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DEFAMATION OF TEACHERS: BEHIND THE *TIMES*?

INTRODUCTION

In the landmark case of *New York Times v. Sullivan*,¹ the Supreme Court applied the first amendment² to state libel³ laws for the first time. To safeguard freedom of speech, this decision makes proof of the common law elements of defamation⁴ insufficient when a public official brings a defamation action against a critic of his official conduct.⁵ Plaintiffs in such actions instead are required to prove that the defendant published a statement with "actual malice."⁶ That is, the plaintiff must show, by evidence of convincing clarity,⁷ that the defendant either knew the statement was false or recklessly disregarded its falsity.⁸

1. 376 U.S. 254 (1964).

2. U.S. Const. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or of the press. . .").

3. Libel is defined as "that which is communicated by the sense of sight." See Prosser & Keeton on Torts § 112 (5th ed. 1984). Slander is generally communicated orally. See *id.*

4. Defamation is defined as a communication "which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, good-will or confidence in which the plaintiff is held." *Id.* at § 111. Under the common law rules of defamation, a plaintiff must show the statement at issue referred to him, was false, defamatory and "published"—that is, seen or heard by a third party. See, e.g., *Walters v. Linhof*, 559 F. Supp. 1231, 1234 (D. Colo. 1983). The plaintiff also must prove the defendant's fault, at least to the point of negligence. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

In an action for slander, which is generally a spoken defamation, see Restatement (Second) of Torts § 568 (1977), a plaintiff also must show financial loss caused by the defamatory statement unless it falls into one of the "slander per se" categories. See *id.* at §§ 570-75. These categories include the imputation of the commission of a serious crime, see *id.* at § 571, the accusation the plaintiff has a loathsome disease, see *id.* at § 572, the imputation of sexual misconduct (generally limited to female plaintiffs), see *id.* at § 574, comment c, and statements that tend to injure the plaintiff in his business or profession. See, e.g., *Manale v. City of New Orleans Dep't of Police*, 673 F.2d 122, 125 (5th Cir. 1982) (imputation of homosexuality to a police officer). This Note is limited to the subject of statements relating to school teachers' professional qualifications and job performance, triggering the "professional reputation" category of slander per se. Therefore, no special damages need be proved in teacher slander actions. Actions for libel require no proof of special damages. See Restatement (Second) of Torts § 569 (1977).

5. See *New York Times v. Sullivan*, 376 U.S. 254, 283 n.23 (1964) (plaintiff was an elected Commissioner of Public Affairs for the City of Montgomery, Alabama, which "clearly" made him a public official for purposes of the new actual malice rule); *infra* notes 62-82 and accompanying text.

6. See *New York Times*, 376 U.S. at 280. To act with "actual malice," a defendant must make the statement in question "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.*; see also *Saint Amant v. Thompson*, 390 U.S. 727, 731 (1968) (defendant must entertain "serious doubts as to the truth of his publication").

7. See *New York Times*, 376 U.S. at 285-86; see also *Loeb v. New Times Communications Corp.*, 497 F. Supp. 85, 92 n.11 (S.D.N.Y. 1980) (defining "convincing clarity" as a "standard intermediate between the normal 'preponderance of the evidence' civil standard and the 'beyond the reasonable doubt' criminal standard.") (quoting *Nader v. de Toledano*, 408 A.2d 31, 49 (D.C. App. 1979), *cert. denied*, 444 U.S. 1078 (1980)).

8. See *New York Times*, 376 U.S. at 280.

The *New York Times* Court intentionally used vague language⁹ to define the limits of "public official."¹⁰ Despite the Court's intention to protect comments made about some of society's important contributors,¹¹ the decision's lack of clarity has fostered an imprecise doctrine governing when a defamation plaintiff is deemed a public official for purposes of the *New York Times* actual malice standard.¹²

The resulting unpredictability of the public official inquiry becomes especially apparent when applied to the question of whether public school teachers should be held to the actual malice standard in defamation actions arising out of statements made about their qualifications or professional performance.¹³ Some state courts conclude teachers are subject to the *New York Times* actual malice standard because they are public officials.¹⁴ Others impose the *New York Times* standard because they find teachers are public figures.¹⁵ A third group holds teachers to be neither public officials nor public figures and requires only that teachers meet the traditional, common law burden of proof to recover damages for defamation.¹⁶ The disagreement among courts stems from a fundamental misinterpretation of Supreme Court precedent in this area.¹⁷

This Note proposes that a correct reading of the Supreme Court guide-

9. See *id.* at 283 n.23 (1964) (Court expressly declined to "determine the boundaries of the 'public official' concept").

10. Indeed, Federal Judge Alexander A. Lawrence of Georgia has compared the task of determining who is a public plaintiff to "trying to nail a jellyfish to the wall." See *Rosanova v. Playboy Enters., Inc.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976) *aff'd*, 580 F.2d 859 (1978) (alleged organized crime figure held to actual malice standard on public figure theory).

11. See *New York Times*, 376 U.S. at 269. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system". *Id.* (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

12. See *infra* text accompanying notes 29-38.

13. Compare *Sewell v. Brookbank*, 119 Ariz. 422, 425, 581 P.2d 267, 270 (Ct. App. 1978) (holding teacher is a public official for *New York Times* purposes) with *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 283, 362 S.E.2d 32, 37 (1987), *cert. denied*, 108 S. Ct. 1997 (1988) (teacher not a public official).

14. See *Sewell*, 119 Ariz. at 425, 581 P.2d at 270; *Basarich v. Roedeghero*, 24 Ill. App. 3d 889, 892, 321 N.E.2d 739, 742 (1974).

15. See *Johnson v. Board of Junior College*, 31 Ill. App. 3d 270, 276, 334 N.E.2d 442, 447 (1975); *Scarpelli v. Jones*, 229 Kan. 210, 217, 626 P.2d 785, 790 (1981).

16. See *Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136-37 (1979); *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984); *True v. Ladner*, 513 A.2d 257, 263-64 (Me. 1986); *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 362 S.E.2d 32, 37 (1987), *cert. denied*, 108 S. Ct. 1997 (1988).

