RICHMOND NEWSPAPERS V. LIPSCOMB: TIGHTENING THE GRIP ON VIRGINIA PUBLISHERS

The United States Supreme Court recently declined to hear an appeal of a 1987 Virginia Supreme Court case which held that a public school teacher is not a public official for the purpose of invoking the New York Times malice rule[1] in defamation cases. In *Richmond Newspapers, Inc. v. Lipscomb*, the Virginia court said the public has no independent interest in Lipscomb's qualifications and performance "beyond its general interest in the qualifications and performance of all government employees," and therefore she was not a public official but rather a private person.[2]

The court noted the lack of any federal case on the question, and a split in the state court holdings. Federal constitutional law determines who is a public official. State courts must determine public official status in accordance with "the purpose of a national constitutional protection," and therefore state law tests are not determinative on the question.[3]

This article analyzes the court's finding in *Lipscomb* that a public school teacher is not a public official. It also compares *Lipscomb* with other federal and state court decisions on the public official question. The article illustrates that this part of the *Lipscomb* decision missed the key components of the test for public official status, such as the breadth of the leading definition of a public official, the impact of public education on government, and the access a teacher has to media remedies.

FACTS OF LIPSCOMB

Lipscomb centered around a newspaper article written for the *Richmond Times-Dispatch* by Charles Cox. In a front-page article published a few weeks before the start of school in the fall of 1981, Cox questioned the qualifications of

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[1]. A suit for defamation provides an avenue of legal redress for invasions of an individual's interest in reputation and good name. To recover damages a plaintiff must prove the defamatory comments injured his reputation and impaired his standing among his peers. Thus an essential consideration in any defamation action is the status of the plaintiff. Whether a court deems a person to be a private individual or a public figure is of paramount importance in such actions because public figures alleging defamation must prove the defendant published the defamatory comments with actual malice or reckless disregard for the truth. Private individuals carry no such onerous burden. Note, Waldbaum v. Fairchild Publications, Inc.: Giving Objectivity to the Definition of Public Figures, 30 Cath.U.L.Rev. 307, 308 (1981).

[2]. 234 Va. 277, 287, 362 S.E.2d 32, 37 (1987) (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966)), *cert. denied*, 108 S.Ct. 1997 (1988).

[3]. Rosenblatt v. Baer, 383 U.S. 75, 84 (1966). The case held that a supervisor of a ski resort who was employed by and directly responsible to county commissioners was a public official for purposes of federal constitutional protection purposes.

Vernelle Lipscomb, a teacher at Thomas Jefferson High School in Richmond. The article included quotes from Lipscomb's colleagues, students and parents of students criticizing Lipscomb's teaching abilities, particularly when dealing with bright or honors program students. Cox was alerted to the problem by a parent of one of Lipscomb's students. The parent had previously approached the school administration and attempted to have Lipscomb removed. When this failed the parent contacted Cox and told him about the situation. At the time, no open conflict existed at the high school, but numerous complaints were on record regarding Lipscomb. The front-page article provided very little refutation of the negative statements. Lipscomb and other school officials had been contacted for comment, but the school board attorney advised them against discussing the details of the complaint against the teacher. Conflicting lines of testimony were presented at the ensuing defamation trial with regard to Lipscomb's qualifications.[4]

Prior to *Lipscomb*, the Supreme Court of Virginia had held that a university professor does not occupy a position of such persuasive power and influence that he could be deemed a public figure for all purposes.[5] In *Lipscomb*, the court broadened the scope of the state's defamation remedy by ruling that a teacher is not a public official, leaving designation as a "limited purpose" or "vortex" public figure[6] the only way in which an educator could qualify for *New York Times* actual malice.[7]

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[4]. Lipscomb, 234 Va. at 283. Lipscomb sued the newspaper, the publisher and the reporter, and was awarded $1,000,000 in compensatory damages and $45,000 in punitive damages by a jury. The trial judge sustained the jury's award of $45,000 in punitive damages but required a remittitur of $900,000 of the compensatory damages. *Id.*

[5]. Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981). Moore took out an advertisement in a local newspaper that accused Fleming of being a racist. Moore was a realtor and his actions were in reference to some property development that Fleming had invested in. The court said the words probably did not have an effect on Fleming in his profession as a teacher, and thus were not defamatory *per se*.

