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Defamation, Public Officialdom and the
Rosenblatt v. Baer Criteria—A Proposal for
Revivification: Two Decades After New York
Times Co. v. Sullivan

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INTRODUCTION

In the two decades since the pivotal decision of New York Times Co. v. Sullivan1 the Supreme Court’s jurisprudence in the realm of defamation law has vociferously and excruciatingly debated the vast array of attitudinal perspectives of the Court’s Justices and of legal scholars on the appropriate accommodation of the competing states’ interests—in protecting individual reputation and ensuring a modicum of responsibility in dissemination of news—and the first amendment interest in providing sufficient breathing space to eliminate the spectre of self-censorship. A short two years into this twenty-year debate, a debate engendered by the constitutional innovations of this decision,2 the Court, in Rosenblatt v. Baer,3 has endeavored to give general guidelines for determining what types of governmental employees qualify as “public officials” and thus invoke the stringent, press-protective requirements of New York Times. The general criteria of this decision, with the footnote qualifications imposed on them by the Court, have often, however, been grossly misinterpreted, inattentively ignored, or perfunctorily applied. The net result has been that all types of

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lower echelon governmental employees have been generally sub-
sumed under the rigorous New York Times standards, threshold requisites which one state court has recently denominated a "virtually impermeable envelope of protection" for the media in suits brought by public persons. This looseness of analysis in the application of the Rosenblatt criteria, however, is at odds with not only the letter and spirit of the decision itself but also with the decided, pro-reputation orientation and realignment of the Court in the last decade, the decade following Gertz v. Robert Welch, Inc. The Rosenblatt standards necessitate reexamination, both in the context of the Supreme Court's own increasingly plaintiff-oriented perspective in defamation cases generally (particularly with respect to its elucidation of "public figure" status) and in light of Chief Justice Burger's highly significant intimation in footnote eight of Hutchinson v. Proxmire that "public official" does not encompass "all public employees." Section I of this Article will delineate in a tripartite analysis the Court's own conceptual framework for evaluating defamation cases and the lessons deducible therefrom. Section II will provide an in-depth analysis of state and federal decisional law and its interpretation and application of the "public official" concept. That Section will also propose a new evaluative framework for delineating and utilizing the Rosenblatt criteria, a framework infused with the pro-reputation perspective of the Court over the past decade. The Article will conclude with a calculated projection for the Court's handling of defamation cases in the future.

4. See Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1376-77 (1975), where the author notes that, as a result of the courts' ignorance of or disregard of the Rosenblatt "footnote thirteen" limitation, "[t]he distinction drawn between scrutiny of the position occupied and scrutiny occasioned by the particular charges in controversy has been all but ignored." See also L. Tribe, American Constitutional Law 636 (1978) ("[P]ublic official' now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen"). One noted commentator has even interpreted Rosenblatt v. Baer, 383 U.S. 75 (1966), itself as intended to have this effect. Christie, Injury to Reputation and the Constitution, 75 Mich. L. Rev. 43, 46 (1976).


I. THE SUPREME COURT AND THE "STATUS"/"SUBJECT MATTER" DICHOTOMY—A CHRONOLOGICAL OVERVIEW

A. The "Public Official" Standard

In the momentous 1964 decision of *New York Times Co. v. Sullivan*, the Supreme Court, writing on a "clean slate," concluded that "libel can claim no talismanic immunity from constitutional limitations" and interposed for the first time stringent limitations on first amendment rights in civil libel suits by "public officials" against critics of their "official conduct." Placing substantial reliance on the thoroughly discredited Sedition Act of 1798 and the "broad consensus" that that act had been invalidated in "the court of history," the Court adopted the Madisonian view that "free public discussion of the stewardship of public officials is a fundamental principle of the American form of government." Concluding that this notion of popular sovereignty could not withstand the endemic self-censorship that would result from the reputation-protective common law of civil libel

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8. *New York Times*, 376 U.S. 254 (1964). Three members of the Court concurred on absolute first amendment grounds. *Id.* at 293 (Black, J., with Douglas, J., concurring); *id.* at 304-05 (Goldberg, J., with Douglas, J., concurring). Note, however, that Justice Goldberg's absolutism did not extend to "private conduct of a public official or private citizen. . . . purely private defamation has little to do with the political ends of a self-governing society." Liability for such "private defamation" does not run afoul of the "freedom of public speech" guarantee by the first amendment. *Id.* at 301-02 (dicta). The decision to reverse as a matter of law was thus unanimous, albeit with shadings of opinion on the ambit of the first amendment. Of course, the underlying assumption was that, if *New York Times* did not apply to the facts of the case, the plaintiff was relegated to the milieu of strict liability and the circumscribed common law qualified privileges, privileges which one author has depicted as "grudgingly granted and narrowly construed." *Id.* at 275 (emphasis added). Justice Brennan, writing for the Court, adopted a qualified version of Alexander Meiklejohn's thesis that "[a]ll constitutional authority" resided in the body public, "the governors." *Id.* at 275 (emphasis added). Justice Brennan seems to have tacitly conceded the influence of Meiklejohn on his authorship of the *New York Times* and *Garrison* decisions. *Id.* at 276.

9. *Id.* at 299 (Goldberg, J., with Douglas, J., concurring).

10. *Id.* at 269.

11. *Id.* at 276.

12. *Id.* at 275 (emphasis added). Justice Brennan, writing for the Court, adopted a qualified version of Alexander Meiklejohn's thesis that "[a]ll constitutional authority" resided in the body public, "the governors." Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 253-54. Justice Brennan seems to have tacitly conceded the influence of Meiklejohn on his authorship of the *New York Times* and *Garrison* decisions. *Id.* at 276.

13. Unless the defendant could prove the truth of the ad in "all" its "particulars," the plaintiff could get "presumed" general damages for this published matter, deemed libelous per se under Alabama law, without any evidence that pecuniary loss had resulted therefrom. *Id.* at 276. Indeed, there was no testimony that anyone "actually believed" the
under which "fear of damage awards" may be "markedly more inhibiting" than fear of criminal prosecution,14 the Court decided to eliminate the "pall of fear and timidity imposed upon those who would give voice to public criticism, an atmosphere in which First Amendment freedoms cannot survive."15 To eliminate this chilling atmosphere, the Court promulgated a constitutional man-

matters purportedly relating to Sullivan. Id. at 260. Justice Black, himself a native Alabamian, stated that "[v]iewed realistically . . . Sullivan's political, social, and financial prestige ha[d] likely been enhanced" by the advertisement. Id. at 294 (Black, J., with Douglas, J., concurring). For an extensive analysis of the racial background and punitive nature of the libel verdict, see Pierce, The Anatomy of an Historic Decision: New York Times Co. v. Sullivan, 43 N.C.L. Rev. 315 (1965). Although such factors were clearly evidenced in the background of the decision, it is necessary to reaffirm that the application of the common law rules therein was not a sham, but reflected the general tenor of the common law of defamation existent in most states at that time. See Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va. L. Rev. 1, 6 (1965); Kalven, The New York Times Case: A Note on the Central Meaning of the First Amendment, 1964 Sup. Ct. Rev. 191, 195-97. However, it is also necessary to keep in mind that the power relationships in evidence in the worst case scenario of New York Times are probably atypical. As one author has noted, the press "wields virtually limitless power against the individual," and the more common situation involves the media "ganging up" on the individual. Shapo, Media Injuries to Personality: An Essay On Legal Regulation of Public Communication, 46 Tex. L. Rev. 650, 653-54 (1976). The Supreme Court's adoption of a negligence standard in private versus media defendant cases, its narrowing of the sphere of the public statuses, and its loosening of the rules of discovery in public person cases, see infra note 154, reflect a sanguine appreciation of the typical power relationships in an individual versus media encounter and evidence a calculated attempt by the Court majority to reach a more fundamentally fair accommodation of reputational and free expression interests. For a further discussion, see infra text accompanying notes 405-09.

14. New York Times, 376 U.S. at 277. The Court noted that the half-million dollar damage award was one thousand times as high as the Alabama criminal defamation fine ($500 and a maximum of six months in jail), one hundred times as high as the repudiated Sedition Act of 1798 penalty ($5000 and a maximum of five years imprisonment) and that no "double jeopardy" rule precluded other awards based upon the same publication. Id. at 273, 277-78. Indeed, another verdict of the same amount had been awarded in the only other case tried; other pending cases sought a total of two million dollars. Id. at 278 n.18. Justice Black stated that eleven libel suits against this media defendant—totaling $5.6 million—and five others against CBS—totaling $1.7 million—with state and local officials as plaintiffs were pending in Alabama. Id. at 295 (Black, J., with Douglas, J., concurring).

15. Id. at 278. Such potential "pain of libel judgments virtually unlimited in amount" deterred not only false, defamatory speech but also matters that are true, due to the "doubt whether it can be proved in court or fear of the expense of having to do so." Such a rule "dampens the vigor and limits the variety of public debate." Id. at 279. This self-censorship assumption has been strongly criticized by some authors who noted that the press "grew and prospered mightily" despite a pre-New York Times common law legal milieu substantially more plaintiff-protective than the regime generated by that case. Shapo, supra note 13, at 656. See also Merin, supra note 2, at 473 (noting that the media are normally "vast corporations . . . unlikely to be snuffed out by a libel suit").
date that "prohibits a public official from recovering damages for a
defamatory falsehood relating to his official conduct unless he proves
that the statement was made with 'actual malice'—that is with
knowledge that it was false or with reckless disregard of whether
it was false or not."\footnote{16}

The Supreme Court, in its famous footnote twenty-three to
\textit{New York Times}, declined to answer in detail the questions of "how
far down into the lower ranks of government employees the 'pub-
lic official' designation would extend for purposes of this rule, or
otherwise to specify categories of persons who would or would not
be included,"\footnote{17} or to determine the "boundaries of the 'official
conduct' " concept.\footnote{18} The Court explicitly limited its holdings to

\footnote{16. \textit{New York Times}, 376 U.S. at 279-80 (emphasis added). Curiously, the Court in its
adoption of the minority view epitomized by Coleman v. MacLennan, 78 Kan. 711, 742-43,
98 P. 281, 292 (1908), seems to have ignored the suggestion therein that such privilege
could be lost by common law "malice" or negligence. As is suggested by the quoted lan-
guage, the near universal view is that the burden of proof on the "actual malice" issue is
on the plaintiff in public person cases. \textit{See infra} notes 420-22. In addition, the Supreme
Court, possibly inadvertently, opined in evaluating the evidence in the case under the "ac-
tual malice" standard that that evidence "lacks the convincing clarity which the constitu-
tional standard demands." 376 U.S. at 285-86. This aside has been transformed into a
"clear and convincing" evidence requirement. It was first formally restated as "clear and
convincing" proof in Rosenbloom v. Metromedia, 403 U.S. 29, 30 (1971), and has been
repeatedly reaffirmed in subsequent cases.

17. \textit{New York Times}, 376 U.S. at 283 n.23. The Court intimated obliquely several times
in the opinion that the first amendment interest might be broader than merely discussion
of "public officials" and their "official conduct" and might encompass discussion of "public
issues." \textit{Id.} at 270, 271, 281-82 (quoting Coleman v. MacLennan, 78 Kan. 711, 723, 98 P.
281, 285 (1908) (the privilege " 'includes matters of public concern, public men, and can-
dates for office.' ") ). \textit{See also id.} at 288 (citing Charles Parker Co. v. Silver City Crystal Co.,
142 Conn. 605, 615-16, 116 A.2d 440, 445 (1955) (comments by a candidate for mayor on
radio concerning the financial instability of the plaintiff company and the possibility of lost
employment for the voting public is a "matter of public interest" to which the minority
rule of "fair comment" applied)); \textit{id.} at 280 n.20 (citing Chagnon v. Union Leader Corp.,
defaming plaintiff, who was under contract with the city and was accused of fraudulently
substituting inferior shrubbery, were privileged, but that the privilege was abused)). The
broader "public issue" orientation of the latter decisions was temporarily implicitly dis-
avowed in Rosenblatt v. Baer, 383 U.S. 75, 87 (1966), particularly its "footnote thirteen"-
rejection of the "catches the public's interest"/newsworthiness notion as sufficient to cause
application of \textit{New York Times}. Although such "public issue" orientation was revived and
reached its zenith in the plurality opinion in Rosenbloom v. Metromedia, 403 U.S. 29
(1971), discussed \textit{infra} text accompanying notes 105-26, it never was the view of a Court
majority in libel cases and has been decisively rejected by the Supreme Court in Gertz v.
notes 127-81.

twin determinations that the claimant therein, an elected city commissioner of public affairs, was "clearly" a "public official" and that the allegations of malfeasance involved, if regarding the unidentified official at all, undoubtedly related to his "official conduct." An examination of the precedents relied upon by the Court, however, provides additional guidance concerning the scope of the "public official" bailiwick. Clearly, the Court's juxtaposition of contempt decisions involving the judiciary ("... men of fortitude, able to thrive in a hardy climate") in its animadversion of "other government officials" (like Sullivan), reflects

19. *Id.*

20. *Id.* The Court later held, as an alternative to its conclusion that the "actual malice" standard had not been met as a matter of law, *id.* at 285-88, that the allegedly libelous remarks were not "of and concerning" Sullivan—either by name or office—and were based on the "bare fact" of his "official responsibility" for the actions of the police as commissioner of public affairs. *Id.* at 288-89. Such transmutation of "impersonal" criticism of government into libel of its constituent officials was constitutionally insufficient. *Id.* at 292. It is not totally clear from the opinion whether such general criticism of government in the abstract was absolutely privileged or afforded only the *New York Times* protection. See the Court's reference to the "good faith critic of government," *id.* at 292. The entire posture of the case does, however, bespeak an absolute immunity from defamation liability for the critic of government, rather than the *New York Times* qualified privilege for the critic of governors defeasible upon proof of "actual malice." *Rosenblatt v. Baer* similarly rejected the "spectre of prosecution for libel on government, which the Constitution does not tolerate in any form." This is the universal view of the case law. See D. Elder, Kentucky Tort Law: Defamation and the Right of Privacy 354-56 (1983); L. Tribe, supra note 4, at 632. Note, however, that the recent California Supreme Court decision of City of Long Beach v. Bozek, 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982), holding that a malicious prosecution action brought by a city against a prior unsuccessful litigant violated the absolute constitutional right of petition, was remanded to the California Supreme Court for clarification of whether its decision was on "federal or state constitutional grounds, or both." City of Long Beach v. Bozek, 105 S. Ct. 712, 712 (1983). On remand, the California Supreme Court reaffirmed its prior opinion "in its entirety," concluding that the federal and state constitutional grounds used previously were dual bases for its decision, and stated that the California constitution was an "independent ground" of its decision. City of Long Beach v. Bozek, 33 Cal. 3d 727, 727-28, 661 P.2d 1072, 1073, 190 Cal. Rptr. 918, 918-19 (1983). This legal scenario suggests that the absolute immunity for criticism of government, at least in the malicious prosecution context, is not totally free from doubt. Note that the Restatement (Second) of Torts has refrained from taking a position on the issue. Restatement (Second) of Torts §561, comment d, caveat 2, (1977).

21. On the "official conduct" component of the "public official" standard, see infra notes 341-404 and accompanying text.


23. *New York Times*, 376 U.S. at 273. The Court rejected the contention that factual
the Court's assumption that members of the judiciary would be similarly covered by the panoply of the "public official" designation. Additional insight is likewise provided by the decisions relied on by the Court in adopting the minority variant of "fair comment" as the framework for its constitutional construct and by the Court's makeweight analogy to the decisions affording absolute immunity as defendants to federal executive officials with substantial authority. A careful analysis of these decisions discloses that none of them involved lower echelon garden-variety public employees but included only individuals with positions of substantial actual or potential influence in the political arena (candidates for public office, a United States congressman, appointed elec-

error or injury to official reputation or the cumulative effect of both was sufficient to terminate the first amendment privilege. Id. It specifically noted that "[c]riticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." Id.

24. See generally Eaton, supra note 4, at 1362-63. In recently reaffirming the judicial duty of "independent examination" of "actual malice" determinations by factfinders, the Supreme Court noted that the federal "public official" standard of "actual malice" had its "counterpart" in state law cases preceding New York Times and referenced the list thereof in footnote 20 of the New York Times opinion. Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1960 & n.18 (1984). This reference reinforces the view advanced herein, that such common law minority view precedents are helpful in fathoming the types of public officials covered by the umbrella of New York Times. Under this common law minority view the media defendant was accorded a privilege even where the underlying facts were untrue. By adopting this Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908) minority variant, the Court tacitly rejected the view of the leading majority decision of Post Publishing Co. v. Hallam, 59 F. 550, 541 (6th Cir. 1893), with its rationale that adoption of a contrary rule would deter "honorable and worthy men" from politics. A fervent plea for revitalization of the latter policy has recently been made by L. Eldredge, THE LAW OF DEFAMATION 271-72 (1978). For a further discussion, see infra note 251 and text accompanying note 411.

25. The Supreme Court in Rosenblatt v. Baer disaffiliated the concept of the "public official" status of plaintiffs from the vagaries of the immunity of such officials as defendants. See infra note 49. Such a slight subsequent change in focus regarding the underlying rationale does not render the Supreme Court absolute immunity decisions any less useful as probative evidence of the types of "public officials" the Court had in mind at the time of issuance of New York Times.

26. Phoenix Newspapers, Inc. v. Choiser, 82 Ariz. 271, 782-74, 312 P.2d 150, 151-52 (1957) (plaintiffs were mayoral and city council candidates in Phoenix charged with the intention of relaxing vice controls if elected); Friedell v. Blakely Printing Co., 163 Minn. 226, 229, 203 N.W. 974, 975 (1925) (the nature of the office sought was unidentified). It was also extended to a candidate-incumbent for public office. Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908) (attorney general and candidate for reelection who was by virtue of his office a member of the commission responsible for supervision of the state school fund; the article related to plaintiff's conduct in "connection with a school fund transaction"). See New York Times, 376 U.S. at 280. Another cited decision concluded that one who had "taken charge" of a statewide campaign to defeat ratification of the electoral
franchise for women stood in the same posture as a candidate for public office: "[A]ny person who takes charge of an election campaign involving a matter of great public moment . . . stands much in the position of a candidate for public office." Consequently, his "doings, his associates, the forces back of him, his support financial and otherwise in connection with the campaign, his goings and comings, all of these insofar as they might throw light upon the nature of the forces that were interesting themselves in such campaign were matters of legitimate public interest and concern." McLean v. Merriman, 42 S.D. 394, 400, 175 N.W. 878, 880-81 (1920). New York Times, 376 U.S. at 280 n.20. Such a non-governmental individual would, of course, be a "public figure" under the Supreme Court's subsequent decisional law. See infra text accompanying notes 63-204.


29. Salinger v. Cowles, 195 Iowa 873, 874-75, 191 N.W. 167, 168 (1922) (plaintiff was charged with "coercing" a railroad having pending cases before the court into hiring a third party). See New York Times, 376 U.S. at 280 n.20.


31. Lawrence v. Fox, 357 Mich. 134, 135, 97 N.W.2d 719, 720 (1959) (plaintiff was accused of official corruption. "Few offenses known to the litany of prostitution of the public trust were omitted"). See New York Times, 376 U.S. at 280 n.20.


35. Barr v. Matteo, 360 U.S. 564, 574 (1959). This decision extended the absolute immunity accorded cabinet level executive officials in Spalding v. Vilas, 161 U.S. 483, 498 (1896) (post-master general) to petitioner, the acting director of "an important agency of government." Barr, 360 U.S. at 574. Note that the fifth member of the 5-4 decision appa-
In the same year it decided *New York Times*, the Court was asked to review two criminal defamation convictions under the standards promulgated in that case. In the single case in which an opinion was issued by the Court, *Garrison v. Louisiana*, the offended “public officials” were eight judges constituting the “entire bench” of the Criminal District Court of Orleans Parish, to whom the criminal defendant (the district attorney of the same parish) had attributed a plethora of allegations of unprofessionalism and worse. Explicitly adopting the conclusion implicit in the *New York Times* progenitor, it held that “libel law . . . civil or


37. *State v. Garrison*, 244 La. 787, 795, 154 So. 2d 400, 403 (1963), rev’d *sub nom.*, *Garrison v. Louisiana*, 379 U.S. 64 (1964). The Court made it quite clear that the case of a criminal defamation prosecution for the “discrete area of purely private libels,” “totally unrelated to public affairs,” was not before it. *Garrison*, 379 U.S. at 72 n.8. For further discussion of this issue see *infra* text accompanying notes 341-404. The Court on a few occasions gave hints of a broader rationale for the *Garrison* decision than criticism of “public officials”: “Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.” *Id.* at 74.


criminal . . . must satisfy relevant constitutional standards,"\(^{40}\) that the "actual malice"/"calculated falsehood"\(^ {41}\) standard was applicable, and that the state courts had utilized "constitutionally invalid standards"\(^ {42}\) in the criminal defamation case. In the other criminal libel case decided by the Court in 1964, \textit{Moity v. Louisiana},\(^ {48}\) reversed \textit{per curiam}, the criminal defendant was convicted for imputing to a parish district attorney, undoubtedly a public official, the illegal incarceration of a prisoner based upon knowingly perjured testimony.\(^ {44}\)

In a terse \textit{per curiam} opinion the following year in the jointly-decided cases of \textit{Henry v. Collins} and \textit{Henry v. Pearson},\(^ {46}\) the Court tacitly extended the evolving "public official" status to the chief of police of Clarksdale, Mississippi, and the elected county attor-

\begin{itemize}
\item \textit{Garrison}, 379 U.S. at 68 n.3.
\item \textit{Id.} at 74-75. The Court made it eminently clear, however, that "use of calculated falsehood" is "at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." Consequently, such a "knowingly false statement" or one made with "reckless disregard of the truth" was \textit{sans} any constitutional safeguard. \textit{Id.} at 75. If the standard is met, there is clearly no general constitutional bar to criminal prosecution for defaming individuals. \textit{See} Herbert v. Lando, 441 U.S. 153, 156 n.1 (1979); Keeton v. Hustler Magazine, Inc., 104 S. Ct. 1473, 1479 \& n.6 (1984) (implied). There may be other constitutional problems of vagueness, however. \textit{See generally} Elder, \textit{Criminal Libel, supra} note 36, at 60-72, and \textit{infra} note 47. The \textit{New York Times-Garrison} treatment of the criminal libel issue clearly calls into question the continuing precedential value of \textit{Beauharnais v. Illinois}, 343 U.S. 250 (1952), wherein the Court, 5-4, upheld a group defamation law. J. NOWAK, R. ROTUNDA, \& J. YOUNG, \textit{Constitutional Law} 944 (1983) [hereinafter cited as J. Nowak]. Indeed, at least two of the dissenters almost ominously suggested that a law that could be used to criminally punish an opponent of integration could be similarly used against a proponent of integration, i.e., the setting of \textit{New York Times, Beauharnais}, 343 U.S. at 274-75 (Black, J., dissenting), \textit{id.} at 304 (Jackson, J., dissenting).
\item \textit{Id.} at 74-75. The Louisiana criminal defamation law forfeited defendant's qualified privilege if true or false statements were made with common law malice or without probable cause, i.e., were made negligently. \textit{Garrison}, 379 U.S. at 78-79.
\item \textit{Id.} at 74-75. Although the conviction was apparently based only on the depiction of the district attorney, other accusations of malfeasance were directed at "various officials" of the parish, "both elected and appointed." \textit{Id.} at 564, 159 So. 2d at 155. \textit{See also} \textit{State v. Cox}, 246 La. 748, 756, 167 So. 2d 352, 353 (1964), cited in \textit{Garrison}, 379 U.S. at 78, and implicitly disavowed therein, wherein a criminal conviction was based on imputations to the effect that a sitting judge solicited and received bribes from blacks who wished to avoid imprisonment. The case was reversed on other grounds.
\item \textit{Id.} at 74-75. The sheriff was likewise implicated in the wrongdoing. \textit{Moity}, 245 La. at 550, 159 So. 2d at 150. Although the conviction was apparently based only on the depiction of the district attorney, other accusations of malfeasance were directed at "various officials" of the parish, "both elected and appointed." \textit{Id.} at 564, 159 So. 2d at 155. \textit{See also} \textit{State v. Cox}, 246 La. 748, 756, 167 So. 2d 352, 353 (1964), cited in \textit{Garrison}, 379 U.S. at 78, and implicitly disavowed therein, wherein a criminal conviction was based on imputations to the effect that a sitting judge solicited and received bribes from blacks who wished to avoid imprisonment. The case was reversed on other grounds.
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ney, respectively, who were charged with participation in a "diabolical plot" to frame the claimant. And in 1966, two years after New York Times, the Court was specifically confronted with the "footnote twenty-three" caveat of that case, namely "how far down into the lower ranks of government employees" the "public official" designation would extend." The question was presented in Rosenblatt v. Baer, a case involving the former ap-

46. Although not disclosed by the Supreme Court's opinion, an examination of the state supreme court decision discloses that Pearson was an elected official and "expected to be a candidate for reelection." Henry v. Pearson, 253 Miss. 62, 82, 158 So. 2d 695, 703 (1963), rev'd, 380 U.S. 356 (1965).

47. 383 U.S. 75 (1966). Justice Brennan wrote the opinion of the Court in which Justice White and Chief Justice Warren joined in toto. Justice Stewart concurred in the rationale of the Court, concluding that nothing therein deviated from the "fundamental proposition" that New York Times and Garrison represented a conversion of civil or criminal libel into a species of "seditious libel." Id. at 92-93 (Stewart, J., concurring). Justice Harlan also concurred in the parts of the Court's opinion developing standards for "public officials," dissenting only with respect to the Court's conclusion that libel of the unidentified plaintiff connoted a "libel of government" running afoul of the constitutional colloquium ("of and concerning" requirements) of New York Times. Thus, a clear majority of five expressly agreed with the Rosenblatt v. Baer alternative criteria for applying the "public official" status discussed in the text. Justice Clark concurred in the result only. Id. at 88 (Clark, J., concurring). Justice Douglas concurred in the judgement of reversal, the part of the Court's opinion on the constitutional colloquium issue, and in Justice Black's partial concurrence and partial dissent. Id. at 91 (Douglas, J., concurring). Justice Black, with Justice Douglas joining, concurred in the judgement of reversal on absolutist grounds and dissented from the remand to the state courts. Id. at 94-95 (Black, J., with Douglas, J., joining, concurring and dissenting). Justice Fortas dissented on the ground that the writ was "improperly granted," as the case (and the resultant record) were pre-New York Times. Id. at 100-01 (Fortas, J., dissenting).

Note that two other libel decisions were decided in the same year. In one the Court held that defamation actions under state law in labor disputes were not preempted by federal law, provided that New York Times "actual malice" and "damages" were proved by the plaintiff. Linn v. Plant Guard Workers, 383 U.S. 53, 64-65 (1966). In the other decision, Ashton v. Kentucky, 384 U.S. 195, 200-01 (1966), the Court reversed a common law criminal libel conviction on vagueness grounds. All three alleged victims were undoubtedly public persons—two (chief of police and sheriff) were undoubtedly "public officials"—and the third, the editor of the local newspaper, was probably a "public person" under the standard developed the next year in the Butts and Walker cases. The "status" issue in Ashton was not specifically addressed by the Court.

