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THE ENDURING ENIGMA OF PUBLIC OFFICIAL STATUS IN LIBEL LAW

*Nat Stern**

Under Supreme Court nomenclature, a public employee is not necessarily a "public official" as that term is used in constitutional defamation doctrine. The distinction is crucial, for only those governmental employees characterized as public officials must meet the typically insurmountable burden of proving that the defendant acted with actual malice: i.e., knowledge that the defendant's statement about the plaintiff was false or reckless disregard of whether it was false or not. For over a half-century, the Court's decision in Rosenblatt v. Baer has been the dominant authority to which courts have looked in determining public official status, and Garrison v. Louisiana the principal guide for deciding whether a specific libelous statement falls within the scope of the privilege. Decades of judicial experience applying these authorities, however, have left significant inconsistencies among courts, uncertainty to individual litigants, and grist for criticism that the range of comment on government employees subject to the actual malice rule has been stretched beyond the bounds originally contemplated by the Court. Any of these developments might induce the Court to revisit and revise the doctrine governing defamation of public employees.

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INTRODUCTION

In *New York Times Co. v. Sullivan*,[1] the United States Supreme Court famously ruled that the First Amendment

> require[s] . . . a federal rule 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.[2]

The Court, however, did not spell out the category of public employees who qualified as public officials for purposes of imposing the actual malice requirement.[3] That doctrinal gap was ostensibly later filled, in substantial part, two years later in *Rosenblatt v. Baer*.[4] Over a half-century after *Rosenblatt*, however, legions of cases addressing this question have not displayed a consistent collective approach to interpreting *Rosenblatt*'s criteria for public official status. Indeed, in some instances courts have relied little or not at all on the Court's ruling.

This Article examines themes arising from judicial efforts to give substance to the Court's indications of when persons holding governmental positions must demonstrate actual malice. Part I describes the Court's pronouncements on this determination as well as the extent to which lower courts have arguably adhered to a more expansive notion than the Court envisioned. Part II reviews contradictory holdings among courts—especially in the realm of education—resulting from the malleability of the Court's guiding principles. Exploring another facet of imprecision in this area, Part III discusses the sometimes-hazy line drawn between public officials and public figures, and the impact of this blurred boundary on courts' public official analysis. Part IV assesses attempts to bring more coherence and predictability to the designation of public officials as well as limitations on such efforts.

1. 376 U.S. 254 (1964).
2. *Id.* at 279–80.
3. *See infra* notes 26–28 and accompanying text.
4. 383 U.S. 75 (1966). *See infra* notes 29–38 and accompanying text.

I. THE PERVASIVE EQUATION OF PUBLIC EMPLOYMENT AND PUBLIC OFFICIAL STATUS

The problem of public official classification arises in the context of an oft-criticized body of defamation doctrine.[5] Bringing defamation within constitutional cognizance,[6] *New York Times* launched the Court's extended project of reconciling the First Amendment's guarantee of free expression with society's "pervasive and strong interest in preventing and redressing attacks upon reputation."[7] In the course of this enterprise, the Court developed rules establishing variable burdens of proof according to the nature of the plaintiff[8] and subject of the defamatory statement.[9] The Court also articulated interpretive principles to determine whether a statement constitutes a

5. *See, e.g.*, David A. Anderson, *Rethinking Defamation*, 48 ARIZ. L. REV. 1047, 1056–57 (2006) (charging that defamation law "gives us the worst of worlds"); Joshua B. Orenstein, Comment, *Absolute Privilege from Defamation Claims and the Devaluing of Teachers' Professional Reputations*, 2005 WIS. L. REV. 261, 267 (characterizing American defamation law as "a hodgepodge of complex and contradictory standards"); Mark P. Strasser, *A Family Affair? Domestic Relations and Involuntary Public Figure Status*, 17 LEWIS & CLARK L. REV. 69, 70 (2013) ("The Court's inability to adopt a coherent rationale combined with its unwillingness to apply the criteria that it has announced have made this area of the law chaotic."); Jeffrey I. Greenwood, Note, *Group Defamation, Power, and a New Test for Determining Plaintiff Eligibility*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 871, 878 (2018) (describing American defamation law as "notorious for inconsistencies and complexity").

6. The *New York Times* Court declared that "libel can claim no talismanic immunity from constitutional limitations." *N.Y. Times*, 376 U.S. at 269. With this proclamation, the Court effectively disavowed its earlier refusal to recognize defamation as a category of speech shielded by the First Amendment. *See* Beauharnais v. Illinois, 343 U.S. 250, 256–57, 266 (1952) (deeming defamatory statements outside the bounds of First Amendment protection); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (dictum) (Defamation forms "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality.").

7. Milkovich v. Lorain J. Co., 497 U.S. 1, 22 (1990) (quoting *Rosenblatt*, 383 U.S. at 86).

8. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that plaintiffs designated as private figures were not required to meet the actual malice standard imposed on public officials and public figures). *Gertz* is discussed at *infra* notes 305–313 and accompanying text.

9. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756–61 (1985) (plurality opinion) (clarifying that private figure plaintiff need not establish actual malice to recover presumed or punitive damages where defamatory statement does not involve matter of public concern).

defamatory falsehood[10] and issued guidance on the proper disposition of libel litigation.[11]

A. The Supreme Court's Limited Guidance

Lower courts determining whether a public employee must surmount the formidable barrier[12] of the actual malice standard have looked primarily to language found in *New York Times*, *Rosenblatt*, and *Garrison v. Louisiana*.[13] *New York Times* not only promulgated the actual malice requirement for public officials but also explained the principles that animated its adoption.[14] In *Rosenblatt*, one finds the Court's fullest (though not comprehensive) expression of the means for ascertaining public official status. *Garrison*—though perhaps not intentionally—opened the door to a wide-ranging conception of statements about public officials that would trigger the actual malice rule.

Unsurprisingly, the *New York Times* Court did not elaborate on the contours of the public official category because the plaintiff in that case was so obviously a member.[15] Instead, the Court was largely occupied with justifying its radical transformation of the common-law

10. Accusations that in context amount to rhetorical hyperbole, for example, will not incur liability based on their literal meaning. *See* Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 296 (1974) (referring to plaintiffs as "traitors"); Greenbelt Coop. Publ'g Ass'n v. Bresler, 398 U.S. 6, 13 (1970) (charging plaintiffs with "blackmail"). Suits will likewise be rejected where the statement at issue cannot reasonably be understood as "of and concerning" the plaintiff. *Rosenblatt*, 383 U.S. at 82–83; *N.Y. Times*, 376 U.S. at 288–92. Further, deliberate alteration of quotations attributed to the plaintiff is protected unless it materially changes the meaning conveyed by the plaintiff's actual words. *See* Masson v. New Yorker Mag., Inc., 501 U.S. 496, 517 (1991). Finally, to be actionable, statements must be susceptible to being proved false. *See Milkovich*, 497 U.S. at 19–20. (This principle, however, does not apply to statements—even if denominated as "opinion"—that imply false assertions of defamatory fact.).

11. *E.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255–56 (1986) (ruling that a defendant is entitled to summary judgment when a public figure's opposing affidavit fails to support a reasonable inference of actual malice by clear and convincing evidence).

12. Just how difficult an obstacle the actual malice rule poses was partly clarified four years after *New York Times* when the Court presented a relatively narrow notion of what qualifies as "reckless disregard" by a defendant. Neither a failure to investigate the truth of a defamatory statement nor animosity toward the plaintiff rises to this level. Rather, the Court demanded "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968); *see also* Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231, 232 n.1 (2002) (noting the conclusion by scholars that actual malice "dooms" plaintiff success).

13. 379 U.S. 64 (1964).

14. *See N.Y. Times*, 376 U.S. at 282.

15. *See id.* at 292.

regime of libel.[16] The case involved a libel suit over a civil rights fundraising advertisement in the New York Times that contained a number of minor inaccuracies in its criticism of the Montgomery Police Department.[17] The plaintiff, a Montgomery County Commissioner, recovered damages in state court on the theory that the advertisement's allegations of police misconduct effectively charged him with abuse of his authority in his capacity as the commissioner who supervised the police department.[18] On appeal, the Supreme Court ruled that even if the accusations could be understood as referring to Sullivan,[19] the evidence was insufficient to prove with "convincing clarity" that any of the defendants had acted with actual malice.[20]

The actual malice rule itself rested principally on two fundamental rationales. First, the First Amendment prizes at its core vigorous discussion of public issues untrammeled by interference by government censors. In Justice Brennan's memorable proclamation for the Court, the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[21] Second, as an instrumental matter, the Court recognized that such debate would not take place unhindered without effective safeguards.[22] To preserve in particular the ability to criticize government—the "central meaning"[23] of the First Amendment—the availability of the defense of truth alone would not

16. For an overview of the common law of defamation, see Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1351–64 (1975).

17. *See N.Y. Times*, 376 U.S. at 257–59. For example, though the police on three occasions were deployed in substantial numbers near the campus, they did not "ring" the campus as described in the advertisement. *Id.* at 259.

18. *Id.* at 257–58, 263–64.

19. The Court ultimately determined that the advertisement's accusations could not be reasonably construed as being "of and concerning" New York Times. *Id.* at 288–92.

20. *Id.* at 285–88.

21. *Id.* at 270. This passage can be regarded as a descendent of Justice Holmes's oft-quoted assertion that "the ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

22. *N.Y. Times*, 376 U.S. at 271–72.

23. *Id.* at 273.

suffice. Because factual errors are "inevitable in free debate," they must be afforded a measure of protection to ensure that free expression has the "breathing space" it needs to survive.[24] The actual malice rule would ensure that citizens critical of government would not be deterred from speaking out by the specter of strict accountability for their false statements.[25]

Since the claim in *New York Times* so clearly involved a public official and his official conduct,[26] the Court refrained from defining the scope of either term. The Court strongly suggested, however, that public officials comprise a subset of public employees when it declined "to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included."[27] Similarly, the Court's unwillingness to "determine the boundaries of the 'official conduct' concept"[28] on this occasion implied that it would later draw parameters of relevant behavior.

The Court's reticence in *New York Times* to describe the qualifications for public official status gave way in *Rosenblatt v. Baer*.[29] Although *Rosenblatt* did not provide a firm definition of the term, the Court offered what remains its most extensive guidance on identification of public officials. The case found a supervisor of a county ski resort to be a public official[30] as conceived by the First Amendment.[31] In arriving at this conclusion, the Court looked to the same considerations that had prompted application of the actual malice requirement to public officials in *New York Times*:

> There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution

24. *Id.* at 271–72 (internal citation omitted).
25. *See id.* at 279.
26. *See id.* at 271, 283 n.23.
27. *Id.* at 283 n.23.
28. *Id.*
29. 383 U.S. 75 (1966).
30. The Court found it irrelevant that the plaintiff had left this position at the time of litigation because the column at issue commented on his performance in the post, and public interest in the manner in which he had carried out his duties remained strong. *Id.* at 87 n.14. *See infra* notes 102–105 and accompanying text.
31. The Court rejected any suggestion that state-law standards could govern this question. *Rosenblatt*, 383 U.S. at 84.

> of those issues. . . . Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.[32]

Accordingly, designation as a public official would apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[33] In a later passage, the Court stated that the designation would apply "[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 public interest in the qualifications and performance of all government employees."[34] The Court did not address whether a plaintiff would have to meet both of these (potentially conflicting[35]) descriptions to be regarded as a public official or whether either could serve as an independent basis. It emphasized, however, that the determination would hinge exclusively on the nature of the position in question; "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."[36] Thus, a night watchman charged with stealing state secrets would not be compelled to prove actual malice simply because the accusation aroused public interest; imposing the rule in such circumstances would "virtually disregard society's interest in protecting reputation."[37] Although this single example did not define the point in the governmental hierarchy at which public employees ceased to be deemed public officials, it gave substance to *New York Times*'s intimation that lower-level government employees would be excluded from the category.[38]

The Court's opinions after *Rosenblatt* that touched on public official status did little to clarify its meaning. While the Court ruled

32. *Id.* at 85.
33. *Id.*
34. *Id.* at 86.
35. *See* David Finkelson, Note, *The Status/Conduct Continuum: Injecting Rhyme and Reason into Contemporary Public Official Defamation Doctrine*, 84 VA. L. REV. 871, 882 (1998) (noting situations in which the two criteria could produce different resolutions).
36. *Rosenblatt*, 383 U.S. at 87 n.13.
37. *Id.* at 86–87 n.13.
38. *See supra* note 24 and accompanying text.

that rationales for imposing the actual malice requirement on public officials also applied to political candidates,[39] other references to identification of public officials consisted of scattered and unrevelatory statements. In *St. Amant v. Thompson*,[40] for example, the Court "accepted" the Louisiana Supreme Court's determination that a deputy sheriff was a public official[41] and overturned the verdict in his favor for failure to prove actual malice.[42] The Court in *Gertz v. Robert Welch, Inc.*,[43] a case centering on the definition of public figures in libel suits,[44] summarily dismissed the defendant's additional contention that the plaintiff—a private attorney—was a public official.[45] As one court bluntly commented, *Gertz* "does nothing to add to the definition of a public official."[46] Perhaps most fittingly, the Court observed in dictum in another case concerned with public figure status: "The Court has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however."[47]

Even a court's determination that a plaintiff falls within these vague boundaries,[48] however, does not alone create the burden of showing actual malice. Under *New York Times*, the defamatory falsehood must relate to the plaintiff's official conduct for the rule to apply.[49] On its face, this element appears to substantially narrow the range of expression eligible for the privilege. Less than a year after *New York Times*, however, the Supreme Court in *Garrison v. Louisiana*,[50] signaled that the category was not confined to commentary on a public official's performance in office. Garrison, a Louisiana parish district attorney, had been convicted of criminal defamation for describing the parish's criminal court judges as

39. Monitor Patriot Co. v. Roy, 401 U.S. 265, 270–72 (1971) ("[P]ublications concerning candidates must be accorded at least as much protection . . . as those concerning occupants of public office.").

40. 390 U.S. 727 (1968).

41. *Id.* at 730.

42. *Id.* at 733.

43. 418 U.S. 323 (1974).

44. *See infra* notes 305–313 and accompanying text.

45. *See Gertz*, 418 U.S. at 351–52.

46. Carroll v. Jones, 74 Va. Cir. 466 (2008).

47. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

48. *Cf.* Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) ("[I]t is for the trial judge in the first instance to determine whether" the plaintiff is a public official.).

49. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

50. 379 U.S. 64 (1964).

inefficient, lazy, overly absent due to excessive vacations, and sympathetic to certain kinds of criminals.[51] Overturning the conviction, the Court might have construed the remarks as directly relating to the maligned judges' official conduct. Instead, the Court rested its application of the actual malice standard on the broader justification that it "protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."[52] Therefore, "anything which might touch on an official's fitness for office is relevant."[53]

Whether or not this formulation "eviscerated the official conduct requirement,"[54] it dramatically reduced the chances that a defendant might founder on the second prong of the *New York Times* test. The potential breadth of what might be considered as touching on fitness for office is suggested by *Garrison*'s insistence that this type of comment would not be precluded from privilege because of its impact on private aspects of an official's life:

> The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. . . . 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.[55]

Such expansive implications appeared to be borne out by the Court's sweeping decree in *Monitor Patriot Co. v. Roy*[56] that "a charge of criminal conduct, no matter how remote in time or place, can never

51. *Id.* at 64–66.

52. *Id.* at 77.

53. *Id.*

54. Finkelson, *supra* note 35, at 889 ("In other words, basically everything about a public official was fair game."). *But see* Jeffrey A. Plunkett, Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 OHIO ST. L.J. 149, 158 (1983) (asserting that because of criteria for privileged comments imposed by *New York Times* and *Garrison*, the actual malice standard "does not create an open season on public officials").

55. *Garrison*, 379 U.S. at 77; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974) (affirming the relevance and conception of fitness for office under *Garrison*).

56. 401 U.S. 265, 277 (1971).

be irrelevant to an official's or a candidate's fitness for office" for purposes of applying *New York Times*'s actual malice rule.[57]

B. Criticism

However indefinite the Court's instruction on the occasions when public employees must show actual malice, various commentators have found its outlines either insufficiently or overly protective of defamatory expression. Notably, the exclusion of lower-level government employees from the meaning of public official is regarded by some as an artificial constraint on the category. For example, Jeffrey Omar Usman has argued that the limitation contradicts both *New York Times*'s rationale of democratic self-governance[58] and the First Amendment's core protection of speech about the official conduct of government employees.[59] By contrast, David Elder would construe restrictively *Rosenblatt*'s reference to "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[60] Under Elder's approach, public school teachers, ordinary police officers, and others whom he regards as low-level employees would not be required to meet the actual malice standard.[61]

A similar divergence of opinion marks the extent to which *Garrison*'s concept of "fitness for office" shields criticism of public officials beyond commentary on their conduct in office. Jeffrey

57. *Id.*; *see also* Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) ("[U]nder any test we can conceive, the charge that a local mayor and candidate for a county elective post has been indicted for perjury in a civil rights suit is relevant to his fitness for office.").

