INTRODUCTION

After a long, hot summer weekend, Andy, Barney, and Goober meet for breakfast at the local eatery. They look at each other, then at the other patrons, all looking at them strangely, the looks varying from the quizzical to the overtly hostile. Their favorite waitress waltzes past them with a steaming coffee pot, ignoring their smiles and empty cups. The silent treatment continues for a couple of minutes until a local retiree pushes himself back from one of the counter stools, hitchs his belt, and tosses the morning daily in the middle of the table. “You boys seen this?”

Andy, Barney, and Goober read the headline in bold two inch print letters: TOWN POLICE FORCE CHARGED WITH ASSISTING AL-QAIDA CELL. Speechless, they read the story. The source is a local in his early twenties with a known history of substance abuse, abusive relationships with women, racist beliefs, psychiatric difficulties, and a record of petty crimes and one perjury conviction. He claims to have seen uniformed officers with Mayberry insignia in the woods training two locals of Middle Eastern ancestry to use “a variety of demolition devices used by al-Qaida operatives.” The alleged terrorists—Frank and Fred Haddad, third generation Lebanese-Americans who run a profitable local chicken farm—are named. The police officers are not.

Barney looks at Andy and Goober and they look at him, stunned fawns in a hunter’s headlights. “Can the paper do this? Can he?” Andy shrugs, Goober stares into his empty cup, slack-jawed. Finally,
Andy stands. "We need to go get us a lawyer." The others follow. No one in the eatery has said a word—people who have known them their entire lives, people who have greeted them and joked with them every morning. Mayberry is hit with a scandal implicating police officers—"public officials," a suspect source with as little believability as Saddam Hussein, and heinous accusations. The common law and the First Amendment should provide a remedy. Do they? For the Haddad brothers, yes. They are identified and are likely only private persons. For Andy, Barney and Goober, no, not if their state follows the Supreme Court of Virginia, which rejected the small group defamation theory in Dean v. Dearing.

The common law, public policy, common sense, fundamental fairness, and the First Amendment justify a finding that the all inclusive defamatory statements above suffice to inculpate and identify each of the unnamed members of the small group, the Mayberry police department. If 9/11 taught us anything, it taught us about the extraordinary heroism expected and given without qualm by America's finest, in large forces and small. Mayberry's finest deserve better. So did Officer Donald Dean. This Article will demonstrate this proposition by analyzing the prevailing law in the following sections: I. The Supreme Court, "Of and Concerning" and the Specter of Seditious Libel; II. The Seditious Libel Analogy and Suits by Government and Governmental Actors—Lower Court Precedent; and III. Dean v. Dearing and the "Of and Concerning" Requirement—A Wrong-headed Interpretation of First Amendment Doctrine.

I. THE SUPREME COURT, "OF AND CONCERNING," AND THE SPECTER OF SEDITIOUS LIBEL

An analysis of the Supreme Court's defamation precedent prior to the advent of the constitutional revolution wrought by New York
small town police forces

**Times Co. v. Sullivan** is quite revealing. The Court was exceedingly protective of the reputations of victims, both reaffirming the publication at peril doctrine of the common law and repudiating lower court attempts to remove discretion over interpretation of ambiguous statements from the jury. In two cases, the Court dealt with "of and concerning" issues. In **Peck v. Tribune Co.**, it held that the use of the plaintiff's picture accompanied by a statement and a name, though not hers, sufficed to imply that she was the named person and had made the statement, despite the attached name of the actual endorser. In **Baker v. Warner** it tacitly affirmed it was sufficient that plaintiff was identified by his governmental office, district attorney. The Court also upheld a criminal group defamation law in **Beauharnais**.
v. Illinois, based on the well documented history of criminal defamation law directed at individuals.

In the famous decision of New York Times Co. v. Sullivan the Court confronted a coordinated effort to squelch media criticism of official opposition in the South to desegregation. Rejecting any "talismanic immunity" of libel from free expression restraints, the Court viewed the case, involving "an expression of grievance and protest on one of the major public issues of our time," against "the backdrop of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Constitution-

14 343 U.S. 250 (1952).
15 Id. at 254-58. Justice Brennan for the Court in Garrison v. Louisiana, 379 U.S. 64, 70 (1964), briefly noted Beauharnais and concluded that the Louisiana criminal defamation statute was not such a "narrowly drawn" group vilification statute. Two members of the Court reaffirmed their view that Beauharnais was improperly decided. Id. at 79-80 (Black, J., joined by Douglas, J., concurring); id. at 82 (Douglas, J., with Black, J., concurring) (contending that Beauharnais was "decided by the narrowest of margins" and "should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment"). Beauharnais's status is still in dispute. Note that the "Skokie" case, which was denied certiorari by the Supreme Court, held it was implicitly overruled by New York Times and its progeny. Collin v. Smith, 578 F.2d 1197, 1204-05 (7th Cir.), cert. denied, 439 U.S. 916, 919 (1978) (Blackmun, J., with White, J., dissenting from denial of certiorari) (noting the Seventh Circuit's decision is "in some tension with Beauharnais," a case not "overruled or formally limited in any way"); see also Smith v. Collin, 436 U.S. 953, 953 (1978) (Blackmun, J., with Rehnquist, J., dissenting from denial of certiorari) (noting similar concerns in the Court's rejection of a stay of mandate and enforcement of the Seventh Circuit's decision). For other cases assuming Beauharnais is no longer viable precedent, see Tollett v. U.S., 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); United States v. Handler, 383 F. Supp. 1267, 1277-78 (D. Md. 1974); Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) (Wright, J., concurring). See also RODNEY SMOLLA, LAW OF DEFAMATION § 4:67 (2d ed. 2003) ("Sweeping prohibitions on hate speech, patterned on the group libel notions of Beauharnais, are unconstitutional.").
17 See id. at 294-95 (Black, J., concurring) (describing this effort as a "technique for harassing and punishing" the press and that eleven libel suits were pending against petitioner and five more against CBS); Kalven, supra note 5, at 200 ("[T]he inescapable impression is that . . . Alabama somehow pounced on this opportunity to punish the Times for its role in supporting the civil rights movement in the South. The judgment . . . represented a powerful blow in the South's counterattack.").
18 New York Times, 376 U.S. at 269. The Court rejected dicta to the contrary in prior cases. See also Kalven, supra note 5, at 201. Note that Alabama adopted a "truth in all its particulars" defense. New York Times, 376 U.S. at 279. The Court rejected any such limited truth defense as inconsistent with the First Amendment. Id. The Court also noted that the respondent's claim that the insignificant inaccuracies sufficed for damages to reputation "may itself raise constitutional problems." Id. at 289. But compare the analysis of Harry Kalven, Jr., who noted the truth defense's strict standards, but said: "[T]he conclusion that the falsity of the statements was harmless would not comport with established legal tests." Kalven, supra note 5, at 200 (citation omitted).
20 Id. at 270.
alizing the minority variant of the common law "fair comment" doctrine, the Court superimposed on state law a free expression-based requirement of "actual malice"—knowing or reckless disregard of falsity—by evidence of "convincing clarity," a qualified constitutional privilege limiting suits by "public officials" defamed as to their "official conduct."

21 Alabama's "fair comment" version, reflecting the majority view, protected only opinions based on true facts. Id. at 267.
22 See id. at 280 n.20 (noting this was the "consensus of scholarly opinion").
23 The co-petitioners were four individual black Alabama clergymen whose names were used in the advertisement apparently without their consent. Id. at 256–57, 260. The Court clearly based its holding on both free speech and press grounds. See id. at 256, 264 & n.4, 266, 268, 282 (referring to a "citizen-critic of government"); id. at 298, 304 (Goldberg, J., concurring) (speaking of the immunity of a "citizen and the press"); see also Rosenblatt v. Baer, 383 U.S. 75, 84 (1966) (treating a regular but unpaid columnist as shielded by the "constitutional protections afforded free expression" established in New York Times); Garrison, 379 U.S. at 74 (noting the "constitutional guarantees of freedom of expression" in a criminal libel prosecution of a prosecutor for statements at a press conference). For a more detailed analysis, see ELDER, supra note 2, § 7:4, at 77–78, suggesting that Chief Justice Burger's casual statement in Hutchinson v. Proxmire was clearly at odds with Court precedent and the steadfast position of lower courts. See Hutchinson v. Proxmire, 443 U.S. 111, 134 n.16 (1979) (stating that the Court had "never decided the question" of New York Times' application in the non-media context).
24 New York Times, 376 U.S. at 279–80. The term "actual malice" precipitated major confusion. The Court disavowed the term in favor of its definition, stating it "can confuse as well as enlighten." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 511 (1991). For purposes of this paper the author substitutes constitutional malice. Note that the Court treated this as a "fair equivalent" of executive official immunity, citing the absolute immunity given all federal officials within the "outer perimeter" of their employment. Barr v. Matteo, 360 U.S. 564, 573–75 (1959). The Court also noted comparable immunity given by states to high ranking officials, but conceded some gave only a qualified immunity to lower officials. New York Times, 376 U.S. at 282–83. In a later opinion by Justice Brennan, the Court took pains to disentangle the New York Times rule from the vagaries of any correlation to Barr. Rosenblatt, 383 U.S. at 84–85 n.10. This was wise, as linkage to the varying absolute or qualified privileges applicable to lower ranking state officials under the divided precedent would create an arbitrary and artificial variation in plaintiff requirements in libel actions from state to state. See David Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria—A Proposal for Revivification: Two Decades After New York Times Co. v. Sullivan, 33 Buff. L. Rev. 579, 591 n.49 (1984).
25 New York Times, 376 U.S. at 279–80. The Court also adopted an "independent examination" standard for Court review. Id. at 285–88. The Court noted that constitutional malice was the antithesis of "good faith." Id. at 286–87. For a detailed analysis of constitutional malice, see ELDER, supra note 2, ch. 7.
27 The Court's decision on the merits was unanimous. Three Justices concurred on absolute privilege grounds. New York Times, 376 U.S. at 293 (Black, J., with Douglas, J., concurring) (stat-
The above so-called "New York Times" or "Sullivan" constitutional malice rule was not, however, the only basis for finding a constitutional deficiency in Alabama libel law. The Court found a second defect in the state courts' application of the "of and concerning" or colloquium element of plaintiff's prima facie case. Affirming the dramatic doctrine espoused in City of Chicago v. Tribune Co. — "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence" — the Court held that the Alabama courts had impermissibly attempted to "sidestep this obstacle by transmuting criticism of government, however impersonal it may

28 New York Times, 376 U.S. at 256, 264, 268, 275, 279, 282-83, 292 n.30. Sullivan was one of three elected councilmen and testified he was the commissioner of public safety in charge of the police. Clearly, he was a "public official." The Court noted the Barr analogy but noted it had "no occasion" to decide "how far down into the lower ranks of government employees" the designation of "public official" status would extend. Id. at 283 n.23. It resolved this by adopting general criteria in Rosenblatt, 383 U.S. at 85-86. See discussion infra note 145.

29 New York Times, 376 U.S. at 256, 264, 268, 273, 279, 282-83. As to the "official conduct" criterion, the Court did not have to decide the precise boundaries but concluded that, if the charges referred to Sullivan at all, they implicated his official responsibilities. Id. at 283 n.23. The Court later expanded it to "anything which might touch on an official's fitness for office," including matters impugning both public and private character, such as "dishonesty, malfeasance, or improper motivation." Garrison, 379 U.S. at 77. For a detailed analysis, see Elder, supra note 2, § 5:2, at 33-43; Elder, supra note 24, at 644-59.

30 Colloquium refers to a defamation plaintiff's burden of pleading and proving that "the defamatory meaning attached to him" in a case where, on its face, plaintiff is not named. W. Page Keeton et al., Prosser and Keeton on Torts 783 (5th ed. 1984) [hereinafter Prosser and Keeton].

31 Although Justice Stewart once listed the "of and concerning" element as one upon which plaintiff had the evidentiary burden of "convincingly clear" evidence, Herbert v. Lando, 441 U.S. 153, 199 (1979) (Stewart, J. dissenting), there is otherwise no basis in Court precedent for this proposition. But see Deaver v. Hinel, 391 N.W.2d 128, 135 (Neb. 1986) (adopting a "clear and convincing" standard without analysis or discussion). In fact, the well established preponderance standard clearly applies. See infra notes 346-47. The Court approved in one of its more recent public person libel cases a set of instructions adopting a preponderance standard as to the "defamatory toward the plaintiff" issue. Harte-Hanks Communications, Inc., 491 U.S. at 661 n.2.

32 139 N.E. 86 (Ill. 1923).

33 New York Times, 376 U.S. at 291 (quoting City of Chicago v. Tribune Co., 139 N.E. at 88). For a detailed analysis of libel on governmental entities, see the text supported by infra notes 187-231.
seem on its face, into personal criticism, and hence potential libel, of the officials of whom the government is composed."\textsuperscript{34} The Court’s analysis left it ambiguous, however, whether this aspect of the case adopted an absolute prohibition or merely barred liability as to the "good-faith critic of government."\textsuperscript{35}

The Court’s evocative and eloquent reliance on the no-libel-of-government analogy should not and cannot camouflage the very limited nature of the Court’s holding, which rejects the attenuated linkage relied on by Sullivan in claiming he was libeled. A close examination of the full-page advertisement, entitled “Heed Their Rising Voices,”\textsuperscript{36} demonstrates convincingly the quantum stretch the Alabama courts made in finding colloquium.\textsuperscript{37} The introductory paragraph referenced the peaceful demonstrations of Southern blacks “in positive affirmation of the right to live in human dignity” under the Constitution, who were encountering “an unprecedented wave of terror by those who would deny and negate that document.”\textsuperscript{38} Paragraph three, the basis for Sullivan’s first claim, came next and read as follows:

\begin{quote}
Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here. \textsuperscript{39} \\
\textit{Id.} (emphasis added). Note that the “good faith critic” language may not be inadvertent. In its analysis of the absence of constitutional malice, the Court used the same “good faith” language as the antithesis of constitutional malice. \textit{Id.} at 286-87. “The entire posture of the case does . . . bespeak an absolute immunity from defamation liability for the critic of government, rather than the \textit{New York Times} qualified privilege for the critic of governors . . . .” Elder, supra note 24, at 584 n.20. One court interpreted this “good faith” language (not altogether convincingly) as “at first, puzzling.” Mullins v. Brando, 91 Cal. Rptr. 796, 801 n.7 (1970).

Such critics should prevail even if their defamatory utterance singles out the plaintiff by name. They do not speak with “actual malice.” The explanation lies . . . in a quirk of the common law of defamation. As far as the identity of the person defamed is concerned, it is a tort of strict liability . . . . A defendant may be in entire good faith when launching an “impersonal attack on governmental operations.” Thus he may accuse, on adequate though erroneous information, the police of a particular city of habitually rousting Negroes. Yet if by some “legal alchemy” the state may transform such an impersonal attack into a personal attack on the chief of police, the chief may quite easily be able to prove that as to him personally the plaintiff spoke with a reckless disregard for the truth. \textit{Id.}


\textsuperscript{37} See \textit{infra} text accompanying notes 39–74.

\textsuperscript{38} \textit{New York Times}, 376 U.S. at app. (emphasis added).
“In Montgomery, Alabama, after students sang ‘My Country, ’Tis of Thee’ on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.”\(^{39}\)

The fourth paragraph listed by name eight major Southern cities and made reference to “a host of other cities in the South”\(^{40}\) where “young American teenagers, in face of the entire weight of official state apparatus and police power, have boldly stepped forth as protagonists of democracy.”\(^{41}\) The fifth paragraph began with repetition of the same introductory words, a standard literary device for emphasis. The paragraph read:

“Small wonder that the Southern violators of the Constitution fear this new, non-violent brand of freedom fighter. . . . Small wonder that they are determined to destroy the one man who . . . symbolizes the new spirit now sweeping the South—the Rev. Dr. Martin Luther King, Jr., world-famous leader of the Montgomery Bus Protest.”\(^{42}\)

The sixth paragraph, containing the second libel complained of, picked up on the indeterminate “Southern violators”\(^{43}\) rubric:

“Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him several times—for ‘speeding,’ ‘loitering,’ and similar ‘offenses.’ And now they have charged him with ‘perjury’—a felony under which they could imprison him for ten years.”\(^{44}\)

Although not mentioned as part of the claimed libel, the “Southern violators” repetition was continued in the remainder of the paragraph. “Obviously, their real purpose is to remove him [Dr. King] physically as the leader . . . and thereby to intimidate all leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle.”\(^{45}\)

The last sentence of paragraph six, paragraph seven and three short ending paragraphs starting with the repetitive “We” (“We must heed their rising voices—yes—but we must add our own,” “We must extend ourselves above and beyond moral support and render the material help so urgently needed . . . . We urge you to join hands with

\(^{39}\) Id. at 257, app. (emphasis added).
\(^{40}\) Id. at app.
\(^{41}\) Id. (emphasis added).
\(^{42}\) Id. (emphasis added).
\(^{43}\) Id.
\(^{44}\) Id. at 257–58, app. (emphasis added except “felony” and “ten years”).
\(^{45}\) Id. at app.
our fellow Americans in the South . . .") explicitly solicited aid in support of Dr. King, demonstrating students and the right-to-vote campaign in response to this broad-based attack by "the Southern violators," both within and without government.

In sum, the "we" versus "they" advertisement was a call for material arms against an oppositionist culture's "unprecedented wave of terror," and a group libel with an exceptionally broad swathe—"the entire weight of official state apparatus and police power"—but hardly limited thereto. Justice Black, himself a native Alabamian, recognized that the background of the case was the "widespread hostility to desegregation" arising from the "efforts of many people, even including some public officials," to retain state-mandated segregation in public schools and public arenas and the "feelings of hostility" directed at the eastern press, the "outside agitators" exemplified by the petitioner.

Reading the advertisement as a whole, the Court could have concluded that the advertisement was reasonably construable only as applying to a large and indefinite class of "Southern violators." This was particularly true of paragraph six, with its lack of explicit geographical focus and its fungible use of "Southern violators," "they" and "their." As to both libel claims, the Court seemed to recognize the respondent's difficulty in distinguishing himself from the other "Southern violators," noting that several of the claims—the dining hall padlocking, the bombing of Dr. King's home, the assault on his person, and the perjury prosecution—involved non-police actors (i.e., other "Southern violators").

46 Id. at app.
47 Id.
48 Id.; see also Kalven, supra note 5, at 198.
It would seem more reasonable to assume that the "they" referred to in the [sixth] paragraph was intended to suggest no specific persons but rather the "Establishment" in which the plaintiff's role would be only incidental. Indeed, both paragraphs would seem to be concerned with such an amorphous group rather than individuals such as the plaintiff.