48. Plaintiff-respondent had been terminated in a change of regimes "some six months" prior to the defamatory article. Rosenblatt, 383 U.S. at 78. However, the mere fact that he was no longer in the governmental position "could not" be "seriously contended" to have "decisional significance" in the case. Although there might be situations in which an individual is "so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify" New York Times protection, the controversy over the efficiency of management of the recreational area remained "a matter of lively public interest"—proposals for
pointed supervisor of a county recreation area. Rejecting the sug-
further reformation were under consideration and "public interest" in the performance of the predecessor administration (in which plaintiff was involved) "continued strong." *Id.* at 87 n.14. See also infra note 98; Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 510 n.67 (3d Cir. 1978) (passage of three years since plaintiff was mayor and port authority chairman did not "strip" him of "public official" status where his "official role was directly relevant" to the defamation), cert. denied, 439 U.S. 861 (1978); Gray v. Udevitz, 656 F.2d 588, 590-91 n.3 (10th Cir. 1981) (conduct of former policeman was still "a matter of lively public interest" at the time of publication); Stripling v. Literary Guild, 5 MEDIA L. REP. (BNA) 1958, 1959-60 (W.D. Tex. 1979), aff'd, 636 F.2d 312 (5th Cir. 1981) (passage of thirty years did not terminate "strong public interest" in chief investigator for McCarthy committee); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 813 n.5 (Tex. 1976) (technicality that plaintiff, a regularly-employed consulting engineer, was not under contract on the date of the alleged defamation was "not so far removed" from his "former position" in that role as to render *New York Times* inapplicable), cert. denied, 429 U.S. 1123 (1977); Hackworth v. Larson, 83 S.D. 674, 683, 165 N.W.2d 705, 709-10 (1969) (prior resignation of "public officials" defamed in press conference held shortly thereafter (and portraying them as terminated for cause) did not affect the application of *New York Times*); Newson v. Henry, 443 So. 2d 817 (Miss. 1983) (former elected sheriff and candidate for sheriff in 1967 was a "public figure" regarding comments in 1980 concerning his 1967 campaign). The same rule has been extended to defeated candidates for office. See A.S. Abell Co. v. Barnes, 258 Md. 56, 75, 265 A.2d 207, 216-18 (1970) ("public figure" status as constitutional convention candidate not lost in abbreviated period from her defeat until publication of defamatory matter), cert. denied, 403 U.S. 921 (1971); Perkins v. Mississippi Publishers Co., 241 So. 2d 139, 141 (Miss. 1970) ("public figure" status not lost by passage of a few weeks since election defeat; also "widely known" in state), and to former "public officials" who have died. State v. Deffley, 395 So. 2d 759, 761 (La. 1981) (criminal defamation case involving statements regarding fitness of deceased "public official" educators "remained in the public realm" after their deaths). See generally, Note, *Public Status Over Time: A Single Approach to the Retention Problem in Defamation and Privacy Law,* 1982 U. ILL. L. REV. 951. It is necessary to reaffirm that the Supreme Court in its "footnote fourteen" discussion in *Rosenblatt* indicated only that it would continue to apply "public official" status under the facts of the case before it—a "matter of lively public interest" of a continuing nature. This was not a case involving a former public official where the "public interest" was revived by the press itself, i.e., where the press published a matter regarding a former public official's conduct in or fitness for office and therefore whose public status did not remain "a matter of lively public interest." Note that the Supreme Court has rejected "newsworthiness" as alone sufficient for "public figure" status. See *infra* text accompanying notes 127-81, and "governmental affiliation" plus newsworthiness as sufficient in "public official" cases. See *infra* text accompanying notes 410-34. Query whether it would apply a similar analysis in cases involving a formerly bona fide "public official" where the media generates the matter's current newsworthiness. See, e.g., Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 301-05, 543 P.2d 988, 993-96 (1975) (former policeman did not lose "public official" status regarding comments in "Looking Backward" column ten years later regarding his conduct in office: "public disclosure"/right of privacy case). One recent decision refused to apply *Rosenblatt's* "footnote fourteen" where the defamatory matter did not relate to his former status as a special prosecutor, but only to his alleged involvement with a house of prostitution. Durham v. Cannan Communications, Inc., 645 S.W.2d 845, 848-49 (Tex. Ct. App. 1982). But compare the case of General Westmoreland. He clearly is a "public official" concerning allegations of manipulation of intelligence data during the Vi-
gestion that "reference to state-law standards" should be controlling, \[49\] the Court attempted to delineate general federal guidelines for determination of "public official" status while noting that "[n]o precise lines need be drawn for the purposes" \[50\] of the case.

49. Rosenblatt, 383 U.S. at 84. State standards, promulgated for "local administrative purposes" rather than "national constitutional protection," were rejected as the controlling frame of reference for defining "public official." If such standards mirrored first amendment concerns, such would be "at best accidental" and would result in standards that would "vary with state" lines. For "similar reasons" the Court noted its rejection of the contention that its previous references in New York Times, 376 U.S. at 282, 283 n.23 and Garrison, 379 U.S. at 74 to Barr v. Matteo, 360 U.S. 564 (1959), involving the absolute immunity of federal officials from suit, "mean that we have tied the New York Times rule to the rule of official privilege." "The public interests protected by the New York Times rule are interests in discussion, not retaliation, and our reference to Barr should be taken to mean no more than the scope of the privilege is to be determined by reference to the functions it serves." Rosenblatt, 383 U.S. at 85 n.10. The Court was specifically responding to the trenchant criticism of one author that there would "rarely be any correspondence" between those attacking and those attacked by government officials. See Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 CORNELL L.Q. 581, 590-91 (1964). It was also probably responding to lower court decisions which had refused to extend New York Times beyond "public officials" to those not holding government office, and, consequently, not entitled to such immunity if sued as defendants. Fignole v. Curtis Publishing Co., 247 F. Supp. 595, 597 (S.D.N.Y. 1965); Clark v. Pearson, 248 F. Supp. 188, 195-96 (D.D.C. 1965). This disentanglement from the federal immunity of executive officials was a necessary precondition to extension of New York Times to "public figures" or "candidates for public office." It was also necessary to eliminate the spectre of potentially different status applications depending on whether one was a federal or state executive official. The New York Times decision had neglected to acknowledge that the federal rule of Barr v. Matteo, 360 U.S. 564, 575 (1960), extending absolute immunity to federal officials of whatever level acting within the "outer perimeter" of their authority, is not the general rule under state law, which accords only a qualified immunity to "inferior administrative officer[s]" of a state or subdivision thereof and limits the absolute immunity to "superior executive officers." RESTATEMENT (SECOND) OF TORTS § 591 and comment c (1977). Surely, a distinction applying different "public official" status criteria depending upon whether one is a federal or state official of comparable rank (and the extent of the federal or state correlative privilege for defendants) would pose problems of constitutional equal protection. See infra note 104. There has been a recent attempt to link the media defendants' argument for absolute immunity in the Sharon and Westmoreland cases to the plaintiffs' absolute immunity when sued as defendants. This has apparently been unsuccessful, at least in the Sharon case. See Margolick, supra note 48. See also Sharon v. Time, Inc., 11 MEDIA L. REP. (BNA) 1153, 1163-66 (S.D.N.Y. 1984). But cf. Westmoreland v. C.B.S., 596 F. Supp. 1170, 1172 (1984) (Judge Leval refused to decide the absolute immunity question in advance of trial—he noted that no cases directly supported or rejected the contention).

before it. Prefatorily, the Rosenblatt Court identified the dual-faceted “motivating force” for the New York Times criteria: “a strong interest in debate on public issues,” and “a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues.” Since “[c]riticism of government” is at the epicenter of the “constitutionally protected area of free discussion,” critical commentary regarding “those responsible for government operations” must be free, lest criticism of government itself be penalized.” In demarcating “public officials,” those “government employees” who are in “a position significantly to influence” public issues or are “responsible for government operations,” the Court stated that the “public official” status “applies at the very least to those among the hierarchy of government employees who have, or appear to be of public to have, substantial responsibility for or control over the conduct of government affairs.”

N.E.2d 620, 260 N.Y.S.2d 29 (1965), is open to the possible interpretation that persons who are not “public officials” but are linked to a “public official” (here, a law partner) in the defamatory matter published are similarly required to prove constitutional “actual malice.” It is clear from reading the Supreme Court’s opinion that the reference to the aforesaid case was only with respect to the “of-and-concerning” the plaintiff issue, i.e., whether the matter specifically pertained to plaintiff or was “impersonal discussion” of government and, hence, absolutely immune under New York Times. It did not hold that, if specifically identified, he was, nonetheless, subject to the New York Times “actual malice” standard, the same as were the elected county commissioners. Rosenblatt, 383 U.S. at 82-83. If the Court had intended to “bootstrap” him thusly into required compliance with New York Times, there would have been no necessity for elucidation of the standards for determining “public official” status. That the court was not subjecting him to New York Times as a member of the group defamed is made clear by a prior footnote, id. at 81 n.5 (a “recovery” by him would be subject to New York Times “if [he] were a ‘public official’”) and by its remanding of the case to the state courts for a determination of his status. Id. at 87-88. In any event, such “bootstrapping” of a plaintiff linked to a “public official” by professional liaison would constitute a resurrection of the “subject matter” approach repudiated by the Court in Gertz v. Robert Welch, Inc. and its progeny. See text accompanying notes 127-81. For a recent well-considered opinion rejecting such “bootstrapping” see Sellars v. Stauffer Communications, Inc., 9 Kan. App. 2d 573, 575, 684 P.2d 450, 455-56 (1984) (wife of a county sheriff not a public person based on such relationship).

51. Rosenblatt, 383 U.S. at 87-88 (emphasis added). Note that one of the Court’s designated dual rationales underlying Rosenblatt’s “public official” criteria—“public issues”—has been decisively repudiated in Gertz v. Robert Welch, Inc., see infra text accompanying notes 127-45, and is not sufficient alone to justify the New York Times standard. It is clear then that the presently controlling rationale for determining “public official” status is the interest in “persons . . . in a position significantly to influence” “public issues” and the two-part, alternative test developed therein.

52. Rosenblatt, 383 U.S. at 87-88 (emphasis added). The three cases cited in the footnote following the “have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs” test are illuminating: Clancy v. Daily
alternatively, according to the Court in *Rosenblatt*, the twin justifications underlying *New York Times* apply where the following criterion is met: "[w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general interest in the qualifications and performance of all government employees."\(^5\)

In cases involving these types of individuals, the thrust of *New York Times*—that first amendment considerations predominate when the "interests in public discussion are particularly strong"—has resulted in a hierarchical preference for first amendment values over society's conceded "pervasive and strong interest" in deterring and remedying reputational disparagement.\(^5\) In a footnote caveat in *Rosenblatt v. Baer*, ("footnote thir-

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News Corp., 202 Minn. 1, 2-3, 277 N.W. 264, 265 (1938) (candidate for city council regarding his previous tenure as mayor and city councilman); Tanzer v. Crowley Publishing Co., 240 A.D. 203, 204, 268 N.Y.S. 620, 621 (1934) (comments concerning a former mayor three months after the end of his tenure in such official capacity); Poleski v. Polish American Publishing Co., 254 Mich. 15, 235 N.W. 841 (1931) (plaintiff was candidate for Detroit common council). Note that no distinction is made between candidates for office regarding their conduct during a previous stint in office, former public officials criticized for their conduct while in office, and those running as candidates for the first time. Indeed, it is arguable that the language—"have, or appear to the public to have, substantial responsibility for or control over governmental affairs"—was intended only to preclude the suggestion that the "public official" status is limited to those presently holding such an elected position. This is clearly not the interpretation given this part of the *Rosenblatt v. Baer* standards by the case law, which has applied it to all manner of appointed officials. The fact that *Clancy, Tanzer, and Poleski* all involved former elected officials and candidates for office is some probative evidence that such individuals were considered, by definition, within the "public official" rule. For a further discussion of the necessity for a "per se" rule, see *infra* notes 410, 412, 418.

53. *Rosenblatt*, 383 U.S. at 86. The fact that the "subject matter may have been only of local interest," was "constitutionally irrelevant" "at least here, where publication was addressed primarily to the interested community." Id. at 83 (emphasis added). The cases have generally made no distinction between "local" and "national" issues. *See* Dyer v. Davis, 189 So. 2d 678, 685 (La. Ct. App. 1966), *writ refused*, 250 La. 533, 197 So. 2d 79 (1967) ("The result is correct" (rejecting a limitation of the "public official" rule to matters of "'grave national concern'")). The tacit assumption of the case law seems to be that only rarely will a local issue generate more than local interest and that the reputation of a "public official" will be subject to diminution normally only in the community in which he can be said to have "assumed" the "risk." But compare Berney, *supra* note 13, at 351, who has concluded that the national press "can and often has" assumed the function of exposing local politicians because of the paralysis of the local media.

54. *Rosenblatt*, 383 U.S. at 86. The Court appended a caveat that it intimated "no view" whether there were "other bases" for utilizing *New York Times*, such as where "in a particular case the interests in reputation are relatively insubstantial, because the subject of
("teen") the Court took pains to note that the substratal policies of *New York Times* discussed above would not warrant the exacting first amendment protections of the "public official" status "merely because a statement defamatory of some person in government employ catches the public interest"—such a result "would virtually disregard society's interest in protecting reputation." The Court specifically rebutted under the latter caveat the contention of concurring Justice Douglas that the "key man" in a government hierarchy might well be a "night watchman" accused of defalcation of "state secrets" and that even such a lower echelon employee should be required to comply with, at minimum, the *New York Times* criteria. To preclude such media "bootstrapping" of the mere government employee into a newsworthy focus of interest by press coverage, the Court clearly qualified its above-mentioned "independent interest in the qualifications and performance"/"beyond the general public interest in the qualifications and performance of all government employees" test with the following, generally forgotten or ignored but eminently important, limitation: "The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." Applying these general criteria to the government discussion has thrust himself into the vortex of the discussion of a question of pressing public concern." *Id.* n.12 (emphasis added). This caveat was, of course, resolved in the *Butts* and *Walker* cases decided the following year. See infra notes 65-86 and accompanying text.


56. *Id.* at 88 (Douglas, J., concurring). Justice Douglas used as his polestar the "free discussion of public issues" and stated that under such a test, he saw "no way to draw lines that exclude the night watchman, the file clerk, the typist, or, for that matter, anyone on the public payroll." *Id.* at 89. It is clear from the Brennan-Douglas contretemps that the majority excluded from "public official" status the "anyone on the public payroll" variety of governmental employee. The Court also implicitly rejected the almost identical view of Justice Black that the right of criticism of any "public official engaged in public activities" cannot justifiably be based on whether he is "arbitrarily labeled" a "public official." Justice Black had noted that "a large percentage of public moneys expended is distributed by local agents handling local funds" as in the case at hand. *Id.* at 94-95 (Black, J., with Douglas, J., joining, concurring and dissenting) (emphasis added). For a parallel view espousing the position that the determination of who is a "public official" is inherently a somewhat "sterile and mechanistic" and "completely unworkable" guide, see Bertelsman, *Libel and Public Men*, 52 A.B.A. J. 657, 659-61 (1966).

57. See infra notes 276-89 & 427-34 and accompanying text.

58. *Rosenblatt*, 383 U.S. at 86 n.13 (emphasis added). On remand the Supreme Court of New Hampshire trenchantly interpreted the impact of the *Rosenblatt v. Baer* criteria. It indicated that it would be insufficient for *New York Times* coverage for the defendant to
employee involved in *Rosenblatt v. Baer*, the Court held that he "*may* have held such a position" and that his own arguments on another contention before the Court (the "of and concerning"/colloquium requirement) raised a "substantial argument" that he qualified as a public official. However, the Court did not hold, as one authoritative commentator has concluded, that he fell within the "public official" classification. Rather, the Court merely afforded him the opportunity to demonstrate that his case was dehors the *New York Times* standard. The Court furthermore determined that it was a matter for the "trial judge *in the first instance* to determine whether the proofs show [a plaintiff] to be a 'public official.'"

Demonstrate that plaintiff had "general charge of financial transactions" and "general supervisory powers" under the supervision of the county commissioners. "It must appear that his position was 'one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion engendered by the defendant's charges.'" *Baer v. Rosenblatt*, 108 N.H. 368, 370, 237 A.2d 130, 152 (1967) (emphasis added). It is unfortunate that the New Hampshire Supreme Court's lucid analysis on remand has not become the prototype for delineation of the *Rosenblatt v. Baer* criteria. For a further discussion of this case, see infra note 434 and accompanying text.

59. *Rosenblatt*, 383 U.S. at 87 (emphasis added). In dicta the Court also intimated that the elected county commissioners for whom respondent worked would be public officials, *id.* at 82-83, a conclusion paralleling *New York Times*.

60. See J. NOWAK, supra note 41, at 947, where the author interprets Rosenblatt as a case when the *New York Times* standard was "applied" and as an example of the "breadth" of the "public official" status.

61. *Rosenblatt*, 383 U.S. at 87. Plaintiff was caught in the throes of a dilemma posed by the lack of specific identification of him in the published article. In order to try to comply with the "of-and-concerning" requisite, he endeavored to persuade the Court that his position in the realm of the recreation area was "so prominent and important" that the general public equated him with responsibility for its success or lack thereof. The Court, taking note of the plaintiff's seemingly antithetical arguments, concluded that the record (in this pre-*New York Times* trial decision) left open the "possibility" that "the respondent could have adduced proofs" to exempt himself from the coverage of *New York Times*. *Id.* (emphasis added). The quoted language does not require *all* plaintiffs with some government affiliation to "adduce proofs" to demonstrate they are not part of "public officialdom." Such a burden of proof finds no support elsewhere in the case or in the decisional law. This language merely reflects the *sui generis* nature of plaintiff's awkward position and the Court's analysis of the difficulties thereof. This was obviously the interpretation of the New Hampshire Supreme Court on remand, where the tribunal reaffirmed the traditional rule that the defendant has the "burden of establishing a privileged occasion" by showing compliance with the *Rosenblatt v. Baer* criteria. See *Baer v. Rosenblatt*, 108 N.H. 368, 371-72, 237 A.2d 130, 133 (1967) and citations therein. This is the general rule. See *Restatement (Second)* of *Torts* § 613(2) and comments g & i (1977). See also infra note 420.

62. *Rosenblatt*, 383 U.S. at 88 (emphasis added). Such a posture would minimize the possibility that the jury would utilize "the cloak of a general verdict to punish unpopular ideas or speakers" and has the added advantage of ensuring the appellate courts an ade-
B. The Public Figure Standard and the Public/Private Dichotomy

In 1967 the Supreme Court decided a pair of libel decisions. In one, *Beckley Newspapers Corp. v. Hanks*, a *per curiam* decision involving the sole question of the impermissibility of the trial court's erroneous definition of "actual malice," the Court tersely denominated the elected clerk of the county criminal and circuit courts a public official and accorded the same appellation in dictum to the president of the county board of health. In the other libel decision, the jointly-decided cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, the Supreme Court, in a variegated set

quate "record and findings" for review of constitutional determinations. *Id.* n.15. Justice Black expressed reservations concerning whether the qualifying language "in the first instance" might lapse into desuetude, with the net result that the constitutional rule would preclude the states from letting juries determine "essentially jury questions" in libel cases. Referring to the bitter legal battle in England and America over court-jury functions and the pivotal Fox's Libel Act of 1792 entrusting juries with resolution of issues of "law and fact," he noted that many states had woven such provisions into their state constitutions to preclude the former "oppressive practice of denying the jury and granting the judge power to determine the guilt of a defendant in libel cases." *Id.* at 96 (Black, J., with Douglas, J., joining, concurring and dissenting). One of the anomalies of the post-*New York Times* era is the anachronistic nature of Justice Black's respect for the jury as the protector of free expression. It is generally accepted that this role has devolved to the courts, trial and appellate, in applying the appropriate legal criteria. See *Kalven, The Reasonable Man and the First Amendment: Hill, Butts and Walker*, 1967 Sup. Ct. Rev. 267, 275, where the decision is humorously depicted as one where "You Can't Tell the Players Without a Score Card," and Bertelsman, *The First Amendment and Protection of Reputation and Privacy—New York Times Co. v. Sullivan and How It Grew*, 56 Ky. L. J. 65 (1968). In a non-defamation case issued in 1967 prior to *Butts-Walker* involving a fictionalized account of a hostage crisis (in essence, a "false light" right of privacy case) the Court extended the *New York Times* standard to "matters of public interest" in "this discrete context." *Time, Inc. v. Hill*, 385 U.S. 374, 388, 390-91 (1967). The Court carefully limited its holding, stating that the "relative opportunities" for rebuttal and "the degree of 'waiver' of the protection" of the state "might be germane" in a libel action by a "public official." *Id.* at 391. Although the claimant therein undoubtedly was not a willing recipient of the notoriety engendered by the article, the Court curiously stated that "the question whether the same standard should be applicable to persons voluntarily thrust into the public limelight is not here before us." *Id.* Justice Harlan, presaging
of opinions requiring at least minimal mathematical competence to interpret, extended an equal measure of constitutional protection to "public figures." The initial plurality opinion of Justice Harlan for the Court interpreted *New York Times* as not having "an unintended inexorability"\(^6\) or containing "the only appropriate accommodation"\(^7\) of the competing reputational and first amendment interests and concluded that the latter decision—based on the analogy to seditious libel and the concomitant "vindication of governmental policy" resultant from damage recoveries by public officials—was inapposite in cases involving "public figures."\(^8\) Such "public figures" were permitted to collect damages for defamation upon a "showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers,"\(^6\) a "gross negligence" standard. Butts was a "well-known and respected figure"\(^7\) among coaches who was depicted as endeavoring to fix the 1962 Alabama-Georgia football game while a privately-paid athletic director for the latter.\(^7\) According to the plurality, he "may have attained [the] status [of public fig-

his views in dissent in *Rosenbloom v. Metromedia*, concluded that a negligence standard was permissible in the case of a private person, as in this case, who, "[n]ot being inured to the vicissitudes of journalistic scrutiny . . . is more easily injured and his means of self-defense . . . more limited." *Time Inc.*, 385 U.S. at 409 (Harlan, J., concurring in part and dissenting in part). For a further discussion of the ambiguous stature of the *Time, Inc. v. Hill* rule in private individual cases after *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), see infra note 137.


67. *Id.* at 155.

68. *Id.* at 154.

69. *Id.* at 155, 158 (emphasis added). This plurality opinion for the Court by Justice Harlan was joined by Justices Clark, Stewart, and Fortas. *Id.* at 133.

70. *Id.* at 136. He was not coaching, but was in the throes of negotiations with a professional football team at the time of publication. *Id.* The district court, after the issuance of *New York Times*, opined that even if Butts was a governmental employee, he was not the kind "contemplated" by that decision. *Butts v. Curtis Publishing Co.*, 242 F. Supp. 390, 394 (N.D. Ga. 1964). The court of appeals rendered no opinion on this issue, finding that defendants had waived the constitutional privilege issue. *Curtis Publishing Co. v. Butts*, 351 F.2d 702, 711-13 (5th Cir. 1965).

71. He was employed by a private company, the Georgia Athletic Association, not the state of Georgia, although the University of Georgia was and is a state school. 388 U.S. at 135. He "hotly disputed" the nature of the overheard telephone conversation with the opposing coach which formed the basis of the allegation. The court majority ultimately affirmed a judgment awarding him $400,000 in punitive and $60,000 in general damages. *Id.* at 138, 159-61; *Curtis Publishing Co. v. Butts*, 351 F.2d 702, 705 (5th Cir. 1965).
In the second of the joint cases Walker, a retired major general in the Army, was portrayed as having "taken command" of a mob involved in a "charge" against federal marshalls. He previously had made numerous "strong statements" against federal intervention in school desegregation controversies in general and concerning the University of Mississippi in particular. According to the plurality, Walker may have received "public figure" status "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy." In any event, both claimants "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehood and fallacies'" of the libelous matter.

The Harlan plurality opinion, with its "highly unreasonable conduct" criterion, was not and has never been adopted by a majority of the Court as the controlling first amendment standard for "public figures." While Chief Justice Warren's concurrence in the result of Justice Harlan's plurality molded a majority for the affirmance of the damage award in Butts, it was his adoption and application of the undiluted New York Times "actual malice" criteria to "public figures" that drew the concurrence of four other members of the Court and became the limited holding of the case. In his opinion Chief Justice Warren denominated Justice

73. Butts, 388 U.S. at 140.
74. Id.
75. Id. He was a person of "some political prominence," and had "received wide publicity" for his views. Id. During the period September 26-30, 1962 (the reported incident took place on September 30, 1962), he held several well-publicized press and media conferences in which he had endeavored to persuade the citizenry to defy desegregation decrees and federal authorities implementing them. Id. at 159 n.22 (containing a summary of those conferences).
76. Id. at 155.
77. Id. at 154 (quoting Whitney v. California, 274 U.S. 357, 377 (Brandeis, J., dissenting)).
78. The Court made this clear in Gertz v. Robert Welch, Inc., 418 U.S. 323, 335-36 & n.7 (1974).
79. Butts, 388 U.S. at 165-70.
80. The Chief Justice agreed with Justice Harlan in reversing the judgment in Walker. Id. at 165. As he noted, all seven members of the Court reaching the issue on the merits agreed on this point. Id. See also the opinion of Justice Black. Id. at 170 (Black, J., with
Harlan's plurality approach "an unusual and uncertain formulation" having "no basis in law, logic, or First Amendment policy" and concluded that "public figures," like their "public official" counterparts, were required to meet the New York Times standard. He eschewed a hard-and-fast distinction between "government" and "private" sectors, noting the "high degree of interaction between the intellectual, governmental, and business worlds." Such "public figures" often play an influential role in ordering society and are "intimately involved in the resolution of important questions or, by reason of their fame, shape events in areas of concern to society at large." Furthermore, "surely as a class these 'public figures' have as ready access as 'public officials' to mass media communication, both to influence policy and to counter criticism of their views and activities." Consequently, the public has a legitimate and substantial interest in such persons and the media has an entitlement to "engage in uninhibited debate" concerning their "involvement in public issues and events" that is as fundamental as its function regarding "public officials."

In the year following the Court's extension of the New York Times rule to "public figures," two decisions were issued which,

Douglas, J., joining, concurring in the result in Associated Press v. Walker, dissenting in the affirmation of Curtis Publishing Co. v. Butts). In the latter opinion, id. at 170, Black and Douglas concurred in the reversal of Associated Press v. Walker on the grounds given in the parts of Chief Justice Warren's opinion adopting New York Times, while noting that it reflected no withdrawal from the absolutist views theretofore adopted. Id. at 170. They dissented in Curtis Publishing Co. v. Butts on such absolutist grounds, concluding that the "quagmire" emanating from adoption of New York Times' qualified privilege necessitated a case-by-case evaluation of whether the libel was "so abusive" that the "quality of the reporting is [not] approved by a majority of us"—a "flat violation" of the seventh amendment. Id. at 171. Justice Brennan, with Justice White, concurred in the result in Associated Press v. Walker based on the same parts of the Chief Justice's opinion adopting New York Times in "public figure" cases, id. at 172 (Brennan, J., with White, J., joining, concurring in the result in Associated Press v. Walker, dissenting in Curtis Publishing Co. v. Butts). Although indicating that the testimony would undoubtedly have supported a finding of "actual malice" in the latter case, unlike the Chief Justice, they would have remanded for a new trial in light of the clear inadequacy of the instructions. Id. at 172-74.

81. Id. at 164 (Warren, C.J., concurring in result).
82. Id. at 164-65.
83. Id. at 163.
84. Id. at 164. "Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest." Id. at 165.
85. Id. at 164.
86. Id.
upon superficial examination, might suggest that the *Rosenblatt v. Baer* criteria for the "public official" status would be interpreted to include garden-variety public employees. A disinterested analysis of these decisions, however, quickly dispels such a reading. In the first decision, *St. Amant v. Thompson*, 87 the Court was almost exclusively concerned with ameliorating the rampant confusion precipitated by its careless adoption of the rubric "actual malice" in the *New York Times* decision. 88 The Court unequivocally adopted for "purposes of this case" only the Louisiana court's determination that a parish deputy sheriff was a "public official." 89 The other decision was *Pickering v. Board of Education*, 90 a non-defamation decision involving the issue of the first amendment standards applicable to a teacher discharged for public criticism of his employer or superiors. In *Pickering*, the Court accorded a high school teacher the benefits of the *New York Times* rule in fighting his discharge for criticism of the way the board of education and district superintendent of schools had dealt with previous propositions for tax increases to support the schools. Finding that the rights of the school administration-employer to delimit the teacher's right "to contribute to public debate" were "not significantly greater" than regarding "any member of the general public" in a case where employment is "only tangentially and insubstantially involved," the Court held that the discharge could not be based on speech concerning "issues of public importance" without complying with the *New York Times* rule. 91 It is clear from the opinion that the Court did not denominate the teacher-victim as a

88. Id. at 730-32. The Court rejected any type of an objective "reasonable man" or "prudent publisher" standard and held that the complainant must show defendant "in fact entertained serious doubts as to the truth of his publication" in order to prove "reckless disregard." Id. at 731.
89. Id. at 730. Justice Fortas in dissent was the only member of the Court that unequivocally denominated the deputy sheriff as a "public official." Id. at 734 (Fortas, J., dissenting). The state supreme court, applying the *Rosenblatt v. Baer* criteria, had concluded that a deputy sheriff's acts were "the acts of the sheriff" since he acted as the latter's "representative . . . in his official capacity" and that "the sheriff's position in government" vested him and his deputies with "'substantial responsibility'" regarding "'governmental affairs'" under *Rosenblatt v. Baer*. Thompson v. St. Amant, 250 La. 405, 422, 196 So. 2d 255, 261 (1967), rev'd, 390 U.S. 727 (1968). Clearly, the Louisiana Supreme Court found such compliance with the latter criteria derivatively through the office and functions of the sheriff. See infra note 482.
91. Id. at 573-74.
"public official," but rather a "member of the general public he seeks to be." The Court further intimated that the offended parties and prosecutors of the discharge petition—the board of education (and its members) and the district superintendent of schools—constituted "public officials" under the rule. Consequently, the St. Amant and Pickering decisions indubitably provide no precedential authority for the proposition that all lower echelon police officers and school teachers qualify as public officials under the Rosenblatt v. Baer standards.