58. *See* Jeffrey Omar Usman, *Defamation and the Government Employee: Redefining Who Constitutes a Public Official*, 47 LOY. U. CHI. L.J. 247, 262–64 (2015).

59. *See id.* at 277–86.

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

61. *See* DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 5:24, Westlaw (database updated Dec. 2020); *see also* Finkelson, *supra* note 35, at 873 ("Lower courts have not recognized that, in the context of lower-level government employees, the balance struck between the First Amendment interest in unbridled criticism of government and the states' interest in providing redress to citizens who suffer defamatory falsehoods does not warrant full constitutional protection for such statements."); Brian Markovitz, Note, *Public School Teachers as Plaintiffs in Defamation Suits: Do They Deserve Actual Malice?*, 88 GEO. L.J. 1953, 1962 (2000) ("In a sense, every public employee is a 'public official'—but in the idiom of libel law, the term has a much *narrower* sweep.") (emphasis added) (quoting Kassel v. Gannett Co., 875 F.2d 935, 939 (1st Cir. 1989)); Kate M. Adams, Comment, *(Re)defining Public Officials and Public Figures: A Washington State Primer*, 23 SEATTLE U. L. REV. 1155, 1172–73 (2000) ("[The] definition of public official should be appropriately *narrow*, in accordance with the importance of protecting reputation and the need to protect speech that is close to the political end of the continuum." (emphasis added)).

Abramson has argued that the near-immunity conferred by the actual malice standard to report on officials' private affairs discourages capable people from pursuing public office, distracts the public from focusing on public matters, and calls into question the press's special role in holding government accountable.[62] Others have also contended that the license for defamatory falsehood enabled by the "fitness for office" criterion strays too far from *New York Times*'s original limitation of protected libel to speech "relating to [an official's] official conduct."[63] On the other hand, it has been argued that latitude to report on officials' or candidates' private lives—especially sexual misconduct—supplies valuable information to citizens about the moral character and other traits of those who govern them.[64]

C. Lower Courts' Expansive Leanings

Whether fittingly or excessively, lower courts, on the whole, have tended toward maximalist constructions of both the category of public officials and the content of speech about them sufficiently pertinent to activate the actual malice rule. This pattern was already conspicuous over thirty years ago.[65] The chief distinction between these two

62. *See* Jeffrey Abramson, *Full Court Press: Drawing in Media Defenses for Libel and Privacy Cases*, 96 OR. L. REV. 19, 53–54 (2017); *see also* Douglas W. Kmiec, *A Reverent Reflection of the Splendid Scholarship of Martin Redish—Does Reexamining Commercial Speech Shed Light on the Regrettable Reliance Upon Lie & Insult in Political Campaigns?*, 25 WM. & MARY BILL RTS. J. 921, 942 (2017) ("[T]o the extent reputational harms are inadequately compensated under *New York Times Co.*, there will be ever greater reluctance for the highly qualified to stand for public election.").

63. *See, e.g.*, Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 TEMP. L. REV. 903, 924 n.136 (1989) ("[T]he 'official conduct' element places virtually no limitation on the applicability of the actual malice rule in public officials' defamation suits.").

64. *See, e.g.*, J. Skelly Wright, *Defamation, Privacy, and the Public's Right to Know: A National Problem and a New Approach*, 46 TEX. L. REV. 630, 640 (1968) ("The electorate looks at its public officials in the round. A false accusation that an official possesses an inordinate number of pornographic books and magazines in his home may be more destructive of his public reputation than an allegation of incompetence or even dishonesty.").

65. *See* Rodney A. Smolla, Dun & Bradstreet*,* Hepps*, and* Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1567–68 (1987) (noting courts' expansive interpretation of both requisites for actual malice requirement); *id.* at 1542 n.105 ("[R]elatively few government related defamation plaintiffs have been held not to be public officials subject to the *New York Times* standard."); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 636 (1978) ("'[P]ublic official' now embraces virtually all persons affiliated with the government . . . .").

components of the *New York Times* rule is that while courts have occasionally found a public employee plaintiff not to meet *Rosenblatt*'s description of public officials, rulings that the defamatory statement at issue bears an inadequate relationship to official conduct have been more unusual.

1. The Far-Reaching Class of Public Officials.

While *Rosenblatt*'s criteria suggest that public official designation is an exceptional status to be affirmatively demonstrated, reported cases reflect almost the opposite presumption. Courts' overwhelming inclination to label government employee libel plaintiffs public officials is evident not only by the proportion of holdings to this effect, but also by the range of bases for reaching this conclusion. Defendants enjoy a variety of means by which they can persuade courts that plaintiffs "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs,"[66] or that the plaintiff's position "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 public interest in the qualifications and performance of all government employees."[67]

Illustrating this phenomenon are the different sources on which courts can rely to discern the functions and authority exercised by the government employee in question. In many instances, simple inspection of the plaintiff's formal title and job description will convince the court to classify the plaintiff as a public official. The Fourth Circuit Court of Appeals did exactly that in *Baumback v. American Broadcasting Companies, Inc.*,[68] noting that the official job descriptions for the three positions that Baumback had held were available to the public.[69] Twenty years later, the same court stated that a county school board employee's title of Director of Budget & Finance "implies substantial control over the school system's budget and finances"—an implication corroborated by the position's job description.[70] Similarly, an Ohio court looked to the plaintiff's

66. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).
67. *Id.* at 86.
68. No. 97-2316, 1998 WL 536358 (4th Cir. Aug. 13, 1998).
69. *Id.* at *4.
70. Horne v. WTVR, LLC, 893 F.3d 201, 208–09 (4th Cir. 2018).

responsibilities under state law as a city law director to conclude that he qualified as a public official under *Rosenblatt*.[71] In *Bienvenu v. Angelle*,[72] the Louisiana Supreme Court went no further than reciting the plaintiff's title of parish Director of Public Welfare to determine that she qualified as a public official; the opinion contained no description—formal or otherwise—of the position.[73]

In other cases, it has been plaintiffs' own words that have stamped them as public officials who must show actual malice. Plaintiffs whose complaint offers an impressive picture of their duties—perhaps with a view toward heightening their stature and thus recovery for harm to reputation—may find their account invoked to cement their public official designation.[74] Other assertions of the importance of their position have preceded their libel action and almost certainly did not anticipate the suit. In a case involving the director of a county capital improvements department, the court considered a letter the plaintiff had written to the county commissioners.[75] The letter's characterization of its author's wide-ranging authority and duties led the court to decide that he was a public official.[76] When the former second-in-command of the New Orleans Levee Board Police brought a defamation claim, the court there also consulted his own version of his duties to determine his status for purposes of the litigation.[77] As portrayed in the plaintiff's earlier appeal of his dismissal, these duties were sufficiently extensive and important to persuade the court that he had been a public official.[78] It is tempting to speculate that such plaintiffs' robust description of their position in a non-libel context

71. *See* Lograsso v. Frey, 10 N.E.3d 1176, 1182 (Ohio Ct. App. 2014).

72. 223 So. 2d 140 (La. 1969), *overruled on other grounds by* Gonzales v. Xerox Corp., 320 So. 2d 163 (La. 1975).

73. *See id.* at 143.

74. *See, e.g.*, Moorhead v. Millin, 542 F. Supp. 614, 618 (D.V.I. 1982) (quoting plaintiff's complaint describing his duties as Director of the Division of Utilities and Sanitation of the Virgin Islands Department of Public Works to include "complete responsibility and authority in the following areas: potable water distribution, solid waste collection and disposal, sanitary sewage, salt water supply, cemetery services, and utility systems services").

75. Eubanks v. N. Cascades Broad., 61 P.3d 368, 373 (Wash. Ct. App. 2003).

76. *Id.* at 372–74; *see also* Lovingood v. Discovery Commc'ns, Inc., 800 F. App'x 840, 846 (11th Cir. 2020) (basing determination that plaintiff was public official on his past statements about his responsibilities at NASA).

77. Landrum v. Bd. of Comm'rs of the Orleans Levee Dist., 685 So. 2d 382, 391 (La. Ct. App. 1996).

78. *See id.*

includes a degree of self-serving exaggeration. If so, this indulgence of ego comes at the cost of erecting a daunting evidentiary barrier to recovery.

For some courts, the duties and powers actually carried out by the plaintiff have been key to concluding that the plaintiff was a public official. As the Tennessee Supreme Court put it, "[t]he right of the press to criticize government and its agents is not bound by the niceties of titles or the legalistic definition of duties."[79] In deciding that a city hearing officer was a public official, a New Mexico court took notice that her performance in that role revealed that "*[f]unctionally*, Plaintiff was the decision making authority in semi-formal, quasi-judicial proceedings that involved the application of law . . . to the conduct of members of the public."[80] Similarly, whatever level of importance might be suggested by the title of assistant superintendent for business services of a school district, a Texas court ruled that the responsibilities undertaken by the plaintiff during his tenure in that position fit *Rosenblatt*'s conception of public officials.[81]

In addition to multiple evidentiary channels for showing public official status, the variety of substantive grounds for deeming a plaintiff a public official offers ample opportunity for defendants to attain this strategic goal. A notable recurring basis for regarding plaintiffs as public officials is responsibility—sometimes rather limited—for the disposition of public funds. Execution of tax laws, for example, may almost automatically produce public official classification. Thus, a city's collector of delinquent taxes[82] and one of three appointed tax assessors of another city[83] were ruled to be public officials with little elaboration. Similarly, courts appear strongly inclined to hold plaintiffs bearing the title financial officer—whether of a large school district[84] or small county[85]—to fall within

79. Ferguson v. Union City Daily Messenger, Inc., 845 S.W.2d 162, 167 (Tenn. 1992) (holding that plaintiff was a public official because his "duties throughout his employment by the County included substantial responsibility with regard to the financial and business affairs of the County"); *see Lovingood*, 800 F. App'x at 843 (deputy manager of NASA space shuttle projects office).

80. Reina v. Lin Television Corp., 421 P.3d 860, 865 (N.M. Ct. App. 2018) (emphasis added).

81. *See* Beck v. Lone Star Broad., Co., 970 S.W.2d 610, 615 (Tex. App. 1998).

82. *See* Ryan v. Dionne, 248 A.2d 583, 585 (Conn. Super. Ct. 1968).

83. *See* Eadie v. Pole, 221 A.2d 547, 548–49 (N.J. Super. Ct. App. Div. 1966).

84. *See* Fuller v. Brownsville Indep. Sch. Dist., No. B: 13-109, 2016 WL 3960563, at *13–14 (S.D. Tex. May 18, 2016).

85. *See* Griffin v. Holden, 636 S.E.2d 298, 303–04 (N.C. Ct. App. 2006).

Rosenblatt's contemplation. More broadly, plaintiffs who are "intimately involved in the expenditures of public funds"[86] in general face a difficult task in avoiding designation as a public official. In this vein, a university purchasing agent who "handle[d] significant amounts of university funds,"[87] a license tag agent involved in "the collection and accounting for substantial amounts of public funds,"[88] a regional Navy contractor with broad authority "to spend millions of dollars of Navy money,"[89] and a director of financial aid at a state college,[90] were all assigned public official status. Nor does a subordinate position of authority prevent its holder from being characterized as a public official. Plaintiffs involved in financial matters who "did not make decisions about how to spend funds,"[91] "lacked direct policy-making authority,"[92] and "act[ed] upon receiving orders from . . . superiors"[93] were each designated as a public official.

In other realms, too, final decision-making authority is not requisite to classification as a public official. In New York, for example, a village building inspector responsible for making recommendations to the mayor as to whether building permit applications should be approved was ruled to hold a position "of such 'apparent importance' that the general public . . . would have an 'independent interest' in his 'qualifications and performance.'"[94] A Louisiana personnel coordinator in a parish office of the clerk of court whose recommendations for disciplining were resolved by higher authority, and who was considered "fairly equivalent" to thirty other supervisors in the office, was likewise held to be a public official.[95] Perhaps the clearest illustration that an advisory role does not preclude

86. Rusack v. Harsha, 470 F. Supp. 285, 298 (M.D. Pa. 1978) (holding supervisory contract negotiator at Navy ships parts control center to be public official).

87. Davis v. Borskey, 660 So. 2d 17, 21 n.6 (La. 1995).

88. Hodges v. Okla. J. Publ'g Co., 617 P.2d 191, 194 (Okla. 1980).

89. Carroll v. Jones, 74 Va. Cir. 466, 470 (2008).

90. Van Dyke v. KUTV, 663 P.2d 52, 55–56 (Utah 1983).

91. Horne v. WTVR, LLC, 893 F.3d 201, 209 (4th Cir. 2018).

92. Coliniatis v. Dimas, 965 F. Supp. 511, 516 (S.D.N.Y. 1997).

93. Peterfish v. Frantz, 424 N.W.2d 25, 29 (Mich. Ct. App. 1988).

94. Dattner v. Pokoik, 437 N.Y.S.2d 425, 427 (App. Div. 1981) (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)).

95. Guzzardo v. Adams, 411 So. 2d 1148, 1149–50 (La. Ct. App. 1982).

public official status is the consistency with which city attorneys have been deemed public officials.[96]

If the ability only to recommend disciplinary measures can help confer public official status, then it is unsurprising that those wielding actual power to impose discipline and other sanctions are typically denominated public officials. In finding a fire captain to be a public official, a court highlighted the disciplinary power that he exercised over personnel at the firehouse.[97] The power of a judge to mete out sentences would seem self-evidently to warrant classification as a public official. Perhaps that is why a juvenile court judge's argument that he was not a public official—in a suit over remarks attributed to him in the course of a sentencing hearing—was rebuffed with little explanation beyond extensive recitation of passages from *Rosenblatt*.[98] Further, the relevant disciplinary authority need not be exercised solely by the plaintiff to trigger public official designation. The former chairman of the Texas Medical Board's disciplinary process review committee argued that he was not a public official because he could not control investigations against physicians or influence the process by which complaints against them were resolved.[99] In rejecting this contention, the court emphasized that the Board had disciplinary authority that included suspension or revocation of a physician's license.[100]

Further heightening the likelihood of public official status is the absence of a strict requirement that plaintiffs hold government employment when the alleged defamatory falsehood is published. Accordingly, former officials suing over statements applicable to their time in office are generally required to prove actual malice.[101] In one sense, this pattern is to be expected. Although Baer himself had left his position as supervisor of a county recreation area six months before

96. *See, e.g.*, Weingarten v. Block, 162 Cal. Rptr. 701, 709–10 (Ct. App. 1980); Finkel v. Sun Tattler Co., 348 So. 2d 51, 52 (Fla. Dist. Ct. App. 1977); Wanless v. Rothballer, 503 N.E.2d 316, 320 (Ill. 1986); Frink v. McEldowney, 275 N.E.2d 337, 337–38 (N.Y. 1971); Rogers v. Cassidy, 946 S.W.2d 439, 445 (Tex. App. 1997).

97. *See* Miller v. Minority Brotherhood of Fire Prot., 463 N.W.2d 690, 695–96 (Wis. Ct. App. 1990); *see also* Ewing v. City of Toledo, No. 18-cv-01626, 2020 WL 1845814, at *18 (D. Or. Feb. 21, 2020) (concluding that fire chief was public official).

98. *See* Simonson v. United Press Int'l, Inc., 500 F. Supp. 1261, 1267–68 (E.D. Wis. 1980).

99. Hotze v. Miller, 361 S.W.3d 707, 713 (Tex. App. 2012).

100. *See id.* at 714.

101. *See* Varner v. Bryan, 440 S.E.2d 295, 299 (N.C. Ct. App. 1994) ("Undoubtedly, a public official's job performance will often continue to be the subject of important public debate and discussion long after the termination of his employment in a public office.").