17. The courts that hold teachers not to be public officials rely primarily on the "apparent governmental authority" prong of the test set forth in *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). See *infra* notes 98-104 and accompanying text. Those holding teachers to the actual malice standard on a public official theory rely on the "independent public interest" prong of the *Rosenblatt* test. See *Rosenblatt*, 383 U.S. at 86; *infra* notes 60-68 and accompanying text. An improper application of the first *Rosenblatt* prong allows some courts to conclude, after an incomplete inquiry, that teachers are not *New York Times* public officials. See *infra* notes 70-88 and accompanying text.

lines requires courts to conclude that public school teachers must be held to the *New York Times* actual malice standard because they are public officials. In the alternative, public school teachers should be required to prove actual malice because they can be considered public figures under the rule of *Curtis Publishing Co. v. Butts*¹⁸ and its progeny,¹⁹ in which the Supreme Court removed the "public official" limitation in applying the actual malice requirement and held that private individuals who play influential roles in society are also subject to the actual malice burden.²⁰

Part I of this Note briefly traces the origins and development of the current *New York Times* doctrine. Part II examines the application of that doctrine to teacher defamation plaintiffs and demonstrates that, as "public officials",²¹ teachers should be required to prove actual malice. Part III demonstrates that teachers otherwise are public figures under *Curtis* and therefore should be subject to the actual malice requirement. This Note concludes that, to achieve the ends sought by *New York Times*, the encouragement of robust and open discussion on an issue critical to the public good, school teachers must be held to the *New York Times* standard.

I. DEVELOPMENT OF THE *NEW YORK TIMES* PUBLIC OFFICIAL STANDARD

In the *New York Times*²² decision, the Supreme Court expressed "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."²³ To that end, the Court injected a constitutional inquiry into state defamation actions by holding that even a false and defamatory statement was entitled to first amendment protection²⁴ if the statement was made about a public official and criticized his official conduct.²⁵ This protection took the form of the

18. 388 U.S. 130 (1967).

19. See, e.g., *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 163-66 (1979) (plaintiff not sufficiently involved in the controversy created by his aunt and uncle, who were convicted of espionage, to be designated a public figure); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-45 (1974) (attorney did not become public figure by representing plaintiff in a notorious case).

20. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result) ("Our citizenry has a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of 'public officials.'").

21. The application of the public official doctrine to teachers in private schools implicates first amendment concerns beyond the scope of this Note, which is limited to the topic of teachers in public schools. However, the grade level of school taught by teacher defamation plaintiffs, be it elementary school, high school or college, makes no difference to this Note's analysis. The rights implicated and the interests deserving protection remain the same regardless of the students' ages.

22. See *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

23. *Id.* at 270.

24. See *id.* at 273.

25. See *id.* at 256.

actual malice standard, which serves as a barrier between a public official defamation plaintiff and recovery of damages²⁶ by requiring the plaintiff to prove the defendant knew of or recklessly disregarded the falsity of his statement.²⁷

A. Definition of "Public Official" Under *New York Times v. Sullivan*

Lower courts originally applied the *New York Times* actual malice standard exclusively to "libel action[s] brought by a public official against critics of his official conduct."²⁸ The Supreme Court purposely left undefined the nature of this public official defamation plaintiff in its opinion,²⁹ and has never expressly defined it. Subsequently, in *Rosenblatt v. Baer*,³⁰ the Court came the closest it has ever come to issuing definitive guidelines as to who is or is not a public official for *New York Times* purposes.³¹

Rosenblatt sets forth a two-pronged test.³² If both prongs produce an affirmative answer, the plaintiff is a public official. The first, more general prong emphasizes the apparent amount of government authority or control the plaintiff has at his command ("apparent governmental authority test").³³ The second, more specific prong stresses the amount of interest the public has in the way the plaintiff performs his job ("independent public interest test").³⁴ Defamation plaintiffs considered to be public officials under this analysis run the gamut from an assistant public defender³⁵ to the United States Ambassador to Chile.³⁶ Within this

26. *See id.* at 292 (overturning damage award since communication was "at the very center of the constitutionally protected area of free expression" and no actual malice was demonstrated).

27. *See supra* note 6.

28. *See New York Times*, 376 U.S. at 256. The type of criticism governed by *New York Times* was clarified in *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (*New York Times* rule covers statements criticizing "anything which might touch on an official's fitness for office").

29. *See New York Times*, 376 U.S. at 283 n.23 ("We have no occasion here 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.").

30. 383 U.S. 75 (1966).

31. *See id.* at 85-86. Despite the *Rosenblatt* Court's caveat that "[n]o precise lines need be drawn for the purposes of this case," it held that "[t]he thrust of *New York Times* is that when interests in public discussion are particularly strong . . . the Constitution limits the protections afforded by the law of defamation." *Id.*

32. *See id.*

33. *See id.* at 85 ("[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.").

34. *See id.* at 86 ("Where 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 . . . the *New York Times* malice standards apply.") (footnote omitted).

35. *See Goodrich v. Gannett Co.*, 500 F. Supp. 125, 126 (D. Del. 1980).

36. *See Davis v. Costa-Gavras*, 595 F. Supp. 982, 987 (S.D.N.Y. 1984).

spectrum, police officers³⁷ and public school teachers³⁸ also have been held to be public officials under the *Rosenblatt* standard.

B. Public Figure Analysis

The Court expanded the scope of the actual malice doctrine in *Curtis Publishing Co. v. Butts*³⁹ when it held that plaintiffs characterized as *public figures* also must be covered by the *Times* standard.⁴⁰ Public figures are distinguishable from private parties, the Court reasoned, and as such should be required to prove actual malice because they not only "command[] sufficient continuing public interest, [but] ha[ve] sufficient access to the means of counterargument" to expose the allegedly defamatory nature of the publications⁴¹ (the "self-help" theory of public figure analysis).⁴²

The Court further developed the public figure analysis offered in *Curtis* in *Gertz v. Robert Welch, Inc.*,⁴³ which requires defamation plaintiffs to "invite attention and comment" before they will be held to the *New York Times* standard.⁴⁴ According to *Gertz*, this can be done in either of two ways: by occupying a position "of such persuasive power and influence that [a plaintiff is] deemed [a] public figure[] . . . for all purposes,"⁴⁵ or

37. See, e.g., *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Coughlin v. Westinghouse Broadcasting & Cable*, 780 F.2d 340, 342 (3d Cir. 1985), cert. denied, 476 U.S. 1187 (1986); *McKinley v. Baden*, 777 F.2d 1017, 1021 (5th Cir. 1985).

