

**WHITHER THE “PATHS OF GLORY”<sup>†</sup>: THE SCOPE OF  
THE *NEW YORK TIMES* RULE IN DEFAMATION CLAIMS  
BY FORMER PUBLIC OFFICIALS AND CANDIDATES**

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† THOMAS GRAY, *Elegy Written in A Country Church-yard*, in THE COMPLETE POEMS OF THOMAS GRAY: ENGLISH, LATIN, AND GREEK 38 (Herbert Willmarth Starr & J.R. Hendrickson eds., 1966). Gray wrote:

The boast of heraldry, the pomp of pow’r,  
And all that beauty, all that wealth e’er gave,  
Awaits alike th’ inevitable hour.  
The paths of glory lead but to the grave.

*Id.*

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## INTRODUCTION

In *New York Times v. Sullivan*, the Supreme Court redefined the legal landscape for defamation claims by public officials. The Court stated as a core principle:

The constitutional guarantees require . . . 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.<sup>1</sup>

William Shakespeare reminds us metaphorically that “[g]lory is like a circle in the water, [w]hich never ceaseth to enlarge itself [t]ill by broad spreading it disperse to nought.”<sup>2</sup> But, should this be so with respect to First Amendment restrictions on defamation claims? I shall examine to what extent, for the purposes of First Amendment restrictions on defamation liability, the status of a former public official or former candidate who once trod those evanescent paths of glory should continue. Specifically, to what extent should the First Amendment requirement of the *New York Times*, that a public official seeking to recover for defamation prove that the defendant communicated the statement with knowledge or reckless disregard, apply to statements about former public officials and former candidates? When should the eddying circle in the water legally cease for the purposes of constitutional limitations on defamation claims brought by persons who allege that they have been defamed by statements published after they no longer are public officials or candidates?

I shall begin by offering a brief background of the relevant First Amendment-based restrictions on the power of the states to impose civil liability for defamation. Then I will examine cases addressing the matter of the First Amendment restriction on defamation claims by former public officials and candidates. I will identify the factual variables which may be relevant, or perhaps should be considered, in deciding such cases. Finally, I

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). I have written more generally on the *New York Times* and its progeny. See Joseph H. King, *Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons*, 95 KY. L.J. 649 (2006). The *New York Times* decision has inspired a cottage industry of legal literature, much too extensive to attempt to survey here. For some additional background and perspective, one might look at several retrospective articles on the *New York Times*. See, e.g., Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-five*, 68 N.C. L. REV. 273 (1990) (for a twenty-five year retrospective).

2. WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE SIXTH* act 1, sc. 2, ll. 133–35, at 43 (William J. Rolfe ed., Harper & Brothers 1898).

will also suggest an approach to determining the status of former officials and candidates, which I summarize below.

The status of former public officials and former candidates should be addressed primarily within the Court's framework for public officials. Attempting to resolve the question of the status of former officials and former candidates by extrapolating from the analysis used for determining whether one is a public figure unnecessarily adds additional sinuosities to an already complex landscape. That ought to be unnecessary in cases in which my proposed approach would require application of the *Times* rule. Accordingly, I prefer that the issue be simply and directly stated as whether or not a defamation claim by a former official or former candidate should be governed by the *New York Times* rules to the same extent as for public officials.

I will suggest an approach to the question of the application of the *Times* rule to former public officials and former candidates for three types of situations. First, when a defendant's statement is related to the plaintiff's performance as official or candidate, or to his alleged conduct while occupying and related to those prior roles, I believe that the plaintiff's defamation claim should be governed by the *Times* rule.<sup>3</sup> For the purpose of applying the *Times* standard to a statement related to an official's or candidate's conduct or performance in those capacities, the fact that the statement was published after the individual's official tenure or candidacy should be irrelevant.

Second, when the defendant's statement described alleged conduct occurring after the plaintiff was no longer serving as official or candidate, plaintiff's defamation claim should be governed by the *Times* rule when either: (1) the alleged conduct was a continuation or outgrowth of or otherwise directly related to plaintiff's prior service as a public official or candidate; or (2) the fact of the plaintiff's prior status as a public official or candidate would make the publication of such statement a matter of public concern.

And third, I suggest the following approach when the defendant mistakenly identified the plaintiff as the person who committed the alleged conduct. If the defendant was incognizant that the plaintiff had previously served in the role as a public official or candidate previously occupied by the plaintiff, I believe that the *Times* rule should apply if the fact of the plaintiff's prior role as a public official or candidate was a factual and foreseeable cause of the mistaken reference to the plaintiff. If, on the other hand, the defendant realized that the plaintiff identified in the statement had previously served as a public official or candidate, the *Times* rule should

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3. See *infra* Part II.A.

still apply if either (1) the fact of the plaintiff's prior role as a public official or candidate was a factual and foreseeable cause of the mistaken reference to the plaintiff; or (2) the fact of plaintiff's prior role made the statement a matter of public concern.

In addition to the three preceding bases for application of the *Times* rule, it should also be sufficient if the plaintiff were found to be an all-purpose or limited-purpose public figure. Indeed, many situations would satisfy not only one or more of the three rules proposed above, but also the requirements for public figure status.

Before proceeding, I should acknowledge my strong preference here. Fundamentally, this discussion would be unnecessary were the Court to simply cut through the complex doctrinal underbrush in the desultory inchoateness left in the wake of *New York Times* and its sequelae, and apply the *Times* standard to all defamation cases irrespective of the status of the plaintiff or the categorical content of the speech or statement. I have previously urged the Court to take that path, and I will not repeat that thesis here.<sup>4</sup> In the interregnum and until the coming of that bright season, I will attempt to light a candle to illuminate a small part of the dark underbrush that has grown in the shadow of the *Times*.

## I. BACKGROUND AND SCOPE OF THE *NEW YORK TIMES* RULE

### A. Public Officials

The core requirement of *New York Times*—that public officials suing for defamation prove that the defendant knew its statement was false or acted in reckless disregard of whether it was so—came at a crucial point in our history.<sup>5</sup> The decision was based on the Court's sense of the acute importance of freedom of expression embodied in the First Amendment, and its salient precariousness at that juncture in our history.<sup>6</sup> Refusing to limit the protections of the First Amendment solely to true statements, the Court recognized that “some degree of abuse is inseparable from the proper use of everything.”<sup>7</sup> The Court explained that the “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>8</sup> It reasoned that if the truth is to develop, it is

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4. See King, *supra* note 1, at 713–14.

5. *New York Times*, 376 U.S. at 279–80.

6. See King, *supra* note 1, at 652.

7. *New York Times*, 376 U.S. at 271 (quoting James Madison, Report on the Virginia Resolutions, in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 546, 571 (1907)).

8. *Id.* at 271–72 (alteration in original) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

imperative to grant the process essential “breathing space” because reciprocally, “[w]hatever is added to the field of libel is taken from the field of free debate.”<sup>9</sup> In other words, “the inchoate perception of unactualized truth makes some errors inevitable as the truth develops from the early, imperfectly formed factual base.”<sup>10</sup> Two years later, the Court stated the underlying interests for its rule for public officials. “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 of those issues.”<sup>11</sup>

To these reasons, one must add the normative refinements articulated by the Court in *Gertz v. Robert Welch, Inc.*,<sup>12</sup> to explain why it applied more demanding constitutional requirements for public officials and public figures than for private plaintiffs. The Court not only reiterated that there is greater public interest in learning the personal attributes of officials than of private persons,<sup>13</sup> but distinguished public from private persons. The Court reasoned that public plaintiffs have greater access to channels of communications,<sup>14</sup> and they should be deemed to accept the consequences of their involvement in public affairs or their engagement in public controversies.<sup>15</sup>

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9. *Id.* at 272 (quoting *Sweeney v. Patterson*, 128 F.2d 457, 458 (D.C. Cir. 1942)).

10. *King*, *supra* note 1, at 655.

11. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (“Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.”). Various rationales have been identified as underlying the First Amendment. See Fred H. Cate, Note, *Defining California Civil Code Section 47(3): the Resurgence of Self-governance*, 39 STAN. L. REV. 1201, 1218 (1987) (footnotes omitted) (“The traditional justifications for the first amendment’s protection of speech and press divide into four categories: self-fulfillment, safety-valve, marketplace of ideas, and self-governance.” (footnotes omitted)); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (observing that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern”); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that, when individuals realize “that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”); see also Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 2–3 (1984) (discussing the “marketplace of ideas” metaphor and noting that “[t]his theory assumes that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth, or at least the best perspectives or solutions for societal problems”).

12. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974); see *infra* notes 33–40 and accompanying text (discussing the *Gertz* analysis).

13. *Id.* at 344–45 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

14. *Id.* at 344.

15. *Id.* at 345 (“Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”).

Regarding the required public official status, the *Times* Court 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.”<sup>16</sup> Soon thereafter, however, in *Rosenblatt v. Baer*, the Court attempted to offer guidance on the definition of “public official” for the purposes of First Amendment restrictions on defamation claims.<sup>17</sup> The Court stated that

[t]here is . . . a strong interest in debate about those persons who are in a position significantly to influence the resolution of . . . [public] issues. . . . [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.<sup>18</sup>

The Court elaborated that the *Times* rule should apply to those whose “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.”<sup>19</sup> But, “[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.”<sup>20</sup> Generally, a person’s status as a public official is a question of law.<sup>21</sup> And, the defendant bears the burden to prove the plaintiff occupied a status that would justify application of the *Times* limitations.<sup>22</sup>

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16. *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 n.23 (1964).

17. *Rosenblatt v. Baer*, 383 U.S. 75, 84–85 (1966).

18. *Id.* at 85.

19. *Id.* at 86.

20. *Id.* at 87 n.13.

21. *Id.* at 88 (stating that “it is for the trial judge in the first instance to determine whether the proofs show respondent to be a ‘public official.’”); see *Lane v. MPG Newspapers*, 781 N.E.2d 800, 803 (Mass. 2003) (“In the absence of disputed material facts, the question whether a person is a public official is one of law . . . .”); *Hotze v. Miller*, 361 S.W.3d 707, 713 (Tex. App. 2012) (stating that “[t]he question of public figure and public official status is one of constitutional law for courts to decide”); *HBO, A Div. of Time Warner Entm’t Co. v. Harrison*, 983 S.W.2d 31, 36–37 (Tex. App. 1998) (“whether appellee is a public official is a question of law to be determined by the court”).

22. DAVID A. ELDER, *DEFAMATION: A LAWYER’S GUIDE* § 4:2, available at Westlaw DEFAMATION (last updated August 2013).

The common law imposes on the defendant asserting a privilege the burden of demonstrating that the occasion for publication is privileged; the consensus view of the decisions (and clear intimations of the Supreme Court) likewise imposes on

It is not my purpose here to explore the question of which categories of governmental employees should be deemed “public officials” subject to the *Times* standard.<sup>23</sup> Rather, I will address the question of whether or to what extent those who once did meet the definition of public official or candidate—i.e., former public officials or candidates for public officialdom—should continue to be subject to the *Times* requirement.

The *New York Times* rule was stated in terms of statements about a public official “relating to his official conduct.”<sup>24</sup> The Court later made clear that the statement does not necessarily need to describe official acts or omissions, but more broadly requires only that the statement relate to or touch on the person’s fitness for office. Thus, the Court has held: “[A]nything which might touch on an official’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.”<sup>25</sup> Judge Sack

the defendant the requirement of showing by a preponderance of evidence that plaintiff is one of the variations of public person. Failing such a burden, the plaintiff will be deemed a private person. The Supreme Court in *Rosenblatt v. Baer* treated the status issue as a matter to be decided by the trial court in the first instance where the facts are undisputed . . . .

*Id.* (footnotes omitted).

23. For discussions of the matter, see ELDER, *supra* note 22, § 5:1; 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS §§ 1:4.1, 5:2.1 (4th ed. Current through Release # 3, May 2013); RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 2:99–2:108.50, available at Westlaw (last updated May 2013); David A. 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 (1984) (hereinafter Elder, BUFF. L. REV.); Richard E. Johnson, *No More Teachers’ Dirty Looks—Now They Sue: an Analysis of Plaintiff Status Determinations in Defamation Actions by Public Educators*, 17 FLA. ST. U. L. REV. 761 (1990); Kate M. Adams, Comment, *(Re)defining Public Officials and Public Figures: a Washington State Primer*, 23 SEATTLE U. L. REV. 1155, 1155 (2000); David Finkelson, Note, *The Status/Conduct Continuum: Injecting Rhyme and Reason Into Contemporary Public Official Defamation Doctrine*, 84 VA. L. REV. 871 (1998); 50 AM. JUR. 2D LIBEL AND SLANDER §§ 46–66, available at Westlaw (last updated August 2013); Danny R. Veilleux, Annotation, *Who is “Public Official” for Purposes of Defamation Action*, 44 A.L.R. 5th 193 (1996).

24. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

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

Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official’s private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official’s fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official’s private character.

has noted that “the scope of commentary about public officials that receives protection under the *New York Times* ‘actual malice’ test, like the definition of public officials, is extremely broad.”<sup>26</sup> Worried that the issue of whether the statement “relat[ed] to” the official’s conduct or fitness could prove too flexible and could thus become “an instrument for the suppression of those ‘vehement, caustic, and sometimes unpleasantly sharp attacks,’ which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail,”<sup>27</sup> the Court also adopted essentially a *per se* rule for criminal conduct.<sup>28</sup> Specifically, it held “as a matter of constitutional law that a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official’s or a candidate’s fitness for office for purposes of application of the ‘knowing falsehood or reckless disregard’ rule of *New York Times*.”<sup>29</sup>

### B. Extension to Additional Categories

In 1967, the Court extended the *Times* knowledge-or-reckless-disregard (“actual malice”) requirement to claims by public figures who were not part of the government.<sup>30</sup> Chief Justice Warren<sup>31</sup> reasoned:

Increasingly . . . there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in . . . the private sector. In many situations, policy determinations which traditionally were

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*Id.*

26. SACK, *supra* note 23, § 5:2.2, at 5–17.

27. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 270, 277 (1971) (citation omitted) (quoting *New York Times*, 376 U.S. at 270, 279–80).

28. *Id.*

29. *Id.*

30. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring in result).

31. Chief Justice Warren’s opinion, commanding five votes, that approved, as a minimum, application of the *Times* to public figures, was the controlling opinion of the Court. *See id.* (calling for application of *New York Times* standard); *id.* at 170 (Black, J., with Douglas, J., concurring) (advocating no liability for libel); *id.* at 172 (Brennan, J., with White, J., concurring in result) (agreeing with Chief Justice Warren that the *New York Times* standard should apply to public figures); *see also* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1083 (4th ed. 2011) (“Thus five Justices said that public figures cannot recover for defamation with less than proof of actual malice.”).



channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

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“[P]ublic figures,” like “public officials,” often play an influential role in ordering society. And surely as a class these “public figures” have as ready access as “public officials” to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, 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.” The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.<sup>32</sup>

In *Gertz v. Robert Welch, Inc.*, the Court adopted less demanding constitutional requirements for defamation claims by private individuals,<sup>33</sup> distinguishing them from public officials and public figures.<sup>34</sup> First, public plaintiffs have greater access to channels of communications;<sup>35</sup> second, they should be deemed to accept the consequences of their involvement in public

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32. *Curtis Publ'g*, 388 U.S. at 163–64.

33. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974). The Court in *Gertz* adopted two core holdings. First, it held that so long as the states “do not impose liability without fault, [they] may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.” *Id.* at 347. Secondly, it also held that no presumed or punitive damages could be awarded in a defamation case, at least in the absence of a showing that the defendant acted with knowledge or reckless disregard. *Id.* at 349. In 1985, the Court concluded that the second core holding of *Gertz*—“that a [s]tate could not allow recovery of presumed and punitive damages [in defamation cases] absent a showing of ‘actual malice’” (knowledge or reckless disregard)—did not apply unless the allegedly defamatory statement involved a matter of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756, 763 (1985); see King, *supra* note 1, at 694–95 & n.248. Although *Dun & Bradstreet* explicitly addressed only the second core holding of *Gertz*, its matter-of-public-concern requirement may also impliedly extend to the *Gertz* requirement of at least some fault in claims by private plaintiffs, although it remains unclear.

34. *Gertz*, 418 U.S. at 345–46.

35. *Id.* at 344.

affairs or their engagement in public controversies;<sup>36</sup> and finally, there is greater public interest in learning the personal attributes of officials than of private persons.<sup>37</sup> The Court went on to identify three categories of public figures. When a person “achieve[s] such pervasive fame or notoriety[,] . . . he becomes a public figure for all purposes and in all contexts.”<sup>38</sup> But, more commonly, a person “injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”<sup>39</sup> Finally, the Court also recognized the possibility of an involuntary public figure.<sup>40</sup>

In two cases in 1971, the Court explicitly held that defamation claims by candidates for public office were also subject to the *New York Times* requirements.<sup>41</sup> The Court explained that

*New York Times* itself was intended to apply to candidates, in spite of the use of the more restricted “public official” terminology, is readily apparent . . . . And if it be conceded that the First Amendment was “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people,” then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.<sup>42</sup>

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36. *See id.* at 345 (“Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”).

37. *See id.* at 344–45.

38. *Id.* at 351.

39. *Id.*

40. *Id.* at 345 (noting that “[h]ypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.”); *see King, supra* note 1, at 671–94.

41. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971); *see also Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300–01 (1971).

Public discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule. And under 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.

*Ocala Star-Banner*, 401 U.S. at 300–01; *see also SACK, supra* note 23, § 5:2.1, at 5–15 (stating that “[c]andidates for public office are covered by the *New York Times* rule”).

42. *Monitor*, 401 U.S. at 271–72 (citations omitted) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Although the *Times* standard applies to candidates, some argue that it may perhaps be more accurate to classify those candidates not currently serving as public officials, as public figures rather than public officials.<sup>43</sup> The Court in *Monitor* found no need to decide between public official and public figure categories because the *Times* requirements applied to both:

The trial judge instructed the jury that [the plaintiff], as a candidate for elective public office, was a “public official,” and that characterization has not been challenged here. Given the later cases, it might be preferable to categorize a candidate as a “public figure,” if for no other reason than to avoid straining the common meaning of words. But the question is of no importance so far as the standard of liability in this case is concerned, for it is abundantly clear that, whichever term is applied, publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office.<sup>44</sup>

It should be noted, however, that if candidates are classified as public figures, the scope of the *Times* rule may arguably be affected by deciding whether such “public figures” are all-purpose or limited-purpose public figures.<sup>45</sup>

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43. Judge Sack has commented that “[c]andidates for public office are covered by the *New York Times* rule; although, if they are not public officials at the time they stand for office, it is probably more accurate to refer to them as public figures.” SACK, *supra* note 23, § 5:2.1, at 5–15.

44. *Monitor*, 401 U.S. at 271. Other courts have simply said that candidates for public office are governed by the same requirement of proof of knowledge or reckless disregard as public officials. See *Pritt v. Republican Nat’l Comm.*, 557 S.E.2d 853, 861 (W. Va. 2001) (quoting *Sprouse v. Clay Commc’ns, Inc.*, 211 S.E.2d 674, 679 (W. Va. 1975)).