50 Id.
51 Id.
52 Id.; see also infra note 268 (providing an interesting example of an earlier parallel rural-versus-big-city contretemps on race in Kentucky).
53 Id.
54 Id.; see infra note 268 (providing an interesting example of an earlier parallel rural-versus-big-city contretemps on race in Kentucky).
55 New York Times, 376 U.S. at 294. This hostility was reflected in the jury's half-million dollar award in the absence of proof of actual damage. Justice Black said, "[V]iewed realistically," the record suggested Sullivan’s fame and finances were probably magnified by the advertisement.
56 Id. at 288. Even Sullivan testified that the alleged aspersions reflected on him, his commissioners, "and the community." Id. at 289-90 & n.28, 292.
The Court did not have to definitively resolve the broader issue of whether the advertisement could be reasonably construed only as a broad criticism of an oppositionist Southern culture because the Alabama courts had adopted a type of "captain-of-the-ship" vicarious responsibility, where respondent's position as commissioner of public safety sufficed to defame him when statements condemned the agency of which he had hierarchical supervisory responsibility. The "truckloads of police... ringed" (paragraph three) and that "[the police] ha[d] arrested [Dr. King] seven times" (paragraph six) did not contain "even an oblique reference" to Sullivan as an individual. Accordingly, support for the "asserted reference" had to be found in witness testimony. However, Sullivan's testimony and that of his six witnesses shared this common fatal defect: Any belief that he was portrayed as approving, directing, or otherwise personally implicated was based "solely on the unsupported assumption that, because of his official position, he must have been... the bare fact of [Sullivan]'s official position." In other words, it was this "captain of the ship"
vicarious responsibility that had "disquieting implications for criticism of governmental conduct" under the no-libel-of-government analogy.

Three aspects of the Court's opinion make it incontrovertibly clear that it was not barring actions under the small group defamation rule where plaintiff could demonstrate that he was one of a small group tainted by a collective inclusive disparagement of a governmental entity compromised of identifiable individuals who could each claim reputational taint under the well-established rule of the common law. The Court specifically cited to and relied upon *Ponder v. Cobb* as an exemplar of its constitutionalization of the minority fair comment privilege. Later, in rejecting the "bare fact of [Sullivan's] official position," the Court again juxtaposed and compared—as not containing that fallacy—*Ponder v. Cobb*, involving correspondence with the Governor imputing explicit election misconduct in a named town precinct. The North Carolina Supreme Court upheld the claim of the three unnamed but identifiable individuals known to or eminently knowable by the townspeople—the election registrar and two election judges. Lastly, the Court in *New\

indictment. Therefore, he asserted, the statements were false as to him. There is revealed here a new technique by which defamation might be endlessly manufactured. First, it is argued that, contrary to all appearances, a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place.... [T]he Court did not have to confront this logic, which remains temporarily buried for resurrection at some later time.

Kalven, *supra* note 5, at 199.

64 *New York Times*, 376 U.S. at 291. Note that the *New York Times* issued a retraction upon the demand of the governor, who claimed the advertisement charged him with "grave misconduct" and "improper actions and omissions" as governor and ex officio chair of the State Board of Education. *Id.* at 261. In a revealing admission as to why the retraction was given to him but not to Sullivan, the secretary of the Times testified that the governor was deemed an "embodiment" of the state and that further facts had demonstrated the advertisement referred to "the action of the State authorities and the Board of Education presumably of which the Governor is the ex-officio chairman." *Id.* at 262. By contrast, the same witness testified he did not view any of the language in the advertisement as referring to Sullivan. *Id.*

65 For a detailed analysis of subsequent precedent applying *New York Times* to suits by large and small governmental entities, see *infra* Part II.

66 *See infra* text accompanying notes 238–368.

67 *See New York Times*, 376 U.S. at 280 n.20 (listing *Ponder v. Cobb* as the first case).

68 126 S.E.2d 67, 80 (N.C. 1962).


70 *Id.* at 291 n.29.

71 *Ponder*, 126 S.E.2d at 69–71 (expressly imputing election fraud or "ballot-stuffing"). The plaintiffs in *Ponder* testified, but not on the issue of "of and concerning." Their testimony was directed at refuting defendant's charges. *Id.* at 72–73, 80–82.

72 The relevant correspondence made a number of charges. In the first letter, the only references were to election fraud in the county generally and that the specific precinct where plaintiffs worked had reported that fraud. *Id.* at 69. In the second letter there were similar references to the county generally and to "ballot-stuffing" "results" in plaintiffs' precinct. The de-
York Times unambiguously reaffirmed in general terms that witness testimony could be used to establish the "of and concerning" element even as to a purported libel not making even an "oblique reference" to plaintiff by name or office—but could not be relied on therein as to testimony based solely on vicarious linkage.\(^7\) However, the Court did not mandate such in small group cases. Any suggestion it so intended would be inconsistent with its references to Ponder v. Cobb.\(^7\)

Bailey v. Charleston Mail Ass'n,\(^7\) a second minority fair comment decision relied on by New York Times,\(^7\) also applied common law "of and concerning" rules. In that case plaintiff alleged he was both state road commissioner and a member of the state road commission and, as such, had purchased the "Silver Bridge" for the state. Although he was never identified by name or position—the only references were to the "Neely administration," "Neely Deal," "state officials," and "state administration"—the Supreme Court of West Virginia found no difficulty with plaintiff's allegation that the editorial imputed scandalous misconduct or neglect of office directly to him.

The continuing vitality post-New York Times of the traditional approach to "of and concerning" in the small group defamation setting is convincingly evidenced by the Court's decision in the criminal defamation case of Garrison v. Louisiana\(^7\) issued shortly thereafter. In an opinion by Justice Brennan, the author of the majority opinion in New York Times, the Court applied the New York Times "calculated

\(^{73}\) New York Times, 376 U.S. at 272–73, 289 (offering a summary of testimony).

\(^{74}\) 126 S.E.2d 67 (N.C. 1962).

\(^{75}\) 27 S.E.2d 837 (W. Va. 1943).


\(^{77}\) Bailey at 838–39.

\(^{78}\) Id. at 839–44.

falsehood" qualified constitutional standard to a criminal defamation conviction of a parish district attorney for disparaging the entire eight-person criminal district bench at a press conference in response to criticism issued the day before by one of the judges. An analysis of the criminal information contained verbatim in the state supreme court's opinion demonstrates that only one judge was mentioned (several times) in Garrison's statement. No member of the Court evinced the least difficulty with the "of and concerning" element or mentioned the "impersonal criticism of government" co-holding of New York Times despite the state high court's express finding that Garrison engaged in "personal attacks upon the integrity and honesty of [all] eight judges," the state attorney general's characterization of the statements as putting "the integrity of the entire judiciary of the State" in controversy, and the state court's approval of several defamed judges' (all but one unnamed in the statement) hearsay testimony as admissible proof of an "essential ingredient" of the charged crime.

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80 Garrison, 379 U.S. at 75-79.
81 Id. at 66 n.2.
82 Id. at 65, 66-67 & n.2. The Court noted Garrison's statement occurred in the context of a controversy with the judges over disbursements from a fines and fees fund to fund vice investigations. Id.
83 State v. Garrison, 154 So. 2d 400, 403-06, 417, 421-22 (La. 1963) (the references were otherwise to "the judges"). In the information each of the judges was mentioned by name, with the statement the judges "constituted all the entire bench" of the court. Id. at 403.
84 In a later case, Monitor Patriot Co. v. Roy, 401 U.S. 265, 273 (1971), the Court correctly characterized Garrison as involving a criminal conviction for disparaging "a group of state court judges"; see also Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968) (interpreting Garrison as a case involving remarks by Garrison "about the judges before whom he regularly appeared").
86 Garrison, 154 So. 2d at 418. Clearly, the Court was aware of and did not disagree with the state courts' interpretation that all the judges were inclusively defamed, as it quoted extensively during its constitutional malice analysis from the trial court opinion that Garrison could not have had "an honest belief[] that not one but all eight of these Judges of the Criminal District Court were guilty." Garrison, 379 U.S. at 78 (emphasis added) (quoting trial court's opinion).
87 Garrison, 154 So. 2d at 406 (emphasis added).
88 Id. at 424-25. This testimony was not introduced on the issue that the particular judges were singled out from the group. It is clear that the individual judges and the state supreme court found it sufficient that the entire bench was defamed. As one testifying judge said, "the bench, criminal bench, seems to be getting the worst of public opinion." Id. at 424. The court found the judges' testimony admissible on the ground it was necessary to show they were "exposed to hatred, contempt or ridicule." Id. at 425-26.
89 Id. at 425.
90 Since Justice Brennan was the author of both New York Times and Garrison, the only logical assumption is that he saw no inconsistency between the two—the former involved impersonal criticism of government under a "captain of the ship" analysis, whereas the latter involved a collective and inclusive small group disparagement under the general doctrine of the common law.
In *Rosenblatt v. Baer*, the Court was confronted with respondent’s claim that, six months after his discharge, he was personally defamed by, though not specifically named in, statements in petitioner’s regularly published, but unpaid, newspaper column. As the Court relied in substantial part on the conclusion that “the column on its face contains no clearly actionable statement,” the alleged libel is worth analyzing in depth. The “relevant part” was quoted in Justice Brennan’s opinion for the Court:

> Been doing a little listening and checking at Belknap Recreation Area and am thunderstruck by what am learning.

> This year, a year without snow till very late, a year with actually few very major changes in procedure; the difference in cash income simply fantastic, almost unbelievable.

> On any sort of comparative basis, the Area this year is doing literally hundreds of per cent BETTER than last year.

> When consider that last year was excellent snow year, that season started because of more snow, months earlier last year, one can only ponder following question:

> What happened to all the money last year? and every other year? What magic has Dana Beane [Chairman of the new commission] and rest of commission, and Mr. Warner [respondent’s replacement as Supervisor] wrought to make such tremendous difference in net cash results?

Justice Brennan’s analysis of the above language is exceptionally interesting. Examine the italicized matter—inflammatory language (“thunderstruck,” “difference in cash income simply fantastic, almost unbelievable,” “literally hundreds of per cent BETTER than last year,” and “magic... wrought to make such tremendous difference in net cash results”), the comparison between optimal and non-optimal weather conditions, limited “major changes in procedure” (impliedly eliminating another explanation), the positive juxtaposition of results of the Beane/Warner team with the negative results of “last year” and “every other year”—and Justice Brennan’s conclusions. He conceded, as he must, that the above text “could be read to imply peculation,” but also opined they “could also be read, in context, merely to praise the present administration.” He said “[p]ersons

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92 *Id.*
93 *Id.* at 79 (emphasis added).
94 *Id.* at 78.
95 *Id.* at 78–79 (alterations in original) (emphasis added).
96 *Id.*
97 *Id.*
98 *Id.* at 79; see also *id.* at 98 (Harlan, J., concurring in part and dissenting in part) (“[T]his Court... found this a permissible reading of the newspaper article.”).
99 *Id.* at 79 (emphasis added).
familiar” with the Area controversy “might well read it as complimenting the luck or skill of new management” and noted witnesses for petitioner testified they had so interpreted the column. Justice Brennan also noted respondent had supplied extrinsic evidence to support a libelous meaning—that the column “greatly exaggerated any new improvement under the new regime” and that “a large part of the community” interpreted the column as “imputing mismanagement and peculation during respondent’s [supervisory] tenure.”

Justice Brennan’s analysis is both skewed and contrary to the ordinary understanding of language. He emphasized that there was “no clearly actionable statement.” But that is not the law and never has been. The law looks at the context of the whole article or column. Viewed in that fashion, the most, and maybe only, defensible interpretation is that the prior regime engaged in “peculation,” as Justice Brennan quaintly termed it. Justice Brennan’s exceptionally strained interpretation resembles the antiquated, plaintiff unfriendly innocent construction/in mitiore sensu rule, which ignores the most likely or only defensible interpretation if there is any conceivable alternative interpretation, however unreasonable.

Clearly, the above defamation would have posed a jury question of libel in most jurisdictions under the majoritarian view of the common law. Consequently, Justice Brennan’s strained interpretation only

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100 Id. (emphasis added).
101 Id. Note that distortions may imply factual underpinnings to what may otherwise be opinion. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990) (“Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.”). These distortions may be relevant to determinations of fault. See ELDER, supra note 2, § 7:13, at 108–28.
102 Rosenblatt, 383 U.S. at 79 (emphasis added).
103 Id. (emphasis added). The use of the singular is telling.
104 ELDER, supra note 2, § 1:7, at 25–36; PROSSER AND KEETON, supra note 30, at 780–83. A charge need not be made directly—indeed, the venom and sting of an accusation is usually more effective when made by insinuations. The floating calumny which each reader may affix to any and every official act which his aroused suspicion may lay hold of is capable of inflicting graver injury and injustice than a direct, specific charge, which may be squarely met and refuted, if untrue. Palmerlee v. Nottage, 138 N.W. 312, 312 (1912); see also infra notes 242–53 (discussing Saenz v. Playboy).
105 ELDER, supra note 2, § 1:7, at 25–36; PROSSER AND KEETON, supra note 30, at 781–82.
106 Rosenblatt, 383 U.S. at 79.
108 ELDER, supra note 2, § 1:7, at 25–36; PROSSER AND KEETON, supra note 30, at 780–81; see also the Supreme Court cases cited supra notes 7, 10. The trial court’s instruction on point clearly reflects the consensus view:

An insinuation of a crime is actionable as a positive assertion if the meaning is reasonably plain and clear, and the putting of the words in the form of a question does not change
became one of constitutional significance because he inextricably linked the issue of defamatory content (i.e., "no clearly actionable statement" "on its face") with the entirely separate plaintiff requirement of reference to the plaintiff. This inextricable linkage is clear from Justice Brennan's opinion, e.g., where he followed his "merely to praise the present administration" construction with the conclusion, "[t]he only persons mentioned by name are officials of the new regime; no reference is made to respondent, the three elected commissioners, or anyone else who had a part in the administration of the Area during respondent's tenure."

Justice Brennan's ostrich-head-buried-in-the-sand approach also ignored the significant indicia mentioned on the face of the column that provided ample bases for a reasonable fact-finder to find reference to plaintiff. The indicia include the express mention of his former employment entity ("Belknap Recreation Area" or "Area"), the "this year" versus "last year" (and "every other year") dichotomy, the several explicit references to differences in income, the express naming of the new regime (Beane-Warner), and the positive/negative comparison between the new and old (but unnamed) Area regimes.

Justice Brennan also noted elsewhere in his opinion other factors a reasonable juror would have found relevant and important in resolving the reference/identifiability issue. For example, petitioner's status as a regular political columnist and "outspoken proponent of the change in operations" at the Area (which had occurred

the liability of the defendant if the form and sense of the question is defamatory or derogatory.

Rosenblatt, 383 U.S. at 98 n.* (Harlan, J., concurring in part and dissenting in part) (quoting trial judge's charge to the jury).

110 Id. at 79.
111 Id.
112 Id. at 77-78. Clearly, if the article had substituted "during the last administration" for "last year," the imputation of peculation to the former management entity would have been clear. It is suggested that the difference is de minimus in terms of how it would be interpreted by the average or any reasonable reader.

113 Id. at 78-79.
114 Id. at 80 n.2.
115 Id. at 78 (noting further his "sharply stated" views and prior disagreements with respondents and the three commissioners' actions). An analysis of the Appendices to the Supreme Court of New Hampshire brief in Baer v. Rosenblatt discloses the following: Rosenblatt did twenty-five "Out of My Head" columns featuring the Area, largely critical or questioning in tone. Four were after the libel in question. Twenty columns were published prior to the libel. Baer was mentioned twenty times by name. One other lengthy letter from the chair of the Belknap Ski Advisory Board responded in detail to Rosenblatt, referring to a prior column as "[h]alf-truths, distortions and downright falsehoods." Brief for Plaintiff at app. at 80-82, Baer v. Rosenblatt, 203 A.2d 773 (N.H. 1964) (No. 5211). Another lengthy letter by Bobby Baer attempted to respond to Rosenblatt's laundry list of questions to the Area Management (a column in which plaintiff was named three times in the first two paragraphs). In this letter Bobby Baer refers to "Manager Baer" once and the "Manager" four times. Id. at 85-87. Rosenblatt's
by act of the state legislature and resulted in plaintiff's discharge to give the new regime "a fresh start" would have been highly relevant. Further, a reasonable juror would have found relevant the Court's conclusion that the Area's management by respondent and the commissioners had become and "was still a matter of lively public interest"—extant proposals for further changes were circulating and "public interest in the way in which the prior administration had done its task continued [to be] strong."

The Court's opinion did not deal directly with this broader "of and concerning" approach based on an evaluation of the totality of the circumstances prevailing at the time of publication, the then and now prevailing view of the common law. The Court responded only to respondent's two proffered theories of reference/"of and concerning"/colloquium. The first theory proposed was that the column "cast suspicion indiscriminately" on all of the limited number of persons constituting the former management entity, "whether or not it [the jury] found that the imputation of misconduct was specifically made of and concerning him," an avenue available under state law and explicitly instructed on by the trial judge. However, that theory raised for the Court the issue of whether liability was barred by the Court's New York Times holding, "that in the absence of sufficient evidence that the attack focused on the plaintiff, an otherwise

next column mentions this letter by author and refers to another by Brenda Baer in the context of saying they could not be deemed answers to questions posed to "Fritzie Baer and County Commissioners." Id. at 88.

Rosenblatt, 383 U.S. at 78.

Id. at 87 n.14.

Id. (emphasis added). This analysis occurred in the context of discussing why "public official" status, if Baer had such, was not impacted by the fact he was no longer supervisor. Id. at 96. Note also that plaintiff had been in the same supervisory job for almost a decade. Baer v. Rosenblatt, 203 A.2d 773, 776 (N.H. 1964).

For a non-media example involving former government employees, see Davis v. Copelan, 452 S.E.2d 194, 202 (Ga. Ct. App. 1994), where the court upheld a finding of "of and concerning" as to plaintiff-discharged public hospital employees (part of a group of twenty-nine) in a publication to co-employees, portraying the class as "criminals or suspected criminals." Although plaintiffs were unnamed, the readers knew plaintiffs and the circumstances of their termination. This sufficed. Id.; see also DeBlasio v. N. Shore Univ. Hosp., 624 N.Y.S.2d 263, 264 (N.Y. App. Div. 1995) (upholding a claim by an unnamed, previously terminated physician where defendant-hospital's press release impugned personnel involved in a specified cancer treatment). Under the "well settled" rule, it sufficed that persons reading the text understood it as referring to plaintiff. The court agreed with plaintiff's allegation that he was one of the "handful" of physicians at the hospital employing this therapy and persons reading the release would have reasonably construed his termination as linked to overdosing patients with radiation, an imputation libelous per se. Id.

Rosenblatt, 383 U.S. at 79-80. Apparently, this management entity was respondent and the three county commissioners who hired him and to whom respondent was directly accountable. Id. at 77.

Id. at 80 (emphasis added).

Id.
impersonal attack on governmental operations cannot be utilized to establish a libel of those administering the operations."

In affirming that the evidence must be read in any such case as "specifically directed" at the plaintiff to avoid the "libel on government" prohibition, the Court strongly intimated, without resolving the issue, that "an explicit charge that the Commissioners and [respondent] Baer or the entire Area management were corrupt" would have supported a recovery by any member thereof, subject to compliance with the constitutional malice requirement. Indeed, the Court clearly suggested such an explicit statement would pose no constitutional difficulties: The express charge itself might suffice as evidence of specific direction at each small group member. Even where the imputation and reference were "merely implicit," as in the case before the Court, plaintiff could still recover by proffering extrinsic evidence that the defamatory statement referred to him or her. In such a situation a defamation defendant could not defend a suit by one such member of "an identifiable group engaged in governmental activity that another was also attacked."