38. See, e.g., *Sewell v. Brookbank*, 119 Ariz. 422, 425, 581 P.2d 267, 270 (Ct. App. 1978); *Luper v. Black Dispatch Pub. Co.*, 675 P.2d 1028, 1031 (Okla. 1983).

39. 388 U.S. 130 (1967). Interestingly, the facts in this landmark case revolve around public schools. *Butts* was the athletic director of the University of Georgia, employed by the Georgia Athletic Association, a private corporation. See *id.* at 135. He was accused, in print, by the Saturday Evening Post of conspiring to "fix" a game. See *id.*

In the *Curtis* companion case of *Associated Press v. Walker*, the plaintiff was a politically active private citizen depicted by the wire service as having led a charge against federal marshalls attempting to carry out the court-ordered registration of a black student at the University of Mississippi. See *id.* at 140.

40. See *id.* at 165 (Warren, C.J., concurring in the result) ("Evenly applied to cases involving 'public men'—whether they be 'public officials' or 'public figures'—[the *New York Times* doctrine] will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.")

41. See *id.* at 155. The court stretched the *New York Times* net the furthest in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971). In that case, the actual malice requirement was imposed on a distributor of nudist magazines. See *id.* at 44-45 (plurality opinion). The *Rosenbloom* Court held that the nature of the controversy from which the defamation arose would decide the actual malice question, rather than the plaintiff's designation as a public official or public figure. See *id.* at 44. The actual malice obstacle between a defamation plaintiff and recovery was extended "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.*

42. See *infra* note 108 and accompanying text.

43. 418 U.S. 323 (1979).

44. See *id.* at 345. Plaintiff Elmer Gertz was representing a plaintiff in a wrongful death action against a Chicago police officer convicted of murdering a young man. Even though the defamation plaintiff at bar was involved indisputedly in a matter of public interest, the Court declined to impose the actual malice requirement. See *id.* at 325.

45. *Id.* at 345.

by "thrust[ing] [oneself] to the forefront of *particular public controversies* in order to influence the resolution of the issues involved"⁴⁶ (the "risk-assumption" theory).

The Court continues to use the "self-help" and "risk assumption" theories of *Curtis* and *Gertz* to determine who is a public figure for purposes of defamation law.⁴⁷ Lower courts have invoked these rationales to find a variety of defamation plaintiffs to be public figures and subject to the burden of proving actual malice, including a political action group,⁴⁸ an air traffic controller,⁴⁹ the vice president and general manager of a radio station,⁵⁰ and professors at a public college.⁵¹

II. NEW YORK TIMES AND TEACHERS

When a defamation plaintiff is a school teacher, the answer to the crucial actual malice question becomes virtually unpredictable. Some state courts hold teachers to the actual malice standard because they find them to be public officials under the *Rosenblatt* test.⁵² Others reach the same conclusion because they find teachers to be public figures.⁵³ Still others hold that teacher defamation plaintiffs should not be required to prove actual malice, because they are neither public officials⁵⁴ nor public figures.⁵⁵ Thus, the need for a more uniform approach is evident.

46. *Id.* (emphasis added); see *id.* at 345 (A private individual is not subject to the *New York Times* standard because "[h]e has not accepted public office or assumed an 'influential role in ordering society'") (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in the result)). See also *supra* notes 98-104 and accompanying text.

47. See, e.g., *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988) (finding television preacher all-purpose public figure); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) (recipient of federal grants and a "Golden Fleece" award not a limited purpose public figure by virtue of receiving federal funds for his research); *Time, Inc. v. Firestone*, 424 U.S. 448, 453-54 (1976) (Palm Beach socialite not a limited purpose public figure merely because her divorce was a matter of public record).

48. See *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3231 (U.S. Oct. 3, 1988).

49. See *Dameron v. Washington Magazine*, 779 F.2d 736, 742 (D.C. Cir. 1985) (plaintiff was on duty at time of crash), *cert. denied*, 476 U.S. 1141 (1986).

50. See *O'Donnell v. CBS, Inc.*, 782 F.2d 1414, 1417 (7th Cir. 1986) (plaintiff claimed he was defamed by broadcasts announcing his dismissal for unethical professional practices).

51. See *Johnson v. Board of Junior College*, 31 Ill. App. 3d 270, 276, 334 N.E.2d 442, 447 (1975) (professors at junior college embroiled in textbook selection controversy); *Scarpelli v. Jones*, 229 Kan. 210, 217, 626 P.2d 785, 790 (1981) (medical school professor accused of racism).

52. See *Sewell v. Brookbank*, 119 Ariz. 422, 425, 581 P.2d 267, 270 (Ct. App. 1978); *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892, 321 N.E.2d 739, 742 (1974).

53. See *Johnson v. Board of Junior College*, 31 Ill. App. 3d 270, 276, 334 N.E.2d 442, 447 (1975); *Scarpelli v. Jones*, 229 Kan. 210, 216-17, 626 P.2d 785, 790 (1981).

54. See, e.g., *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984).

55. See, e.g., *Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136 (1979).

A. Teachers as Public Officials

Because public school teachers work for local governments⁵⁶ and are paid with public funds, state courts first must decide whether school teachers are public officials for *New York Times* purposes.⁵⁷ Decisions vary on this question because courts apply the Supreme Court's public official standard set forth in *Rosenblatt v. Baer*⁵⁸ inconsistently.

