somewhat by two circumstances. First the test does not stick to the narrow and unambiguous criterion of calculated falsehood, as does the rationale. It expands to embrace "reckless disregard of the truth," a concept which belongs to the negligence family. Second, on the record in *Hill*, Mr. Justice Brennan was willing to remand for a new trial, meaning that if a jury, properly instructed, were to find against the defendant publishers, he would have no objection. There was a point, therefore, to Mr. Justice Black's complaint that the action of remanding on this record gives a clue to what the test is to mean in actual operation.

Mr. Justice Brennan had two final observations to add which are of high interest. Although *New York Times* had apparently been applied to reach the decision in *Hill*, we are expressly told that the Court got there "not through blind application of *New York Times Co. v. Sullivan*, relating solely to libel actions by public officials,"[114] but only upon consideration of the specific problem of the New York privacy statute and private individuals. "Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context."[115] I would happily read this as meaning that *New York Times* is a seminal case in that it gave a reading to the First Amendment that can properly guide the Court in cases not involving libel or public officials. The point pre-

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[113] In a recent panel discussion Professor Martin Shapiro observed that the final result of this extension of the *Times* rule might be a net loss of robust critical speech. His point was that critics of government or public policy might now be inhibited from entering public controversy by the risks that as "public figures" they would forfeit the protection the laws of libel had hitherto given them. Interestingly enough, this is precisely the counterargument that was unsuccessfully made in Coleman v. MacLennan, 78 Kan. 711 (1908), against broadening the fair comment privilege, *viz.*, that good men would be inhibited thereby from seeking public office. The Supreme Court does not deal with this counterrisk to speech, but I am fairly sure it would see the balance falling on the other side. In any event, I would.

[114] 385 U.S. at 390.

[115] *Id.* at 390–91.

sumably is that we are reasoning by analogy not for the purposes of tort law but for the purposes of constitutional law.

Mr. Justice Brennan then turned directly to the Harlan position. He met it not on the merits, but on the grounds that "this is [not] a libel action."[116] If it were, some of the Harlan distinctions as "between the relative opportunities of the public official and private individual to refute defamatory charge might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved."[117] Once again, Mr. Justice Brennan appeared to be leaving the door open for a different result when libel of a newsworthy person is the issue, as was to be the case six months later in *Butts* and *Walker*.

When it finally was a question of libel, Mr. Justice Brennan found the *Times* standard appropriate after all. He devoted his opinion in *Butts* and *Walker* exclusively to arguing that the instructions in *Butts* were not close enough to the standard and that the case should be sent back for a new trial. It was left, therefore, to the Chief Justice to carry on the argument for the *Times* standard.

Chief Justice Warren tackled the job with gusto. First he labeled the Harlan standard of reportorial malpractice ("extreme departure from the standards of the investigation and reporting ordinarily adhered to by responsible publishers") as "an unusual and uncertain formulation."[118] He doubted that it could guide a jury of laymen.

Next, in a passage already quoted,[119] Chief Justice Warren argued that under the conditions of modern life there are no relevant differences between public officials and public figures. Hence he would have applied the same standard to both. And picking up Mr. Justice Harlan's emphasis in *Hill* on the possibilities of counterargument, he stated: "surely as a class these 'public figures' have as ready acccess as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities."[120] If, then, the possibility of counterargument were the test, as Mr. Justice Harlan contended, public figures and public officials are fungible. And, reflecting Mr. Justice Harlan's taste for nuance, Chief Justice Warren found a subtle difference between public officials and public figures which moves in the direction of

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116 *Id.* at 390.

117 *Ibid.*

118 388 U.S. at 163.

119 Text *supra*, at note 57.

120 388 U.S. at 164.

giving more protection, if distinctions are to be drawn, to the critic of the public figure! Unlike officials, public figures are not subject "to the restraints of the political process."[121] This means that society may have to rely on public opinion as "the only instrument by which society can attempt to influence their conduct."[122] This again shows that one trouble with "balancing" is that there are too many ways to do it.

The Chief Justice then concluded with some words of praise for the *Times* standard. It is manageable, "readily stated and understood,"[123] and moreover reflects a proper balancing of the interests involved. He stressed that the standard is not so restrictive as to limit recovery to cases where there is "knowing falsehood"; it included, after all, "reckless disregard for the truth."