123 Id. (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964)). But compare Justice Harlan's more reasoned interpretation: "I see no reason why that cause of action should fail if the jury finds that the article was read as accusing the three Commissioners along with Baer. This is a very different case from New York Times...." Id. at 100 (Harlan, J., concurring in part and dissenting in part) (emphasis added). Later he said: "I cannot understand why a statement which a jury is permitted to read as meaning 'A is a thief' should become absolutely privileged if it is read as meaning 'A, B, C, and D are thieves.'" Id.

124 Id. at 81 (majority opinion).
125 Id. The Court later reinforced this point specifically by comparing the instruction at issue therein to the "explicit charge" scenario: "Here, no explicit charge of peculation was made; no assault on the previous management appears." Id. at 82. (emphasis added). This analysis directly parallels the facts in Ponder v. Cobb, 126 S.E.2d 67 (N.C. 1962), discussed in New York Times. See supra text accompanying notes 68-74; infra text accompanying note 335. Note that the Rosenblatt dicta cannot be read as mandating an explicit charge as a precondition to liability. Saenz v. Playboy Enters., Inc., 841 F.2d 1309, 1316 (7th Cir. 1988) ("Taken in its proper context, the Court's language simply does not support the imposition of an 'explicit charge' requirement.").
126 Rosenblatt, 383 U.S. at 81 n.5.
127 Id. at 81. Note that no extrinsic evidence was required by the Court in such a scenario. Id. at 81-82.
128 Id. at 81.
129 Id. On remand the state supreme court referred the case to the trial court on the basis of both prior evidence—including Baer's responsibilities and duties—and any new evidence on the "of and concerning" issue. Baer v. Rosenblatt, 237 A.2d 130, 133 (N.H. 1967).
130 Rosenblatt, 383 U.S. at 81-82 (emphasis added). The use of the italicized language is interesting. Is such to be equated with the criteria for determining "public official" status discussed later in its opinion? See infra note 145. Or is it broader, to include public employees, none of whom qualify as "public officials," for example, a small group of public school teachers? See infra notes 315, 324-27, 475-80. Where the small group includes both "public officials" and non-public officials, the "specific reference" standards discussed in Rosenblatt apply to all, as in the case before it, involving elected commissioners and Baer, who the Court conceded might be able to bring himself outside the "public official" status. See infra note 145. The Court specifically cited to and relied on Gilberg v. Coffi, 251 N.Y.S.2d 823, 829 (N.Y. App. Div. 1964), where
The Court distinguished the above scenarios from the case before it where the jury was allowed to find both its libelous nature and reference to respondent from the challenged libel itself, even though it constituted "on its face . . . only an impersonal discussion of governmental activity." The Court opined broadly that the small group defamation jury instruction was constitutionally defective, because it allowed liability to be imposed upon a finding Baer was "one of a small group acting for an organ of government, only some of whom were implicated, but all of whom were tinged with suspicion . . . liability merely on the basis of his relationship to the government agency" whose activities were at issue.

Despite the Court's grandiloquent language, it is clear the Court was not invalidating the small group defamation theory in the doubly implicit setting but only finding defective the particular instruction amplifying the theory in this setting. This is shown by the Court's fixation on the jury's "too broad" discretion—to transform an impersonal critique of government into "of and concerning" Baer—found in italicized language identified in the trial court "small group" defamation instruction:

"It is sufficient if Mr. Baer . . . proves . . . that he was one of a group upon whom suspicion was cast . . . ; but Mr. Baer has the burden of showing that

the court held that plaintiff-partner in the defamed "Mayor's law firm" was required to show such specific reference. Plaintiff's subjective construction of the words and his receipt of a number of "unidentified telephone messages" calling his attention to the article did not suffice under New York Times. Id. Plaintiff also relied on the fact he was the active member of the firm—which contained only his and the mayor's names—and was in sole charge of cases in the city court referred to as a "clear conflict of interests" in defendant's defamatory remarks. Id. He also alleged he was known to the bar, bench and many litigants in this capacity, who identified him with the remarks. The court's sole response was that plaintiff could not rely thereon because he had failed to show either actual or constructive notice by defendant that plaintiff was a member of the "Mayor's law firm." Id. Apparently, had he shown such knowledge, his claim would have been viable. A dissenter trenchantly refuted the majority's knowledge analysis, pointing out that defendant undoubtedly knew plaintiff was the mayor's partner for two reasons—plaintiff's name was in the firm name and he was specifically mentioned in the newspaper article which defendant relied on in making his defamatory remarks. Id. at 833 (Beldock, P.J., dissenting). Compare Gilberg's implicit conclusion that proof of such knowledge would have sufficed with the Restatement (Second) of Torts illustration of how a member of a maligned large group—radio repairmen who solicited telephone calls and responded to contacts therefrom were engaged in a dishonest "racket" to remove radios and not return them—met the "of and concerning" by showing he was the sole local repairman who solicited business in this manner by advertising extensively for such calls. RESTATEMENT (SECOND) OF TORTS § 564A (1977). The illustration concludes: "Readers of the newspaper thus reasonably understand that the article is intended to have personal reference to him." Id. § 564A, illus. 5. Further compare Boyce & Isley, PLLC v. Cooper, 568 S.E.2d 893, 900 (N.C. Ct. App. 2002), where the court upheld a claim against a candidate for state attorney general by unnamed members of the opposing candidate's "law firm" composed of four lawyers.

131 Rosenblatt, 383 U.S. at 82.
132 Id. (emphasis added).
133 Id. at 82 n.6.
the defamation, if you find that there was one, either was directed to him or could have been as one of a small group."\textsuperscript{134}

The Court responded directly to the possible argument that the doubly implicit instruction directed the jury to find liability only if it found that the libel was aimed at Mr. Baer \textit{or} if it found that the libel aimed at Mr. Baer, along with a few others. Such a charge might not be objectionable; we do not mean to suggest that the fact that more than one person is libeled by a statement is a defense to suit by a member of the group. However, we cannot read the charge as being so limited.\textsuperscript{135}

In light of this "might not be objectionable" caveat, the true crux and narrow holding of the Court's "too broad" jury discretion concern as to the doubly implicit scenario was the "\textit{could have been}" alternative to the "directed to him" burden dictated by the "one or some" aspect. This defect could have been easily eliminated by deleting the "one or some" aspect, "either" and "could have been" and rephrasing this part of the instruction:

\textsuperscript{134} \textit{Id.} Although not italicized by the Court as problematic, the Court's holding appears to be specifically limited to scenarios where the trial court instructs on a situation involving small group defamation not involving a \textit{fully inclusive} defamation of the group but defamation of \textit{less than all} of the group. Note that the trial court did instruct that "an imputation of impropriety or a crime to one or some of a small group that casts suspicion upon all is actionable." \textit{Id.} (emphasis added). In other words, the "one or some of a small group" and "casts suspicion" or "suspicion was cast," are inextricably linked. \textit{Id.} This reflects the black letter rule found in the Restatement. \textbf{RESTATEMENT (SECOND) OF TORTS} \S 564A cmt. c (1977) ("Even when the statement does not purport to include all of the small group or class but only some of them, as in the case of 'Some of A's children are thieves,' it is still possible for each member of the group to be defamed by the suspicion attached to him by the accusation." (emphasis added)). In Rosenblatt this "one or some" language related back to "an imputation of impropriety or a crime." \textit{Rosenblatt, 383 U.S. at 80.} Clearly, respondent wanted to link himself to the implied "peculation." \textit{Id. at 82.} Baer had two problems in this respect. One, the implication of wrongdoing was \textit{not necessarily fully inclusive}. Peculation could conceivably have occurred without all of the Area's management entity being involved therein. Second, Baer's alternative non-small group defamation basis for "of and concerning" relied on the argument he was the "man in charge" responsible for financial matters. \textit{Id. at 83.} A fully inclusive small group defamation instruction would have been inconsistent with the latter. See infra text accompanying notes 139-45. Consequently, Baer's options were maximized and the ambiguity of the implication taken into account by the "\textit{could have been}" qualifier that ultimately decimated the instruction. For another interpretation of \textit{Rosenblatt} as a "one or some of a small group" case, see \textit{Scefo v. Rutgers University, 282 A.2d 445, 448 (N.J. Super. Ct. Law Div. 1971)}, where the court said \textit{Rosenblatt} supported this "established point of law." As a corollary, "an explicit charge directed to . . . the entire force would allow any member of the identified group to recover." \textit{Id.} However, in the case before it, there was no such "sweeping charge" directed at the entire group, i.e., the mounted police assigned to co-defendant university. \textit{Id.} Only two unidentified and unidentifiable officers were shown in a picture attached to co-defendant author's essay about an SDS-YAF confrontation. Moreover, additional factors undermined the identification issue. No reference was made to the photo in the article. No caption pointed out the two police in the photo as the "pigs" mentioned in the article. No other factors in the picture—such as crowds or other linking campus events—connected the photo to the confrontation. \textit{Id.} The "of and concerning" was only one ground of many—the matter was nonactionable name-calling, the matter was not false, and no constitutional malice had been alleged or shown. \textit{Id. at 449-51.}

\textsuperscript{135} \textit{Rosenblatt, 383 U.S. at 82 n.6.} (emphasis added).
"[A]n imputation of impropriety or a crime to all of a small group that casts suspicion upon all is actionable. It is sufficient if [plaintiff] . . . proves . . . that he was one of a group upon whom suspicion was cast . . . . [The plaintiff] [or plaintiff's name] has the burden of showing that the defamation, if you find that there was one, . . . was directed to him [or her] . . . as one of a small group."

These exceedingly modest changes would have little or no impact on actual litigation involving a small group governmental entity inclusively defamed. If that is all the Court required, as seems clear, one is tempted, with Shakespeare, to find such breath-takingly innocuous changes "much ado about nothing."

The Court also analyzed respondent's second alternative theory of reference, which it noted was substantiated by several witnesses' trial testimony, i.e., the column was interpreted by the jury as "referring specifically" to him as the individual "in charge" at the Area and "personally responsible for its financial affairs." Justice Brennan did not attack this alternative, and could not have, under the "impersonal criticism of government" analogy, because it was based on a jury

136 Id. If this defect is eliminated, the implicit assumption is that the Court does not preclude liability for members of the small group, e.g., the former Area management entity, comprised of respondent and the three county commissioners. Note that the Area was not a separate legal entity from the county commission, which employed Baer. See Cox Enters. Inc. v. Carroll City/County Hosp. Auth., 273 S.E.2d 841, 843 (Ga. 1981) ("The manager was employed by the county commissioners and the Recreation Area itself was not a separate legal entity.").

137 This conclusion is particularly true in light of another part of the trial court instruction, not quoted by Justice Brennan but quoted by Justice Harlan, where the "could have been" language was absent.

'Now, as to any part of the article which you, if you do, find defamatory, and that Mr. Baer was intended, or he with a few others was intended, he and a small group, if you find that it was derogatory of him and charged him with a crime, held him up to scorn and ridicule, that he was the fellow, either singly or in a small group, then you can go on to consider . . . whether the publication was privileged or justified.'

Rosenblatt, 383 U.S. at 98 n.* (Harlan, J., concurring in part and dissenting in part) (quoting the trial court's charge to the jury) (emphasis added). As Justice Harlan said, the trial court instructions are "conventional tort law" reflecting "an eminently sound" and "salutary" principle, id. at 98-99, despite Justice Brennan's crankishness and hypertechnical parsing of the instruction.

138 WILLIAM SHAKESPEARE, MUCH ADO ABOUT NOTHING.

139 Rosenblatt, 383 U.S. at 83 (majority opinion).

140 Id. The Court noted in another respect that plaintiff's theory of reference/"of and concerning" might also augur in favor of "public official status" since he contended his position in the Area's management was "so prominent and important" that the local public treated him as the individual accountable and, therefore, "chargeable with its failures and to be credited with its successes." Id. at 87. Also see Justice Black's conclusion supportive of absolute privilege in which he viewed the case as "discussing the way an agent of government does his governmental job." Id. at 94 (Black, J., concurring and dissenting). Note Justice Brennan seemed to be unaware of the anomalies he created. Baer was arguably prominent enough that this worked against him on the status issue while such prominence was irrelevant as to his identification/"of and concerning" as a member of the maligned Area management!

141 Id. at 83-88 (majority opinion).

142 Id. at 100 (Harlan, J., concurring in part and dissenting in part).
conclusion Baer was the individual personally responsible for the "peculation."\textsuperscript{143} The Court's sole ground for constitutional inadequacy was the impropriety of the jury instruction on constitutional malice\textsuperscript{144} if respondent was in fact a "public official" under the Court's newly announced standards.\textsuperscript{145}

The Court's exceedingly narrow holding in \textit{Rosenblatt} was exemplified two years later in its interpretation and application of \textit{New York Times} in \textit{Pickering v. Board of Education},\textsuperscript{146} in the context of employer discharge of a teacher who wrote a letter to the editor critical of the city board of education. Although its members were not specifically named, the board charged that both it as an entity and its individual members' reputations were disparaged.\textsuperscript{147} The Court found the teacher to be functioning as a prototypical public citizen and concluded that he could not be sanctioned without a showing of knowing or reckless disregard of falsity under \textit{New York Times}, noting that neither the board of education nor the individual member(s) thereof could have sued for libel except upon such proof.\textsuperscript{148} Interestingly, no

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\textsuperscript{143} Id. at 82 (majority opinion).
\textsuperscript{144} Id. at 83–84.
\textsuperscript{145} The Court took up the issue left unresolved by \textit{New York Times} and provided two general tests for "public official" status. \textit{See supra} note 28. The status "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." \textit{Rosenblatt}, 383 U.S. at 85. It also applied to "position[s] in government [of] 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 . . . ." \textit{Id.} at 86. To the suggestion that this might extend to the night watchman, \textit{see id.} at 88–89 (Douglas, J., concurring), the Court appended an important caveat: \textit{New York Times} did not apply merely "because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation." \textit{Id.} at 86 n.13. Accordingly, the governmental employee's position "must be one which would invite public scrutiny and discussion of the person holding it, \textit{entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.}" \textit{Id.} (emphasis added). On the impact of the mere governmental employee versus "public official" dichotomy on the small group defamation rule, \textit{see the discussion infra text} accompanying notes 475–80. For general discussions, \textit{see ELDER, supra} note 2, § 5:1, at 3–33; \textit{Elder, supra} note 24. The Court noted the possibility that Baer could bring himself outside the "public official" realm. \textit{Rosenblatt}, 383 U.S. at 87. Justice Douglas said respondent might have been "a hybrid in the nature of independent contractor." \textit{Id.} at 91 n.5 (Douglas, J., concurring). On remand, the court imposed the burden of showing "public official" status on defendant and concluded it was not enough that he showed Baer had general responsibility for financial matters at the Area and general powers of supervision under the commissioners' control. \textit{Rosenblatt v. Baer}, 237 A.2d 130, 132–33 (N.H. 1967).
\textsuperscript{146} 391 U.S. 563 (1968).
\textsuperscript{147} Id. at 567, 570–74.
\textsuperscript{148} Id. at 573–74.
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\textit{It is . . . perfectly clear that, were [Pickering] a member of the general public, the State's power to afford the . . . Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in \textit{New York Times}.}
member of the Court treated the board as a City of Chicago equivalent and no member of the Court treated individual members thereof as subject to any First Amendment-mandated small group defamation "of and concerning" restrictions.

Three years later, in Rosenbloom v. Metromedia, Inc., the Court majority fleetingly adopted the New York Times constitutional malice standard in a private person matter of general or public interest case involving two sets of telecasts, one about the original arrest wherein plaintiff was named and a second series of thirteen broadcasts over a twelve-day period, none of which expressly identified the plaintiff by name. The Court's plurality opinion by Justice Brennan specifically synthesized (and tacitly affirmed the propriety of) the trial court's instruction—that "a reasonable listener would conclude that the defamatory statement referred to petitioner." Despite defendant's contention that plaintiff had offered no witness testimony as to the second series, the trial court left the issue to the jury to resolve under the common law "reasonable listener" totality of the "surrounding circumstances" standard. Under the latter plaintiff was identifiable as the sole Philadelphia distributor of nudist periodicals then seeking injunctive relief in federal courts against raids by law enforcement authorities.

Similarly, in Hutchinson v. Proxmire, the Court referenced a television appearance by Proxmire, the defendant senator, among the alleged libels and noted that he had described plaintiff's research but

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Id. at 573 (emphasis added). Analogizing to the district attorney-judge setting in Garrison, see supra notes 79–90, the Court held that First Amendment protection must be accorded this speech "despite the fact that the statements are directed at their nominal superiors." Pickering, 391 U.S. at 574 (emphasis added).

149 Id. at 575–82 (Douglas, J., with Black, J., concurring); id. at 582–84 (White, J., concurring in part and dissenting in part). For a parallel dissent in the Illinois Supreme Court, see Pickering v. Bd. of Educ., 225 N.E.2d 1, 7–10 (Ill. 1967) (Schaeffer, J., with Solfisburg, C.J., dissenting).


151 Rosenbloom, 403 U.S. at 33.

152 Id. at 34.

153 Id. The Court quoted a "pretty much" typical example, citing arguments from one distributor and two publishers seeking (but not getting) injunctive relief from the district attorney, police commissioner and local newspaper. Id.

154 Id. at 39.

155 Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737, 744 (E.D. Pa. 1968) ("The law is clear that [i]t is the fact that the plaintiff is not specifically named in the [publication] is not controlling. A party defamed need not be specifically named, if pointed to by description or circumstances tending to identify him . . . .") (quoting Cosgrove Studio & Camera Shop, Inc. v. Pane, 182 A.2d 751, 753 (Pa. 1962)) (alteration in original) (emphasis added)).

156 Id.

not named him.\footnote{Id. at 117 n.4 (noting parties’ stipulation that defendant referred to plaintiff’s research on at least one television show). The Court also mentioned a 1976 newsletter in which the “Golden Fleece” awards to governmental entities providing wasteful grants were listed with reference to specific projects, but plaintiff was not named. The newsletter referred to plaintiff’s purported “why the monkeys clench their jaw” research as “monkey business” which had been dropped by the relevant government agencies. \textit{Id.} at 117.} Resolving issues of status and Speech and Debate Clause protection favorably to the plaintiff, Hutchinson, the Court reversed and remanded the case to the Seventh Circuit. Again, as in \textit{Rosenbloom}, no member of the Court discussed the possibility of any constitutional restrictions on the “of and concerning” issue on remand. The appellate court had not definitively resolved the latter local law issue, reaching \textit{only} the controlling First Amendment issue.\footnote{The appellate court took no position on the district court’s conclusion that neither the “brief and innocuous” television reference nor the newsletter statements sufficed for the certainty required for “of and concerning” under state law.} The appellate court took no position on the district court’s conclusion that neither the “brief and innocuous” television reference nor the newsletter statements sufficed for the certainty required for “of and concerning” under state law.\footnote{Id. at 133–36; \textit{see also} text accompanying \textit{infra} note 416 (discussing public figure status).}

Shortly thereafter, the Court raised doubts about \textit{New York Times’} “impersonal criticism of government” aspect, at least as to its possible application in the malicious prosecution context,\footnote{Hutchinson, 443 U.S. at 123–33 (finding press releases and newsletters were outside the absolute immunity provided by the Speech and Debate Clause).} by remanding \textit{City of Long Beach v. Bozek}\footnote{Hutchinson v. Proxmire, 579 F.2d 1027, 1034 (7th Cir. 1978) (“[W]e agree with the district court that summary judgment was proper based upon first amendment grounds. Consequently, we need not decide whether the statements were actionable defamation under local law.”).} to the California Supreme Court for

\footnote{For a brief discussion of the malicious prosecution cases, see \textit{infra} note 189.}
determination whether its judgment was "based upon federal or state constitutional grounds, or both." In this case the California Supreme Court had held that a malicious prosecution proceeding brought by a municipality victor in false arrest litigation for reimbursement of litigation expenses was barred, in part, by the absolute privilege afforded to criticism of government under *New York Times* and its progeny. On remand, the California Supreme Court found that the petition clause of the California Constitution was an independent basis for its earlier decision, thereby depriving the U.S. Supreme Court of a basis for further review.