45. Judge Sack would classify candidates as all-purpose “pervasive” public figures:

Included in the “pervasive” category are candidates for public office. By running, they, like public officials, have surrendered “to public scrutiny and discussion so much of [their] private character[s] as affects [their] fitness for office.” The Supreme Court has made this explicit, describing criticism of candidates during an election as a citizen’s constitutionally protected duty. . . . The courts have interpreted the scope of such permissible scrutiny broadly. “[I]n measuring the extent of a candidate’s proof of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles.”

SACK, *supra* note 23, § 5:3.2, at 5–22 (footnotes omitted) (alteration in original) (quoting *Coleman v. MacLennan*, 98 P. 281, 291 (Kan. 1908)). Some courts have, however, classified them as limited-purpose public figures. See, e.g., *Hagaman v. Angel*, No. ATL-L-2408-03, 2005 WL 1390360, at \*3 (N.J. Super. Ct. Law Div. 2005) (“Candidates for public office, whether it is on a national or local level, are considered public figures for the limited purpose of their candidacy.”); *Verna v. Links at Valleybrook Neighborhood Ass’n*, 852 A.2d 202, 214 (N. J. Super. Ct. App. Div. 2004) (stating *in dicta*

Here, I address to what extent the First Amendment requirement of the *New York Times* that plaintiff seeking to recover for defamation prove that the defendant communicated his statement with knowledge or reckless disregard applies to statements about former public officials and former candidates.

## II. ANALYSIS AND PROPOSED APPROACH

There is an ontological dimension to the question of the status of former public officials and former candidates because of the multiple potentially relevant variables. The outcome of the issue of the status of a former public official or candidate should, in some situations, I believe, be affected by a number of variables including among others the following: (1) whether the defendant's statement described conduct that occurred while the plaintiff was still serving in the role of a public official or candidate, as opposed to subsequent conduct; (2) whether the defendant mistakenly referred to the plaintiff and whether the defendant was aware of the plaintiff's former status; (3) whether the fact of the plaintiff's former status was a factual and foreseeable cause of a mistaken reference to the plaintiff; (4) whether the defendant's statement was a matter of public concern; and (5) whether the fact of plaintiff's former status as a public official or candidate was sufficient to make the plaintiff a "public figure." Given this topic's polycentricity, I have organized my analysis around three categories of potential defamation claims: First, I shall address cases in which the allegedly defamatory statement described conduct that allegedly occurred while the plaintiff was still serving as a public official or candidate.<sup>46</sup> Second, I shall discuss situations in which the defendant's statement described alleged conduct occurring after the plaintiff was no longer serving as a public official or candidate.<sup>47</sup> And finally, I will briefly consider the situation in which the defendant mistakenly identified the plaintiff as the person committing the alleged conduct.<sup>48</sup> Within these three categories, I have tried to address some of the preceding variables to the extent I believe that they may or should be deemed relevant.

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as a general rule that "candidates for public office, who never achieve the status of public official because of lack of success at the polls, nevertheless take on the garb of public figures for the limited purpose of their candidacy"); *Weaver v. Pryor Jeffersonian*, 569 P.2d 967, 973 (Okla. 1977) (stating that "unquestionably the filing of a declaration of candidacy for public office places the declarant in the position of special prominence in the resolution of a public issue, that is, the election of a candidate to public office by the voting citizenry").

46. *See infra* Part II.A.

47. *See infra* Part II.B.

48. *See infra* Part II.C.

*A. Conduct Allegedly Occurring While the Plaintiff Was Still Serving as a Public Official or Candidate*

1. The Cases

The first category of cases arises when the conduct or performance described in the statement allegedly occurred while the plaintiff was still serving as a public official or candidate. Thus, the allegedly defamatory statements about a former public official or former candidate describe or directly relate to the plaintiff's conduct and/or performance that allegedly occurred while the plaintiff was still actively serving as a public official or candidate.

Most cases explicitly addressing defamation claims by former public officials arise from allegations of conduct or performance by the plaintiff in instances when such conduct allegedly occurred during the time that plaintiff was still serving in an official or candidate capacity. Thus, although the publication occurred after the plaintiff had left office or ended his candidacy, the defendant's statement related to conduct allegedly occurring while the plaintiff was still engaged in his official capacity or candidacy. The Supreme Court has held that the mere fact that the statement was published subsequent to the plaintiff's tenure does not preclude application of the *Times* rule. In *Rosenblatt*, the Court held that "[i]t is not seriously contended, and could not be, that the fact respondent no longer supervised the Area when the column appeared has decisional significance here."<sup>49</sup> Having said that, the Court added the following caveat:

[T]here may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule. But here the management of the Area 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. The comment, if it referred to respondent, referred to his performance of duty as a county employee.<sup>50</sup>

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

50. *Id.*; see SMOLLA, *supra* note 23, § 2:102. The issue was also addressed in a concurring opinion in *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979). The majority opinion of the Supreme Court in *Wolston*, holding that the plaintiff was not a limited-purpose public figure, did not address the matter of the effect of the passage of time on the issue of public figure status. *Id.* at 166–69. But, Justice Blackmun's concurring opinion did. *Id.* at 170–72 (Blackmun, J., concurring). He explained in context of limited-purpose public figures:

Dean Smolla has noted that despite this caveat,

instances in which the passage of time will be held to eliminate the actual malice standard are so rare as to be virtually nonexistent: lower courts have consistently refused to permit the passage of time to destroy public official status for speech relating to the activities of the official while in office.<sup>51</sup>

Thus, apart from its caveat, the *Rosenblatt* Court expressly extended the reach of the *Times* requirement to former public officials, at least when the official's performance was "still a matter of lively public interest."<sup>52</sup> Accordingly, the *Times* requirement generally may apply despite the fact that the statement was made or published after the plaintiff was no longer serving as a public official or a candidate for public office. Numerous cases have similarly held. Thus, when the defendant's statement related to the plaintiff's alleged conduct that occurred while the plaintiff was still serving as a public official or candidate, most federal<sup>53</sup> and state courts<sup>54</sup> have

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I believe that the lapse of the intervening 16 years renders consideration of this petitioner's original public-figure status unnecessary . . . . The passage of time, I believe, often will be relevant in deciding whether a person possesses these two public-figure characteristics. First, a lapse of years between a controversial event and a libelous utterance may diminish the defamed party's access to the means of counterargument. . . . Second, the passage of time may diminish the "risk of public scrutiny" that a putative public figure may fairly be said to have assumed.

*Id.* at 170–71 (Blackmun, J., concurring). Justice Blackmun continues by noting:

This analysis implies, of course, that one may be a public figure for purposes of contemporaneous reporting of a controversial event, yet not be a public figure for purposes of historical commentary on the same occurrence. Historians, consequently, may well run a greater risk of liability for defamation. Yet this result, in my view, does no violence to First Amendment values. While historical analysis is no less vital to the marketplace of ideas than reporting current events, historians work under different conditions than do their media counterparts. A reporter trying to meet a deadline may find it totally impossible to check thoroughly the accuracy of his sources. A historian writing *sub specie aeternitatis* has both the time for reflection and the opportunity to investigate the veracity of the pronouncements he makes.

*Id.* at 171 (Blackmun, J., concurring). For further background on the question in the general context of public figures, see generally SACK, *supra* note 23, § 5:3.8; ELDER, *supra* note 22, § 5:14.

51. SMOLLA, *supra* note 23, § 2:102.

52. *Rosenblatt*, 383 U.S. at 87 n.14.

53. See, e.g., *Revell v. Hoffman*, 309 F.3d 1228, 1230, 1232–33 (10th Cir. 2002) (rejecting plaintiff's argument that "he is no longer a public official, as he has now retired from the FBI," and holding plaintiff was still deemed a "public official for First Amendment purposes" with respect to "statements concerning [plaintiff's alleged] activities during his tenure at the FBI"); *Crane v. Arizona Republic (Crane II)*, 972 F.2d 1511, 1525 (9th Cir. 1992) (holding that for purposes of a portion of an

article that addressed plaintiff-Crane's alleged activities while head of a Justice Department's Strike Force that he should be deemed a public official); *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1069 (5th Cir. 1987) (noting that "courts have held that ex-public officials must prove that 'actual malice' prompted speech concerning their in-office activities," and that plaintiffs did not "claim that the articles referred to any conduct of theirs not connected to their positions as public officials"); *Gray v. Udevitz*, 656 F.2d 588, 590 n.3 (10th Cir. 1981) ("That the person defamed no longer holds the same position does not by itself strip him of his status as a public official for constitutional purposes. If the defamatory remarks relate to his conduct while he was a public official and the manner in which he performed his responsibilities is still a matter of public interest, he remains a public official within the meaning of *New York Times*."); *Pierce v. Capital Cities Commc'ns, Inc.*, 576 F.2d 495, 510 & n.67 (3d Cir. 1978), *cert. denied*, 439 U.S. 861 (1978) (noting that "the remarks in the telecast about Pierce were pertinent to his official conduct," and that "[t]he passage of some three years between the time of Pierce's departure from the Port Authority and the airing of the broadcast did not, by itself, strip Pierce of his status as a 'public official' for purposes of analyzing this case"); *Schmidli v. City of Fraser*, 784 F. Supp. 2d 794, 800, 806, 809 (E.D. Mich. 2011) (holding that allegedly defamatory remarks that involved plaintiff's alleged conduct as the Director of the Fraser Public Library were subject to the *Times* rule even though the remarks were apparently published later in the day after the plaintiff had been informed that she was being terminated as an at-will employee and handed a termination notice, although the plaintiff had a right to appeal her termination); *Phifer v. City of Rocky Mount*, No. 5:08-CV-00292-FL., 2010 WL 3834565, \*10 (E.D.N.C. Aug 12, 2010) (stating that defamation claim based on statements that related to the plaintiff's alleged job performance as a law enforcement officer was subject to the *Times* rule "even though the allegedly defamatory statements were made after [plaintiff] resigned"); *Sparks v. Reneau Publ'g Inc.*, 245 F.R.D. 583, 585-86 (E.D. Tex. 2007) (holding that former city manager suing for defamation was deemed a public official with respect to remarks involving plaintiff's alleged conduct as city manager even though article was published after his termination); *Worrell-Payne v. Gannett Co.*, 134 F. Supp. 2d 1167, 1171-72 (D. Idaho 2000) ("Neither [the plaintiff's] firing nor the passage of two years [sic] time altered her status for First Amendment purposes" with respect to statement plaintiff alleges "falsely described her performance as executive director" of the joint city-county housing authority.); *Perk v. Readers' Digest Ass'n*, No. C84-652, 1989 WL 226143, at \*1-2 (N.D. Ohio, Nov. 14, 1989) (stating that defamation claim by plaintiff-former mayor, published years after he left office and which concerned his alleged performance as mayor were subject to the *Times* rule); *Camacho v. Udick*, No. 81-0103A, 1983 WL 30225, at \*2 (D. Guam 1983) (stating in connection with statements concerning plaintiff's alleged conduct while a police officer, that "[t]he lapse of time between the firing and publishing is overcome by the fact that the matter was still of lively public interest, not *solely* because [the plaintiff] continued to litigate the matter, but also because he is a former public official requiring application of the malice standard").

54. *See, e.g., Redmond v. Sun Publ'g Co.*, 716 P.2d 168, 171 (Kan. 1986) (holding in the context of an article relating to the plaintiff's unsuccessful candidacy that "[t]he fact that the person defamed is a former public official does not of itself return the individual to the status of a 'private individual,'" and that "[t]he protection of the rule of the *New York Times* case, where the former official position was one which would invite public scrutiny and discussion of the person holding it, may still be in effect"); *Milgroom v. News Grp. Bos., Inc.*, 586 N.E.2d 985, 986 (Mass. 1992) (citations omitted) ("A judge who has left the bench continues to be a public official as to her conduct during her judicial tenure, at least with respect to matters involving the administration of justice, a subject of continuing public interest."); *Vamer v. Bryan*, 440 S.E.2d 295, 299 (N.C. Ct. App. 1994) ("plaintiff was a 'public official' for purposes of our review of the allegedly defamatory statements made after his termination as Town Manager" because "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"); *Ortego v. Hickerson*, 989 So. 2d 777, 783 (La. Ct. App. 2008) (holding that claim based on statement published after the plaintiff was no longer Executive Director of a local housing authority which related to alleged conduct while plaintiff occupied that position was governed by the *Times*); *Newson v. Henry*, 443 So. 2d 817, 821, 823 (Miss. 1983) (holding that a former candidate for sheriff was still deemed a

decided that plaintiff's claim should be governed by *Times*' knowledge-or-reckless-disregard rule to the extent otherwise applicable. Commentators agree.<sup>55</sup>

Consider, for example, *Milgroom v. News Group Boston, Inc.* The defendant News Group published a newspaper article authored by another defendant concerning a former Massachusetts district court judge.<sup>56</sup> The article was published several weeks after the retirement of the former judge.<sup>57</sup> The allegedly defamatory aspects of the article concerned the judge's alleged absences from court duties during the two and one-half years before her retirement.<sup>58</sup> The court held that "[a] judge who has left the bench continues to be a public official as to her conduct during her judicial tenure, at least with respect to matters involving the administration of justice, a subject of continuing public interest."<sup>59</sup> The rationale of the courts, in extending the *Times* rule to former public officials or candidates,

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public figure thirteen years after his unsuccessful campaign for sheriff, and stating that "[a]nything Ross did in connection with that campaign remains in the public domain and he remains a public figure . . . regarding the events of that campaign"); *Purvis v. Ballantine*, 487 S.E.2d 14, 18 (Ga. Ct. App. 1997) (stating that its public official analysis was "not changed by the fact that the allegedly defamatory statements were uttered three years after [plaintiff] retired from the superintendency" in connection with statement about his superintendency); *Clark v. Fernandina Beach News-Leader, Inc.*, No. 93-616-CA, 1994 WL 532980, at \*4 (Fla. Cir. Ct. 1994) (holding that plaintiff, suing for defamation based on article published more than a year after he was no longer employed as deputy sheriff but which dealt directly with plaintiff's alleged conduct while a deputy sheriff, "continued to be a public official"); *Vassallo v. Bell*, 534 A.2d 724, 732-33 (N.J. Super. Ct. App. Div. 1987) (stating with respect to a statement that it "clearly related to [plaintiff's] fitness for the office and his activities while holding it," and that "[t]he fact that the allegedly defamatory letter was published after plaintiff left his position does not affect his public official status"); *Crane II*, 972 F.2d at 1525 (holding with respect to plaintiff-Crane, a former head of the Justice Department's Los Angeles Organized Crime and Racketeering Strike Force, that with respect to the part of the article that spoke to Crane's alleged former official activities, he was deemed a public official); *Briggs v. Channel 4, KGBT*, 739 S.W.2d 377, 378-79 (Tex. App. 1987) (noting that even though the plaintiff "technically was not a candidate at the time of the publication . . . , the election was held only four days earlier," which "did not remove him from the public eye sufficiently that comment on his qualifications would have lost the public interest which makes it necessary to apply the actual malice standard"), *rev'd on other grounds*, 759 S.W.2d 939 (Tex. 1988).

55. See, e.g., DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 563 (West, 2nd ed. 2011) (explaining that there is no automatic loss of official status due to retirement); SMOLLA, *supra* note 23, § 2:102 ("lower courts have consistently refused to permit the passage of time to destroy public official status for speech relating to the activities of the official while in office"); SACK, *supra* note 23, § 5:2.1, at 5-7 to 5-8 ("Even though a person is no longer publicly employed, moreover, he or she will ordinarily be treated as a public official with respect to comments about his or her past performance in that role.").

56. *Milgroom*, 586 N.E.2d at 986.

57. See *id.* (noting that the plaintiff retired on July 31, 1988, and that the defendant News Group published the allegedly defamatory article on August 21, 1988).

58. *Id.*

59. *Id.* at 986-87 (citations omitted).



centered on the fact that their prior official conduct was still a matter of public interest.<sup>60</sup>

Other cases seem to tacitly assume that the *Times* rule applies to statements about former public officials relating to their official conduct without addressing or even acknowledging the issue.<sup>61</sup> In still other cases,

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60. See *Rosenblatt v. Baer*, 383 U.S. 75, 85, 87 n.14 (1966) (“Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. . . . [H]ere the management of the Area 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.”); *Sparks v. Reneau Publ’g Inc.*, 245 F.R.D. 583, 585–86 (E.D. Tex. 2007) (holding that former city manager suing for defamation is a public official, and relying on above-quoted language of *Rosenblatt* that freedom to criticize government depends on freedom to criticize officials responsible for government); *Revell v. Hoffman*, 309 F.3d 1228, 1232–33 (10th Cir. 2002) (rejecting plaintiff’s argument that “he is no longer a public official, as he has now retired from the FBI,” holding plaintiff was still deemed a “public official for First Amendment purposes,” and suggesting that his performance in the high echelons of the FBI was “still a matter of public interest”); *Gray v. Udevitz*, 656 F.2d 588, 590 n.3 (10th Cir.1981) (“That the person defamed no longer holds the same position does not by itself strip him of his status as a public official for constitutional purposes. If the defamatory remarks relate to his conduct while he was a public official and the manner in which he performed his responsibilities is still a matter of public interest, he remains a public official within the meaning of *New York Times*.”); *Van Englen v. Broad. News Networks, Inc.*, No. 96-CV-02503, 1997 WL 406267, at \*4 (D.N.J. 1997) (stating that “[a]n individual who was once a public official will be considered a public official for the purposes of the application of the actual malice standard for as long as his or her actions in office are newsworthy and ‘a matter of lively public interest,’” and that the plaintiff-Van Englen “was not so far removed from his former position of authority ‘that comment on the manner in which he performed his responsibilities no longer’ had the interest necessary to justify the application of the actual malice standard” (quoting *Rosenblatt*, 383 U.S. at 87 n.14)); *Mobile Press Register, Inc. v. Faulkner*, 372 So.2d 1282, 1986 (Ala. 1979) (former public official who had served as mayor and as state senator, and had been a candidate for governor was subject to *Times* rule in libel claim based on 1975 articles, and noting that “[t]he fact that he has not held or run for public office since 1958 does not necessarily lead to the conclusion that he has lost his public figure status,” that “[t]he press is entitled to make historical comment on past controversial issues involving persons who were public figures at the time,” that “[t]he activities of [the plaintiff] discussed in the articles . . . were of public interest, were controversial subjects and therefore were legitimate topics for comment,” and that “[t]he article about the captive county road legislation concerned the actions of a State Senator while in office and remains open for future debate”), *disapproved on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988); *Milgroom*, 586 N.E.2d at 986–87 (Mass. 1992) (citation omitted) (“A judge who has left the bench continues to be a public official as to her conduct during her judicial tenure, at least with respect to matters involving the administration of justice, a subject of continuing public interest.”); *Varner v. Bryan*, 440 S.E.2d 295, 299 (N.C. Ct. App. 1994) (stating with respect to a defamation claim by a former town manager, that “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,” and that the “extension of ‘public official’ status beyond the duration of an official’s employment is consistent with the *New York Times* policy favoring robust and open debate of public issues”).