Rosenblatt's column appeared,[102] the Court still considered him a public official for purposes of the libel action.[103] The Court emphasized that the area's management "was still a matter of lively public interest; propositions for further change were abroad, and public interest in the way in which the prior administration had done its task continued strong."[104] At the same time, the Court acknowledged that a plaintiff could be "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 the *New York Times* rule."[105] *Rosenblatt*, then, did not appear to hold that the actual malice rule attached to public officials beyond their time in government indefinitely. Nevertheless, courts typically proceed as though they are acting upon such a premise. In *Zerangue v. TSP Newspapers, Inc.*,[106] for example, the Fifth Circuit Court of Appeals brushed aside the contention by a deputy sheriff and chief of detectives that the lapse of nearly six years since their discharge had transformed them into private figures.[107] On the contrary, noted the court, it was aware of "no cases holding that public official status erodes with the passage of time."[108] In *Pierce v. Capital Cities Communications, Inc.*,[109] the Third Circuit similarly dismissed the notion that an interval of three years between the plaintiff's departure from public office and the broadcast in question negated his burden to demonstrate actual malice.[110] Other courts have also treated the period between plaintiffs' return to the private sector and publication of the offending expression as lacking significance.[111]

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102. Rosenblatt v. Baer, 383 U.S. 75, 78 (1966).
103. *Id.* at 87.
104. *Id.* at 87 n.14.
105. *Id.*
106. 814 F.2d 1066 (5th Cir. 1987).
107. *See id.* at 1069.
108. *Id.*
109. 576 F.2d 495 (3d Cir. 1978).
110. *See id.* at 510 n.67 (stating that passage of three years "did not, by itself, strip Pierce of his status as a 'public official'").
111. Revell v. Hoffman, 309 F.3d 1228, 1232–33 (10th Cir. 2002); Conese v. Hamilton J.-News, Inc., No. CA2000-09-189, 2001 WL 1004264, at *2 (Ohio Ct. App. Sept. 4, 2001); MediaOne, L.L.C. v. Henderson, 592 S.W.3d 933, 942 (Tex. App. 2019); Hill v. Stubson, 420 P.3d 732, 739–40 (Wyo. 2018).

Going further, some courts have designated plaintiffs as public officials without their having held government employment at all. The Fourth Circuit Court of Appeals observed:

> It is conceivable that an individual holding no formal public position, and standing in no employment or even contractual relationship with government, nevertheless may participate in some governmental enterprise to such an extent that the policies underlying *New York Times Co. v. Sullivan* . . . would demand that he or she be classified a public official.[112]

More emphatically, a Texas court rejected the proposition that "the phrase 'governmental employee,' . . . was intended to limit it to those individuals who have a traditional 'employer-employee' relationship with a governmental entity."[113] Ruling that a court-appointed psychologist testifying in a child custody dispute was a public official under *Rosenblatt*, the court declared the fact that the plaintiff held no formal public office to be "of no consequence."[114] Similarly, a North Carolina court declared a physician retained by the state as a witness in a mental commitment proceeding to be a public official because his role held "the potential for great social harm if abused."[115] Extending this logic, the Minnesota Supreme Court determined that grand jurors, though concededly "private citizens . . . conscripted for the duty," fit the profile of a public official.[116] Because of a grand jury's substantial powers—including indictment, investigation, and inquiries into prison conditions and possible public corruption—"the body must be considered governmental in nature."[117] Moreover, in some instances, a plaintiff suing in a private capacity may nevertheless be deemed a public official because of that capacity's connection to a governmental position held by the plaintiff.[118] Thus, a New York court concluded that the president of a police labor union qualified as a public official because of the "nexus" between his union position and his status as a state trooper in a libel

112. Jenoff v. Hearst Corp., 644 F.2d 1004, 1006 (4th Cir. 1981); *see also* Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518, 522 (4th Cir. 1980) ("There well may be circumstances in which a consultant employed by a government entity could be classified as a public official.").

113. HBO v. Harrison, 983 S.W.2d 31, 38–39 (Tex. App. 1998).

114. *Id.* at 39.

115. Hall v. Piedmont Publ'g Co., 266 S.E.2d 397, 400 (N.C. Ct. App. 1980).

116. Standke v. B.E. Darby & Sons, Inc., 193 N.W.2d 139, 143–44 (Minn. 1971).

117. *Id.*

118. *See, e.g.*, Stuart v. Porcello, 603 N.Y.S.2d 597, 599 (App. Div. 1993).

suit arising from his alleged misappropriation of union funds.[119] Finally, in a few cases, courts have not required the plaintiff to have any involvement in a government function to be considered a public official. An Illinois court, for example, inferred from the Supreme Court's treatment of the subject that the category includes one who "is participating in acts relating to matters in which the government has a substantial interest."[120] On this assumption, the court viewed as a public official a nursing home among whose patients were children with intellectual disabilities because of the public's great interest in such individuals.[121]

Where plaintiffs have actually been in government, courts have still often seemed to deviate from the Supreme Court's indications that public official classification would not reach into the lower echelons of government.[122] The term has been applied, for example, to an IRS agent,[123] the manager of a community center,[124] the administrator of a county motor pool,[125] an HIV/AIDS case worker,[126] a county license tag agent,[127] and—frequently, though not invariably—public schoolteachers.[128] In an especially vivid illustration of the designation's reach, a court's characterization of a university student senator as a public official rendered understatement another court's assertion that "[i]t is not necessary that the government employee be near the top of the official hierarchy to be considered a public official for purposes of a defamation case."[129] Similarly expansive in approach is the Tennessee Supreme Court's ruling that a junior social worker in a county human services office was a public official as intended by

119. *Id.*

120. Drs. Convalescent Ctr., Inc. v. E. Shore Newspapers, Inc., 244 N.E.2d 373, 376 (Ill. App. Ct. 1968).

121. *Id.* at 377.

122. *See supra* note 35 and accompanying text.

123. Angel v. Ward, 258 S.E.2d 788, 791 (N.C. Ct. App. 1979).

124. Brown v. Kitterman, 443 S.W.2d 146, 155 (Mo. 1969).

125. Clawson v. Longview Publ'g Co., 589 P.2d 1223, 1227–28 (Wash. 1979).

126. Harris v. Cochise Cnty., No. CIV 08-008-TUC, 2009 U.S. Dist. LEXIS 135275, at *54 (D. Ariz. Sept. 30, 2009).

127. Hodges v. Okla. J. Publ'g Co., 617 P.2d 191, 194 (Okla. 1980).

128. *See infra* Section II.A.

129. Luper v. Black Dispatch Publ'g Co., 675 P.2d 1028, 1035–36 (Okla. Civ. App. 1983) (Means, J., concurring in part and dissenting in part).

Rosenblatt.[130] The decision is understandable in light of the potential impact of such workers on families' lives, but it seems fair to ask whether the *Rosenblatt* Court had this kind of position in mind when referring to government employees who "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[131] More importantly, the Tennessee court's definition of public official appears to leave relatively few persons in government outside its compass: those holding "[a]ny position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family."[132]

Further implying a strong presumption of public official status are those cases in which courts forego explicit analysis of the question and proceed directly to applying the actual malice standard. In a libel suit brought by an assistant city manager, the Connecticut Supreme Court simply observed that a public official must prove actual malice by clear and convincing evidence.[133] Similarly, the totality of a Georgia court's discussion of the constitutional status of a board member of the Metropolitan Atlanta Rapid Transit Authority (MARTA) consisted of: "[T]he articles [giving rise to the suit] had reference to the plaintiff as a board member of MARTA, and he is a public official in serving in this capacity; hence he may recover for defamation only upon a showing of actual malice."[134] And in a case decided just five years after *Rosenblatt*, the Delaware Supreme Court without elaboration

130. Press, Inc. v. Verran, 569 S.W.2d 435, 443 (Tenn. 1978); *see also* Kahn v. Bower, 284 Cal. Rptr. 244, 253 (Ct. App. 1991) (holding that county social worker was public official); Villarreal v. Harte-Hanks Commc'ns, Inc., 787 S.W.2d 131, 134–35 (Tex. App. 1990) (finding that child protective services specialist was public official).

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

132. *Press, Inc.*, 569 S.W.2d at 441; *see* Eder v. N. Ariz. Consol. Fire Dist. No. 1, No. CV-19-08101-PCT, 2020 WL 1307964, at *2 (D. Ariz. Mar. 19, 2020) ("Arizona courts take an expansive view on what constitutes a public official, finding that police officers, teachers, narcotics agents, county sheriffs, 'lower rung' FAA inspectors, student senators, and IRS agents are all public officials."); Schofield v. Gerda, No. 02-15-00326-CV, 2017 WL 2180708, at *12 (Tex. Ct. App. May 18, 2017) (Under *Rosenblatt*, "a 'public official' includes anyone who holds, by election or appointment, a public office." (citation omitted)).

133. Brown v. K.N.D. Corp., 529 A.2d 1292, 1294 (Conn. 1987).

134. Murray v. Williams, 305 S.E.2d 502, 503 (Ga. Ct. App. 1983).

pronounced it "settled law" that police officers are considered public officials under *New York Times*.[135]

Of course, courts have not always treated government employment as tantamount to public official status. In taking the unusual step[136] of refusing to consider a police officer a public official, the Iowa Supreme Court stated its disavowal of "the expansive view that all government employees are public officials as inconsistent with the plain meaning of the standards announced by the Supreme Court."[137] Under the same reasoning, the court also declined to recognize a fire fighter as a public official.[138] Moreover, just as the court emphasized the "low-ranking" position of the plaintiff in each of these two cases,[139] other courts among the minority rejecting public official status have underscored the modest level of the plaintiff's position and power.[140] While the unexceptional influence and visibility of a file clerk in a county sheriff's office might seem self-evident, a Kansas court took pains to spell out that the plaintiff holding this position "exercised no sovereign power or control over the exercise of governmental affairs."[141] By contrast, a county surveyor on the surface possesses a greater degree of responsibility and control; however, the Texas Supreme Court took notice of the plaintiff's "minimal responsibilities" as a surveyor in finding that the actual malice standard did not apply.[142] Even the vice-presidency of the state bar association did not create public official status, ruled the West Virginia Supreme Court of Appeals, because the bar lacked formal authority to change the rules of that court.[143] In a Florida case, a state agency's coordinator, charged with investigating elder-care facilities accused of elder abuse, was not a public official "under the definition

135. Jackson v. Filliben, 281 A.2d 604, 605 (Del. 1971). The status of police officers is discussed at *infra* Section IV.A.

136. *See infra* Section IV.A.

137. Kiesau v. Bantz, 686 N.W.2d 164, 178 (Iowa 2004), *overruled on other grounds by* Alcala v. Marriott Int'l, Inc., 880 N.W.2d 699 (Iowa 2016).

138. Jones v. Palmer Commc'ns, Inc., 440 N.W.2d 884, 895 (Iowa 1989).

139. *See id.*; *Kiesau*, 686 N.W.2d at 178.

140. *See* Sellars v. Stauffer Commc'ns, Inc., 684 P.2d 450, 453 (Kan. Ct. App. 1984), *aff'd*, 695 P.2d 812 (Kan. 1985); Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 583 (W. Va. 1992).

141. *Sellars*, 684 P.2d at 453.

142. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 814–15 (Tex. 1976).

143. *Hinerman*, 423 S.E.2d at 583.

of *Rosenblatt.*"[144] The court reeled off several limitations on the coordinator's authority to determine that this "mid-level employee" had modest responsibility for and "minimal control" over the operations of such facilities.[145] Further noting that the plaintiff had received "little exposure in the general community," the court concluded that his position did not call for "special public scrutiny" apart from the attention directed at him as a result of the allegedly defamatory articles and press releases.[146] Finally, a California court held that a plaintiff whose position resembled that of Baer in *Rosenblatt* not to be a public official.[147] Much as Baer had served as the supervisor of a county recreation area, the plaintiff had been a city recreation director.[148] Without sufficient evidence of the nature of that position, however, the court assumed that it did not warrant public official status.[149]

When the *Garrison* Court announced that any expression that "might touch on an official's fitness for office"[150] would find shelter in the actual malice requirement, it appeared to extend the category of relevant speech far beyond defamation obviously "relating to [the plaintiff's] official conduct."[151] That expectation has been borne out by the overwhelming proportion of cases in which courts, having classified the plaintiff as a public official, have gone on to find the statement at issue to fall within the purpose of the actual malice rule. Critics and advocates alike agree that this second prong of the *New York Times* standard imposes little limitation on the category of defamatory speech that will obligate plaintiffs to prove actual malice.[152] Or as one court put it, "So many things can 'touch on'

144. Wilkinson v. Fla. Adult Care Ass'n, 450 So. 2d 1168, 1172 (Fla. Dist. Ct. App. 1984).

145. *See id.* at 1172–73.

146. *See id.*

147. *See* Peoples v. Tautfest, 79 Cal. Rptr. 478, 482 (Ct. App. 1969).

148. *See id.*

149. *Id.*; *see* Porcari v. Gannett Satellite Info. Network, Inc., 856 N.Y.S.2d 217, 218–19 (App. Div. 2008) ("The position of associate corporation counsel [employed by city] is not a position of 'such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it . . . .'" (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966))).

150. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

151. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).

152. *Compare* David Elder, *Defamation, Public Officialdom and the* Rosenblatt v. Baer *Criteria—A Proposal for Revivification: Two Decades After* New York Times Co. v. Sullivan, 33 BUFF. L. REV. 579, 648 (1984) ("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."), *with* Arlen W.

someone's 'fitness for office' that this restriction to the actual malice standard is very rarely applied."[153] Little weight, then, has been given to Justice Goldberg's caveat concurring in *New York Times* that "the Constitution [does not] protect[] defamatory statements directed against the private conduct of a public official."[154]

The elasticity of what may be thought germane to an official's fitness for office is illustrated by the variety of statements about police officers that have been subjected to the actual malice standard. A Texas court articulated this philosophy: "The public perceives a police officer as an authority figure entrusted in upholding the law and possesses a legitimate interest in information related to his ability to follow the law and perform his duty to protect the public."[155] That information appears to encompass virtually all serious misconduct regardless of the capacity in which the officer was acting at the time of the alleged behavior. In a Georgia case, a sheriff said of a police investigator that the latter "broke up a family in town and was involved in an altercation in the city streets of Glennville with [the] jealous husband."[156] The court ruled that these statements concerned the plaintiff's "qualifications for carrying out his position as a police officer."[157] Similarly, the First Circuit found a comment to the effect that an off-duty police officer had engaged in public drunkenness sufficiently related to her fitness for office to fall under the *New York Times* rule.[158] The same was held true of accusations by neighbors of

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Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 138 (1987) ("The message of *Garrison* and *Monitor Patriot* is unmistakable and appropriate . . . . Virtually anything in the defendant's statement that some members of the public could regard as bearing upon the public official's or political candidate's fitness for office should trigger operation of the actual malice rule in a defamation action brought by a public official or political candidate on the basis of such statement.").

153. Dixon v. Int'l Brotherhood of Police Officers, 504 F.3d 73, 88 (1st Cir. 2007); *see also* Horne v. WTVR, LLC, 893 F.3d 201, 209–10 (4th Cir. 2018) (commenting that the requirement that allegedly defamatory statement relate to plaintiff's official conduct "is easily satisfied").

154. *N.Y. Times*, 376 U.S. at 301 (Goldberg, J., concurring).

155. Opaitz v. Gannaway Web Holdings, LLC, 454 S.W.3d 61, 66 (Tex. App. 2014).

156. Jessup v. Rush, 609 S.E.2d 178, 179 (Ga. Ct. App. 2005) (alteration in original). The sheriff also asserted that the plaintiff "doesn't know a felony from a misdemeanor." *Id.* However, this part of his comments was plainly relevant to the plaintiff's qualifications and also presumably protected as an expression of opinion rather than a literal representation of fact.

157. *Id.* at 181.

158. *See Dixon*, 504 F.3d at 88.

an off-duty police detective that he had harassed neighbors with foul language, displayed a violent temper, threatened small children, kicked pets, and needlessly called the city police department.[159] The Maine Supreme Court rejected the detective's argument that *New York Times* did not apply because the charges did not pertain to his official responsibilities.[160] Rather, the assertions' aim of demonstrating that the detective should be barred from carrying his weapon to his residence "unquestionably impugns his 'fitness for office.'"[161] By comparison, allegations that a campus police officer on several occasions had committed "racist and homophobic behavior" explicitly called into question the officer's fitness for his position; still, the Ohio court's opinion finding such behavior relevant to his qualifications did not strictly confine its reasoning to the display of animus while performing official duties.[162] It also did not matter to the Ohio Supreme Court that a police officer (erroneously) reported to have testified that he advised his nephew not to talk to investigators of a killing was not acting in his formal capacity in law enforcement. The court instead characterized the account of the testimony as dealing with "matters relevant to [the officer's] fitness to be a public official."[163]

The principle that police officers' misconduct committed out of uniform remains relevant to their fitness has been applied with particular stringency to accusations of personal abuse. Thus, a Texas court summarily concluded that a charge of sexual assault by an off-duty officer triggered the actual malice requirement.[164] Likewise, an accusation that a deputy sheriff engaged in "conduct amounting to domestic violence" was governed by the premise that "any conduct that might adversely affect [an official's] fitness for public office" would fall within the *New York Times* rule.[165] Nor need the alleged behavior rise to the level of violence for it to bear on the officer's

159. *See* Roche v. Egan, 433 A.2d 757, 759, 763 (Me. 1981).