Courts reaching the conclusion that public school teachers are not *New York Times* public officials find that teachers lack sufficient "apparent governmental authority" to come within *Rosenblatt*'s parameters.⁵⁹ Thus, they foreclose the *Rosenblatt* "independent public interest" inquiry⁶⁰ by answering the first *Rosenblatt* question—that of "apparent governmental authority"—in the negative.⁶¹

These courts find that teachers possess inadequate government authority by equating the amount of apparent governmental authority necessary to satisfy *Rosenblatt* with the amount of governmental control vested in elected or policymaking officials.⁶² Because it is clear that

56. See, e.g., *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 321 N.E.2d 739 (1974); Cal. Educ. Code § 44830 (West 1978); N.Y. Educ. Law § 2573 (McKinney Supp. 1988).

57. Working for a government entity and being paid with public funds form the minimum requirements before a defamation plaintiff can be categorized as a public official. See Note, *Teachers as Plaintiffs in Defamations: Determination of Their Status as Public Officials or Public Figures*, 24 Santa Clara L. Rev. 431, 437-38 (1984).

58. 383 U.S. 75, 85-86 (1966). Compare *Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136 (1979) (interpreting *Rosenblatt* to protect only criticism of the "governor" and those who "control the conduct of government") with *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892-93, 321 N.E.2d 739, 741-42 (1974) (interpreting *Rosenblatt*'s "independent public interest" test to include teachers as public officials because the policies and conduct of teachers "are of as much concern to the community as are other 'public officials'").

59. See, e.g., *Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136 (1979) ("[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"); *McCutcheon v. Moran*, 99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133 (1981) ("The relationship a public school teacher . . . has with the conduct of government is far too remote . . . to justify exposing these individuals [to the actual malice standard.]; *True v. Ladner*, 513 A.2d 257, 264 (Me. 1986) ("[T]he authority exercised by a public school teacher is very limited [It] is normally limited to school children within the school building during ordinary school hours.").

60. See *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966); *supra* note 34 and accompanying text.

61. See *Franklin*, 97 Cal. App. 3d at 924, 159 Cal. Rptr. at 136; *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984); *McCutcheon*, 99 Ill. App. 3d at 424, 425 N.E.2d at 1133; *True*, 513 A.2d at 263-64.

62. See, e.g., *Nodar*, 462 So. 2d at 808 ("[W]e cannot conclude that one who accepts a position as a teacher in a public high school thereby effects the same kind of surrender of the right to vindicate defamation as does one who seeks or accepts an elected or policymaking position with a public body or government institution."). The Florida court in *Nodar* did require a showing of actual malice by the defendant, but based the requirement on a theory of conditional privilege rather than the *New York Times* public official designation. See *id.* at 809-10. The privilege was founded on several grounds, including the listener's interest in receiving information about the performance of an employee, and, more importantly, that the alleged defamation consisted of "statements of a citizen

teachers do not exercise the same level of government control as mayors or other elected officials,⁶³ these opinions categorize the relationship between public school teachers and the conduct of government as sufficiently remote not to warrant *New York Times* protection.⁶⁴

Courts that find teachers to be public officials for *New York Times* purposes focus on the "independent public interest" language from *Rosenblatt*.⁶⁵ Under this theory, the public's independent interest in a school teacher's qualifications and performance satisfies this more specific prong of the *Rosenblatt* test because education is a "prime . . . responsibility"⁶⁶ of local government and teachers "maintain highly responsible positions in the community."⁶⁷

Thus, it is clear that whether the actual malice standard applies to public school teacher defamation plaintiffs depends on whether the trial court is able to find the public official designation appropriate under the broad *Rosenblatt* apparent governmental authority prong. If it does, it then applies the more specific independent public interest prong. Courts able to reach the second prong invariably hold teachers to the actual malice standard as public officials.⁶⁸

B. Teachers Should Be Deemed Public Officials for Purposes of *New York Times*

A fundamental misinterpretation of the threshold *Rosenblatt* inquiry results in decisions allowing teachers to avoid the actual malice requirement. Courts finding teachers to be private defamation plaintiffs consistently misconstrue⁶⁹ the language from *Rosenblatt* directing courts to apply the public official designation "at the very least to those among the

to a political authority regarding matters of public concern, i.e., the school curriculum and the performance of a public employee." *See id.* at 810.

63. Election to office undoubtedly makes a defamation plaintiff a public official. *See New York Times v. Sullivan*, 376 U.S. 254, 283 n.23 (1964) (elected commissioner of Montgomery, Alabama); *see also Cianci v. New Times Publishing Co.*, 639 F.2d 54, 58 (2d Cir. 1980) (mayor of Providence, Rhode Island).

64. *See Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136 (1979); *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984); *McCutcheon v. Moran*, 99 Ill. App. 3d 421, 424-25, 425 N.E.2d 1130, 1132-33 (1981).

65. *See Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966); *supra* note 34 and accompanying text.

66. *See Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892, 321 N.E.2d 739, 742 (1974) (citing Ill. Const. art. X, § 1).

67. *Id.* at 892, 321 N.E.2d at 742. In answering the *Rosenblatt* "independent public interest" question, the Illinois court, in *Basarich v. Rodeghero*, required the teacher defamation plaintiff to meet the actual malice standard because "[p]ublic school systems . . . are consistent subjects of intense public interest and substantial publicity" and "[p]ublic school teachers . . . and the conduct of such teachers . . . and [the teachers'] policies are of as much concern to the community as are other 'public officials' ". *Id.*

68. *See Sewell v. Brookbank*, 119 Ariz. 422, 425, 581 P.2d 267, 270 (Ct. App. 1978); *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892, 321 N.E.2d 739, 742 (1974); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978).

69. *See Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136-37 (1979); *Nodar v. Galbreath*, 462 So. 2d 803, 807-08 (Fla. 1984); *McCutcheon v. Moran*,

hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."⁷⁰ These courts fail to acknowledge that the apparent governmental authority prong of the *Rosenblatt* test⁷¹ indicates the *minimum*, rather than the maximum, number of government employees to be considered public officials⁷² and that the Court's language clearly does not limit the public official designation to those public employees who make policy or otherwise control the conduct of government.⁷³

If, as *Rosenblatt* states, the "apparent governmental authority" test is intended to apply to policymakers and similar public officials near the top of governmental hierarchy, then it applies to these particular officials "at the very least."⁷⁴ Thus, the apparent governmental authority inquiry is meant to *begin* at the policymaking level, leaving ample room for courts to apply the standard to school teachers.⁷⁵

Courts refusing to hold that public school teachers are public officials misapply the apparent governmental authority test in another way as well. As the Supreme Court clearly stated, public officials are those who have "or appear to the public to have"⁷⁶ the requisite control over, or responsibility for, government conduct.⁷⁷ The view that teachers do not appear to the public to have such authority ignores the teacher's position in the community as a role model for his students and as a conspicuous representative of local government to the general population.⁷⁸ Thus, the view that school teachers have little or no governmental authority ignores the impact teachers have on their students' daily lives.