61. See, e.g., *Ortego v. Hickerson*, 989 So. 2d 777, 783 (La. Ct. App. 2008) (holding that claim based on statement published after the plaintiff was no longer Executive Director of a local housing authority which related to alleged conduct while plaintiff occupied that position was governed by the *Times* rule); *Hotze v. Miller*, 361 S.W.3d 707, 714–15 (Tex. App. 2012) (holding that a former member of the Texas Medical Board was a public official with respect to an article written after he resigned

the former official conceded that the *Times* rule applied and the issue was never addressed.<sup>62</sup>

Other courts have chosen to categorize former officials or former candidates as public figures in some circumstances, particularly with respect to their alleged conduct relating to their official capacity or candidacy. Thus, the plaintiff was deemed a “public figure,”<sup>63</sup> at least in part because of his former status as public official<sup>64</sup> or candidate,<sup>65</sup> his

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which referred to him in his capacity as a board member and related to his alleged official conduct as such); HBO, *A Div. of Time Warner Entm't Co. v. Harrison*, 983 S.W.2d 31, 37–38 (Tex. App. 1998) (holding, in defamation case based on a documentary film focusing on cases in one of which plaintiff served as a court-appointed psychologist, that plaintiff was a public official with respect to remarks relating to plaintiff's alleged conduct as a court-appointed psychologist in the case).

62. See, e.g., *McCoy v. Hearst Corp.*, 727 P.2d 711, 714, 715 n.3, 738, app. at 742 (Cal. 1986) (involving defamation claims in which one plaintiff, former Assistant District Attorney Merle, was at the time of publication, no longer an assistant district attorney, but rather “employed by a New York investment firm,” as “investment firm's lawyer,” and which related to plaintiffs' alleged official conduct during the prosecution of a criminal case, in which the court noted that plaintiffs “concede they are public officials within the *New York Times* rule”).

63. See *supra* text accompanying notes 30–41 (discussing the extension of the *Times* requirement to public figures).

64. See *Camacho v. Udick*, No. 81–0103A, 1983 WL 30225, \*2–3 (D. Guam 1983) (stating that “[t]he lapse of time between the firing and publishing is overcome by the fact that the matter was still of lively public interest, not solely because [the plaintiff] continued to litigate the matter, but also because he is a former public official requiring application of the malice standard,” and that the plaintiff “was a public figure at the outset by virtue of his position as a police officer”); *Faulkner*, 372 So. 2d at 1284, 1286 (former mayor, state senator, and candidate for governor, who served on numerous governmental boards, who had held many roles with non-governmental organizations, and who owned various media businesses, was a public figure for all purposes in case in which one of the allegedly libelous articles referred to plaintiff's alleged activity while he was a public official, and the others commented on alleged conduct while the plaintiff was chairman of a public hospital governing board, president of a corporation, or chairman of the Bay Minette Industrial Development Board), *disapproved on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988); cf. *Herbert v. Lando*, 441 U.S. 153, 155–56 (1979) (noting in defamation case involving “a retired Army officer who had extended wartime service in Vietnam and who received widespread media attention in 1969–1970 when he accused his superior officers of covering up reports of atrocities and other war crimes,” in which plaintiff “alleged that the program and article falsely and maliciously portrayed him as a liar and a person who had made war-crimes charges to explain his relief from command,” that plaintiff conceded that because he was a “public figure” that the *Times* rule applied).

65. Candidates for public office are technically not public officials unless they already hold office. Therefore, the “public official” rubric may not technically fit for candidates who are not already office holders. See SACK, *supra* note 23, § 5:2.1, at 5–15. Judge Sack has stated that candidates are included within the all-purpose (or “pervasive”) category of public figures, since just like public officials, they have “surrendered ‘to public scrutiny and discussion so much of [their] private character[s] as affects [their] fitness for office.’” *Id.* § 5:3:2, at 5–22 (quoting *Coleman v. MacLennan*, 98 P. 281, 291 (Kan. 1908)). Of course, the *Times* standard applies to both categories. But, this technical matter of nomenclature-terminology can sometimes complicate analysis of the court's rationale for applying the *Times* rule to a former candidate. When the court says that a former candidate is a public figure, it is sometimes unclear whether the court means that once a person is a candidate, the public figure status continues, or means that the plaintiff was a general purpose public figure under the *Gertz* criteria, or both. See *Newson v. Henry*, 443 So. 2d 817, 821–23 (Miss. 1983) (holding that a former

involvement in activities related to his prior position,<sup>66</sup> or his prior official position or candidacy coupled with his involvement in public affairs generally.<sup>67</sup> Courts using a public figure analysis for former public officials most commonly deem them all-purpose public figures.<sup>68</sup> Some courts, however, focus on a controversy that existed while the plaintiff was a public

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candidate for sheriff was still deemed a public figure thirteen years after his unsuccessful campaign for sheriff, and stating that “[a]nything Ross did in connection with that campaign remains in the public domain and he remains a public figure when he brings suit for libel regarding the events of that campaign, even though the libel is not published until thirteen years later”).

66. *Arnheiter v. Random House, Inc.*, 578 F.2d 804, 804–05 (9th Cir. 1978) (holding in defamation claim based on the reporting of “events which occurred during [plaintiff’s] 99-day command of a Navy warship . . . during the Vietnam war” and his removal from command, that based on the fact that his “persistent efforts to bring about a reversal of this decision became the subject of much public notice and attention from journalists,” the plaintiff “qualifies under both the public official and public figure tests and that the book must be judged against the *New York Times* standard”); *Mastandrea v. Lorain Journal Co.*, 583 N.E.2d 984, 987 (Ohio Ct. App. 1989), *appeal dismissed*, 553 N.E.2d 276 (Ohio 1990) (noting that during the six month time lapse between the plaintiff’s election defeat and the publication of the article, “the controversy apparently had not died, as during this time a hearing was initiated before the Ohio Elections Commission,” and holding that the plaintiff was still a “public figure” or “public official” with respect to the article); *Faulkner*, 372 So. 2d at 1284, 1286 (former public official who had served as mayor and as state senator, and was a candidate for governor, who served on numerous governmental boards, who had held many roles with non-governmental organizations, and who owned various media businesses, was a public figure for all purposes), *disapproved on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d. 1085 (Ala. 1988).

67. *See Faulkner*, 372 So. 2d at 1284, 1286 (former mayor, state senator, and candidate for governor, who served on numerous governmental boards, who had held many roles with non-governmental organizations, and who owned various media businesses, was a public figure for all purposes in libel case based on articles one of which referred to plaintiff’s alleged activity while he was a public official, and the others commented on alleged conduct while the plaintiff was chairman of a public hospital governing board, president of a corporation, or chairman of the Bay Minette Industrial Development Board), *disapproved on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988); *Adams v. Frontier Broad. Co.*, 555 P.2d 556, 559–62 (Wyo. 1976) (plaintiff, who had been a city commissioner, state legislator, insurance commissioner, and candidate for various local and state positions, who was planning to be a candidate again, was both a limited-purpose public figure with respect to a subsequent fund raising project to clean up a city stream, and “[q]uite likely . . . a public figure for all purposes and in all contexts,” in defamation claim based on statement about plaintiff’s alleged conduct while insurance commissioner).

68. *See Redmond v. Sun Publ’g Co.*, 716 P.2d 168, 170–72 (Kan. 1986) (holding in context of article relating to the plaintiff’s unsuccessful candidacy, that former police department patrolman and candidate for city commission, who had also been allegedly involved in various public controversies, became a public figure for all purposes when he became a candidate, and noting that plaintiff’s defeat was “of public concern when the article was printed”); *Williams v. Pasma*, 656 P.2d 212, 216 (Mont. 1982) (holding in context of alleged conduct occurring before plaintiff’s senatorial campaign, that former candidate for the U.S. Senate who was active in politics having served as chairman for the Montana Republican Party, and had authored various financial publications was a public figure for all purposes); *Adams*, 555 P.2d at 559–62 (Wyo. 1976) (plaintiff, who had been a city commissioner, state legislator, insurance commissioner and candidate for various local and state positions, who was planning to be a candidate again, was both a limited-purpose public figure with respect to a subsequent fund raising project to clean up a city stream, and “[q]uite likely . . . a public figure for all purposes and in all contexts,” in defamation claim based on statement about plaintiff’s alleged conduct while insurance commissioner).

official, and thus treat the former official as a limited-purpose public figure.<sup>69</sup> There are perhaps two ways to deal with the public controversy requirement of the limited public figure status in this context. One way would be if the former official had actually been involved in such a controversy while serving in his official role, and that controversy continued after the official left office. Perhaps the limited public figure analysis could also be explained by analogy to the tendency of some courts to consider prominent sports figures and celebrities to be limited-purpose public figures, reasoning that the public controversy consists essentially of the assessment of the plaintiff's performance in such roles.<sup>70</sup> In any event,

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69. See *Sands v. News Am. Publ'g., Inc.*, 655 N.Y.S.2d 18, 19 (N.Y. App. Div. 1997) (stating that “[b]ased upon the three public offices that plaintiff held, . . . as well as plaintiff’s roles as a fundraiser for a political candidate and an active member of several civic organizations, the motion court correctly found plaintiff to be a public figure, albeit a ‘limited issue’ public figure,” and that “[i]t does not avail plaintiff that he no longer held these official positions or participated in matters of civic interest at the time the alleged defamatory statements were written”); *Faulkner*, 372 So. 2d at 1286 (holding that a former mayor, state senator, and candidate for governor, who served on numerous governmental boards, who had held many roles with non-governmental organizations, and who owned various media businesses, not only was a public figure for all purposes, but alternatively was a public figure for limited purposes, and noting that the alleged activities of the plaintiff discussed in the articles, “were of public interest, were controversial subjects and therefore were legitimate topics for comment,” and noting that one article “concerned the actions of a State Senator while in office and remains open for future debate”), *disapproved on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988); cf. Elsa Ransom, *The Ex-Public Figure: A Libel Plaintiff Without a Class*, 5 SETON HALL J. SPORT L. 389, 415 (1995) (discussing limited-purpose public figure status generally, and urging an approach “that adheres more faithfully to the principles and policies of *Gertz*” in deciding whether to classify “once-famous or -infamous plaintiffs” as limited-purpose public figures with respect to statements made subsequent to the plaintiffs’ prior alleged status-conferring activity). In *Faulkner*, the court commented “Faulkner contends that . . . he no longer remains a public figure for any purpose. We disagree. The fact that he has not held or run for public office since 1958 does not necessarily lead to the conclusion that he has lost his public figure status.” *Faulkner*, 372 So. 2d at 1286.

70. See, e.g., *McGarry v. Univ. of San Diego*, 64 Cal. Rptr. 3d 467, 481 (Cal. Ct. App. 2007) (stating that “[n]umerous courts . . . have concluded professional and collegiate athletes and coaches are at least limited purpose public figures,” because their “‘decision to pursue a career in sports, whether as an athlete or a coach, ‘invites attention and comment’ regarding his job performance” (quoting *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1119 (N.D. Cal. 1984)). Judge Sack prefers an all-purpose public figure analysis for celebrities. He writes:

[B]y voluntarily devoting themselves to the public arena, usually for profit, and by reaping enormous benefits financial and otherwise in the process, these individuals may be deemed to have thereby devoted their personalities to public discussion for all purposes. They have purposefully surrendered some of the private person’s reputational protection. This approach seems preferable, comporting more closely with the colloquial meaning of “public figure” and the general theme of *Gertz* that public people are those who, by their actions, assume the risk that their step into the public eye may result in critical coverage and injury from defamatory statements.

using the all-purpose public figure analogy still seems better suited for former officials, especially in the absence of a specific public controversy. Former officials seem to be the quintessential all-purpose (“pervasive”) public figures as delineated in *Gertz* as those who “have assumed roles of especial prominence in the affairs of society”<sup>71</sup> and “in the resolution of public questions,”<sup>72</sup> and “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>73</sup>

## 2. Proposed Approach for Conduct Allegedly Occurring While the Plaintiff Was Still Serving in Official Capacity or During Candidacy

The *Times* rule should, to the extent otherwise applicable, govern a plaintiff’s defamation claim when a defendant’s statements related to the plaintiff’s performance as official or candidate, or to his alleged conduct occurring while occupying and related to those prior roles. Most cases are largely in agreement that the plaintiff’s claim should be governed by the *Times* rule in such circumstances.<sup>74</sup> The mere fact that at the time of publication, the plaintiff is no longer a public official or candidate should not limit the public’s freedom of expression and right to unfettered information regarding the former official’s or candidate’s conduct and performance while serving in and related to those roles. Thus, the fact that the statement that related to an official’s or candidate’s conduct or performance in those capacities was published subsequent to the individual’s official tenure or candidacy should be irrelevant.

This result makes sense. The public has a continuing interest in the conduct, performance, and activities of public officials and candidates occurring while they served in and related to their capacities as public official or candidate. That interest surely does not end merely because the date of publication was after the plaintiff’s service or tenure as official or candidate. The mere fact that at the time of publication, the plaintiff is no longer a public official or candidate should not limit the public’s interest in information regarding that former official’s or candidate’s conduct and performance while serving in those roles. Information regarding a former official’s or candidate’s conduct and performance is also important history. Moreover, the public’s assessment—and perhaps reaction or legal response to that information—may serve as an important normalizing function in

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

72. *Id.* at 351.

73. *Id.* at 345. The Court added that “[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.” *Id.* at 352.

74. For an overview, see discussion and cases cited *supra* Part II.A.1.

detering misconduct by other current and future public servants and candidates. Additionally, the plaintiff may well occupy or seek public office in the future. Likewise, former officials' or candidates' conduct may well continue to influence events. The past conduct and performance of a former official or candidate occurring during his tenure or candidacy should not be arbitrarily hermitically sealed merely because his official term of duty ceases or candidacy has ended.

I recommend that the courts simply treat both former public officials and former candidates as legally equivalent to public officials<sup>75</sup> for the purposes of applying the *Times* rule to statements about their alleged conduct and performance while they were still public officials or candidates.<sup>76</sup> And, specifically, with respect to candidates, I believe such a straightforward treatment of candidates is preferable to the more particularized analysis that would be entailed if candidates and former candidates were analyzed under a "public figure" matrix. Addressing the status of former public officials and former candidates within the public-official doctrine is preferable to trying to bootstrap it into the *Times* standard by relying on a traditional public figure analysis. The public figure analysis may, if applied strictly within the traditional *Gertz* framework, be too narrow to protect the important First Amendment concerns that impelled the *New York Times* decision. Moreover, the public figure analysis, with its various categories of public figures,<sup>77</sup> has proven to be cumbersome, ad hoc and indefinite.<sup>78</sup> There is no guarantee from case to case whether a former public official or candidate would satisfy the unpredictable public-figure standards of *Gertz* and its progeny.<sup>79</sup> In particular, a limited-purpose public figure analysis, which would presumably depend on the existence of and plaintiff's engagement in a public controversy, would be even more restrictive and unpredictable. Thus, a traditional public figure analysis is not a satisfactory solution.

If a court nevertheless chose to deal with former public officials and former candidates within a public figure framework, hopefully it would analogize them to all-purpose public figures. Ideally, they should hold that former public officials and former candidates were *per se* all-purpose public

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75. Both current and former candidates should, in my opinion, simply be deemed the equivalent of public officials or former public officials for the purposes of deciding whether their defamation claims were governed by the *Times* rules.

76. See *DOBBS ET AL.*, *supra* note 55, § 563 (stating in connection with statements about former public officials' "office or activities in connection with it" that they "may be referred to as public figures rather than public officials, but a full-blown public figure analysis does not seem to be required to show that their status requires them to prove knowing or reckless falsehood" (footnotes omitted)).

77. See *supra* notes 33–40 and accompanying text.

78. See King, *supra* note 1 at 661–72.

79. See *id.* at 661–98.

figures with respect to conduct that occurred during their official service or candidacy.

*B. Conduct Allegedly Occurring After Plaintiff Left Office or Ended Candidacy*

1. Background

Although the *New York Times* Court stated its rule in terms of defamatory falsehoods about a public official “relating to his official conduct,” the scope of activities subject to the rule has been construed very broadly,<sup>80</sup> certainly more broadly than a literal interpretation of that *Times* language might suggest. Subsequently, in *Garrison v. Louisiana*, the Court expansively proclaimed that “anything which might touch on an official’s fitness for office is relevant.”<sup>81</sup> And, in *Monitor Patriot Co. v. Roy*, the Court held 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 for purposes of application of the . . . rule of *New York Times* . . . .”<sup>82</sup> Thus, a statement making a charge of criminal conduct seems virtually *per se* relevant to an official or candidate for the purposes of the *Times* rule.

According to Professor Elder, the “tenor of lower federal courts and state courts ‘overwhelmingly follows the broad-gauged and almost all-encompassing’ standards adopted in the Court’s *Garrison-Monitor Patriot-Ocala Star-Banner* triad” by which “all imputations of criminality, either as to plaintiff’s public or private life, are held to be generally relevant to fitness for public officialdom.”<sup>83</sup> He also comments that in addition, the decisions have explicitly or implicitly “extend[ed] the *New York Times* standard to multivariate other defamatory imputations of officials or candidates.”<sup>84</sup> The broad scope and construction of the “relating to official conduct” concept, including the judicial decisions making a charge of criminal conduct virtually *per se* relevant to an official or candidate, would not only clearly apply to statements about present public officials or present

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80. ELDER, *supra* note 22, § 5:2.

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

82. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971).

83. ELDER, *supra* note 22, at 5:2 (footnote omitted) (quoting Elder, *BUFF. L. REV.*, *supra* note 23, at 579).

84. *Id.*; see, e.g., *Dixon v. International Broth. of Police Officers*, 504 F.3d 73, 86 (1st Cir. 2007) (noting that the “‘relating to . . . official conduct’ . . . limitation has been broadly construed” and that “[s]o many things can ‘touch on’ someone’s ‘fitness for office’ that this restriction to the actual malice standard is very rarely applied”), *cert. dismissed*, 552 U.S. 1171 (U.S. 2008).

candidates, but most likely to former officials and even candidates as well,<sup>85</sup> at least respecting conduct that allegedly occurred while they were still serving as officials or candidates. But, should the broad sweep of the *Times* rule also include statements about conduct of a former official or candidate if that conduct allegedly occurred after the former official or candidate left office or ended his active candidacy?<sup>86</sup>

As previously discussed, the only Supreme Court case expressly addressing the issue of the status of a former public official allegedly defamed by a publication after he left office was in the context of the former official's alleged conduct occurring while he was still serving in his official capacity.<sup>87</sup> The Court has not explicitly analyzed the question of the status of former public officials in the context of alleged conduct of a former public official or candidate in which that conduct allegedly occurred *after* the official left office or ended his candidacy. The *Rosenblatt* opinion seems to at least obliquely acknowledge the issue.<sup>88</sup> And, one other early

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85. See ELDER, *supra* note 22, § 5:14 (footnotes omitted) (stating “[t]he candidate for public office indubitably does not lose public figure status the day following defeat as a candidate. Any other result would effectively preempt any and all comments concerning the losing candidate after the election is held, an anomalous and ridiculous result that would provide heightened scrutiny of the victor and lowered scrutiny of the vanquished, a distinction with no justification in First Amendment policy.” (footnotes omitted)).