The Court returned to the Petition Clause issue in 1985 in *McDonald v. Smith*, the last of its major cases analyzing the qualified/absolute immunity dichotomy in First Amendment libel cases. This case involved a letter to President Reagan opposing plaintiff's nomination as U.S. Attorney. In a powerful opinion the Court unanimously rejected preferred status for the Petition Clause, finding that it was "cut from the same cloth" as other clauses in the First Amendment. The Court exclusively relied on its analysis of the common law qualified public interest privilege in a parallel appeal to the President 140 years earlier as conclusive of the Framers' intent.

Following the reasoning of *Garrison v. Louisiana*, the Court expressly rejected absolute privilege (as did Justice Brennan's equally strong concurrence), finding "[t]he right to petition is guaranteed; the claratory judgment action against initiative proponents even though they were private parties. City of San Diego v. Dunkl, 103 Cal. Rptr. 2d 269, 278 (Cal. Ct. App. 2001) ("Nothing in *Bozek* prevents a public or private entity from seeking, in an otherwise authorized action, a judicial declaration of the invalidity of a proposed ballot measure, even where private citizens are the proponents of same.").

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166 City of Long Beach v. Bozek, 645 P.2d at 143 ("[T]he bringing of suits against the government is absolutely privileged and cannot form the basis for imposition of civil liability for malicious prosecution.").
168 *Id.*; see also Milkovich v. Lorain Journal Co., 497 U.S. 1, 10-12 n.5 (1990) (noting that the Ohio Supreme Court could address the issue of greater state constitutional protection for opinion on remand). A few states have done so, including Ohio. *See Elder, supra* note 2, § 8:23, at 66-70.
169 472 U.S. 479 (1985) (holding that the Petition Clause does not provide government officials absolute immunity from libel charges).
170 The participating Justices were unanimous. Justice Powell did not participate. *Id.* at 480.
171 *Id.* at 482.
172 *Id.* at 484 ("Nothing presented to us suggests that the Court's decision not to recognize an absolute privilege in 1845 should be altered." (construing White v. Nicholls, 44 U.S. 266 (1845))).
173 *Id.* (citing *Garrison* for the proposition that petitions to the President are not protected from libel claims).
174 *Id.* at 486-87 (Brennan, J., concurring) (quoting at length from *Garrison*). [E]xpression falling within the scope of the Petition Clause, while fully protected by the actual-malice stan-
right to commit libel with impunity is not."

The Court affirmed both lower courts, noting the reasoning of the district court, which had expressly based its qualified constitutional privilege conclusion on New York Times' reliance on Ponder v. Cobb's petition clause/small group defamation setting reasoning.

In sum, the Supreme Court's jurisprudence, common law and constitutional, generally reflects the views of the common law and the Restatement (Second) of Torts on the "of and concerning"/reference/colloquium issue. Plaintiff can meet the latter by showing plaintiff's picture was used, office was identified, or that the totality of the facts and circumstances known to the reader or viewer support such a finding. The small group libel doctrine, at least as to fully inclusive groups of eight individuals or fewer (the Garrison scenario), also seems to be available to plaintiff. The tepid Rosenblatt incursion thereon appears narrowly limited to libel not clearly libelous on its face and where the jury instruction contains the amorphous "could have been" language in its instruction. The Court's constitutional jurisprudence evidences strong preference for the "calculated falsehood" standard established by New York Times and Garrison. Lastly, it is not ineluctably clear that the Court's City of Chicago interpretation portends absolute protection or whether the Court would affirm it as such or extend the reasoning to the malicious prosecution setting.

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173 Smith v. McDonald, 562 F. Supp. 829, 841 (M.D.N.C. 1983) (noting that "when the Supreme Court fashioned the requirements that plaintiffs must meet to recover in libel actions involving issues of free speech, it looked for guidance to [Ponder v. Cobb]").


177 See supra text accompanying note 12.


179 See Henry v. Pearson, 158 So. 2d 695, 699 (Miss. 1963), rev'd on other grounds sub nom. Henry v. Collins, 380 U.S. 356, 357 (1965) (explaining that two of the three libels identified plaintiffs by name, the third referred to them by position, e.g., county attorney of a specific county and chief of police of "my town"); see also supra text accompanying note 13.

180 See supra text accompanying notes 38-53.

181 See infra text accompanying notes 283-330.

182 See supra text accompanying note 12.

183 See supra notes 66-73, 79-90.

184 See supra notes 120-38.

185 See supra notes 16-29, 79-90, 144-45, 148-56, 169-77.

186 See supra notes 147-49, 163-68.
II. THE SEDITIOUS LIBEL ANALOGY AND SUITS BY GOVERNMENT AND GOVERNMENTAL ACTORS—LOWER COURT PRECEDENT

Despite clear intimations in the Supreme Court’s jurisprudence that the issue is not unambiguous, and the caveat as to municipal corporations by the Restatement (Second) of Torts, the established consensus of the somewhat limited precedent at lower levels views

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187 See supra text accompanying notes 35, 146-49.

188 See RESTATEMENT (SECOND) OF TORTS § 561 caveat 2 (1977). The Restatement expressed no opinion on "whether there may be liability for defamation of a municipal corporation and if so under what circumstances." In the comment on the caveat the drafters noted that the limited precedent accorded absolute immunity to defamers and concluded that "[n]o doubt" the rule therein was linked to the large group defamation precedent. Id. cmt. d. However, in the limited precedent the matter in question was privileged and might not be determinative for the future. Id. One decision rejected the analogy to private, not-for-profit corporations on the basis of the city's funding base, the power of taxation. Johnson City v. Cowles Communications, Inc., 477 S.W.2d 750, 753 (Tenn. 1972) (holding that criticisms of government are absolutely privileged).


the right of both media and non-media critics\textsuperscript{190} to criticize government and large governmental entities as “now an indisputable axiom”\textsuperscript{191} of freedoms of expression found in the state\textsuperscript{192} and federal constitutions.\textsuperscript{193} The decisions universally rely on the notion of popular sovereignty\textsuperscript{194} as “an American birthright”\textsuperscript{195} and the “bedrock of

\textsuperscript{190} The cases uniformly accord general approval to protection of both media and private critics. \textit{See} Cox Enters., 273 S.E.2d at 842; City of Chicago v. Tribune Co., 139 N.E. 86, 90–91 (Ill. 1923); State v. Time, Inc., 249 So. 2d 328, 331–32 (La. Ct. App. 1971); \textit{Johnson City,} 477 S.W.2d at 753–54. Several have actually involved non-media defendants. \textit{See} Coll. Sav. Bank, 919 F. Supp. at 757–66 (extending protection to a business competitor in a prepaid college tuition program); \textit{Johnson,} 522 F. Supp. at 1150–58 (involving resident’s letters to newspaper and Board of Selectmen); City of Albany v. Meyer, 279 F. 213, 214–15 (Cal. Dist. Ct. App. 1929) (involving an action against the author of an article describing the city as bankrupt); Aluminum Co. of Am. v. City of Lafayette, 412 N.E.2d 312, 314 (Ind. Ct. App. 1980) (addressing corporate challenge to city’s compliance with annexation responsibilities); \textit{Wolf,} 429 A.2d at 432–33 (involving a taxpayer association and its members); Capital Dist. Reg’l Off Track Betting Corp. v. N.E. Harness Horsemen’s Ass’n, 399 N.Y.S.2d 597, 598–99 (N.Y. Sup. Ct. 1977) (involving a newsletter of a non-profit corporation alleging various legal and financial improprieties); \textit{Port Arthur Indep. Sch. Dist.,} 70 S.W.3d at 351 & n.1 (providing protection to the owner of a website, called the \textit{South East Texas Political Review,} and refusing to draw any distinction between the website and owner).

One case applying the non-standing rule involved a sports franchise leaving the city and purportedly hurting the city’s sports image. HMC Mgmt. v. New Orleans Basketball Club, 375 So. 2d 700, 710 (La. Ct. App. 1979).

\textit{Cox Enters.,} 273 S.E.2d at 843 (quoting \textit{LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW} §§ 12–10, 12–11 (1st ed. 1978)); \textit{see also} SMOLLA, supra note 15, § 4:76, 4–122.2 (“[G]overnmental corporations are not like other corporations for First Amendment purposes, precisely because they are the government”); \textit{id.} at 4–124 (“[T]he only position consistent with the common law traditions and constitutional principles is that all governmental and quasi-governmental entities are flatly barred from maintaining an action for defamation”).

\textit{Meyer,} 279 P. at 214–15 (finding that the “abuse” limitation on free speech was no bar to the privilege); \textit{City of Chicago,} 139 N.E. at 87–91 (same); \textit{Wolf,} 429 A.2d at 433 (noting that the state constitution “abuse” limitation on free speech did not “militate against” absolute First Amendment privilege); \textit{Capital Dist. Reg’l Off Track Betting Corp.,} 399 N.Y.S.2d at 598 (dicta). Of course, \textit{City of Chicago} predates the Court’s recognition of the First Amendment as applicable to the states. \textit{See} J. NOWAK & R. ROTUNDA, CONSTITUTIONAL LAW 429, 431 (6th ed. 2000) (noting that one of the Court’s first statements assuming incorporation of the First Amendment was \textit{Gitlow v. New York,} 268 U.S. 652 (1925)).


\textit{Time, Inc.,} 249 So. 2d at 331.
democracy,"\(^{196}\) and reject standing\(^{197}\) of government or governmental entities to sue as "out of tune with the American spirit, and [having] no place in American jurisprudence."\(^{198}\)

Under this absolute privilege—with its disallowance of liability for knowing or reckless falsity\(^{199}\) and inquiry into good faith\(^{200}\)—inequities may periodically seem to arise.\(^{201}\) However, as one court opined, "if unfairness there must be, we deem it preferable that it should be on the side of freedom of speech."\(^{202}\) Another concluded, "if critics of government, be they citizens or press, speak only at the risk of being prosecuted for libel or slander, few will criticize government at all."\(^{203}\) Accordingly, absent the "powerlessness of government"\(^{204}\) to sue, every critic faced with difficult to prove charges\(^{205}\) would be silenced by the specter of threatened litigation.\(^{206}\) Nothing could be "more

\(^{196}\) HMC Mgmt., 375 So. 2d at 710; see also Meyer, 279 P. at 215 ("[I]f the administrative officers of any branch of the government may use the process in libel, either civil or criminal, to control criticism of their financial policies in the management of the government’s business, then the constitutional guaranty of free speech becomes a shadow without a substance.").

\(^{197}\) A civil action was "as great, if not a greater, restriction" on free speech because it eliminated the restrictions imposed by the law on criminal prosecutions, including, for example, damages greater than the criminal penalty, lack of a proof beyond a reasonable doubt standard and lack of a presumption of innocence. City of Chicago v. Tribune Co., 139 N.E. 86, 90 (Ill. 1923); see also Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534, 548 (H.L. 1993) (quoting City of Chicago). This analysis was likewise adopted by the Court in New York Times Co. v. Sullivan as to libels by individuals. 376 U.S. 254, 277–78 (1964).

\(^{198}\) City of Chicago, 139 N.E. at 91; see also Meyer, 279 P. at 215; Time, Inc., 249 So. 2d at 330; Am. Broad. Co., 435 N.E.2d at 1134; Johnson City, 477 S.W.2d at 753–54.


\(^{200}\) Wolf, 429 A.2d at 432–33.


\(^{202}\) Id.; see also Progress Dev. Corp. v. Mitchell, 219 F. Supp. 156, 163 (N.D. Ill. 1963) (postulating "a firm policy permitting the widest latitude in criticism of a governmental entity").


\(^{204}\) Cox Enters., 273 S.E.2d at 846.

\(^{205}\) City of Chicago v. Tribune Co., 139 N.E. 86, 89 (Ill. 1923); Am. Broad. Co., 435 N.E.2d at 1135; Johnson City v. Cowles Communications, Inc., 477 S.W.2d 750, 754 (Tenn. 1972); see also Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534, 548 (H.L. 1993) ("Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available.").

destructive" of democracy than empowering "a corrupt government to stifle all opposition by free use of the public treasury to silence critics.\textsuperscript{207}

All manner of governmental entities—an agency of the federal government,\textsuperscript{208} the state\textsuperscript{209} or a state entity,\textsuperscript{210} municipal corporations of all sizes,\textsuperscript{211} local boards,\textsuperscript{212} governmental subdivisions,\textsuperscript{213} quasi-governmental entities with specialized functions\textsuperscript{214}—are covered by this prohibition. Moreover, the prohibition applies to all types of criticism of government,\textsuperscript{215} even as to a government entity acting in a
proprietary capacity and even where its critic is a competitor. It has been suggested that such absolute immunity is even more compelling in cases of the government acting proprietarily because of the enhanced opportunities for corruption, incompetence and efficiency, and the concomitant augmented inducement to silence critics.

In sum, government, whether suing in its own name, on behalf of its citizens under parens patriae, on behalf of a maligned sub-

ruption); *Washington Post*, 482 F. Supp. at 898–99 (E.D. Pa. 1979) (dismissing claims over a newspaper story chronicling a history of alleged police brutality); *Progress Dev. Corp.*, 219 F. Supp. at 158, 163 (alleging violations of civil rights); *Meyer*, 279 P. at 214–15 (Cal. Ct. App. 1929) (involving an article describing the city as bankrupt); *Cox Enters.*, 273 S.E.2d at 843–47 (involving mismanagement of a hospital with patient care complications and economic distress); *City of Chicago v. Tribune Co.*, 139 N.E. 86, 909–91 (Ill. 1923) (involving statements alleged to have intended to destroy the city’s credit standing); *Comet Press Newspaper, Inc.*, 528 So. 2d at 592 (involving statements over flooding due to a hurricane): *HMC Mgmt.*, 375 So. 2d at 710 (involving the validity of a lease agreement for playing professional basketball games in the Superdome); *Wolf*, 429 A.2d at 431 (N.J. Super. Ct. Law Div. 1981) (listing allegations of misuse, loss, or possible embezzlement of school funds by a school board); *Capital Dist. Reg’l Off Track Betting Corp.*, 399 N.Y.S.2d at 598 (involving violations of law in operating pari-mutuel betting system); *Slow*, 644 N.E.2d at 676 (imputing tax unfairness); *Aluminum Co. of Am.*, 412 N.E.2d at 314 (imputing non-compliance with annexation duties); *Am. Broad. Co.*, 435 N.E.2d at 1133, 1136–37 (involving allegations of inviting or permitting pollution, resulting in an “unwhole-some environment”); *Johnson City*, 477 S.W.2d at 751–54 (citing criticisms to the effect that a municipality is backward, totalitarian, “represents everything terrible,” lawless, and a place where businesses should not locate as falling within the privilege); *Port Arthur Indep. Sch. Dist.*, 70 S.W.3d at 351–59 (involving a “huge fight” at a prom sponsored by a school district).

Dean Prosser has been traditionally critical of *City of Chicago*. See PROSSER AND KEETON, supra note 30, § 111, at 780 (1984) ("[T]he decisions have turned upon the particular facts and questions of privilege, and have been criticized"). One noted commentator criticizes this as "one of the few statements (such as it is) in that text that appears clearly unsound." See SMOLLA, supra note 15 § 4:76, 4–122 n.16; see also *Port Arthur Indep. Sch. Dist.*, 70 S.W.3d at 351–59 (Burgess, J., concurring) (concurring in the result only, he would have saved the broader issue of whether there might exist a case for proper use of a defamation claim by a governmental entity, "particularly" one "solely performing a proprietary function"); cf. *DOBBS*, supra note 58, at 1139 (noting that, "[i]t may be arguable that a false publication of fact harmful financially to a governmental entity should be actionable, if not as defamation then as injurious falsehood," but further noting that *City of Chicago* rejected this idea).


220 *Washington Post*, 482 F. Supp. at 898–99 (holding that the city cannot maintain an action for libel on its own behalf); *State v. Time, Inc.*, 249 So. 2d 328, 329 (La. Ct. App. 1971) ("[T]he Court cannot accord with plaintiff’s conclusion that the state is a person for purposes of the law of defamation and libel."); *Wolf*, 429 A.2d at 435 ([G]overnmental entities, such as plaintiff here, should not have the right to maintain actions for defamation in their own right.").
entity therein, or in the interest of protecting individual members of a disparaged group, has no standing to sue for libel in the United States (or Great Britain). The Supreme Court's repeated refusal to protect "calculated falsehood" has not effected the fundamental principle that a government has no claim for libel. Indeed, courts will scrutinize claims carefully to make sure that a lawsuit is not subterfuge for a governmental entity suit. Thus, a suit by the chief of police and a police officers' association was rejected where the real party in interest was the city police department. The court

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222 Washington Post, 482 F. Supp. at 899 (finding Philadelphia's parens patriae theory unpersuasive in libel suit brought on its own behalf and on behalf of the citizens of the city); Time, 249 So. 2d at 329, 333-34) (citing in part the large group non-liability rule).


224 Id.

225 In Derbyshire County Council v. Times Newspapers Ltd., [1993] A.C. 534, 539-40 (H.L. 1993), the House of Lords cited to New York Times and City of Chicago and concluded that a local authority had no standing to sue for libel under the common law, noting "it is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech." Id. at 547. The House of Lords noted that if local authorities could sue, so could central government entities—in either case actions would "place an undesirable fetter on freedom of speech." Id. at 549. The House of Lords did not reach the ground principally relied on by the Court of Appeals, Article 10 of the European Convention of Human Rights and Fundamental Freedoms. Id. at 550 (referring to the lower court decision and Article 10). The House of Lords specifically noted that the local authority as an entity was different from the individual officers thereof suing as individuals:

A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day-to-day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceedings for defamation.

Id. (emphasis added). In addition, the controlling entity had the right to respond publicly and in the council chamber. Id.

226 See supra text accompanying notes 16-29, 79-90, 141-45; infra text accompanying notes 403-44, 470-71.

227 City of Chicago v. Tribune Co., 139 N.E. 86, 90-91 (Ill. 1923) ("Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished, but all other utterances or publications against the government must be considered absolutely privileged."); Weymouth Township Bd. of Educ. v. Wolf, 429 A.2d 431, 433 (N.J. Super. Ct. Law Div. 1981) (acknowledging special constitutional protection of criticism of government).