In a period of approximately one year in 1970 to 1971 the Supreme Court rendered a spate of important libel opinions. In the first decision, Greenbelt Cooperative Publishing Association v. Bresler, it held that the contention that the claimant therein was a "public figure" was "clearly correct" in light of his extensive involvement in the past and future development of the city of Greenbelt and the volatile exchanges and confrontations engendered by the "[n]egotiations of significant concern" between him and local officials. In light of its conclusion that the plaintiff "clearly fell within even the most restrictive definition of a 'public figure,'" it abjured deciding whether he was a "public official" in view of his status as an elected state representative from an adjoining county.

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92. Id. at 574.
93. "It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue would be limited by the requirement . . . laid down in New York Times." Id. at 573 (emphasis added).
95. Id. at 8-9. Plaintiff owned land the city wanted for a high school and used this fact as a lever to get zoning variances for high-density housing not permitted by the city master plan.
96. Id. at 9. Note that the Court accorded "public figure" status to him despite the Maryland Court of Appeals' conclusion that he was unlikely to receive an entree to defendant's paper to respond to the articles, as evidenced by the latter's refusal to even allow him to subscribe to the paper. Greenbelt Cooperative Publishing Ass'n v. Bresler, 253 Md. 324, 344, 252 A.2d 755, 766, 775 (1969), rev'd, 398 U.S. 6 (1970).
97. Greenbelt Cooperative Publishing Ass'n, 398 U.S. at 9. In view of plaintiff's counsel's concession that he was a "public figure," the Maryland Court of Appeals did not resolve the issue of whether his status as a member of the Maryland House of Delegates from another county rendered him a "public official." It did explicitly indicate "grave doubts" as to whether he would so qualify, since the city of Greenbelt was in a different county than the one he represented and there was "no suggestion" that his conduct as representative "had had any particular effect" upon the city of Greenbelt or the county in which it was located. Indeed, the articles concerned him as a "private developer" and there is "no sug-
In *Time, Inc. v. Pape*, the first of a trio of decisions issued on the same day a few months after *Bressler*, the Court accepted, without itself deciding, the lower courts' determinations that the deputy chief of detectives of the city of Chicago was a "public official" and that allegations of police brutality and deprivation of constitutional rights appertained to his "official conduct." In the remaining two cases of the triad, *Monitor Patriot Co. v. Roy*, and *Ocala Star-Banner Co. v. Damron*, the Court applied the *New York Times* rule to candidates for public office of the highest and lowest strata of elected officialdom: candidates for the Democratic nomination for the United States Senate and for county tax assessor respectively. Recognizing the intended implication of

gestion he had any political prominence at the national, state, county, or municipal level" in the battery of articles. Although he had been asked to run for state comptroller by then Governor Agnew, that was some seven months after "[s]ubstantially all" of the libels had been disseminated. *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 253 Md. 324, 356-57, 252 A.2d 755, 773-74 (1969), rev'd, 398 U.S. 6 (1970). In light of the trial court's disposition of the case—it had instructed on the "actual malice" standard—the court assumed, arguendo, that he was a public official and public figure and that the allegedly libelous articles had relevance to his functioning in each capacity. *Id.* at 774. For a discussion of this unresolved issue see *infra* note 203.

98. 401 U.S. 279 (1971). The Court said that the "only question" before it was whether the court of appeals "correctly applied" the constitutional "actual malice" standard to the facts of the case. *Id.* at 284. Justice Harlan in dissent noted that he did not believe the majority disputed the lower court's determination that the *New York Times* standard was the appropriate one. *Id.* at 294 (Harlan, J., dissenting). The court of appeals decision in the case, *Pape v. Time, Inc.*, 419 F.2d 980, 981 (7th Cir. 1969), rev'd, 401 U.S. 279 (1971), which had reaffirmed its earlier decision in the same case that an appointed deputy chief of detectives and lieutenant of police of the Chicago Police Department was a "public official," is undoubtedly correct, in view of the substantial authority wielded by such a ranking police functionary. *See infra* note 270 and accompanying text. Nor is the fact of his "leave of absence" for employment as director of security for Chicago Thoroughbred Enterprises, Inc., (the operator of several Chicago-area race tracks), *id.* at 981, significant in light of the unquestioned continued "public interest" under *Rosenblatt v. Baer*, *see supra* note 48, of the police brutality/deprivation-of-constitutional-rights issue involved therein. This issue resulted in a major civil rights decision, *Monroe v. Pape*, 365 U.S. 167 (1961), and a jury verdict for the claimant on January 24, 1963. The $8000 judgment was satisfied by Pape. *Time, Inc. v. Pape*, 401 U.S. 279, 283 (1971).


100. 401 U.S. 295 (1971).


102. *Ocala Star-Banner Co.*, 401 U.S. at 296. He was also mayor of Crystal River. Such status was an entirely separate ground for applying *New York Times*, as his mayoral position "without question" rendered him a public official. *Id.* at 299. Note that the trial court and the district court of appeals had, in part, decided the "public official" classification was inapplicable because there was "no reference to the public offices held or sought" by him. *Id.* at 298, 300 n.4. Since no such identification, by office or position sought, occurred,
the *New York Times* decision itself, the Court held that these stringent limitations have their "fullest and most urgent applications precisely to the conduct" of political campaigns.

"the record is devoid of any evidence" to demonstrate that he was "acting in the area falling within the federal rule asserted." Ocala Star-Banner Co. v. Damron, 221 So. 2d 459, 461 (Fla. Dist. Ct. App. 1969), review denied, 231 So. 2d 822 (Fla. 1970), rev'd, 401 U.S. 295 (1971). This theory of non-applicability of *New York Times* was "not before the Court," and it did not discuss the issue. Ocala Star-Banner Co., 401 U.S. at 300 n.4. For a further discussion of this open issue, see infra note 203.

103. The Court characterized Coleman v. MacLennan, 78 Kan. 711, 98 P. 281, 286 (1908), as "admirably" justifying the subsumption of candidates under the panoply of *New York Times*:

"[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the State and to society of such discussions is so vast and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputation of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from publicity is so great, and the chance of injury to private character so small that such discussion must be privileged."

*Monitor Patriot Co.*, 401 U.S. at 271-72, n.3 (quoting Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908)). Coleman was the major state law precedent followed by *New York Times* in its constitutionalization of the minority variant of "fair comment." See supra note 16.

104. *Monitor Patriot Co.*, 401 U.S. at 272. See also Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 300 (1971) ("Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule."). The Court admitted that it "might be preferable" to denominate candidates as public figures, if only to "avoid straining the common meaning of words." However, the issue of status categorization was of "no importance" since candidates "must be accorded at least as much protection" as those currently in office. *Monitor Patriot Co.*, 401 U.S. at 271. The Court's results in these two cases are undoubtedly correct and reflect the unanswerable arguments of lower court decisions so holding. See Dyer v. Davis, 189 So. 2d 678, 685 (La. Ct. App. 1966), writ refused, 250 La. 533, 197 So. 2d 79 (1967) ("The result is correct") (Any distinction between a holder of office and a contestant for that office would "constitute a manifest anomaly resulting in a gross inequity," accord the non-incumbent a "tremendous advantage" over the incumbent, shield the non-incumbent candidate from the "revealing searchlight" of public scrutiny while subjecting his opponent to such scrutiny, and could result in election to public office of unqualified and unfit persons through the ignorance of the electorate); Noonan v. Rousselot, 239 Cal. App. 2d 447, 452, 48 Cal. Rptr. 817, 821, hearing denied (1966) ("[A]ny rule of law which would differentiate between the freedom of speech allowed to an incumbent running for reelection and that permitted to him who seeks his office, would run afoul of the equal protection clause of the fourteenth amendment"); Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964)("[I]f a newspaper cannot constitutionally be held for defamation when it states without malice, but cannot prove, that an incumbent seeking reelection has accepted a bribe, it seems hard to justify holding it liable for further stating that the bribe was offered by his opponent"), cert. denied, 379 U.S. 968 (1965).
C. The Subject Matter Approach

In the last of the five libel decisions of 1970-1971, *Rosenbloom v. Metromedia, Inc.*, a plurality of the Court shelved the "status" approach (whether plaintiff constituted a "public official" or "public figure" or rather a non-public or private person) and substituted a standard focusing on the "subject matter" of the libel—"matters of public or general concern"—in determining the sphere of applicability of *New York Times*. Adopting as first principles and postulates that "[s]elf-governance . . . presupposes far more than knowledge and debate about the strictly official activities of various levels of government" and that modern society places in the private domain "vast areas of economic and social power that vitally affect the nature and quality of life," the plurality opinion by Justice Brennan suggested that the Court's own decisional law had "disclosed the artificiality, in terms of the public's interest" in utilizing a public/private status bifurcation. Specifically rejecting the view that constitutional protection was "limited to matters bearing broadly on issues of responsible government," the plurality expanded *New York Times* to include all the "myriad matters of public interest." In elucidating its rationale for rejecting the Harlan-Marshall-Stewart dissenting posture—with its "assumption of risk"/"access to the media" underpinnings for a negligence-and-limitation-to-actual-damages standard in private individual cases—the plurality opinion concluded that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose

105. 403 U.S. 29 (1971). For a detailed analysis of this case, see Keeton, *Some Implications of the Constitutional Privilege to Defame*, 25 Vand. L. Rev. 59, 61-75 (1972). Eaton's conclusion that the self-defining nature of the *Rosenbloom* decision's test ("public interest"/"newsworthiness") had "nearly destroyed" the common law action for defamation is undoubtedly correct. See Eaton, *supra* note 4, at 1402-03. Very few actions resulting in judgment for the plaintiff were sustained on appeal during the vitality of the *Rosenbloom* test. See Comment, *The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis*, 70 Mich. L. Rev. 1547, 1566 (1972) (only three plaintiff's verdicts had withstood appeal at the time of publication).


107. *Id.* at 42. The Court plurality expressly reserved the question of what constitutional standards applied in cases falling "outside the area of public or general interest." *Id.* at 44 n.12. The opinion left the definitional content of the new subject matter classification to future opinions, *id.* at 44-45, while concluding that the police arrest for distributing alleged obscenity qualified thereunder. *Id.* at 45.
to become involved.” The preeminent public interest was “in the event” and “the public focus . . . on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.”

Consequently, according to the plurality of the Court, the primary raison d’être of the Harlan-Marshall-Stewart dissenting perspective—that “public” persons had “voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view”—was deemed “at best, a legal fiction.” The secondary, peripheral rationale of the public/private dichotomy—the presumed greater access to the media for rebuttal—was considered to be “too insubstantial a reed on which to rest a constitutional distinction.” While the access, self-help argument might be applicable regarding “some very prominent people,” media access for the purpose of contradiction or reply for the “vast majority” of public persons would depend on the “same complex factor” that was determinative in private person cases: “continued interest” by the media. Lastly, the proposed “reasonable person or care” standard was considered too vague a standard for assessing media culpability.

108. Id. at 43. The opinion cited Associated Press v. Walker, 388 U.S. 130 (1967), as an example in which the “public’s interest in the provocative speech” would have been the same whether made by an unidentified student rather than the prominent, retired general. That decision was likewise referred to in support of “another anomaly” of the “status” approach—that the retired general’s notoriety emanated from “events completely unconnected” with the campus incident. “It seems particularly unsatisfactory to determine the extent of First Amendment protection on the basis of facts completely unrelated to the newsworthy events being reported.” Rosenbloom, 403 U.S. at 43 n.11.

109. Rosenbloom, 403 U.S. at 48. “[S]ome aspects of the lives of even the most public men fall outside the area of public or general concern.” Id. “This is not the less true because the area of public concern in the cases of candidates for public office and of public officials is broad.” Id. at 48 n.16 (citing Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971)).

110. Rosenbloom, 403 U.S. at 47.

111. Id. at 46. Even in such cases, it is “the rare case where the denial overtakes the original charges,” as such denials, retractions and corrections do not constitute “‘hot’ news, and rarely receive the prominence of the original story.” Id.

112. Id. “When the public official or public figure is a minor functionary or has left the job that put him in the public eye, the rationale loses all of its force.” Id.

113. Id. In any event, the diminished protection for the media in cases involving “public discussion of matters of public concern” is a “cure . . . far worse than the disease.” A suggested alternative is to accord the private individual a right of response under a retraction or similar statute. Id. at 47 & n.15. This suggestion seems to be an eminently doubtful alternative in light of the unanimous decision in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). See Lewis, New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment,” 83 COLUM. L. REV. 603, 616 (1983).
because of the "[f]ear of guessing wrong" that would "inevitably cause self-censorship," with its omnipresent danger that "legitimate utterance will be deterred."

The majority of five deeming reversal appropriate consisted of the absolutist Black,\textsuperscript{118} concurring in the judgment, and Justice White, concurring on a very limited ground, who would have held that \textit{New York Times} allowed the media "to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view."\textsuperscript{119} Both the dissenting opinion of Justice Harlan and that of Justices Marshall and Stewart repudiated this fractionated extension of \textit{New York Times} to the arena of "public or general concern" as inadequately accommodating the inherent tension between state protection of reputational interests and the first amendment value of avoidance of self-censorship. Justice Harlan argued that the plurality's analysis results in a case-by-case examination of trial court verdicts which would inherently necessitate "judicial second-guessing of the newsworthiness of each item," a process that requires a type of individualized assessment of competing values, underlining thereby the need for "a measure of order and predictability in the law."\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{114} \textit{Rosenbloom}, 403 U.S. at 50.
\item \textsuperscript{115} \textit{Id.} at 57 (Black, J., concurring in the judgment). The other remaining absolutist, Justice Douglas, did not participate in the decision. \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 62 (White, J., concurring in the judgment). One post-\textit{Rosenbloom v. Metromedia} decision "experience[d] some discomfort" in accepting it as the "definitive statement" of controlling law, suggesting that, in light of supervening changes in the Court, the "yet unarticulated philosophies" of Justices Powell and Rehnquist would determine the future course of the Court in deciding between the "status" and "subject matter" approaches to first amendment protection of the media in libel cases. \textit{Gordon v. Random House, Inc.}, 486 F.2d 1356, 1359-60 (3d Cir. 1973). The court's reluctance was justified, as Justices Powell and Rehnquist joined the majority view which discarded the \textit{Rosenbloom} test in \textit{Gertz v. Robert Welch, Inc.}
\item \textsuperscript{117} \textit{Rosenbloom}, 403 U.S. at 62-63 (Harlan, J., dissenting). See also Justice Marshall's conclusion that the Brennan plurality view would involve the courts, "not anointed with any extraordinary prescience," in determining "what information is relevant to self-government," \textit{id.} at 79 (citing \textit{Whitney v. California}, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)), a function which would require the Court to adopt the role of "constant and continuing supervision" of libel litigation nationally. \textit{Id.} at 81. While Justice Brennan contended that matters of contraception are only of private interest, \textit{id.} at 48, Justice Marshall noted that the concept generated by the plurality is essentially open-ended, since "all human events are arguably within the area of 'public or general concern.'" He argued that even such "intimate and personal concerns" are not outside that area in an "era of a dra-
In the view of dissenting Justice Harlan, the proper assessment of the competing interests developed in the New York Times decisions was “not fully applicable” in cases of private, non-“public” personages—clearly, true “public persons” have “a greater likelihood of securing access to channels of communication sufficient to rebut falsehood” than private persons who do not “toil in the public spotlight.”

Likewise, “our willingness to assume that public personalities are more impervious to criticism, and may be held to have run the risk of publicly circulated falsehoods concerning them” was not based “solely upon an empirical assertion of fact but also upon a belief that, in our political system, the individual speaker is entitled to act upon such an assumption if our institutions are to be held up, as they should be, to constant scrutiny.”

In light of these countervailing considerations Justice Harlan declared that the states, though required to “use finer, more discriminating tools” of regulation in “purely” private plaintiff versus media defendant cases, were not precluded from utilizing a negligence standard to protect the reputational interests of the “ordinary citizen.” He would, however, have limited the permissible recovery under the negligence standard to “actual, mea-
surable harm"122 "reasonably foreseeable" to a person of "average sensibilities"123 unless "actual malice"124 was proved. If the latter additional threshold requirement was met, state law admonitory policies did not preclude the imposition of punitive damages bearing "a reasonable relation"125 to actual damages. Justice Marshall’s dissent, with which Justice Stewart joined, took substantial issue only with the latter aspect of the Harlan opinion and would have precluded punitive damages which, like traditional common law "presumed" damages, were subject to the "unlimited discretion" of juries and would have magnified the problem of self-censorship126 resulting from large awards.

D. Public Figuredom Revisited

A short three years later the Supreme Court rejected the fragile Rosenbloom v. Metromedia plurality extension of New York Times to matters of "public or general interest" and adopted the general rationale of the Harlan-Marshall-Stewart dissent for cases involving private individuals suing the media. In Gertz v. Robert Welch, Inc.127 the Court, while reaffirming the appropriateness of the New

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122. Id. at 66 (Harlan, J., dissenting).
123. Id. at 68. This is an exception to the normal tort rule, the "eggshell skull" rule. Id. (citing W. Prosser, THE LAW OF TORTS § 50 (3d ed. 1964)). If, however, the defendant had scienter regarding any unusual susceptibility of the plaintiff, the general rule would apply. Id.
124. Id. at 73.
125. Id. at 75.
126. Id. at 84 (Marshall, J., Stewart, J., joining, dissenting). "This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others." Id.
127. 418 U.S. 323 (1974). Gertz was a reputable attorney hired by the family of a victim of a homicide by a police officer to sue said officer. Defendant, publisher of American Opinion, a John Birch Society publication, published an article depicting the attorney as the "architect of the ‘frame-up’" of Nuccio, the policeman (despite his decidedly "remote connection" with the criminal proceeding), a "Leninist" and "Communist-fronter" and as having a criminal file requiring "a big, Irish cop to lift." Such allegations contained "serious inaccuracies." Id. at 325-26. The opinion cited extensively in the text was by Justice Powell for a plurality of four members of the Court. Justice Blackmun joined the opinion and judgment of the Court with a brief explanation of the two-fold reasons for his departure from his views in Rosenbloom v. Metromedia (he formed part of the Brennan plurality): the removal of presumed and punitive damages, unless the New York Times standard was met, eliminated "significant and powerful motives for self-censorship" inherent in the traditional libel action, affording thereby "sufficient and adequate breathing space for a vigorous press," and the "profound importance" of a "clearly defined majority position" to replace the "sadly fractionated" result in Rosenbloom v. Metromedia. Id. at 354 (Blackmun,
York Times standard for "public persons" (i.e., "public officials" and "public figures") as an "extremely powerful antidote" to the self-censorship precipitated by common law strict liability for defamation, noted frankly that that standard "exacts a correspondingly high price" from victims of reputational disparagement. This price is exacted by the New York Times standard's "demanding requirements," threshold requirements which "many deserving plaintiffs" were incapable of meeting. According to the Gertz Court, this exacting rule, reflecting the "limited state interest" in "public person" libel cases, did not, however, reflect an "equitable boundary" between competing reputational and first amendment values in the private individual versus media context. In such a context, a different balancing of interests justifies a more limited incursion upon the common law of defamation. Explicitly adopting the Harlan-Marshall-Stewart dissenting view of Rosenbloom v. Metromedia, Inc. that there are two distinguishing characteristics between "private" and "public" persons (the primary rationale of assumption of risk, i.e., "a compelling normative consideration") that "public officials and public figures have voluntarily exposed themselves to increased risk of injury from de-

J., concurring). Four members of the Court dissented: Chief Justice Burger, id. at 354-55; Justice Douglas, id. at 356-60; Justice Brennan, id. at 361-69; and Justice White, id. at 370-404.


129. Id. at 337.
130. Id. at 342.
131. Id. at 343.
132. Id. at 347-48.
133. Id. at 344.
famatory falsehood,” 134 and a peripheral rationale of access to the media, i.e., that they “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy”), 135 the Court held that such considerations warranted more solicitous treatment for private individuals than the Rosenbloom v. Metromedia result: “[P]rivate individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.” 136

Rejecting the “drastic alternatives” of New York Times and common law strict liability, 137 the Court approved the general

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134. Id. at 345.
135. Id. at 344. The Court conceded that the “opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood” and that the law of defamation is “rooted in our experience that the truth rarely catches up with a lie.” However, this “fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.” Id. at n.9. By contrast, private individuals have no such generalized opportunity for self-help and are “more vulnerable to injury.” Consequently, the state's interest in according them redress for injury to reputation is “correspondingly greater.” Id. at 344. Note that the media defendants in the Generals Sharon and Westmoreland cases have contended that their virtually unlimited opportunities for rebuttal and their assumption of the risk of criticism due to their close identification with governmental conduct of war warrant and compel adoption of an absolute immunity for the defendants. This has apparently (and properly) been rejected as unjustified under controlling precedent at least in the Sharon case. See supra note 49 and accompanying text. Query whether the absolute immunity argument would not be more persuasive where the head of state of an autocratic regime (e.g., the Ayatollah Khomeini or Colonel Khadaffi) is suing for libel. The courts might be tempted to find that such figures are inextricably linked with and symbolize their respective governments and that any criticism of them was, in fact, criticism of government qua government. Note that this absolutist argument was recently made in a certiorari request in Gannett Co. v. DeRoburt, 11 MEDIA L. REP. (BNA) No. 112 (Dec. 11, 1984), on the ground that “foreign leaders using vast national treasury resources” were attempting to suppress critical accounts of their countries' official acts. See infra note 205 and accompanying text. Certiorari was denied January 14, 1985. 53 U.S.L.W. 3499 (1985). If this step is taken regarding autocratic regimes, could a comparable argument of “l'état, c'est lui” not be made concerning the head of state in a democracy, i.e., a U.S. President with regard to his conduct of foreign affairs, an area in which he reigns supreme as governmental spokesman? But compare the decision in which Barry Goldwater, as a presidential candidate, was subject only to the New York Times standard. See infra note 250 and accompanying text.

136. Id. at 345.

137. Id. at 346. The New York Times rule in “public or general interest” cases “inadequately serve[d]” both reputational and first amendment interests. If a private individual was involuntarily thrust into such an issue or controversy, he was remediless unless the “rigorous requirements” of New York Times were satisfied, despite the aforesaid factors that justified the greater state interest in protecting private persons. On the other hand, if the issue did not fall within the confines of the “public or general interest” concept, the media
The framework of the constitutional construct proffered by the Harlan-Marshall-Stewart trio in dissent in *Rosenbloom*: the abnegation of common law strict liability in all private individual ver-

might be mulcted in damages despite taking “every reasonable precaution to ensure the accuracy” of its story. Indeed, such common law damages could include both “presumed” and punitive damages, exceeding any redress for actual injury. *Id.*

The Court’s adoption of a negligence standard in such private versus media defendant cases calls into question the continuing viability of *Time, Inc. v. Hill*, and its adoption of *New York Times* in non-public person versus media “false light” cases. In one decision issued shortly after *Gertz*, the Court discussed the issue of whether the latter decision justified “a more relaxed standard of liability” than the constitutional “actual malice” standard, but did not resolve the issue therein, as no objection to use of the more stringent standard had been made at the trial level. *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 249-50 (1974). This caveat was repeated the following year in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 490 n.19 (1975). Justice Powell, the author of the Court’s opinion in *Gertz*, has suggested that the latter “calls into question the conceptual basis” of requiring a *New York Times* analysis in “false light” cases involving private individuals. *Id.* at 498 (Powell, J., concurring). Undoubtedly, the Court ultimately will apply the public/private dichotomy to “false light” cases, a development foreshadowed by its designation of reputation as the protected interest in both libel and “false light” cases in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 573 (1977). The recent suggestion that plaintiffs, whatever their status, will likely be required to meet the *New York Times* standard, W. *Prosser & W. Keeton, Prosser & Keeton on the Law of Torts* 866 (5th ed. 1984), is unpersuasive. It ignores the basic commonality of interests protected in defamation and “false light” and neglects to mention the substantial emerging consensus to the contrary. See the citations in *Wood v. Hustler*, 736 F.2d 1084, 1089-90 (5th Cir. 1984), *cert. denied*, 11 Media L. Rep. (BNA) No. 6 (1985). But compare *Crump v. Beckley Newspapers*, 320 S.E.2d 70, 89-90 (W.Va. 1984), where the court purports to adopt the *Gertz* standard in “false light” cases in light of the “pronounced overlap” of the two torts but then inexplicably states that *New York Times* would be applicable in “false light” cases involving public persons or “legitimate matters of public interest.” Without apparently recognizing the net result of its decision the court effectively reaffirmed *Time, Inc. v. Hill*.

138. *Gertz*, 418 U.S. at 347-48. Although the Court did not unequivocally denote negligence as a constitutionally permissible ground for liability in such cases, this was undoubtedly what the Court intended. It did refer to the negligence standard once in its opinion. *Id.* at 350. This minimal negligence threshold was the clear consensus interpretation of the rest of the Court. *Id.* at 353 (Blackmun, J., concurring), 355 (Burger, C.J., dissenting), 360 (Douglas, J., dissenting), 366 (Brennan, J., dissenting), 376, 392 (White, J., dissenting). Furthermore, the standard of evidence constitutionally required was predicted to be that of “preponderance” rather “than clear and convincing.” *Id.* at 366 (Brennan, J., dissenting). Note, however, that the negligence standard only applied to “false statements of fact” in private person cases, as “[u]nder the first amendment there is no such thing as a false idea.” *Id.* at 339. Utilizing this dicta and limited holdings in two other cases (*Greenbelt Publishing Ass’n v. Bresler*, 398 U.S. 6, 13-14 (1970) (“blackmail” held to be “rhetorical hyperbole” in the context of disclosed supporting facts) and *Letter Carriers v. Austin*, 418 U.S. 264, 283-86 (1974) (epithet “scab” held non-actionable under federal labor law)), the *Restatement (Second) of Torts* § 566 (1977) and a munificence of recent decisions have adopted an absolute privilege for “pure” opinion—opinion, however unreasonable, based on disclosed or readily assumed non-defamatory facts. For a survey of the decisions, see generally D. Elder, supra note 20, at 334-53. There is a substantial developing consen-
sus media defendant suits and the limitation of such plaintiffs' recovery to that for "actual injury," precluding thereby "presumed" or punitive damages absent compliance with the New York Times rule. Having elucidated its novel standard and hav-

sus that imputations of criminality, dishonesty, and unethical behavior are not protected opinion even where the underlying facts are disclosed and non-defamatory. Id. at 348-52. At least two members of the Court have recently opined that there was no intent by the Gertz majority to "wipe out this 'rich and complex'" history of the common law "opinion" doctrine by its Gertz, dicta citing Hill, Defamation and Privacy Under the First Amendment, 76 Colum. L. Rev. 1205 (1976). See Miskovsky v. Oklahoma Publishing Co., 103 S. Ct. 235, 236 (1983) (Rehnquist, J., with White, J., joining, dissenting from a denial of certiorari). And note that the Court has referred to the common law "opinion" rule obliquely in a non-libel opinion. Pickering v. Board of Educ., 391 U.S. 563, 580 (1968).