The second part of the *Rosenblatt* test, the independent public interest in the teacher's qualifications and performance,⁷⁹ also must result in the finding that public school teachers are *New York Times* public officials.

99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1132 (1981); *True v. Ladner*, 513 A.2d 257, 263-64 (Me. 1986).

70. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (emphasis added).

71. *See id.*; *supra* text accompanying note 33.

72. *See Rosenblatt*, 383 U.S. at 85.

73. *See id.*

74. *See id.* (emphasis added).

75. To read this *Rosenblatt* language as excluding teachers from the public official designation is to "seriously misapprehend[]" the *Rosenblatt* decision. *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 958 (1985) (Brennan, J., dissenting from denial of certiorari in 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984)); *accord*, *Sewell v. Brookbank*, 119 Ariz. 422, 425, 581 P.2d 267, 270 (Ct. App. 1978); *Gallman v. Carnes*, 254 Ark. 987, 989, 497 S.W.2d 47, 50 (1973); *Luper v. Black Dispatch Publishing Co.*, 675 P.2d 1028, (Okla. 1978); *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101, 1103 (Okla. 1978).

76. *Rosenblatt*, 383 U.S. at 85.

77. *See id.* at 85.

78. *See Bernal v. Fainter*, 467 U.S. 216, 220 (1984) ("[T]eachers . . . possess a high degree of responsibility and discretion in the fulfillment of a basic governmental obligation. They have direct, day-to-day contact with students, exercise unsupervised discretion over them, *act as role models*, and influence their students about the government and the political process." (emphasis added); *see also infra* note 83 and accompanying text (discussing public's independent interest in qualifications and performance of teachers).

79. *See supra* note 34 and accompanying text.

The *Rosenblatt* test was established in a case that held the former supervisor of a county recreation area to the public official standard.⁸⁰ While this defamation plaintiff managed public funds,⁸¹ his impact on the societal structure was insignificant when compared to those to whom we entrust the education of our children. To conclude that Mr. Rosenblatt was a public official but that public school teachers are not is to assert that the public has a greater interest in the management of recreation areas than in the education of its children.⁸²

The Supreme Court long has recognized the public's strong, independent interest in the qualifications and performance of its school teachers.⁸³ It has stated that "education is perhaps the most important function of state and local governments."⁸⁴ Moreover, Justice Brennan, the author of both the *New York Times* and the *Rosenblatt* decisions, has spoken out for the proposition that public school teachers are public officials under the *Rosenblatt* test.⁸⁵ Justice Brennan made it clear that public comment about teachers' qualifications and performance is exactly the type of discussion the first amendment should protect.⁸⁶ According to Justice Brennan, it follows that the status of teachers is that of public officials under the standards set forth by the Court in *New York Times* and

80. See *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966).

81. See *id.* at 83.

82. Compare *Rosenblatt v. Baer*, 383 U.S. 75, 85-88 (1966) (*New York Times* may protect discussion about resort supervisor because he is a public official) with *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984) (*New York Times* does not protect criticism of public school teacher's performance because she is not a public official).

83. "[T]eachers may be regarded as performing a task 'that go[es] to the heart of representative government.'" *Ambach v. Norwick*, 441 U.S. 68, 75-76 (1979) (upholding American citizenship requirement for public school teachers) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). "[Their] influence is crucial to the continued good health of a democracy." See *id.* at 78-79 (illustrating government function exception to equal protection bar to discrimination against aliens). Cf. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973) (upholding school financing based on local tax revenues); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (state's interest in universal education must be balanced against free exercise clause of the first amendment).

84. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (striking down the separate but equal doctrine).

85. In 1985, the Supreme Court denied certiorari in a case that presented the question of teachers as *New York Times* public official defamation plaintiffs. See *Lorain Journal Co. v. Milkovich*, 474 U.S. 953 (1985). In dissent to the denial of certiorari, Justice Brennan stated: "[I]t is self-evident that 'the public has an independent interest in the qualifications and performance' of those who teach . . . that goes 'beyond the general public interest in the qualifications and performance of all government employees.'" *Id.* at 959 (Brennan, J., dissenting from denial of certiorari in 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984)) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)). Justice Brennan concluded that "[t]o say that [the teacher defamation plaintiff] . . . was not a public figure . . . is simply nonsense." *Id.* at 964. The Ohio Supreme Court, relying heavily on Justice Brennan's dissent from the denial of certiorari, expressly overruled *Milkovich* shortly after the Supreme Court's decision to deny certiorari. See *Scott v. News-Herald*, 25 Ohio St. 3d 243, 247-48, 496 N.E.2d 699, 703-04 (1986).

86. See *Lorain Journal*, 474 U.S. at 959-60 (Brennan, J., dissenting from denial of certiorari).

Rosenblatt.⁸⁷

Other contexts provide further support for the conclusion that teachers are *New York Times* public officials. Public school teachers exercise wide discretion in the performance of their duties⁸⁸ and typically are required to take oaths of office, swearing allegiance to the Constitution of the United States and of the state in which they teach.⁸⁹ Other government employees who share these traits with school teachers, such as police officers,⁹⁰ uniformly are held to be *New York Times* public officials.⁹¹ Indeed, the Supreme Court has held that the power of a teacher or other school official to search a student for drugs within a school building exceeds the power given to a police officer in similar circumstances.⁹² If the Court is to recognize more authority in teachers than in police officers in a fourth amendment⁹³ context at the same time it recognizes first amendment protection for discussion about police officers,⁹⁴ it follows that it should also apply the protection of *New York Times* to allegedly defamatory publications about teachers.⁹⁵

87. *See id.*

88. *See Bernal v. Fainter*, 467 U.S. 216, 220 (1984).