228 The seditious libel analogy applies only, however, to governments in the traditional sense of the term and not to non-traditional entities, such as the self-styled Provisional Government of New Afrika, a group seeking independent government status within the United States. See Provisional Gov't of New Afrika v. Am. Broad. Co., Inc., 609 F. Supp. 104, 110 (D.D.C. 1985) ("Since the Provisional Government exercises no sovereignty over ABC . . . this libel suit threatens democracy no more than a libel suit filed by any kind of political organization.").

229 Cf. infra text accompanying notes 270-81.

230 See Edgartown Police Patrolmen's Ass'n v. Johnson, 522 F. Supp. 1149 (D. Mass. 1981) (concluding that since none of defendant's statements singled out any individuals, the statements were directed at the police department as a government body).
held that *New York Times* had "specifically and forcefully" rejected such an argument—that the individuals comprising the government entity were individually libeled when, in fact, no individuals were identified or "singled out." Despite the absence of precedent and in the face of *Goldwater v. Ginzburg*, where the Second Circuit upheld a damage award for a U.S. senator who was running for president, defense counsel in the simultaneous *Westmoreland v. C.B.S.* and *Sharon v. Time, Inc.* libel trials attempted to equate the plaintiffs’ statuses as high government officials at the time of their defamed conduct with suits for libels on government. Only the *Sharon* judge resolved the issue, rejecting the argument as unsupportable, citing the "vast difference" between a seditious libel action where truth was no defense and a defamed official's attempt to vindicate his reputation with the requisite burden of proving falsity and constitutional malice.

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231 See *id.* at 1153 ("Public authorities must not be permitted to stifle commentary concerning their conduct by simply substituting individuals as plaintiffs in a defamation action.").


235 *Id.* at 327, 335–43 (involving a phony psychiatric poll concerning Senator Goldwater's fitness for the Presidency). In applying *New York Times*’ qualified privilege the court emphasized the breadth of what was relevant to Senator Goldwater's fitness: "By seeking election to the office of President of the United States, Senator Goldwater invited the press and the public to scrutinize every aspect of his life, public and private alike." *Id.* at 335 (emphasis added). The court felt that inquiry into his mental health was appropriate "in an age of powerful nuclear, chemical and biological weapons capable of massive destruction." *Id.*


237 *Sharon*, 599 F. Supp. at 554; *Westmoreland*, 596 F. Supp. at 1172. The *New York Times* analysis of the aspersion-of-the-President aspect of the Sedition Act of 1798 does not support an absolute right to defame the President as the embodiment of the federal government with impunity. It is clear that the act as a whole was treated as invalid under the "broad consensus" in the "court of history," for as Jefferson said, it was "a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image." *New York Times* Co. v. Sullivan, 376 U.S. 254, 276 (1964). However, the Supreme Court’s analysis in *Garrison* and the First Circuit’s in *Goldwater* tell us that both a civil action by a defamed plaintiff and a narrowly drawn criminal statute incorporating the "calculated falsehood" standard as to aspersions on the President as an individual would likely survive constitutional scrutiny. Indeed, in *City of Chicago*, relied on in *New York Times*, the Illinois Supreme Court made this exact point—the Sedition Act would have been constitutional as to prosecution for the defamation “of the President or any other person... but in so far as it sought to make criminal any defamation of the government or of the administration in power it has been generally considered to be unconstitutional." *City of Chicago* v. Tribune Co., 139 N.E. 86, 88–89 (Ill. 1923); see also the analysis of the California statutes involving imputations of misconduct to a particular police officer discussed *infra* note 439.

238 *Sharon*, 599 F. Supp. at 554–55. Query whether a head of state of an autocratic regime would be treated differently. The courts might be tempted to view such individuals as "inextricably linked with and symboliz[ing] their respective governments and that any criticism of them was, in fact, criticism of government qua government." Elder, *supra* note 24, at 610 n.135. A certiorari request in *Gannet Co. v. De Roburt*, 733 F.2d 701, 703–04 (9th Cir. 1984), made an absolute immunity claim based on the argument that "foreign leaders using vast national treasury
The consensus view\textsuperscript{238} of the decisions delineating the seditious libel/"powerlessness of government" rule is that the latter rule does not apply where individual members of a small government unit sue under the small group defamation rule,\textsuperscript{239} for example, individual members of a township board of education,\textsuperscript{240} or where the prevailing circumstances at the time of publication suggest that the publication referred particularly to or "singled out" the plaintiff.\textsuperscript{241} The latter rule is well-illustrated by \textit{Saenz v. Playboy Enterprises, Inc.},\textsuperscript{242} where a public official sued Playboy for publishing an article detailing the excesses of a CIA-generated program advising foreign police in Latin America and elsewhere, implying that the official was involved in torture.\textsuperscript{245} Even though plaintiff was mentioned by name in the article, the district court interpreted \textit{New York Times} and \textit{Rosenblatt} as mandating that defamation "specifically and explicitly"\textsuperscript{244} libel plaintiff—no defamation \textit{personal} to him could be \textit{implied} from statements condemnatory of government.

The Seventh Circuit rejected the district court's reasoning, concluding that libelous inferences may be as "clear and perhaps more damaging"\textsuperscript{245} than explicit imputations just because of their

\textsuperscript{238} See infra notes 239–40, 288–335. The case of \textit{Johnson v. Delta-Democrat Pub. Co.}, 531 So. 2d 811, 814–15 (Miss. 1988), is not to the contrary. In that "metaphorical language" constituting "name calling and verbal abuse" directed at the city council (of which plaintiff was a member) was found non actionable under both common law fair comment and the First Amendment opinion doctrines.


\textsuperscript{240} See also Wolf, 429 A.2d at 433 (affirming the right of "individual members of a governmental unit" to sue (emphasis added)).

\textsuperscript{241} O'Brien v. Williamson Daily News, 735 F. Supp. 218, 223, 226 (E.D. Ky. 1990) (affirming magistrate's finding that a material issue of fact remained where journalist had arguably defamed a particular member of the class).

\textsuperscript{242} 841 F.2d 1309 (7th Cir. 1988).

\textsuperscript{243} The passage at issue said: Torture in Uruguay, said the array of authorities, had been "common," "normal," "habitual" before 1969. And the U.S. advisor who had been Mitrione's predecessor for four years, whose office was on the first floor of the Montevideo jefatura, where torture reportedly took place and the screams of victims reverberated, who by his own account had intimate and influential relations with the Uruguayan police, was Adolph Saenz. From Montevideo, allegations of torture by his police clients would follow Saenz through subsequent assignments in Colombia and Panama.

\textit{Id.} at 1312.


\textsuperscript{245} \textit{Saenz}, 841 F.2d at 1314.
indefiniteness. The federal district court’s opinion was far too expansive and allowed for “the spectre of heinous abuse by crafty and mischievous authors whose subtle art of insinuation is honed for destruction.” In fact, Rosenblatt specifically contemplated a libel action based on something other than an explicit imputation “specifically leveled” against complainant, that is, by implication. In ringing language the court concluded that a defendant could not, “without impediment of law, trammel a public official by ‘surreptitious and insidious implication’ under the pretense of governmental critique.” To deny libel by innuendo would open Pandora’s Box from which countless evils may spring. A legal fiction denying . . . clearly discernable, though not explicit charges, exposes public officials to baseless accusations and public mistrust while promoting an undisciplined brand of journalism both unproductive to society and . . . unprotected by constitutional considerations.

In another decision, a New York state court interpreted New York Times-Rosenblatt as authorizing the imposition of liability where plaintiff lottery director provided extrinsic evidence connecting himself personally to articles referring to the Lottery and “Lottery officials.” In the first series, all but one were published daily over an eleven-day period. In a number of articles plaintiff was specifically identified as

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246 Id. See the well-reasoned decision in O’Brien v. Williamson Daily News, 735 F. Supp. 218 (E.D. Ky. 1990), aff’d, 931 F.2d 898 (6th Cir. 1991), where the court held the following statement in an article to be libelous per se and actionable in false light, when viewed in light of other references and the “overall structure” of the article, which was about a public meeting concerning allegations of sexual misconduct of high school teachers with students: “None of the speakers directly linked the request with the clash between Francis [a student terminated for fighting] and Hunt [a teacher] but most referred to ‘allegations’ and ‘charges’ surrounding the incident [a fight between Francis and Hunt] that could prove harmful to a teacher’s career.” Id. at 224. One added reference was the principal’s statement confirming receipt of a complaint by a seventeen-year-old female student against Hunt. Id. The court noted the defendant conceded that the New York Times “of and concerning” restraints under the First Amendment would be unavailable in such a case where plaintiff was “personally and specifically defamed.” Id. at 226. See Saenz, 841 F.2d at 1316 (reasoning that to conclude such a requirement from Rosenblatt takes the Supreme Court’s language out of its “proper context”).

247 Id. at 1314.

248 Id. at 1315. The court noted that identification by position or name was recognized as important by New York Times. Id. Saenz’s name was specifically and explicitly used multiple times in the passages that purportedly defamed him. Id. at 1316.

249 Id.

250 Id. at 1317.

251 On libel by implication concerning public persons see Elder, supra note 2, §1:7, at 29 n.25.

252 Saenz, 841 F.2d at 1317.

head of the lottery and its chief public defender. His photo was attached to one editorial. He also proffered evidence of angry letters from Lottery participants identifying him in the same language used in the articles. This provided a sufficient link. In another article several months later, references to "state officials" were treated the same way. Specific references to him elsewhere in the article and the readership's letters recognizing him as the source of the Lottery's difficulties sufficed to meet the "of and concerning" requirement.

By comparison, another decision carefully analyzing defendant's critical accounts of the federal investigation and "cover-up" of the death of Clinton aide Vincent Foster found that plaintiff had not met his burden of proving the "of and concerning" requirement as to criticisms of the "Park Police" generally, or its official reports, in which defendant had not participated. Nor had he met the requirement as to references to the "federal officials" who investigated the death, as the court noted that defendant Ruddy's report carefully distinguished the initial search in which plaintiff participated briefly from the subsequent investigation and report in which he also had not participated. Implicitly, the court found the groups identified in the "cover-up" were large and amorphous entities implicating "impersonal criticisms of government" and plaintiff had not otherwise met his burden of proving the "of and concerning" requirement.

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255 See id. at 840 ("Therefore, we think the link to plaintiff was sufficiently established to prevent dismissal of the action with respect to the News' charges against the Lottery which did not specifically refer to him.").

256 See id. at 842 (stating that the damaging references to plaintiff created a triable issue as discussed in Rosenblatt); cf. Early v. Toledo Blade, 720 N.E.2d 107, 122-24, 126-27, 129, 133 (Ohio Ct. App. 1998) (applying the common law "of and concerning" requirement in finding non-actionable a large number of general newspaper articles and editorials about Toledo police that never mentioned plaintiffs).

257 Fornshill v. Ruddy, 891 F. Supp. 1062, 1071 (D. Md. 1995), aff'd, 89 F.3d 828 (4th Cir. 1996). The court noted that plaintiff was one of 650 Park Police, 430 of whom lived in the D.C. metro area. Id. at 1064.

258 Plaintiff tried to segregate himself as one of only three Park Police mentioned anywhere in the Ruddy report, but the court found no material issue of fact as to "of and concerning" based on the overall content of the report. Id. at 1071.

259 Id.

260 Id. Such "investigating officials extend far beyond" the members of plaintiff's Park Police. Id.

261 See id. ("Ruddy clearly distinguishes between those who participated in the search efforts for Foster's body and those who subsequently investigated Foster's death.").

262 Id. at 1070. The court stated the "of and concerning" element was a First Amendment requirement when the complaint involved such "impersonal criticisms of government." Id.

263 See id. at 1072 (noting that no affidavit of plaintiff or others who knew him and read the report confirmed they viewed it as "of and concerning" him).
As the Supreme Court itself has recognized,\(^{264}\) clearly a libel victim can be a readily ascertainable person even though mentioned only by title. For example, the libeler cannot insulate himself from liability merely by referring to “the sheriff”\(^ {265}\) or an unnamed judge in a particular trial.\(^ {266}\) As an early criminal libel trial evidenced, in the “conduct of particular trials, courts are not impersonal.”\(^ {267}\) Thus, a statement that a judge in a high-profile case “busied himself with the prosecution” so that criminal defendants could be swiftly convicted and hanged was prosecutable.\(^ {268}\) Unlike Sullivan, where there was not even “an oblique reference” by name or position, such defamatory allegations of judicial malfeasance would be read as imputing “personal involvement”\(^ {269}\) to the judge. 

\(^{264}\) See supra notes 13, 180; see also Saenz v. Playboy Enters., Inc., 841 F.2d 1309, 1315 (7th Cir. 1988) (aligning itself with the Court in New York Times, recognizing that identification of a complainant-public official by position was an “important factor”).

\(^{265}\) Neal v. Huntington Publ’g Co., 223 S.E.2d 792, 796 (W. Va. 1976). The court rejected the suggestion that plaintiff was “an anonymous member of a libeled class.” The defamation was “rather pointedly singular” in attacking an “ascertainable” person, the sheriff of the county in which the defendant-newspaper was published. \(\text{Id. at 795–96 n.1}\).

\(^{266}\) See, e.g., Keohane v. Stewart, 882 P.2d 1293, 1300 n.10 (Colo. 1994) ("While the letter does not refer to Judge Keohane by name, the evidence at trial established that the letter was widely understood as referring to Judge Keohane .... As such, any defamatory meaning is properly regarded as a defamation of Judge Keohane."); Cole v. Commonwealth, 300 S.W. 907, 908–11 (Ky. 1927) (affirming conviction of libel against defendants who identified a particular individual by referring to his title as judge).

\(^{267}\) Cole, 300 S.W. at 911.

\(^{268}\) Id. at 908–11. In the companion conviction there was not even a specific reference to “the judge.” There were only references to the defendants “being rushed to the gallows by farcical trial,” “legal lynching,” and “mob law,” which were viewed as “direct attack(s) and reflection(s)” on the trial judge. \(\text{Id. at 911}\). The court’s logic is compelling and should not be eviscerated by confusion with the unmeritorious nature of the libel victim. The case bears interesting resemblances to New York Times—in this case a small town judge went after the big city (Louisville) progressive press for trying to shed light on racial injustice. It is worthy of note that the unnamed judge, Ruby Laffoon, became so well known in this case despite the absence of media references to him by name that he was elected Governor in 1931. \(\text{See Robert A. Leflar, The Social Utility of the Criminal Law of Defamation, 34 Tex. L. Rev. 984, 988 (1956) (characterizing the case as also having “intimations of racial as well as political retribution”).}\)

\(^{269}\) New York Times Co. v. Sullivan, 376 U.S. 254, 288–92 (1976); cf. Huyen v. Driscoll, 479 N.W.2d 76, 78–79 (Minn. Ct. App. 1991) (holding that “general criticisms of government procedures and policies, such as “departmental meetings are irregular and infrequent, and generally unsolicitative of staff observations and opinion,” “the current environment ... is non-conducive to problem resolution and that the overall mission of the Department is lost in a cloud of hostility and divisiveness,” and “the policy prohibiting staff attendance at in-house workshops conducted by Employee Relations was ill-considered,” were not actionable under the “well settled” rejection of supervisory linkage as alone sufficient under New York Times). While much of this case involved statements opinionative in tone, at least some of the statements could have been viewed as “of and concerning” plaintiff if testimony were adduced that people who worked in the entity viewed him as the target and the policies were ones he promulgated. For example, if the policy on staff attendance at in-house workshops was issued under his signature and authority, the circumstances known to at least some recipient-readers would provide the basis for an “of and concerning” link. \(\text{See supra note 119}\).
By contrast, defamation of a large governmental group may invoke the seditious libel analogy by allowing an individual to sue for what is in essence defamation of a governmental body—a clear corollary of New York Times-Rosenblatt. An analysis of the decisions both before New York Times and after makes it clear that courts have been exceptionally sensitive to free expression concerns in the large governmental group defamation scenario. Although the cases involving large governmental groupings are not as numerous as in the non-governmental arena, the results are the same. Thus, it did not suffice for an individual to sue for such "broad and general defamation" where reference was made to a village police department and sheriff's department over many years, the FBI or general group of FBI agents, 165 governmental employees, 5000 police, deputies,

270 See supra text accompanying notes 187–231.
271 See supra text accompanying notes 30-145.

[T]he great interests of society require that it [the civil remedy] should not be made to apply. It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation.

25 Wend. 186, 199 (N.Y. 1840). For an analysis of the First Amendment underpinnings of the "of and concerning" requirement see Smolla, supra note 15, § 4:40.50.
273 See generally Elder, supra note 2, §§ 1:31, 1:35 (discussing defamation in the context of large groups and governmental groups).
274 Restatement (Second) of Torts § 564A cmt. a (1977).
275 See Wainman v. Bowler, 576 P.2d 268, 270 (Mont. 1978) (holding that the action was not libelous per se since it was not "specifically directed" at the claimant); see also Farrell v. Triangle Publ'ns, Inc., 159 A.2d 734, 736 (Pa. 1960) (holding that no claim existed as to an utterance "directed toward a class or group whose membership is so numerous that no one individual member can reasonably be deemed an intended object of the defamatory matter").
276 See Price v. Viking Press, Inc., 625 F. Supp. 641, 646 (D. Minn. 1985) ("[G]eneral references to a group of FBI agents or the FBI itself is [sic] not actionable defamation."). Even if linked to a particular city near the reservation at issue, the court rejected the suggestion that the number generally assigned was as few as ten, as this was not the number during the time in question—the area was "replete" with FBI agents and federal marshals. Id. At least one specification was even broader, referencing FBI conduct on "reservations" and when "AIM gathers." The latter were nationwide. Id. at n.8.
278 See L.A. Fire & Police Protective League v. Rogers, 86 Cal. Rptr. 628, 627 (Cal. Ct. App. 1970) ("[P]laintiff league cannot, as a matter of law, maintain an action for damages for alleged defamation of such a large group . . . . "); see also Mullins v. Brando, 91 Cal. Rptr. 796, 805 (Cal. Ct. App. 1970) (finding that, since none of the 5000 could sue under "very basic traditional defamation principles," by definition, the police officers' association could not sue on their be-
agents, and employees in a sheriff's office of over 740,279 "law enforcement in Eugene" and "the police in this community," or "prosecutors."

Even in a large group context, however, circumstances known to readers, viewers or hearers where a defamation is published may equate to individual reference as effective as if plaintiff alone were specified.282 In these cases there is a "reasonable presumption of personal allusion."283 For example, three officer-participants in a shoot-out depicted as an execution were not "run-of-the-mill members"284 of a large group but "ascertainable persons"285 aimed at by defendants. In a case like this, plaintiff officers were like the "unidentified but identifiable police" in New York Times who actually performed the purported illegalities.286 In another case the two unnamed of seven "federal narcotics agents" involved in a particular incident met the colloquium requirement as to those within the law enforcement entities involved who were familiar with the incident.287

Paralleling the non-governmental area,288 significant precedent, both before and after New York Times, has applied the small group defamation rule to small governmental groupings, treating the

half). In dicta the Mullins opinion suggested the "impersonal criticism of government" aspect of New York Times might apply to the group plaintiffs. 91 Cal. Rptr. at 800-01; see also O'Leary v. Police Dep't, 409 N.Y.S.2d 676, 677-79 (N.Y. Sup. Ct. 1978) (denying an action to enjoin on behalf of a class and individual members of two police recruiting classes to the N.Y.P.D). 279 See Webb v. Sessions, 531 S.W.2d 211, 212-13 (Tex. Civ. App. 1975) (denying the claim as a matter of law on the basis of group size).