[6]. A limited purpose or "vortex" public figure is far more common than the "general purpose" public figure. The designation is comprised of those individuals who voluntarily inject themselves into a particular public controversy and thereby assume a role of special prominence in the affairs of society and therefore invite attention and comment. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

[7]. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The *Times* published an advertisement that was challenged as maliciously defamatory of a city commissioner in Montgomery, Alabama. The Alabama Supreme Court held that the statements in the advertisement were libelous *per se*, false, and not privileged, and that the evidence showed malice on the part of the newspaper. The U.S. Supreme Court held that there was a qualified privilege for honest misstatements of fact, defeasible only upon a showing of actual malice.

The court disposed of the public official question summarily, relying on the *Gertz*[8] arguments to conclude that a public school teacher is not a public official. The court, citing *Gertz*, reasoned that a teacher does not have access to channels of effective communication and hence does not have an opportunity to counteract potentially false or defamatory statements, thus making a teacher more like a private citizen than a public official and more in need of government protection.[9] The court cited the Virginia Code,[10] which prohibits disclosing student names and records, as one barrier to effective communication.

Following the reasoning of *Gertz*, one part of the test for a public official is whether, in view of his employment position, an official ran "the risk of closer public scrutiny" than might otherwise be the case.[11] The court acknowledged this was true for a public school teacher, but felt this point did not outweigh the other factors in the final decision. Particularly influential to the court's decision was Lipscomb's lack of access to channels of effective communication and the lack of a controversy at the time the newspaper article was published.

The court found that the criticism of Lipscomb came as a result of her performance as a teacher, not as temporary head of Jefferson High School's English department. She did not attempt to influence or control any public affair or school policy. The court focused on the question of whether her position as a schoolteacher was one that would invite public scrutiny and public discussion.[12] Finally, the *Times-Dispatch* article was one that created a controversy rather than reported on one that already existed. The employee's position was not inviting

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[8]. Gertz concerned a libelous article appearing in a magazine called American Opinion, a monthly publication of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a communist campaign to discredit local law enforcement agencies. The magazine alleged that Gertz was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Gertz was working for the plaintiff in a related civil suit. The Supreme Court held he was neither a public official nor a public figure. The court rejected the defendant's "de facto" public official argument and decided the question based on the attorney's lack of access to effective reply in the media. The court also based its decision on Gertz' failure to thrust himself into the vortex of any public issue or to seek the limelight in any meaningful way.

[9]. Lipscomb, 234 Va. at 285, 362 S.E.2d at 36 (quoting Gertz, 418 U.S. at 418).

[10]. Va. Code Sec. 22.1-287(A) provides in pertinent part:

"No teacher, principal or employee of any public school nor any school board member shall permit access to any written records concerning any particular pupil enrolled in the school in any class to any person except under judicial process...."

[11]. Gertz, 418 U.S. at 344.

[12]. Rosenblatt, 383 U.S. at 87 n.13.

public scrutiny and discussion, but rather because discussion was occasioned by the particular charges against Lipscomb, public official designation was inappropriate.[13]

BACKGROUND DECISIONS

In *New York Times Co. v. Sullivan*,[14] the United States Supreme Court introduced the concept of the public official whose privacy interest would have to partially yield to the public interest to further free and open debate on issues of general public concern. Under the *Times* standard, public criticism of a public official's public conduct is constitutionally protected from defamation liability absent clear and convincing proof[15] that the defendant acted with "actual malice."[16]

In *New York Times*, the Supreme Court intentionally left the boundaries of what constitutes a "public official" an open question.[17] Two years later the Court again addressed the question in *Rosenblatt v. Baer*.[18] The Court established that persons in either of the following two situations could fit the public official definition, thus triggering the *New York Times* malice standard:

> (1) "...at the very least...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." or
> (2) "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees...."[19]

The Rosenblatt decision determined that the focus must be on the nature of the public employee's function and the public's particular concern with the employee's work. The case, however, did not provide a clear demarcation between public officials and mere public employees. The Court again left unclear to which government employees the public official designation extended.