139. Gertz, 418 U.S. at 349. Since the state's "strong and legitimate interest" in protecting private persons' reputations was limited to compensation for injury, id. at 348-49, it had "no substantial interest" in "gratuitous awards" exceeding "actual injury" in the form of presumed damages, "an oddity of tort law," id. at 349, or punitive damages, "private fines levied by civil juries to punish reprehensible conduct and deter its future occurrence." Id. at 350. The Court declined to define precisely "actual injury," noting the extensive experience of trial judges in drafting instructions. But the Court did suggest that actual injuries were not limited to special damages, "out-of-pocket loss," but additionally included "the more customary types of actual harm inflicted by defamatory falsehood" such as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." The very flexible nature of the "actual injury" requirement and the facility of compliance therewith was evidenced clearly by the subsequent decision of Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976), in which the Court held that damages to reputation were not the "only compensable injury" in defamation cases or a threshold requirement of a defamation action if state law did not so provide. Even where the libel claimant therein had withdrawn the issue of reputational injury prior to trial, the awarding of other damages from among the Gertz-generated non-exclusive "actual injury" concept "did not transform" such a suit into a non-defamation action. Id. at 460. Thus, the Court has clearly held that actual reputational injury is not a constitutional prerequisite to recovery of the other "actual damage" component elements. See also Hearst Corp. v. Hughes, 297 Md. 112, 150, 466 A.2d 486, 495 (1983). Such reputational loss may be required as a matter of state law, however. See Gobin v. Globe Publishing Co., 232 Kan. 1, 6-7, 649 P.2d 1239, 1243-44 (1982) (adopting the New York view—mental distress is not alone sufficient).

140. The Court clearly intimated that such "presumed" and punitive damages were constitutionally permitted if the New York Times standard (i.e., "calculated falsehood") was met and if such damages were permissible under the applicable state law. Gertz, 418 U.S. at 349-50. See also the concurring opinion of Justice Blackmun, id. at 354, and the dissents of Justice Brennan, id. at 367 and Justice White, id. at 370, 377, 395-98. In addition, see Herbert v. Lando, 441 U.S. 153, 162 n.7 (1979) (Punitive damages are "still awardable upon a showing of knowing or reckless falsehood") (dicta). The authors of one generally authoritative hornbook clearly misinterpret Gertz and ignore the result in Butts and the aforesaid dictum in Herbert when they conclude that the implication of punitive damage availability extends only to private plaintiffs if New York Times "actual malice" is met, suggesting that it "should not be surprising" if such punitive damages were proscribed in futuro in all public person cases. J. Nowak, supra note 41, at 950-51. A close reading of the
ing reinstated and rejuvenated its traditional emphasis on the determinative nature of the "status" of the litigation plaintiff, the Gertz Court proceeded to reformulate the concept of "public figuredom" and apply that reformulation to the facts of the case. The Court held that the lawyer-claimant therein, though "well known in some circles," had "no general fame or notoriety in the community" and was not, consequently, a public person.

Supreme Court's decisions, however, reveals that once the New York Times "actual malice"/"calculated falsehood" threshold is met, such defamatory matters "do not enjoy constitutional protection," Garrison v. Louisiana, 379 U.S. 64, 75 (1964), and thus all common law damages are available, if state law so provides. See also Brennan, supra note 12, at 18-19. It surely would be a curious perversion of logic to permit internment for criminal defamation regarding public persons if that standard is met, see supra, note 41, but to deny in toto quasi-criminal punishments such as punitive damages in all such cases. This permissibility of "presumed" and punitive damages if New York Times is met is the clear consensus rule followed by the lower federal and state courts. See, e.g., the Gertz decision on remand. Gertz v. Robert Welch, Inc., 680 F.2d 527 (7th Cir. 1982), cert. denied, 103 S. Ct. 1233 (1983) (affirming an award of $100,000 compensatory and $300,000 punitive damages) and cases cited therein. This permissibility of punitive damages is the only material respect in which the majority deviated from the opinion of Justice Marshall, with Justice Stewart joining dissenting, in Rosenbloom v. Metromedia. See supra text accompanying note 126. Note that this permissibility of "presumed" damages conflicts with the non-constitutional policy of the Court delineated in a labor dispute context in Linn v. Plant Guard Workers, 383 U.S. 53, 55, 58 n.2, 64-65 (1966), where the Court required plaintiff to prove "damages" in addition to "actual malice." See supra note 47. Note also that it adopted proof of "compensable harm" as a precondition of punitive damages in labor cases, a prerequisite not presently imposed in constitutionally-limited libel actions. In a case issued the same day as Gertz, Letter Carriers v. Austin, 418 U.S. 264, 281-86 (1974), the Court reaffirmed extension of New York Times to labor disputes, but, curiously, it made no mention of the damage rules discussed above. However, in dicta the Court has recently reaffirmed the anomalous Linn "damages" requirements. Bill Johnson's Restaurants, Inc. v. NLRB, 103 S. Ct. 2161, 2169-70 (1983). It is not clear that the Court is aware of the inconsistency of its labor law decisions and first amendment decisions on the damage requirements interposed by New York Times. For a thoughtful proposed set of statutory alternatives to the present damage rules, see Franklin, Good Names and Bad Law: A Critique of Libel Law and a Proposal, 18 U.S.F.L. Rev. 1 (1983).

141. The Court stated that "hypothetically," the possibility exists for a third type of "public figure," the "truly involuntary public figure," one who becomes such "through no purposeful action of his own," but concluded that this "must be exceedingly rare." Gertz, 418 U.S. at 345. Indeed, it is highly doubtful if such a sub-status continues to exist in light of the post-Gertz decisions of the Court. It is noteworthy that the Court subsequently reinterpret ed Gertz as specifying only "two ways" of becoming a "public figure"—"all" or "limited" purpose. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 164 (1979). See Comment, The Involuntary Public Figure Class of Gertz v. Robert Welch: Dead or Merely Dormant?, 14 U. Mich. J.L. Ref. 71, 84-85 (1980) (proposing abolition of the involuntary "public figure" category); Rosen, Media Lament—The Rise and Fall of Involuntary Public Figures, 54 St. John's L. Rev. 487 (1980).

142. Gertz, 418 U.S. at 351-52. Although he had "long been active in community and
ality for "all aspects of his life"—he was not an "all purpose" public figure. Furthermore, and in light of his limited professional role in the controversy precipitating the libel, he could not be considered to be a "public figure" in the "more meaningful context" of an evaluation of "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." He was not, in other words, one of those who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." Finally, the Court perfunctorily and disdainfully rejected the suggestion that a lawyer representing a client in contemplated civil litigation was a "de facto public official": "Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the New York Times rule as officers of the court and distort the plain meaning of the 'public official' category beyond all recognition." professional affairs" and had published widely on legal topics, none of the jurors knew of him and there was a dearth of evidence that such general anonymity was "atypical." Id. at 351-52. The Court refused to "lightly assume" that such involvement rendered him an "all purpose" public figure: "absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." Id. at 352 (emphasis added). He would probably have been a "public figure" under the more expansive notion of "public figure" preceding the issuance of his namesake decision. See Robertson, supra note 127, at 222. As a result of the Gertz decision "all purpose" public figures doubtlessly are limited generally to those who constitute "household names." Id. at 222-23.

143. Gertz, 418 U.S. at 352.

144. Id.

145. He played a "minimal role" in the coroner's inquest into the decedent's death and his total involvement in the controversy "related solely" to representing the interests of his private client. He was not involved in the criminal proceedings against the police officer, Nuccio, had no contact with the media, and was never even cited as having discussed either proceeding with the media. Id.

146. Id. at 351 (emphasis added). One aspect of Letter Carriers v. Austin, 418 U.S. 264 (1974), issued the same day, indirectly and obliquely reinforces the view that the Gertz decision was intended to tighten up the criteria applicable to public persons, including "public officials." It is clear from reading the former decision that the plaintiffs therein were governmental employees, i.e., non-union letter carriers. It is also probable that the medium used to defame plaintiffs, a monthly union newsletter, closely enough parallels the "press" as to precipitate application of the first amendment. See infra note 161. It is interesting that no member of the Court, in reaffirming the applicability of New York Times to labor cases, referred to the plaintiff's status and the logical concomitant that New York Times applied as a matter of first amendment jurisprudence—an appropriate conclusion if mere "governmental affiliation" were deemed sufficient for "public official" status. In any event, undoubtedly, such mere governmental employment status would be insufficient today. See infra text accompanying note 204, 451-98.
Two years later, in *Time, Inc. v. Firestone*, the Supreme Court followed its narrowing of the sphere of applicability of the "public figure" status in a case involving imputation of adultery as an alternative ground for a divorce awarded to Mrs. Firestone's former husband. In determining that she had not "assume[d] any role of especial prominence in the affairs of society" and that she had not "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved" therein, the Court rebuffed the notion that this "'cause célèbre'" was a "public controversy." It eschewed equating "public controversies" with "all controversies of interest to the public." The Court imposed thereby a qualitative limitation on the nature of the "public controversy" an alleged "public figure" must become involved in for the purpose of deciding the status issue: "Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*, even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public." The Court also refused to find that she had voluntarily thrust herself into the public limelight by involving herself in the divorce process, either by her initial filing or subsequent conduct of the civil action. In view of the monopolistic and exclusive nature of the divorce process for one seeking a marital dissolution, utilization of

148. Id. at 452.
149. Id. at 453. The Court's relegation of the access-to-the-press factor to back-burner status is well demonstrated by this case. Mrs. Firestone had conducted numerous interviews during the lengthy divorce proceeding. Despite this demonstrated ability to command press attention, the Court cryptically rejected that as sufficient to qualify her for "public figure" status: "Such [press] interviews should have had no effect upon the merits of the legal dispute between respondent and her husband or the outcome of that trial, and we do not think it can be assumed that any such purpose was intended. Moreover, there is no indication that she sought to use the press conferences as a vehicle by which to thrust herself to the forefront of some unrelated controversy in order to influence its resolution." Id. at 454 n.3.
150. The Supreme Court of Florida had used this phrase to characterize this rather sensational, lengthy, hotly-disputed divorce. The divorce trial had lasted seventeen months and had received extensive national publicity. Id. at 485 (Marshall, J., dissenting).
151. Id. at 454. In the Court's view, adoption of such a broad subject-matter approach would admit the rejected posture of *Rosenbloom v. Metromedia* through the back door. For a discussion of whether the Court may in the future append a comparable qualitative restriction on the relevance regarding "official conduct" concept in "public official" cases, see infra note 360.
the State's judicial machinery was, in the Court's view, "'no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.'"152

The Supreme Court has continued to reflect the unequivocal pro-reputation / restrictive-application-of-"public status"-orientation of Gertz-Firestone in its most recent triad of decisions, issued in 1979.153 The first of them, Herbert v. Lando,154 involved primarily discovery of evidence of "state of mind" in cases mandating compliance with New York Times. The Court accepted the concession that the claimant therein, a retired military officer with an extensive Vietnam War record who had received "widespread media attention" resulting from an imputation to senior officers of covering up war crimes, was a public figure.155

152. Firestone, 424 U.S. at 454 (quoting Boddie v. Connecticut, 401 U.S. 371, 376-77 (1971)). Although noting that some parties to judicial proceedings might be "all purpose" or "limited purpose" public figures, the Court stated that most will "more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves" against proceedings initiated by the sovereign or third parties. Id. at 457.

153. In the five-year hiatus until 1984, the Court issued no libel decisions. In 1984, it issued four such opinions. Two of them, Calder v. Jones, 104 S.C. 1482, 1488 (1984), and Keeton v. Hustler, 104 S.Ct. 1473, 1481 & n.12 (1984), have rejected any special procedural status based on the first amendment for media defendants in cases involving personam jurisdiction. A third, Seattle Times v. Rhinehart, 104 S. Ct. 2199, 2208-09 (1984), affirmed the authority of the trial court to issue protective orders to prevent media defendants from publishing in a wholesale fashion matters learned during discovery in libel litigation. The only media-protective decision involved a reaffirmation of the rule of independent examination of the record to ensure that the "constitutional fact" of "actual malice" had been properly established. Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1967 (1984). Any other result in the latter case would have entailed outright reversal of numerous prior libel decisions. Id. (The Court noted that the "independent appellate review" rule had been applied "uncounted times before").

154. 441 U.S. 153 (1979). In affirming New York Times as the appropriate standard in suits by public persons against the media, the Court noted that "the individual's interest in his reputation is also a basic concern," Herbert, 441 U.S. at 169, and held that the first amendment did not proscribe inquiry into the "editorial processes of those responsible" for publication of the libel in endeavoring to prove compliance with "a critical element" of their case—a minimum of subjective awareness of probable falsity under New York Times. Id. at 155, 169, 171.

155. Herbert v. Lando, 441 U.S. 153, 155-56 (1979), rev'd 568 F.2d 974, 979 n.15 (2d Cir.), rev'd 73 F.R.D. 387, 391 (S.D.N.Y. 1977). He accused the defendants—CBS, the producer and narrator of 60 Minutes, and the author and publisher of Atlantic Monthly—of libeling him by their portrayal of his charges as mendacious and fabricated in order to explicate his relief from command. Id. at 156. One member of the Court clearly intimated that the concession that plaintiff was a "public figure" was correct. Id. at 181, 194 (Brennan, J., dissenting in part) (Herbert is "concededly a public figure"). One court of appeals judge apparently considered him to be both a "public official" and "public figure." Her-
In its two most recent status decisions, *Hutchinson v. Proxmire*, 156 and *Wolston v. Reader’s Digest Ass’n, Inc.*, 157 the Court further narrowed the statuses of “public figure” and “public official.” In the former decision the Court declined to resolve the question left unresolved by the federal district court and court of appeals as to whether the claimant—who had numerous associations with the state of Michigan and the federal government158—was a “public official.” At a minimum, he was a “state

bert v. Lando, 568 F.2d 974, 985 n.2 (2d Cir. 1977) (Oaks, J., concurring) (“a United States Army officer who was a public official and employee, who by his charges against the military establishment unquestionably made himself a public figure, thereby inviting ‘attention and comments’”). A district court judge has recently declined to resolve the “public official” status issue in light of Herbert’s conceded status as a “public figure.” *Herbert v. Lando*, 11 MEDIA L. REP. (BNA) 1233, 1236 (S.D.N.Y. 1984).


157. 443 U.S. 157 (1979). The thrust of this Article is an attempt to infuse the “public official” status with the underlying values reflected in the Supreme Court’s decisional law, not to provide the reader with a detailed critique of the Court’s stringent “public figure” criteria. For a recent incisive critique of the latter, see Smolla, *Let the Author Be War*: The Rejuvenation of the American Law of Libel, 132 U. PA. L. Rev. 1, 49-63 (1983).

158. During the seven-year period antedating his receipt of the “Golden Fleece of the Month Award,” he had received at least a half-million dollars in federal funds—during pre-trial both sides had proffered “higher estimates.” *Hutchinson*, 443 U.S. at 114 n.1. At the time of the award, Hutchinson was director of research at Kalamazoo State Mental Hospital. Previously, he had held a comparable position at the Fort Custer State Home. Both positions were under the direction and control of the Michigan State Department of Mental Health—consequently, he was a “state employee” during both jobs. Additionally, he was an adjunct professor at Western Michigan University, a state school, during the greater part of the period covered by the award. However, a couple of months after Hutchinson’s receipt of the award in April, 1975, the research division employing Hutchinson was closed, and he transferred his funding to the non-profit Foundation for Behavioral Research, which employed him as research director. *Id.* at 114-15.

159. The court of appeals had declined to decide the “public official” issue and had held him to be a “public figure.” *Hutchinson v. Proxmire*, 579 F.2d 1027, 1035 n.14 (7th Cir. 1978). The district court, however, did hold that plaintiff was a “public official” under the standards of *Rosenblatt v. Baer*, Hutchinson v. Proxmire, 431 F. Supp. 1311, 1327-28 (W.D. Wis. 1977), citing the fact that he held the “important public position” of research director at Kalamazoo State Hospital and was dealt with as a “responsible public official” by the federal administrative entities which had underwritten his research. The court relied on *Adey v. United Action for Animals*, 361 F. Supp. 457 (S.D.N.Y. 1973), aff’d without opinion, 493 F.2d 1397 (2d Cir.), cert. denied, 419 U.S. 842 (1974). In this decision the court found that the plaintiff, who was director of the brain research institute at UCLA, consultant to NASA, and “intimately involved” in a space mission in which an experimental monkey allegedly died in an inhumane manner, was a “public official,” “public figure,” and involved in a “matter of public interest” for the purpose of defamatory commentary thereon. *Id.* at 460-62. Note that the district court decision in *Hutchison* was followed in a subsequent case involving the director of the children’s section at the state psychiatric hospital and associate professor of clinical psychiatry at the University of Kansas medical
employee.” However, in an extremely important footnote, one of a pregnant trio in Chief Justice Burger’s opinion, the Court


160. Hutchinson, 443 U.S. at 114.

161. The other two footnotes have potentially influential effects on public person versus media defendant libel litigation. In footnote nine, the Court, although noting the issue was not before them, felt “constrained to express some doubt about the so-called ‘rule’” that use of summary judgment “might well be the rule rather than the exception” in determining “whether plaintiff had made an adequate showing of [New York Times] actual malice” (“The proof of ‘actual malice’ calls a defendant’s state of mind into question . . . and does not readily lend itself to summary disposition.”). Id. at 120 & n.9. The lower court decisional law endeavoring to fathom the import of this pithy footnote is divided regarding whether normal summary judgment rules apply. See S. Metcalf, Rights and Liabilities of Publishers, Broadcasters and Reporters § 1.81 (1982). See also Calder v. South, 104 S. Ct. 1482, 1488 (1984), where the Court reiterated its footnote as an example of where it had “declined” to give “special procedural protections” to media defendants in libel cases.

In footnote 16 of Hutchinson, the Court interposed an issue which it acknowledged had not been examined by either lower federal court, i.e., whether the New York Times standard applied to “individual,” non-media defendants sued by public persons and, then, inexplicably concluded that “this Court has never decided the question.” Hutchinson, 443 U.S. at 193 n.16. See also the Court’s dicta in a decision dealing with a state farm labor statute. Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289, 309 n.16 (1979) (“[w]e have not adjudicated the role of the First Amendment in suits by private parties against non-media defendants”). At least two lower court decisions have extended New York Times protection to non-media defendant congressmen like Proxmire. Trails West, Inc. v. Wolff, 32 N.Y.2d 207, 217, 298 N.E.2d 52, 58, 344 N.Y.S.2d 863, 870 (1973) (“[C]ertainly, an elected official merits the same protection”); Rusak v. Harsha, 470 F. Supp. 285, 297 n.22 (M.D. Penn. 1978) (The congressman-defendant was “protected by constitutional rights applicable to the general citizenry”). See generally Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 UCLA L. Rev. 915 (1978); Note, Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Non-Media Defendants, 95 Harv. L. Rev. 1876 (1982). At least in the realm of public persons, the Chief Justice’s “footnote 16” seems clearly at odds with a number of the Court’s precedents. See New York Times Co. v. Sullivan, 376 U.S. 254, 256, 264 & n.4, 267-72, 282, 286 (1964). The Court talked throughout the decision of the twin guarantees of speech and press in reversing an award against the media defendant and four individual defendants. See particularly its discussion of the “‘commercial’ advertisement” issue where the Supreme Court concluded that treating this as such might eliminate an “important outlet” for information for those “who wish to exercise their freedom of speech even though they are not members of the press.” Id. at 266. See also its reference to the “citizen-critic of government.” Id. at 282. See also id. at 296-97 (Black, J., with Douglas, J., joining, concurring) (the “people and the press” have a coequal absolute immunity) and id. at 298, 300, 301, 304, 305 (Goldberg, J., Douglas, J., joining, concurring) (the “citizen and the press” have an absolute right of “public criticism”). Other post-New York Times cases similarly appear to reject a media/non-media dichotomy in public person plaintiff cases: Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (criminal defamation prosecution of an individual defendant for statements critical of sitting judges at a press conference ran afoul of the “constitutional guarantees of freedom of expression”); Moity v. Louisiana, 379 U.S. 201 (1964) (a criminal defamation conviction—for imputing illegal imprisonment of a prisoner based on knowingly perjured testimony to a parish district attorney—was reversed per curiam under Garrison v. Louisiana);
explicitly rejected the notion that mere public employment was synonymous with "public official" status: "The Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however." 162

The Court thus left the "public official" versus "public employee" issue for another day. The Court instead limited its analysis to the sole question of whether the behavioral scientist and federal grant recipient was a "limited purpose" public figure in light of his conceded success in receiving federal grants, the reports thereon in the local media, and his access to that media, i.e., the reportage of his reply to receipt of the "Golden Fleece Award." The Court found these factors insufficient to precipitate application of "public figure" status. Hutchinson's professional activities and public persona paralleled those of "countless members" of his profession and his published scholarship was of interest only to a "relatively small category" of similarly interested co-professionals. 163 To the extent that his research had developed into a controversial matter, such was a "consequence" of the award. It thus unequivocally rejected media "bootstrapping" of a previously purely private person into a "public figure" by press-generated notoriety: "Clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public

Rosenblatt v. Baer, 383 U.S. 75, 78 (1966) (defendant "regularly contributed" to a column on a gratuitous basis and defamed the plaintiff therein; the media defendant which published that column had settled the claim against it. Baer v. Rosenblatt, 106 N.H. 26, 36, 203 A.2d 779, 781 (1964)); St. Amant v. Thompson, 390 U.S. 727, 728-29 (1968) (defendant was a candidate for U.S. Senator who made the libelous statements during a televised speech); Henry v. Collins, 380 U.S. 356 (1965). Collins and the case decided with it both involved non-media defendants, although the statements were in fact communicated to and published by the press. Henry v. Collins, 253 Miss. 35, 42-43, 158 So. 2d 29, 33 (1963), rev'd per curiam, 380 U.S. 356 (1965); Henry v. Pearson, 253 Miss. 62, 67-69, 158 So. 2d 695, 697 (1963), rev'd per curiam, 380 U.S. 356 (1965). Although all the above cases involved some direct or indirect media linkage, there is no indication in any of the opinions that said factor was of any relevance whatever. See also Greenbelt Co-op. Publishing Ass'n v. Bresler, 398 U.S. 6, 13 (1970) (The Court concluded that the epithet "blackmail" was "not slander when spoken" at the city council meeting and "not libel" when reported in defendant newspaper—rejecting, in dicta, any media/ non-media distinction). In its most recent opinion, the Court has observed that the publisher of Consumer Reports was a " 'media defendant' . . . under any conceivable definition of that term." Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1955 n.8 (1984). 

162. Hutchinson, 443 U.S. at 119 n.8 (emphases added).

163. Id. at 133-36. No member of the Court disputed the majority characterization of Hutchinson as a private individual, a non-"public figure." Only Justice Brennan dissented, and that was on the Speech and Debate Clause issue. Id. at 136 (Brennan, J., dissenting).
The Hutchinson Court delineated, in further detail, its limiting construction of the "limited purpose" "public figure" status. Initially, it noted that the media had not specifically identified the "particular controversy" into which the petitioner had "thrust" himself—"at most," they had pointed to a "concern about general public expenditures." That generalized concern was, however, "shared by most and related to most public expenditures." Acceptance of this definition of "public controversy" would entail inclusion of all recipients or beneficiaries of the "myriad public grants for research" within "public figuredom," a position the Court declined to adopt. Furthermore, Hutchinson had not at any point "assumed any role of public prominence" in the "broad question" of public concern regarding expenditure of public moneys. By his grant applications and professional scholarship he had not assumed any risk of "public attention and comment" thereon sufficient to justify "public figure" status. Finally, the Court redefined the "access to the media" policy rationale for "public figure" status: that policy rationale encompasses only "regular and continuing access" to the media. Clearly, in the Court's view, Hutchinson's limited and fleeting right of response did not precede the Award but was precipitated by it, hardly "one of the accoutrements" of having attained "public figure" status.

In the last of the trio of 1979 decisions, Wolston v. Reader's Digest Ass'n Inc., the Court held that a witness who "voluntarily chose not to appear" before a grand jury investigating Soviet espionage activities in the late 1950's, and was convicted subsequently of criminal contempt was neither an "all purpose" nor

164. Id. at 135 (emphases added).
165. Id.
166. Id.
167. Id.
168. Id.
169. Id. at 136.
170. Id.
172. Id. at 165. In emphasizing that Wolston was not one of the "small group" of "all purpose" public figures, the Court noted that he had "a thoroughly private existence" prior to the newsworthy occurrence, reverted to a post-sentencing "position of relative obscurity," and at no time had achieved "general fame or notoriety" or "assumed" a "role of special prominence in the affairs of society" because of his activities. Id.
a "limited purpose" public figure based upon the "flurry of publicity" precipitated by the incident. Far from having "voluntarily thrust" or 'injected' himself into the forefront of the public controversy," he had, in fact, been "dragged unwillingly" into any such controversy by governmental pursuit of its investigation. His declination to appear — with foreknowledge that such refusal "might be attended by publicity" — was not determinative. Like attorney Gertz, who had "voluntarily associated himself" with civil litigation "certain to receive extensive media exposure," Wolston's involvement in the "particular controversy" was quite limited — his "minor role" in whatever controversy existed was restricted to his defense of the contempt citation. The Court refused to consider the criminal contempt citation as itself sufficient for "limited purpose" public figure status. While his non-appearance and consequent contempt conviction were undoubtedly "newsworthy," Gertz's repudiation of Rosenbloom v. Metromedia, Inc. had, according to the Court, clearly refuted "public figure" status based on the "simple fact" that activities "attracted media attention": "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of New York Times." There was, furthermore, no evidence that Wolston's absence from the grand jury was "calculated to draw attention to himself in order to invite public comment or influence the public with respect to any issue," i.e., his absence was not intended "as a fulcrum to create public discussion" concerning investigative or prosecutorial methodology. In sum, there was no justification

173. Id. at 163. Collectively, there were fifteen stories in the six week interim between his initial contemptuous refusal and subsequent sentencing which appeared in the Washington, D.C., and New York press. Id.
174. Id. at 166.
175. Id. at 167.
176. The Court "accept[ed], arguendo" the definition of "public controversy" proposed by defendants — the "propriety of the actions of law enforcement officials" pursuing the investigation and prosecution of those suspected of Soviet liaisons — while pointedly concluding that it was "difficult to determine with precision" the "public controversy" into which Wolston had purportedly precipitated himself. Undoubtedly, in the Court's opinion, there was "no public controversy or debate" at that time concerning Soviet espionage — "all responsible" citizens "were and are opposed" to such. Id. at 166 n.8 (emphasis added).
177. Id. at 167.
178. Id. at 167-68 (emphasis added).
179. Id. at 168. The Court apparently accepted Wolston's justification that his initial refusal to appear was attributable to ill-health. Id.
for a conclusion that Wolston had "relinquished, to any degree, his interest in the protection of his own name" under the "limited purpose" public figure concept. Any other result would, under the exacting criteria of New York Times, "create an 'open season'" to defame, any and all persons convicted of a criminal offense, even though most such defendants were "‘drawn into a public forum largely against their will in order . . . to defend themselves against actions brought by the State.'"

E. The Lessons of New York Times and Its Progeny

The above discussion of the Supreme Court's defamation "status" decisions during the fifteen year period 1964-1979 discloses several clearly-evidenced, though not necessarily well-articulated, facts of life for courts, scholars, and practitioners attempting to fathom the rules and nuances of New York Times and its "status" progeny:

—First, the Court has definitively resolved the "status"-"subject matter" threshold determination for application of New York Times and has constructed a two-tiered analysis of first amendment rules depending on "status"—for "public persons," the New York Times criteria, and for "private persons," a minimum of negligence for "actual damages"—in suits against the media.

180. Id. Two members of the Court concurred in the result, eschewing the "more difficult question" of Wolston's status in 1958 in favor of a conclusion that the intervening sixteen years had rendered him a "private" individual. Id. at 171-72 (Blackmun, J., with Marshall, J., joining, concurring). Under the "access"-"assumption-of-risk" "public figure" rationales he was a "private" individual in 1974. Id. at 171. Such a posture concededly created a dichotomy between reporters' protection for "contemporaneous reporting of a controversial event" ("public figure" status) and an historian's more limited protection ("private" status) when he writes "sub specie aeternitatis." In the concurring Justices' view such merely reflected the respective functions and working limitations of the two professions. Id. The majority had not reached this issue of restoration to "private" status, id., and had adopted a too narrow holding that applied the "limited purpose" public figure sub-specie only to one who "literally or figuratively 'mounts a rostrum' to advocate a particular view," i.e., "to influence the resolution of the issues involved." "[S]o restrictive a definition" was "unnecessary" in light of the sixteen year "lapse" in the case before it. Id. at 169-70. Only one member of the Court found Wolston to be a "public figure" in both 1958 and 1974. Id. at 172 (Brennan, J., dissenting).