281 Murray v. Bailey, 613 F. Supp. 1276, 1283 (N.D. Cal. 1985); see also Weston v. Commercial Advertiser, 77 N.E. 660, 662 (N.Y. 1906) ( remarking in dicta that an article stating generally that all coroners in the state were corrupt would likely not be libelous as to any individual).

282 See RESTATEMENT (SECOND) OF TORTS § 564A(b) & cmt. d (1977) ("[T]he circumstances of publication [may] reasonably give rise to the conclusion that there is particular reference to the member." For example, "there may be circumstances that are known to the readers or hearers and which give the words such a personal application to the individual that he may be defamed as effectively as if he alone were named.").


285 Id.

286 See id. at 801. The court rejected the New York Times "of and concerning"/libel of government argument, correctly concluding that it was limited to vicarious responsibility cases. Id. at 801-02.

287 See Hansen v. Stoll, 636 P.2d 1236, 1241 (Ariz. Ct. App. 1981). The two unnamed plaintiffs had the burden of proving colloquium. Id. at 1241. This is the general rule. See ELDER, supra note 2, § 1:30, at 134. It was not necessary to show that the ordinary reader or every reader would make the connection as long as it was "reasonable under the circumstances." Hansen, 636 P.2d at 1241. Since the jury was appropriately instructed on group libel, the facts of record supported a conclusion the defamatory publications were "sufficiently specific" to identify the unnamed plaintiffs. Id.

288 For a discussion of non-governmental small-group defamation, see ELDER, supra note 2, § 1:32, at 150-55.
defamation as reasonably understandable as referring to each individual member of the group. Sometimes this small group is a subset of a larger group, such as a group of police accused of specific misconduct at a picketing site. In other cases it is defined by specific vocational affiliation or description, such as physicians working for coroners in a particular borough, the motorcycle police in a particular city, or the doctors at a particular public hospital. Even vague descriptions—village "officials"—have been justifiably covered. Courts found that to local readers they were as clearly identifiable as if identified by name. More commonly, plaintiffs were allowed to sue as individuals because a small governmental entity or group was specifically named or identified. This was treated as having "so affected and particularized" them as individuals to justify a finding of personal reference. Thus, fully inclusive defamation gave standing to

289 See, e.g., Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786, 790 (N.Y. App. Div. 1981) (finding that, since the group included few persons, "reference to the individual reasonably follows from the statement and the question of reference is left for the jury"); RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977) ("When the group or class defamed is sufficiently small, the words may reasonably be understood to have personal reference and application to any member of it, so that he is defamed as an individual... [and] can recover for defamation."); see also EDER, supra note 2, § 1:32, at 150–51 (listing cases before and after New York Times that applied the small group defamation rule to government groups).


291 See Weston v. Commercial Advertiser Ass' n, 77 N.E. 660, 661–62 (N.Y. 1906) (holding defendant's article stating a borough's coroner's office was extorting money from family members in order to allow them to avoid unnecessary autopsies was specific enough for a physician working for one of the coroners in the office at issue to have an actionable claim). The group of four coroners was also maligned. The entire group totaled eight. Id.

292 Commercial Tribune Publ'g Co. v. Haines, 15 S.W.2d 306, 307 (Ky. 1929) (affirming the lower court's finding that plaintiff motorcycle police officer succeeded in proving a claim of defamation against a newspaper, which had published an article stating the town's motorcycle police force—consisting of plaintiff and another officer—was neglecting its duties). The group of four coroners was also maligned. The entire group totaled eight. Id.

293 Bornmann v. Star Co., 66 N.E. 723, 724 (N.Y. 1903) (affirming a judgment for plaintiff member of a group of twelve "physicians").

294 See De Hoyos v. Thornton, 18 N.Y.S.2d 121, 122–23 (N.Y. App. Div. 1940) (finding that village readers would "clearly and quite reasonably understand who was referred to... as being dictated to by gangsters"). The article at issue in De Hoyos made reference to "our village affairs," "our officials," and the desirability of a "golden age" when persons of "brains plus horse sense run our village right." Id. at 122. The court said there was "no room for doubt as to who were the objects of her attack" in the local mind. Id. at 123; see also infra note 299; cf. Arnold v. Ingram, 138 N.W. 111, 114, 117, 119 (Wis. 1912) (involving much vaguer references to "[o]fficials," "those who have served the city and the community in public office," "carry... into office those who are utterly unworthy of public confidence," which did not specifically refer to plaintiff district attorney any more than to other officers).

295 Wofford v. Meeks, 30 So. 625, 628 (Ala. 1901).

296 For more on the issue of less than fully inclusive reference, see supra text accompanying notes 133–38, and infra notes 305–14.
members of the following: town boards of trustees, county commissioners, city councils, criminal or civil juries, water boards, boards of trustees of a school districts, district election boards, and precinct election officials.

297 See Schomberg v. Walker, 64 P. 290 (Cal. 1901) (finding that the article referred to the entire board, and that plaintiff was one of three board members actually involved in the matter featured in the article); see also Noral v. Hearst Publ'ns, 104 P.2d 860, 863 (Cal. Dist. Ct. App. 1940) (remarking that where an entire board of five supervisors of a specific place was defamed, any individual member thereof could sue) (dicta).

298 See Wofford, 30 So. at 626 (finding that plaintiff has standing, as he was one of the "Third Partyties" to whom the article referred); see also Price v. Viking Press, Inc., 625 F. Supp. 641, 645 (D. Minn. 1985) (interpreting Palmerlee as involving a group "few in number"); Palmerlee v. Nottage, 138 N.W. 312, 313 (Minn. 1912) (following the Wofford court by affirming that a member of a board of county commissioners had a cause of action against a newspaper that falsely accused the entire board of corruption).

299 See Swearingen v. Parkersburg Sentinel Co., 26 S.E.2d 209, 214 (W.Va. 1943). In the article there were numerous references to city council and a couple of express references to plaintiff council member by name (in non-defamatory aspects) but not by identifying title. In the editorial there was no reference to plaintiff's name or even to the city council as such. The references were to "municipal authorities," "municipal authorities," "our governmental affairs," "city government," "city administration," and "city officials." The court upheld the claim, saying the mayor and city council were a "small restricted group" of five persons. Id.

300 See Welch v. Tribune Pub. Co., 47 N.W. 562, 563, 565 (Mich. 1890) (criminal juror); see also Byers v. Martin, 2 Colo. 605 (1875) (same); Smallwood v. York, 173 S.W. 380, 381–82 (Ky. 1915) (dicta); Boehmer v. Detroit Free Press, 53 N.W. 822, 823 (Mich. 1892) (interpreting Welch); Carter v. King, 94 S.E. 4, 6 (N.C. 1917) ("It was as harmful to libel and slander the plaintiff collectively as one of the 11 jurors as it would have been to have libeled him individually."); RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977) ("Thus the statement that 'That jury was bribed' may reasonably be understood to mean that each of the twelve jurymen has accepted a bribe."). But cf infra note 369.

Compare the two recent companion decisions from Mississippi involving allegations by unnamed members of civil juries that a "60 Minutes" program entitled "Jackpot Justice" imputed to them improper or corrupt behavior. In Berry v. Safer, 293 F. Supp. 2d 694, 704 (S.D. Miss. 2003), and Gale v. CBS Broadcasting, Inc., 269 F. Supp. 2d 772, 784 (S.D. Miss. 2003), the trial judge dismissed the non-diverse individual defendants, finding fraudulent joinder. The court analyzed the claims of the individual defendants only, and found that the small group defamation rule of the Restatement (Second) of Torts 564A could not be met. Berry, 293 F. Supp. 2d at 704–05; Cales, 269 F. Supp. 2d at 782. The only references by the individual defendants were to "juries" and "jurors" generally. The court viewed these references as involving the large group of all county jurors. It is important to emphasize that the court looked only at the individual co-defendants' utterances, not the "entire utterance" published by "60 Minutes," refusing to hold the individual defendants liable for impressions conveyed by the context of the program as a whole. Clearly, however, the court intimated that the issue of liability of the media co-defendants would entail an analysis of the "entire utterance"/context rule to determine whether the average viewer would deem that a jury in a particular trial (for example, the diet pill case mentioned in the broadcast) had been inclusively defamed. Berry, 293 F. Supp. 2d at 700; Cales, 269 F. Supp. 2d at 778. The small group defamation rule would then apply to the individual jurors.

301 See McGuire v. Roth, 8 Ohio Misc. 92, (Ohio Ct. Com. Pl. 1955) (affirming that the small group defamation rule was consistent with New York Times, but holding that the particular statement was not defamatory).

Where the defamation is not fully inclusive, the cases are divided. The (better) Restatement (Second) of Torts rule allows recovery where a "high degree of suspicion" is suggested by the defamatory statement. Under this test where a "considerable proportion" of the group is included, the jury may view it as "a blanket slur, reaching all." Clearly, however, disparaging one police officer in a department of twenty-one did not suffice. Implicating one of two prison guards in a train escape by Al Capone, however, defamed each, as did depicting "some" of a group of high school English teachers as sexually involved with students. And where "a number of" thirteen township commissioners were implicated, it was held...
"irrational, as well as unconscionable" not to let an individual member sue.

Where to draw the dichotomy between large and small groups is not without controversy. Undoubtedly, as a general rule, the larger the group, the more difficult it is to show plaintiff is tainted by disparagement of the group. The Restatement (Second) of Torts and most authorities adopt a "de facto maximum" "consistent rule of thumb" limitation of twenty-five, following the analysis of the leading case, Neiman-Marcus v. Lait, where the court allowed all of a group of twenty-five salesmen to sue where the disparagement extended to "most." Under this approach, none among forty-six members of a street crimes unit accused of targeting minorities could sue, nor could twenty-nine high school teachers implicated in

514 Farrell v. Triangle Publ'ns, Inc., 159 A.2d 734, 736-39 (Pa. 1960); see also Alvord-Polk, Inc. v. F. Schumacher Co., 37 F.3d 996, 1015-16 (3rd Cir. 1994) (approving, but distinguishing, Farrell in the context of a group of twenty to twenty-five wallpaper dealers not involving "an easily identifiable cohesive group" as in Farrell). The article in Farrell said the district attorney's investigators would question all thirteen commissioners. This suggested that none of the commissioners was "above suspicion of knowledge, guilty or otherwise" of the imputed impropriety. Farrell, 159 A.2d at 739. The court applied an eminently sound, common sense approach, concluding that certainly a "substantial number" of readers, especially those from plaintiff's township, knew of plaintiff's status as commissioner. Additionally, it was reasonable to conclude that township readers who did not know all the commissioners' names were "impelled by the scandalous nature of the charges" to determine who they were, leading almost inexorably to plaintiff's name being linked to the purported corruption. Id. at 738-39.

515 See Brady v. Ottaway Newspapers, Inc., 445 N.Y.S.2d 786, 791 (N.Y. App. Div. 1981) (noting that, despite some courts' focus on group size, "no definitive limitation has been set").

516 See O'Brien, 735 F. Supp. at 223 (noting that the court's own research found no case in which a group of more than twenty-five had standing); McCullough v. Cities Serv. Co., 676 P.2d 833, 836 (Oka. 1984) (explaining the rationale as that "the larger the collective named in the libel, the less likely it is that a reader would understand it to refer to a particular individual"). The underlying assumption for large group non-liability—that the reader will treat the statement "rationally—is "not without challenge." Brady, 445 N.Y.S.2d at 788-89 & n.2 (quoting Note, Group Vilification Reconsidered, 89 Yale L.J. 308, 311-13 (1979)).

517 RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977) ("[T]he cases in which recovery has been allowed usually have involved numbers of 25 or fewer." (emphasis added)).

518 See Bujol v. Ward, 778 So.2d 1175, 1178 (La. Ct. App. 2001) ("[M]ost authorities agree that the group must consist of twenty-five or less members in order for the plaintiff to state a cause of action for group defamation."); see also ELDER, supra note 2, § 1:32, at 153 (characterizing opposition to the numerical guideline as a "small minority view").


520 See Alexis, 77 F. Supp. 2d at 41, 44-45 (citing the twenty-five-member maximum discussed in RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977)); Bujol, 778 So. 2d at 1178, 1180 (citing RESTATEMENT (SECOND) OF TORTS § 564A cmt. b (1977)).


522 Id.; see RESTATEMENT (SECOND) OF TORTS § 564A cmt. c, illus. 4 (1977) (adopting Neiman-Marcus v. Lait).

523 See Bujol, 778 So. 2d at 1178, 1180 (noting also that the imputation was not specifically directed to members of the group inclusively).
committing adultery with students. This mechanistic approach to small group analysis is wholly artificial and arbitrary. Imagine trying to justify why a group of twenty-five inclusively (or largely inclusively) defamed teachers can sue as individuals but a group of twenty-nine inclusively defamed cannot. Even the Restatement (Second) of Torts has conceded that it is impossible to provide "definite limits."

Although decidedly a minority view, a few well-reasoned cases reject size alone as controlling in favor of a focus on "the intensity of the suspicion" put on the plaintiff. In one decision, an all-inclusive imputation of amphetamine use to a state university football team of sixty to seventy players authorized a suit by a fullback on the alternate squad who had played in nine of the team's eleven games. In a later case, twenty-seven of a group of fifty-three police officers were allowed to sue for an imputation that they were accessories to (eighteen) other indicted officers. Finding an absolute ceiling on size unjustified and arbitrary, the court weighed size against "definiteness in number and composition" and "prominence of the group and the
prominence of the individual within the group."\textsuperscript{332} Applying these criteria, it noted that police officers in small, local communities such as the city in question are generally viewed as "prominent public officials,"\textsuperscript{333} since their environment is one in which citizens tend to know their fellow citizens.\textsuperscript{334} The court specifically rejected any suggestion that a constitutional defect existed under New York Times-Rosenblatt, as the disparagement involved "explicit reference to a specifically defined group.\textsuperscript{335}

Viewed against this backdrop, only two decisions can even arguably be seen as presaging Dean v. Dearing's\textsuperscript{356} per se rule rejecting the small group defamation rule on First Amendment grounds. In one, Deaver v. Hinel,\textsuperscript{357} plaintiff, a former county sheriff, initially complained about a column referencing "reports of harassment, incompetency, lawbreaking apparently by law enforcement."\textsuperscript{358} Plaintiff was not named.\textsuperscript{359} In the second claim, mention was made in a letter to the editor about "recent activities of our law enforcement officials in this county" and their engagement in "felonious acts."\textsuperscript{360} The only reference was to plaintiff by office—the letter portrayed these "officials" as "fraternizing in public with our present Sheriff."\textsuperscript{361} The court properly viewed the latter associational connection as not tainting plaintiff as a wrongdoer.\textsuperscript{362}

The court found Deaver's arguments to be indistinguishable from Sullivan's, that is, as based solely on his "overall responsibility" and "perforce directed specifically ... at him."\textsuperscript{363} It also rejected as inaccurate any suggestion that the "statements ... necessarily concerned him" as the sole law enforcement official in the county.\textsuperscript{364} Testimony had established there were at least four deputies and the broad "law enforcement" class could also refer to the county attorney and court

\textsuperscript{332} Id. at 793.
\textsuperscript{333} Id. at 795 & n.5. A police officer was held to be a "public official" under the "well settled" rule. \textit{Id.} This is the overwhelming view of the voluminous case law, although it is not necessarily compelled by \textit{Rosenblatt} or its "night watchman" example. \textit{See} Elder, supra note 24, at 675-78 (discussing the difficulties in attempting to apply public official status to all law enforcement personnel); supra note 145 and accompanying text.
\textsuperscript{354} Brady, 445 N.Y.S.2d at 795.
\textsuperscript{355} Id. at 793 n.4.
\textsuperscript{356} 561 S.E.2d 686 (Va. 2002).
\textsuperscript{357} 391 N.W.2d 128 (Neb. 1986).
\textsuperscript{358} \textit{Id.} at 130 (emphasis added).
\textsuperscript{359} \textit{See} id. at 133 ("In his column, Hinel makes no reference to Deaver.").
\textsuperscript{360} \textit{Id.} at 130 (emphasis added).
\textsuperscript{361} \textit{Id.}
\textsuperscript{362} \textit{See} id. at 133-34 ("[The statement] suggests at most an association between the former sheriff and those who allegedly committed the acts complained of.").
\textsuperscript{363} \textit{Id.} at 134.
\textsuperscript{364} \textit{Id.}
personnel.\textsuperscript{545} In other words, the class was not a small and clearly defined one composed of plaintiff and four deputies. The court also did an independent review under a heightened proof standard ("clear and convincing"\textsuperscript{346} evidence) of testimony proffered to support the purported "specific attacks" and found it wanting.\textsuperscript{547}

Lastly, and most important, in the summarizing paragraph the court declined to find that plaintiff had shown "with convincing clarity"\textsuperscript{548} that the statements at issue were false\textsuperscript{49} "with respect to him.\textsuperscript{550} "To be sure, the observations... seem to be accurate, general accounts\textsuperscript{551} of actions of "a number of" county "law enforcement personnel."\textsuperscript{552} Thus, "[b]eyond stating the truth," they "merely constituted fair comment on governmental activity, protected speech under the first amendment."\textsuperscript{553} The latter should be read as the essence of the Deaver opinion—that the plaintiff's claim failed because the purported defamation constituted either absolutely privileged opinion or qualifiedly privileged "fair comment" speech based on true facts.\textsuperscript{554}

In another decision, Andrews v. Stallings,\textsuperscript{555} the court acknowledged that the First Amendment should not be interpreted as "automatically"\textsuperscript{556} proscribing group defamation actions, but cited several legal commentators for the view that courts should err in close decisions

\begin{footnotes}
\item[545] Id. at 135.
\item[546] Id. There was no discussion of this heightened standard. It appears to be inconsistent with the overwhelming common law rule. See Elder, supra note 2, \S 1:90, at 135 n.3 (noting that only a couple of states have adopted the "clear and convincing" standard). This elevated standard is not constitutionally mandated for the "of and concerning" requirement. See supra note 31.
\item[547] One witness viewed it as only referring to "the sheriff's office." This did not even meet the vicarious responsibility-as-to-those-in-charge evidence found constitutionally insufficient in New York Times. Deaver's own testimony merely replicated Sullivan's—that he was implicated based on his status as the hierarchical superior. A third witness testified that she perceived the column, which did not reference even his position, as "prosecuting Dave." This vague testimony was constitutionally insufficient to meet the requirement the libel "clearly referred" to plaintiff. Deaver, 391 N.W. at 135.
\item[548] Id.
\item[549] Clearly, plaintiff has the burden of proving falsity. See infra note 418 and accompanying text (discussing plaintiffs' burden of proof); see also supra note 26 and accompanying text (discussing "clear and convincing" standard).
\item[550] Deaver, 391 N.W.2d at 135.
\item[551] Id. (emphasis added).
\item[552] Id.
\item[553] Id. (emphasis added).
\item[555] 892 P.2d 611 (Ct. App. N.M. 1995).
\item[556] Id. at 617. Incongruously, the court cited Brady v. Ottaway Newspapers, Inc. as support for this position. Id.; see supra text accompanying notes 315, 329, 331-35.
\end{footnotes}
on the side of finding the matter "of and concerning" government.\textsuperscript{357} In analyzing the generally amorphous multiple statements therein alleged to be actionable, the court cryptically stated twice that statements explicitly referencing the "mayor and council" did not refer to plaintiff council member personally.\textsuperscript{558} It is clear, however, from the court's analyses that these cryptic asides were a minor aspect of the opinion, if not dicta, and that the essential basis was a failure to meet Milkovich's provable-as-factually-false requirement.\textsuperscript{559} An analysis of the items\textsuperscript{560} in question suggests that they involved exceedingly amorphous matters in a quintessentially opinionative context (editorials\textsuperscript{361} in the political area\textsuperscript{362}) wholly inappropriate for actionability before or after Milkovich.