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[13]. Lipscomb, 234 Va. at 287, 362 S.E.2d at 37 (citing Gertz, 383 U.S. at 87 n.13).

[14]. 376 U.S. 254 (1964).

[15]. *Id.* at 285-86.

[16]. *Id.* at 279-80.

[17]. The Court had no occasion "to determine how far down into the lower ranks of government employees the 'public official' designation would extend..." *Id.* at 283 n.23.

[18]. 383 U.S. 75 (1966).

[19]. *Id.* at 85, 86.

In 1967, the Supreme Court said that public figures would also be subject to the *New York Times* malice rule.[20] Like the public official, the public figure "...commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehoods and fallacies'"[21] voiced against him or her. A public figure designation could be achieved through the status of one's position in society, or by "thrusting ...[oneself] into the 'vortex' of an important public controversy...."[22]

The expansion of First Amendment protection under the public official and public figure doctrines reached its peak in 1971 with *Rosenbloom v. Metromedia, Inc.*[23] A plurality[24] of the Supreme Court said that regardless of whether the plaintiff was a public or private citizen, his involvement in a matter of public or general concern was sufficient to trigger the *New York Times* knowing and reckless falsity standard for defamation. Two years later in *Gertz*, the Supreme Court began to withdraw some of these First Amendment freedoms by narrowing the working definition of a public official. Rather than focusing solely on the question of whether the matter exposed to media attention was a valid public concern as *New York Times* and *Rosenblatt* did, the *Gertz* decision said that public official decisions had to balance this First Amendment concern against the privacy interests of the individual, and the individual's ability to respond to false or misleading statements made about them. In the opinion of the Court, "[t]he 'public or general interest' test for determining the applicability of the *New York* Times standard to private defamation actions inadequately serves both of the competing values at stake."[25]

The law as it stands today allows room for both the *Gertz* and *Rosenblatt* rationales. While in *Hutchinson v. Proxmire*[26] the U.S. Supreme Court reiterated its movement away from the pure "responsibility or control over government

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[20]. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

[21]. *Id.* at 155 (quoting Whitney v. California, 274 U.S. 357, 377 (Brandeis, J., dissenting)).

[22] *Id.*

[23]. 403 U.S. 29 (1971)

[24]. Justice Brennan wrote the plurality opinion joined by Burger and Blackmun. Justices Black and White each wrote a separate concurrence. Justice Harlan wrote a dissenting opinion, as did Justice Marshall which was joined by Justice Stewart. Justice Douglas did not take part in the decision.

[25]. Gertz, 418 U.S. at 346.

[26]. 443 U.S. 111 (1979).

affairs"[27] test, in Virginia, "the *Rosenblatt* characterization of a *New York Times* public official has not been modified and in our view fits well into the framework of competing values created by libel litigation."[28]

VIRGINIA

In *Lipscomb*, the Supreme Court of Virginia focused primarily on the self-help doctrine: the idea that society will allow more potentially damaging discussion about public officials in part because of their enhanced ability to contradict lies or correct errors by their greater access to the media. The conclusion that Lipscomb did not have access to the media is contrary to the facts of the case. If Lipscomb's professional conduct as a schoolteacher was noteworthy enough to be published on the front page of the *Richmond Times-Dispatch*, the teacher had viable access to that medium. The court in *Lipscomb* is primarily concerned that the avenue for expression be a two-way street, yet the underlying facts show that this was the case. Because the institution of public education is being scrutinized, media interest is assured. For instance, had Lipscomb made a statement that her students were exceptionally belligerent, or made any other reference to her job which indicated that things were out of the ordinary, that would have been "news" also, and would have merited coverage in the newspaper.