86. Professor Smolla has obliquely acknowledged the issue when he states that according to *Rosenblatt*, “[a] person remains a public official . . . for the purposes of the *New York Times* actual malice standard even after he or she has left office, at least with regard to stories that refer to that person’s conduct while he or she was in office.” SMOLLA, *supra* note 23, § 2:102 (emphasis added). He adds that “lower courts have consistently refused to permit the passage of time to destroy public official status for speech relating to the activities of the official while in office.” *Id.* (emphasis added).

87. See *supra* notes 49-52 and accompanying text; see also ELDER, *supra* note 22, § 5:14 (noting that “[t]he Supreme Court has delved into the effect of passage of time on the status of public personages only in a single ‘public official’ decision, *Rosenblatt v. Baer*”).

88. The Court perhaps obliquely acknowledged the issue in *Rosenblatt* by carefully couching its holding that *Times* applied to a former public official in terms of a comment that referred to the plaintiff’s “*performance of duty as a county employee*.” *Rosenblatt v. Baer*, 383 U.S. 75, 87 n.14 (1966) (emphasis added). It also couched its caveat in similar language. See *id.* (stating that “there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the *New York Times* rule” (emphasis added)); see also *Ryder v. Time, Inc.*, 557 F.2d 824, 825-26 (D.C. Cir. 1976) (noting in a mistaken identification case in which the alleged activities occurred before plaintiff had been a public official and a candidate, that the plaintiff’s public activities “had nothing to do with the reference” to him in the article); *Peterson v. New York Times Co.*, 106 F. Supp. 2d 1227, 1232 (D. Utah 2000) (distinguishing *Ryder*, *supra*, because “in that case, it was clear that the alleged wrongdoing did not occur during the time that the plaintiff held office”); *Newson v. Henry*, 443 So. 2d 817, 823 (Miss. 1983) (stating in connection with alleged defamatory statements referring to the plaintiff’s campaign for sheriff, that “[a]nything [he] did in connection with that campaign remains in the public domain and he remains a public figure when he brings suit for libel regarding the events of that campaign, even though the libel is not published until thirteen years later,” and adding in dicta that “[o]nce a person becomes a public figure, he or she remains a public figure with respect to the event or events that made him or her a



Supreme Court opinion does state matter-of-factly, almost as an aside, that a former Army General was not a public official with respect to events occurring after his separation from the military. In *Associated Press v. Walker*, the plaintiff was a retired Army General and former candidate for Governor of Texas,<sup>89</sup> who had pursued “a long and honorable career in the United States Army before resigning to engage in political activity.”<sup>90</sup> The allegedly defamatory statement described alleged conduct during a riot that took place after the plaintiff had retired from the military.<sup>91</sup> The Court noted that the case did not involve public officials, but public figures.<sup>92</sup> The Court then held that the former general was a public figure, requiring application of the *Times* rule.<sup>93</sup> Thus, in the commanding opinion of Chief Justice Warren,<sup>94</sup> the Court held that General Walker was a public figure and that

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public figure in the first place. He or she may in time become a private figure, but only with respect to the events of his or her life occurring after he or she leaves public life”).

89. Brief for the Petitioner, *Associated Press v. Walker*, 388 U.S. 130 (1967) (No. 150), 1967 WL 113795, at \*6.

90. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 140 (1967) (Harlan, J., plurality opinion). *Associated Press* and *Curtis Publishing* were decided together. *Id.* at 130 n.\*.

91. *Id.* According to Justice Harlan’s recitation of the facts:

*Associated Press v. Walker*[] arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court’s decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas.

*Id.*; see also Brief for the Petitioner, *Associated Press v. Walker*, 388 U.S. 130 (1967) (No. 150), 1967 WL 113795, at \*6 (describing the plaintiff-Walker as a “central figure in the confrontation” who was “a former General Officer of the United States Army, the commander of the troops at a similar confrontation in Little Rock in 1957, a man who had resigned his commission in order to be free to engage in political controversy and who thereafter lectured widely on public issues, a man who had recently been a candidate for nomination for Governor of Texas, a man who had achieved national status and was a self-admitted person of political prominence” (references to the Record deleted)).

92. *Curtis Publ’g*, 388 U.S. at 162 (Warren, C.J., concurring in the result).

93. See *Curtis Publ’g*, 388 U.S. at 162 (“The present cases involve not ‘public officials,’ but ‘public figures’ . . .”).

94. The case had no majority opinion. Nevertheless, the opinion by Chief Justice Warren was the controlling opinion. That conclusion is derived from looking *at the opinions* for an intersection of views or common ground where there is a majority that can agree that they would at least go this far and also would prefer this view over the alternative advocated by those taking a contrary position. Reasoning this way, Chief Justice Warren along with Justices Brennan and White agreed that the *New York Times* standard should apply to public figures. *Id.* at 162, 172. And, two additional justices—Black and Douglas—advocated no liability for libel. *Id.* at 170–71. See also ERWIN CHEREMINSKY,

as such he was subject to the *Times* rule.<sup>95</sup> Although focusing on public figures, the sweep of Chief Justice Warren's analysis seems equally applicable to prominent former public officials and former candidates, irrespective of whether one technically categorizes them as public officials or as all-purpose public figures under the later *Gertz* ontological typology.<sup>96</sup> The Court stated broadly that "[u]nder any reasoning, General Walker was a *public man* in whose public conduct society and the press had a legitimate and substantial interest."<sup>97</sup>

In *Street v. National Broadcasting Co.*, the court addressed the question of the applicability of the *Times* rule to a person who once was clearly a limited-purpose public figure.<sup>98</sup> Although *Street* was thus not addressing the status of former public officials with respect to conduct occurring after their official tenure,<sup>99</sup> Judge Merrit's analysis nevertheless seems equally compelling in the context of former public officials as well:

Considerations that underlie the public figure doctrine in the context of contemporaneous reporting also apply to later historical or dramatic treatment of the same events. Past public figures who now live in obscurity do not lose their access to channels of communication if they choose to comment on their role in the past public controversy. And although the publisher of history does not operate under journalistic deadlines it generally

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CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1079–81 (4th ed. 2011) (commenting that "five Justices said that public figures cannot recover for defamation with less than proof of actual malice").

95. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967).

96. See *supra* notes 38–40 and accompanying text. See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344–45 (1974). The 1974 *Gertz* case had not yet been decided at the time of *Curtis*, which came seven years earlier.

97. *Curtis Publ'g*, 388 U.S. at 165 (Warren, C.J., concurring in the result) (emphasis added).

98. *Street v. Nat'l Broad. Co.*, 645 F.2d 1227, 1235 (6th Cir. 1981). The court stated:

Plaintiff argues that even if she was a public figure at the time of the 1930s trial, she lost her public figure status over the intervening forty years. We reject this argument and hold that once a person becomes a public figure in connection with a particular controversy, that person remains a public figure thereafter for purposes of later commentary or treatment of *that controversy*. This rule finds support in both case law and analysis of the constitutional malice standard.

*Id.* On the question of the effect of the passage of time on a person's possible status as a public figure, see ELDER, *supra* note 22, § 5:14; SACK, *supra* note 23, § 5:3:8. Professor Elder comments that although "[t]he dispute as to the passage of time . . . remains open," that "the near consensus of the case law, emphasizing the continuing public interest in the controversy, broadly defined," has held that the "lapse of time did not destroy public figure status." ELDER, *supra* (footnote omitted).

99. The *Street* case thus involved a public figure and statements about the public controversy the involvement in which conferred such status on her. *Street*, 645 F.2d at 1235. Moreover, the allegedly defamatory statements in *Street* related to the same public controversy the origin of which provided the basis for the plaintiff's initial public figure status, rather than a former public official. *Id.*

makes little difference in terms of accuracy and verifiability that the events on which a publisher is reporting occurred decades ago. Although information may come to light over the course of time, the distance of years does not necessarily make more data available to a reporter: memories fade; witnesses forget; sources disappear.

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There is no reason for the debate to be any less vigorous when events that are the subject of current discussion occurred several years earlier. The mere passage of time does not automatically diminish the significance of events or the public's need for information. A nation that prizes its heritage need have no illusions about its past. It is no more fitting for the Court to constrain the analysis of past events than to stem the tide of current news. From Alfred Dreyfus to Alger Hiss, famous cases have been debated and reinterpreted by commentators and historians. A contrary rule would tend to restrain efforts to shed new light on historical events and reconsideration of past errors.<sup>100</sup>

I believe that the *Times* rule should not be foreclosed merely because the plaintiff's alleged conduct occurred after the plaintiff's official tenure or active candidacy, but should continue to apply in various circumstances outlined in my proposed approach to such cases.<sup>101</sup> In *Garrison*, the Court reminds us of the underlying interest at stake: "[t]he public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."<sup>102</sup>

Few decisions have explicitly addressed the issue of the status of a former public official or candidate in a defamation claim based on statements about alleged conduct that took place when the plaintiff was no longer serving as a public official or candidate. Generalization is difficult because of the factual variations, although some categorization can be deduced from some of the cases.

## 2. Public Figure Analysis

When addressing the question of the former official or candidate's status with respect to his alleged conduct occurring after leaving office or ending a candidacy, some courts analyze the case in terms of whether the

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100. *Id.* at 1236.

101. *See infra* Part II.B.3.

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

plaintiff was a public figure.<sup>103</sup> A former public official or candidate may be deemed to be an all-purpose<sup>104</sup> public figure<sup>105</sup> because of his prior official position or candidacy, or that coupled with his involvement in public affairs generally. Moreover, on that basis, he would presumably be subject to the *Times* rule even with respect to conduct that occurred after he left office. This result would follow, at least unless the court found that the circumstances were deemed to warrant an exception falling into the *Rosenblatt* caveat,<sup>106</sup> or unless the court imposed a “relating to”<sup>107</sup> limitation on public figure status when such status is based on the plaintiff’s former role as an official or candidate.<sup>108</sup>

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103. See, e.g., *Finkel v. Sun Tattler Co.*, 348 So. 2d 51, 52 (Fla. Dist. Ct. App. 1977) (applying public official or public figure analysis and stating in a terse opinion that “it appears that the appellant is a public official or public figure by virtue of his former status as city attorney and his current activities relating thereto or emanating therefrom”); *Young v. Morning Journal*, 717 N.E.2d 356, 358–59 (Ohio Ct. App. 1998) (stating that the former head of the County Metropolitan Enforcement Group, a narcotics investigative unit, allegedly defamed by an article that incorrectly reported that as a private attorney, he faced a contempt of court citation for an alleged failure to appear at a pretrial hearing while representing a client after he had left his position with the investigative unit, was a public figure); cases cited *infra* notes 111-160 and accompanying text.

104. All-purpose public figures “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

105. See *Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282, 1284, 1286 (Ala. 1979) (former mayor, state senator, and candidate for governor, who served on numerous governmental boards, who had held many roles with non-governmental organizations, and who owned various media businesses, was a public figure for all purposes in libel case based on articles one of which referred to plaintiff’s alleged activity while he was a public official, and the others commented on alleged conduct while the plaintiff was chairman of a public hospital governing board, president of a corporation, and chairman of the Bay Minette Industrial Development Board), *disapproved on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So.2d 1085 (Ala. 1988); *Williams v. Pasma*, 656 P.2d 212, 216 (Mont. 1982) (holding in context of alleged conduct occurring before plaintiff’s senatorial campaign, that former candidate for the U.S. Senate who was active in politics having served as chairman for the Montana Republican Party, and had authored various financial publications was a public figure for all purposes); *Adams v. Frontier Broad. Co.*, 555 P.2d 556, 559–62 (Wyo. 1976) (plaintiff, who had been a city commissioner, state legislator, insurance commissioner and candidate for various local and state positions, who was planning to be a candidate again, was both a limited-purpose public figure with respect to a subsequent fund raising project to cleanup a city stream, and “[q]uite likely . . . a public figure for all purposes and in all contexts,” in defamation claim based on statement about plaintiff’s alleged conduct while insurance commissioner); see also SACK, *supra* note 23, § 5:3.2, at 5–22 (“Included in the ‘pervasive’ category are candidates for public office.”); cf. *Williams*, 656 P.2d at 215 (holding in context of alleged conduct occurring before plaintiff’s senatorial campaign, that former candidate for the U.S. Senate who was active in politics having served as chairman for the Montana Republican Party, and had authored various financial publications was a public figure for all purposes).

106. See *supra* notes 50-51 and accompanying text.

107. See *supra* notes 80-86 and accompanying text.

108. Cf. *Redmond v. Sun Publ’g Co.*, 716 P.2d 168, 170–72 (Kan. 1986) (holding in context of article relating to the plaintiff’s unsuccessful candidacy, that former police department patrolman and candidate for city commission, who had also been involved in various public controversies, became a public figure for all purposes when he became a candidate, and noting that plaintiff’s defeat was “of public concern when the article was printed”). Although the court characterized the plaintiff as an all-

Most courts that have used a public figure framework for deciding whether a statement about a former public official or candidate describing alleged conduct occurring after the plaintiff left office or ended his candidacy, seem to focus on whether the plaintiff was an all-purpose public figure. There may, however, also be an issue of whether, with respect to such statements, the former official or candidate was a limited-purpose public figure,<sup>109</sup> which would depend on whether all the requirements for such status were present.<sup>110</sup>

The public figure analysis is illustrated in the early pre-*Gertz* case of *Perkins v. Mississippi Publishers Corp.* Plaintiff-appellant Perkins was a former candidate for Congress.<sup>111</sup> The defamation claim arose from the following circumstances, which allegedly occurred several weeks after Perkins' congressional campaign had ended:

[The FBI] had taken into custody a certain . . . Hawkins on a federal warrant issued for his arrest upon a charge of having robbed a bank . . . . In the automobile which Hawkins was driving the federal officers found . . . several firearms, of various types, ammunition, posters announcing meeting of the Ku Klux Klan, hangman's nooses, and one or more of appellant's political posters, which had been printed and distributed by him in his most recent political campaign. On the posters was a picture of appellant and former heavyweight boxing champion, Rocky Marciano, and a solicitation of votes for Perkins.

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Upon the arrest of Hawkins, the [FBI] notified the various news media . . . that the weapons and other articles taken from Hawkins' car were available for photographing at the bureau office.

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Several news services and representatives of local television stations availed themselves of the invitation to photograph these

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purpose public figure, it seemed to qualify that holding by reasoning that plaintiff's candidacy and defeat was "of public concern when the article was printed," *id.* at 172, thus arguably implying that it was applying the *Times* rule to only with respect to statements about the plaintiff's former candidacy.

109. On the general question of the effect of the passage of time on a person's possible status as a public figure, particularly limited-purpose public figure, see ELDER, *supra* note 22, § 5:14; SACK, *supra* note 23, § 5:3.8; SMOLLA, *supra* note 23, § 2:49. Professor Elder comments that although "[t]he dispute as to the passage of time controversy remains open," that "the near consensus of the case law, emphasizing the continuing public interest in the controversy, broadly defined," has held that the "lapse of time did not destroy public figure status." ELDER, *supra* (footnote omitted).

110. See King, *supra* note 1, at 668-94.

111. Perkins v. Miss. Publishers Corp., 241 So. 2d 139, 141 (Miss. 1970).

articles. . . . The photographs then taken showed among them Perkins' political poster containing the picture of Perkins and Marciano and the legend "Vote for Perkins." These photographs were telecast that evening by local television stations, with which appellee had nothing to do. The next day a copy of this photograph appeared in appellee's newspapers with a news story dealing with the arrest and activities of Joe Daniel Hawkins. Perkins is not mentioned in the article.

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Under the published photograph there appeared "Hawkins arsenal—weapons and ammunition seized from the automobile of Joe Daniel Hawkins here Thursday night is displayed—photograph by Jimmy Carman." In one issue, the article on Hawkins also was accompanied by a small photograph of Hawkins purporting to show him in the regalia of the Ku Klux Klan.<sup>112</sup>

The court summarized the plaintiff's allegations in part:

The declaration charged further that appellee caused a photograph to be made of the weapons and other articles taken from Hawkins upon his arrest, that among these was a large political poster which Perkins had distributed in the "area" in his . . . race for a seat in Congress . . . on which there appeared a picture of Perkins with Rocky Marciano . . . .

\* \* \*

Appellant averred that appellee "caused" said political poster to be included in the photograph with a hangman's noose hanging over it, and that this photograph was published by appellee in its newspapers on July 12, 1968, in connection with a news article regarding the arrest of Hawkins, and that appellee did so with the "intention of associating the said photograph with the said violence and obnoxious activities of Hawkins, including the charge against Hawkins of bank robbery and other activities involving moral turpitude."<sup>113</sup>

"The gravamen of the complaint," according to the court, was that

appellee published the photograph although appellee ". . . knew that (Perkins) was in no manner connected with said person

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112. *Id.* at 140–41.

113. *Id.* at 140.

(Hawkins) and was in no manner connected with the investigation of any charges against said person or any personal activities of said person [or] . . . with said appliances and instrumentalities of violence secured from . . . Hawkins . . . .” Further, that the photograph was published “. . . with the obvious intention of associating the said photograph with the said violence and obnoxious activities of the said Joe Daniel Hawkins, including the charge against him of bank robbery and other crimes and activities involving moral turpitude.”

\* \* \*

Appellant’s position is, in essence, that the publication of the photograph of his political poster among other items also taken from Hawkins’ automobile was reasonably calculated to create . . . the logical conclusion that Perkins was connected with the robbery of the bank by Hawkins and with his “other crimes and activities involving moral turpitude,” and that this assumption or inference was false.<sup>114</sup>

The court held that the plaintiff “was, at the time of the publication of the photograph a ‘public figure’ . . . notwithstanding the fact that his latest political campaign ended several weeks earlier.”<sup>115</sup> Ultimately the court held for the defendant.<sup>116</sup>

114. *Id.* at 142.

115. *Id.* at 141–42. The court relied on the fact that:

Perkins had been prominently engaged in Mississippi politics for a good many years and had been a candidate and had conducted political campaigns for the following public offices: 1949—State Senate; 1951—State Senate; 1952—U.S. House of Representatives; 1953—City Commissioner; 1963—Lieutenant Governor; 1967—State Land Commissioner; 1968—U.S. House of Representatives. Perkins’ campaign for this latter office had been concluded only four or five weeks prior to the discovery of one of his political posters in Hawkins’ automobile and publication of the photograph. The poster found in Hawkins’ car was one of several hundred printed and distributed by Perkins in his 1968 Congressional race.