In an excellent concurrence, Judge Hartz agreed with the failure to show falsity/opinion aspects of the majority in Andrews but not with its references to "of and concerning" and its conclusion that references to the "village" or "Council" were nonactionable "regardless of the nature of the statement or whether the context of the publication establishes that the statement is focused on a particular individual."\textsuperscript{563} In a trenchant analysis of New York Times and Rosenblatt, he eviscerated the majority's stated view—that is, that a statement will be deemed privileged as "a libel on government" if it can legitimately so interpreted—

\textsuperscript{357} Andrews, 892 P.2d at 617.
\textsuperscript{558} Id. at 618.
\textsuperscript{559} Id. at 618-19, 621. A third discussion involved one of a series of ten rhetorical questions directed at the village concerning the departure of the city manager—"Did you, Mr. Norwood, get tired of the village's appearance of impropriety by having the same people serve on several boards where money switches hands."—and specifically relied on the defamation statute's "of and concerning" requirement as to reference to the "village." \textit{Id.} at 617. The Court also cited to \textit{New York Times} and Rosenblatt, and treated it as a libel of a governmental entity. \textit{Id.} at 616-17. \textit{See supra} text accompanying notes 30-73, 91-145. The material also appears to have been wholly opinionative in a context—invoking rhetorical questions and the political area—courts would otherwise find nonactionable under Milkovich. \textit{See} \textit{ELDER}, supra note 2, § 8:13, at 46-48 (discussing the Supreme Court's decision in Milkovich and relevant precedent); \textit{id.} § 8:26, at 77-88. Lastly, a fourth claim based on vague statements that village police were instructed not to restrain motorcyclists' activities during the rally was apparently resolved on the common law ground the statement was not "clearly directed" at plaintiff. \textit{Andrews}, 892 P.2d at 619.

\textsuperscript{360} Andrews, 892 P.2d at 618. The bases were an editorial entitled "Law and order took a vacation" and a statement in the article—"We don't agree with Ruidoso's mayor and council and Ruidoso Downs' mayor who say that the problems [with the Motorcycle Rally] were no big deal." \textit{Id.} at 618. The editorial caption posed the question, "What happened?" and then began: "Ruidoso's Village Council is battling the budget, conducting hearings to form next year's financial plan and chip away at what Mayor Victor Alonso said is an $800,000 deficit." The editorial also said, "[w]hat have these guys been doing while the deficit creeped up near the million dollar mark?" \textit{Id.} at 621. The court held that these implications or assertions of conflict of interest violations were based on disclosed facts.

\textsuperscript{361} \textit{See} \textit{ELDER}, supra note 2, § 8:3, at 22-28 (noting the rationale of allowing readers, instead of courts, to consider the basis for opinions published without underlying facts).
\textsuperscript{562} \textit{See generally id.} § 8:26, at 77-88 (discussing the fact/opinion issue in the public arena).
\textsuperscript{563} Andrews, 892 P.2d at 627 (Hartz, J., specially concurring) (emphasis added).
as at odds with both the Court's exaltation of *substance over form* and its detailed analyses recognizing that both such cases were on their faces impersonal discussions of government. This "well-intended overkill" by the majority was also inconsistent with the express provision of a remedy under *New York Times* and Garrison's "mighty fortress" for libel claims involving knowing or reckless falsehood: "[I]t would be surprising if the Court cloaked such a statement with immunity just because the person making the statement was careful to refer to the defamed individual only by title rather than by proper name."

III. *DEAN V. DEARING* AND THE "OF AND CONCERNING" REQUIREMENT—A WRONG-HEADED INTERPRETATION OF FIRST AMENDMENT DOCTRINE

The salvos in opposing briefs well illustrate the strong disagreement between the parties as to prevailing First Amendment doctrine. Appellant argued that small group defamation liability was "adhered to across the nation," relied on § 564A and argued powerfully that post-*New York Times* no other court, trial or appellate, had interpreted it to mandate such a "blanket prohibition." Appellee viewed appellant's claim and §564A as not reflecting "predominant case law in this area" and further criticized §564A as "ignor[ing] the constitutional arguments plainly established in *New York Times*." As was suggested earlier, appellant's arguments are more compelling.

As a framework for analyzing the *Dean* court's short opinion, it is important to look at the type of defamation in Officer Dean's complaint. Appellant featured one example in his reply brief.

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564 Id. at 628.
565 Id. at 628–29.
566 Id. at 629.
567 Id.
568 Id. at 628.
569 Opening Brief of Appellant at 3–4, 5, n.2, *Dean v. Dearing* 561 S.E.2d 686 (Va. 2002) (No. 011154); Reply Brief of Appellant at 1, *Dean* (No. 011154). Appellant noted that the group of five to eight was a smaller group than the jury of twelve that was quoted as an example in Restatement (Second) of Torts §564A cmt. b (1977), and as an illustration in *Ewell v. Boutwell*, 121 S.E. 912, 914 (Va. 1924). Opening Brief of Appellant at 3–4, *Dean* (No. 011154). The author has found only general dicta in one case interpreting *Rosenblatt* as proscribing reliance alone on the small group defamation theory. See *Saenz v. Playboy Enters.*, Inc., 841 F.2d 1309, 1316 (7th Cir. 1988) ("[T]he Court reaffirmed its holding that an otherwise impersonal attack on governmental operations cannot establish defamation of the administering officials notwithstanding their relatively limited number and therefore readily identifiable nature.").
570 Brief of Appellee at 14 n.3, *Dean* (No. 011154). The court itself described Dearing's statements in this way: "From February through November 1999, Dearing accused the police department of intimidating witnesses, stealing property, harassment, misappropriation of money, and improperly disposing of drug and gun evidence. These statements were published in newspapers serving the Elkton community." *Dean*, 561 S.E.2d at 688.
“I am telling you that I have allegations, I have facts. Prove me wrong,’ Dearing said, ‘.... If you can sit here and say all these people are lying, prove me wrong,’ the mayor later added. ‘Tell me that our law enforce-
ment is not running guns. I’m saying I have information that they are. Tell me that they are not out here beating up our citizens, because I tell you they are. Tell me that they are not out here harassing our citizens, having young girls meeting them in the cemetery to keep from getting tickets. You tell me it’s not—it is.’

In addition, throughout the lengthy series of defamatory articles, Dearing repeatedly referred to fifteen or more areas of criminal wrongdoing attributed to the Elkton police. In one local article he was quoted as saying he had received more than 200 phone calls from town residents complaining of “police wrongdoing.”

The media interpreted Dearing’s charges as alleging that the Elkton police were “rife with corruption”—a characterization that any fair-minded reading of the appendix of articles would amply justify. Undoubtedly, this high-gauge shotgun approach would decimate the reputations of individual members of a small group in a small town. Even the trial judge conceded how the broad charges of corruption and laundry list of specific offenses were understood locally: “[T]he Elkton police force has only five (5) to eight (8) officers, and many of the citizens of Elkton would unquestionably understand that some or all of the alleged defamatory remarks to apply to Plaintiff.”

In a small town of just over 2000, with a small police force, the city mayor, Dearing, made a lengthy series of public statements inside and outside of city council meetings, reported at length in a series of articles over several months in the local and other locally available newspapers. Locals undoubtedly and reasonably understood that some or all of the imputations applied to plaintiff, an unnamed

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571 Reply Brief of Appellant at 1–2; Appellant’s Appendix at 33, Dean (No. 011154); see also id. at 154 (containing Circuit Court’s Opinion and Order, at 2 (citing Dean v. Town of Elkton, 54 Va. Cir. 518, 519 (2001))).

572 Appellant’s Appendix at 33, 36, 39, 49, Dean (No. 011154). The designations used were “our law enforcement,” “Town of Elkton’s police department,” “Elkton Police Department,” and “Elkton police.” Opening Brief of Appellant at 4, Dean (No. 011154).

573 Appellant’s Appendix at 13, Dean (No. 011154) (“You would not believe some of the stuff I have heard. And the sad thing is, I don’t believe these people are lying.”); id. at 19 (referencing nineteen notarized affidavits of “Elkton Police Department wrongdoing” expected to be turned over to the county commonwealth’s attorney, containing, according to Dearing, “19 specific accusations of police transgressions.” These were characterized by Dearing as “only a few and a test to see if any action will be taken before I send the more serious allegations forward”); id. at 43 (parallel remarks); id. at 45–46 (referencing “19 persons making allegations against the town’s police department and administration”).

574 Id. at 47, 61.

575 See supra text accompanying notes 314, 333–34.

576 Dean, 54 Va. Cir. at 524 (emphasis added); see also Reply Brief of Appellant at 2 n.1, Dean (No. 011154) (citing same, adding emphasis).

officer. The logic for a finding of "of and concerning" as to all of the officers (including plaintiff) seemed incontrovertible. But the trial court and the Virginia Supreme Court disagreed, holding that the First Amendment was a per se bar to reliance on the small group defamation rule to meet the "of and concerning" requirement.

After correctly noting that New York Times did not involve a small group defamation setting, the court concluded nonetheless that it "foreshadow[ed] . . . Rosenblatt v. Baer." Relying on the Court's broad overstatement rather than its limited holding, the Dean court found that the use of the small group defamation rule "alone as the basis for . . . 'of and concerning'" did "not survive constitutional scrutiny." The court held that "[a]n allegedly defamatory statement which imputes misconduct generally to a governmental group constitutes libel of government, for which there is no cause of action in American jurisprudence."

Under the court's analysis, defamed public officials like Dean could only fulfill the "of and concerning" requisite by providing extrinsic proof of one of the following: specific implication of the individual member or each member of the small group. However, extrinsic evidence that third persons interpreted the defamation as applying to plaintiff could not be "based solely upon a plaintiff's membership in the referenced group." Finding that plaintiff's pleading contained no allegations showing how the articles "reference [plaintiff] specifically or could be understood to do so" other than on his status as a police officer in the maligned group, the court upheld the trial's grant of demurrer, refusing to allow such extrinsic facts to be adduced at trial. The court upheld this extraordinary remedy

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578 Appellant’s Appendix at 153-64, Dean (No. 011154); Dean, 54 Va. Cir. at 525.
579 Dean, 561 S.E.2d at 687-90.
580 See id. at 689 (referring to Supreme Court precedent to support its contention).
581 Id.
582 See id. (finding that Rosenblatt rejected, as the equivalent of a libel on government, the view that a jury could find "of and concerning" based on the fact that the publication "cast suspicion indiscriminately on the small number of persons who composed the former management group, whether or not it found the imputation of misconduct was specifically made of and concerning [the plaintiff]" (quoting Rosenblatt, 383 U.S. at 79-80)).
583 See supra text accompanying notes 112-38.
584 Dean, 561 S.E.2d at 689 (emphasis added). For a laudatory analysis of Dean, see SMOLLA, supra note 15, §§ 4:69, 4:76.
585 Dean, 561 S.E. 2d at 689. It is unclear what the court envisions. Cf. supra text accompanying notes 241-63, 282-87.
586 Dean, 561 S.E.2d at 689 (emphasis added).
587 Id.
588 Id. at 689-90. Appellant correctly interpreted New York Times as only requiring production of such extrinsic evidence at trial. See Opening Brief of Appellant at 4, Dean (No. 011154); infra notes 423-31.
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despite its prior approval of the leading small group defamation decision in its own leading post-New York Times opinion. 589

The Dean opinion misapplied Rosenblatt as controlling First Amendment jurisprudence in several ways. First, it inexcusably ignored the clear implication that Rosenblatt's limitation of small group defamation would not apply to explicit statements that the entire governmental entity was corrupt and its corollary, that is, that the express charge itself might alone suffice to demonstrate the defamatory charge was specifically directed at each small group member. 590 Second, the Dean court ignored the very specific defect the Court seized upon in Rosenblatt in invalidating the jury's "too broad" discretion to find "of and concerning" in the doubly implicit scenario—that it sufficed that Baer showed that the defamation "could have been" directed" at him "as one of a small group." 591 The discretion found in this italicized language was the true raison d'être of Rosenblatt, illustrating the problems inherent in a some-but-less-than-all scenario, 592 a scenario the Dean court specifically rejected, conceding as it did, that the statements "impute misconduct generally to a governmental group." 593 Third, the court ignored Rosenblatt's response in the doubly implicit setting to the argument that the instruction directed the

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589 See Opening Brief of Appellant at 6, Dean (No. 011154) (citing Gazette, Inc. v. Harris, 325 S.E.2d 713, 737-40 (Va. 1985)). The Gazette, Inc. court cited Ewell v. Boutwell, 121 S.E. 912, 914 (Va. 1924), discussed supra note 369, approvingly and quoted from Restatement (Second) of Torts § 564 cmt. b (1977). Gazette, Inc., 325 S.E.2d at 738. The companion case to Gazette, Inc. involved a case of purported child abuse depicted as a homicide in which a fictitious name for the child was used, but where the identical facts surrounding the death of plaintiffs' child were revealed. The court affirmed a finding of identification under an instruction requiring that the article was "intended to refer to the plaintiff, directly or indirectly, and that it is reasonably probable that members of the public who read the article would understand it as referring to them." Id. at 739. The court affirmed that the trial court properly allowed the jury to find "of and concerning." Id. The Dean court appears oblivious to the anomaly created: a common law totality of the circumstances approach generally resolved by the jury in all "of and concerning" cases other than the small group defamation context and an extremely circumscribed matter-of-law-for-the-court approach in the small governmental group setting. This anomaly is further exemplified by the same court's contemporaneous and quite justifiable decision in WJLA-TV v. Levin, where it considered a series of defamation cases about the same plaintiff over a short period as a collective unit for "of and concerning" purposes even where the publications identifying plaintiff occurred subsequent to those not identifying him. 564 S.E.2d 383, 390-91 (Va. 2002).

590 See supra text accompanying notes 124-27. The court was aware of this argument, as appellant's excellent briefs cited to this important aspect of Rosenblatt. See Opening Brief of Appellant at 5-6, Dean (No. 011154).

591 Rosenblatt, 388 U.S. at 79-83.

592 See supra text accompanying notes 128-38.

593 Dean, 561 S.E.2d at 689 (emphasis added). The court also quoted the all inclusive small group defamation dicta in Ewell, 121 S.E. at 914. Dean, 561 S.E.2d at 688. The court apparently accepted this aspect of Appellant's argument, see the discussion in Opening Brief of Appellant at 5, and rejected the vigorous attempt by appellee to portray appellant's claim as a some-or-more-but-not-all case under Virginia law, citing dicta in Ewell, 121 S.E. at 914, and Restatement of Torts § 564 (1938). Brief of Appellee at 13-17, Dean (No. 011154).
jury to find for Baer "only if it found the libel was aimed at [him] or if it found that the libel aimed at [him], along with a few others." The Court replied that such a small group defamation instruction "might not be objectionable," as "we do not mean to suggest that the fact that more than one person is libeled by a statement is a defense to suit by a member of the group." The Rosenblatt Court, however, could not "read the charge as being so limited" in light of the italicized defect delineated above. Fourth, the Dean court was apparently unfamiliar with the strong suggestions of the continuing liability of the small group theory in New York Times and the Court's undoubted reliance on the small group theory in Garrison.

In sum, the Virginia Supreme Court's broad and erroneous interpretation of Rosenblatt is inconsistent with both a detailed analysis thereof and the Court's jurisprudence as a whole. Despite some broad language therein, language relied on by the Dean court, Rosenblatt did not purport to disavow the strong intimations in New York Times or the unequivocal reliance on the small group defamation theory in Garrison. Had the Court so intended, Justice Brennan, the author of all three majority opinions—New York Times, Garrison, Rosenblatt—would have so stated. That he did not reinforces the extraordinarily modest nature of Rosenblatt. The Court's subsequent analyses of suits by governmental entities and members thereof and its reliance on state common law to resolve "of and concerning" issues further emphasizes Rosenblatt's limited sphere of influence.

The Court's strong predisposition against absolute immunity for either the media or non-media entities or individuals also strongly

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534 Rosenblatt, 383 U.S. at 82, n.6.
535 Id.
536 See supra text accompanying note 135.
537 See supra text accompanying notes 67-72.
538 See supra text accompanying notes 79-90.
539 See Dean, 561 S.E.2d at 689; supra text accompanying notes 389-84.
540 See supra notes 397-98.
541 See supra text accompanying notes 146-77.
542 For discussion of New York Times, see supra text accompanying notes 16-29. For a discussion of Garrison see supra notes 79-90. For a discussion of Rosenblatt see supra notes 141-45; see also Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) ("We have not gone so far . . . as to accord the press absolute immunity in its coverage of public figures or elections."); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 773 (1986) (discussing Gertz, infra); McDonald v. Smith, 472 U.S. 479, 484 (1985) (finding, in a Petition Clause case, that a letter to the President that was defamatory of a candidate for U.S. attorney was protected only by New York Times); id. at 486-87 (Brennan, J., concurring) (stating that under New York Times, there is no absolute privilege protecting expression that falls within the scope of the Petition Clause); Hutchinson v. Proxmire, 443 U.S. 111, 127 (1979) (rejecting the suggestion that either history or the language of the Speech and Debate Clause created an absolute privilege for defamation made outside the chamber of the House or Senate); Herbert v. Lando, 441 U.S. 153, 169, 173, 176 (1979) (rejecting an absolute privilege against inquiry into the editorial process as contrary to New York Times and its progeny); Gertz v. Robert Welch, Inc., 418 U.S.
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augurs against absolute immunity for defamers who limit themselves to disparaging small governmental entities rather than specifically identified individual members thereof. As the Court has said, absolute immunity "requires a total sacrifice of the competing value" redressed by the law of defamation, including "our basic concept of the essential dignity and worth of every human being," a view it has "regularly found... an untenable construction of the First Amendment." By contrast, the Court has repeatedly restated its preference for the qualified constitutional privilege found in *New York Times*, widely perceived as "essentially protective" of freedoms of expressions and "an extremely powerful antidote to the inducement" to self-censorship.

Viewed collectively, the Court's jurisprudence treats freedoms of expression and redress of reputation under the law of defamation as "equally compelling need[s]." In essence, the Court imposes a heavy burden of persuasion on defendants attempting to extend even the swathe of *New York Times'* qualified constitutional privilege.

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323, 341 (1974) (noting that if self-censorship were the only issue, the Court "would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation").