The Virginia Supreme Court also reasoned that Lipscomb was barred from effectively replying to criticism because of a statute in the Virginia Code.[29] The court assumes that if Lipscomb were to defend her teaching reputation, she would need to disclose official records of students in her class, an act forbidden under the Code. There are three problems with this reasoning. First, equally effective options existed for Lipscomb to defend herself. At the trial there were students, teachers and school administrators who testified in contradiction of the complaints about Lipscomb,[30] so certainly there were reliable people available whom Lipscomb could have referred Cox to in order to contradict the defamatory statements Cox had recorded.

Secondly, the Virginia court misapplied the test for a public official. They focused on the individual circumstances of Lipscomb's case, and not the position of school teachers in general. When deciding whether a person is a public figure it is appropriate to delve into the particular circumstances surrounding the alleged defamatory statements. However, when deciding whether a person is a public official, the court should look at the employment position in a generic sense, and

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[27]. Rosenblatt, 383 U.S. 75 at 85-86.

[28]. Arctic Co., Ltd., v. Loudoun Times Mirror, 624 F.2d 518, 521 (4th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981).

[29]. See *supra*, note 10.

[30]. Lipscomb, 234 Va. at 283, 362 S.E.2d at 35.

not add in factors such as Lipscomb's ability to respond to specific charges.A person seeking government office "runs the risk of closer public scrutiny."[31] It is self evident that a person whose job entails trying to influence scores of young men and women on a daily basis is going to be scrutinized by those persons, their families and their peers.

Perhaps the strongest refutation of this "inhibited access" theory adopted by the Virginia Supreme Court in *Lipscomb* comes from an earlier Virginia case, *Landmark Communications, Inc. v. Virginia*, in which the U.S. Supreme Court, on appeal from the Virginia Supreme Court, said the fact that judges traditionally do not respond to media reports and public commentary did not give them any greater immunity from criticism than other persons or institutions.[32]

The Supreme Court of Virginia mentions the fact that Lipscomb was not an elected official. This should not have had any bearing on the outcome of the question.[33] The general public's right to vote for the official is dispositive of neither of the two criteria from *Rosenblatt*, apparent importance in government and heightened interest in job performance.[34] Appointed officials ranging from the executive cabinet to police officers[35] fit comfortably in the *Rosenblatt* definition of a public official. This is an example of the court's application of public figure reasoning to a public official question.

The determinative question in the public figure analysis is whether the person makes a conscious effort to seek out the limelight. A person campaigning for[36]

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[31]. Gertz, 418 U.S. at 344.

[32]. 435 U.S. 829, 838-9 (1978). Landmark focused on a Virginia statute which enacted criminal sanctions against any person publishing information about proceedings before a state judicial review commission hearing complaints about judges' disabilities or misconduct. The U.S. Supreme Court said that in general the operation of the judiciary, and in specific the conduct of judges, is a matter of utmost public concern. This analysis leads to a similar conclusion that complaints about a teacher's qualifications necessarily are a matter of public concern and protected speech because they have a direct bearing on the operation of public education.

[33]. "There has been no showing that Lipscomb, who was not an elected official...." Lipscomb, 234 Va. at 286, 362 S.E.2d at 37.

[34]. 383 U.S. at 85-86.

[35]. *See* True v. Ladner, 513 A.2d 257 (Me. 1986); Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984). Both of these courts rejected the public school teacher as a public official in part by distinguishing the position from a police officer. Both states have held a police officer to be a public official.

[36]. For an example of the New York Times malice rule applied to the higher strata of elected officialdom, *see* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (candidate for democratic nomination for U.S. Senate), and at the lower end of the spectrum, Ocala Star Banner Co. v. Damron, 401 U.S. 295 (1971) (candidate for

or holding an elected office would obviously be striving to stay in the public eye. A public official does not necessarily have the same motivations. The court errs by asking *how* Lipscomb obtained her position of authority.