182. The status of the "purely private" case—private plaintiff and non-media defen-
—Second, the Court has unambiguously constricted the field of application of the more exacting *New York Times* standard in "public figure" cases and has clearly intimated by its "footnote eight" portentous suggestion that it will similarly respond to expansive or all-encompassing interpretations of inclusion within "public officialdom."

—Third, the Court's own decisions, expressly delineating the "public official" status or otherwise providing guidance on its realm of applicability, refute any suggestion that any and all governmental employees from the highest to the lowest echelons of governmental employment warrant treatment as "public officials," with the concomitant severe incursions on their rights to redress for reputational injury resultant therefrom. The Court has thus far concluded or intimated that only the following types of political figures or public employees are required to meet the *New York Times* threshold: elected officials at all levels of the body politic; all candidates for public office, at whatever level, whether incumbent or non-incumbent; members of the judiciary at all levels; governmental attorneys in positions of substantial power; high-ranking police and military officials; the president or members of local policy-making boards; a high-ranking school administrator; and federal and state executive officials of significant policy-making authority, or with functions at date—has not been resolved by the Court. See *supra* note 161. A credit reporting agency case is pending presently before the Court. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 148 Vt. 66, 461 A.2d 414 (1983) (no first amendment or state common law privilege applied to erroneous reports of credit reporting agencies), appeal pending.

183. See *supra* text accompanying note 19 (city commissioner), note 27 and accompanying text (U.S. congressman), note 22 and accompanying text (judges), note 46 and accompanying text (county attorney), note 59 (county commissioner), text accompanying note 64 (clerk of county criminal and circuit courts), note 102 (mayor).

184. See *supra* notes 26, 52 & 101.

185. See *supra* notes 101-02 and accompanying text.

186. See *supra* notes 22, 29-30, 37 & 44 and accompanying text. The Court treats all members of the judiciary identically, regardless of their elected or appointed status. In the cases in notes 29 and 30, it is unclear whether the judges were elected or appointed.

187. See *supra* note 38; note 44 and accompanying text.

188. See *supra* notes 31-32, 45 & 46 and accompanying text.

189. See *supra* note 33 and accompanying text.

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

191. See *supra* note 93 and accompanying text.


193. See *supra* notes 34-35 and accompanying text.
the core of the political process. Furthermore, it is worthwhile reiterating that the Supreme Court has not held that low-ranking policemen or teachers are "public officials" and has concluded only that a supervisor of a county recreation area might be a "public official"—an issue decided negatively by the state court on remand. Lastly, it is noteworthy that the Court has taken pains on three occasions to reject the suggestion that the merest governmental connection suffices for "public official" status—its "night watchman" analysis in Rosenblatt v. Baer, its rejection of an attorney-"officer-of-the-court" as a "public official" in Gertz v. Robert Welch, Inc., and its pithy "footnote eight" in Hutchinson v. Proxmire, disavowing mere "governmental affiliation" as sufficient for "public official" status.

—Fourth, the primary "assumption of risk" and the peripheral "access" rationales underlying the constitutional differential for "public" and "private" persons and the Court's unequivocal refutation of media-generated "newsworthiness" as a sufficient basis for a finding of "public" status (basic, explicit postulates for resolving "public figure" issues in the post-Gertz era) have their express counterparts in the general standards for determining "public official" status as delineated by the Court in Rosenblatt v. Baer.

—Fifth, a close analysis of the defamation decisions during the Gertz v. Robert Welch, Inc. era discloses that the Supreme Court has rarely granted review of well-articulated, plaintiff-oriented lower court decisions and, more frequently, has reversed such

194. See supra note 28 and accompanying text.
195. See supra note 89 and accompanying text.
196. See supra notes 91-92 and accompanying text.
197. See supra text accompanying notes 57-62.
198. Id.
199. See supra note 56 and accompanying text.
200. See supra note 146 and accompanying text.
201. See supra note 7 and accompanying text.
202. See infra text accompanying notes 419-98.
203. See Bufalino v. Associated Press, 692 F.2d 266 (2d Cir. 1982), cert. denied, 103 S. Ct. 2460 (1983), where the court held that the defendant was "presumptively precluded" from benefiting from the "public official" standard because the story failed to specifically "identify" plaintiff "as the holder of a public office." Id. at 273-74. Concluding that the Rosenblatt policy of encouraging discussion of persons in a position to substantially influence public issues only applied where plaintiff was "directly or indirectly" identified as an office-holder, it was determined that the interest in protecting reputation warranted applying the negligence standard where the plaintiff was not so identified. It did indicate that
decisions when they impose substantial and, in the majority’s estimation, unjustifiable, impediments to the protection of individual reputation.

In view of the aforesaid factors, it is likely that the Court, in the imminent future and at an early opportunity, will explicitly and unequivocally disaffirm the general view of the pre-*Hutchinson v. Proxmire* lower court decisional law that “governmental affiliation” connotes “public official” status. It is also probable that the Court will accord that contention the same cryptic treatment it rendered the attempt to characterize attorney Gertz as a “de facto public official”—that it would “distort the plain meaning of the ‘public official’ category beyond all recognition.”²₀₀⁴

II. *New York Times, Rosenblatt v. Baer, and the Public Official Status—Two Decades of Interpretation and Misinterpretation*

A. *The Public Official Status and Candidacy for Public Office*

The universal consensus of the decisional law has properly concluded that the prototype for inclusion within the "stewardship of public officials" subject to the *New York Times* rule is the elected public official. Consequently, all gradations and varieties of federal and state elected public officials have been subjected to the threshold requirement of the constitutional "actual malice" standard: a United States congressman or senator; the holder of

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205. New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964). There is very little decisional law dealing with the issue of the application of *New York Times* to foreign officials or those involved in foreign elections. One early decision refused to extend the rule to an aspirant non-incumbent (but former) President of Haiti on the now rejected ground that it did not apply to candidates (i.e., who were not entitled to absolute immunity themselves). See supra notes 25, 49 and accompanying text. Fignole v. Curtis Publishing Co., 247 F. Supp. 595, 597 (S.D.N.Y. 1965). To the extent the decision can be read to suggest that *New York Times* is inapplicable to foreign officials, it is undoubtedly wrong. See DeRoburt v. Gannett Co., 83 F.R.D. 574, 579-80 (D. Hawaii 1979), 507 F. Supp. 880, 882 & n.2 (D. Hawaii 1981) (plaintiff was a "public official" or "public figure"), 548 F. Supp. 1370, 1373 (1982), rev'd on other grounds, 733 F.2d 701 (9th Cir. 1984), cert. denied, 11 MEDIA L. REP. (BNA) No. 7 (1985), where the court repeatedly applied the constitutional "actual malice" rule to the President of Nauru. See also Sharon v. Time, Inc., 575 F. Supp. 1162, 1167 (S.D.N.Y. 1983) (former Israeli Minister of Defense and present Minister without Portfolio termed a "public figure"). Any other result would be anomalous, indeed. The "public official" rule has never been strictly limited to criticism by the local governed of their local governors, but rather to governors in general. A contrary decision regarding foreign officials would logically suggest that critics lose the right of free expression when criticizing "public officials" outside their geographical locus, a view never accepted by any modern libel decision. Note that if one is not a foreign official, he can nonetheless become a "vortex" public figure by thrusting himself into a foreign election. Time, Inc. v. McLaney, 406 F.2d 565, 573 (5th Cir.), cert. denied, 395 U.S. 922 (1969); Bryant v. Associated Press, 595 F. Supp. 814, 816-18 (D.V.I. 1984) (former government minister and current opposition leader in British territory of St. Kitts-Nevis held to be a "public figure"). In the latter the court took note of the plaintiff's "unique and intriguing" argument—that he was not a "public figure" in the Virgin Islands where the publication occurred—but held that he was a "public figure" in the Virgin Islands, recognizing the "intimacy of our Caribbean community." It is doubtful the result would or should be different if the story had been picked up and published by the Associated Press on the mainland, i.e., South Florida or New York City.


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a state office, such as a governor, attorney general, state treasurer, or member of the state senate or house of representatives; and a myriad of county, city, and local officials of all three branches of government—mayor; city council member; alderman; or city commissioner; county sheriff; county supervisor; judge of the supreme court; circuit court; county


court, member of the school board; chairman of the county board; county district attorney; county superintendent of public instruction; county surveyor; township tax assessor or auditor; and parish (county) treasurer.

Reflecting the postulate that "[i]n a republic where the people are sovereign, the ability of the citizenry to make informed
choices among candidates for office is essential," for such candidates, if successful, "inevitably shape the course that we follow as a nation," the cases have also uniformly held that candidates for a rather broad spectrum of offices, whether in a primary or a general election, are compelled to meet the same exacting standard. Candidates for the following offices have thus been held to fall within the "public official" rubric: the United States presidency, the United States House of Representatives, governor, or lieutenant governor; state insurance commissioner; state senate, or house of representatives.


232. Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 776 (D.C. Cir.) ("It is part of the democratic evolution of our country that primary elections have increasingly taken the place of private clubs and close knit caucuses, to select both the holders of party office and nominees for public office"), cert. denied, 399 U.S. 947 (1969). Thompson v. Stone, 259 So. 2d 146, 147 (Fla. 1972) (non-libel case involving a candidate trying to keep his name off the Florida presidential primary ballot).


state supreme court; county sheriff; county commissioner; or county (parish) council member; district attorney; town moderator; member of the board of education and constitutional convention delegate. A number of cases have involved twofold justifications for application of the New York Times standard, paralleling Ocala Star-Banner Co. v. Damron, i.e., an elected official running for reelection or for another office.

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244. Blanke v. Time, Inc., 308 F. Supp. 378, 380 n.6 (E.D. La. 1970) (also a matter of "public interest").


A wide variety of non-elected government officials and employees at every gradation of the federal, state, and local government has been subsumed within the almost open-ended, "governmental affiliation" approach to the "public official" status under the grossly misunderstood and misapplied Rosenblatt v. Baer standards. In the upper tier of this wide-ranging group are numerous examples of appointees to state, county, or local agencies, boards, or commissions who wield substantial authority and partake in the making of policy. These appointees undoubtedly and justifiably qualify under either the "have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs" or "independent interest beyond that in the qualifications and performance of all government employees" alternative criteria of Rosenblatt v. Baer. These appointees have included: U.S. ambassador or consul to a foreign embassy; head of the state bureau for the elderly; member of the state board...

Prior Jeffersonian, 569 P.2d 967, 973 (Okla. 1977), or in another public office, D'Amato v. Freeman Printing Co., 38 Wis. 2d 589, 596, 157 N.W.2d 686, 690 (1968) (candidate for judge, regarding his conduct as district attorney), or where he is running for election to a municipal court position to which he was appointed, Driscoll v. Block, 3 Ohio App. 2d 351, 358-61, 210 N.E.2d 899, 904-06 (1965).

251. See supra notes 51-53 and accompanying text. The late Professor Eldredge has made an impassioned appeal for treatment of such board members as private individuals. See Eldredge, supra note 24. This position, however, is untenable regarding elected members, see infra notes 410-18 and accompanying text, or appointed members thereof. The limited Supreme Court guidance on the issue is contrary to his position. See supra notes 64 & 90-93 and accompanying text. Indeed, it would appear that such board members generally qualify under either of the Rosenblatt criteria. Only two opinions, neither of which were final status adjudications, have declined to find such board members public officials. Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 862-63, 330 N.E.2d 161, 171-72 (1975) (school department food service director and member of redevelopment authority board—court expressed "no opinion" on "public official" status issue—such was left for further development on remand); Jones v. Himstead, 7 MEDIA L. REP. (BNA) 2433, 2435 (Mass. Super. Ct. 1981) (Stone followed, on summary judgment motion regarding airport commission member). The Gertz decision does not support Eldredge's position. The Court did reference the fact that Gertz had, "[s]everal years prior to the present incident . . . served briefly on housing committees" as a mayoral appointee, but that he had never had a "remunerative governmental position." Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The latter aside is, however, no precedential support for a contention that had Gertz been publicly identified and criticized in his capacity as a board member he would not have been deemed a public official.


of optometry; member of the board of directors of the metropolitan transit authority; member or president of the county airport board; executive secretary of the state board of medical examiners; member of a city licensing board; member or president of the county airport board; executive secretary of the state board of medical examiners; member of a city licensing board; member of the state fish and game commission; commissioner of a port district; chairman of the state board of highways; chairman of the county democratic primary board; and chief zoning hearing officer for a county. Of coequal stature is another grouping of public functionaries whose extensive involvement in and control over public affairs, public monies, and important governmental functions qualify them as public officials: director of the division of utilities and sanitation of the


263. McNabb v. Tennessean Newspaper, Inc., 55 Tenn. App. 380, 392-93, 400 S.W.2d 871, 876-80 (1965), cert. denied (1966). It is unclear whether the plaintiff was appointed by the state Democratic executive committee to whom he reported and certified precinct returns, or was appointed by local governmental officials. In any event, his functions were extensively regulated by statute and he performed a pivotal role in the local political process. The state court implicitly held him to be a public official without discussing his status in detail; this treatment is undoubtedly correct.

Virgin Islands department of public works; chief investigator for the House Un-American Activities Committee; and director of the state employees' retirement system. Also included have been individuals with policymaking and supervisory status within the police or military hierarchy—chief of police or comparable official, commanding

265. Moorhead v. Millin, 542 F. Supp. 614, 618 (D.V.I. 1982) (extensive responsibilities over drinking water distribution, collection of solid waste and its disposal, sanitation, sewage, salt water supply, cemetery services, and other utilities give plaintiff "control over an important area of local government . . . important to the health and welfare of the people of the territory"). A comparable argument for "public official" status could be made regarding an independent contractor which, "[f]or all practical purposes" functions as the sanitation department of several cities and towns, i.e., in a "quasi-governmental" capacity. See Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412, 416 (S.D.N.Y. 1969) (decided on a pre-Rosenblatt "public interest" basis).


267. Stripling v. Literary Guild, 5 MEDIA L. REP. (BNA) 1958, 1959-60 (W.D. Tex. 1979) (also a "public figure"), aff'd, 636 F.2d 312 (5th Cir. 1981). See also Dalton v. Meister, 52 Wis. 2d 173, 176, 180, 188 N.W.2d 494, 495, 499 (1971) (state assistant attorney general and head of criminal investigation division held to be a "public figure" and involved in a matter of "public or general concern"). He also clearly qualifies as a "public official" under Rosenblatt v. Baer.


officer of a naval vessel during wartime, ranking colonel in the air national guard or marine corps— or persons with comparable stature in the field of education—superintendent of a junior college district, or dean of the college of education of a state university. The positions of these individuals would appear similarly to justify “public official” status under the aforementioned criteria.

Juxtaposed to these appropriate determinations are a significant number of lower echelon government employees, seemingly prototypical ordinary citizens, that the courts have indefensibly in-
cluded within the “public official” status: supervisor of a branch post office; independent contractor in clerk-of-court’s office; independently contracted architectural and structural engineer; psychiatric or traditional social worker; public school teacher; administrator of a county motor pool; patronage-secretary to the public works director; army pediatric clinic re-


277. Guzzardo v. Adams, 411 So. 2d 1148, 1150 (La. Ct. App.) (one of thirty-two supervisors of equal rank and salary in clerk’s office), rev. denied, 415 So. 2d 942 (La. 1982). The application of the New York Times standard was undoubtedly correct on another ground, however, as plaintiff “thrust himself into the fray” regarding his employer’s controversial trip. The court confuses the “public official” and “public figure” statuses.


283. Grzelak v. Calumet Publishing Co., 543 F.2d 579, 582-83 (7th Cir. 1975). The exact basis for this decision is unclear. The court initially found merit in the contention that the plaintiff “occupied a public position and that the matter of her public appointment was a subject of public or general interest.” However, even if not a “public figure,” her patronage status was deemed an issue of “genuine interest and concern,” id., referencing Rosenbloom. The reference to the latter decision in 1975 would, of course, be an erroneous ground for the constitutional “actual malice” standard as a matter of first amendment jurisprudence. It seems probable that the court, applying Indiana law in a diversity case, meant to rely on Rosenbloom as a matter of Indiana state law, following a then recent Indiana decision which reaffirmed the Rosenbloom approach, regardless of the status of the individual, in matters of “general and public concern.” Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 679-80, 321 N.E.2d 580, 586-87 (1974), cert. denied, 424 U.S. 913 (1976). Consequently, although the “public official” status of the plaintiff (if such was the basis) is undoubtedly erroneous, the standard was clearly correct as a matter of state law. See infra text accompanying notes 446-50.
ceptionist;\textsuperscript{284} assistant public defender;\textsuperscript{285} independently contracted doctor for correctional facilities;\textsuperscript{286} garden variety police officer;\textsuperscript{287} employee of the department of parks and recreation

\textsuperscript{285} Tague v. Citizens for Law & Order, Inc., 75 Cal. App. 3d Supp. 16, 21-24, 142 Cal. Rptr. 689, 691-94 (1971); Goodrick v. Gannett Co., Inc., 500 F. Supp. 125, 126 (D. Del. 1980) (conceded status as "public official"). The \textit{New York Times} standard was, however, appropriately applied in the latter based on his status as a candidate for appointment to the circuit court and concomitant alternative status as a public figure.
\textsuperscript{286} Green v. Northern Publishing Co., 655 P.2d 736, 741 (Alaska 1982), \textit{cert. denied}, 103 S. Ct. 3539 (1983). \textit{Compare} Ferguson v. Watkins, 448 So. 2d 271, 279 (Miss. 1984), where the court held that emergency room physicians at a publicly-funded hospital were "vortex public figures." The court implicitly rejected "public official" status, \textit{id.} at 279 n.9, noting that, though they were "public employees," they held no "public office." \textit{Id.} at 277.
and director of its ski program; and chief x-ray technician at a county hospital. A number of others designated by the courts as "public officials" are difficult to categorize because of the dearth of discussion therein. These characterizations, however, may have been defensible had there been a fact-intensive delineation of their duties and authority: executive director of a city parking authority; director of county computer services; director of town department of parks and recreation or city manager; chief of the division of penalties of the corporation counsel; assistant, or deputy, district or village attorney; director of a


291. Manuel v. Fort Collins Newspapers, Inc., 42 Colo. App. 324, 599 P.2d 931 (1979). It is unclear from the case whether plaintiff was deemed a "public official" on this ground alone or also because of his status as a commissioner when some of the alleged impropriety started. The case was reversed on procedural grounds, 631 P.2d 1114 (Colo. 1981), and no "actual malice" was found on remand. 661 P.2d 289 (Colo. Ct. App. 1982).


city urban development agency;\textsuperscript{297} county engineer;\textsuperscript{298} county medical examiner;\textsuperscript{299} village building inspector;\textsuperscript{300} delinquent tax collector;\textsuperscript{301} or appointed tax assessor;\textsuperscript{302} principal of an attendance center,\textsuperscript{303} or a high school;\textsuperscript{304} chief deputy in a county clerk’s


298. Blessum v. Howard County Bd. of Supervisors, 295 N.W.2d 836, 843 (Iowa 1980).


office, or clerk of county district court, or clerk of the state senate; assistant secretary of state or corporations secretary; independent contractor for nursing homes; owner-manager of a community center; and county director of public welfare. In a few gray-area cases the courts have provided fact-intensive and in-depth analyses of the functions and responsibilities of the "public officials" involved therein which substantiate appropriately their decision to apply the New York Times standards: director of financial aid at a state college; county environmentalist; supervisory contract negotiator for a navy ships parts control

304. Kapiloff v. Dunn, 27 Md. App. 514, 524, 343 A.2d 251, 258 (1975) ("plain" that plaintiff was "within the 'public figure'-'public official' classification" and that "the position was a matter of public or general interest or concern"), cert. denied, 426 U.S. 907 (1976).


309. Halpern v. News-Sun Broadcasting Co., 53 Ill. App. 3d 464, 466, 368 N.E.2d 1052, 1064 (1977) (status conceded). But compare Doctors Convalescent Center, Inc. v. East Shore Newspapers, Inc., 104 Ill. App. 2d 271, 244 N.E.2d 373, 377 (1968) ("There are few functions of the state of Illinois in which the public has greater interest and concern than institutionalization of unfortunately subnormal and mentally retarded children"—it extended the same rationale to "all persons young or old so afflicted"). Of course, if the facility is completely private, the plaintiff can be subjected to the New York Times standard only if found to be a public figure. See Doman v. Rosner, 246 Pa. Super. 616, 620, 371 A.2d 1002, 1005 (Pa. Super. Ct. 1977) (private institute for brain-injured children found to be "public figure").


311. Bienvenu v. Angelle, 254 La. 182, 191, 223 So. 2d 140, 143 (1969). This case is very interesting in another respect. Plaintiff therein was informally promised the job on an unofficial basis but had not been officially hired. Defendant intervened and, as a result of his defamatory remarks, plaintiff never received the job. In litigation the courts later "confirmed" her appointment, retroactive to the date of the informal assurances and prior to the defamation. In finding her to be a public official, the court stated, "[w]here this not the case we would have difficulty in distinguishing between an active applicant, candidate, or seeker of public office and an office-holder."

312. Van Dyke v. KUTV, 663 P.2d 52, 55-56 (Utah 1983) (excellent, well-developed opinion).

center;\textsuperscript{314} and former city attorney and counsel for the city urban redevelopment agency.\textsuperscript{315}

Although the aforesaid decisions clearly evidence that the overwhelming majority of decisions have adopted, albeit with little or only superficial analysis, an unduly expansive interpretation of "public official," a small but growing minority view reflects a more sophisticated appreciation of the limitations of the "public official" concept. As one recent, well-reasoned opinion involving an independent contractor-consultant on archaeological matters has aptly concluded, \textit{Rosenblatt v. Baer} "fits well into the framework of competing values" in libel cases, and defamation plaintiffs with some governmental affiliation should not be compelled to comply with the demanding \textit{New York Times} standard unless they have "relinquished" their private status by "entering into the type of government and political activities that would set it apart as an entity that must be closely scrutinized by the press."\textsuperscript{316} The following governmental agents or employees have been deemed, either explicitly, implicitly, or in dicta as not having "relinquished" their private status, and, consequently, not being subject to the constitutional "actual malice" requirement: private consulting engineer;\textsuperscript{317} juror;\textsuperscript{318} city recreation director;\textsuperscript{319} part-time deputy


315. Weingarten v. Block, 102 Cal. App. 3d 129, 136-39, 162 Cal. Rptr. 701, 706-09, \textit{cert. denied}, 449 U.S. 899 (1980) (plaintiff was held to be both a "public official" and "public figure"—at the time of the allegedly libelous articles he had "assumed a role of especial prominence in the affairs of the community... and occupied a position of persuasive fame and notoriety in the community... ").


319. Peoples v. Tautfest, 274 Cal. App. 2d 630, 636, 79 Cal. Rptr. 479, 482 (1969) (defendant failed to meet burden of adducing evidence delineating the "functions, duties, or relationship with the public of that... job").
sheriff,\textsuperscript{320} prison guards,\textsuperscript{321} or unpaid undercover police informant;\textsuperscript{322} supervisor of a county recreation district;\textsuperscript{323} private attorney as "officer of the court,"\textsuperscript{324} or appointed counsel receiving governmental funding in a criminal trial;\textsuperscript{325} public health nurse;\textsuperscript{326} public school teacher,\textsuperscript{327} principal,\textsuperscript{328} or state university faculty members;\textsuperscript{329} independent contractor-legal counsel for a county  

\textsuperscript{320} McCusker v. Valley News, 121 N.H. 258, 261, 428 A.2d 493, 495 (1981) (deputy sheriff not a "public official as a matter of law"—matter for the jury), \textit{cert. denied}, 454 U.S. 1017 (1981). Note that the same result has been achieved in other cases by manipulating the "official conduct" concept. \textit{See infra} text accompanying notes 395-403.  

\textsuperscript{321} Towse v. State, 64 Hawaii 624, 632-33, 647 P.2d 696, 703 (1982) (only common law privileges, defeasible by negligence, applied in suit against the state for defamation and false imprisonment). The \textit{Towse} decision has been subsequently interpreted as involving plaintiffs who might have been "public employees" but not "public officials" or "public figures." \textit{See} Hoke v. Paul, 65 Hawaii 478, 481, 653 P.2d 1155, 1158 (1982). Note that one decision has rejected the \textit{New York Times} standards in malicious prosecution actions by police officers, allowing "malice" to be "inferred" from lack of "reasonable inquiry." Breda v. Attaway, 371 So. 2d 1270, 1273 (La. Ct. App. 1979).  

\textsuperscript{322} Jenoff v. Hearst Corp., 644 F.2d 1004 (4th Cir. 1981) (he was reimbursed for expenses).  


\textsuperscript{324} Harkaway v. Boston Herald-Traveler Corp., 418 F.2d 56, 59 (1st Cir. 1969).  

\textsuperscript{325} Ratner v. Young, 465 F. Supp. 386, 400 n.23 (D.V.I. 1979); Steere v. Cupp, 226 Kan. 566, 572, 602 P.2d 1267, 1272 (1979). There seems to be no defensible difference between these cases and Tague v. Citizens for Law & Order, Inc., 75 Cal. App. 3d Supp. 16, 142 Cal. Rptr. 689 (1977), involving an assistant public defender. As a concurring judge trenchantly stated therein, there is "no material distinction" between such an assistant public defender and a court-appointed, publicly-paid or privately-compensated attorney in a criminal proceeding. \textit{Id.} at 26, 142 Cal. Rptr. at 695 (Avakian, J., concurring). Once such an acknowledgment is made, however, one is faced with the clear finding of the Supreme Court in \textit{Gertz}, that an attorney \textit{qua} attorney is not a public official. For a further discussion, \textit{see infra} text accompanying note 465 and \textit{supra} text accompanying note 146.  


\textsuperscript{327} Ranous v. Hughes, 30 Wis. 2d 452, 466, 141 N.W.2d 251, 259 (1966) (after citing the constitutional cases, court characterized case as "a private individual suing a public official for libel"); Poe v. San Antonio Express-News Co., 590 S.W.2d 537, 539-41 (Tex. Civ. App. 1979) (high school science teacher); Franklin v. Lodge 1108, Benevolent & Protective Order of Elks, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136-37 (1979); Milkovich v. News-Herald, 15 Ohio St. 3d 292, 297,— N.E.2d —,— (1984) (former high school wrestling coach held not a "public official" as a matter of law); Nodar v. Galbreath, 462 So. 2d 803, 808 (Fla. 1984) (high school teacher subject to only common law privileges—not a "public official"). Another case has arrived at the same result by misinterpreting the "official conduct" concept. \textit{See infra} note 399 and accompanying text.  


\textsuperscript{329} Foote v. Sarafyan, 432 So. 2d 877, 880 (La. Ct. App. 1982) (department chair-
sewer district;\textsuperscript{330} independent contractor-architects on state projects,\textsuperscript{331} or contractor on university construction projects;\textsuperscript{332}

man and two mathematics faculty members), \textit{cert. denied}, 440 So. 2d 736 (La. 1983). Although the decision is correct, the reasoning is flawed. The court misinterpreted \textit{Hutchinson v. Proxmire} as holding that the state university adjunct faculty member therein was not a "public official." In fact, the court never reached the "public official" issue. \textit{See supra} notes 156-62 and accompanying text. \textit{See also supra} note 70. Another decision involving a tenured faculty member at the University of Virginia, \textit{Fleming v. Moore}, 221 Va. 884, 275 S.E.2d 652 (1981), tacitly suggests that the plaintiff therein was not a public official. Plaintiff had been disparaged in several publications, including paid ads in the university newspapers, as "racist" because of his opposition as landowner to defendant's request for a zoning change. Defendant's ads repeatedly referred to plaintiff's status as a university faculty member ("tenured position-holder") and plaintiff claimed that such reference had injured his reputation in the university community. Despite these linkages to his status as a university faculty member, the court only discussed the "public figure" status (finding him to be a "private" person) and the non-actionability of the epithet without special damages. \textit{Id.} at 887-92, 275 S.E.2d at 634-37. Lastly, the Illinois Supreme Court, though declining to decide whether an assistant professor of library science was a "public official" or "public figure," has recently extended the \textit{New York Times} first amendment privilege to university tenure determinations. \textit{Colson v. Steig}, 89 Ill. 2d 205, 212-13, 453 N.E.2d 246, 249 (1982). The decision is poorly reasoned and extends the \textit{New York Times} threshold barrier to a situation involving a private person to which the latter rule "simply does not apply." \textit{Id.} at 216, 453 N.E.2d at 251 (Clark, J., specially concurring). The \textit{Colson} decision, in essence, seems to have adopted the \textit{New York Times} standard as a matter of state law as the definition of "abuse" of a common law qualified privilege, thereby modifying the preexisting "abuse" criteria, which had included negligence, i.e., lack of reasonable grounds. \textit{See Smolla, supra} note 157, at 73 (\textit{Colson} "mischaracterized federal constitutional law in the service of expanding Illinois common law"). For another decision involving a university instructor where the court similarly adopted \textit{New York Times} as the state law "abuse" standard, see \textit{Creps v. Waltz}, 5 Ohio App. 3d 213, 450 N.E.2d 716 (1982) (part-time instructor in state university continuing education program in suit against members of the realty profession who questioned his fitness to teach realty courses in a letter to the university administration).


accountant with a state commerce commission; director of a university print shop; engineer for a national medical institute; juvenile probation officer; official court reporter; CETA file clerk; and state-employed adult congregate-living facility coordinator. In all of these decisions, the courts seem to have recognized that the Rosenblatt v. Baer standards apply only where "the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government" is involved and not to mere governmental employees whose level of "governance or control . . . over the conduct of government is at best remote and philosophical." (Ala. 1977) (where plaintiff, owner of taxi franchise, pleaded only negligence, trial court should have "presumed" plaintiff was a private person—defendants did not submit evidence to the contrary).