89. *See, e.g.*, Fla. Stat. Ann. § 231.17 (1) (2) (West 1977) (repealed effective 1995); Nev. Rev. Stat. Ann. § 391.080 (Michie Supp. 1987); N.J. Stat. Ann. § 18A:26-9 (West 1968); N.Y. Educ. Law § 3002 (McKinley 1987).

90. *See, e.g.*, Mont. Code Ann. § 7-32-303(3) (1987); N.C. Gen. Stat. § 160A-284 (1982).

91. *See, e.g.*, *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971) (Chicago Police Department Deputy Chief of Detectives charged with brutality); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 780 F.2d 340, 342 (3d Cir. 1985) (Philadelphia police officer accused of bribe-taking), *cert. denied*, 476 U.S. 1187 (1986); *McKinley v. Baden*, 777 F.2d 1017, 1021 (5th Cir. 1985) (fired police officer accused of sexual intercourse with a thirteen-year-old girl).

92. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985) (teachers do not need to obtain a warrant before searching student under their authority suspected of wrongdoing). In *T.L.O.*, the Court reasoned that the need to maintain discipline and security in schools outweighed students' expectation of privacy. *See id.* at 339-40. The fourth amendment's requirement of probable cause also was excused in favor of a test measuring whether the search of the student, in light of the particular circumstances, was reasonable. *See id.* at 341. The Court based this holding on the "substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.*; *see also Buss, The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739, 746 (1974) ("There is no suggestion in any of the cases that the police have special immunity to make warrantless searches in public schools without some facilitating action taken by school officials.").

93. The fourth amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

94. *See, e.g.*, *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 780 F.2d 340, 342 (3d Cir. 1985), *cert. denied*, 476 U.S. 1187 (1986); *McKinley v. Baden*, 777 F.2d 1017, 1021 (5th Cir. 1985).

95. In his *T.L.O.* concurrence, Justice Powell recognized that "[a] State has a compelling interest in assuring that the schools meet th[eir] responsibility [of educating and

III. TEACHERS AS PUBLIC FIGURES

Courts refusing to apply the public official designation to teacher defamation plaintiffs are not precluded from applying the actual malice standard to them. By holding a teacher is a public figure,⁹⁶ courts still constitutionally may protect comments about teachers.⁹⁷

A. Public Figure Analysis in General

The Supreme Court extended the *New York Times* doctrine to "public figures" in *Curtis Publishing Co. v. Butts*.⁹⁸ Because certain defamation plaintiffs "often play an influential role in ordering society,"⁹⁹ these "public figures" are held to the actual malice standard to further the original purpose of the *New York Times* decision.¹⁰⁰

The Court refined the public figure doctrine in *Gertz v. Robert Welch, Inc.*,¹⁰¹ establishing two classes of defamation plaintiffs within the public figure category: "all-purpose"¹⁰² and "limited purpose" public figure plaintiffs.¹⁰³ To be counted among all-purpose public figures, a defamation plaintiff must have achieved something akin to national fame.¹⁰⁴ Because community public school teachers typically do not reach this requisite level of fame, they cannot be designated all-purpose public figures for defamation law purposes.

Limited purpose public figures, on the other hand, are easier to find because their "fame" is linked to a specific public controversy,¹⁰⁵ to

training young people]." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985) (Powell, J., concurring).

96. See, e.g., *Johnson v. Board of Junior College*, 31 Ill. App. 3d 270, 274, 334 N.E.2d 442, 447 (1975); *Scarpelli v. Jones*, 229 Kan. 210, 216-17, 626 P.2d 785, 790 (1981).

97. See, e.g., *Basarich v. Rodeghero*, 24 Ill. App. 3d 889, 892-93, 321 N.E.2d 739, 741-42 (1974).

98. 388 U.S. 130 (1967).

99. *Id.* at 164 (Warren, C.J., concurring in result).

100. See *id.* at 163 ("differentiation between 'public figures' and 'public officials' . . . [has] no basis in law, logic, or First Amendment policy").

101. 418 U.S. 323 (1974).

102. See *id.* at 345 ("[T]hose who attain this status have assumed roles of especial prominence in the affairs of society [and] [s]ome occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.").

103. See *id.* ("[T]hose classed as [limited purpose] public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.").

104. See, e.g., *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882 (1988) (television preacher); *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1280 (3d Cir. 1979) (professional football player); *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976) (nationally prominent political commentator), *cert. denied*, 429 U.S. 1062 (1977); *Carson v. Allied News Corp.*, 529 F.2d 206, 209 (7th Cir. 1976) (Johnny).

105. Teacher defamation claims arise from publicized controversies that relate to their qualifications and performance. Such controversies have included discussion about a teacher's general professional fitness, see *Gallman v. Carnes*, 254 Ark. 987, 497 S.W.2d 47 (1973); *Foote v. Sarafyan*, 432 So. 2d 877, 878 (La. App. 1982); *True v. Ladner*, 513 A.2d 257, 260 (Me. 1986), the selection of textbooks, see *Franklin v. BPOE*, 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979); *Johnson v. Board of Junior College*, 31 Ill. App. 3d

which the defamatory statement at issue relates.¹⁰⁶ Whether a school teacher is a limited purpose public figure turns on whether the teacher has assumed the risk of defamation¹⁰⁷ and whether he has sufficient access to the self-help remedy.¹⁰⁸

State courts divide on the question of whether public school teachers are limited purpose public figures for *New York Times* purposes. Some find that teachers are public figures for the limited purpose of certain controversies surrounding their professional responsibilities and, as such, are subject to the actual malice requirement.¹⁰⁹ Others simply hold teachers do not satisfy the *Gertz* criteria, and are not to be held to the *New York Times* standard.¹¹⁰

B. Teachers Should Be Deemed Public Figures

A fair reading of the risk assumption¹¹¹ and self-help¹¹² criteria of *Gertz* leads one to conclude that courts should consider teachers limited purpose public figures and that teachers should be required to prove actual malice. While public school teachers rarely achieve the fame or power in their capacity as teachers necessary to be deemed all-purpose

270, 272, 334 N.E.2d 442, 444 (1975), and a teacher's disciplinary methods, see *Johnston v. Corinthian Television Corp.*, 583 P.2d 1101 (Okla. 1978).