The proper controlling question is whether the public acknowledges the job the official holds to be authoritative or influential. Under *Gertz*, public funding is relevant in deciding whether a government employee is a public official. *Lipscomb* did not mention the fact that the public school teacher was on the public payroll. While the question of whether an official receives public funds is not dispositive,[37] there is merit to the view that a threshold question to show public official status should be whether the position comes under the ambit of a government institution.[38]

ANALYSIS BY OTHER COURTS

As the Supreme Court of Virginia noted, there is a decided split in the state court holdings on this question. Other state courts have looked at the question in greater detail than did the Virginia court. Generally the courts that extend the public official doctrine to public school teachers rely on *Rosenblatt* (public debate should take precedence over privacy interest), while courts holding a teacher is not a public official emphasize the *Gertz* premise that privacy of the individual is superior. In the two decades since *Rosenblatt*, several cases have limited the scope of the public official doctrine, however.[39]

The Supreme Court of Virginia did not value a teacher's impact on society as highly as the state cases coming to an opposite conclusion on the public official question. There is substantial sociological data affirming the impact of the schoolteacher on the citizenry.[40] In *Gallman v. Carnes*,[41] the Arkansas Supreme

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county tax assessor).

[37]. Hutchinson v. Proxmire, 443 U.S. 111 (1979).

[38]. Johnston v. Corinthian City Television Corp., 583 P.2d 1101 (Okla. 1978).

[39]. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. at 119 n.8. The Supreme Court "has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees, however."; *and* Dun & Bradstreet v. Greenmoss Builders, Inc. 472 U.S. 749 (1985).

[40]. Brennan noted the Court's repeated reference to public schools as "the Nation's most important institution in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." Brennan said the teacher plays a critical role in developing students' attitude toward government and understanding of the role of citizens in our society, and serves as a role model for students. *See, e.g.*, Note, Aliens' Right to Teach: Political Socialization and Public Schools, 85 YALE L. J. 90, 99-104 (1975). "With the family and the peer group, the school is recognized as a crucial agent of political socialization. A teacher's role in the process of political and cultural learning becomes critical because a teacher is quite often the first nonfamilial spokesman of society that a child regularly encounters, and functions

Court said newspaper articles could question the qualifications of a law school professor because education is a matter of general or public concern. The Arkansas holding is in direct conflict with *Lipscomb*. There is little to distinguish the case from *Lipscomb* other than the fact that the courts came to opposite conclusions.

In drawing the distinction that a teacher has very limited authority[42] the courts again emphasize the "control" aspect of the definition and overlook the "substantial responsibility" part of the definition. A review of the language used by the courts that espouse this reasoning reveals an underlying premise that to meet the definition of public official a government employee must have the ability to assert direct, tangible control over the citizenry.[43] This is simply not the case. A public official may be one who appears to have substantial responsibility for the conduct of government as well as private affairs.[44]

DECISIONS CONTRARY TO LIPSCOMB

State courts have mentioned a number of factors in holding a teacher to be a public official. In *Gallman*, the Arkansas Supreme Court held that a faculty dispute at a public institution was a matter of general public concern.[45] Other

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in the classroom as a model for acceptable behavior and social attitudes." *Id.* at 102-3 and "The public school teacher as an authority figure...is much more like a political authority...The teacher, like the policeman, president, or mayor, is part of an institutional pattern, a constitutional order." *Id.* at 103 n.52 (quoting R. Dawson and K. Prewitt, POLITICAL SOCIALIZATION (1969) at 158).

41. 497 S.W.2d 47 (Ark. 1973). The Supreme Court of Arkansas held that a law school professor was a public official for purposes of a news article that questioned his teaching abilities. The court said that a faculty dispute over the teacher's qualifications was properly an issue for public comment and therefore privileged. *Id.* at 50 (quoting Clark v. McBane, 299 Mo. 77, 252 S.W.428 (1923)). The court quoted Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), which extended the "constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." *Id.*

42. True v. Ladner, 513 A.2d at 264.

43. *See, e.g.*, True v. Ladner, 513 A.2d 257 (Me. 1986) *and* Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984).