*Id.* at 141.

116. In response to plaintiff’s position that the “publication . . . was reasonably calculated to create in the minds of readers of the paper . . . the logical conclusion that Perkins was connected with the robbery of the bank by Hawkins and with his ‘other crimes and activities involving moral turpitude,’” the court said:

The published photograph of the weapons and miscellaneous paraphernalia found in Hawkins’ car did no more nor less than reflect the fact that one of Perkins’ political posters, of which hundreds had been printed and distributed, had been among them. We cannot accept as logical or reasonable the view urged upon us by appellant that there was implicit in this fact a charge that Perkins was

Similarly, in *Lewis v. Coursolle Broadcasting*, the court held that the *Times* rule applied to a former official, deeming him an all-purpose public figure.<sup>117</sup> The plaintiff, James R. Lewis, had been a member of the Wisconsin legislature between 1972 and 1979. "In 1979 a federal court, upon a plea of guilty, convicted Lewis of perjuring himself before a federal grand jury in connection with its investigation of a scheme to manufacture laser weapons and sell them to Guatemala."<sup>118</sup> Thus, being no longer legally eligible to serve in the legislature, the plaintiff surrendered his seat.<sup>119</sup>

Plaintiff Lewis petitioned the federal court to vacate his conviction, and information that had been presented to the grand jury became public.<sup>120</sup> Thereafter, in 1982, the defendant radio station broadcast a news story which began: "'James W. Lewis, the man who's accused of trying to extort one million dollars from the makers of 'Tylenol' after seven people died from poisoned capsules was a former representative to the 53rd district.'"<sup>121</sup> The broadcast also described Lewis as "'well known and respected throughout the district, being a very visible representative who spoke to many service organizations and church groups.'"<sup>122</sup> The problem was that while the broadcast, according to the court, "correctly identified the accused 'Tylenol' extortionist as James W. Lewis,"<sup>123</sup> it also "inaccurately identified James R. Lewis as the same person."<sup>124</sup> The defendant's broadcast occurred

personally connected or associated with Hawkins in his criminal or immoral activities.

\* \* \*

In the light of all of this, it cannot be said that the photograph reflecting Hawkins' possession of the poster constituted a sinister indictment of Perkins or implied a charge, known to be false or made with reckless disregard of the truth, that Perkins was connected with Hawkins in robbing the bank or with any of Hawkins' other activities involving moral turpitude. Such an implication is too tenuous and does not naturally or logically follow from the premises.

\* \* \*

Neither malice nor reckless indifference to or disregard of the truth was established in connection with the publication of the photograph in appellee's newspapers.

*Id.* at 142-43.

117. *Lewis v. Coursolle Broad. of Wis., Inc.*, 377 N.W.2d 166, 174 (Wis. 1985).

118. *Id.* at 167.

119. *Id.*

120. *Id.*

121. *Id.* at 168 (quoting WLKE radio broadcast Dec. 22, 1982).

122. *Id.* (quoting WLKE radio broadcast Dec. 22, 1982).

123. *Id.* (emphasis added).

124. *Id.* (emphasis added) ("Later the same day, WLKE learned of its error. It broadcast retractions that afternoon and the next day.").



on December 22, 1982.<sup>125</sup> The alleged attempted Tylenol extortion occurred in October 1982,<sup>126</sup> and thus, the broadcast alleged conduct that would have occurred after the plaintiff had left his official position.

In addressing the issue of the plaintiff's status, the court held that the plaintiff was not a public official, noting that he had "not been a 'public official' since he resigned from his assembly office in 1979."<sup>127</sup> Nor was he a "'public figure for a limited range of issues,' because he in no way 'thrust himself' into the 'Tylenol' extortion controversy."<sup>128</sup> The court did, however, conclude that the plaintiff was a "'public figure for all purposes."<sup>129</sup> It explained:

We by no means conclude that "once a public official, always a public figure." Lewis was, however, more than a public official who simply gained elective office in 1972, represented his constituents and performed his legislative duties until 1979, and then resigned to drift quietly into oblivion. He was much more.<sup>130</sup>

The court reasoned:

The question is whether an elected public official, such as Lewis, who commits perjury while in office and who does not deny that he participated in highly controversial and newsworthy activities while in public office which had little or no relationship to his official duties, should escape the searching public scrutiny which inevitably comes to an individual in this position who participates in such activities simply because he has resigned from office. We think not. To the contrary, his conduct in office *and afterwards* raised questions which were as worthy of public discussion in 1982 as in 1979. He had, in short, achieved the notoriety which the United States Supreme Court has declared makes an individual a "public figure for all purposes." Accordingly, we hold that Lewis was a "public figure for all purposes" in this action.<sup>131</sup>

Similarly, in *Mobile Press Register, Inc. v. Faulkner*, the plaintiff was a former mayor, state senator, and candidate for governor who served on

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125. *Id.*

126. *See* United States v. Lewis, 797 F.2d 358, 360 (7th Cir. 1986) (affirming the conviction of James William Lewis for attempted extortion), *cert. denied*, 479 U.S. 1093 (1987).

127. Lewis v. Coursolle Broad. of Wis., Inc., 377 N.W.2d 166, 171 (Wis 1985).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (emphasis added).

numerous governmental boards; who had held many roles with non-governmental organizations; and who owned various media businesses.<sup>132</sup> He sued for libel based on four news articles.<sup>133</sup> Only one of the articles referred to the plaintiff's alleged conduct while he was a public official—that is, while he was a legislator in the early 1950s.<sup>134</sup> The first three articles commented on the plaintiff's alleged conduct while he was chairman of a public hospital governing board, president of a corporation, and chairman of the Bay Minette Industrial Development Board.<sup>135</sup> All of the later events described in the first three articles allegedly occurred at various times during the early 1960s<sup>136</sup> and 1970s.<sup>137</sup> The plaintiff's time as mayor, state senator, and gubernatorial candidate all preceded the alleged conduct described in the first three articles.

The plaintiff in *Faulkner* contended that even if he had once been a public figure, he no longer remained a public figure for “any purpose.”<sup>138</sup> The court responded:

We disagree. The fact that he has not held or run for public office since 1958 does not necessarily lead to the conclusion that he has lost his public figure status. He has since held public and private positions of influence and power and has thrust himself into

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132. *Mobile Press Register, Inc. v. Faulkner*, 372 So. 2d 1282, 1284, 1286 (Ala. 1979), *disapproved on other grounds by Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085 (Ala. 1988).

133. *Id.* at 1284.

134. *Id.*

135. *Id.* The court offered this summary:

This action arose as a result of the publication of four news articles by the Mobile Press Register. . . . In essence they stated: (1) Faulkner, when stepping down as Chairman of North Baldwin County Hospital Board, gave public indication that he was leaving the hospital in good financial condition when in fact a fiscal crisis was occurring; (2) Faulkner, while President of Bay Minette Mills, Inc., had promised investors that its bonds were a good investment, but then refused to pay off the bonds and threatened to discontinue paying interest if bondholders attempted to convert their bonds to common stock; (3) Faulkner, as Chairman of the Bay Minette Industrial Development Board, had a conflict of interest in his business and public enterprises, made a false oath that he had no interest as stockholder, director, etc., and had no intention of acquiring such interest in Den-Tal-Ez Manufacturing Co., Inc., but after the proceeds of a bond issue of the Board in the amount of 2.5 million dollars went to Den-Tal-Ez, Faulkner was named a director of that company; and (4) Faulkner, while a legislator in the early 1950's had sponsored a presently unpopular captive county road bill for Baldwin County over objection of the County Commission.

*Id.* (footnotes omitted).

136. *See id.* app. at 1292.

137. *See id.* app. at 1289–90, 1292–93.

138. *Id.* at 1286 (emphasis in original).

public controversies to influence their outcome. The mere lapse of time is not decisive in any event. The press is entitled to make historical comment on past controversial issues involving persons who were public figures at the time. The activities of [the plaintiff] discussed in the articles were matters in which [he] was involved, were of public interest, were controversial subjects and therefore were legitimate topics for comment. The article about the captive county road legislation concerned the actions of a State Senator while in office and remains open for future debate.<sup>139</sup>

Although two of the three articles did relate to the plaintiff's service on the hospital board and the industrial development board, the court seemed to assume, at least for the sake of argument, that its decision did not rest alone on whether or not the service on these boards would make the plaintiff an all-purpose public figure (or a public official). The court stated:

Nor do we agree with [plaintiff's] contention that he is not a public figure because his membership on various city and county boards is nonremunerative. His status as a public figure did not arise solely from his membership on various governing boards. Most probably his appointment to the boards was a result of his prominence. However, even if his status depended only on these memberships, he would, in this case, be a public figure. [Some] of the published articles were directly concerned with the functioning of these boards. Clearly, [the plaintiff] was a public figure in controversies regarding them.<sup>140</sup>

Other cases, however, have reached a different result based on a determination that the former official or candidate was not an all-purpose public figure, and have held the *Times* rule inapplicable. In *Rutt v. Bethlehem's Globe Publishing Co.*, a newspaper obituary stated in part: "City police said Randy Lee Rutt apparently shot himself to death with a rifle belonging to his father at the home of Mr. & Mrs. Joseph Hegedus, 256 E. North St., a couple days after the victim's father asked him to leave his home at 804 Linden St."<sup>141</sup> The decedent's father sued for defamation.<sup>142</sup> He had resigned from the police force more than five months before his son's suicide and the publication of the obituary.<sup>143</sup> He had also conducted a

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139. *Id.* (citations omitted).

140. *Id.* at 1287 (citations omitted).

141. *Rutt v. Bethlehem's Globe Publ'g Co.*, 484 A.2d 72, 74-75 (Pa. Super. Ct. 1984) (quoting THE GLOBE TIMES, Aug. 29, 1977) (internal quotation marks omitted).

142. *Id.*

143. *Id.*

write-in campaign for mayor and was defeated approximately three months before his son's suicide.<sup>144</sup> The defendant conceded that the plaintiff's "resignation from the police department . . . more than five months before the article in question was published, caused appellant to lose his status as a public official."<sup>145</sup> The court focused on whether the plaintiff should be deemed an all-purpose public figure. In concluding that the plaintiff was not a public figure, the court reckoned:

The article of which appellant complains did not appear until August 29, 1977, more than three months after his ten day candidacy and defeat in the primary election. There is no evidence that the public or the press followed the actions or ideas of appellant with any interest, report or comment. In fact, it would appear that by the time of publication of the challenged article, appellant had for all purposes disappeared from public view, an understandable result, as his only effort to influence matters of public importance had been notably unsuccessful as well as brief. Appellant, not having attained prominence in the affairs of society nor enjoying the status of a "celebrity", could not, as a matter of law, have been found to be an all purpose public figure.<sup>146</sup>

Likewise, in *Durham v. Cannan Communications*, the plaintiff had served as special counsel for a county court of inquiry, which rendered its report two months before the allegedly defamatory television broadcast by the defendant station.<sup>147</sup> The broadcast reported that defendant newsman "after two weeks of personal investigation . . . had discovered that appellant was connected with a club located just north of Amarillo called the Chicken Ranch, which was used as a front for various activities including orgies and prostitution."<sup>148</sup> Thus, the plaintiff's alleged conduct presumably occurred after the plaintiff had completed his official service in the court of inquiry.<sup>149</sup> The court held that although the plaintiff had previously achieved some notoriety in the past when he acted as defense counsel, when

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144. *Id.*

145. *Id.* at 79.

146. *Id.* at 80. Nor did the court find that the plaintiff was a limited-purpose public figure based on his alleged involvement in the events dealt with in obituary. *See id.* at 80-81 ("[T]he allegedly defamatory obituary, although containing a matter which appellees may have believed would tweak the prurient and morbid interest of certain members of the public, did not involve a matter of public controversy with foreseeable and substantial ramifications for the members of the general public." (footnote omitted)).

147. *Durham v. Cannan Commc'ns, Inc.*, 645 S.W.2d 845, 848 (Tex. App. 1982).

148. *Id.* at 847.

149. *Id.* at 848.

he was appointed to serve on a panel investigating the causes of a jail riot, and when he was appointed special counsel for a court of inquiry, he was not “a celebrity or household name and thus an all-purpose public figure.”<sup>150</sup> And, since there was “no evidence that [plaintiff’s] alleged involvement with the Chicken Ranch had anything to do with his legal and investigative activities for the county government” nor that he “had sought publicity over his alleged Chicken Ranch activities or that the Chicken Ranch had become a center of public controversy,”<sup>151</sup> the court concluded that the “evidence failed to establish that [the plaintiff] had achieved the status of a public figure within the context of his involvement with the Chicken Ranch.”<sup>152</sup> And thus the plaintiff was neither an all-purpose nor a limited-purpose public figure.<sup>153</sup>

Some cases seem to basically ignore the possibility that a plaintiff’s former official position might render him an all-purpose public figure when the defendant’s statement relates to alleged conduct occurring after the plaintiff left office, at least in the circumstances presented. For example, in *Andreucci v. Foresteire*, the plaintiff was a retired elementary school principal.<sup>154</sup> The allegedly defamatory statements described conduct that allegedly occurred after the plaintiff had retired from his official position as principal.<sup>155</sup> The court stated that the plaintiff was a public official while he was a principal and “would remain a public figure with regard to his performance as a principal even though he had retired.”<sup>156</sup> However, with respect to conduct that allegedly occurred after he had retired, the court held that plaintiff’s status depended on whether or not he was a voluntary

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150. *Id.* at 849–50.

151. *Id.* at 851.

152. *Id.*

153. *Id.*

154. *Andreucci v. Foresteire*, No. 957183, 1998 WL 1184151, at \*4 (Mass. Super. Ct. Jan. 6, 1998).

155. The plaintiff-Andreucci, a retired former elementary school principal, had requested that his resignation be extended for six months to take advantage of better pension benefits. *Id.* at \*1. At the meeting of the School Board to consider the request, “statements were made with regard to Andreucci’s performance as a principal and his request was subsequently denied. Andreucci did not make any response to these allegations.” *Id.* Shortly after plaintiff’s resignation, a series of articles and editorials were published in the Everett Advocate criticizing various members of the School Board, the defendant-Foresteire (the Superintendent of Schools), and the principal who replaced the plaintiff. *Id.* In response to these articles, defendant-Foresteire filed a defamation suit against James David Mitchell and The Advocate Newspaper, Inc.” *Id.* Thereafter, Foresteire “caused to be published in the Everett *Leader-Herald* (“*Herald*”) an article which discussed the suit and his reasons behind its filing. . . . The article specifically named Andreucci as being involved in the publication of the articles in the Advocate.” *Id.* The defamation claim by the plaintiff-Andreucci was based on the article in the *Herald*. *Id.*

156. *Id.* at \*4 (“Andreucci in this case is a retired elementary school principal. Undoubtedly, when Andreucci was employed as an elementary school principal, the public had an interest in his performance. Additionally, he would remain a public figure with regard to his performance as a principal even though he had retired.”).

limited-purpose public figure.<sup>157</sup> And that in turn depended on whether he “interjected himself into the debate or if he was brought into the controversy . . . [or] with regard to this controversy if he put himself out to the public.”<sup>158</sup>

In *Ryder v. Time, Inc.*, the court declined to apply the *Times* rule with respect to a statement that allegedly misidentified the plaintiff as the person who had allegedly committed specified conduct in 1967 (which was before the plaintiff’s service in government or as a candidate), stating:

It is true that plaintiff had been a public official for a time and had been a candidate for public office. Yet these public activities had nothing to do with the reference to Richard Ryder in the essay and, in any case, those activities were no longer engaged in by plaintiff.<sup>159</sup>

A later case sought to explain *Ryder*, noting: “in that case, it was clear that the alleged wrongdoing did not occur during the time that the plaintiff held office,”<sup>160</sup> thus, perhaps implying that at least there was no “public official” basis for applying the *Times* rule in such situations.

157. *See id.* at \*5.

158. *Id.* As the court stated:

[T]his article was not about the performance of Andreucci as principal. The context of this article was a lawsuit between Foresteire and Mitchell. The overall point of the article was to discuss the dispute between those two parties. Foresteire brought Andreucci into the debate by claiming that Andreucci was the source of the information in Mitchell’s articles. The critical issue therefore becomes, whether Andreucci interjected himself into the debate or if he was brought into the controversy by Foresteire. Andreucci can only be considered a public figure with regard to this controversy if he put himself out to the public. There is some circumstantial evidence as to the source of Mitchell’s articles and the various editorials. Andreucci denies having any involvement in their writing and publication. If Andreucci was the source of those articles and editorials, then Andreucci has put himself out to the public with regard to this issue and therefore, the *New York Times* standard applies. If Andreucci was not the source, then he will not be considered a public figure and only a negligence standard would apply. Whether Andreucci was the source of these editorials and articles is an issue of material fact which must be determined by the trier of fact in this case.

*Id.*

159. *Ryder v. Time, Inc.*, 557 F.2d 824, 825–26 (D.C. Cir. 1976). The court also noted that “[a]t the time he brought this suit in the court below against Time, Inc., publisher of *Time* magazine, he was politically active in his community, but not the holder of any public office.” *Id.* at 824.

160. *Peterson v. New York Times Co.*, 106 F. Supp. 2d 1227, 1232 (D. Utah 2000). In discussing *Ryder*, the Peterson court stated:

### 3. Conduct a Continuation of or Directly Emanating From the Prior Official Role

In some cases, a former official's alleged conduct occurring after holding office or being a candidate consists of a continuation or outgrowth of or directly related to official or candidacy activities undertaken while the plaintiff was still serving as a public official or candidate. Some courts have deemed the plaintiff a public official if the alleged post-official conduct was a continuation of or directly related to activities that the plaintiff began while still a public official.<sup>161</sup>

Consider the *Victoria v. Le Blanc* case. During the two months after the plaintiff had left office, the defendant wrote two letters to a local newspaper which, according to the plaintiff's complaint, "'intended to convey, and did convey, to the community at large, the impression that plaintiff was misappropriating city funds . . . Defendant meant, and intended to mean, that plaintiff was stealing city funds, and was so understood by the readers of [the] publication.'"<sup>162</sup> Thus, the situation in *Victoria*, as interpreted by

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The *Ryder* case, relied upon by Mr. Peterson, does not suggest otherwise because, in that case, it was clear that the alleged wrongdoing did not occur during the time that the plaintiff held office. In addition, although the *Jones* case did not involve a situation in which the court had to determine whether the alleged defamation related to the plaintiff's official duties—because the defamation did not concern the period during which the plaintiff held office—the *Jones* court's determination that the *New York Times* malice standard applies to a situation in which a photograph of a public figure is mistakenly juxtaposed with an article about someone else also comports with this court's conclusion.