160. *Id.* at 762–63.

161. *Id.* at 763.

162. *See* Waterson v. Cleveland State Univ., 639 N.E.2d 1236, 1237–39 (Ohio Ct. App. 1994).

163. Soke v. Plain Dealer, 632 N.E.2d 1282, 1284 (Ohio 1994).

164. *See* Opaitz v. Gannaway Web Holdings, LLC, 454 S.W.3d 61, 66 (Tex. App. 2014). The court also noted the Supreme Court's declaration that "a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's fitness for office . . . ." *Id.* (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 277 (1971)).

165. Murray v. Lineberry, 69 S.W.3d 560, 563 (Tenn. Ct. App. 2001) (internal citation omitted).

fitness. The plaintiff in a Missouri case—a reserve police officer and a customs inspector—was described in letters by the defendant as having committed a series of acts that could be considered stalking or harassment.[166] Dismissing the plaintiff's argument that he was not performing official duties as a customs inspector or police officer at the time of the alleged acts, the court countered that "[c]omments bearing on the private conduct of a police officer may touch on the officer's fitness to hold office."[167]

Of course, police officers represent just one example of public officials who must show actual malice to recover for statements not directed at their performance in office. The Supreme Court's pronouncement in *Monitor Patriot Co. v. Roy*[168] that charges of criminal conduct are always relevant to fitness for office[169] has proved particularly potent grounds for requiring holders of various government positions to demonstrate actual malice. On this basis, both a school board member incorrectly identified as a rape suspect[170] and a judge accused of committing fraud as an attorney a decade before his appointment to the bench[171] were held subject to the *New York Times* rule. Even an erroneous report that a mayor had committed trespass to retrieve lost cows enjoyed the protection of the actual malice standard because the offense constituted a misdemeanor under the state's criminal code.[172] Courts have invoked this principle as well in rejecting plaintiffs' arguments that the defamatory content at issue involved "purely private matters" rather than official conduct.[173] Such was the disposition by an Ohio court of a judge's suit over an article stating that his wife had asserted in a divorce proceeding that he had

166. *See* Westhouse v. Biondo, 990 S.W.2d 68, 70 (Mo. Ct. App. 1999) (setting forth seven allegations, including assertions that plaintiff arranged to be allowed into defendant's apartment and that he made a number of harassing telephone calls to defendant and her parents).

167. *Id.* at 71 (citing Shafer v. Lamar Publ'g Co., 621 S.W.2d 709, 711 (Mo. Ct. App. 1981)).

168. 401 U.S. 265, 277 (1971).

169. *Id.*; *see supra* note 57 and accompanying text.

170. Strong v. Okla. Publ'g Co., 899 P.2d 1185, 1188–89 (Okla. Civ. App. 1995).

171. DiSalle v. P.G. Publ'g Co., 544 A.2d 1345, 1348–49 (Pa. Super. Ct. 1988), *overruled on other grounds by* Bd. of Supervisors of Willistown Twp. v. Main Line Gardens, Inc., 155 A.3d 39, 45 (Pa. 2017).

172. *See* Savannah News-Press v. Whetsell, 254 S.E.2d 151, 152 (Ga. Ct. App. 1979).

173. *See* Scaccia v. Dayton Newspapers, Inc., 867 N.E.2d 874, 879–80 (Ohio Ct. App. 2007) (applying actual malice standard in suit by chief of criminal section of city's law department to reports suggesting improper behavior by chief and his wife leading transfer of large sum to them by elderly neighbor).

beaten her.[174] Responding to the judge's contention that the actual malice rule was not germane because the article "related to his private life," the court pointed to *Monitor Patriot*'s promulgation of the invariable relevance of charges of criminal conduct.[175]

Moreover, courts also tend to rely on the "fitness for office" rationale to apply the *New York Times* rule to allegations of behavior that is disturbing though not expressly criminal. When the chairman of a state highway board brought suit over articles purportedly charging him with "intimidating business tactics," the court dismissed his argument that the actual malice rule was inapt on the sweeping ground that "the reporting of the plaintiff's private business activities, regardless of their relationship in time to his holding office, fall 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.'"[176] And in a case of mistaken identity, a state senate majority leader was falsely linked to "alleged improprieties" by a city's Olympic bid committee; the court ruled that if the allegations had been true, they would have borne on the plaintiff's "fitness for office and his public stewardship as Senate Majority Leader."[177]

Admittedly, instances can be found of rulings that defamatory statements were insufficiently connected with plaintiffs' official position to warrant application of the *New York Times* rule. Such cases of "pure" disjunction between the nature of a falsehood and a public official's performance, however, are rare and typically involve idiosyncratic circumstances. In *Cox v. Hatch*,[178] a group of postal employees posed with Senator Hatch for a picture that they alleged had been included in his campaign materials in a manner that implicitly and falsely conveyed their endorsement of him.[179] Observing that the political flier at issue "did not raise any issues at all about the efficiency or integrity of either the postal service or any of its employees," the Utah Supreme Court deemed the employees "private plaintiffs" for the purpose of their libel suit.[180] In *DeLuca v.*

174. Harris v. Plain Dealer Publ'g Co., 532 N.E.2d 192, 194 (Ohio Ct. App. 1988).
175. *Id.*
176. Johnson v. Cap. City Press, Inc., 346 So. 2d 819, 821–22 (La. Ct. App. 1977).
177. Peterson v. N.Y. Times Co., 106 F. Supp. 2d 1227, 1231–32 (D. Utah 2000).
178. 761 P.2d 556 (Utah 1988).
179. *Id.* at 558.
180. *Id.* at 560.

New York News, Inc.,[181] a retiring public schoolteacher brought suit over an article reporting that he had accepted health leave benefits to which he was not entitled.[182] As in *Cox*, the court determined that the article "did not relate to the qualifications or performance" of the plaintiff's duties as a teacher; indeed, this kind of claim could be made against any public employee.[183]

In other cases, however, courts have avoided imposing the actual malice standard on public officials by essentially ignoring *Garrison*'s "fitness for office" grounds and focusing narrowly on a literal version of *New York Times*'s requirement that the defamatory falsehood "relat[e] to [the public official's] official conduct."[184] A Washington court acknowledged as much in declining to apply the actual malice rule to a police officer suing over a broadcast stating that he had been seen in a "compromising position" with the wife of another man.[185] Though conceding that the allegation might bear on the plaintiff's fitness for the vice squad on which he served, the court found dispositive that it did "not relate to his official duties or to his performance of those duties."[186] A similarly cabined inquiry marked the Eighth Circuit Court of Appeals opinion in *Michaelis v. CBS, Inc.*[187] Michaelis, a county coroner, brought suit over a broadcast raising questions about her competence in performing an autopsy at the invitation of a neighboring county.[188] While such criticism would seem to bear directly on her fitness as a county coroner, the Eight Circuit's refusal to apply the *New York Times* rule hinged on the formality that here she was hired as a private physician rather than serving in an official capacity in the other county.[189]

In a few cases, a determination that the defendant's statement was insufficiently relevant because it did not relate to official conduct—even though it might shed light on the plaintiff's fitness for office—serves as a kind of backstop to the court's perhaps unconfident holding

181. 438 N.Y.S.2d 199 (Sup. Ct. 1981).
182. *Id.* at 200–01.
183. *Id.* at 204.
184. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).
185. Himango v. Prime Time Broad., Inc., 680 P.2d 432, 435–36 (Wash. Ct. App. 1984).
186. *Id.* at 436.
187. 119 F.3d 697 (8th Cir. 1997).
188. *Id.* at 699–700.
189. *Id.* at 702.

that the plaintiff was not a public official to begin with. Having found the vice-president of the state bar association not to be a public official, the West Virginia Supreme Court of Appeals went on to consider whether the actual malice standard would apply "even if" the plaintiff qualified for public official status.[190] The libel suit arose from an editorial accusing the plaintiff of unethical behavior in his representation of a client[191]—surely conduct that bore on his fitness for the bar association's vice-presidency. Nevertheless, the court ruled the charge beyond the bounds of actual malice protection on the ground that the editorial referred to the plaintiff in his capacity as a private attorney but not as a public official.[192] In a Texas case, that state's Supreme Court followed a similar analytical progression. After determining that a county surveyor qualified as a public official,[193] the court proceeded to hold that the article at issue did not touch on the plaintiff's fitness for his position.[194] The article incorrectly reported that the plaintiff, acting as a consultant, had platted an area of the county that flooded; to the plaintiff, the false statement in context insinuated that he performed shoddy work.[195] This appeared to be another instance in which the libelous assertion (if true) would be of interest to someone assessing the plaintiff's fitness for the public office that he held. Here too, however, the court ruled that the absence of reference to the plaintiff's position in government meant that the allegedly libelous statements did not relate to the plaintiff's "official conduct" and therefore the actual malice rule was inapplicable.[196]

II. CONTRADICTIONS

Notwithstanding the dominant judicial tendency to treat public employee libel plaintiffs as public officials, in some areas, courts have diverged in their classifications of some kinds of employees. The Supreme Court tacitly recognized this possibility when it acknowledged that it had "not provided precise boundaries for the

190. Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 583 (W. Va. 1992); *see supra* note 143 and accompanying text.

191. *See Hinerman*, 423 S.E.2d at 566–67.

192. *See id.* at 583.

193. Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 814–15 (Tex. 1976); *see supra* text accompanying note 142.

194. *Foster*, 541 S.W.2d at 814–15.

195. *Id.* at 811.

196. *Id.* at 815.

category of 'public official.'"[197] To critics, however, such variation more harshly demonstrates the vagueness and manipulability of *Rosenblatt*'s standard.[198] However the phenomenon is characterized, it is especially visible among two types of employees: educators at public institutions and what might be considered hybrid employees whose activities entail a mix of public and private responsibilities.

A. Educators

In 1990, a commentator lamented inconsistency among courts on the question of public educators' status as plaintiffs in libel suits.[199] Thirty years later, a consensus on this issue remains elusive. The most notable discussion of the topic on the Supreme Court appears in Justice Brennan's dissent from a denial of certiorari in *Lorain Journal Co. v. Milkovich*.[200] Justice Brennan argued that public schoolteachers' status as public officials "follows *a fortiori* from" *Rosenblatt*.[201] He emphasized that teachers have "an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities,"[202] and noted the Court's observation in a previous case that "public school teachers may be regarded as performing a task 'that go[es] to the heart of representative government.'"[203] Some courts have embraced Justice Brennan's conclusion that the designation of public schoolteachers as public officials flows from *Rosenblatt*'s reasoning. In the absence of a more authoritative source, however, a substantial number of decisions have refused to require public schoolteachers to show actual malice.

The most straightforward basis for regarding public schoolteachers as public officials under *Rosenblatt* is that theirs is a

197. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

198. *See, e.g.*, Finkelson, *supra* note 35, at 882–83 ("[E]ach criterion [of *Rosenblatt*] is sufficiently elastic to permit different findings when applied to the same class of public official."); *see also* Plunkett, *supra* note 54, at 157 ("[*Rosenblatt*] does not provide a clear demarcation between public officials and mere public employees.").

199. *See generally* Richard E. Johnson, *No More Teachers' Dirty Looks—Now They Sue: An Analysis of Plaintiff Status Determination in Defamation Actions by Public Educators*, 17 FLA. ST. U. L. REV. 761 (1990) (analyzing state court defamation cases with public educators as plaintiffs).

200. 474 U.S. 953 (1985).

201. *Id.* at 958 (Brennan, J., dissenting).

202. *Id.* at 959.

203. *Id.* at 958 (alteration in original) (quoting Ambach v. Norwick, 441 U.S. 68, 75–76 (1979)).

position that "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 public interest in the qualifications and performance of all government employees."[204] This was the central theme of the oft-cited decision in *Basarich v. Rodeghero*.[205] The court declared that "[p]ublic school systems . . . are consistent subjects of intense public interest and substantial publicity" and "[p]ublic school teachers . . . and [their] conduct . . . and . . . policies[] are of as much concern to the community as are other 'public officials.'"[206] In a similar assessment, a Connecticut court asserted that "[u]nquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms."[207] More tersely, an Arizona court pronounced teachers public officials simply on the authority of *Basarich* without elaboration.[208] In Oklahoma and Tennessee as well, it has been established that public school teachers are regarded as public officials when bringing libel actions.[209]

Conversely, courts that reject the label of public official for public schoolteachers generally emphasize *Rosenblatt*'s description of the category as including "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[210] Perhaps the most influential decision taking this stance was issued by a California court in *Franklin v. Benevolent & Protective Order of Elks*.[211] According to the court, "[t]he governance or control which a public classroom teacher might be said to exercise over the conduct of government is at most remote and philosophical."[212] Also minimizing public schoolteachers' control, the Maine Supreme

204. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).
205. 321 N.E.2d 739 (Ill. App. Ct. 1974).
206. *Id.* at 742.
207. Kelley v. Bonney, 606 A.2d 693, 710 (Conn. 1992).
208. *See* Sewell v. Brookbank, 581 P.2d 267, 270 (Ariz. Ct. App. 1978).
209. *See* Luper v. Black Dispatch Publ'g Co., 675 P.2d 1028, 1031 (Okla. Civ. App. 1983) (citing Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla. 1978)); Campbell v. Robinson, 955 S.W.2d 609, 611–12 (Tenn. Ct. App. 1997); *see also* Corbally v. Kennewick Sch. Dist., 973 P.2d 1074, 1077 (Wash. Ct. App. 1999) (declaring conduct attributed to public schoolteacher as "that of a public official").
210. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).
211. 159 Cal. Rptr. 131 (1979).
212. *Id.* at 136.

Judicial Court in *True v. Ladner*[213] ruled that the "very limited" authority they exercise did not warrant treating them as public officials.[214] The court's opinion included a reference to *Nodar v. Galbreath*,[215] in which the Florida Supreme Court summarily declined to characterize a public high school teacher as a public official.[216] Citing *True* in turn, a New York appeals court even more succinctly announced that a public school teacher "should not be considered a public official."[217] Courts in Idaho, Texas, and Virginia, too, have concluded that public schoolteachers do not meet the criteria for public officials.[218] Sharp criticism of decisions holding that public schoolteachers are not public officials[219] does not appear to have affected courts in these states.

Like teachers, athletic coaches have been both assigned to and excluded from the category of public officials.[220] In *Basarich*, the classification of coaches as public officials was considered a corollary of the broader community interest in public school systems that also assigned this status to teachers.[221] In *Johnston*, the Oklahoma Supreme Court echoed *Basarich* in finding a middle school wrestling coach to be a public official: "[W]e can think of no higher community involvement touching more families and carrying more public interest than the public school system. This includes the athletic program."[222]

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213. 513 A.2d 257, 264 (Me. 1986), *superseded by statute on other grounds as stated in* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 41–42 (D. Me. 2005).

214. *Id.*

215. 462 So. 2d 803 (Fla. 1984), *superseded by statute as stated in* Linafelt v. Beverly Enters.-Fla., Inc., 745 So. 2d 386, 388 (Fla. Dist. Ct. App. 1999).

216. *Id.* at 808.

217. Dec v. Auburn Enlarged Sch. Dist., 672 N.Y.S.2d 591, 593 (App. Div. 1998) (citing *True*, 513 A.2d at 264).

218. *See* Verity v. USA Today, 436 P.3d 653, 663 (Idaho 2019); Poe v. San Antonio Express-News Corp., 590 S.W.2d 537, 540 (Tex. App. 1979); Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32, 37 (Va. 1987).