44. Rosenblatt v. Baer, 383 U.S. at 85-86.

45. 497 S.W.2d at 50. Interestingly, the Arkansas court noted that the Supreme Court of Virginia had recently upheld a summary judgment in recognizing that a faculty dispute at a state college constituted a subject of public and general concern. The Virginia case involved a faculty dispute at Virginia Western Community College. The Virginia court based its "public official" decision on the fact that there was open dispute between faculty and administrators, rather than the general question of whether the position of college professor fit the public official definition, and the case is therefore not applicable to the present question.

relevant factors for some courts included the closeness of the teaching position to the electoral process,[46] and whether the position was publicly funded.[47] Another court has found that even a voluntary teaching position can qualify for public official status.[48] The most prevalent rationale used by courts when holding a teacher to be a public official is to emphasize the social and political responsibilities incumbent upon the position in the community.[49]

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[46]. In Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (1978), the Arizona Supreme Court held that a teacher must show actual malice under New York Times and Curtis Publishing Co. v. Butts. The court was persuaded by an Illinois case, Basarich v. Rodeghero, 24 Ill.App.3d 889, 321 N.E.2d 739 (1974), later overruled in its state of origin by McCutcheon v. Moran, 99 Ill. App.3d 421, 54 Ill.Dec. 913, 425 N.E.2d 1130 (1981).
Basarich found it relevant that public school teachers were hired by the school board, an elected body, and were paid with public funds. Also, the court said the teaching occupation is a highly responsible position in the community and thus fit the Rosenblatt criteria for public official status.

[47]. Sewell v. Brookbank, 119 Ariz. 422, 581 P.2d 267 (1978).

[48]. Johnston v. Corinthian Television Corp., 583 P.2d 1101 (Okla.1978) involved a grade school physical education teacher and wrestling coach. The fact that Johnston was not paid for his work as a coach was not relevant, according to the Supreme Court of Oklahoma, because Johnston was still working within the public school system, an obvious governmental function.

[49]. Scott v. News-Herald, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986). The court borrowed language from the U.S. Supreme Court in saying that the public school teacher performs a task "that goes to the heart of representative government." Sugarman v. Dougall, 413 U.S. 634, 647 (1973). The court also advanced the argument that as an authority figure for children, the teacher has a significant impact on the community. *See also* Johnston v. Corinthian City Television Corp., 583 P.2d 1101 (Okla. 1978). The court said it could "think of no higher community involvement touching more families and carrying more public interest than the public school system" *and* Lorain Journal Co. v. Milkovich, 474 U.S. 953 (1985) (Brennan, dissenting). Brennan quoted from the newspaper column under question to accent his case for the importance of high school employees:

> "When a person takes on a job in a school, whether it be as a coach, administrator or even maintenance worker,it is well to remember that his primary job is that of educator.
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> "There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way--many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions." *Id.* at 955-56.

STATES IN ACCORD WITH LIPSCOMB

Other courts have argued on policy grounds that making a teacher a public official would stifle creativity[50] and have said a teacher's control is too remote to be authoritative.[51] Other courts have focused on the size of the audience served by the newspaper;[52] asked whether the institution was a uniquely government affair;[53] whether the position had any administrative or supervisory duties;[54] whether it required any intrusion into the intimate details of daily lives;[55] or whether the employees would reasonably be aware that they were forfeiting some privacy rights.[56] Still other courts have asked whether the position is a highly visible one.[57]

The policy-based argument in other states holding teachers to be private citizen diverges greatly from the *Lipscomb* reasoning. Implicit in the policy argument "is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those

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[50]. In Franklin v. Benevolent and Protective Order of Elks, Lodge 1108, 97 Cal.App.3d 915, 159 Cal.Rptr. 131 (1979), the California Supreme Court said that a rule making teachers public officials, and therefore remediless for all defamation excepting where actual malice is present, would stifle the teacher's expression and intellect and lead to less effective teaching.