106. See, e.g., *Dameron v. Washington Magazine*, 779 F.2d 736, 741 (D.C. Cir. 1985) (air traffic controller on duty at time of plane crash), cert. denied, 476 U.S. 1141 (1986); *Street v. NBC, Inc.*, 645 F.2d 1227, 1234 (6th Cir. 1981) (witness who testified at infamous trial in 1931 held to be a public figure for purposes of a defamation suit arising from her portrayal on television program forty years later); *Johnson v. Board of Junior College*, 31 Ill. App. 3d 270, 276, 334 N.E.2d 442, 447 (1975) (college professors embroiled in controversy over their textbook selection).

107. See *supra* notes 43-53 and accompanying text. Private individuals become limited purpose public figures because they have invited attention and comment. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974). Lower courts have held such figures to the actual malice standard on a risk assumption theory. See *True v. Ladner*, 513 A.2d 257, 264 (Me. 1986).

108. The *Gertz* Court, reaffirming the availability of the *Curtis* self-help remedy as a prerequisite for finding a defamation plaintiff to be a public figure, stated:

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. . . . [P]ublic figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

Gertz, 418 U.S. at 344.

109. See, e.g., *Johnson v. Board of Junior College*, 31 Ill. App. 3d 270, 276 & n.1, 334 N.E.2d 442, 447 & n.1 (1975); *Scarpelli v. Jones*, 229 Kan. 210, 217, 626 P.2d 785, 790 (1981).

110. See, e.g., *Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136 (1979); *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984); *McCutcheon v. Moran*, 99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1133 (1981); *True v. Ladner*, 513 A.2d 257, 263-64 (Me. 1986).

111. See *supra* notes 43-46 and accompanying text.

112. See *supra* notes 41-42 and accompanying text.

public figures under *Gertz*,¹¹³ the limited purpose public figure classification easily applies because the defamation at issue necessarily concerns the teacher in his professional capacity.¹¹⁴ The public controversy always exists in these publications by virtue of the fact that teachers are public employees in positions of intense public interest.¹¹⁵

Courts finding teachers not to be public figures purport to base their conclusions on the *Gertz* criteria.¹¹⁶ The reasoning employed by these courts, however, cannot survive close scrutiny.¹¹⁷ For example, the California appellate court, in *Franklin v. Lodge 1108, Benevolent and Protective Order of Elks*,¹¹⁸ construed the *Gertz* risk-assumption test to require a plaintiff *voluntarily* and *actively* to have sought to influence the resolution of a controversy in order to be designated a limited purpose public figure.¹¹⁹ It did not acknowledge, however, that voluntariness and activism are not mandated by *Gertz* or its progeny.¹²⁰ Even if *Franklin* is correct in its interpretation of *Gertz*, this approach should *include*, not *exclude*, teachers from the limited purpose public figure category. Part of a teacher's job, if done correctly, is to "voluntarily and actively [seek] . . . to influence the resolution of the issues"¹²¹ such as the selection of curricula, textbooks and methods of discipline. To assume otherwise is to assume a teacher is not doing his job.

113. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974); see also *supra* notes 390-95 and accompanying text.

114. See *supra* notes 105-06 and accompanying text. "To say that [the teacher defamation plaintiff] nevertheless was not a [limited purpose] public figure . . . is simply nonsense." *Lorain Journal Co. v. Milkovich*, 474 U.S. 953, 964 (1985) (Brennan, J., dissenting from a denial of certiorari to 15 Ohio St. 3d 292, 473 N.E.2d 1191 (1984)).

115. See, e.g., *Basarich v. Rodegeho*, 24 Ill. App. 3d 889, 892, 321 N.E.2d 739, 742 (1974).

116. See *Franklin v. BPOE*, 97 Cal. App. 3d 915, 924, 159 Cal. Rptr. 131, 136 (1979); *McCutcheon v. Moran*, 99 Ill. App. 3d 421, 424, 425 N.E.2d 1130, 1132-33 (1981); *True v. Ladner*, 513 A.2d 257, 264 (Me. 1986).

117. See, e.g., *Nodar v. Galbreath*, 462 So. 2d 803, 808 (Fla. 1984) (court, even while citing *Gertz*, bypassed public figure analysis and erroneously concluded "[b]ecause plaintiff was not a public official, *New York Times* [did] not apply") (emphasis added); *McCutcheon*, 99 Ill. App. 3d at 424, 425 N.E.2d at 1133 (holding the teacher-plaintiff not a public figure under *Gertz*, based on the fact that she was not paid with public funds); *True*, 513 A.2d at 264 (court raised both the self-help and risk assumption tests, but dismissed both with conclusory statements).

118. 97 Cal. App. 3d 915, 159 Cal. Rptr. 131 (1979).

119. See *id.* at 929, 159 Cal. Rptr. at 140 ("In our view the definition of 'public figure' . . . incorporates as an element a requirement that the libel plaintiff must have voluntarily and actively sought, in connection with any given matter of public interest, to influence the resolution of the issues involved.") (emphasis in original).

120. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) ("[A]n individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.") (emphasis added); *Dameron v. Washington Magazine*, 779 F.2d 736, 741 (D.C. Cir. 1985) ("Injection is not the only means by which public-figure status is achieved. Persons can become involved in public controversies and affairs without their consent or will [and still be deemed public figures]."), *cert. denied*, 476 U.S. 1141 (1986).