219. Johnson, *supra* note 199, at 776 (describing reasoning by which courts have determined that teachers are not public officials as "[a] sort of judicial shell game"); Peter S. Cane, Note, *Defamation of Teachers: Behind the Times?*, 56 FORDHAM L. REV. 1191, 1198 (1988) (asserting that decisions relieving teachers of burden of showing actual malice results from "[a] fundamental misinterpretation of the threshold *Rosenblatt* inquiry"). *But see* Markovitz, *supra* note 61, at 1981 ("Holding public school teachers, as public officials, to the actual malice standard is not consistent with the original intent of the category as established in *New York Times*.").

220. Basarich v. Rodeghero, 321 N.E.2d 739, 742 (Ill. App. Ct. 1974).

221. *See id.*

222. Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1103 (Okla. 1978).

While the plaintiff was employed as a teacher who volunteered to serve as a coach, the court expressly based its conclusion on the latter capacity.[223] A Texas court was even more pointed in characterizing a high school head football coach as a public official. In *Johnson v. Southwestern Newspaper Corp.*,[224] the court refused to hold that the plaintiff's additional role as a classroom teacher made him a public official.[225] Rather, "[a]s head football coach, Johnson filled a position of such importance that the public not only had, but exhibited, an independent interest in his qualifications and performance, transcending any interest shown in other employees of the school system."[226]

Other courts, however, have ascribed considerably less importance to the position of coach. Representative of this attitude is the Minnesota Supreme Court's recent decision in *McGuire v. Bowlin*[227] refusing to regard a high school basketball coach as a public official.[228] Tracing the actual malice standard for public officials to the preservation of free discussion of public issues and those with the power to influence their resolution, the court dismissively observed that "basketball is not fundamental to democracy."[229] Hence, whatever emotional importance a community may attach to a high school basketball team, the issues that it raises "are not the sort of issues that the public has 'a strong interest in debat[ing].'"[230] A coach's authority to "determine the strategy of a basketball team," then, did not rise to the level of responsibility for or control over the conduct of government affairs that had persuaded the court to recognize public official status in previous cases.[231] In *O'Connor v. Burningham*,[232] the Utah Supreme Court likewise rejected the interest or passion aroused by a high school basketball coach as a valid gauge of the position's constitutional importance.[233] Rather, a coach's actions and policies did

223. *See id.*
224. 855 S.W.2d 182 (Tex. App. 1993).
225. *Id.* at 186.
226. *Id.* at 187. The court also noted Johnson's position as the high school athletic director as grounds for finding him to be a public official, but appeared to indicate that his responsibilities as head football coach alone would have sufficed to consider him a public official. *See id.* at 186–87.
227. 932 N.W.2d 819 (Minn. 2019).
228. *Id.* at 829.
229. *Id.* at 825 (citing Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)).
230. *Id.* at 826 (alteration in original) (quoting *Rosenblatt*, 383 U.S. at 85).
231. *See id.*
232. 165 P.3d 1214 (Utah 2007).
233. *Id.* at 1219.

not "affect in any material way the civic affairs of a community—the affairs most citizens would understand to be the real work of government."[234] Nor has this skepticism about the importance of coaches' functions been confined to secondary education. Though presumably in general more visible and impactful than their high school counterparts, college basketball coaches have also been ruled not to be public officials.[235]

As to university educators more broadly, this represents still another area where courts have failed to reach consensus on public official status. This lack of uniformity may be attributed in part to "[t]he result in any particular case [being] fact-sensitive, turning on the particular duties and status of the professor in issue."[236] Even taking this variable into account, however, the more important factor seems to be divergence in approaches toward addressing this question. A Louisiana court, for example, found state university professors not to be public officials in mistaken reliance on the Supreme Court's decision in *Hutchinson v. Proxmire*[237]—a case in which the Court did not reach the question of whether the professor-cum-research director bringing suit was a public official.[238] By contrast, the Arkansas Supreme Court summarily declared a law professor a public official but left ambiguous the weight assigned to the plaintiff's additional role as the law school's assistant dean.[239] In a more nuanced analysis, a federal court ruled that among three university plaintiffs, a full

234. *Id.*; *see also* Verity v. USA Today, 436 P.3d 653, 663–64 (Idaho 2019) (rejecting public official status for high school teacher accused of inappropriate relationship with student whom he coached).

235. *See* Moss v. Stockard, 580 A.2d 1011, 1029–30 (D.C. 1990) (stating that interest evoked by coach "would not result, even in part, from the perception or reality that the coach had 'substantial responsibility for or control over governmental affairs'" and that coach's impact on players "did not invest her position with a statute [sic] 'invit[ing] public scrutiny and discussion . . . apart from . . . the particular charges in controversy'" (alteration in original) (omissions in original) (quoting *Rosenblatt*, 383 U.S. at 85, 87 n.13)); Grayson v. Curtis Publ'g Co., 436 P.2d 756, 762 (Wash. 1967) (ruling that coach was not public official but qualified as public figure).

236. Fortenbaugh v. N.J. Press, Inc., 722 A.2d 568, 577 (N.J. Super. Ct. App. Div. 1999).

237. 443 U.S. 111 (1979); *see* Foote v. Sarafyan, 432 So. 2d 877, 880 (La. Ct. App. 1982) (citing *Hutchinson* as basis for determination that professors were not public officials); *see also* Staheli v. Smith, 548 So. 2d 1299, 1304 (Miss. 1989) (acknowledging that *Hutchinson* Court did not decide whether Hutchinson was a public official but still citing case to support ruling that university professor bringing defamation action was not a public official).

238. *See Hutchinson*, 443 U.S. at 119 n.8.

239. *See* Gallman v. Carnes, 497 S.W.2d 47, 50 (Ark. 1973).

professor and a high-level administrator qualified as public officials but an assistant professor did not.[240] On the other hand, rank was not discussed when another federal court rejected out of hand the possibility that a law professor suing his former wife (also a law professor) would be considered a public official.[241] Conversely, a Texas court differed from the case of dueling law professors in both its analysis and result; it explained that a psychology professor lacked the responsibility, control, and apparent importance under *Rosenblatt* to be deemed a public official.[242] In some instances courts have sidestepped altogether the determination of whether public university professors are public officials by subjecting them to the actual malice standard as public *figures*.[243]

Finally, while one might expect agreement that public school principals possess sufficient responsibilities, control, and apparent importance to qualify them as public officials, here too courts have diverged.[244] Even courts finding principals to be public officials have varied in the grounds on which they have reached this conclusion. In *Williams v. Detroit Board of Education*,[245] the court determined that the public had an independent interest in the principal's performance as set forth in *Rosenblatt*.[246] The court, however, also appeared to both collapse the two prongs of the *New York Times* test and ignore the expansive "fitness for office" basis for finding defamatory comment relevant: "[P]rincipals are public officials to the extent their defamation claims involve communications relating to their conduct

240. *See* Grossman v. Smart, 807 F. Supp. 1404, 1408–10 (C.D. Ill. 1992); *see also* Baxter v. Doe, 868 So. 2d 958, 961 (La. Ct. App. 2004) (stating that vice-president of university was public official).

241. *See* Lassiter v. Lassiter, 456 F. Supp. 2d 876, 880 (E.D. Ky. 2006).

242. *See* Hoskins v. Fuchs, 517 S.W.3d 834, 841–43 (Tex. App. 2016).

243. *See, e.g.*, Johnson v. Bd. of Junior Coll. Dist. No. 508, 334 N.E.2d 442, 447 (Ill. App. Ct. 1975); El Paso Times, Inc. v. Trexler, 447 S.W.2d 403, 405 (Tex. 1969).

244. This division has not characterized plaintiffs occupying higher levels of authority in the public educations system, who are routinely deemed public officials. *See, e.g.*, Garcia v. Bd. of Educ. of Socorro Consol. Sch. Dist., 777 F.2d 1403, 1408 (10th Cir. 1985) (school board members); Ghafur v. Bernstein, 32 Cal. Rptr. 3d 626, 634 (Ct. App. 2005) (superintendent of charter schools); Palm Beach Newspapers, Inc. v. Early, 334 So. 2d 50, 51 (Fla. Dist. Ct. App. 1976) (superintendent of public instruction); State v. Defley, 395 So. 2d 759, 761 (La. 1981) (school superintendent and school supervisor); Scott v. News-Herald, 496 N.E.2d 699, 702–03 (Ohio 1986) (school superintendent); Strong v. Okla. Publ'g Co., 899 P.2d 1185, 1188–89 (Okla. Civ. App. 1995) (school board vice president).

245. 523 F. Supp. 2d 602 (E.D. Mich. 2007).

246. *Id.* at 610.

as principals."[247] A federal court similarly seemed to hinge public official status on the nature of the defamatory speech at issue.[248] In *Stevens v. Tillman*,[249] the Seventh Circuit Court of Appeals asserted *ipse dixit* that the principal bringing suit was a public official before generically citing *Rosenblatt* without elaboration.[250] For a Tennessee appeals court, the keys to a principal's public official status were that she was an authority figure and a government representative to the students and parents with whom she dealt and that her actions affected the state's taxpayers.[251] In the logic of the Vermont Supreme Court, a principal is a public official "[b]ecause of the crucial role of public education in American society."[252] In *Kapiloff v. Dunn*,[253] a Maryland appeals court somewhat ambiguously stated it was "plain" that the principal was within the "'public figure-public official' classification."[254]

While courts declining to recognize principals as public officials also vary somewhat in their analyses, what largely unites them is their relatively scant reliance on *Rosenblatt*'s indicia in reaching their conclusion. In *Ellerbee v. Mills*,[255] for example, the Georgia Supreme Court's entire discussion of *Rosenblatt* consisted of a recitation of the case's language concerning responsibility and control amidst its review of several relevant precedents.[256] Later, the court briefly stated its reasoning:

> [U]nder normal circumstances, a principal simply does not have the relationship with government to warrant "public official" status under *New York Times*. Principals, in general, are removed from the general conduct of government, and

247. *Id.*

248. *See* Johnson v. Robbinsdale Indep. Sch. Dist. No. 281, 827 F. Supp. 1439, 1441 (D. Minn. 1993).

249. 855 F.2d 394 (7th Cir. 1988).

250. *See id.* at 403 (citing Rosenblatt v. Baer, 383 U.S. 75, 85–86 (1966)).

251. Junior-Spence v. Keenan, No. 89-284-II, 1990 WL 17241, at *4 (Tenn. Ct. App. Feb. 28, 1990).

252. Palmer v. Bennington Sch. Dist., 615 A.2d 498, 501 (Vt. 1992).

253. 343 A.2d 251 (Md. Ct. Spec. App. 1975).

254. *Id.* at 258; *see also* Reaves v. Foster, 200 So. 2d 453, 456–58 (Miss. 1967) (declaring actual malice standard applicable to principal but not expressly designating plaintiff as public official under *Rosenblatt*).

255. 422 S.E.2d 539 (Ga. 1992).

256. *See id.* at 540 (quoting Rosenblatt v. Baer, 383 U.S. 75, 85 (1966)).

> are not policymakers at the level intended by the *New York Times* designation of public official.[257]

In *East Canton Education Association v. McIntosh*,[258] the Ohio Supreme Court endorsed this position[259] while referring to *Rosenblatt* even more obliquely.[260] An Illinois appeals court mentioned *Rosenblatt* only when reviewing an earlier ruling that had cited *Rosenblatt* in deciding that three high school teachers who served as coaches must show actual malice.[261] To explain its refusal to deem a principal a public official, the court later simply stated: "The relationship a public school . . . principal has with the conduct of government is far too remote . . . to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation."[262] An Indiana court quoted passages from *Rosenblatt* in its canvass of pertinent caselaw,[263] but ultimately rejected public official status on the ground that the issues involved in the suit "do not concern broader education issues of public concern, but merely an internal, work-place dispute."[264]

B. Hybrid Plaintiffs

While the field of education offers the most prominent illustrations of divergent approaches to public official status, it is hardly the only area where this phenomenon appears. For example, even courts within the same state have reached opposite conclusions as to whether a deputy public defender is a public official.[265] Most

257. *Id.*

258. 709 N.E.2d 468 (Ohio 1999).

259. *Id.* at 475 (quoting *Ellerbee*, 422 S.E.2d at 540).

260. *See id.* at 473–74 (noting that court had consulted *Rosenblatt* in previous decisions determining public official status of school superintendent and high school teacher/wrestling coach).

261. *See* McCutcheon v. Moran, 425 N.E.2d 1130, 1132 (Ill. App. Ct. 1981) (citing Basarich v. Rodeghero, 321 N.E.2d 739 (Ill. App. Ct. 1974)); *see also* Stevens v. Tillman, 568 F. Supp. 289, 294 (N.D. Ill. 1983) (finding principal not to be public official on authority of *McCutcheon*).

262. *McCutcheon*, 425 N.E.2d at 1133.

263. *See* Beeching v. Levee, 764 N.E.2d 669, 676–78 (Ind. Ct. App. 2002).

264. *Id.* at 679.

265. *Compare* Tague v. Citizens for Law & Order, Inc., 142 Cal. Rptr. 689, 693 (Cal. App. Dep't Super. Ct. 1977) (the plaintiff's "performance of [his] governmental duties, for the direct benefit of those for whom the government is legally responsible, is precisely the 'conduct of government affairs' deserving of public scrutiny that the court envisioned in *Rosenblatt*"), *with* James v. San Jose Mercury News, Inc., 20 Cal. Rptr. 2d 890, 895 (Ct. App. 1993) ("It would be a gross overstatement to say that a deputy public defender has, or would appear to the public to have, 'substantial responsibility for or control over the conduct of governmental affairs.'" (quoting Mosesian v. McClatchy Newspapers, 252 Cal. Rptr. 586, 589 (Ct. App. 1988)).

notable, however, is variation in the weight assigned to the private capacity of libel plaintiffs who also participate in government. Given scattered approaches to the question, it is difficult to forecast under what circumstances courts will adjudge the private dimension of such "hybrid" individuals as preclusive of public official designation.

As noted earlier, formal employment in the private sector has not been deemed an absolute bar to characterization as a public official.[266] The most compelling circumstance for treating private individuals as public officials in libel suits is when the statement at issue comments on the conduct of the plaintiff while formerly serving in public office. *Rosenblatt* acknowledged that a situation might arise in which interest in such plaintiffs' performance in office might have subsided to the point as to render the *New York Times* rule inapplicable.[267] A review of reported cases, however, has not identified an example of this scenario.[268]

A strong case for imposition of the actual malice standard can also be made where the plaintiff, though nominally a private individual, performs the functions of a particular public position. Thus, a Texas court found a lawyer who was retained by a city to serve as "City Attorney," and who interacted in various ways with the public in that capacity, to possess the responsibility for or control over the conduct of governmental affairs that marks a public official.[269] A California court similarly determined that the superintendent of privately operated charter schools qualified as a public official for libel purposes because the schools were considered part of the state's public school system.[270]

Even private actors who do not discharge the duties of an established public position may be designated public officials where they wield substantial influence within government. In *Hatfill v. New York Times Co.*,[271] an expert in biological welfare working for a large government contracting firm had extensive input into federal defense

266. *See* Johnson v. Cap. City Press, Inc., 346 So. 2d 819, 821–22 (La. Ct. App. 1977).

267. *See* Rosenblatt v. Baer, 383 U.S. 75, 87 n.14 (1966).

268. More typical of courts' disposition of this question is *Victoria v. Le Blanc*, 7 P.3d 668 (Or. Ct. App. 2000). There, the court rejected the argument by a former city administrator that the actual malice rule did not apply to letters written about her after her dismissal from office. *Id.* at 669–71.

269. *See* Rogers v. Cassidy, 946 S.W.2d 439, 445 (Tex. App. 1997).

270. *See* Ghafur v. Bernstein, 32 Cal. Rptr. 3d 626, 628, 632–33 (Ct. App. 2005).

271. 488 F. Supp. 2d 522 (E.D. Va. 2007).

policies—for example, making recommendations to high-ranking government officials, developing training programs for several government agencies including the CIA, and receiving federal funds to work on defense programs of "national importance."[272] The nature and significance of his work, held the court, gave the public an "independent interest" in his qualifications and performance.[273] Nor need private plaintiffs exert a potential impact comparable to Hatfill's for their involvement to thrust public official status upon them. An architect and structural engineer engaged to design and construct a county building,[274] the manager of a community center who owned the building the city rented for that purpose,[275] and a county tag agent presumed to be an independent contractor[276] were all ruled to fall within *Rosenblatt*'s conception of public officials. Under a comparable analysis, governmental delegation of significant authority to a private individual to control the lives of others can make the individual a public official when exercising this power. Under this reasoning, a California court applied the actual malice standard to a court-appointed conservator accused of abusing an elderly woman in her charge.[277]

At the same time, other courts have displayed considerable reluctance to apply the actual malice standard to plaintiffs who have a foot in both the private and public spheres. Reminiscent of the Supreme Court's state action doctrine,[278] some courts evince deep skepticism that an individual whose primary responsibilities lie in the private realm can qualify as a public official in libel actions. In *Mosesian v. McClatchy Newspapers*,[279] the court stated flatly that being in the government's employ was "the condition precedent for 'public official.'"[280] A New Mexico court refused to apply the actual

272. *Id.* at 528.