333. Zurek v. Hasten, 553 F. Supp. 745, 749 (N.D. Ill. 1982) (ancillary claim in section 1983 action at motion to dismiss stage—"typical government employee" "lacking either prosecutorial or adjudicatory responsibility"). See also Kruteck v. Schimmel, 27 A.D.2d 837, 278 N.Y.S.2d 25, 26 (1967), rev'd 50 Misc. 2d 1052, 1053-54, 272 N.Y.S.2d 261, 264-65 (Sup. Ct. 1966). The lower court had held that the plaintiff, a part-time accountant-auditor for a water works, did not meet the "independent interest" test, but fell within Rosenblatt "footnote thirteen." The lower court was undoubtedly correct on the "public official" status issue. The reversing court was, however, probably correct in reversing the case on the alternative ground that the plaintiff actively sought and received press coverage and was a "vortex" public figure. Kruteck, 27 A.D.2d at 837, 278 N.Y.S.2d at 26 (implied).

334. Madison v. Yunker, 180 Mont. 54, 66-67, 589 P.2d 126, 132-33 (1978) (court was "skeptical" plaintiff was a "public official"—question for the jury).

335. Stephens v. Dixon, 30 Md. App. 56, 351 A.2d 187 (1976) (plaintiff treated as private individual in his defamation suit against mayor). See also Dameron v. Washington, 575 F. Supp. 1575, 1577 & n.3 (D.D.C. 1983) (in dicta the court rejected the suggestion that "every individual performing work which 'citizens have entrusted to government' . . . is a public official" in a case involving an air traffic controller).


339. Wilkinson v. Florida Adult Care Ass'n, 450 So. 2d 1168, 1172-73 (Fla. Dist. Ct. App. 1984). In a well-considered opinion the court extensively analyzed the employee's functions, concluding that neither Rosenblatt test was met. He had "minimal control" of "governmental affairs" (his only involvement in the licensing process was advisory) and the only "special public scrutiny" was that "generated from the instant controversy."

B. "Public Officials" and the "Official" versus "Private" Conduct Dichotomy

In holding in *New York Times* that "public officials" were constitutionally required to prove "actual malice" in defamation actions brought against "critics of [their] official conduct," the *Supreme Court* expressly declined to elucidate the "boundaries of the 'official conduct' concept." It limited its holding to a conclusion that, if the allegedly libelous allegations—that "truckloads of police" had "ringed the . . . campus" and that the "Southern violators" had used "intimidation and violence" against Dr. Martin Luther King, bombing his abode ("almost killing his wife and child"), assaulting him and charging him with a variety of misdemeanors and with perjury, a felony—were "of and concerning" the elected city commissioner "at all," such allegations must have been in regard to the "performance of his official duties."

In dealing thusly with the unusual factual basis for compliance with the "of and concerning" requirement—that, although plaintiff was not specifically identified by name, he was identified by the public with the defamation because of his official position as the city commissioner with supervisory control over the police department—the Court, in an ambiguous aside, stated that it was "immaterial" that the allegations regarding the assaults and bombing of Dr. King "might not be considered to involve respondent's official conduct if he himself had been accused of perpetrating" the illegalities, as he had not claimed such alleged defamations "charged him personally" with such actions. The Court thereby seemingly appended a caveat to the "official conduct" concept, intimating that the issue of whether a public official was to be held to the exacting *New York Times* rule when defamed "personally" rather than in his "official capacity" might be an open issue—even where such actions, outside the realm of his official duties, would be arguably relevant to his fitness for the public position which he occupies.

The Court expeditiously resolved the latter intimation of a possible narrow construction of the relevance-to-"official con-

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342. *Id.* n.23.
343. *Id.* at 257-58.
344. *Id.* at 283 n.23.
346. *Id.* at 283 n.23 (emphasis added).
duct” criterion in the criminal defamation case of the same year as New York Times: Garrison v. Louisiana. In that case, the Court held that the defendant-appellant’s disparaging statements—that the “large backlog of pending criminal cases [was imputable] to the inefficiency, laziness, and excessive vacations” of the criminal district court judiciary, that the judges had impeded his vice investigations by declining to approve his expenditures for such, and that the judges had “made it eloquently clear where their sympathies lie in regard to aggressive vice investigations . . . [r]aising interesting questions about the racketeer influences on our eight vacation-minded judges” were “within the purview of criticism of the official conduct of public officials” under New York Times. It expressly repudiated the limited sphere of applicability accorded the “official conduct” criterion by the Louisiana Supreme Court, i.e., encompassing only “criticisms of a court trial or of the manner in which any one of the eight judges conducted his court when in session,” and concluded that such “personal attacks upon the integrity and honesty of the eight judges” were protected. Although conceding that “any criticism” of performance of official duties would inevitably “tend to affect his private, as well as his public, reputation,” the court concluded that such duality of disparagement did not displace the panoply of New York Times. The latter decision had protected the “paramount public interest in a free flow of information to the people concerning public officials, their servants.” Consequently, the Garrison Court held that “[t]o this end, anything which might touch on an official’s fitness for office is relevant: Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.”

348. Id. at 66 (synthesis of allegations by the Court).
349. Id. at 76 (emphasis added).
350. Id. (quoting the Louisiana Supreme Court’s opinion, State v. Garrison, 244 La. at 834-35, 154 So. 2d at 417-18).
351. 379 U.S. at 76 (quoting the Louisiana Supreme Court’s opinion, State v. Garrison, 244 La. at 834-35, 154 So. 2d at 417-18).
352. 379 U.S. at 77.
353. Id.
354. Id. The Garrison opinion specifically noted that “different interests” might come into play in the realm of “purely private libels, totally unrelated to public affairs,” and stated that the decision was not to be construed as “intimating any views” in this “discrete
In the jointly issued decisions of *Monitor Patriot Co. v. Roy*[^355] and *Ocala Star-Banner Co. v. Damron*,[^356] the Supreme Court reaffirmed the expansiveness of the "official conduct" concept, giving it an almost open-ended construction, and extended the same treatment to candidates for public office. The Supreme Court rejected the state court's determination that a jury could justifiably conclude that an allegation that the candidate in *Monitor Patriot Co.* was a "former small-time bootlegger" was a ""private matter in the private sector," i.e., "a bringing forward of the plaintiff's long forgotten misconduct in which the public had no interest."[^357] The Court decided that the "official conduct" formulation applied "with special force" to candidates for public office and that "whatever vitality the 'official conduct' concept may retain with regard to occupants of public office...it is clearly of little applicability in the context of an election campaign."[^358] In such a context the "principal activity of a candidate...his 'office,' so to speak," is his submission to the electorate of "every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him."[^359] Indeed, "[g]iven the

[^357]: *Monitor Patriot Co.*, 401 U.S. at 269 (quoting the trial court's instructions to the jury). Thus, the Court resolved one issue left open by the caveat in the *Garrison* opinion, see supra note 354, by determining that criminal conduct was always relevant to the fitness of public officials and candidates for public office.
[^358]: *Monitor Patriot Co.*, 401 U.S. at 274. The Court seems to suggest the possibility that the "official conduct" criterion might have a more constrained application to "occupants of public office" than to candidates therefore. *Id.* The only arguable logic to such a suggestion is that the office-holder has a public record from which to evaluate his fitness for and conduct of his office, whereas a candidate (non-incumbent) has only his private life from which the electorate can draw deductions concerning his fitness to hold a public trust. See Noel, *Defamation of Public Officers*, 49 Colum. L. Rev. 875, 888 (1949). It has been suggested any such distinction between candidates and office-holders might pose equal protection problems. See supra note 104.
[^359]: *Monitor Patriot Co.*, 401 U.S. at 274 (emphasis added). The Court amplified its views thusly:

A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a
realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks.”

Opining that the husband or father remain of “purely private” concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry “Foul!” when an opponent or an industrious reporter attempts to demonstrate the contrary.

Id. The Court gave further guidance concerning what was protected under the “official conduct” criterion by quoting from a leading author to the effect that “[c]harges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent . . . .” Id. n.4 (quoting Noel, supra note 358, at 875).

360. Monitor Patriot Co., 401 U.S. at 275. The Court left open the issue of “whether there remains some exiguous area of defamation” where the candidate “may have full recourse.” Id. The Restatement (Second) of Torts notes the possibility that the Supreme Court will decide “that for a certain type of public official or public figure any defamatory statement affects him in regard to his conduct, fitness or role in that capacity” so that the New York Times standard applies to any and all defamatory statements of and concerning him. It suggests, however, that the more probable conclusion is that there will be some defamatory aspersions that will be found to affect such a public person, “no matter how prominent, in only a purely private capacity.” Restatement (Second) of Torts § 580A, comment c (1977). If so, the negligence standard would apply. Id. One possible area is the realm of sexual privacy. However, even in these sacrosanct areas one’s private views and conduct—regarding contraception, abortion, homosexuality, transsexuality—may be relevant to one’s fitness for public office, at least with regard to many elected and high appointive positions, e.g., the controversy involving 1984 Democratic Vice-Presidential nominee Ferraro and New York Governor Cuomo on Catholic public officials’ “public” versus “private” attitudes toward abortion. See, e.g., Glover v. Herald Co., 549 S.W.2d 858, 859-64 (Mo.), cert. denied, 434 U.S. 965 (1977) (where a woman alderman sued as a result of an erroneous report that she had admitted during a public session that she had had two abortions. Although she lost on the ground of a failure to prove “actual malice,” there is no suggestion in the opinion that the matters were not defamatory or were irrelevant to her fitness for public office). See also the “public interest” debate in Rosenbloom regarding contraception, supra note 117. But see Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 188 Cal. Rptr. 762, 772-73 (1983), in which in a right of privacy/public disclosure” case the court refused to find that press disclosure of plaintiff’s transsexuality (and surgical transformation of sexual identity) was “newsworthy” as a matter of law regarding plaintiff’s “fitness for office” as student body president of a state community college and member of the community college board of trustees—whether “newsworthy” or “beyond the bounds of decency” was a jury question. While the facts therein certainly have a sympathetic ring, it is doubtful that if she had sued for a similar false, defamatory depiction that such would be irrelevant to her fitness for office, assuming arguendo that she is a public official. Compare Miskovsky v. Oklahoma Publishing Co., 654 P.2d 587 (Okla. 1982) (press criticism of one candidate for Democratic nomination for U.S. Senate for imputing homosexuality and possible security risk to his opponent was protected opinion). It is doubtful that had his opponent sued as defamation plaintiff this information would have been deemed totally irrelevant under the Garrison, Monitor Patriot, and Ocala Star-Banner cases. See also Goldwater v. Ginzburg, 414 F.2d 324, 329 n.3, 331-32, 335 n.17 (2d Cir. 1969) (alleged sexual identity difficulties were part of the defamatory imputation of mental illness that the court found relevant to candidacy for the U.S. presidency), cert. denied, 396 U.S. 1049 (1970);
public/private dichotomy applicable by the jury by a "preponderance" standard provided the jury undue "leeway to act as censors,"361 the Court held "as a matter of constitutional law"362 that such "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office" under New York Times.363 In Ocala Star-Banner Co., the Court followed this expansive "official conduct" criterion in determining that allegations of perjury in a civil rights suit were "relevant" to the fitness of a "public official" mayor and candidate for county office, "under any test we can conceive,"364 even though those allegations were completely and utterly false and resulted from a mistaken substitution of plaintiff's name for that of his sibling.365

The federal and state decisional law overwhelmingly follows the broad-gauged and almost all-encompassing delineation of relevance regarding "official conduct" established by the Garrison, Monitor Patriot, and Ocala Star-Banner decisions. Reflecting the Supreme Court's hierarchical preference for a well-informed citi-

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361. Monitor Patriot Co., 401 U.S. at 275. Unlike a "standard of care" which can be content-neutral, a "standard of 'relevance'" under a preponderance standard is "unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression" of free expression. Id. at 276-77.

362. Id. at 277. In rejecting the contention that relevance regarding "official conduct" was a factual question for the jury, the Court stated that the "syllogistic manipulation" of "public sectors" and "private sectors," or "fact" versus "law" was of little utility in delineating issues of first amendment coverage. Id. at 273.

363. Id. at 277. The Court thus specifically rejected the New Hampshire Supreme Court's contention that minor bootlegging involvement "some 26 or 37 years in the past" could have been constitutionally found by a jury to be "purely private defamation" outside the New York Times rule. Roy v. Monitor Patriot Co., 109 N.H. 441, 445, 254 A.2d 832, 834 (1969), rev'd, 401 U.S. 265 (1971).

364. Ocala Star-Banner Co., 401 U.S. at 300-01.

365. At trial the newspaper attributed the error to the "mental aberration" of one of its editors, who had been employed by it for only a brief period. Id. at 297.
zenry over the reputation of the injured public official or candidate for public office, one early state decision concluded that the citizenry was "entitled to know and discuss the life, the character and qualifications, the finances and the innermost thoughts, motives, connections and associations" of such public persons, "as well as the likely or inevitable result of the official's or candidate's actions, connections, statements, or votes . . ." A more recent state decision has similarly expansively concluded that the reportage of commentary on the private business characteristics of a public official fell "within the New York Times rule where facts show his integrity, qualifications, compassion, honesty, ethics, or 'anything which might touch on an official's fitness for office'" are at issue. A plethora of state and federal decisions has held that imputations of criminality, either in one's public capacity or private life, are undeniably relevant to the fitness of the candidate.

366. Clark v. Allen, 415 Pa. 484, 204 A.2d 42, 44 (1964) (dicta in a case in which comments regarding the "communist tendencies" of the record of an incumbent-candidate for the U.S. Senate were deemed non-libelous).


368. Many of the decisions have involved police officials. See Postill v. Booth Newspapers, Inc., 118 Mich. App. 608, 618-19, 325 N.W.2d 511, 515 (1982) (that a county sheriff and a jail administrator had criminal records, threatened to kill a police officer and his wife, misappropriated prisoners' and public property, had engaged in general maladministration in office, and threatened to retaliatorily discharge officers cooperating in the investigation); Gray v. Udevitz, 556 F.2d 588, 591 (10th Cir. 1981) (a police officer was charged with sale of drugs on duty, "extorting" favors from a prostitute, use of heroin, and provision of inside information on raids to a prostitute cohabitor); Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977) (attempted illegal entry into a public office); Seymour v. A.S. Abell Co., 557 F. Supp. 951, 953, 957 (D. Md. 1983) ("theft" during a "sting" operation); Meiners v. Moriarty, 563 F.2d 343, 352 (7th Cir. 1977) (criminal violations of civil rights, assault, theft of personal property, and malicious damage to private property); DeGregorio v. News Printing, 9 MEDIA L. REP. (BNA) 1045, 1047-48 (N.J. Super. App. Div. 1982) (implied involvement of police officer in urban arson and operation of an unlicensed boarding house with accumulated housing code violations); Cline v. Brown, 24 N.C. App. 209, 215, 210 S.E.2d 446, 447-49 (1974), cert. denied, 211 S.E.2d 793 (N.C. 1975) (killing a burglar in violation of his constitutional rights); Jurkowski v. Crawley, 637 P.2d 56, 57-59 (Okla. 1981) ("staging" a robbery as a pretext for executing third parties during the apprehension of the perpetrator at a prior job as chief of police was relevant to his current position in a similar capacity); Shafer v. Lamar Publishing Co., 621 S.W.2d 709, 711 (Mo. Ct. App.) (imputation of crime of statutory rape, motion for transfer denied (1981). Other elected and non-elected "public officials" and candidates have also been required to meet the New York Times standard with regard to imputations of criminality. See Chase v. Daily Record, Inc., 83 Wash. 2d 37, 41-42, 515 P.2d 154, 156-57 (1973) (implied misappropriation of monies by a port district official); Rusak v. Harsha, 470 F. Supp. 285, 293,
or public official. However, the concept is not so limited to allegations of criminality, and the decisions have generally extended the relevance-to-"official conduct" concept to a multiplicity of non-criminal defamatory aspersions: violations of a citizen's right of privacy,\textsuperscript{369} or of his civil or constitutional rights;\textsuperscript{370} misuse of pub-


\textsuperscript{369} Colombo v. Times-Argus Ass'n, 135 Vt. 454, 456-57, 380 A.2d 80, 82-83 (1977) (alleged dissemination by a policeman of the picture of a nude college streaker).

\textsuperscript{370} Press, Inc. v. Verran, 569 S.W.2d 435, 437 (Tenn. 1978) (social worker charged with coercing a mother into involuntary sterilization as a precondition for the return of her children to her); Noel v. McCain, 538 F.2d 633, 634-36 (4th Cir. 1976) (members of school board charged with racial discrimination); Scelfo v. Rutgers Univ., 116 N.J. Super. 403, 407, 412, 282 A.2d 445, 447, 450 (Law Div. 1971) (mounted police charged with being "Rightists, Racist Pig Bastards" in separating right-wing and left-wing demonstrators); Van Dyke v. KUTV, 663 P.2d 52, 56 (Utah 1983) (director of financial aid of state college charged with sexually harassing aid applicants and recipients); Roberts v. Dover, 525 F. Supp. 987, 989 (M.D. Tenn. 1981) (allegations highway patrolman urinated publicly along the highway, used foul language, "buzzed" truck driver in his helicopter, and detained the truck driver in an abusive and inhumane manner); Hall v. Piedmont Publishing Co., 46 N.C. App. 760, 763, 266 S.E.2d 397, 400 (1980) (charge of "railroading" a civil commitment imputed to county medical examiner misfeasance in the "performance of his duties"); Moriarty v. Lippe, 162 Conn. 371, 385, 294 A.2d 326, 334 (1972) (allegations of police brutality). See also a similar conclusion in a case involving truthful disclosures in a "Looking Backward" column, wherein the court rejected a "public disclosure"-right of privacy cause of action. Rawlins v. Hutchinson Publishing Co., 218 Kan. 295, 296, 305, 543 P.2d 988, 989, 996 (1975) (accurate republication of discharge of a police officer for "conduct unbecoming an officer" in "annoying" a woman appertained to his "conduct in office, and not . . . his private life").
lic position for private pecuniary gain, 371 or for private non-pecuniary benefit, 372 psychiatric unfitness for office; 373 misrepresentation of one’s accomplishments in office; 374 unethical and unprofessional behavior; 375 a suggestion by a judge that women provoke sexual assaults; 376 general malfeasance and misfeasance in


373. Goldwater v. Ginzburg, 414 F.2d 324, 335 (2d Cir. 1969) (imputations of “paranoid personality,” sadism, etc., to a U.S. Senator and candidate for president), cert. denied, 396 U.S. 1049 (1970); Roche v. Egan, 433 A.2d 757, 763 (Me. 1981) (imputation that officer was too unstable to safely handle a weapon and that his conduct is “disgraceful” as a “human being” and “public servant”).

374. Baldine v. Sharon Herald Co., 391 F.2d 703, 707-08 (3d Cir. 1968) (imputation in a political advertisement of a county commissioner’s (a candidate for reelection) long list of misstated, false accomplishments in office).


376. Simonson v. United Press Int’l, Inc., 500 F. Supp. 1261, 1267-68 (E.D. Wis. 1980), aff’d, 654 F.2d 478 (7th Cir. 1981). See also Spence v. Funk, 396 A.2d 967, 973 (Del. 1978), where in a discussion of the nature of libel the court held that the statements attributed to plaintiff as chief of police (which implied that prostitution was not a problem locally because a substantial number of the city’s women were unchaste) imputed to him “a characteristic or view incompatible with the exercise of [his] . . . profession, or office” and was defamatory per se. Generally, anything held slanderous per se or libelous regarding a public official or candidate in respect to his “profession” or “office” as such, will, by definition, “relate” to his “official conduct” thereof. The reverse is not, however, true. Although it would undoubtedly be relevant concerning a candidate’s fitness that he had previously dropped out of a race for the same office for a substantial “bribe,” a minority view holds such to not be slanderous per se regarding a non-incumbent. Field v. Coulson, 93 Ky. 347, 20 S.W. 264 (1892). The Restatement and preferred view is contra. RESTATEMENT (SECOND) OF TORTS §573, comment b (1977).
office; a forced resignation from a position that would reflect on fitness for a comparable public office; receipt of disciplinary action for violation of public employment regulations; imputation of intimidating and coercive private business practices; insulting and offensive public behavior; public insobriety; vindictiveness, obstructionism and ineptitude; "hood-winking" the public in the operation of a public lottery; failure of a candidate to file required financial reports; and general lack of qualifications or unfitness for office.


381. Michaud v. Inhabitants of Livermore Falls, 381 A.2d 1110, 1113, 1116-17 (Me. 1978) (charge in letter to governor that head of important government bureau had treated local officials with arrogance and contempt).

382. State v. Deffley, 395 So. 2d 759, 761 (La. 1981) (criminal defamation case based on charge that deceased parish school superintendent and school superintendent were drunkards).


386. Eadie v. Pole, 91 N.J. Super. 504, 508, 221 A.2d 547, 549 (App. Div. 1966) (appointed tax assessor depicted as "not free of pressures" and not "qualified" for the
Undoubtedly, the sphere of applicability of the relevance-to-
"official conduct" criterion is a flexible one; its parameters vary
with "the nature of the office involved, with its responsibilities
and necessary qualifications, and the nature of the private conduct
and the implications that it has as to his fitness for the office."
Consequently, one who sought the presidency of the United States, where the necessity for a "continuing robust approach to matters and men political" reached its quintessence,\textsuperscript{388} "invited the press and the public to scrutinize every aspect of his life, public and private alike."\textsuperscript{389} In a push-button age with a multitude of weapons of mass destruction at the President's proverbial fingertip, the purported mental disequilibrium of the candidate\textsuperscript{389} was "not only relevant but indeed crucial" to the intelligent selection of the occupant of "our most powerful office."\textsuperscript{391} At the opposite end of the "official conduct" spectrum, e.g., an elected member of

to "official conduct"—mandated by \textit{Rosenblatt v. Baer}. There has been some recent tendency to use a sliding-scale approach to determination of (1) above, which permits a governmental employee "near the bottom" of the governmental hierarchy to be considered a "public official" if the imputations regarding "official conduct" are "more closely connected to actual job performance." \textit{Clawson v. Longview Publishing Co.}, 91 Wash. 2d 408, 417, 589 P.2d 1223, 1228 (1979) (administrator of county motor pool held to be a "public official" regarding allegations he repaired sheriff's son's car at public expense). The difficulty with the commingling of steps (1) and (2) is that it effectively disembowels the "public official" determination and deprives it of any significance as a limitation on treating all government employees as "public officials." The net result of this incestuous symbiosis is well illustrated by an example cited approvingly by a leading commentator:

For example, if an article falsely portrays a governmental employee as having failed a few history courses in college, it would have little bearing on his job performance as a driver of city trucks. However, a history of having been fired for drunkenness on the job may well be sufficiently relevant to the performance of a night watchman for a nuclear facility to designate him a public official under this test.

\textit{Metcalf, supra} note 161, at 1.111. Presumably, under this analysis, a pattern of drunkenness would be relevant to the fitness of the truck driver. The net result of the aforesaid "nexus" test is that two individuals, a truck driver and a night watchman, who were never contemplated as within "public officialdom," are "bootstrapped" into required compliance with \textit{New York Times}.


\textsuperscript{389} \textit{Id.} (emphasis added).

\textsuperscript{390} \textit{See supra} note 373. The "person who holds that high office [of the presidency] has an almost unbounded power for good and evil." \textit{Ginzburg v. Goldwater}, 396 U.S. 1049, 1051 (1970) (Black, J., dissenting from denial of certiorari).

\textsuperscript{391} \textit{Goldwater}, 414 F.2d at 335. But even such a quintessentially public person probably has some areas protected from public scrutiny. See \textit{Providence J. Co. v. FBI}, 460 F. Supp. 778, 789-90 (D.R.I. 1978) ("Even a president, as to whom the public has the most compelling, near total interest, has private realms which may not be disclosed") (dicta), \textit{rev'd on other grounds}, 602 F.2d 1010 (1st Cir. 1979); \textit{Nixon v. Adm'r. of Gen. Servs.}, 433 U.S. 425, 457 (1977) ("We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity") (dictum in a case upholding the constitutionality of the Presidential Records and Materials Preservation Act).
the student senate of a state university (assuming *arguendo* he is a "public official" for *New York Times* purposes), the swath of the "official conduct" concept would conceivably and justifiably be much more circumscribed, limited only to matters directly bearing on fitness for that office. In this respect, as in the making of the threshold determination of "public official" status, the constitutional, substratal policies underlying the "public" versus "private" status bifurcation—the primary "assumption-of-risk" and peripheral "access" rationales—are factors that should be utilized for guidance in borderline, "gray areas" of "private" versus "official" conduct.

The flexible, commensurability approach to discerning "private" from "official" conduct will doubtlessly leave some more or less limited realm of privacy wherein the states will be permitted to protect the basic, quasi-constitutional interest in reputation. That protection will likely be under a less stringent constitutional standard than *New York Times*, i.e., negligence/preponderance-of-evidence standards. This is the clear intimation flowing from the "official conduct" concept itself and the limited decisional law reaffirming this residual sphere of "private" conduct. Unfortu-

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392. *See supra* note 231.

393. Klahr v. Winterble, 4 Ariz. App. 158, 418 P.2d 404 (1966). In this decision the court held that the epithets disparaging the plaintiff's political reputation were protected opinion. *Id.* at 415-16. In dicta it did note that the disparaging activities only related to his political activities and fitness as an elected student leader and did not attack "traits of character" having no connection to his fitness for said position. *Id.* at 413.