121. See *Franklin*, 97 Cal. App. 3d at 929, 159 Cal. Rptr. at 140.

In finding a teacher to be a private defamation plaintiff,¹²² *Franklin* also misinterprets the Supreme Court's directive in *Wolston v. Reader's Digest Association*.¹²³ In *Wolston*, the Supreme Court reaffirmed the public figure inquiry should focus on "the 'nature and extent of an individual's participation in the particular controversy giving rise to the defamation'." ¹²⁴ Relying on this language, *Franklin* holds that a teacher who has chosen a controversial textbook for her high school class is not involved in the ensuing controversy in a sufficient nature or to a sufficient extent to support a finding that she is a public figure for the limited purpose of discussion about her book selection.¹²⁵

The *Franklin* court failed to recognize that teachers "invite attention and comment"¹²⁶ simply by accepting a public teaching position with the knowledge that, to justify their public trust, they must do more than merely keep their students off the street.¹²⁷ As stated earlier, this view of the teacher's role—as something beyond mere lecturer or supervisor—has been recognized expressly by the Supreme Court.¹²⁸ Thus, by virtue of their position as public employees, teachers assume the risk of defamation.¹²⁹

The reasoning of the California court rests on the contentions that the teacher did not anticipate or intend that her choice of books would result in controversy.¹³⁰ *Franklin* clearly applies the wrong standard, as it is irrelevant whether a defamation plaintiff anticipated or intended to cause the controversy giving rise to the defamation.¹³¹ *Wolston* limits the inquiry to the *nature and extent* of a plaintiff's involvement in a controver-

122. *See id.* at 928, 159 Cal. Rptr. at 139.

123. 443 U.S. 157 (1979).

124. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)). Sixteen years after pleading guilty to a contempt charge following his failing to answer a subpoena, the plaintiff in *Wolston* was falsely accused of being a Soviet agent who had been indicted on espionage charges. *See id.* The plaintiff's only involvement with the controversy giving rise to the defamation was that his aunt and uncle had been convicted of espionage and that he failed, for health reasons, to respond to a subpoena to testify about them. *See id.* at 161-62. The Supreme Court held the nature and extent of his involvement in the controversy were too remote to support an application of the *New York Times* actual malice standard on a limited purpose public figure theory. *See id.* at 167-68.

125. *See Franklin*, 97 Cal. App. 3d at 930-31, 151 Cal. Rptr. at 140-41.

126. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

127. *Cf. Bernal v. Fainter*, 467 U.S. 216, 220 (1984) ("[Teachers] have direct, day-to-day contact with students, exercise unsupervised discretion over them, act as role models, and influence their students about the government and the political process.").

128. *See id.*

129. *Cf. Dameron v. Washington Magazine*, 779 F.2d 736, 741-42 (D.C. Cir. 1985) (defamation plaintiffs can become involved in public controversies against their will and still be held to the actual malice standard on a limited-purpose public figure theory), *cert. denied*, 476 U.S. 1141 (1986).

130. *See Franklin v. BPOE*, 97 Cal. App. 3d 915, 930-31, 159 Cal. Rptr. 131, 140-41 (1979).

131. *See Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 167 (1979).

sial matter.¹³² Had it properly applied the *Wolston* standard, the California court would have found the teacher-plaintiff to be a limited purpose public figure and held her to the actual malice standard.

The media's interest in education in general, and in teachers in particular, is well-documented.¹³³ This attention from the media merely reflects the great public interest in the people who teach our children. It also offers overwhelming proof that school teachers indeed have greater access to the communications media than the ordinary citizen usually enjoys.¹³⁴ For example, the *New York Times* devotes two pages each week exclusively to the discussion of education issues.¹³⁵

Teachers' access to the self-help remedy is consolidated by their union affiliations. The everyday activities of teachers' unions receive prominent coverage by the press, both as news¹³⁶ and as editorial items.¹³⁷ Teachers also have ample opportunity to be heard within their own community, through scholarly journals¹³⁸ and local media, whose desire to pay attention to teachers is documented by the coverage giving rise to many defamation cases.¹³⁹ Because public school teachers satisfy both the risk-assumption and self-help elements of the limited purpose public figure test, courts should consider them public figures for the purpose of applying the *New York Times* actual malice standard.

CONCLUSION

The purpose of *New York Times v. Sullivan* and its progeny is to encourage robust discussion of issues of public concern and to protect individuals who speak out on those issues. Education is undeniably an area of intense concern to the public, and educators are the most appropriate

132. See *id.* at 167.

133. A recent, unscientific survey of the *New York Times* indictates the prominent role education and teachers play in the news media. See, e.g., *National Rise Reported in Teacher Pay*, *N.Y. Times*, Feb. 26, 1988, at D14, col. 1; *Study Suggests Poor Readers Are Hurt by Teachers' Tactics*, *N.Y. Times*, Feb. 26, 1988, at D14, col. 3; *Custodian vs. Principal: Stacked Deck*, *N.Y. Times*, Feb. 25, 1988, at B1, col. 2. The installation of a new *New York City Schools* Chancellor received both prominent news coverage, see *Green, at Induction, Appeals for Help*, *N.Y. Times*, Mar. 4, 1988, at B1 col. 2, and editorial comment, see *Chancellor Green's Good Fight*, *N.Y. Times*, Mar. 4, 1988 at A38, col. 4.

The unorthodox methods of principal Joe Clark of Eastside High School in Paterson, New Jersey attracted so much media attention that the White House took notice and offered him a job. See *Sixty Minutes: Joe Clark* (CBS television broadcast, Mar. 6, 1988); *Why Johnny Can't Speak*, *The Nation*, Jan. 30, 1988, at 109.

134. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

135. See, e.g., *N.Y. Times*, Feb. 10, 1988, at B8, col. 1.

136. See, e.g., *Life After Shanker: Leader Mends Fences*, *N.Y. Times*, Feb. 17, 1988, at B1, col. 2.

137. Albert Shanker, president of the American Federation of Teachers, has a weekly opinion column in the *New York Times* paid for by the union. See *Where We Stand*, *N.Y. Times*, Aug. 21, 1988, § 4 at 9, col. 1.

138. The Current Index to Journals in Education lists more than seven hundred publications, all by or about educators. See *Current Index to Journals in Education* (Semianual Cumulation, Jan.-June, 1987).

139. See *supra* note 105.

focus of that concern. Application of the *New York Times* actual malice standard to discussion about teachers in their professional capacity not only safeguards public debate on a critical national issue but also encourages involvement by parents and other members of local communities in the education process. The absence of such involvement threatens our most precious national resource.

Peter S. Cane