273. *Id.*

274. *See* Turley v. W.T.A.X., Inc., 236 N.E.2d 778, 781 (Ill. App. Ct. 1968).

275. *See* Brown v. Kitterman, 443 S.W.2d 146, 155 (Mo. 1969).

276. Hodges v. Okla. J. Publ'g Co., 617 P.2d 191, 194 (Okla. 1980).

277. Young v. CBS Broad., Inc., 151 Cal. Rptr. 3d 237, 240 (Ct. App. 2012).

278. *See, e.g.*, Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930–32 (2019); Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 157–64 (1978); *see also* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1415–16 (2003) (noting narrow conception of private activities that constitute "public function" so as to deem private actors as engaging in state action subject to constitutional requirements).

279. 252 Cal. Rptr. 586 (Ct. App. 1988).

280. *Id.* at 594 (rejecting argument that man with an interest in an association licensed to manage horse races was a public official); *see also* Smith v. A Pocono Country Place Prop. Owners

malice rule to a member of a mayoral advisory committee because the committee's members lacked "any official status."[281]

Though refraining from such categorical pronouncements, some courts have avoided designating plaintiffs as public officials on narrow or formalistic grounds. In *Bufalino v. Associated Press*,[282] the Second Circuit declined to rule whether his position as a part-time borough solicitor made him a public official because articles alleging ties to organized crime did not identify him as an officeholder.[283] The court was unmoved by the consideration that the charge, if true, would presumably bear on the plaintiff's fitness as solicitor.[284] In a variation of this reasoning, the Eighth Circuit Court of Appeals relied on the circumstance that a county coroner who performed an autopsy for another county was paid out of private funds for this service.[285] To buttress the conclusion that the actual malice rule did not apply to statements about her performance during this episode, the court went on to note that, in any event, the plaintiff's supervision by the other county's coroner meant that she lacked the degree of responsibility or control needed to characterize her as a public official in the context of her suit.[286] The Eighth Circuit likewise preferred not to rest its rejection of public official status for an informant to the police solely on the informant's lack of formal government employment.[287] Instead, the court asserted that the informant's "minor role" in a government enterprise would have barred his classification as a public official anyway.[288]

In other instances, the absence of government employment appears to operate more as a thumb than a fist on a scale that tilts against public official status. For example, an insurance agent who was appointed as a county's "agent of record" for health and life

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Ass'n, 686 F. Supp. 1053, 1056 (M.D. Pa. 1987) ("Plaintiff was the General Manager of a private property development and, hence, cannot be characterized as a public official.").

281. Furgason v. Clausen, 785 P.2d 242, 250 (N.M. Ct. App. 1989).

282. 692 F.2d 266 (2d Cir. 1982).

283. *See id.* at 272–74.

284. *See id.* at 272.

285. *See* Michaelis v. CBS, Inc., 119 F.3d 697, 702 (8th Cir. 1997). This case is discussed at *supra* notes 187–189 and accompanying text.

286. *See Michaelis*, 119 F.3d at 702.

287. *See* Jenoff v. Hearst Corp., 644 F.2d 1004, 1006 (4th Cir. 1981).

288. *Id.*

insurance, advised the county on all health and life insurance matters, and served as plan administrator for the county's deferred compensation plan[289]—and was conceded to have "a good deal of influence" over the county's selection of health insurance programs for its employees[290]—was ruled not to meet the criteria for public officials. Although the Arizona court noted that the plaintiff was not a government employee, it justified its holding by pointing out that the county's board of supervisors rather than the plaintiff made final decisions about insurance.[291] A Louisiana court similarly referred to a plaintiff as a "private consulting engineer" but ultimately resolved his status on his insufficient responsibility for or control over the installation of a sound system of a specialized public school.[292] In the same vein, the Fourth Circuit ruled that a private institute's temporary role as consultant to a county water authority had not rendered it a public official because of the institute's lack of formal authority.[293]

In a final class of cases, courts' withholding of public figure status from dual-nature plaintiffs appears to stem not from categorical resistance to characterizing such individuals in this way, but rather a well-grounded sense that a plaintiff's position does not accord with *Rosenblatt*'s underlying intention. An example is a private attorney who is engaged to participate in a specific governmental activity. In *Steere v. Cupp*,[294] the Kansas Supreme Court acknowledged that the plaintiff had been acting as an officer of the court when he served as a court-appointed defense attorney in a murder trial.[295] Neither this circumstance, however, nor his earlier participation in county government[296] "afford[ed] him the opportunity to exercise . . . [the] sovereign power" necessary to qualify him as a public official in the context of an allegedly defamatory news story concerning his representation of the defendant.[297] In *Durham v. Cannan*

289. Dombey v. Phx. Newspapers, Inc., 708 P.2d 742, 744 (Ariz. Ct. App. 1985), *vacated in part on other grounds*, 724 P.2d 562 (Ariz. 1986).

290. *Id.* at 746.

291. *See id.* at 746–47.

292. *See* Forrest v. Lynch, 347 So. 2d 1255, 1256–58 (La. Ct. App. 1977).

293. *See* Arctic Co. v. Loudoun Times Mirror, 624 F.2d 518, 522 (4th Cir.1980) (The Institute "had no control over the conduct of government affairs. It made no recommendations, participated in no policy determinations, and exercised no discretion").

294. 602 P.2d 1267 (Kan. 1979).

295. *Id.* at 1272.

296. Steere had been county attorney and later special counsel for a county board in a dispute. *Id.* at 1273 (noting Steere's public service as factors in finding him to be a public figure).

297. *Id.* at 1272.

Communications, Inc.,[298] the link between defamatory statements about a private attorney and his earlier employment by government was even more attenuated. Appearing after the plaintiff had completed his service as special counsel for a court of inquiry, a news broadcast accused him of involvement with a house of prostitution.[299] Because the charge had no bearing on the plaintiff's conduct as a special prosecutor, the court refused to consider him a public official.[300]

III. PUBLIC OFFICIALS AND PUBLIC FIGURES

Under First Amendment doctrine, ascribing public official status to a plaintiff is not the only means of activating the actual malice standard. Designation as a public figure also imposes on plaintiffs the burden of showing that the defendant acted with knowledge or reckless disregard of falsity.[301] In principle, the two kinds of "public" plaintiffs represent two distinct categories of individuals. As dealt with in some lower court reasoning, however, they intermingle in ways that tend to blur this distinction.

The extension of *New York Times*'s actual malice requirement in *Curtis Publishing Co. v. Butts*[302] to those denominated public figures stemmed largely from a recognition that many persons who are not public officials nonetheless wield comparable power and influence. In his pivotal concurring opinion,[303] Chief Justice Warren asserted that many individuals "who do not hold public office . . . are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at

298. 645 S.W.2d 845 (Tex. App. 1982).

299. *See id.* at 847.

300. *Id.* at 849; *see* Crane v. Ariz. Republic, 972 F.2d 1511, 1514 (9th Cir. 1992) ("[T]he position of private attorney does not automatically invite public scrutiny. An attorney is not a governmental official, so heightened press scrutiny does not serve a watchdog function.") In *Crane*, the court held that the former head of a city crime strike force was not a public official for the purpose of allegations of improper conduct subsequent to his service on the strike force. *Id.* at 1514, 1524.

301. *See infra* notes 302–313 and accompanying text.

302. 388 U.S. 130 (1967).

303. For an explanation of the configuration of opinions that produced the result in *Butts*, see Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill*,* Butts*, and* Walker, 1967 SUP. CT. REV. 267, 275–78.

large."[304] Later, in *Gertz v. Robert Welch, Inc.*,[305] the Court articulated somewhat different rationales for requiring public figures to prove actual malice as well as a taxonomy of such individuals. Relative to private individuals—who were constitutionally required to show only negligence[306]—public figures, like public officials, generally have "greater access to the channels of effective communication" and can therefore more effectively rebut defamatory falsehoods.[307] More importantly, public figures and public officials presumably accepted the risk of exposure to false accusations when they chose to engage in conduct that "invite[d] attention and comment."[308] Guided by these rationales, the Court identified two principal kinds of public figures.[309] Some individuals become public figures through their positions of "persuasive power and influence";[310] they thus attain this status by achieving "such pervasive fame or notoriety" that they become public figures for all purposes and in every context.[311] In most cases, however, people become public figures by having "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[312] Having acquired their visibility in this specific manner, such persons assume the position of a public figure only for "a limited range of issues."[313] In subsequent decisions, the Court soon demonstrated the restricted basis for becoming a limited-purpose public figure. The Court ruled that public interest alone, even where the plaintiff engages the media, does not necessarily render a dispute a "public controversy";[314] that defendants

304. *Curtis Publ'g Co.*, 388 U.S. at 163–64 (Warren, C.J., concurring).

305. 418 U.S. 323 (1974).

306. *Id.* at 347. *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749,751 (1985) (Powell, J., plurality opinion) (explaining that *Gertz*'s ruling that private figures must demonstrate actual malice to recover presumed or punitive damages applies only to defamatory expressions about matters of public concern).

307. *Gertz*, 418 U.S. at 344.

308. *Id.* at 344–45.

309. The Court also noted a third category of involuntary public figures but anticipated that such individuals would be "exceedingly rare." *Id.* at 345. Caselaw has borne out this expectation. *See* Matthew Lafferman, Comment, *Do Facebook and Twitter Make You a Public Figure?: How to Apply the* Gertz *Public Figure Doctrine to Social Media*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 199, 220 (2012) ("Courts have used this [involuntary public figure] doctrine so sparingly that some courts and commentators have questioned its existence altogether.").

310. *Gertz*, 418 U.S. at 345.

311. *See id.* at 351.

312. *Id.* at 345.

313. *Id.* at 351.

314. Time, Inc. v. Firestone, 424 U.S. 448, 454–55 (1976) (holding that socialite's convening of several press conferences to discuss her divorce proceedings did not make her a limited public

could not transform someone who had not invited attention or comment into a public figure by their own actions propelling the plaintiff into public consciousness;[315] and that an individual's conviction of a crime that draws media attention does not automatically make that person a public figure in the absence of voluntary participation in a public controversy.[316]

Gertz's application of rationales for the actual malice standard to both public figures and public officials obscures differences between these two categories as well as the distinct standard governing each. As a preliminary matter, it is difficult to gauge relative access to channels of communication in light of the Internet, social media, and other expansions in communicative capacity that have arisen since *Gertz*.[317] Assuming that some classes of people can more readily summon public attention, however, this premise does not apply equally to both types of public plaintiffs. Virtually by definition, those who have attained "such pervasive fame or notoriety"[318] as to constitute all-purpose public figures will presumably be able to reach a broad audience. Limited-purpose public figures, who have vaulted to "the forefront of particular public controversies,"[319] are also likely to gain media attention when they respond to criticism arising from their participation in the controversy. Given the wide range of government employees who may be considered public officials under *Rosenblatt*,[320] however, it seems dubious to assume that most of them will effectively gain the ear of the public when countering defamatory falsehoods.

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figure); *see* Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980) ("A public controversy . . . must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way. . . . [A] public controversy is a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants.").

315. *See* Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).

316. *See* Wolston v. Reader's Dig. Ass'n, 443 U.S. 157, 166–67 (1979).

317. *See* Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 89 (2007) (arguing that ability to reach large audiences through the Internet has undermined Court's reasoning in *Gertz*); Usman, *supra* note 58, at 287 (noting "four decades of technological change in access to media" as factor in calling *Gertz* rationales into question).

318. *Gertz*, 418 U.S. at 351.

319. *Id.* at 345.

320. See *supra* Section I.C.

These observations apply with even more force to the Court's "normative consideration"[321] that public plaintiffs have assumed the risk of harsh scrutiny by ascending into the public arena. While it is an exaggeration to say there is no such thing as bad publicity, the adage captures the reality that all-purpose public figures understand that rising to this level of prominence can entail severely critical inspection of their lives.[322] Those who have elected to thrust themselves into the "vortex"[323] of a public controversy should similarly expect intense focus and unfavorable commentary on their role.[324] Public officials, on the other hand, should not be assumed to have undertaken the risk of public obloquy where they do not occupy a position of prominence.[325]

Overlapping elements of the public official and public figure doctrines have given rise to a sometimes awkward or ambiguous coexistence between the two in some cases. Occasionally a court will appear simply to confuse or conflate the two concepts.[326] In some instances, a court will redundantly—from the standpoint of requiring

321. *Gertz*, 418 U.S. at 344.

322. *Id.*

323. *Id.* at 352.

324. 2 EDMUND BURKE, *Speech on Mr. Fox's East India Bill* (Dec. 1, 1783), *in* THE SPEECHES OF THE RIGHT HONOURABLE EDMUND BURKE IN THE HOUSE OF COMMONS, AND IN WESTMINSTER HALL 406, 488 (1816) ("[C]alumny and abuse are essential parts of triumph.").

325. *See* Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1666 (1987) ("In few of these cases [where courts have held lower-level government employees to be public officials] could one honestly say that the plaintiff either had access to the media to respond or had assumed the risk.").

326. *See, e.g.*, Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431 (8th Cir. 1989) (plaintiff "was a *public figure* and . . . the challenged statements relate to his *official conduct*" (emphasis added)); Wilkinson v. Schoenhorn, No. CV 960565559S, 1999 WL 203750, at *3 (Conn. Super. Ct. Mar. 24, 1999) ("'Public figure' includes public officials . . . and have been held to include such persons as a public school teacher [and] a police officer . . . ." (internal citations omitted)); Abdelsayed v. Narumanchi, 668 A.2d 378, 380 (Conn. App. Ct. 1995) (referring to plaintiff as "public figure" in course of finding him to be public official); Ducklow v. KSTP-TV, LLC, Nos. A13-1279, A13-1280, A13-1281, 2014 WL 802515, at *2 (Minn. Ct. App. Mar. 3, 2014) (citing case holding that a public schoolteacher is a "public official" to support ruling that public schoolteachers are treated as "public teachers"); Frensley v. Newschannel 5 Network, No. 11C-1390, 2013 Tenn. Cir. LEXIS 690, at *2 (Mar. 22, 2013) ("It is undisputed that the plaintiff, a school teacher, is a 'public figure' for purposes of determining the standard for establishing the essential elements of defamation and false light invasion of privacy."); MediaOne, L.L.C. v. Henderson, 592 S.W.3d 933, 942 (Tex. App. 2019) ("[The plaintiff], as a former public *official* [police chief], was a public *figure* with respect to the publication of The Monitor's original article because less than two years had passed between his resignation and the defamatory statements." (emphases added)); O'Connor v. Burningham, 165 P.3d 1214, 1219 (Utah 2007) (reviewing discussion of public figures in *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967), to support ruling that plaintiff was public official).

actual malice—find a plaintiff to be both a public official and public figure.[327] In others, the court—perhaps hedging—will state that the plaintiff falls into at least one of these categories.[328] In still another variation, a court concluding that the plaintiff cannot be a public official will rest the application of the actual malice rule squarely on designation as a public figure.[329] Somewhat more curiously, courts sometimes characterize as public figures plaintiffs who seem readily to lend themselves to public official status. In a suit brought by a university's associate dean of students, the court devoted extended analysis to conclude that he was a limited-purpose public figure.[330] Police officers, perhaps among the government employees most frequently classified as public officials in libel cases,[331] have nonetheless instead been treated as public figures from time to time.[332] Finally, the courts that most clearly display a firm grasp of the distinction between public officials and public figures are arguably those that find the plaintiff to qualify as neither.[333] By so ruling, they demonstrate their understanding that only by excluding the plaintiff from either category can application of the actual malice standard be precluded.

Complicating the distinction between public officials and public figures is the tendency by some courts to treat *Gertz*'s rationales for distinguishing between public persons and private figures as criteria for determining individual plaintiffs' status. *Gertz* itself

327. *See, e.g.*, Arnheiter v. Random House, Inc., 578 F.2d 804, 805 (9th Cir. 1978) (per curiam); Nothstein v. U.S. Cycling, 499 F. Supp. 3d 101, 125 (E.D. Pa. 2020); Demby v. English, 667 So. 2d 350, 354–55 (Fla. Dist. Ct. App. 1995) (per curiam); Luper v. Black Dispatch Publ'g Co., 675 P.2d 1028, 1031 (Okla. Civ. App. 1983).