[51]. *Id.* The California court said that while a public school teacher invites public scrutiny and discussion, the policy behind the concept is to "allow the governed to question the governors," and the teacher's governing or control in the classroom is too remote and philosophical to qualify on those grounds. *See* also McCutcheon v. Moran, 99 Ill.App.3d 421, 54 Ill. Dec. 913, 425 N.E.2d 1130 (1981); Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984).

[52]. Johnson v. Board of Junior Colleges, 31 Ill.App.3d 270, 276 n.1, 334 N.E.2d 442 n.1 (1975). The court held that the public figure status of a college professor was due to his actions during the controversy, and that the teacher was a public figure only for purposes of media that specifically served the school audience, in this case the college newspaper. In a later case the court further narrowed the circumstances where a teacher could be a public figure. McCutcheon v. Moran, 99 Ill.App.3d 421, 54 Ill.Dec. 913, 425 N.E.2d 1130 (1981).

[53]. True v. Ladner, 513 A.2d 257 (Me. 1986). The state supreme court analysis consisted of distinguishing the public school teacher from a police detective, a position they had recently held to come under the public official doctrine. The court said that a detective is a public official because he is involved in law enforcement, and the duties of a law enforcement official are a uniquely government affair.

[54]. *Id.*

[55]. *Id.*

[56]. *Id.*

[57]. Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984).

who control the conduct of government."[58] The use of the word "control" in this argument is much stronger than the language of *Rosenblatt*, where the Supreme Court said there need be apparent control *or* substantial responsibility for the conduct of government affairs.[59]

The school teacher fits much better into the second category, substantial responsibility. Education is a government affair, perhaps the most important government affair at the state and local level, and the school teacher is the direct link between the government and the populace in this function. As the primary medium of the government message, the teacher certainly carries substantial responsibilities. Further, the private citizen decisions such as *Lipscomb* do not articulate the reasons why a teacher's control is "too remote or philosophical."

The policy argument says that there would be a chilling effect on teacher effectiveness if they were subject to this defamation exception. However, the courts do not attempt to balance this evil against the countervailing harm of a chill on the media. The public official doctrine was developed originally as a shield for the media. When a court ignores this factor it loses sight of the original intent of the doctrine.

BRENNAN'S INTERPRETATION OF THE PUBLIC OFFICIAL DOCTRINE

Justice Brennan wrote a dissent from a certiorari denial on the public official question in *Lorain Journal Co. v. Milkovich*.[60] Brennan, the author of the *Rosenblatt* decision, advocates a return to the standards set out in that case.[61] He gave a more expansive interpretation of the public official doctrine than the state courts and recognized that small newspapers would be singled out to bear the burden of a decision favoring teachers as private citizens.[62]

Brennan, joined by Justice Marshall, said that a narrow reading of the doctrine would unnecessarily deprive publishers of the "breathing space"[63] allowed for public expression and thus lead to a chilling effect on reports about borderline private individuals. The justices were most concerned about the effect on reporting by local papers, who rely heavily on coverage of these borderline

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58. Franklin v. Benevolent and Protective Order of Elks, Lodge 1108, 97 Cal.App.3d at 924, 159 Cal. Rptr. at 136.

59. Rosenblatt v. Baer, 383 U.S. at 85.

60. 474 U.S. 953 (1985).

61. *See also* Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria -- A Proposal for Revivification: Two Decades after New York Times v. Sullivan. 33 Buffalo L. Rev. 579 (1984).

62. *Id.*

63. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

public officials. Small, non-daily newspapers have the fewest resources and are more easily influenced by threats of a lawsuit and potential libel damage awards.[64]

CONCLUSION

An examination of the state court decisions reveals no clear trend in either direction on whether a public school teacher is a public official. The decision in *New York Times v. Sullivan* was announced a quarter century ago, yet courts continue to come up with contradictory results when assessing whether a teacher is a public official.