*Id.*

161. See *Victoria v. Le Blanc*, 7 P.3d 668, 670–71 (Or. Ct. App. 2000); *Scott v. News-Herald*, 496 N.E.2d 699, 703 & n.2 (Ohio 1986). In some cases the court's opinion does not specify whether the alleged defamation was based on alleged conduct occurring during or after the period the plaintiff was serving as a public official. See *Finkel v. Sun Tattler Co.*, 348 So. 2d 51, 52 (Fla. Dist. Ct. App. 1977) (stating in a terse opinion applying public official or public figure analysis that "it appears that the appellant is a public official or public figure by virtue of his former status as city attorney and his current activities relating thereto or emanating therefrom").

162. *Victoria*, 7 P.3d at 670 (second alteration in original). By way of background, the court stated:

Plaintiff was the City Administrator of . . . Hubbard from 1994 until March 1996, when the city council dismissed her. While she was City Administrator, a private group, the City Park Committee, established a fund to benefit the city's parks. Plaintiff was a member of the Committee and opened a bank account on its behalf, with herself as the only authorized signer. At the time, the Committee had not completed the necessary paperwork to receive a taxpayer identification number as a nonprofit organization. Plaintiff did not wish to use her own Social Security number, or someone else's, for the bank account, and she therefore used the city's taxpayer identification number as a temporary measure. The city council

the court, differed from the more common cases involving former public officials in which the alleged defamation described conduct or performance that took place while the plaintiff was still serving as a public official.<sup>163</sup> The court viewed the instant case as one involving a statement alleging conduct subsequent to the plaintiff's official tenure. It stated: "Neither *Rosenblatt* nor any of the cases that the parties cite deals with the precise issue in this case, in which defendant criticized plaintiff for actions that occurred *after* her dismissal but that were continuations of actions that she began while a city employee."<sup>164</sup> The court concluded that "because of the nature of defendant's charges, at the time of the letters plaintiff was a public official,"<sup>165</sup> stating:

In those letters defendant treated plaintiff as a public official, describing her by her former position rather than by name. He attacked plaintiff's alleged misconduct in the use of a bank account that she had opened while working for the city and that, he asserted, contained public funds. That attack came shortly after plaintiff's dismissal from her position and in the context of an attack on a serving member of the city council, one of whose faults, according to the letters, was her connivance with plaintiff in the misconduct. Because defendant criticized plaintiff for conduct that, as he described it, was directly related to her work as a public official, we agree with the trial court that he is entitled to the protections that the First Amendment provides persons who make such criticisms.<sup>166</sup>

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was aware of plaintiff's action in opening the account and knew that the account did not contain city money; the subject was discussed at a council meeting. Before plaintiff's dismissal, only one or two council members knew that plaintiff had used the city's taxpayer identification number for the account. Her involvement with the Committee ended after her dismissal, apparently at least in part as the result of a city council decision.

*Id.* at 669.

163. *See supra* Part II.A.

164. *Victoria*, 7 P.3d at 670 (emphasis in original).

165. *Id.* at 670–71.

166. *Id.* at 671 (footnote omitted). The court noted that:

The City Park Committee was separate from the city government and plaintiff's involvement with it was nominally not part of her job duties. However, the purpose of the Committee was to improve the city's parks, and plaintiff was involved with it only while she was City Administrator. Defendant's criticisms involved her handling of its funds, which he implied in his letters was city money.

*Id.* at 671 n.3.



Another case reaches a similar conclusion. In *Scott v. News-Herald*, the plaintiff was a former superintendent of the Maple Heights Schools.<sup>167</sup> The case arose from the following events:

Plaintiff [Scott] was present on February 8, 1974, at an interscholastic wrestling match between Maple Heights High School and Mentor High School held in Maple Heights. During the match, an altercation occurred when a Maple Heights wrestler was disqualified for allegedly fouling his Mentor opponent, and hence, lost the match. The crowd became emotional and a disturbance ensued during which several persons were injured.

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Subsequently, the Ohio High School Athletic Association (OHSAA) held a hearing on February 28, 1974, which resulted in censoring the team's coach, Michael Milkovich, placing the entire Maple Heights wrestling team on probation . . . Several parents and wrestlers involved sued OHSAA . . . contending they were denied due process during the hearing. Plaintiff was not part of this action. The court issued a temporary restraining order against OHSAA. The court held that the decision of OHSAA denied team members due process rights and reversed the suspension order.<sup>168</sup>

The plaintiff alleged that an article, published by defendant-newspaper and written by defendant-reporter on the day following the court's order, defamed him by suggesting that he had committed perjury.<sup>169</sup> Some of the article's<sup>170</sup> and the court's<sup>171</sup> language was ambiguous, referring to the "hearing" without clearly delineating which hearing—the one before the OHSAA or the subsequent "legal hearing" before the court—was the one at

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167. *Scott v. News-Herald*, 496 N.E.2d 699, 703 (Ohio 1986).

168. *Scott v. News-Herald*, No. 9-128, 1983 WL 6067, at \*1 (Ohio Ct. App. Dec. 30, 1983), *aff'd*, 496 N.E.2d 699 (Ohio 1986).

169. *Scott*, 496 N.E.2d at 706 ("[T]he crux of appellant's argument is that he was accused of the crime of perjury.").

170. *See id.* at 706 (quoting the article that "[a]nyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth"). A copy of the actual article as it appeared in print is set forth in the case's Appendix. *Id.* app. A at 727–28. A textual version of the article is also included in the Supreme Court decision in the defamation case brought by Michael Milkovic, the head wrestling coach at the relevant time. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 5–7 n.2 (1990).

171. *See Scott*, 496 N.E.2d at 707 ("Whether or not H. Don Scott did indeed perjure himself is certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing.").

which the article allegedly implied the plaintiff had lied.<sup>172</sup> Notwithstanding this ambiguity, the court seemed to at least contemplate that the plaintiff was alleging that the article may have implied that the plaintiff was untruthful at the legal hearing before the court.<sup>173</sup>

The court held, *inter alia*, that the *Times* rule applied because the plaintiff was a public official.<sup>174</sup> The trouble was that although the plaintiff was still the superintendent at the time of the wrestling match and the OHSAA hearing,<sup>175</sup> he was no longer the superintendent at the time of the subsequent court hearing.<sup>176</sup> And according to the Ohio Supreme Court, it was “the legal hearing which was the source of [plaintiff’s] averred perjury.”<sup>177</sup> Thus, the *Scott* court was faced with a situation in which the alleged defamation—that appellant “lied at the hearing after . . . having given his solemn oath to tell the truth”<sup>178</sup>—was based, at least in part, on alleged conduct that occurred after the plaintiff was no longer serving in his prior official role.<sup>179</sup> The court, to its credit, recognized the issue and concluded that the plaintiff remained a public official for the purpose of his defamation claim.<sup>180</sup> The court reasoned:

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172. *Id.* at 708.

173. *See id.* at 703 (referring to “the legal hearing which was the source of his averred perjury”); *see also id.* at 703 & n.2 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (quoted in text accompanying note 181 *infra*)); *id.* at 707–08 (“The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun’s having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.”); *id.* at 706 (quoting the complaint and article, which refer to the judicial hearing the day before the article, and which state that “[a] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8. A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: If you get in a jam, lie your way out.”); *cf.* *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1197 (Ohio 1984) (stating, in a case by another plaintiff, the wrestling coach at the relevant time, based on the same article, that: “[t]he plain import of author’s assertions is that Milkovich, *inter alia*, committed the crime of perjury in a court of law”), *rev’d on other grounds by Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

174. *Scott*, 496 N.E.2d at 704.

175. The OHSAA hearing was on February 28, 1974. *Scott v. the News-Herald*, No. 9-128, 1983 WL 6067, at \*1 (Ohio Ct. App. Dec. 30, 1983), *aff’d*, 496 N.E.2d 699 (Ohio 1986). The plaintiff apparently left his position in September 1974. *See id.* at \*2 (“Plaintiff, in his deposition, indicated that he did not leave this position until September, 1974.”).

176. *Id.* at \*2.

177. *Scott*, 496 N.E.2d at 703 (referring to “the legal hearing which was the source of his averred perjury”); *id.* at 707–08 (“The issue, in context, was not the statement that there was a legal hearing and Milkovich and Scott lied. Rather, based upon Diadiun’s having witnessed the original altercation and OHSAA hearing, it was his view that any position represented by Milkovich and Scott less than a full admission of culpability was, in his view, a lie.”).

178. *Id.* at 707 (internal quotation marks omitted).

179. *Id.* at 703.

180. *Id.* at 704.

[T]he averred defamatory remarks arose from events where appellant was acting in an official capacity as a school superintendent and within the ambit of his responsibilities. Appellant's prior activities and actions while in an official capacity were inextricably bound, in [the reporter's] view, to the legal hearing which was the source of his averred perjury.

\* \* \*

[Plaintiff's] retired status at the time of the legal hearing is thus not germane because the averred defamatory remarks were made in the course of actions arising from official conduct that were, most importantly, matters of import to the community's legitimate interest in a public official's performance of public responsibilities. Justice Brennan in his majority opinion in *Rosenblatt* reiterated the "strong interest in debate on public issues, and . . . a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion." It is similarly our view, under Ohio's Constitution, that the subsequent retirement of an individual does not diminish his or her status with respect to the discussion and debate of issues related to a prior status or position.<sup>181</sup>

In short, appellant's testimony at the legal hearing was related to his official responsibilities at the wrestling match and OHSAA hearing. Here, as in *Victoria*, the subject article alleged conduct that, while occurring after the plaintiff left office, was "inextricably bound" to the plaintiff's prior official role.

But, another case involving alleged conduct occurring after the plaintiff left office takes a more restrictive view on the scope of the *Times* rule for former public officials in such situations. In *Crane v. Arizona Republic*, the plaintiff Crane was a former head of the Justice Department's Los Angeles Organized Crime and Racketeering Strike Force at the time of the allegedly defamatory article.<sup>182</sup> A small portion of the subject article addressed Crane's activities while head of the Strike Force, reporting allegations that he "avoided prosecuting certain organized crime figures."<sup>183</sup> For purposes of those allegations—the ones that concerned his alleged conduct while serving as the head of the Strike Force—the court, as would be expected, held that Crane should be deemed a public official.<sup>184</sup> The bulk of the

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181. *Id.* at 703 & n.2 (citation omitted) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

182. *Crane II*, 972 F.2d 1511, 1514 (9th Cir. 1992).

183. *Id.* at 1521, 1525.

184. *Id.* at 1525.

article, however, addressed “allegations that Crane, as a private attorney, exploited his personal contacts with Strike Force personnel to protect his clients from prosecution.”<sup>185</sup> In that respect, the article addressed conduct that allegedly occurred after Crane had left his official position with the Strike Force. For the purposes of that portion of the article, the court held that the plaintiff was not deemed a public official.<sup>186</sup> It noted that this portion of the article addressed “neither Crane’s performance of official duties nor any misconduct engaged in while a prosecutor.”<sup>187</sup> The court explained: “That Crane’s [post-official] conduct *allegedly* impacted or influenced prosecutorial policy does not alone suffice to make him a public official. The press cannot, by virtue of the content of their news stories, ‘create their own defense by making the claimant a public [official].’”<sup>188</sup> The district court opinion in *Crane* explained:

The article addresses Crane’s activities *after* he left office. While defendant’s [sic] have provided great authority for the proposition that statements regarding a former public official’s performance of his duties *while in office* require a showing of malice to be actionable, no authority is presented for the proposition that statements regarding a former public official’s activities engaged in after leaving the public post also require a showing of malice to be actionable. Indeed the language of the cases cited strongly indicate that the statements must relate to the former public officials [sic] activities *while in office*.

\* \* \*

Therefore, since the article refers to Crane’s activities after he left public office, and since there is no evidence indicating that Crane had substantial responsibility for or control over the conduct of governmental affairs after his retirement, Crane was not a public figure for the purposes of this article.<sup>189</sup>

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185. *Id.* at 1524–25.

186. *Id.* at 1525. The court did, however, require application of the *Times* actual malice requirement in plaintiff-Crane’s claim to the extent that he sought punitive damages. *Id.*

187. *Id.* at 1525.

188. *Id.* at 1525 (second alteration in original) (quoting *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)). The court also stated that one engaged in the private practice of law “is not a governmental official, so heightened press scrutiny does not serve a watchdog function.” *Id.* The court added, “[n]or do those entering the legal profession expect to be at the center of the public spotlight,” and that “unlike governmental officials and public figures, private lawyers do not have that greater accessibility to the press needed to counter defamatory remarks.” *Id.*

189. *Crane v. Arizona Republic (Crane I)*, 729 F. Supp. 698, 708 (C.D. Cal. 1989), *aff’d in part and vacated in part on other grounds*, 972 F.2d 1511 (9th Cir. 1992); see *Crane II*, 972 F.2d at 1524 (agreeing with the district court opinion that the *Times* rule did not apply to allegations concerning conduct that allegedly occurred after the plaintiff-Crane left office).

I believe that the holding and analysis of the opinions in *Crane* with respect to conduct allegedly occurring subsequent to Crane's official tenure seem overly narrow in focus and problematic. True, the plaintiff-Crane was no longer head of the Strike Force. And, a private attorney is not *ipso facto* a public official.<sup>190</sup> But, to simply stop there would be premature and leave the analysis incomplete and inadequate. Here the plaintiff's former role in government was a substantial factor in facilitating the plaintiff's alleged subsequent conduct and in prompting the allegedly defamatory statement regarding that conduct. The post-official conduct alleged in *Crane* was perhaps not as seamless a continuation of the official activities as was the conduct alleged in *Victoria*. Nonetheless, the conduct alleged in *Crane* was clearly connected to, indeed dependent on, the plaintiff's prior role in government. Surely such allegations are a foreseeable part of the package a person should be deemed to have assumed when entering into government service.<sup>191</sup> And more importantly, one cannot help but believe that the airing and public assessment of such alleged sequelae to one's former role in government are as essential as the assessment of the official's candidacy and performance. If Justice Brennan's admonition that "freedom of expression upon public questions is secured by the First Amendment," means anything, it must certainly contemplate the kind of alleged conduct that, if true, so clearly emanated from the former official's position with government.<sup>192</sup> Moreover, the district court's comment "that the statements *must* relate to the former public official's activities *while in office*"<sup>193</sup> is simply not supported by the language from the cases and authorities it cites. Those cases do not state that in order for the plaintiff to be deemed a public official, the defendant's statement *must always* relate to conduct that occurred while the plaintiff was still serving in an official role.<sup>194</sup> Rather, those cases simply state the prevailing rule that *when* the defendant's statements relate to alleged conduct and performance during plaintiff's official tenure or candidacy, the *Times* rule applies. The cases simply do not address the question of which principles apply when statements concern a former public official, and those statements describe conduct that allegedly

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190. *Crane II*, 972 F.2d at 1525 (stating that "the 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").

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

192. *New York Times*, 376 U.S. at 269.

193. *Crane I*, 729 F. Supp. at 708 (C.D. Cal. 1989) (first emphasis added), *aff'd in part and vacated in part on other grounds*, 972 F.2d 1511 (9th Cir. 1992); see *Crane II*, 972 F.2d at 1524 (agreeing with the district court opinion that the *Times* rule did not apply to allegations concerning conduct that allegedly occurred after the plaintiff-Crane left office).

194. *Id.* at 708 n.7.

occurred after the plaintiff was no longer serving as a public official or running as a candidate.<sup>195</sup>

#### 4. Suggested Approach to Conduct Occurring after Official Left Office or Ended His Candidacy

When the defendant's statement described alleged conduct occurring after the plaintiff was no longer serving as an official or candidate, the plaintiff's defamation claim should be governed by the *Times* rule when either: (1) the alleged conduct was a continuation or outgrowth of or otherwise directly related to plaintiff's prior service as a public official or candidate; or (2) the fact of the plaintiff's prior status as a public official or candidate would make the publication of such statement a matter of public concern. Moreover, the *Times* rule should, of course, also apply if for any reason the plaintiff were deemed to be a public figure.

In the first alternative above, the alleged post-official conduct emanated from the plaintiff's official service or candidacy. It should simply be viewed as a logical and necessary extension of the core rule regarding comments on an official's or candidate's conduct or performance as an official or candidate.<sup>196</sup>

The second alternative basis, above, is in accord with fundamental First Amendment interests in communication and learning information about former officials or candidates that are matters of public concern. Thus, the proposed approach will sometimes necessitate determining whether the fact of plaintiff's prior role in government or as a candidate made a statement that described conduct occurring after the plaintiff's official role or candidacy had ended a matter of public concern. One might question

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195. *See id.* As support for its conclusion, the court cited several authorities in the following footnote:

*See, e.g.,* Rosenblatt, 383 U.S. at 87 n.14 (fact that a former county recreation supervisor no longer held that position is of no "decisional significance" where the "interest in the way in which the *prior administration had done its task* continued strong") . . . ; Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 510 (3d Cir.) . . . (1978) (malice standard applies because "remarks in telecast were pertinent to his *official* conduct") . . . ; R. Smolla, *The Law of Defamation* § 2.25[2] at 2-89 ("lower courts have consistently refused to permit the passage of time to destroy public official status for speech relating to activities of the official while in office") . . . .

*Id.* (emphasis in original). But the above-quoted language simply addressed the situation in which the allegedly defamatory statements concerned conduct that allegedly occurred while the plaintiff was still serving as a public official. It did not deal with the question addressed in this subsection, namely where the statement described conduct occurring after the official left office.

196. *See supra* Part II.A.2.

whether or not the *Times* requirement that the statement “relat[e] to [plaintiff’s] official conduct”<sup>197</sup> would, technically, be satisfied if the statement described the plaintiff’s conduct occurring after the plaintiff had served as an official or candidate. Irrespective of how literally or broadly one wishes to construe that *Times* language, I nevertheless believe that my proposed approach is consistent with the underlying First Amendment concerns that impelled the *Times* decision, and should forthrightly be adopted.

In applying the second alternative, I believe that the policies underlying the *Times* decision should be important in deciding the matter under my suggested public concern test. More specific guidance on the meaning of “matters of public concern” should be drawn from *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*<sup>198</sup> There the Court, albeit laconically, addressed the concept of whether a statement was a matter of public concern for the purposes of delineating the scope of at least one (and perhaps impliedly both) of the core holdings of *Gertz* in defamation cases in general.<sup>199</sup> The Court began with the self-evident generality that “[w]hether . . . speech address[ed] a matter of public concern must be determined by [the expression’s] content, form, and context . . . as revealed by the whole record.”<sup>200</sup> The Court suggested that the test should also consider whether the type of information at issue “requires special protection to ensure that ‘debate on public issues [will] be uninhibited, robust and wide-open.’”<sup>201</sup> I

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197. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *see supra* Part I.A.1; Part II.B.1.

198. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985).

199. The Court concluded that even with respect to private plaintiffs, at least the second holding of the *Gertz* case—“that a [s]tate could not allow recovery of presumed and punitive damages [in defamation cases] absent a showing of ‘actual malice’” (knowledge or reckless disregard), *id.* at 756—did not apply unless the alleged defamatory statement involved a “matter[] of public concern.” *Id.* at 763. For elaboration on the *Gertz* and *Greenmoss* cases, *see supra* note 33 and accompanying text; King, *supra* note 1, at 694–98.