328. Hicks v. Stone, 425 So. 2d 807, 813 (La. Ct. App. 1982) ("[W]e find that Dr. Hicks is a public official, or at least a public figure . . . ."); Romero v. Abbeville Broad. Serv., Inc., 420 So. 2d 1247, 1250 (La. Ct. App. 1982) ("[P]laintiff was a public officer and/or a public figure for purposes of fixing the burden of proof.").

329. *See, e.g.*, Steere v. Cupp, 602 P.2d 1267, 1272–73 (Kan. 1979); Grayson v. Curtis Publ'g Co., 436 P.2d 756, 762 (Wash. 1967).

330. *See* Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 869–71 (W.D. Va. 2016); Eidson v. Berry, 415 S.E.2d 16, 17 (Ga. Ct. App. 1992) (referring to city attorney as "public figure").

331. See *infra* Section IV.A.

332. *See, e.g.*, Mercer v. City of Cedar Rapids, 308 F.3d 840, 848–49 (8th Cir. 2002); Sparks v. Thurmond, 319 S.E.2d 46, 49 (Ga. Ct. App. 1984); *see also* El Paso Times, Inc. v. Trexler, 447 S.W.2d 403, 404–05 (Tex. 1969) (viewing public university professor as public figure).

333. *See, e.g.*, Verity v. USA Today, 436 P.3d 653, 663–64 (Idaho 2019); Beeching v. Levee, 764 N.E.2d 669, 679 (Ind. Ct. App. 2002); Sellars v. Stauffer Commc'ns, Inc., 684 P.2d 450, 453–56 (Kan. Ct. App. 1984).

acknowledged that its observations about access to media and assumption of risk were "generalities" that would not obtain in every instance where plaintiffs were deemed public figures or public officials.[334] Nevertheless, the Court in *Hutchinson v. Proxmire*[335] in finding Hutchinson to be a private figure observed that he lacked the "regular and continuing access to the media that is one of the accouterments of having become a public figure."[336] It is perhaps unsurprising, then, that a number of courts have conflated *Gertz*'s justifications for requiring public officials to show actual malice and the means by which such persons are identified. In ruling that a public schoolteacher was not a public official, the Virginia Supreme Court in *Richmond Newspapers, Inc. v. Lipscomb*,[337] compared the plaintiff to Elmer Gertz, the attorney who the United States Supreme Court had ruled was neither a public official nor a public figure.[338] The court observed that "attorneys have significantly more access than teachers to the media and a more realistic opportunity to answer false charges about their competence."[339] The court also cited the risk an individual takes of close public scrutiny as an element to be weighed in deciding whether *a particular public employee* is one classified as a "public official."[340] Although the court went on to state that the teacher did not hold a position recognized by *Rosenblatt* as that of a public official,[341] this discussion did not negate the court's importation of *Gertz*'s justifications into its analysis. The Utah Supreme Court in *O'Connor v. Burningham*[342] also seemed to elevate the role of *Gertz*'s reasoning. Though the court found that the plaintiff's position did not possess the

334. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

335. 443 U.S. 111 (1979).

336. *Id.* at 136; *see also* Wolston v. Reader's Dig. Ass'n, 443 U.S. 157, 170–71 (1979) (Blackmun, J., concurring) (stating that lapse of 16 years between plaintiff's participation in event giving rise to alleged falsehood about him and publication of book containing defamatory statement eroded whatever access to media and "risk of public scrutiny" might be ascribed to plaintiff at time of event (internal quotation marks omitted)).

337. 362 S.E.2d 32 (Va. 1987).

338. *Gertz*, 418 U.S. at 351–52.

339. *Richmond Newspapers, Inc.*, 362 S.E.2d at 36; *see* Mandel v. Boston Phx., Inc., 456 F.3d 198, 204 (1st Cir., 2006) (The public-official determination generally "tak[es] into account: (i) the extent to which the inherent attributes of a position define it as one of influence over issues of public importance; (ii) the position's special access to the media as a means of self-help; and (iii) the risk of diminished privacy assumed upon taking the position.").

340. *Richmond Newspapers, Inc.*, 362 S.E.2d at 36.

341. *See id.* at 37 (citing *Rosenblatt*, 383 U.S. at 86 n.13).

342. 165 P.3d 1214 (Utah 2007).

"apparent importance" needed to make him a public official,[343] crucial to its reasoning was the question of assumption of risk. Unlike higher-level public education administrators, who "likely surrendered no small portion of their ability to protect their reputations," coaches and teachers like the plaintiff "struck no such bargain."[344] In addition, a Washington court went further and appeared to place *Gertz*'s considerations of media access and assumption of risk at center stage in its analysis of the plaintiff's status: "[T]he most important factor distinguishing public and private plaintiffs is the assumption of the risk of greater public scrutiny of public life. . . . Of secondary importance is the public plaintiff's ease of access to the press."[345]

Other courts have blended *Rosenblatt*'s tests and *Gertz*'s rationales to formulate their standards for identifying public officials. In *Mosesian v. McClatchy Newspapers*,[346] a California court promulgated a four-part definition of public official. Three of the prongs echoed passages from *Rosenblatt*, while the fourth tracked *Gertz* in stating that a public official "usually enjoys significantly greater access to the mass media and therefore a more realistic opportunity to contradict false statements than the private individual."[347] After quoting extensively from *Rosenblatt*, the First Circuit Court of Appeals in *Kassel v. Gannett Co., Inc.*[348] set forth access to media and assumption of risk as two of the three legs of the "stool" to which it would look to ascertain whether a plaintiff was a public official.[349] In *True v. Ladner*,[350] the Maine Supreme Court also recited passages from *Rosenblatt* before additionally stressing schoolteachers' lack of media access and their non-assumption of risk

343. *Id.* at 1218–19 (quoting *Rosenblatt*, 383 U.S. at 86).

344. *Id.* at 1220.

345. Eubanks v. N. Cascades Broad., 61 P.3d 368, 373 (Wash. Ct. App. 2003) (citing Clawson v. Longview Publ'g Co., 589 P.2d 1223 (Wash. 1979)). After discussing the roles that media access and assumption of risk would play in determining the plaintiff's status, *Clawson*, 589 P.2d at 1226–27, the Washington Supreme Court had later quoted *Rosenblatt*'s descriptions of public officials, *id.* at 1227–28. However, the *Eubanks* court's implicit interpretation of the latter as more-or-less an afterthought appears plausible.

346. 252 Cal. Rptr. 586 (Ct. App. 1988).

347. *See id.* at 593; *accord* James v. San Jose Mercury News, Inc., 20 Cal. Rptr. 2d 890, 895 (Ct. App. 1993).

348. 875 F.2d 935 (1st Cir. 1989).

349. *See id.* at 939–40.

350. 513 A.2d 257, 264 (Me. 1986), *superseded by statute on other grounds as stated in* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 41–42 (D. Me. 2005).

as reasons for not classifying them as public officials.[351] In a kind of mirror image to *Ladner*, a Connecticut court concluded that a teacher is a public official under *Rosenblatt*, and then optimistically added that the media would probably give teachers charged with misconduct both opportunity and encouragement to respond.[352]

IV. PUBLIC OFFICIALS AND THE QUEST FOR RULES

The tension between the stability of fixed rules and the adaptability of more flexible standards is old and indeed inherent in law.[353] Determination of whether a government employee in a defamation suit must prove actual malice embodies this dilemma. Under *Rosenblatt*, a court has broad latitude to assess whether a government position entails the responsibility, control, or apparent importance to brand its holder a public official.[354] *Rosenblatt*'s general indicia of public official status amount to a standard; indeed, the Court does not purport to be promulgating a rule.[355] Compounding this imprecision is the wide latitude afforded courts under *Garrison* to decide whether the defamatory statement at issue bears on an official's fitness for office.[356] At the same time, the impulse persists to develop a framework that avoids endless ad hoc decision-making within the blurred parameters of the *Rosenblatt-Garrison* regime. Thus, patterns can be discerned in which courts have apparently adopted a nearly irrebuttable presumption of public official status for certain classes of government employees.[357] In addition, proposals have been advanced for a more specific test to gauge the appropriateness of applying the actual malice rule.[358] As with other doctrines, however, courts cannot impose more certainty than the subject can bear. Inevitably, courts will sometimes consult their sense of whether a libel plaintiff on balance

351. *See id.* at 263–64; *see also* Verity v. USA Today, 436 P.3d 653, 663–64 (Idaho 2019) ("A schoolteacher or coach is not situated better than a private citizen to combat falsehoods. [The plaintiff] lacked access to a bully pulpit . . . so any influence [the plaintiff] could have had to defend his reputation as a public schoolteacher would be minuscule.").

352. *See* Kelley v. Bonney, 606 A.2d 693, 710 (Conn. 1992).

353. *See generally* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (discussing how Supreme Court Justices' divergent views on use of fixed rules versus flexible standards affected constitutional analysis and decisional outcomes in the Court's 1991 term).

354. See *supra* Section I.C.

355. See *supra* notes 29–38 and accompanying text.

356. See *supra* notes 49–57 and accompanying text.

357. *See infra* Section IV.A

358. *See infra* Section IV.B.

"deserves" to be subjected to the actual malice requirement. At least some courts have intimated as much.

A. The Case of Police Officers

Aside from obvious positions like governor and senator, *Rosenblatt* appears to call for an individualized determination of public official status tailored to the authority and perceived importance of the plaintiff. Recurring libel suits by certain classes of government employees, however, have encouraged the search for categorical resolution of their designation. In the case of some employees like public schoolteachers, no consensus has been reached.[359] For at least one kind of employee, however, courts appear to have arrived at a virtually per se rule of public official status: police officers.[360] The rationales for regarding police officers as public officials have been well-stated by courts. In the oft-cited case of *Gray v. Udevitz*,[361] the Tenth Circuit Court of Appeals declared:

> The cop on the beat is the member of the department who is most visible to the public. He possesses both the authority and the ability to exercise force. Misuse of his authority can result in significant deprivation of constitutional rights and personal freedoms, not to mention bodily injury and financial loss. The strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official.[362]

In another frequently quoted passage—involving a patrol officer[363] but elsewhere applied to police officers[364]—the Illinois Supreme Court observed:

> [L]aw enforcement is a primary function of local government and . . . the public has a far greater interest in the qualifications and conduct of law enforcement officers, even

359. *See supra* Section II.A.

360. Gray v. Udevitz, 656 F.2d 588, 591 (10th Cir. 1981).

361. *Id.*

362. *Id.*

363. *See, e.g.*, Ramacciotti v. Zinn, 550 S.W.2d 217, 225 (Mo. Ct. App. 1977).

364. *See, e.g.*, Opaitz v. Gannaway Web Holdings, LLC, 454 S.W.3d 61, 66 (Tex. App. 2014); Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287 (Mass. 2000); Smith v. Russell, 456 So. 2d 462, 464 (Fla. 1984).

> 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 . . . .[365]

The credence given such reasoning is attested by the overwhelming number of cases in which courts have classified police officers as public officials.[366] Members of police departments in higher positions, though some may lack the visibility of officers on the beat, are also routinely assigned this status.[367] Moreover, while the structure of federalism precludes imposition of a uniform rule absent a Supreme Court edict, it is common for courts to treat the designation

365. Coursey v. Greater Niles Twp. Publ'g Corp., 239 N.E.2d 837, 841 (Ill. 1968); *see Smith*, 456 So. 2d at 464 (A police officer "[i]s a highly visible representative of government authority who has power over citizens and broad discretion in the exercise of that power. . . . Most citizens are interested in the qualifications and performance of policemen . . . ."); *Rotkiewicz*, 730 N.E.2d at 287 ("[B]ecause of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers' high visibility within and impact on a community . . . [police officers] are 'public officials' for purposes of defamation."); *Opaitz*, 454 S.W.3d at 66 ("The public perceives a police officer as an authority figure entrusted in upholding the law and possesses a legitimate interest in information related to his ability to follow the law and perform his duty to protect the public.").

366. *E.g.*, Ammerman v. Hubbard Broad., Inc., 572 P.2d 1258, 1261 (N.M. Ct. App. 1977); Rattray v. City of Nat'l City, 51 F.3d 793, 800 (9th Cir. 1994); McKinley v. Baden, 777 F.2d 1017, 1021 (5th Cir. 1985); Coughlin v. Westinghouse Broad. & Cable, Inc., 603 F. Supp. 377, 386 (E.D. Pa. 1985); Ethridge v. N. Miss. Commc'ns, Inc., 460 F. Supp. 347, 351 (N.D. Miss. 1978); Gomes v. Fried, 186 Cal. Rptr. 605, 610 (Ct. App. 1982); Moriarty v. Lippe, 294 A.2d 326, 334 (Conn. 1972); Jackson v. Filliben, 281 A.2d 604, 605 (Del. 1971); Harrison v. Williams, 430 So. 2d 585, 585 (Fla. Dist. Ct. App. 1983); Pierce v. Pac. & S. Co., 303 S.E.2d 316, 318–19 (Ga. Ct. App. 1983); Angelo v. Brenner, 406 N.E.2d 38, 40 (Ill. App. Ct. 1980); Tucci v. Guy Gannett Publ'g Co., 464 A.2d 161, 165 (Me. 1983); Shafer v. Lamar Publ'g Co., 621 S.W.2d 709, 710–11 (Mo. Ct. App. 1981); Marchiano v. Sandman, 428 A.2d 541, 542 (N.J. Super. Ct. App. Div. 1981); Orr v. Lynch, 401 N.Y.S.2d 897, 899 (App. Div. 1978), *aff'd*, 383 N.E.2d 562 (N.Y. 1978); McNabb v. Oregonian Publ'g Co., 685 P.2d 458, 460 (Or. Ct. App. 1984); Dellinger v. Belk, 238 S.E.2d 788, 789 (N.C. Ct. App. 1977); Dunlap v. Phila. Newspapers, Inc., 448 A.2d 6, 8 n.1 (Pa. Super. Ct. 1982); McClain v. Arnold, 270 S.E.2d 124, 125 (S.C. 1980); *see* MediaOne, L.L.C. v. Henderson, 592 S.W.3d 933, 941 (Tex. App. 2019) ("Police officers and other law enforcement officials are almost always held to be public officials.").

367. *See, e.g.*, Thuma v. Hearst Corp., 340 F. Supp. 867, 869 (D. Md. 1972) (captain); Rosales v. City of Eloy, 593 P.2d 688, 689 (Ariz. Ct. App. 1979) (sergeant); *Jackson*, 281 A.2d at 605 (sergeant); Goolsby v. Wilson, 246 S.E.2d 371, 372 (Ga. Ct. App. 1978) (chief); Moore v. Streit, 537 N.E.2d 408, 415 (Ill. App. Ct. 1989) (chief); Kidder v. Anderson, 354 So. 2d 1306, 1307–08 (La. 1978) (chief); Roche v. Egan, 433 A.2d 757, 762 (Me. 1981) (detective); Tomkiewicz v. Detroit News, Inc., 635 N.W.2d 36, 42–43 (Mich. Ct. App. 2001) (lieutenant); Mahnke v. Nw. Publ'ns, Inc., 160 N.W.2d 1, 2, 6–7 (Minn. 1968) (detective captain); *Ramacciotti*, 550 S.W.2d at 221, 225 (sergeant); Costello v. Ocean Cnty. Observer, 643 A.2d 1012, 1021–22 (N.J. 1994) (lieutenant); Starr v. Beckley Newspapers Corp., 201 S.E.2d 911, 913 (W. Va. 1974) (sergeant); Pronger v. O'Dell, 379 N.W.2d 330, 331 (Wis. Ct. App. 1985) (chief).

of police officers as public officials as an established judicial fact.[368] Nor has this logic been confined to members of the police department. Public official status has also been accorded to highway patrol officers,[369] deputy sheriffs,[370] correctional officers,[371] and other government personnel with enforcement responsibilities.[372]

B. Alternative Approaches: A Sliding Scale

Under Supreme Court rulings, the framework for determining whether a government employee must satisfy the actual malice requirement comprises two distinct phases: (1) ascertaining whether the plaintiff's position intrinsically is the kind contemplated by *Rosenblatt*, and (2) deciding whether the defamatory falsehood related to the plaintiff's official conduct or bore on the plaintiff's fitness for

368. *See, e.g.*, *McKinley*, 777 F.2d at 1021 ("Federal courts have consistently held police officials to be public officials for the purposes of the [*New York Times*] rule."); *Gray*, 656 F.2d at 591 ("Police officials have uniformly been treated as public officials within the meaning of *New York Times*."); *Coughlin*, 603 F. Supp. at 385 ("Courts have consistently treated police officers as public officials within the meaning of *New York Times*."); *Gomes v. Fried*, 186 Cal. Rptr. at 610 ("Courts have uniformly held that a . . . low-level police officer is a 'public official' for the purpose of the *New York Times* privilege."); Smith v. Danielczyk, 928 A.2d 795, 805 (Md. 2007) ("[I]t appears to be well-settled . . . that police officers, from patrol officers to chiefs, are regarded for *New York Times* purposes as public officials."); *Rotkiewicz*, 730 N.E.2d at 288 (finding plaintiff police officer to be public official "in line with the vast majority of other jurisdictions"); *Starr*, 201 S.E.2d at 913 ("[C]ourts throughout the land . . . declare police officers to be public officials as defined in the *New York Times* case.").