One problem is that many courts confuse public official and public figure theories and interchange the definitions and criteria of the two concepts. There were several other issues in the *Lipscomb* case,[65] the key issue being whether Cox acted negligently in gathering information for publication, and the public figure issue was given only threshold analysis. The court did little more than reiterate the minimal defamation protections under *Gertz*.

Classifying a public school teacher as a private citizen causes much more of a chill on small newspapers than large ones. Small town newspapers devote much more coverage to schools and teachers than larger papers, and limitations in terms of capital, copy editing expertise and legal advice amount to a much greater chill on their ability to publish than on the ability of larger, daily newspapers.

With little funding, it is easy for a small newspaper to be intimidated by the fear of a long, drawn-out lawsuit. Small newspapers traditionally employ persons with limited or no formal journalism training to write and edit articles. Cox, the author of the article in *Lipscomb*, received his college degree in economics, not journalism.[66] Because of this lack of expertise in the editing process, the news editor of a small paper is going to be more reluctant to assign a story that has

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[64]. In Lipscomb the jury awarded the plaintiff $1,000,000 in compensatory damages and $45,000 in punitive damages. *Supra* n.5.

[65]. In addition to the public official question, the court cited two main issues, and three collateral issues:

(1) If Lipscomb was not a public official, was negligent publication by Cox and the newspaper subsumed in the jury's finding of a publication with reckless disregard for the truth; and, if so, was the evidence in this case sufficient to support a finding of negligent publication?

(2) Was the evidence in this case sufficiently clear and convincing to support the jury's finding of publication by Cox with a reckless disregard for the truth, which Lipscomb must establish to recover punitive damages?

Collateral issues were the admissibility of an expert's opinion on the standard of care, the obligation of a trial court to segregate potentially defamatory evidence from nondefamatory evidence in its instruction to the jury, and the size of the jury's verdict. 234 Va. at 281, 362 S.E.2d at 34.

[66]. 234 Va. at 297 n.6, 362 S.E.2d at 43 n.6.

libel potential, and, when those stories are covered, the paper will err on the side of less coverage to avoid the risk of a defamation suit.

The third effective chill on small papers deals with their comparative lack of legal assistance. While large papers can afford to have in-house counsel to prevent a libelous article from being published, or at least to mitigate the damage once a mistake has been made, small papers usually can only afford to retain an attorney to deal with problems after they have risen to the level of an impending lawsuit. In *Lipscomb*, the Virginia Supreme Court could have avoided this problem by exercising its power to give defamation defendants protection beyond the minimal federal requirements extended in *Gertz*.[67]

Coverage of borderline public officials, including schoolteachers, is the mainstay of rural, non-daily publications which do not have the resources or economic incentive to cover national events and figures. The market for coverage of larger events and people is adequately served by the metropolitan and national newspapers. People buy rural and non-daily newspapers to keep themselves informed on local matters such as religious organization activities, business and club functions, educational matters, and crime reports. The court does not fully realize the chill it has cast on small newspapers with the *Lipscomb* decision. Small papers do not have the resources to challenge this action. Any challenge in court must come from a larger metropolitan newspaper with the resources to take a court battle to Virginia's high court. Until then, local press in Virginia will be restrained from coverage of many of the events which make their publications viable.

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[67]. The Virginia Constitution contains an "abuse" clause where "any citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right..." Va. Const., Art. I, Sec. 12. While some state courts have relied on similar "abuse" provisions to follow the minimal protections of Gertz, *see, e.g.*, Troman v. Wood, 62 Ill.2d 184 (1975); McCall v. Courier-Journal & Louisville Times, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982). Other state courts have not felt themselves bound by similar clauses, *see*, Diversified Management v. Denver Post, Inc. 653 P.2d 1103 (Colo. 1983); Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 162 Ind.App. 671 (1974), *cert. denied*, 424 U.S. 913 (1976).