200. *Dun & Bradstreet*, 472 U.S. at 761 (alterations in original, except second set of brackets) (quoting *Connick v. Myers*, 461 U.S. 138, 147–48 (1983)) (internal quotation marks omitted); *see also* *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–17 (2011) (addressing, *inter alia*, the matter of whether speech is of public or private concern for purposes of First Amendment limitations on a claim for intentional infliction of emotional distress, and holding that speech of defendants picketing near a funeral of a military service member was entitled to First Amendment protection, given that it was at a public place and was a matter of public concern in light of its content, form and context). The Court in *Greenmoss* briefly discussed the specific speech at issue, a credit report, noting that it “was speech solely in the interest of the speaker and its specific business audience” and “was made available only to five subscribers, who, under the terms of the subscription agreement, could not disseminate it further.” *Dun & Bradstreet*, 472 U.S. at 762. The Court added that the credit-report type of speech was “hardy and unlikely to be deterred by incidental state regulation,” and “more objectively verifiable,” and that “the market provides a powerful incentive to a credit reporting agency to be accurate.” *Id.* at 762–63.

201. *Dun & Bradstreet*, 472 U.S. at 762 (alteration in original) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

wish to emphasize that under my test I am not simply advocating application of the *Gertz* rules limiting defamation claims, but advocating application of the more absolute and less qualified limitations on defamation claims of the *Times* rule. The application of the *Times* rule under my test is justified in part by the fact that in order for my test to apply, it must appear that the statement about the post-official conduct of a former public official or candidate not merely be a matter of public concern, but be a matter of public concern *because of* the plaintiff's prior role as an official or candidate.

David Finkelson has suggested a three-step matrix for deciding when one should be subject to the *Times* rule based on the nature of the plaintiff's official status and the conduct described in the content of the alleged defamatory statement:

1. Determine public official status by locating a public employee's position on the government hierarchy according to the degree of his "substantial responsibility for or control over the conduct of governmental affairs," access to self-help remedies, and assumption of risk;
2. Determine the nexus between the public employee's position and the content of the alleged defamatory falsehood;
3. Weigh the relevance of this nexus according to the status determination: The lower the status of the public employee in the government hierarchy, the closer the relationship must be between that status and the content of the defamation in order to deem the employee a public official subject to the *New York Times* rule.<sup>202</sup>

Although Finkelson's article does not focus on the question of former officials or candidates addressed in this article, its third step nevertheless could be useful in determining when a statement about alleged conduct

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202. Finkelson, *supra* note 23, at 894; *see also* RESTATEMENT (SECOND) OF TORTS § 580A, cmt. b (1976) (stating that determining whether a statement as to a person's private conduct "should be treated as affecting him in his capacity as a public official . . . depends upon both the nature of the office involved, with its responsibilities and necessary qualifications, and the nature of the private conduct and the implications that it has as to his fitness for the office"); Elder, *BUFF. L. REV.*, *supra* note 23, at 653–55 (quoting the Restatement, and adding that "the constitutional, substratal policies underlying the 'public' versus 'private' status bifurcation—the primary 'assumption-of-risk' and peripheral 'access' rationales—are factors that should be utilized for guidance in borderline, 'gray areas' of 'private' versus 'official' conduct").



subsequent to a plaintiff's tenure in government or as a candidate was a matter of public concern and thus, under my proposed approach, subject to the *Times* rule.

The public has a continuing interest in the activities of former public officials and candidates with respect to at least some of their conduct that occurs after they leave office or end their candidacy. Such conduct may, for example, be connected to or emanate from the prior official service or candidacy. But even when subsequent conduct was not directly connected to the plaintiff's prior official role or candidacy, I believe that such conduct may sometimes still be a matter of public concern and the public may still have an interest in knowing about it. For example, there remains the distinct possibility that some politically active former officials or candidates may again enter public life, seek public office, or influence important events. And, it is common for former officials to leverage their prior role in government to achieve some advantage or end. Thus, one's prior official role may confer an empowering economic or other advantage that should be mediated by public access to information about the post-official conduct of former officials or candidates. Such information about post-official conduct can be, as the aphorism says, like the thirteenth chime on a clock, offering insights and a better understanding of what came before—that is, during one's tenure holding public office or his candidacy. I believe that my proposed approach offers an appropriate way to address such concerns. It provides needed clarity, while at the same time protecting the strong interests in freedom of expression that inspired the *New York Times* rule and its expansion.

One might argue for a less expansive scope for the *Times* rule than I have proposed, perhaps relying on one of the Court's rationales from the *Times* case. That rationale went like this: officials, or at least some officials, enjoy varying degrees of official immunity that may, according to the Court, afford them some protection from defamation liability.<sup>203</sup> Therefore, as this rationale goes, some corresponding or reciprocal protection is appropriate for the private "citizen-critic" of government officials.<sup>204</sup> The Court explained that "[i]t would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."<sup>205</sup> One might accordingly argue by extrapolation that because

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203. *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964); see *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 134 (1967) (Harlan, J., plurality opinion).

204. *New York Times*, 376 U.S. at 282.

205. *Id.* at 282–83. The Court reasoned:

officials may enjoy protection against liability for conduct occurring while serving in and within the scope of their official capacity, the protection of the *Times* rule should *pari passu* be similarly limited to statements that were related to the conduct related to official duties. The problem with that argument is that it would ignore two crucial developments. First, the reach of the *Times* rule has already expanded well beyond officials to encompass candidates and, more broadly, public figures.<sup>206</sup> And, second, the most compelling rationales for the rule requiring a plaintiff to prove knowledge or reckless disregard of the falsity (“actual malice”) now focuses on the twin pillars articulated in *Gertz*. Those are: (1) public plaintiffs (public officials, candidates, and public figures) have greater access to channels of communications,<sup>207</sup> and (2) such public plaintiffs should be deemed to accept the consequences of their involvement in public affairs or their engagement in public controversies.<sup>208</sup> I believe that these modern *Gertz* rationales militate strongly in favor of the formulation I have suggested, with its broader scope for the *Times* standard and its concomitant enhancement of freedom of expression.

The approach I suggest offers some clarity and predictability to the question of the status of former public officials and candidates, clarity and predictability that are essential in protecting the crucial<sup>209</sup> and vulnerable freedom to freely assess former public servants. The protections of freedom

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Such a privilege for criticism of official conduct is appropriately analogous to the protection accorded a public official when *he* is sued for libel by a private citizen. . . . The reason for the official privilege is said to be that the threat of damage suits would otherwise “inhibit the fearless, vigorous, and effective administration of policies of government” and “dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer. As Madison said, “the censorial power is in the people over the Government, and not in the Government over the people.” It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves.

*Id.* (citations omitted) (quoting *Barr v. Matteo* 360 U.S. 564, 571 (1959); 4 ANNALS OF CONG. 934 (1794)).

206. *See supra* Part I.B.

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

208. *See id.* at 345 (“Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”).

209. Justice Cardozo once described it as called it “the matrix, the indispensable condition, of nearly every other form of freedom.” *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

of expression contemplated by the *Times* decision are undermined and eroded by uncertainty and “indeterminacy”<sup>210</sup> over which individuals fall within the scope of the rule. Not only is doctrinal and adjudicative consistency necessary generally for “advantageous predictability in the ordering of private conduct,”<sup>211</sup> it is crucial to freedom of expression. We must be afforded a realistic idea “in advance what speech is and is not permitted, thereby avoiding the self-censorship caused by uncertainty.”<sup>212</sup> The Court has admonished that “[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords.”<sup>213</sup>

Doctrinal uncertainty abets and reinforces the “chilling effect”<sup>214</sup> by which the specter of potential defamation litigation and liability shrouds and chokes freedom of expression. The threat of liability, both real and apparent, is magnified by uncertainty about the applicable legal principles and their opaque doctrinal parameters.<sup>215</sup> Clarification of the status of former officials and candidates would help to address these concerns.

210. Professor Peter Schuck identifies “indeterminacy” as one of the four features which characterize a legal system as complex. Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 3 (1992). Indeterminate rules are “usually open-textured, flexible, multi-factored, and fluid.” *Id.* at 4.

211. Christopher J. Peters, *Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis*, 105 YALE L.J. 2031, 2039 (1996). Justice Cardozo wrote of the transcending “yearning for consistency, for certainty, for uniformity of plan and structure” in the judicial process. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 50 (1949).

212. SMOLLA, *supra* note 23, § 4:59. Professor Schauer has explained that the “problem of notice can occur because the more flexibility that the trial court has, the less certain anyone can be in advance of the likely result in a particular case.” Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND L. REV. 265, 299 (1981).

213. *Harte-Hank Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989).

214. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 685 n.1 (1978) (tracing the phrase in this context to *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

215. See *id.* at 695–96. In this regard, Dean Schauer has commented:

[A]s the legal concepts become more complex, the probability of error is increased. In the area of free speech, the legal principles seem particularly difficult to enunciate, understand and apply. The various standards are often far from precise . . . . By far, the most difficult questions will arise where the challenged expression falls close to the line separating protected and unprotected speech. Thus, it is this “marginal” conduct that is most likely to be erroneously adjudged unlawful, and consequently the degree of fear will be greatest where such borderline activities are involved.

*C. Plaintiff Mistakenly Identified as the Individual Committing Alleged Conduct*

What if a defendant mistakenly identified the plaintiff as the person committing the alleged conduct? The misidentification problem may arise in various scenarios. Sometimes, for example, the defendant may have been incognizant, not realizing that the person misidentified in the statement was the plaintiff. In other situations, the defendant may have been aware that the person identified in the statement was the plaintiff-former official or candidate, but was mistaken in so identifying the plaintiff because the individual who had allegedly committed the conduct described in the statement was actually someone else rather than the plaintiff. The question of whether to apply the *Times* standard in mistaken identification situations may arise in the context of statements about current public officials or candidates, as well as former ones. I will focus mostly on the issue in that latter context, involving former officials and former candidates who have been incorrectly identified as ones committing the alleged conduct.

In *Ocala Star-Banner Co.*, the Supreme Court applied the *Times* rule requiring proof of knowledge or reckless disregard of the falsity in a misidentification case based on a newspaper story to the effect that the plaintiff Leonard Damron, a mayor and a candidate for the office of county tax assessor at the time, had been charged in federal court with perjury.<sup>216</sup> Actually, the plaintiff had not been charged with any crime in federal court, but the story was substantially accurate as to the plaintiff's brother, James Damron.<sup>217</sup> Regrettably, the Court did not address the question of the Constitutional significance, if any, of whether or not the responsible editor meant to refer to the plaintiff-Leonard Damron, or rather meant to refer to James Damron and simply used the name of plaintiff-Leonard Damron in an incognizant inadvertent mistake as the newspaper and editor seemed to contend.<sup>218</sup>

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216. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 295–96, 300–01 (1971).

217. *Id.* at 296.

218. The Court simply noted:

At the trial, the newspaper did not deny that the story was wholly false as to the respondent, and explained the error as the result of a “mental aberration” by one of the paper’s area editors. The area editor had been working for the paper for a little more than a month. He testified that he had run several stories about the political activities of the respondent, but had never heard of his brother James. When a local reporter telephoned in the story, correctly identifying the protagonist as James Damron, he inadvertently changed the name. The respondent presented evidence tending to cast doubt on this explanation.

Cases in which the person responsible for the publication of the statement was unaware or not cognizant that the person identified was actually the former official or former candidate use a variety of reasoning, with some applying the *Times* rule<sup>219</sup> and some not.<sup>220</sup> In *Jones v. New Haven Register, Inc.*, the defendant newspaper published an article which began: “William B. Jones, the former treasurer of the local NAACP convicted of stealing \$14,000 from the organization’s coffers last year, was arrested Tuesday for violating his parole.”<sup>221</sup> While the text of the article was correct in identifying the person who had allegedly committed the

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*Id.* at 297.

219. See, e.g., *Jones v. New Haven Register, Inc.*, No. 393657, 2000 WL 157704, at \*1, \*3, \*7 (Conn. Super. Ct. 2000) (holding in case in which defendant used the name of another person in its article but apparently used a file photo of the plaintiff by mistake, that even if the court disregarded plaintiff’s staff position with city Housing Authority, the plaintiff was nonetheless a public figure based on his prior governmental positions as alderman and city clerk, his candidacy for mayor, and his admissions in his pleadings); *Biskupic v. Cicero*, 756 N.W.2d 649, 652–53, 657 (Wis. Ct. App. 2008) (holding that the plaintiff, who had previously been the Outagamie County District Attorney from 1994 until January 2003 and in 2002 had run unsuccessfully for state Attorney General, was a public figure for all purposes with respect to a 2004 article in which the plaintiff’s name was used by mistake rather than the name of a former district attorney in another county); cf. *Vazquez Rivera v. El Dia, Inc.*, 641 F. Supp. 668, 669–70, 672 (D.P.R. 1986) (applying the *Times* rule in a claim by the then current Director of the Office of Internal Audits at a local governmental executive agency who played an essential role in investigation of alleged official corruption and was present at court to serve a prosecutorial witness, and whose photo was taken in corridor of the local court but was identified in the article as the photo of the former auditor who had allegedly been accused); *Goodrick v. Gannett Co., Inc.*, 500 F. Supp. 125, 125–26 (D. Del., 1980) (applying the *Times* rule to a claim by a plaintiff, who was an Assistant Public Defender, based on an article regarding a county jail inmate whom the plaintiff had represented as public defender, and that included a photograph of the inmate that the defendant mistakenly captioned with the plaintiff’s name); *Tomkiewicz v. Detroit News, Inc.*, 635 N.W.2d 36, 43 (Mich. Ct. App. 2001) (holding that the *Times* rule applied to claim by a City police lieutenant who was the lead investigator into allegations of stalking against a fellow police officer, and whose photo was taken when he was attending a hearing concerning the criminal charges against the other officer, and an article included plaintiff’s photo and identified him as the accused officer); *Strong v. Oklahoma Publ’g Co.*, 899 P.2d 1185, 1186, 1188–89 (Okla. Civ. App. 1995) (applying the *Times* rule in a case that arose when the defendant published a photo which it stated was of a rape suspect and his wife during a break at the suspect’s trial, when the male in the photo was actually the plaintiff who was not accused of anything, was accompanying the suspect’s wife, and was in fact at the time a minister of a local church and a vice-president of the School Board). *But cf.* *Bufalino v. Associated Press*, 692 F.2d 266, 273 (2d Cir. 1982) (stating that “[w]e conclude that the public official doctrine is not available where the defendant’s statements do not directly or impliedly identify the plaintiff as a public official, and there is no showing that the plaintiff’s name is otherwise immediately recognized in the community as that of a public official”).

220. See, e.g., *Ryder v. Time, Inc.*, 557 F.2d 824, 824, 825–26 (D.C. Cir. 1976) (holding that the *Times* rule did not apply to plaintiff-Richard J. Ryder, an attorney who was a former member of the House of Delegates and candidate for the Virginia State Senate, where an article about Richard R. Ryder, also a Virginia attorney, simply referred to alleged conduct by “Attorney Richard Ryder” without a middle initial).

221. *Jones*, 2000 WL 157704, at \*1.

conduct in question, the article's photograph on the front page was not.<sup>222</sup> It was a photograph of a person named William B. Jones, but the William B. Jones in the photograph was not the same William B. Jones who had allegedly been arrested.<sup>223</sup> Rather, it "was a different person of some local prominence who, as far as the record indicates, had led a blameless life."<sup>224</sup> The photo was presumably from the defendant newspaper's photo files.<sup>225</sup> The plaintiff William B. Jones pictured in the article had previously served as an alderman and democratic town chairman, and had once been a mayoral candidate.<sup>226</sup> The court stated:

The problem in this case is that the defamatory publication is not about the plaintiff's official conduct. Indeed, the article in question isn't even about him. Rather, the article is about an entirely different person. Only the photograph is of the plaintiff, and that was, as the defendants concede, a mistake rather than a comment.<sup>227</sup>

The court held that the plaintiff was a "general purpose" public figure.<sup>228</sup> Relying on the considerations from *Gertz*, the court explained that for 30 years the plaintiff has been "well known" in the City and the State as "a politician" and "a good citizen,"<sup>229</sup> and therefore has "greater access to channels of effective communication and hence has a more realistic opportunity to counteract false statements than private individuals normally enjoy."<sup>230</sup> The court added that "[a] false charge against a well known public figure is less likely to be believed than a false charge against a private person, at least if the act alleged is an improbable one."<sup>231</sup> And finally, the court stated that while the rewards of plaintiff's standing in the community from many years of holding office and public service are great,

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222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at \*3. Also, at the time of publication, plaintiff "had worked for the New Haven Housing Authority for a number of years 'helping minority contractors, to get jobs.'" *Id.* (quoting plaintiff's deposition). It is unclear whether serving in that capacity would have qualified one as a public official for the purposes of the *Times* rule. In any event, the court presumably did not believe so since it did not rely on that as its basis for application of the *Times* standard, noting that "[e]ven if the fact of his employment at the time of the publication is disregarded, the plaintiff remained a public figure." *Id.*

227. *Id.* at \*5 (internal quotation marks omitted).

228. *Id.*

229. *Id.* (internal quotation marks omitted).

230. *Id.* at \*7.

231. *Id.* at \*6.

“they come at the price of scrutiny and comment, much of it inevitably unfair.”<sup>232</sup> The court offered this illustration:

Suppose a New Haven resident, otherwise unknown, is fortuitously named William J. Clinton. This hypothetical local resident is arrested for stealing money from a local organization, and the *Register* publishes a front-page story about the arrest. The text of the story is perfectly accurate, but accompanying the story is a photograph entitled “Clinton,” and the photograph is—you guessed it—a photograph of the President of the United States. The President sues the *Register* for defamation. Does the *Sullivan* rule apply? The plaintiff conceded at argument that the answer to this question is yes. This concession—while fatal to the plaintiff’s cause—is almost certainly correct.<sup>233</sup>

Although I agree that the *Times* rule should apply in the *Jones* case, I would have preferred that the court had also emphasized that the plaintiff’s prior official role was the reason for his photo being in the defendant’s file photos. And, thus plaintiff’s prior official role was, one assumes, directly tied to the mistaken identification of the plaintiff; his prior official role was a factual and foreseeable cause of the mistaken reference to the plaintiff.

In another mistaken-identification case in which the defendant was unaware of the reference to the former public official, however, the court reached a different outcome. In *Ryder v. Time, Inc.*, the plaintiff Richard J. Ryder had practiced law in Virginia and had been “a member of the Virginia House of Delegates from January, 1970, to December, 1971, and an unsuccessful candidate for the Virginia State Senate in November, 1971.”<sup>234</sup> Although at the time of his lawsuit plaintiff was politically active, he held no public office.<sup>235</sup> In 1973, an article described alleged conduct that would have occurred in 1967 (and thus prior to the plaintiff’s time in government or as a candidate) by a Virginia attorney it identified as “Attorney Richard Ryder.”<sup>236</sup> But, as the court pointed out, “[i]t was Richard R. Ryder, not the plaintiff, who was the intended subject of that reference.”<sup>237</sup> An identifying middle initial was omitted.<sup>238</sup> In declining to apply the *Times* standard, the court stated:

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232. *Id.* at \* 7.