369. *E.g.*, Roberts v. Dover, 525 F. Supp. 987, 991 (M.D. Tenn. 1981); Nat'l Ass'n for the Advancement of Colored People v. Moody, 350 So. 2d 1365, 1369 (Miss. 1977) (erroneously using term "public figure").

370. *E.g.*, Romero v. Abbeville Broad. Serv., Inc., 420 So. 2d 1247, 1250 (La. Ct. App. 1982); *Ammerman*, 572 P.2d at 1261; Dally v. Orange Cnty. Publ'ns, 497 N.Y.S.2d 947, 948 (App. Div. 1986); Cline v. Brown, 210 S.E.2d 446, 449 (N.C. Ct. App. 1974); Murray v. Lineberry, 69 S.W.3d 560, 563 (Tenn. Ct. App. 2001).

371. Beeton v. District of Columbia, 779 A.2d 918, 924 (D.C. 2001); Stewart v. Sun Sentinel Co., 695 So. 2d 360, 361–62 (Fla. Dist. Ct. App. 1997); Sweeney v. Prisoners' Legal Servs. of N.Y., Inc., 538 N.Y.S.2d 370, 373 (App. Div. 1989); Lyons v. State, No. 01-A-01-9304-BC-00160, 1993 WL 414840, at *2 (Tenn. Ct. App. Oct. 20, 1993).

372. Meiners v. Moriarity, 563 F.2d 343, 352 (7th Cir. 1977) (federal drug enforcement agent); Selby v. Savard, 655 P.2d 342, 344–45 (Ariz. 1982) (state's assistant superintendent of liquor enforcement); Lewis v. Oliver, 873 P.2d 668, 675 (Ariz. Ct. App. 1993) (FAA safety inspector); Demby v. English, 667 So. 2d 350, 350 (Fla. Dist. Ct. App. 1995) (per curiam) (county director of animal control); McAvoy v. Shufrin, 518 N.E.2d 513, 516 n.3 (Mass. 1988) (constable) (basing public official designation on plaintiff's declining to contest that status); Britton v. Koep, 470 N.W.2d 518, 523–24 (Minn. 1991) (county probation officer); Angel v. Ward, 258 S.E.2d 788, 791 (N.C. Ct. App. 1979) (IRS agent).

the position.[373] To some, however, the framework provides insufficient direction to courts or protection of the private dimensions of public employees' lives. Thus, proposals have been advanced for deciding whether a government employee must prove actual malice by means other than the Court's two discrete inquiries. In particular, a more holistic approach that focuses on the relationship between a plaintiff's place in the government hierarchy and the nature of the conduct falsely attributed to the plaintiff has been thought to more equitably and predictably resolve this arena's underlying tension between freedom to comment on government and states' interest in protecting reputation.

Under one notable proposal, courts would apply a kind of sliding scale in which the level of the plaintiff's position would determine the scope of defamatory statements shielded by the actual malice barrier.[374] Thus, much like an all-purpose public figure,[375] an official at the apex of the government hierarchy would be required to show actual malice regardless of the conduct with which the official has been falsely charged.[376] As positions descend from this pinnacle, however, the more evident should be the nexus between the government employee's position and the alleged conduct for the actual malice rule to apply.[377] This calibration, too, finds a parallel in public figure doctrine; it has been observed that when courts assess whether a plaintiff is a limited-purpose public figure, "the more important the controversy, the lower will be the threshold of the involvement needed to qualify as having 'thrust' oneself to the controversy's forefront."[378] At the lowest level of government employees, the closeness of this relationship would become irrelevant because of an irrebuttable presumption that no false charge would suffice to activate the actual

373. *See infra* Section I.A.

374. *See* Finkelson, *supra* note 35, at 894–907.

375. *See* Hatfill v. N.Y. Times Co., 532 F.3d 312, 318 (4th Cir. 2008) ("[A] public official . . . must *always* meet the actual malice standard . . . ." (emphasis added)); Davidson v. Baird, 438 P.3d 928, 940 (Utah Ct. App. 2019) ("*[A]ll allegedly defamatory statements* about an all-purpose public figure must be made with actual malice in order to be actionable." (emphasis added)).

376. *See* Finkelson, *supra* note 35, at 899.

377. *See id.* at 901–03. Rodney Smolla has suggested the possibility of a similar kind of approach: "[a] type of pyramid analysis . . . with public officials at the high end of the policymaking hierarchy receiving only a narrow area of reserved privacy, but officials at the low end of the hierarchy enjoying a substantial degree of what will essentially be private figure status." Smolla, *supra* note 65, at 1568.

378. Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1053 (1996) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974)).

malice standard.[379] To locate an employee's position in government, the proposal would reverse the relative relevance of *Rosenblatt* and *Gertz v. Robert Welch, Inc.*[380] under current Supreme Court doctrine.[381] Determination of rank would take into account "character of employment," "access to means of self-help," and "assumed risk."[382]

Whatever the merits of this kind of standard, no discernible trend has arisen to abandon the *Rosenblatt* framework without the imprimatur of the Supreme Court. Nevertheless, such proposals prompt speculation of whether courts are already weighing such considerations *sub silentio* under the rubric of *Rosenblatt*'s verbiage. That question in turn implicates the larger debate of the extent to which formal legal tests constrain judicial latitude or simply offer a facade for decisions arrived at on more equitable or outcome-oriented grounds.[383] The broader issue is of course unresolvable, but determination of public official status offers a helpful illustration of this tension. That examination follows below.

C. Rosenblatt and Normative Judicial Decision-making

The potential for courts to resolve public official status as much on their sense of whether the government employee should be required to show actual malice, as on conformity to *Rosenblatt*'s prescriptions, finds stimulation in *Rosenblatt* itself. Because the Court's opinion

379. *See* Finkelson, *supra* note 35 at 903.

380. 418 U.S. 323 (1974).

381. *See supra* Section III and accompanying text.

382. Finkelson, *supra* note 35, at 895 (quoting Kassel v. Gannett Co., Inc., 875 F.2d 935, 940 (1st Cir. 1989)).

383. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 61 (2003) ("The dubious aspect of separation-of-powers thinking is the idea that judges are not to make law (that being the legislature's prerogative) but merely to apply it. . . . But in interpreting the Constitution and statutes as well, judges make up much of the law that they are purporting to be merely applying."); Michael R. Dimino, *Pay No Attention to that Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 362 (2003) ("Citation to authority or legal principle [by the Supreme Court] is often a rationalization for a conclusion already reached, a 'game' designed to decoy analysts into thinking that the decisions are other than politically motivated and equal in effect . . . to the decisions of legislators."); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155, 156 (1994) ("[Courts] must always deny their authority to make law, even when they are making law. . . . I call it lying. Courts and judges always lie. Lying is the nature of the judicial activity.").

does not purport to offer a comprehensive definition,[384] it leaves interstices that courts may wish to fill with their own interpretation of the values at stake. Such an approach need not be viewed as outright defiance of *Rosenblatt*; these values can be drawn from principles identified by the Court as underlying the indicia of public official status it set forth. Almost ritualistically, for example, the *Rosenblatt* Court quoted the *New York Times* declaration that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[385] The Court further observed that there exists "a strong interest in debate on public issues";[386] that "[c]riticism of government is at the very center of the constitutionally protected area of free discussion";[387] that "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized";[388] and that "when interests in public discussion are particularly strong . . . the Constitution limits the protections afforded by the law of defamation."[389]

Much as some courts treat *Gertz*'s rationales for subjecting public officials to the actual malice rule as criteria for their identification,[390] they may be tempted to employ *Rosenblatt*'s conceptual foundations as free-floating principles for deciding whether a certain government employee should have to prove actual malice. It is impossible, of course, to know when courts may be incanting *Rosenblatt*'s descriptions while actually arriving at their decision through assessment of the just balance of broader First Amendment interests.[391] Nevertheless, courts apparently do not universally view

384. *See supra* notes 29–38 and accompanying text.

385. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) (alteration in original) (emphasis omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.* at 86.

390. *See supra* notes 334–352 and accompanying text.

391. Such exposition of reasoning is hardly unknown in the law. *See, e.g.*, MELVIN ARON EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 132 (10th ed. 2011) (asserting that courts often decide whether to classify an enterprise as a joint venture or partnership according to which would produce a more desirable result in the case); *see also* State v. Shack, 277 A.2d 369, 374 (N.J. 1971) ("We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That

Rosenblatt as cabining their discretion in determining a plaintiff's status. Perhaps the strongest indication of this phenomenon is those cases in which courts conclude that the plaintiff is a public official without reference to *Rosenblatt* at all.[392] Granted, it is conceivable that at least some of these courts simply believe that the government employee's status is so self-evident or well-established that no analytical rigor is necessary. Still, the omission of the Supreme Court's dominant authority on the question leaves ample room for the inference that such courts are deeming plaintiffs public officials because—at bottom–on balance they ought to be held to the actual malice standard.

Further evidence that such post hoc classification sometimes occurs can be found in cases in which courts offer public figure status as an alternative basis for requiring a government employee to show actual malice.[393] A conspicuous example of a court's determination to apply the actual malice rule whatever plaintiff's label is needed is *Bishop v. Wometco Enterprises, Inc.*[394] There, an investigator employed by the City of Miami brought suit over a television editorial on his testimony before the City Commission.[395] The court's opinion took pains to cover every principal basis for holding the plaintiff to the actual malice standard without definitively committing to any:

> Whether he was a public official, a public figure, or whether he simply involved himself in a matter of public interest, or whether his appearance and testimony before the Miami City

approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the [parties].").

392. *See, e.g.*, Zurita v. V.I. Daily News, 578 F. Supp. 306, 308 (D.V.I. 1984); Thuma v. Hearst Corp., 340 F. Supp. 867, 869 (D. Md. 1972); Goolsby v. Wilson, 246 S.E.2d 371, 372 (Ga. Ct. App. 1978); McCarney v. Des Moines Reg. & Trib. Co., 239 N.W.2d 152, 155–56 (Iowa 1976); City of Natchitoches v. Emps. Reinsurance Corp., 819 So. 2d 413, 418 (La. Ct. App. 2002); Johnson v. Cap. City Press, Inc., 346 So. 2d 819, 821 (La. Ct. App. 1977); Malerba v. Newsday, 406 N.Y.S.2d 552, 554 (App. Div. 1978); Silbowitz v. Lepper, 299 N.Y.S.2d 564, 566–67 (App. Div. 1969); McClain v. Arnold, 270 S.E.2d 124, 125 (S.C. 1980); Lyons v. State, No. 01-A-01-9304-BC-00160, 1993 WL 414840, at *2 (Tenn. Ct. App. Oct. 20, 1993); Eubanks v. N. Cascades Broad., 61 P.3d 368, 374 (Wash. Ct. App. 2003); Starr v. Beckley Newspapers Corp., 201 S.E.2d 911, 913 (W. Va. 1974); *see also* Bishop v. Wometco Enters., Inc., 235 So. 2d 759, 761 (Fla. Dist. Ct. App. 1970) (finding actual malice rule applicable without unequivocally stating that plaintiff was public official).

393. *See supra* notes 327–328 and accompanying text.

394. 235 So. 2d 759 (Fla. Dist. Ct. App. 1970) (per curiam).

395. *Id.* at 759.

> Commission was a matter of public interest, it is clear that the rule in *New York Times Co. v. Sullivan* applies . . . .[396]

Such reasoning appears to flow from an underlying belief that the tenet that speech on public matters lies at the heart of the First Amendment[397] is significantly implicated, with the proper category for justifying the actual malice rule a secondary consideration.

Additionally, some opinions reflect express engagement with open-ended First Amendment themes and balancing of interests that transcend *Rosenblatt*'s distinct touchstones of responsibility, control, and apparent importance. In reviewing a defamation claim by school board members, the Tenth Circuit ultimately determined that "[t]he strong public interest in ensuring open discussion of their job performance warrants the conclusion that school board members are public officials."[398] More sweepingly, a California appeals court—after noting that "public defenders, as integral components of [the criminal justice] system, are appropriate targets for scrutiny as to their qualifications and performances"—was directed to its conclusion that a deputy public defender was a public official by the "constitutional policy" that "any doubt as to the public status of a government employee should be resolved in favor of the First and Fourteenth Amendments' guarantees of freedom of the press and the public's interest in open criticism of government operations."[399]

Other courts have introduced into their analysis specific factors that, while not directly contradicting *Rosenblatt*, extrapolate liberally from that opinion's guidelines.[400] After reciting passages from *Rosenblatt*, a Massachusetts appeals court added: "Other relevant considerations include the employee's remuneration and duties, his or

396. *Id.* at 761 (internal citations omitted).

397. *See* Connick v. Myers, 461 U.S. 138, 145 (1983) ("[T]he Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy [sic] of First Amendment values,' and is entitled to special protection.") (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 534 (1980) ("This Court has emphasized that the First Amendment 'embraces at the least the liberty to discuss publicly and truthfully all matters of public concern.'") (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940)); Pickering v. Bd. of Educ., 391 U.S. 563, 573 (1968) ("The public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause . . . .").

398. Garcia v. Bd. of Educ. of Socorro Consol. Sch. Dist., 777 F.2d 1403, 1408 (10th Cir. 1985) (per curiam).

399. Tague v. Citizens for Law & Order, Inc., 142 Cal. Rptr. 689, 693–94 (App. Dep't Super. Ct. 1977).

400. *Id.*

her participation in decisions on public issues, the impact of the government position on everyday life, the potential for social harm from abuse of the government position, and the employee's access to the press."[401] The Tennessee Supreme Court expounded its own expansive interpretation of government employment whose holder is a public official: "[a]ny position . . . that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family."[402] And a Louisiana court, equating the First Amendment concept of public official with a "public officer" under state law, declared the latter term to encompass those instances where "the Constitution or an act of the Legislature creates a position, fixes the compensation therefor, and prescribes the duties thereof, and these duties, not occasional or temporary in character but of a continuing and permanent nature, pertain to the public."[403]

CONCLUSION

Admittedly, significant aspects of the public official doctrine cannot fairly be called enigmatic. These include the premier place of *Rosenblatt* and *Garrison* as authority in this area; the general tendency by courts to take an expansive view of these decisions, and thus of libel of government employees subject to the actual malice requirement; and the undeniable presence of inconsistences among courts in the designation of certain classes of government employees. Nevertheless, decades of judicial grappling with this question have left genuine questions about the meaning and direction of standards by which occasions for applying the *New York Times* rule will be resolved. Both the imperfect clarity of current jurisprudence and a sense that prevailing interpretations leave public employees too vulnerable to libel may induce the Supreme Court to revisit the doctrine. Such a development would have precedent: in *Gertz v. Robert Welch, Inc.*,[404] the Court both formally catalogued the various kinds of defamation plaintiffs and narrowed the scope of the actual

401. Netherwood v. Am. Fed'n of State, Cnty. & Mun. Emps., Loc. 1725, 757 N.E.2d 257, 262–63 (Mass. App. Ct. 2001).

402. Press, Inc. v. Verran, 569 S.W.2d 435, 441 (Tenn. 1978).

403. Cherry v. Hall, 270 So. 2d 626, 628 (La. Ct. App. 1972).

404. 418 U.S. 323 (1974).

malice rule.[405] Until such time, courts will continue to decide government employees' status in defamation suits by criteria at which future litigants must guess.

405. *See supra* notes 305–313 and accompanying text.