394. Gulf Publishing Co. v. Lee, 434 So. 2d 687, 695 n.8 (Miss. 1983) (dicta); Savannah News-Press v. Whetsell, 149 Ga. App. 233, 234, 254 S.E.2d 151, 152 (1979) (dicta); People v. Mager, 25 A.D.2d 363, 364, 269 N.Y.S.2d 848, 849 (1966) (*Garrison* limited to criminal libels where "official conduct" of "public official" involved—only unidentified "private conduct" involved therein); Brubaker v. Reading Eagle Co., 422 Pa. 63, 65-66, 221 A.2d 190, 191 (1966) (question of whether plaintiff county district attorney was defamed only in "private citizen" capacity was properly for trial court—there was "no opportunity" for plaintiff to raise such and appellate court refused to consider such as "properly" before it); Sewell v. Brookbank, 119 Ariz. 422, 425, 581 P.2d 267, 270 (Ct. App.), *rev. denied* (1978) (approved draft predecessor to now § 580B, permitting negligence regarding "private" conduct of public official) (dicta). In one decision, involving dubious application of the "actual malice" standard to a patronage secretary, the court affirmed a lower court dismissal of a claim that an "impromptu 'go-go'" on a pool table at a local bar was not actionable. Grzelak v. Calumet Publishing Co., 543 F.2d 579, 581-84 (7th Cir. 1975). The trial court had previously found that such defamatory allegations related only to plaintiff's "private life" and were not subject to the "actual malice" standard. *Id.* at 581.
nately, the decisional law elucidating the "private" realm of otherwise "public" officials has generally been fatally flawed and proffers very little guidance on the issue. The cases generally apply a strict "official conduct" definition reminiscent of the parallel argument repudiated clearly and unequivocally in Garrison and, later, in the Monitor Patriot and Ocala Star-Banner duet. For example, an early post-New York Times Kentucky case held that allegations by a civil rights leader regarding a patrolman assigned to the convention of a segregated fraternity—that he was of "limited training, no culture, and a professional moocher" ("who strikes you for 50 cents or a dollar every time he meets you on the streets") and who was "illegally using" his authority to harass defendant, "at the behest of his masters... in this phony race organization"—merely focused on his "fitness and character as a man" epitomizing the fraternity, a "purely personal attack," rather than on the "coincidental circumstance" of his official position.395

Similarly deficient reasoning relying on a stringent "private" versus "official" conduct dichotomy antithetical to the doctrine espoused in Garrison, Monitor Patriot, and Ocala Star-Banner has been likewise applied in other cases: that fraudulent misrepresentations by a police officer to raise money for his junior league football team related to "unofficial" conduct of "a private citizen;"396 that a United States congressman's purported attempt to "fix" a pending criminal case did not "appear to refer to or in-

395. Tucker v. Kilgore, 388 S.W.2d 112, 114-16 (Ky. Ct. App. 1965). Of course, prior to Gertz v. Robert Welch, Inc., a finding that a defamatory matter did not pertain to a public official's "official conduct" resulted in the application of only the common law privileges.

396. Aku v. Lewis, 52 Hawaii 366, 375, 477 P.2d 162, 168 (1970). The court's perfunctory discussion of the New York Times rule is curiously inconsistent with its conclusion therein that the same language was defamatory per se, as charging plaintiff with behavior that would render him "unfit to faithfully and correctly fulfill his duties" as a police officer. Id. at 373, 477 P.2d at 166-67. One decision has questioned the continuing viability of the Tucker v. Kilgore and Aku v. Lewis cases and has distinguished them in a case involving alleged instability of a police officer affecting his trustworthiness with a firearm: "[A]ny statement to a police officer's superior expressing concern about that officer's official weapon must bear upon his 'fitness for office.'" Roche v. Egan, 433 A.2d 757, 763 n.4 (Me. 1981). While one noted author has commented that the Tucker v. Kilgore and Aku v. Lewis decisions have an "appealing ring," Eaton, supra note 4, at 1381, the decisions are clearly inconsistent with the definition of "official conduct" in the wealth of the decisional law aforementioned. The results achieved are correct, but on a different rationale—that the plaintiffs were not "public officials." See infra text accompanying notes 468-93.
volve ... performance of his duties as a congressman;" that attribution to an elected school board member of a wide variety of misbehavior—intimidating threats, attribution of misuse of office to fellow board members, unethical behavior, that he was a "'politician in the lowest sense of the word,'" that he had attempted to promote illegal actions by the board and the school superintendent—did not, "as a matter of law," appertain to his "official conduct;" that "illegal" expenditures of lodge funds by police officer members of a public safety council for lobbying did not "relate" to their "official conduct;" that imputation to a retiring teacher sued for mistaken receipt of salary while on disability leave that he was a "'[n]o-show teacher'" did not appertain to his "qualification or performance" as a teacher; or that generalized "'complaints pertaining to the medical practice'" of the executive secretary of the state composite board of medical examiners were not "related to his 'official conduct.'"


399. Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 716, 459 P.2d 8, 13 (1969), cert. denied, 399 U.S. 927 (1970). Since the appellants had not challenged the lower court determination that they were public figures, a view affirmed on appeal, the discussion of the "official conduct" issue is dicta. However, in a more recent case, Himango v. Prime Time Broadcasting, 37 Wash. App. 259, 680 P.2d 432, 436 (1984), the court followed the Tilton case dicta. It concluded that the "nexus" between his "official position" and the defamatory allegations was "weak." Although terming the policeman "not a public official," the case seems to rely basically on the strict construction of "official position" and "official duties" rejected in the Supreme Court cases discussed in the text. Clearly, it is relevant to the fitness of a police officer on the vice squad that he was portrayed during reportage of the husband's criminal trial as having made sexual advances to his wife and as having been found in a "compromising position" in her car in a parking lot, resulting in the physical altercation which was the basis for the prosecution. The court undoubtedly felt uncomfortable applying the "public official" rule to the lowly police officer therein. However, the correct result is based on the wrong rationale. Such a low echelon police officer functionary should not be denominated a "public official." See infra text accompanying notes 468-93.


401. Morton v. Gardner, 155 Ga. App. 600, 601, 604, 271 S.E.2d 733, 735, 737 (1980) (quoting the allegedly libelous letter written by the defendants; also quoting RESTATEMENT (SECOND) OF TORTS § 580A(b)). The court does not discuss the issue in detail or discuss the contents of the letters sent to the board concerning the plaintiff. Interestingly, in discussing defendants' motives for sending the letter the court mentioned general considerations such as the "'quality of medical care'" and the "'interests of patients' health, interest and safety.'" Id. at 605, 271 S.E.2d at 738 (quoting testimony of record relating to
There are two readily apparent, partial reasons for the rampant confusion evidenced by the aforesaid decisions. First, all but two of the decisions were pre-Monitor Patriot and Ocala Star-Banner and further did not refer to, discuss, or appear to be aware of the Garrison "official conduct" discussion. Second, in at least three cases a close analysis of the decisions suggests that the courts were collectively discomfitted by the spectre of including the plaintiffs—police officers in two cases and a school teacher in the other—within the status of "public officialdom." In the words of the aforementioned Kentucky decision, the New York Times standard could not "sensibly be turned into an open season to shoot down the good name of any man who happens to be a public servant." Although the results achieved in these three cases are quite likely correct (with the concomitant minimal constitutional standard of negligence and whatever state privileges are not inconsistent therewith), the courts seized upon and misinterpreted the secondary hurdle ("official conduct" concept)—rather than the threshold determination ("public official" status)—as the raison d'être for their conclusions.

Undeniably, and as the majority view discussed above convincingly demonstrates, the determination of the "official conduct" issue, with its expansive definitional scope, will normally be

defendant's motive for initiating the allegedly libelous letter). Surely, such allegations concerning his fitness as a doctor are relevant to his ability as a board member to make similar assessments regarding other physicians. If the allegations in the non-media defendants' letter are comparable to those reported in the press account, where plaintiff was implicated in "'questionable ethics'" and "'unquestionable fraud,'" Morton v. Stewart, 153 Ga. App. 636, 637, 266 S.E.2d 230, 232 (1979) (quoting the allegedly libelous editorial that appeared in the defendant Atlanta Newspaper, Inc., publication, the Atlanta Constitution), the non-relevance regarding "official conduct" conclusion is clearly unjustified under the constitutional standard. Indeed, the court doubtlessly used the same standard that it applied to its statutory conditional privilege—"comments upon the acts of public men in their public capacity." Ga. Code § 51-5-7 (1982). Clearly, the statutory standard is much narrower than the Garrison, Monitor Patriot, and Ocala Star-Banner constitutional standard; the court erred in commingling the two standards. A court clearly can give greater expansiveness to the "official conduct" concept than required by minimal first amendment constraints; however, it is not permitted to return to the narrow construction of "official conduct" definitively repudiated by that line of cases. See supra note 360.


403. Tucker, 388 S.W.2d at 116 (emphasis added).
a "relatively simple matter." The courts should endeavor, however, in cases where the issue appropriately arises, to define the limits of the concept—as delineated by the controlling Supreme Court decisional law and in light of the jurisprudential substrata underlying the Supreme Court's "public"/"private" bifurcation—and ignore the limited, clearly erroneous lower federal and state court authority delineated above.

III. *Rosenblatt v. Baer*—A Reformulation

A. *The Revivification*

In order to give a flavor of and insight into the deep philosophical debates engendered by the imposition of constitutional restraints on the confusing morass of the common law, the initial sections of this Article have sketched in some detail the Supreme Court's decisional law over the last two decades. In retrospect, the Court's decision in *New York Times* and subsequent expansion—to bona fide appointed "public officials" in *Rosenblatt*, "public figures" in *Butts* and *Walker*, and candidates for public office in *Monitor Patriot* and *Ocala Star-Banner*—make eminently good sense. Its fleeting flirtation with an all-encompassing "public or general interest" test in *Rosenbloom*, however, did not. In *Rosenbloom* the Court effectively absolved the media of liability to nearly all plaintiffs with a resultant near desuetude of the law of defamation in cases within the panoply of the first amendment. Fortunately, three years later in *Gertz* the Court recognized the skewed nature of the reputational interest-free expression accommodation of *Rosenbloom* in private versus media defendant cases. This recognition has resulted in a more equitable and fundamentally fair compromise between the inherently competing and inconsistent interests at stake: those who have actual or potential power over matters near the "core" of the first amendment—effective self-govern-ment—or who otherwise attempt to influence this "core" decision-making process relinquish appreciably thereby their claim to

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404. *Belli v. Orlando Daily Newspapers, Inc.*, 389 F.2d 579, 588 (5th Cir. 1967) (dictum), *cert. denied*, 393 U.S. 825 (1968). This is not always the case, however. *See, e.g.*, *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809, 815-16 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977), where the court appears to tacitly admit that disparaging comments would relate to plaintiff's fitness for the elected office of county surveyor, if defendant could show at trial a direct or implied reference thereto in the article. *See generally supra* note 203.
protection of the basic interest in reputation—an interest of quasi-constitutional stature. For those who retain their status as anonymous, and, therefore, essentially defenseless, members of the body politic, there is no justification for subjecting them to the requirements of New York Times, requirements recently characterized by the most consistently media-protective member of the present Court as “exceedingly generous standards.” Unlike public persons, prototypical private persons cannot defensibly be said to have voluntarily subjected themselves, by bare membership in the body politic, to the potentiality of the stringent scrutiny and utterly damaging exposition of their private lives whenever deemed newsworthy by the institutional press in its self-defining wisdom. This, in essence, would have been the result of the now-repudiated Rosenbloom plurality view.

Whatever one’s ultimate posture on the appropriateness of Gertz and its progeny, it is clear that the values considered therein (particularly in delineating the “public person” status) reflect a basic realignment of the competing interests of reputation and free expression. The Court seems to have granted approximate parity to the two, treating the interest in reputation as an “equally com-

405. See infra text accompanying note 407. See also Clark v. Pearson, 248 F. Supp. 188, 191 (D.D.C. 1965) (the “civil right” of one’s reputation is “equally fundamental and vital, and its protection is equally efficacious and vigorous”); Troman v. Wood, 62 Ill. 2d 184, 194-95, 340 N.E.2d 292, 297 (1975) (right of protecting reputation “fundamental” under the state constitution—rationale for rejecting more stringent standards than negligence in private versus media defendant cases); Madison v. Yunker, 180 Mont. 54, 62-63, 589 P.2d 126, 130-31 (1978) (condition precedent of compliance with state retraction statute violated state constitutional right of access to the courts to protect reputation); Seegmiller v. KSL, Inc., 626 P.2d 968, 973 (Utah 1981) (“freedom from false attacks on one’s personality may be viewed as at least as essential to ordered liberty as freedom from physical abuse”); McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882, 886 (Ky. 1981) (“the fundamental right of private individuals to be free from being defamed”), cert. denied, 456 U.S. 975 (1982). The Court has, of course, held that the mere deprivation by state action of the right of reputation is insufficient to support a procedural due process claim in a § 1983 action. Paul v. Davis, 424 U.S. 693 (1976). The case has been strongly criticized as having “very little historical basis, as Anglo-American law has long placed a value on the individual’s right to one’s good reputation,” J. Nowak, supra note 41, at 552-53, and may be limited to situations where there is a common law action available under state law. Id. Curiously, the Court never mentioned that “reputation” is a constitutionally protected right under the Kentucky state constitution under the guaranteed right of access to the courts “for any injury” to “lands, goods, persons or reputation.” Ky. Const: Bill of Rights § 14. A recent comment lists thirty-nine jurisdictions as similarly expressly protecting reputation in their state constitutions. Comment, Defamation and State Constitutions: The Search for a State Law After Gertz, 19 WILLAMETTE L. REV. 665, 665 n.2 (1983).

pelling need” which must not be subjected to “substantial deprec-
ration” “without any convincing assurance” that such a “sacrifice”
is mandated by the first amendment.\textsuperscript{407} Moreover, it would be a
gross miscalculation to relegate this realignment solely to the
realm of “public figures” and assume that the “governmental affil-
iation” test remains unsullied in its pristine, knee-jerk imperturba-
bility. The Court has clearly evidenced a predisposition to the
contrary in its “footnote eight” in \textit{Hutchinson} and its terse rejec-
tion of attorney Gertz as a “public official”/“officer-of-the-
court.”\textsuperscript{408} It is clear from the philosophical substratum of the
Court’s recent decisions that the \textit{Rosenblatt} criteria, including
“footnote thirteen,” are viable and “fit well into the framework of
competing values created by libel litigation” involving “public
officials.”\textsuperscript{409}

To facilitate application of a rejuvenated \textit{Rosenblatt}, with an
infusion of the value perspective reflected in \textit{Gertz} and its prog-
eny, it is suggested here that the following multi-step analysis be
utilized:

1. \textit{All} elected officials and candidates for public office should be
deemed “public officials” for purposes of the \textit{New York Times}
standard. The \textit{New York Times} decision and its progeny collectively evi-
dence a strong consensus that those functioning at the “core” of
the political process are the supreme exemplars of those over
whom the public has the right and duty of exercising its “‘censo-
rial power.’”\textsuperscript{410} Although some sympathy is to be had for the late
Professor Eldredge’s passionate plea for not subjecting the myriad
members of local boards and commissions (appointed or elected)
to the “devastating effect”\textsuperscript{411} of \textit{New York Times}, this eloquent ap-
peal finds no support with respect to elected members thereof in
the cases decided by the Supreme Court to date. Neither can such

\textsuperscript{407} Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976) (discussion of refusal to extend
\textit{New York Times} to factually inaccurate reports of judicial proceedings).

\textsuperscript{408} Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). \textit{See supra} text accompany-
ing note 146.

\textsuperscript{409} Arctic Co. v. Loudon Times Mirror, 624 F.2d 518, 521 (4th Cir. 1980), \textit{cert.}

\textsuperscript{410} New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) (quoting 4 \textit{ANNALS OF
CONG.} 994 (1794)). Of course, if the person is no longer an official or candidate at the time
of the defamation, he is still within the rule as long as there is continuing public interest in
the matter. \textit{See supra} note 48.

\textsuperscript{411} \textit{See Eldredge, supra} notes 24 & 251.
support be found in the jurisprudential underpinnings of the public/private dichotomy drawn by the Court. Moreover, there is a definite need for a “per se” or “bright line” rule in cases involving elected officials or candidates for public office. The press should be and is entitled to proceed on the assumption that those who “hold” or “seek governmental office” assume the “risk of closer public scrutiny” and have concomitantly “relinquished” proportionately their claim on the state to protect their interest in an unsullied reputation. There is nothing fundamentally unfair in thusly according elected officials and candidates for office such “per se” status as it reflects, as a matter of con-

413. Gertz, 418 U.S. at 342.
414. Id. at 344.
415. Id. at 345. The Court has relegated the “access” rationale to a quite subordinate or peripheral status. See Harris v. Tomczak, 94 F.R.D. 687, 700 (E.D. Cal. 1982) (access is not a “necessary element nor is its absence determinative”). Many exemplars of “public officialdom” will have no effective access to the media or other means of reply. See State v. Deffley, 395 So. 2d 759, 761 (La. 1981) (although deceased “public officials” by definition were unable to respond to defamation, as “public officials” they assumed the “responsibilities of a public position” and “relinquished” a measure of their protection under the law of defamation); Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1306, 397 N.Y.S.2d 943, 950 (“Judges are constrained, by principles of judicial ethics, to refrain from engaging in public debate”), cert. denied, 454 U.S. 969 (1977); Landmark Communications, Inc., v. Virginia, 435 U.S. 829, 839 (1978) (Court in non-libel case noted that judges “by tradition will not respond to public commentary” but declined to give judges as individuals or the judiciary as an institution “greater immunity from criticism” on said basis); Bienvenu v. Angelle, 254 La. 182, 191, 223 So. 2d 140, 143 (1969) (contention civil service regulations’ prohibitions against speaking politically removed plaintiff from category of public official held without merit—“it is one’s power to manage affairs affecting the public which subjects one to the federal rule”).

416. It is suggested that candidates for public office be treated as “public officials,” or in a separate “candidate” classification, rather than as “public figures.” There is no necessity for subjecting the press to the quagmire of cumulative criteria for determination of whether the candidate is an “all” or “limited purpose” (the more likely category) public figure. Where the plaintiff’s elected or candidate status at the time of defamation is readily conceded or is detectable from the complaint, answer, or appended affidavits, the court should summarily determine said issue as a preliminary matter on motion by the defendant. Of course, if the plaintiff is a candidate for office in a political party, the “public figure” criteria would have to be applied. See Thompson v. Evening Star Newspaper Co., 394 F.2d 774, 776 (D.C. Cir.), cert. denied, 393 U.S. 884 (1968). The same applies to office-holders in a political party, News-Journal Co. v. Gallagher, 233 A.2d 166, 170 (Del. 1967) (chairman of city Republican committee held to be a public figure), Dickey v. CBS, Inc., 583 F.2d 1221, 1222, 1227 (3d Cir. 1978) (plaintiff, member of county Republican board of supervisors, admitted he was a public figure), or to spouses of candidates, Hemengway v. Blanchard, 163 Ga. App. 668, 671, 294 S.E.2d 603, 606 (1982) (spouse of congressional candidate playing “an important part” in campaign held to be a public figure), cert. denied
stitional jurisprudence, a common sense maxim of politics and public life—"If you can't stand the heat, you should stay out of the kitchen"—and allows the elected public official or candidate, as well as the critics thereof, to order their existence accordingly.418

—2. The courts must recognize that the Supreme Court has never extended the "public official" status to non-elected garden variety "public officials" and has expressly rejected that view in its "night watchman" analysis in Rosenblatt. Moreover, the courts should frankly view with skepticism much of the decisional law delineated above which was engendered during the period prior to Gertz (when the Court had not clearly disentangled the "status" and "subject matter" approaches), and which resulted in many "public official" determinations based on generalized references to the "public interest" generated by public employees' activities.419 Public employment plus "public interest" or "newsworthiness" was insufficient to attain "public official" status under Rosenblatt and is clearly insufficient under the post-Gertz decisions. The demonstrated capacity of media legal counsel to persuade lower federal and state courts that New York Times was to be logically extended to all matters of "public interest" was mirrored in that


418. The Supreme Court's case law undoubtedly supports a "per se" rule for all elected government office-holders and candidates therefore. See supra notes 183-85 and accompanying text. It is possible that the courts will follow the decision of one court and hold that elected student officers at the high school or lower level are not subject to the above rule. Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979) (in a §1983 action against a school official for seizing student newspaper, court declined to place an elected vice-president of the student body in the "same withering spotlight of the press as it does publicly elected officials," emphasizing, the "protected environment" of a school). But compare Klahr v. Winterble, 4 Ariz. App. 158, 418 P.2d 404, 412 (1966), where the court applied the New York Times rule as a matter of "law and equity," without deciding whether it was mandatory, in the case of an elected student senator of university senate.

419. Deprived of its "footnote thirteen" caveat, the Rosenblatt "independent interest" had become, in essence, a public employment plus "newsworthiness" standard.
extension's Siamese twin, the "governmental affiliation" (governmental employment and "newsworthiness"/"public interest") test. The former view has been rejected expressly by Gertz; the latter correlative illegitimate was indefensible under Rosenblatt and has been implicitly disavowed by Gertz and its offspring, as well as by the well-considered lower federal and state decisional law.

—3. The courts should adopt and apply the prevailing rule in the law of defamation that the defendant has "the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamation communication." When the defendant sustains that burden of proving "public official" privilege, the plaintiff will then be required to meet the "burden of proving that the privilege was abused," i.e., establish knowing or reckless disregard of falsity, by "clear and convincing" evidence. If the media defendant fails to sustain its burden of demonstrating a New York Times privilege, the plaintiff will be required to meet the constitutional min-

420. Restatement (Second) of Torts § 613(2) (1977). See generally Peoples v. Tautfest, 274 Cal. App. 2d 630, 635, 79 Cal. Rptr. 479, 482 (1969) (New York Times privilege is an "affirmative defense" upon which defendant has the burden of pleading and proof—"unless it appears on the face" of plaintiff's complaint); Flannery v. Allyn, 75 Ill. App. 2d 365, 221 N.E.2d 89 (1966) (New York Times privilege waived where not asserted at trial), cert. denied, 388 U.S. 912 (1967); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 592 (1st Cir. 1980) (defendant failed to meet its burden on the record of proving successful middle echelon manufacturer merchant was a public figure); Bufalino v. Associated Press, 692 F.2d 266, 273-74 (2d Cir. 1982) (court implied that the burden of proof was on defendant to show that plaintiff was within the "public official" privilege—it "made no showing" that plaintiff, not identified by title, met the requirements for "implied" colloquium-of-office), cert. denied, 103 S. Ct. 2463 (1983); R. Sack, supra note 412, at 150. On the issue of court versus jury functions, see supra note 62.

421. Restatement (Second) of Torts § 613, comment g (1977).

422. Numerous statements by the Supreme Court in its case law have generally imposed the burden of proof of "actual malice" on public persons; generally, the lower court decisional law has followed this clear indication by the Court. See Elder, supra note 20, at 357-58. For example, the Court stated in Herbert v. Lando that New York Times and its progeny had "effected major changes" in the common law and "public officials and public figures who sue for defamation must prove knowing or reckless falsehood in order to establish liability." Herbert v. Lando, 441 U.S. 153, 159 (1979). See also id. at 160, 169, 170, 172, 174. And see also Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1965 n.30 (1984) (the Court reaffirmed the duty of the courts to reexamine the record to ensure compliance with the "actual malice" requirement).
ima of negligence-by-a-preponderance\textsuperscript{423} criterion (or whatever more media-protective standard has been adopted in minority jurisdictions).\textsuperscript{424}

The defendant’s burden will be a nominal one in cases involving elected public officials and candidates for public office. That burden will be easily met in cases involving other officials comparable to those deemed, directly or indirectly, “public officials” in the Supreme Court’s limited decisional law. In addition, state courts (or federal courts sitting in diversity cases and applying and anticipating state law) may wish to develop “bright line” categories of other public employees (e.g., law enforcement personnel) who are to be subjected to the \textit{New York Times} criteria as a matter of state constitutional law or as a matter of public policy.\textsuperscript{425} In all other cases involving public employee plaintiffs where the plaintiff has not conceded the status issue the defendant will normally be required, by fact-intensive analysis, to demonstrate that the plaintiff meets one of the alternative tests of \textit{Rosenblatt}. In such cases the burden is the same as that imposed implicitly by the Court in the “four horsemen” of “public figuredom” (\textit{Gertz, Firestone, Hutchinson, and Wolston}) and explicitly by the consensus of lower court decisional law.\textsuperscript{426}


\textsuperscript{424} See infra note 448.

\textsuperscript{425} The adoption of such a “bright line” rule is not specifically advocated here. See infra text accompanying notes 468-93.

\textsuperscript{426} See, e.g., Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 589 (1st Cir. 1980) (“particularized determinations of public figure status are the rule”). In implementing the fact-intensive analysis of functions and responsibilities of the public employee suggested in the text, the following non-inclusive (and somewhat overlapping) list of areas of inquiry may be helpful: the source of the appointment and the nature of the appointment approval process, if any; the proximity of the position to the “core” functions of government; the extent of the appointee’s independent discretion, policy-making responsibilities, supervisory control over others, administrative functions, and authority to legally bind the employer; the extent and content of constitutional, statutory, and regulatory specification of functions and responsibilities; the nature of the appointee’s legal relationship to government and the source and nature of funding thereof (independent contractor? hourly employee? etc.); the nature and extent of the appointee’s control over public monies; the number of employees performing the same or comparable job; whether the governmental nature of the job is essentially fortuitous or irrelevant (i.e., the functions are the same as those in the private sector and the only or major distinguishing factor is the source of funding); the degree of immunity the appointee would have as defendant; the sensitivity of the functions of the position and the extent of public visibility of the appointee; access to the press; and the potential for social harm from abuse of the appointee’s position, the
—4. Courts must not apply the *Rosenblatt* alternative “independent interest” test offhandedly. As delineated in detail above, the Supreme Court has clearly repudiated the notion that that test—“such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications of all government employees”427—could be met by press-generated newsworthiness, i.e., that a statement defaming “some person in government employ catches the public’s interest.”428 Such a “public employee” plus “newsworthiness” definition of “public official” status “virtually disregard[s] society’s interest in protecting reputation.”429 Consequently, in order to constitute a “public official” under this test the governmental position “must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.”430

Although this extremely important footnote in *Rosenblatt* has been somewhat cavalierly ignored as extraneous dicta by some,431 it is clear from a careful reading of the opinion that the Court

number of persons potentially affected thereby, and the nature of interests potentially affected thereby. The latter factor must be utilized, however, with extreme care, as it has the potential for consuming the limitations on “public official” imposed by *Rosenblatt* and effectively resulting in a reaffirmation and application of a form of the “governmental affiliation” approach criticized throughout this Article. Clearly, the “night watchman” at a secure military facility or a clerk-typist whose boss has access to classified information both have an enormous capability for injury to the public interest. However, undoubtedly, they are not “public officials” under *Rosenblatt*. Moreover, in assessing this factor courts must beware of attaching too much significance to the subjective perspective of the individual victim of the appointee’s actions. To the victim, said appointee may, indeed, “epitomize” government, but such an approach would result in “bootstrapping” all government functionaries into “public officials” because of the perceptions of their victim(s). See Press, Inc. v. Verran, 569 S.W.2d 435, 443 (Tenn. 1978) (to the victims of a social worker’s alleged abuse of authority, she was “the very epitome of government”). Under this approach a janitor at an elementary school charged with molesting a student might be termed a “public official,” an assuredly anomalous result. Note that the *Rosenblatt* alternative tests both refer to “the public” (not the victim) and utilize an objective standard for applying the “public official” status, which, if properly applied, would preclude the latter result. See supra text accompanying notes 47-62.

428. Id. at 87 n.13 (emphasis added).
429. Id.
430. Id. (emphasis added).
431. See L. Tribe, supra note 4 at 640, citing only Eaton, supra note 4, but failing to note that Eaton concluded that *Gertz* may “signal a retreat” from the “governmental affiliation” test. Eaton, supra note 4, at 1447.
intended to eliminate the spectre of subjecting all governmental employees to the demanding *New York Times* standard through media-generated newsworthiness. This “footnote thirteen” qualification constitutes a pivotal element in this delicate balancing of the competing reputational and free expression interests involved in the determination of status issues. In any event, the “footnote thirteen” qualification appears to have been implicitly revived by the Chief Justice’s pregnant “footnote eight” in *Hutchinson* and the Court’s oft-reiterated rejection of bare newsworthiness in “public figure” cases: “A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.” 432 In light of the Supreme Court’s equation of “public officials” and “public figures” with respect to the primary “assumption-of-risk” and peripheral “access” rationales and its repudiation in *Gertz* of the “newsworthiness”-“public interest” approach of *Rosenbloom*, it is virtually inconceivable that the present Court would discard the “footnote thirteen” caveat delineated above. Rather, it appears undeniable that “footnote thirteen” is alive and well and has two functions parallel to the criteria for “public figuredom” discussed above. *First*, it repudiates resoundingly the adequacy of newsworthiness regarding a public employee as a sufficient basis for a finding of “public official” status. *Second*, it illustrates clearly the insufficiency of a vague “concern about general public expenditures”433 to meet the “independent interest” test. The latter proposition is well illustrated by the New Hampshire Supreme Court’s decision on remand in *Rosenblatt*, where it incisively concluded that the “independent interest” test would not be met by evidence of newsworthiness plus a demonstration that plaintiff had “general charge of financial transactions” at the recreation area and “general supervisory powers” subject to the local county commissioners’ “direction.” 434

The aforesaid principles deducible from a careful reading of *Rosenblatt*, particularly in light of the lessons clearly evidenced by the Court’s “public figure” cases, have been generally grossly misinterpreted, flagrantly misapplied, or blatantly ignored in lower

434. Baer v. Rosenblatt, 108 N.H. 368, 370, 237 A.2d 130, 132 (1967). The court remanded the case to the trial court to determine whether the other Supreme Court test could be met by defendant. *Id.* at 372, 237 A.2d at 133.
court decisions. A trio of examples elucidates the nature of the trap many courts have fallen into and will illustrate the beneficient results of rejuvenation of the "independent interest" test with its "footnote thirteen" caveat.