This is perhaps the fitting moment to pause to marvel at the pattern of the Court's argument on this issue. The Court was divided 5 to 4 on whether the constitutional standard for the conditional privilege of those who libel public figures is that it be defeasible only upon a showing of "reckless disregard for truth" or merely on a showing of an "extreme departure" from professional newspaper standards! Further it was understood that the chief significance of the standard relates simply to how jury instructions will be worded. Yet this nuance triggered a major debate in the courts on the theory of free speech. Nor was this quite all. Perhaps there is poetic justice in the fact that each side can make a claim to victory. The Harlan standard, as we noted at the outset, has its *Butts;* the Brennan-Warren standard has its *Walker!*

When, however, we remember that the appearance of victory for Harlan in *Butts* is a fluke, occasioned by Warren's vote to save the verdict for the plaintiff, it is apparent that the Court stands 5 to 4 in favor of the Brennan-Warren standard and hence in favor of an across-the-board application of *New York Times.* The decisive precedent on the issue of the standard is therefore *Walker*— and behind it *New York Times.*

What are we to make, in the end, of the Court's disposition to argue so fiercely over so tiny a difference in jury instructions? Was Mr. Justice Fortas perhaps the one who really had the matter properly in focus when he admonished the Court in *Hill:*[124]

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121 *Ibid.*

122 *Ibid.*

123 *Ibid.*

124 385 U.S. at 418.

> But a jury instruction is not abracadabra. It is not a magical incantation, the slightest deviation from which will break the spell. Only its poorer examples are formalistic codes recited by a trial judge to please appellate masters. At its best, it is simple, rugged communication from trial judge to jury of ordinary people, entitled to be appraised in terms of its net effect.

Was he disdaining to join the Court in debate on the merits?[125]

I have no inside information on why these issues held such extraordinary power to move the Supreme Court. I have no socio-psychological theories about small group process in the current Court or about its incapacity to reach consensus. I do have a few final hunches about what it all might mean, and they are benign.

First, it shows that the free speech issue etched in the sequence from *Times* to *Butts* and *Walker* of public speech interlaced with comment on individuals is a new issue never really confronted before in legal theory about freedom of speech and press. And it is a surprisingly troublesome issue. Second, it shows once again—and it is a splendid thing—that all members of this Court care deeply about free speech values and about their proper handling by law. Only a concerned Court would have worked so hard on such a problem. And finally, I think it shows a special respect for the potential of *New York Times* as a precedent on the First Amendment. In a sense the quarrel is over preserving the trademark of the *New York Times* case. If it is applied across the board in these cases, it retains its salience as a key precedent and it gives the Court a touchstone for the future; if the standard is nibbled away, a promising starting point for analysis of future problems is wasted.[126]

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[125] Yet in *Butts* he joined Mr. Justice Harlan in the gross negligence standard against the "reckless disregard" formula" of Warren and *New York Times!*

[126] This is not the place seriously to inventory the intriguing questions left in the future of *New York Times v. Sullivan,* but the following at least come quickly to mind: (1) Whether *Beauharnais v. Illinois,* 343 U.S. 250 (1952), upholding the constitutionality of group libel laws is still "good law." (2) Whether the Court will ever re-examine, in light of *Times,* the rationale it gave in *Roth v. United States,* 354 U.S. 476 (1957), for the constitutionality of obscenity regulation. (3) Whether the fact-opinion distinction, on which so much of the common law on fair comment is based, is to be operative at the constitutional level. That is, is there an absolute privilege to express opinions, no matter how deliberately unfair, on public officials and public figures? (4) Will the libel per se controversy (which relates to whether special damages need be shown where the statement is not libelous on its face but requires extrinsic facts to spell out the full implication) have a constitutional dimension? It would indeed be a remarkable step in the growth of

However we may feel about the almost endless complexity of the arguments among the individual Justices, it seems to me the Court in *Hill*, *Butts*, and *Walker* has, as an institution, played its proper role very well indeed.

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the law if the libel per quod rule, which has seemed to many to be simply a technical error in haudling doctrine in the law of defamation, were to acquire status under the First Amendment as a safeguard for speech. See Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960); Eldridge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); and see Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 660 (D.C. Cir. 1966). (5) In recent years it has become apparent that the right of privacy encompasses not only a dignitary tort but also a tort of unfair appropriation, a right of publicity. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Does *Hill* carry implications for such claims when made by public figures? Or will it be compatible with the First Amendment that public figures be paid the market price for their photos, their stories, their biographies, as well as for their endorsements? (6) Will there be further development of the constitutional law on the connection between the plaintiff and the statement, the so-called "of and concerning" issue of the law of defamation?