233. *Id.* at \*6.

234. *Ryder v. Time, Inc.*, 557 F.2d 824, 824 (D.C. Cir. 1976).

235. *Id.*

236. *Id.*

237. *Id.* at 826.

238. *Id.* at 824, 826.

It is true that plaintiff had been a public official for a time and had been a candidate for public office. Yet these public activities had nothing to do with the reference to Richard Ryder in the essay and, in any case, those activities were no longer engaged in by plaintiff.<sup>239</sup>

A later case sought to explain *Ryder* not only on the basis that the plaintiff's "public activities had nothing to do with the reference to the Richard Ryder in the essay," but also that "he was no longer holding public office."<sup>240</sup>

Whether the *Times* rule should apply in the *Ryder* scenario seems more problematic. The plaintiff's prior official or candidacy roles had nothing whatsoever to do with the defendant's use of the name "Richard Ryder" in the story. On the one hand, using one prong of the *Gertz* analysis, perhaps the plaintiff had greater access to self-help in correcting the error.<sup>241</sup> But under the other prong of *Gertz*, the mistaken identification of the plaintiff here seems totally beyond what he might have contemplated as foreseeably going with the territory when entering or seeking to enter public life.<sup>242</sup>

I suggest the following approach when the defendant mistakenly identified the plaintiff as the person who committed the alleged conduct. If the defendant was incognizant that the plaintiff had previously served in the role as a public official or candidate previously occupied by the plaintiff, I believe that the *Times* rule should apply if the fact of the plaintiff's prior role as a public official or candidate was a factual<sup>243</sup> and foreseeable cause

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239. *Id.* at 826.

240. *See* *Peterson v. New York Times Co.*, 106 F. Supp. 2d 1227, 1231 (D. Utah 2000). In discussing *Ryder*, the *Peterson* court stated:

The *Ryder* case, relied upon by Mr. Peterson, does not suggest otherwise because, in that case, it was clear that the alleged wrongdoing did not occur during the time that the plaintiff held office. In addition, although the *Jones* case did not involve a situation in which the court had to determine whether the alleged defamation related to the plaintiff's official duties—because the defamation did not concern the period during which the plaintiff held office—the *Jones* court's determination that the *New York Times* malice standard applies to a situation in which a photograph of a public figure is mistakenly juxtaposed with an article about someone else also comports with this court's conclusion.

*Id.* at 1232.

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

242. *Id.* at 345.

243. By "factual cause" I mean as that concept is defined by the Restatement. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 26 (2010) (stating that "[c]onduct is a factual cause of harm when the harm would not have occurred absent the conduct," and that "conduct may also be a factual cause of harm under § 27"); *id.* § 27 (stating that "[i]f



of the mistaken reference to the plaintiff. If, on the other hand, the defendant realized that the plaintiff identified in the statement had previously served as a public official or candidate, the *Times* rule should still apply if either the fact of the plaintiff's prior role as a public official or candidate was a factual and foreseeable cause of the mistaken reference to the plaintiff; or, the fact of plaintiff's prior role made the statement a matter of public concern.<sup>244</sup>

The preceding approach is supported by the *Gertz* analysis, particularly the *Gertz* rationale that public scrutiny goes with the territory that public plaintiffs, especially public officials, should be deemed to accept as one of the inevitable consequences of their involvement in public affairs.<sup>245</sup> Absent the preceding connection between the fact of plaintiff's role as official or candidate and his mistaken inclusion in the publication, the reason for applying the *Times* rule seems less compelling when a defendant is unaware that the object of the statement is the person who had previously served in the official or candidate capacities in question. The *Times* rule was based in large part on enabling criticism of government and government officials without fear of retaliatory defamation claims except when the defendant knew the statement was false or recklessly disregarded whether it was false.<sup>246</sup> When a defendant is unaware or incognizant that the statement refers to the plaintiff, the reason for applying the *Times* rule seems less compelling. Accordingly, I believe that a more limited scope for the *Times* rule may be justified in such circumstances, as long as the Court continues generally to apply the *Times* rule only selectively rather than, as I have previously urged, to all defamation claims.<sup>247</sup> My proposed approach is consistent with the results in a number of the incognizant mistaken identification cases under the first scenario described in this subsection. The formulation I recommend, however, is not derived from the precise

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multiple acts occur, each of which under § 26 alone would have been a factual cause of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm"). Thus, by extrapolating from the Restatement idea embodied in § 27, plaintiff's prior status as a public official or candidate would be a factual cause of the mistaken reference to the plaintiff and would not have occurred except for the fact of the plaintiff's prior status, or whenever the plaintiff's prior status was one of "two or more competing causes, each of which is sufficient without the other to cause" the mistaken reference to the plaintiff being made. *Id.* cmt. a.

244. For a discussion of the concept of matters of public concern, see *supra* notes 198–201 and accompanying text.

245. See *Gertz*, 418 U.S. at 345 ("Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.").

246. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

247. I have made no secret of my preference that the *Times* rule should ideally be applied to all defamation claims. See *supra* King, note 1, at 713–14.

language of these cases. Thus, in most of the incognizant identification cases that apply the *Times* rule, the mistaken identification of the plaintiff seemed to be, at least arguably, causally and foreseeably connected to the fact of plaintiff's official status.

In the *Ocala* case,<sup>248</sup> for example, the defendant incorrectly identified the plaintiff, at the time a current official and active candidate, rather than his brother (whom the story was supposed to be about).<sup>249</sup> The defendant contended the error was a "result of a 'mental aberration' by one of the paper's area editors" who testified "he had run several stories about the political activities of the respondent, but had never heard of his brother James" and that "[w]hen a local reporter telephoned in the story, correctly identifying the protagonist as James Damron, he inadvertently changed the name."<sup>250</sup> In another case, the plaintiff—a former District Attorney from one county who was misidentified as a former District Attorney from an adjoining county in connection with a bribery case involving and resulting in the conviction of the latter—was the subject of publicity related to his service as District Attorney that was conducive to his misidentification.<sup>251</sup> The defendant in another misidentification case apparently used a file photo

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248. See *supra* notes 216–18 and accompanying text (discussing the case).

249. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 296 (1971).

250. *Id.* at 297.

251. See *Biskupic v. Cicero*, 756 N.W.2d 649, 653 (Wis. Ct. App. 2008). In *Biskupic*, the plaintiff's claim was based on two statements in a 2004 article. *Id.* The article quoted a source that plaintiff was involved in a bribery case, and the article also commented that plaintiff was convicted of bribery. *Id.* The plaintiff's name was used by mistake rather than the name of Joe Paulus, a former District Attorney of adjoining Winnebago County. *Id.* The person quoted in the article, Stacey Cicero, stated that she had "intended to refer to Paulus and had a 'brain lapse' and inadvertently used [plaintiff's] name instead." *Id.* There was disagreement about whether Cicero was the source for the mistaken identification of the plaintiff (instead of Paulus) in the article. *Id.* at 653–54. The plaintiff had previously been the Outagamie County District Attorney from 1994 until January 2003, and in 2002 had run unsuccessfully for state Attorney General. *Id.* at 652–53. He was the subject of widespread publicity related to his service as District Attorney. As the court noted, "[t]he record includes fifty-six news articles and editorials from 2002 through 2005 mentioning both Paulus and Biskupic. Some discuss cases both Paulus and Biskupic were involved in prosecuting, while others cite allegations against both men as a reason for changes in the justice system." *Id.* at 652. The court noted that plaintiff-Biskupic "was rebuked by the state Ethics Board in 2003 for striking secret deals with defendants to avoid prosecution in exchange for payments of up to \$8,000 to local anti-crime groups and his privately operated crime-prevention fund," which "raised statewide judicial awareness of the possibility of paying sums without court proceedings, leading to a review of [crime prevention organization] practices." *Id.* at 653 (alteration in original). But, the court also noted that an ethics board "concluded Biskupic did not profit personally from the fund and was not affiliated with any organization that received money from it." *Id.* at 652. According to a local judge, "the Paulus case had nothing to do with the cutoff of funding for [crime prevention organizations]," nor had he "heard or seen any allegation that Biskupic personally benefitted from these funds," nor has he been charged. *Id.* at 653 (alteration in original). Also, before he was elected District Attorney, the plaintiff had worked for five years in the Winnebago County District Attorney's Office including three years as Deputy District Attorney while Joe Paulus was County District Attorney. *Id.* at 652.

of the plaintiff which one would assume was in its file because of the plaintiff's status.<sup>252</sup> In still another case, a photo of an inmate was mistakenly identified as the plaintiff, presumably because while working as a public defender, the plaintiff had represented the inmate.<sup>253</sup> In another case, a photo was taken while the plaintiff was attending a hearing involving a fellow police officer.<sup>254</sup> In another example, the plaintiff—a Director of the Office of Internal Audits at a local governmental executive agency who played an essential role in investigating alleged official corruption—was serving as a prosecutorial witness, when he was photographed in a corridor of the local court. An article later misidentified the photo as being that of an accused.<sup>255</sup> Although these courts did not expressly rely on my proposed test, I believe the results they reached are consistent with it.

In mistaken identification situations in which the defendant was unaware of the plaintiff's prior affiliation with government, the fact that the plaintiff's prior governmental role not only caused the reference to him in defendant's statement, but made it foreseeable, should provide a sufficient basis for application of the *Times* rule. A core justification under *Gertz* for applying the *Times* limitation is that public plaintiffs should be deemed to accept the consequences of their involvement in public affairs or their engagement in public controversies.<sup>256</sup> When a mistaken reference to the

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252. See *Jones v. New Haven Register, Inc.*, No. 393657, 2000 WL 157704, at \*1, \*3, \*7 (Conn. Super. Ct. 2000) (holding in case in which defendant used correct name in its article but apparently used a file photo of the plaintiff by mistake, that even if the court disregarded plaintiff's staff position with city Housing Authority, the plaintiff was nonetheless a public figure based on his prior governmental positions as alderman and city clerk, his candidacy for mayor, and his admissions in his pleadings).

253. See *Goodrick v. Gannett Co., Inc.*, 500 F. Supp. 125, 125–26 (D. Del., 1980) (applying the *Times* rule to a claim by a plaintiff, who was an Assistant Public Defender, based on an article regarding a county jail inmate whom the plaintiff had represented as public defender, and that included a photograph of the inmate that the defendant mistakenly captioned with the plaintiff's name).

254. See *Tomkiewicz v. Detroit News, Inc.*, 635 N.W.2d 36, 43 (Mich. Ct. App. 2001) (holding that the *Times* rule applied to claim by a City police lieutenant who was the lead investigator into allegations of stalking against a fellow police officer, and whose photo was taken when he was attending a hearing concerning the criminal charges against the other officer, and an article included plaintiff's photo and identified him as the accused officer).

255. See *Vazquez Rivera v. El Dia, Inc.*, 641 F. Supp. 668, 669–70, 672 (D.P.R. 1986) (holding, in a claim by the then current Director of the Office of Internal Audits at a local governmental executive agency who played an essential role in investigation of alleged official corruption and was present at court to serve a prosecutorial witness, and whose photo was taken in corridor of the local court but was identified in the article as the photo of the former auditor who had allegedly been accused, that *Times* applied).

256. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (“Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”).

plaintiff by a defendant who is unaware or not cognizant of the plaintiff's prior official status is nonetheless *causally and foreseeably linked* to the plaintiff's prior governmental role, then the mistaken reference seems well within those consequences that a public person should be deemed to assume. As Thomas Jefferson put it, "[w]hen a man assumes a public trust, he should consider himself as public property."<sup>257</sup> When the defendant was aware of the plaintiff's prior role in government or as a candidate, but not cognizant of the fact that the statement mistakenly identified the plaintiff as the person committing the alleged conduct, a broader application of the *Times* rule seems warranted. Thus, it should be sufficient not only when the plaintiff's prior official role was a foreseeable cause of the mistaken reference to him, but also when the fact of plaintiff's prior official role or candidacy made the statement a matter of public concern.

An additional issue complicates misidentification cases involving former public officials or candidates. Some courts have held that the public-official basis for applying the *Times* rule "is not available where the defendant's statements do not directly or impliedly identify the plaintiff as a public official, and there is no showing that the plaintiff's name is otherwise immediately recognized in the community as that of a public official."<sup>258</sup> The few cases are apparently "divided on the colloquium-of-office issue."<sup>259</sup> Notwithstanding the above, and irrespective of whether or not the courts would otherwise adopt or apply the so-called *Buffalino* rule,<sup>260</sup> I believe that my proposed approach is a sensible course.

### III. SUMMARY OF SUGGESTED APPROACH AND CONCLUSION

This article examined the extent to which the First Amendment requirement of *New York Times*—that plaintiff seeking to recover for defamation prove that the defendant communicated the statement with knowledge or reckless disregard—should apply to statements about former public officials and former candidates. The status of former public officials and former candidates should, I believe, be addressed primarily within the

257. THE JEFFERSONIAN CYCLOPEDIA: A COMPREHENSIVE COLLECTION OF THE VIEWS OF THOMAS JEFFERSON § 8596, at 887 (John P. Foley ed., 1900) (quoting Thomas Jefferson's remark to Baron von Humbolt in 1807, that "[w]hen a man assumes a public trust, he should consider himself as public property").

258. *Buffalino v. Associated Press*, 692 F.2d 266, 273 (2d Cir. 1982).

259. See ELDER, *supra* note 22, § 5:5 & n.4; SACK, *supra* note 23, § 5:2.2, at 5-18 to 5-19. Professor Elder seems to prefer the preceding so-called *Buffalino* rule. See ELDER, *supra* (commenting that "[t]he *Buffalino* rules are consistent with an appropriate interpretation of *Rosenblatt v. Baer* and the jurisprudence of the Court in *Gertz v. Robert Welch, Inc.* and its progeny and are highly likely to be followed in the future.").

260. See ELDER, *supra* note 22, § 5:5 & n.4 (discussing the *Buffalino* rule).

framework of the public official and candidate categories. Attempts to resolve the question of the status of former officials and former candidates by extrapolating from the analysis used for determining whether one is a public figure add an additional layer of doctrinal complexity. That ought to be unnecessary in cases in which my proposed approach would require application of the *Times* rule. Accordingly, I prefer that the issue be simply and directly stated as whether or not a defamation claim by a former official or former candidate should be governed by the *New York Times* rules to the same extent as for public officials.

I have suggested an approach to the question of the application of the *Times* rule to former public officials and former candidates for three scenarios. By way of summary, then, I propose the following approach to the question of the application of the *Times* rule to former public officials and former candidates for three types of circumstances.

First, when a defendant's statement relates to the plaintiff's performance as official or candidate, or to his alleged conduct while occupying and related to those prior roles, I believe that the plaintiff's defamation claim should be governed by the *Times* rule.<sup>261</sup> For the purpose of the *Times* standard, the fact that the statement that related to an official's or candidate's conduct or performance in those capacities was published subsequent to the individual's official tenure or candidacy should be irrelevant.

Second, when the defendant's statement described alleged conduct occurring after the plaintiff was no longer serving as official or candidate, plaintiff's defamation claim should be governed by the *Times* rule when either: (1) the alleged conduct was a continuation or outgrowth of, or otherwise directly related to, plaintiff's prior service as a public official or candidate; or (2) the fact of the plaintiff's prior status as a public official or candidate would make the publication of such statement a matter of public concern.

And third, I suggest the following approach when the defendant mistakenly identified the plaintiff as the person who committed the alleged conduct. If the defendant was incognizant that the plaintiff had previously served in the role as a public official or candidate previously occupied by the plaintiff, I believe that the *Times* rule should apply if the fact of the plaintiff's prior role as a public official or candidate was a factual and foreseeable cause of the mistaken reference to the plaintiff. If, on the other hand, the defendant realized that the plaintiff identified in the statement had previously served as a public official or candidate, the *Times* rule should

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261. See *supra* Part III.A.

apply if either: (1) the plaintiff's prior role as a public official or candidate was a factual and foreseeable cause of the mistaken reference to the plaintiff; or (2) the plaintiff's prior role made the statement a matter of public concern.

In addition to the preceding bases for applying the *Times* rule, it should also suffice if the plaintiff were found to be an all-purpose or limited-purpose public figure. Thus, it should also be sufficient for applying the *Times* rule, if the plaintiff were deemed to be an all-purpose public figure, such as when for example, the plaintiff's prior official position or candidacy, coupled with any prior or subsequent involvement in public affairs or general notoriety, warranted deeming the plaintiff an all-purpose public figure.<sup>262</sup> Likewise, the *Times* rule would also be justified when a former official or candidate was found to be a limited-purpose public figure in view of his involvement in a public controversy. Many situations might well satisfy not only one or more of the three rules proposed above, but in addition, the requirements for public figure status.

The preceding approach may hopefully offer a measure of clarity and predictability to the question of the status of former public officials and candidates. Seeking clarity and predictability has proven elusive in face of the doctrinal overgrowth one sees in the field plowed by the *Times* decision in its attempt to protect freedom of expression. As a consequence, the uncertainty over which individuals fall within the scope of the rule has eroded and undermined the protection of freedom of expression championed in the *Times* decision. Not only is doctrinal and adjudicative consistency generally necessary for "advantageous predictability in the ordering of private conduct,"<sup>263</sup> it is crucial to freedom of expression. Speakers must be afforded a realistic idea. Adopting broadly conceived doctrines to enhance freedom of expression, while at the same time applying those doctrines by ad hoc and tentative decisions without offering clear or predictable direction, may actually undermine the very freedom we seek to protect. Doctrinal uncertainty abets and reinforces the specter of potential defamation litigation and liability, shrouding and choking freedom of expression. The threat of liability, both real and apparent, is magnified by uncertainty about the applicable legal principles and their opaque doctrinal parameters. Doctrinal clarity and predictability are essential in protecting

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262. The relevance of a plaintiff's prior status as a public official or candidate should presumably bolster the argument that the plaintiff is an all-purpose public figure. Moreover, irrespective of whether or not a person was deemed a former "public official" under the *Rosenblatt* test, that person may, like anyone else, be or become a "public figure" if the criteria of *Gertz* are satisfied. See ELDER, *supra* note 22, § 5:24.

263. Peters, *supra* note 211, at 2039.

the freedom to freely discuss our public servants and those who seek public office.

I wish to once again reiterate my strong preference. Fundamentally, this discussion would be unnecessary were the Court to decide to apply the *Times* standard to all defamation cases irrespective of the status of the plaintiff or the categorical content of the speech or statement, rather than to continue to apply it selectively as it has since 1964. That being said, the approaches I suggest in this article may, in the interregnum, illuminate part of the dark underbrush that followed the *Times* decision. I nevertheless remain hopeful that on some enlightened morning the Court will broadly decide in favor of the universal application of the *Times* rule, thereby making moot the more limited solution recommended in this article.