In Johnston v. Corinthian Television Corp., the Oklahoma Supreme Court held, without even mentioning "footnote thirteen," that a high school wrestling coach was a public official under the "independent interest" test. The Oklahoma court cited, as evidence in support of its conclusion, the numerous withdrawals from the teacher-coach's classes as a result of the adverse publicity generated by the press regarding alleged physical abuse, with the tacit approval of the plaintiff—a student on the wrestling team.

In another decision, Clawson v. Longview Publishing Co., the Supreme Court of Washington held that the administrator of a county motor pool was a "public official" with regard to the controversy generated by allegations that he had performed private repairs on a sheriff's son's car with public materials. Although admitting that the administrator had a public function "near the bottom" of the public employment hierarchy, the court found an extremely close "nexus" between the plaintiff's position and the "defamatory allegations" which were directly relevant to his job performance. Citing the "potential for abuse" to which the administrator "did, in fact, succumb," it found that potential to be a "matter of public interest" "quite apart" from the specific malfeasance charged in the article, because of the "legitimate and continuing interest" in how tax dollars are spent by governmental employees having authority to "utilize the public purse." From a close reading of the opinion it is clear that its two predominant foci were the public interest generated by the controversy and the generalized interest in public expenditures—both of which are inadequate, as a matter of law, under the Rosenblatt criteria. Justice Rosellini, in a well reasoned, biting dissent, concluded that the majority had given "slight heed" to Rosenblatt and that there was a dearth of evidence to demonstrate "any interest" in the plaintiff's position prior to the controversy developed by the press. Ac-

437. Id. at 417, 589 P.2d at 1231. For a criticism of this nexus test, see supra note 387.
438. Clawson, 91 Wash. 2d at 417, 589 P.2d at 1228.
according to the dissent, the majority unduly emphasized the potential for abuse of his position for private gain. Although such potential might have "affected his performance of his duties," it "was not a characteristic of his position . . . it is that type of characteristic which determines whether a position is one commanding the attention of the public."\

In a third egregious example, Green v. Northern Publishing Co., Inc., the Alaska Supreme Court admitted that an independent contractor-physician supplying medical care to Anchorage area jails was generally "not highly visible in the community," "usually attracted little 'public scrutiny,' " and that the plaintiff's position did not receive "critical public attention" until the unforeseen demise of a patient under his ostensible care resulted in a public uproar. Despite the court's apparent admission that the case was one inappropriate for the "independent interest" test and its concession that the case was arguably one within the "footnote thirteen" caveat, the court curiously concluded that the "independent interest" test was met. The court, in essence, disregarded the "independent interest" test. As one concurring judge tersely commented, the majority's analysis of the "public official" standards constituted a "very convincing argument" that the plaintiff was not a "public official."

5. State courts should keep in mind that the Supreme Court's decisional law in the realm of libel clearly imposes only minimal federal constitutional (and, in the area of labor law, statutorily preemptive) restraints on defamation actions brought under state law. Consequently, it is beyond peradventure that state courts have the undoubted prerogative, as a matter of state constitutional law or public policy, to afford defamation defendants protection

439. Id. at 424, 589 P.2d at 1231 (Rossellini, J., dissenting) (emphasis added). He rejected the laundry list of "governmental affiliation" cases cited by the majority as "rather curious decisions" in which "[n]ot surprisingly the rationale . . . if any, is not presented in the opinion."


441. The court blithely concluded that the "independent interest" test was not foreclosed by the "normally quiescent character of the public job." Green, 655 P.2d at 741.

442. Id. at 744 n.1 (Compton, J., concurring) (dicta).

443. See Letter Carriers v. Austin, 418 U.S. 264, 281-86 (1974). See also supra notes 47 & 140. The Court has recently acknowledged that the Linn-Letter Carriers rule for labor disputes protected under federal law also has "constitutional overtones." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 309 n.16 (1979).
in excess of that mandated by the Supreme Court’s decisions.\textsuperscript{444} Indeed, one state’s premier decision extending “public official” status to a social worker (and opining that exemptions from such status for any public employee must be strictly scrutinized) appears to reflect substantial reliance on its state constitution.\textsuperscript{446} While this additional protection would require reasoned explanation of the justifications warranting such preferred stature for defamation defendants (a particularly difficult hurdle for those states incorporating into their constitutions explicit “abuse” limitations on the exercise of freedom of expression),\textsuperscript{446} there is clearly no

\textsuperscript{444} Mashburn v. Collin, 355 So. 2d 879, 891 (La. 1977) (the first amendment sets “only minimum safeguards;” it is “permissible and perhaps appropriate for a state to grant broader protection” under its own constitution and laws) (dicta); Ferri v. Ackerman, 444 U.S. 195, 198 (1979) (“W]hen state law creates a cause of action, the state is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law”); Steaks Unlimited, Inc. v. Deane, 623 F.2d 264, 279 & n.74 (3d Cir. 1980) (since the first amendment does not mandate a cause of action for defamation, a state may limit such a cause of action—by a state “shield” law—to “promote other social purposes”); Harris v. Tomczak, 94 F.R.D. 687, 690 n.3 (E.D. Cal. 1982) (state can broaden the definition of “public figure” beyond first amendment “constitutional minima”) (dicta); Maressa v. New Jersey Monthly, 89 N.J. 176, 188-89, 445 A.2d 376, 384-85 (shield law upheld—rejected contention plaintiff had a state constitutional entitlement to bring a libel action), cert. denied, 459 U.S. 907 (1982). And see the minority view prohibiting all punitive damages in libel cases as a matter of state law: Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 860, 330 N.E.2d 161, 169 (1975); Wheeler v. Green, 286 Or. 99, 118-19, 593 P.2d 777, 789 (1979); Taskett v. King Broadcasting Co., 85 Wash. 439, 447, 546 P.2d 81, 86 (1976); Peisner v. Detroit Free Press, Inc., 104 Mich. App. 59, 68, 304 N.W.2d 814, 819 (1981). See also Ferguson v. Watkins, 448 So. 2d 271, 278-79 (Miss. 1984) (adopting a broader definition of “vortex public figure” as a matter of state law than would be constitutionally mandated by the first amendment).

\textsuperscript{445} In Press, Inc. v. Verran, 569 S.W.2d 435, 441-42 (Tenn. 1978), the court referenced § 19, article I of the state constitution—“That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of government, and no law shall ever be made to restrain the right thereof”—in support of its conclusion that the state constitutional counterpart was a “substantially stronger provision,” in that it was “clear and certain, leaving nothing to conjecture and requiring no interpretation, construction or clarification.” In light of the latter “any infringement” upon freedom of expression was “constitutionally suspect” with a threshold presumption of invalidity. It is clear that, although the court rests its conclusion jointly on commingled state and federal grounds, it placed heavy reliance on the language of the aforesaid state constitutional provision.

federal constitutional barrier to adoption of a mere "governmental affiliation" test (government employment plus a "newsworthiness"-"public interest" addendum), or the development on a selective basis of additional "per se" or "bright line" categories (e.g., all police officers, whatever their level in the law enforcement hierarchy)—as a matter of state law.

As one court vividly stated in another context, state courts are not required to "ride with the Federales" when providing more expansive protection to constitutional liberties than required by the federal constitution. However, it is incumbent upon the state courts (or federal courts anticipating and applying state law in diversity cases) to elucidate clearly and unambiguously the basis or bases for their decisions in light of the Supreme Court's recent indication that "public official" does not connote "public employee" under the first amendment.


449. Kentucky State Bd. for Elementary & Secondary Educ. v. Rudasill, 589 S.W.2d 877, 879 n.3 (Ky. 1979) (Kentucky constitutional religious freedom provision held to be more restrictive of state regulation of private schools than its federal counterpart), cert. denied, 446 U.S. 938 (1980).

450. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979). Otherwise, the Supreme Court may grant review. See Michigan v. Long, 103 S. Ct. 3469, 3476 (1983), where the Court indicated that it would not review state court decisions indicating "clearly and expressly" alternative "bona fide separate, adequate, and independent" state and federal...
B. Application of a Revivified Rosenblatt

Application of the above conceptual framework for revitalization of *Rosenblatt* to three common categories of defamation plaintiffs—educators, attorneys, and law enforcement personnel—will aptly illustrate how “public official” status determinations should be handled. Although the early decisions involving the first group, educators, mirrored the mechanistic application of the “public official” appellation of the case law majority view, more recent decisional law has trenchantly criticized this perspective and some decisions have declined to impose on the garden variety teacher or university faculty member the almost insuperable obstacles to effective relief posed by *New York Times*. In the words of one decision, the level of “governance or control” which a classroom educator has over “the conduct of government is at most remote and philosophical” and cannot be justified by any contention of the assumption of risk of “nonmalicious defamation.” Any grounds, but would review such decisions where the “adequacy and independence” of the state ground is “not clear from the face of the opinion.” In such cases where federal and state grounds were commingled ambiguously, it would “accept as the most reasonable explanation” that the state court felt compelled to so hold by the federal precedents. Where, however, the state court used federal decisions only as precedential authority of equal calibre to other states’ opinions for “purpose of guidance,” the state should make such “clear” by a “plain statement” in its decision in the interest of “both justice and judicial administration.”

451. See L. Tribe, *supra* note 4, at 643-47. The leading decision for the view that all teachers are public officials is Basarich v. Rodeghero, 24 Ill. App. 3d 889, 892-93, 321 N.E.2d 739, 742 (1974). This decision is of dubious value as a precedent regarding garden variety teachers for a number of reasons in addition to its basic “governmental affiliation” substratum. First, the plaintiffs therein were suing on behalf of the teachers’ federation, a factor which may have influenced the court’s decision. Note that there has been significant case law finding unions or organizations of low echelon governmental employees to be public persons. See *infra* note 498. Second, the court commingled the “public official” standard with “public interest” analysis, suggesting that it was influenced, in part, by post-*Gertz* viability of *Rosenbloom*—the teachers and coaches were “‘public officials’ or ‘public figures,’ or involved in matters of general interest. . . .” Third, the *Basarich* case may not represent controlling law in Illinois. See McCutcheon v. Moran, 99 Ill. App. 3d 421, 423-24, 425 N.E.2d 1130, 1192-93 (1981) (rejected treatment of a teacher-principal as a “public official”); Johnson v. Board of Junior College Dist. No. 508, 31 Ill. App. 3d 270, 276 & n.1, 334 N.E.2d 442, 447 & n.1 (1975) (former junior college professors were not “by that very fact public officials” but were public figures regarding their active involvement in the textbook controversy on campus).

452. See *supra* notes 327 & 329 and accompanying text.

other result would present "a real and intolerable danger" to that intellectual creativity which is a precondition to true teaching effectiveness. However, non-elected educators with substantial, policy-making positions in the educational hierarchy—a state university president, dean of a state college, or superintendent of a junior college district, or a county or city school system—can be justifiably treated as "public officials" under either Rosenblatt test, as such educators easily fit within the raison d'etre of New York Times: the "freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government."

Elementary or high school principals would be included here as a generality within the non-"public official" grouping. However, the defendant may, in an unusual case, be able to develop a documented case for treatment of such an educator as a "public official" through the fact-intensive assessment of functions and responsibilities suggested above.

A parallel analysis applies to the different varieties of government attorneys. Clearly, federal or state legal counsel with substantial control over important aspects of the judicial system and significant decision-making or policy-making input into the opera-

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454. Id.
455. See supra note 239.
456. See supra note 275. In Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 204, 304 S.E.2d 593, 596-97 (1983), rev'd on other grounds, 310 N.C. 312, 312 S.E.2d 405, cert. denied, 105 S. Ct. 187 (1984), the lower court treated plaintiff therein, an associate dean of the college of arts and sciences of the University of North Carolina at Chapel Hill, as a "public figure" for "purposes of this appellate review," and opined that he appeared to come under either of the types of "public figure" described in Gertz. On appeal, the state supreme court reversed on other (common law) grounds, noting that it need not resolve the first amendment issues therein. Renwick, 310 N.C. at 315 n.1, 312 S.E.2d at 408 n.1. See also Byers v. Southeastern Newspapers Corp., 161 Ga. App. 717, 721, 288 S.E.2d 698, 700-01 (1982), where the court declined to resolve the issue of whether the dean of Savannah State College was a public official and held him to be a "limited purpose" public figure.
457. See supra note 274 and accompanying text.
458. See supra note 275.
459. Franklin, 97 Cal. App. 3d at 924, 159 Cal. Rptr. at 136 (1979) (emphasis original).
460. See supra notes 303-04 & 327-28. See also McCutcheon, 99 Ill. App. 3d at 424, 425 N.E.2d at 1133, where the court concluded that the connection that a public school teacher or principal has with "the conduct of government is far too remote . . . to justify exposing these individuals to a qualifiedly privileged assault . . . upon reputation."
tion thereof—the U.S. Attorney General, a U.S. attorney, a county or city chief prosecutor, chief counsel for a congressional committee, or an appointed federal special prosecutor—are fairly deemed "public officials." At the other extreme, the functions of an assistant public defender or an appointed defense counsel paid with government funds are "akin to that of private counsel" with a "principal responsibility . . . to serve the undivided interest of his client" and are thus indistinguishable from the attorney Gertz, a private citizen. In the gray area between these two extremes are the myriad part-time and full-time attorneys employed by government at the local level. A good example of well-reasoned jurisprudence in this gray area is a recent federal decision in which the court indicated "serious doubts" whether the "public official" status, with its resultant loss of an effective remedy for defamation, was necessitated by first amendment considerations with regard to part-time or full-time town attorneys.
or village attorneys. The defendant may, however, be able to demonstrate that the particular functions and responsibilities of such an attorney qualify him as a "public official" through a fact-intensive delineation of his authority in accordance with the analysis proffered above.

The last category, law enforcement personnel, presents the most significant difficulties in applying the revitalized Rosenblatt criteria. Doubtlessly, police officials at the upper levels with important supervisory and policy-making positions—the director of the F.B.I., the chief of police of a large or even a small city, and other comparably ranked law enforcement professionals—present no obstacle to application of the "public official" designation. However, the prolific and ever-burgeoning case law generally draws no distinction between the latter upper echelon police officials and the street level beat policeman, highway patrolman, or undercover agent. As one court cryptically stated: "A deputy sheriff, a deputy marshall, a police officer, from the lowest to the highest rank in municipalities, are public officials." The discussion in the decisional law regarding application of the Rosenblatt criteria has generally been quite superficial and few decisions have even mentioned the discussion in that decision rejecting application of "public official" status to Rosenblatt's "footnote thirteen" "night watchman," a close relative of these lowest echelon police officers. The courts have generally followed the rationale of the leading case of Coursey v. Greater Niles Township Publishing Co. and have considered some of the following factors in ac-

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467. 692 F.2d at 273 n.5.
469. See supra note 269 and accompanying text.
470. See supra note 270 and accompanying text.
471. See supra note 287 and accompanying text. This non-differentiation view has been adopted in W. Prosser & W. Keeton, The Law of Torts 806 (5th ed. 1984).
472. Ammerman v. Hubbard Broadcasting Co., 91 N.M. 250, 253, 572 P.2d 1258, 1261 (Ct. App. 1977), writ denied (1977), cert. denied, 436 U.S. 906 (1978). See also Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981) ("Street level policemen, as well as high ranking officers, qualify as public officials" under Rosenblatt); Roche v. Egan, 433 A.2d 757, 762 (Me. 1981) ("[E]very court that has faced the issue has decided that an officer of law enforcement, from the ordinary patrolman to Chief of Police is a 'public official'.").
473. The court of appeals held that a patrolman, "the lowest in rank of police officials," could not be considered a "public official" under the Rosenblatt "substantial responsibility" test. Coursey v. Greater Niles Township Publishing Co., 82 Ill. App. 2d 76, 81, 227 N.E.2d 164, 168 (1967). The Illinois Supreme Court appears to have accepted the conclusion that said test was not met in the case of a patrolman, who would have "slight
cording "public official" status to the garden variety law enforce-
ment officer: the general public interest in information regarding
abuse of a police officer's authority;\textsuperscript{474} the potential power exer-
cised by the police over the daily lives of the citizenry;\textsuperscript{475} the great
potential for societal harm from abuse of a police officer's author-
ity;\textsuperscript{476} the "peculiarly 'governmental'" or essential nature of po-
lice functions in a democratic form of government;\textsuperscript{477} the assumed
risk of criticism as a \textit{quid pro quo} of the "honor and respect" they

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voice in setting departmental policy," and appears to have relied solely on the "independ-
ent interest" test:

[H]is duties are peculiarly "governmental" in character and \textit{highly charged with
the public interest}. It is indisputable that law enforcement is a primary function
of local government and that \textit{the public has a far greater interest in the qualifica-
tions and conduct of law enforcement officers, even at, and perhaps especially at, an
"on the street" level than in the qualifications and conduct of other comparably low-
ranking government employees performing more proprietary functions. The abuse of a
patrolman's office can have great potentiality for social harm; hence, public dis-
cussion and public criticism directed towards the performance of that office
cannot constitutionally be inhibited by threat of prosecution under State libel
laws.

\textit{Coursey, 40 Ill. 2d at 265, 239 N.E.2d at 841 (emphases added)}. An analysis of the prece-
dents cited therein discloses that the Illinois Supreme Court appears to have given some
weight to the Supreme Court's acceptance of the state courts' conclusion in the \textit{St. Amant}
case, \textit{see supra} text accompanying notes 87-89, that the deputy sheriff was a public official,
and failed to note that, of the remaining "variety" of "law enforcement" cases cited in its
opinion, \textit{all} involved officers who might justifiably be deemed to have substantial substanc-
emaking and supervisory functions within the police hierarchy: Henry v. Collins, 380 U.S.
356 (1965) (chief of police), \textit{see supra} text accompanying notes 45-46; Pape v. Time, Inc.,
354 F.2d 558 (7th Cir. 1965) (the deputy chief of detectives of Chicago), \textit{see supra} notes 98
& 270; and Gilligan v. King, 48 Misc. 2d 212, 216, 264 N.Y.S.2d 309, 313-14 (Sup. Ct.
1965) (involved police lieutenant-plaintiff whose responsibilities were not discussed), \textit{aff'd},

\textit{474. Gray, 656 F.2d at 591 ("The strong public interest in ensuring open discussion
and criticism of his qualifications and job performance warrant the conclusion that he is a
has "a significant interest in having access to information that concerns the abuse of power
by its police officers, the very individuals expected to protect each individual from the
abuses of others")}.

\textit{475. Roberts, 525 F. Supp. at 991; Gray, 656 F.2d at 591 (police officer "possesses both
the authority and the ability to exercise force"); Roche, 433 A.2d at 762 (police detective is
"in fact, and also is generally known to be, vested with substantial responsibility for the
safety and welfare of the citizenry in areas impinging most directly and intimately on daily
living: the home, the place of work and of recreation, the sidewalks and the streets")}.

\textit{476. Gray, 656 F.2d at 591 ("Misuse of his authority can result in significant depriva-
tion of constitutional rights and personal freedoms, not to mention bodily injury and finan-
potential for harm"), \textit{cert. denied}, 294 N.C. 182, 241 S.E.2d 517 (1978).}

\textit{477. Coursey, 40 Ill. 2d at 265, 239 N.E.2d at 841}.}
are entitled to; the high public visibility; the accoutrements of office—a firearm and a badge; the requirement of an oath of office; derivative authority through their ranking superior; the greater interest in police officers than “other comparably low-ranking” employees functioning in “more proprietary” capacities; the necessity of public criticism and the inhibiting effect thereon of potential libel actions; and the uniformity of the decisional law.

Having carefully perused the plethora of decisions involving law enforcement personnel, it appears that there are a number of serious difficulties with the almost universal posture of the case law extending “public official” status to all law enforcement officers, regardless of their position and functions within the police hierarchical regime. Numerous decisions have been substantially influenced by the false impression that St. Amant v. Thompson was a clear holding by the Court that a deputy sheriff was a “public official.” Others have failed to discern the quantum difference in functions, authority, and responsibilities between the chief of police in Henry v. Collins and the deputy chief of detectives in Time, Inc. v. Pape and the lowly police officer at the bottom of

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479. Dellinger, 34 N.C. App. at 489, 238 S.E.2d at 789; Gray, 656 F.2d at 591.

480. Roche, 433 A.2d at 762, 763 n.4.

481. Ammerman, 91 N.M. at 256, 572 P.2d at 1260.

482. Thompson v. St. Amant, 250 La. 405, 422, 196 So. 2d 255, 261 (1967) (concluding that the deputy’s acts were the acts of the sheriff); Cline v. Brown, 24 N.C. App. 209, 215, 210 S.E.2d 446, 449, cert. denied, 238 N.C. 412, 211 S.E.2d 793 (1975).

483. Coursey, 40 Ill. 2d at 265, 239 N.E.2d at 841.

484. Gray, 656 F.2d at 591 (“strong public interest in ensuring open discussion and criticism of his qualifications and job performance”); Coursey, 40 Ill. 2d at 265, 239 N.E.2d at 841 (“public discussion and public criticism directed towards the performance of that office cannot constitutionally be inhibited by threat of prosecution under state libel laws”).

485. Gray, 656 F.2d at 591; Roche, 433 A.2d at 762; Cline, 24 N.C. App. at 213, 210 S.E.2d at 448; Starr v. Beckley Newspapers Corp., 201 S.E.2d 911, 913 (W. Va. 1974) (court felt “impelled” to hold police sergeant a “public official” by Supreme Court decisions and decisions of “numerous courts throughout the land”); Reed v. Northwestern Publishing Co., 11 MEDIA L. REP (BNA) 1382, 1384-85 (Ct. App. Ill. 1985) (court followed Coursey though noting that the Supreme Court had never decided a case of a police officer of “relatively low rank”).

486. See, e.g., Colombo v. Times-Argus Ass’n, 135 Vt. 454, 456, 380 A.2d 80, 83 (1977); Gray, 656 F.2d at 591; Starr, 201 S.E.2d at 913.

487. See supra text accompanying notes 45-46. See also Colombo, 135 Vt. at 456, 380 A.2d at 83.

488. Gray, 656 F.2d at 591; Starr, 201 S.E.2d at 913.
the "totem pole" of the police infrastructure. Most suprisingly of all, the cases have rarely endeavored to confront and distinguish the "night watchman" discussion of Rosenblatt. Can the latter federal security officer be distinguished in any principled fashion from the beat policeman, the undercover agent, the radio dispatcher, the part-time deputy, the uniformed taxicab inspector, or the officer in the communications department (or their counterparts in the military)?

It is extremely doubtful that such police officers come within the "motivating force" of Rosenblatt, i.e., "a strong interest in debate about those persons who are in a position significantly to influence the resolution of [public] issues." Recent decisional law reflects a reawakening of interest in this issue and suggests that the mass of case law to the contrary will not preclude courts from adopting the instinctive fairness of the Kentucky decision the year after New York Times, in which the court refused to apply the "public official" status to a garden variety policeman on the ground that the latter decision did not justify an "open season" on anyone who "happens to be a public servant."

CONCLUSION

This Article has demonstrated that the Supreme Court's limited decisional law in the realm of "public officialdom" does not justify the overly expansive definition of that status appended by oftentimes non-discriminating courts, which have accorded only superficial treatment to the Rosenblatt criteria—standards never intended to encompass all public employees or servants. With Gertz's repudiation of the "public interest" sojourn of the plurality in Ro-


490. See supra note 287.


492. See supra notes 320-22 and accompanying text, and Berkey v. Delia, 287 Md. 302, 312, 413 A.2d 170, 180 (1980) (court left "open" the issue of whether a policeman "at the very bottom level" is a "public official"); DiLeo v. Koltnow, 613 P.2d 318, 322-23 (Colo. 1980) ("unnecessary" to decide "public official" issue—discharged policeman held to be a "limited purpose" public figure).

Defaming Public Officials

Senbloom, the Court has clearly retreated to the milieu prior to Rosenbloom, where only those "matters bearing broadly on issues of responsible government" are subject to the New York Times standard and only when the individuals involved therein are "public figures" or bona fide "public officials"—the latter category including only those "responsible for government operations" and "in a position significantly to influence the resolution of [public] issues." Consequently, a dispassionate reading of the Rosenblatt decision (with its unequivocal rejection of the anyone-on-the-public-payroll definition of "public official") and thoughtful application of its two-part alternative test for "public official," infused with the Gertz substratal "assumption of risk" "compelling normative consideration" for "public" statuses, is mandatory for judges and attorneys attempting to fathom the parameters of New York Times in the post-Gertz era. This is the lesson of "footnote eight" of Hutchinson. Enlightened application of these reinvigorated Rosenblatt criteria will eventually result in a resounding repudiation of the bare "governmental affiliation" approach (and the "domino effect" this mechanistic test has had on the decisional law) and will eliminate the debilitation of the quasi-constitutional interest in reputational redress in cases of many deserving public employee-plaintiffs—heretofore left remediless, as "but gilded loam or painted clay."

494. This proposition was rejected in the plurality opinion in Rosenbloom v. Metromedia, 403 U.S. 29, 42 (1971), but has effectively been reaffirmed by Gertz and its progeny. See Seegmiller v. KSL, Inc., 626 P.2d 968, 973-74 (Utah 1981) ("[I]nformation concerning public officials and public figures is more likely to be relevant in the decision-making process of self-government . . . .").

495. Rosenblatt, 383 U.S. at 85.

496. Gertz, 441 U.S. at 344. Note that the Supreme Court has recently added a novel rationale to its repertoire of arguments supporting state defamation law: "False statements of fact harm both the subject of the falsehood and the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens." Keeton v. Hustler Magazine, Inc., 104 S.Ct. 1473, 1474 (1984) (dicta).


498. W. Shakespeare, The Tragedy of King Richard III, Act I, scene 1, line 179. Under the framework proposed above such mere governmental affiliates who are not "public officials" will be subject to New York Times only if state law so requires or if the plaintiff constitutes a "public figure." A number of cases have focused on the latter status and found low-ranking government employees to be "limited purpose" public figures. See Anderson v. Low Rent Hous. Comm'n, 304 N.W.2d 239, 245 (Iowa) (secretary), cert. denied, 456 U.S. 1086 (1981); Oaks v. City of Fairhope, 515 F. Supp. 1004, 1046-47 (S.D. Ala. 1981) (former librarian); Romero v. Abbeville Broadcasting Service, Inc., 420 So. 2d 1247, 1249 (La. Ct. App. 1982) (deputy sheriff-jailer); DiLeo v. Koltnow, 613 P.2d 318,
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322 (Colo. 1980) (discharged policeman); El Paso Times, Inc. v. Trexler, 447 S.W.2d 403, 405 (Tex. 1969) (university professor); Johnson v. Board of Junior College District No. 508, 31 Ill. App. 3d 270, 276, 334 N.E.2d 442, 447 (1975) (junior college teachers). And see the cases involving unions and organizations of such low-ranking governmental servants. Guam Fed’n of Teachers, Local 1581 v. Ysrael, 492 F.2d 438, 439 (9th Cir. 1974) (teachers' union and seven of its officers “in agreement” they are 'public officials' . . . or at least 'public figures’ ”), cert. denied, 419 U.S. 872 (1974); National Ass’n of Gov’t Employees v. Central Broadcasting Co., 396 N.E.2d 996, 1002 n.12 (Mass. 1979) (national labor union with a local in the city was a public figure of “limited range” if not an “all purpose” public figure), cert. denied, 446 U.S. 935 (1980); City Firefighters Union, Local 28 v. Derci, 104 Misc. 2d 498, 504, 428 N.Y.S.2d 772, 775-76 (Sup. Ct. 1976) (firemen’s and patrolmen’s unions and officers held to be public figures); Tilton v. Cowles Publishing Co., 76 Wash. 2d 707, 716, 459 P.2d 8, 14 (1969) (elected executive committee members (firemen and policemen) of public safety council held to be public figures), cert. denied, 399 U.S. 927 (1970).