403 Gertz, 418 U.S. at 341.

404 Rosenblatt v. Baer, 388 U.S. 75, 92 (1966) (Stewart, J., concurring), quoted in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990); see Gertz, 418 U.S. at 341; see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515–16 (1991) (noting that defamation law had redressed reputational injury since the late 16th century); *Milkovich, 497 U.S. at 11* (same); *Philadelphia Newspapers, 475 U.S. at 782, n.2* (Stevens, J., dissenting) (stating that reputation is an "important interest" recognized for over a thousand years); *Herbert, 441 U.S. at 169* (finding that the interest in reputation is a "basic concern").

405 Herbert, 441 U.S. at 176.

406 See supra note 402. In only "fair report" has the Court hinted at an absolute privilege. See *Time, Inc. v. Firestone*, 424 U.S. 448, 457 (1976) (suggesting *Cox Broadcasting Co. v. Cox*, 420 U.S. 469 (1975), which accorded protection to true matters of public record, would apply to accurate reports of false matters of public record). For a detailed analysis of this still not totally resolved issue, see DAVID A. ELDER, THE FAIR REPORT PRIVILEGE § 3:02 (1988) (detailing contradictory and vague elements of First Amendment jurisprudence on whether fair and accurate reports enjoy an absolute constitutional privilege); ELDER, supra note 2, § 3:17, at 58–60 (noting the issue is "a difficult one" on which the Court has given "little guidance" and that the *Time, Inc. v. Firestone* decision used accuracy and truth "as fungible concepts without apparently comprehending the important distinction between the two").

407 Herbert, 441 U.S. at 169; id. at 192 (Brennan, J., dissenting) (remarking that *New York Times* provided "exceedingly generous standards").

408 Gertz, 418 U.S. at 342; see also *Philadelphia Newspapers, 475 U.S. at 783* (Stevens, J., dissenting) ("[T]he publisher must come closely to willfully blinding itself to the falsity of its utterance."); *Wolston v. Reader's Digest Ass'n.*, 443 U.S. 157, 168 (1979) ("demanding burden"); *Time, Inc.*, 424 U.S. at 457 ("rather drastic limitations").

409 *Time, Inc.*, 424 U.S. at 456, quoted in *Philadelphia Newspapers, 475 U.S. at 774*.

410 For a development of this theme in detail and a suggested presumption of falsity and constitutional malice in libel/false light hidden camera litigation, see David A. Elder et al., *Establishing Constitutional Malice for Defamation and Privacy/False Light Claims When Hidden Cameras Are Used by the Newsgatherer*, 22 LOY. L.A. ENT. L. REV. 927 (2002).
In *Time, Inc. v. Firestone*,\(^411\) the Court repulsed an attempt to extend *New York Times* to all inaccurate reports of legal proceedings, regardless of plaintiff's status, as "effect[ing] substantial depreciation of the individual's interest in protection from such harm, without any convincing assurance" this was necessitated by the First Amendment.\(^412\) In *Herbert v. Lando* the Court replied similarly to defendants' attempt to "erect an impenetrable"\(^413\) barrier against inquiry into the editorial process\(^414\) to meet the requirements of *New York Times* or the lower standard allowed private persons by *Gertz*: "The case for making this modification is by no means clear and convincing...we decline to accept it.\(^415\)

The Court’s explicit, strong predisposition against expanding the established substantive protections wrought by *New York Times* and *Gertz*—the burden of constitutional malice by all public persons\(^416\) as to matters of public interest (and for presumed or punitive damages for public or private individuals in matters of public interest\(^417\)),

\(^{411}\) 424 U.S. at 455–58 (1976) (rejecting a narrower version as to what actually occurred in the courtroom).

\(^{412}\) Id. at 456 (emphasis added).


\(^{414}\) Id. at 155–70.

\(^{415}\) Id. at 169–70 (emphasis added); see also *Gertz*, 418 U.S. at 352 (rejecting all purpose or general public figure status, stating that it "would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." (emphasis added)).

\(^{416}\) The Court's interpretations narrowly construe public figure status. See *Wolston v. Reader's Digest Ass'n.*, 443 U.S. 157, 165–69 (1979) (rejecting public figure status as to all convicted of criminality, holding that the rule would "create an 'open season' for all who sought to defame persons convicted of crime"); id. at 169 (Blackmun, J., concurring) (interpreting the majority as saying a vortex public figure becomes such only by "literally or figuratively 'mount[ing] a rostrum' to advocate a particular view"); *Hutchinson v. Proxmire*, 443 U.S. 111, 138–36 (1979) (rejecting the suggestion that a federal grant recipient was a vortex public figure); *Time*, Inc., v. *Firestone*, 424 U.S. 448, 453–55 (1976) (finding that Palm Beach socialite who was a participant in a divorce trial and held eleven press conferences was not a public figure); *Gertz*, 418 U.S. at 345, 351–52 (finding that a prominent local attorney in a high profile case was neither an all purpose or vortex public figure). The lower courts have not always followed the Court's limited construction. See generally *ELDER*, supra note 2, §§ 5:9–5:11 (discussing the Court's vortex public figure jurisprudence). The same narrow Court construction is true as to the "public official" status. See supra note 145. The Court has reaffirmed this constrained view of public officialdom. See supra note 114. The Court has reaffirmed this constrained view of public officialdom. See supra note 145. The Court has reaffirmed this constrained view of public officialdom.

\(^{417}\) See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16, 21 n.8 (1990) (noting the applicability of the *New York Times* and *Gertz* limitations on damages to the instant case); Philadelphia Newspapers, Inc. v. *Hepps*, 475 U.S. 767, 774 (1986) ("[E]ven when private figures are involved, the constitutional requirement of fault supersedes the common law's presumptions as to fault and damages."); *Herbert v. Lando*, 441 U.S. 153, 162 nn.7–8, 168 (1979) (discussing historical jurisprudence on the propriety of such a constitutional limit); *Gertz*, 418 U.S. at 349–50 (basing
plaintiffs' burden of proving material falsity as to matters of public interest\(^4\) (with the concomitant partial subsumption of an opinion privilege\(^4\) under the Court's interpretation of this burden as precluding liability as to matters not provable as probably false\(^4\)), protection for other forms of imaginative expression and hyperbole,\(^4\) and independent assessment of the record on appeal to proscribe "'forbidden intrusion on the field of free expression'"\(^4\)\(^4\)\(^2\) - parallels its refusal to give special First Amendment-based protection in matters

\(^{418}\) See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) (citing \textit{Philadelphia Newspapers Inc.}, 475 U.S. at 775, for the rule of plaintiff's burden); \textit{Milkvich}, 497 U.S. at 9 n.4, 16, 19-20 (declining to add an opinion/fact test to the analysis); \textit{Philadelphia Newspapers Inc.}, 475 U.S. at 775-77 (reasoning that because "the burden of proof is the deciding factor only when the evidence is ambiguous," the plaintiff's burden helps ensure protection of true speech). Note that the shift of the burden of proof in the private person-public interest setting was a \textit{very} close call, with four dissenters willing to keep the burden of proving truth on the defendant. \textit{Philadelphia Newspapers Inc.}, 475 U.S. at 782-83 (Stevens, J., with Burger, C.J., White, J., Rehnquist, J., dissenting). As a corollary, truth is an absolute First Amendment defense as to matters of public interest. \textit{See Philadelphia Newspapers Inc.}, 475 U.S. at 777 (implying this corollary from the importance of First Amendment protection of true speech); \textit{Garrison v. Louisiana}, 379 U.S. 64, 78 (1964) ("[T]he New York Times rule ... absolutely prohibits punishment of truthful criticism."). \textit{See generally ELDER, supra note 2, § 2:3, at 17-21 (discussing the truth defense and the First Amendment).}

\(^{419}\) See \textit{Milkvich}, 497 U.S. at 17-23 (rejecting both a "wholesale defamation exemption for anything that might be labeled 'opinion'" as an "artificial dichotomy" between fact and opinion and the defendant-protective multi-factor test adopted in \textit{Ollman v. Evans}, 750 F.2d 970 (D.C. Cir. 1984)). The cases remain in a state of disarray despite the Court's attempt to rein in this potentially open-ended doctrine. \textit{See generally ELDER, supra note 2, at ch. 8 (discussing the Court's fact/opinion jurisprudence).}

\(^{420}\) See \textit{Milkvich}, 497 U.S. at 19 ("[A] statement on matters of public concern must be provable as false before there can be liability under state defamation law ... ").

\(^{421}\) See \textit{id.} at 17, 21 (describing such a type of speech as falling under constitutional limits and defamation law); \textit{Hustler Magazine, Inc. v. Falwell}, 485 U.S. 46, 48-50 (1988) (rejecting plaintiff's intentional infliction of emotional distress claim, finding that a parody "interview" with plaintiff depicting his "first time" as an incestuous inebriated encounter with his mother in an outhouse was protected expression); \textit{Old Dominion Branch No. 496 v. Austin}, 418 U.S. 264, 283-86 (1974) (finding that "scab" was protected by federal labor law); \textit{Greenbelt Coop. Pub. Ass'n v. Bresler}, 398 U.S. 6, 13-14 (1970) (finding the use of "blackmail" was, in context, mere "rhetorical hyperbole" regarding plaintiff's exercise of negotiating leverage).

\(^{422}\) \textit{Milkvich}, 497 U.S. at 17, 21 (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984))); \textit{see also ELDER, supra note 2, § 4:1, at 4-8 (discussing the Court's requirement for appellate review).}
of jurisdiction, discovery, trial, evidence, procedure, employer imputed fault/vicarious responsibility, allocation of fault-finding responsibility, and damages (other than those imposed by New York Times and Gertz).

423 See Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780 n.12 (1984) (rejecting any suggestion the First Amendment's "invisible radiations" restricted jurisdiction acceptable under the Due Process Clause). In Calder v. Jones, 465 U.S. 783, 789-91 (1984), the Court rejected any suggestion that the First Amendment limited plaintiff-California-domiciliary's right to sue therein for a publication in Florida where "intentional, and allegedly tortious, actions were expressly aimed at California." The Court found that "[i]nfusion of such [First Amendment] considerations would needlessly complicate an already imprecise inquiry." Id. at 790. Because the First Amendment had already been considered in imposing limitations on the substantive law, to consider it again in the jurisdictional context would be "a form of double counting." Id.

424 See Herbert v. Lando, 441 U.S. 153, 155-77 (1979) (concerning discovery inquiry into journalist's thoughts and conversations to prove constitutional malice); supra text accompanying notes 413-15.

425 See Herbert, 441 U.S. at 174 n.25 (rejecting a proposal for a bifurcated trial as to falsity, then fault and injury, in part because the Court refused to subject libel litigation to "such burdensome complications and intolerable delays").

426 See id. at 155-72 (allowing plaintiff latitude to prove the "critical element" of constitutional malice, rejecting any constitutional restrictions, citing the use of indirect or direct evidence on issues of motivation or malice at common law). The Court's analysis "suggests that more accurate results will be obtained by placing all, rather than part, of the evidence before the decision-maker." Id. at 172-73; see also Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667-68, 684 (1989) (finding that, although issues of motivation and common law malice were not alone sufficient for constitutional malice, they were, like other forms of circumstantial evidence, relevant evidence on the issue). For detailed analyses of common law malice as strong probative evidence of constitutional malice, see ELDER, supra note 2, § 7:3, at 61-77, and Elder, supra note 410, at 377-441.

427 See Calder, 465 U.S. at 790-91 (1984) (suggesting no special rules extended to summary judgment in First Amendment cases); Hutchinson v. Proxmire, 443 U.S. 111, 120 & n.9 (1979) (expressing doubt about the suggestion that summary judgment "might well be the rule rather than the exception" on constitutional malice cases); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 n.7 (1986) (interpreting these earlier statements as "simply an acknowledgment of our general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws'"). For a detailed analysis of Anderson see ELDER, supra note 2, § 7:6, at 84-89.

428 See Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253-54 (1974) (discussing publisher's liability for employee-reporter's false statements in a newspaper article). This hugely important development is analyzed in depth in ELDER, supra note 2, §§ 6:4, 6:10, 7:9.

429 See Time, Inc. v. Firestone, 424 U.S. 448, 461 (1976) (stating that there is no prohibition against an appellate court's making a finding of fault in the first instance of a civil case). "The First and Fourteenth Amendments do not impose upon the states any limitations as to how, within their own judicial systems, fact finding tasks shall be allocated." Id.

430 See Masson v. New Yorker Magazine, 501 U.S. 496, 522-23 (1991) (rejecting the incremental harm doctrine); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-81 (1984) (finding that where defendant engaged in multi-state sales, it was required to anticipate plaintiff's search for an extended statute of limitations—New Hampshire was the only state where the claim was not time-barred—and was charged with notice of the possibility it might be assessed damages throughout the country under the "single publication rule"); see also infra text accompanying notes 453-54.

431 Even under Gertz, the Court broadly defined compensatory damages as not limited to economic loss but as covering other "actual harm," such as "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Gertz v. Robert

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In sum, the Court has made it clear that there is a need to "hold the balance" between the "vital guarantee of free and uninhibited discussion of public issues" and the "important social values" on the opposite "side of the equation" and affirmed unambiguously that the First Amendment can well "tolerate sanctions against calculated falsehood without significant impairment of [the] essential function[s]" of freedoms of expression. In powerful, oft-quoted language in *Garrison*, involving a criminal prosecution for inclusive defamation of a small group of eight judges, the Court eloquently reaffirmed that "calculated falsehood"—the knowing or reckless falsehood—is beyond the pale of the First Amendment and "at odds with the premises of democratic government." Other Court

Robert Welch, Inc., 418 U.S. 323, 350 (1974). Later, in *Time, Inc. v. Firestone*, the Court disavowed any suggestion that the First Amendment required proof of reputational impairment before mental distress damages could be awarded. 424 U.S. at 460-61. Some state cases impose such a threshold as a matter of state law. See *Elder*, supra note 2, § 9:2, at 12-16 (noting several such state cases). Also note that the Court rejected any suggestion that a heightened standard of fault above and beyond that for compensatory damages is required for punitive damages. *Id.* § 9:5, at 29-30 (discussing *Gertz*). The Court recognized the peculiar competence and "wide experience" of trial courts in framing instructions on damages. *Gertz*, 418 U.S. at 350.


*Id.* at 22.

*Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

*Milkovich*, 497 U.S. at 22.


*Garrison v. Louisiana*, 379 U.S. 64, 66 n.2 (1964); see *supra* text accompanying notes 79-80.

"At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat a public servant or even topple an administration."). See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 687, n.34 (1989) (quoting *Garrison*); *McDonald v. Smith*, 472 U.S. 479, 487 & n.1 (1985) (Brennan, J., concurring) (quoting *Garrison*, 379 U.S. at 79). For a powerful example of the lessons taught by *New York Times* and *Garrison*, see *People v. Stanistreet*, 58 P.3d 465 (Cal. 2002), where the court unanimously upheld misdemeanor convictions under the California statute proscribing the making of knowingly false accusations of misconduct against police. Citing extensively to *New York Times* and *Garrison* (and noting that the statute was more exacting in absolving complainants of reckless falsehood), the California Supreme Court rejected the contention the statute violated First Amendment precedent on content discrimination, referencing the greater potential injury from such complaints. *Id.* at 469-71. In other words, the legislature could criminalize knowingly false charges against this class of officer victims but could not, for example, criminalize only knowingly false racial profiling allegations. *Id.* at 472. More broadly, the court said, "[i]n our country, we do not expect, and the Constitution does not require us to tolerate, knowingly false statements of fact." *Id.* at 473. Their statement was not overbroad, as it did not apply to "more casual speech." *Id.* at 473-74. Accordingly, the offense was more like perjury, a felony. *Id.* The court noted the cases invalidating another statute that provided a civil action for defamation by a police officer against a complainant who filed a complaint with plaintiff's employer charging incompetency, misconduct or criminality if the charge was knowingly false and made with "spite, hatred, or ill will," but also said they had been "weakened" by reliance on partially overruled (on jurisdictional grounds) precedent. *Id.* at 474 & n.6 (quoting a section of the
precedent has emphasized the compensatory, vindicatory, and deterrent nature of damage liability, acknowledged in powerful and unequivocal terms the right of a state to use its laws to "discourage the deception of its citizens" by falsehoods, and warned against "the poisonous atmosphere of the easy lie [that] can infect and degrade a whole society."
In interpreting the dictates of the First Amendment in the post-
*New York Times* era and the *Gertz* counter-revolution, the Court has
repeatedly reaffirmed the continuing vitality of the common law and the historical content and
significance of common defamation principles and privileges. For example, in *Masson v. New Yorker Magazine Inc.*, the Court vigorously rejected any special First Amendment rules for quotations in assessing truth and falsity and adopted the common law of substantial truth/material falsity. The Court further rejected a "rational interpretation" standard in interpreting quotations attributed to plaintiff—as a "near absolute, constitutional protection" that would "ill serve" First Amendment values—and held that the incremental harm doctrine was not mandated by the First Amendment. What was defamatory of a plaintiff was held to be purely a matter of state law.

Viewed against the Court’s powerful preference for *New York Times* (and concomitant liability for “calculated falsehood”), the case for an expansive proscription of liability based on the small group

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445 See Elder, *supra* note 24, at 660 ("Gertz and its progeny . . . reflect a basic realignment of the competing interests of reputation and free expression.").

446 See *Masson v. New Yorker Magazine*, 501 U.S. 496, 514–17 (1991) (rejecting a suggestion of any alteration other than in syntax or grammar constituted a falsity, the Court adopted the historical sense of substantial truth, with non-liability for minor or insignificant variances); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 & nn.18–20 (1984) (citing the "common-law heritage" of the *New York Times* rule and the judge’s "especially broad role" in applying it and the close analogy of such cases to the English precedent on the tort of deceit); *id.* at 510 (noting that *New York Times* “emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage”); *Herbert*, 441 U.S. at 161–62 (adopting the “deeply rooted” common law rule of permitting state-of-mind evidence on issues of punitive damages in the context of proving constitutional malice); *id.* at 163 (relying in part on the forfeiture by “malice” rules of the common law antedating *New York Times*); *supra* text accompanying notes 7–13, 150–62, 169–77. Note that in *Masson* the Court relied on in major part the Restatement (Second) of Torts § 563 cmt. c (1977). The Court has relied on the Restatement (Second) of Torts in other cases. See *Milkovich*, 497 U.S. at 13 (citing *RESTATEMENT (SECOND) OF TORTS* § 566, cmt. a (dealing with opinion)); *Keston*, 465 U.S. at 774 n.3, 777 and n.8 (citing *RESTATEMENT (SECOND) OF TORTS* § 577A ("single publication" rule)).

447 See McDonald v. Smith, 472 U.S. 479, 482–84 (1985) (finding its common law qualified privilege decision of 1845 controlling as to the meaning and content of the Petition Clause in a case involving a nominee for U.S. Attorney); *supra* text accompanying notes 169–77.

448 See *McDonald*, 472 U.S. at 482–84.


450 *Id.* at 510, 514–17, 524–25. In modern times, the burden of proving falsity is usually on the plaintiff. See *id.* at 517 (citing *Philadelphia Newspapers, Inc.*); see also *supra* note 418. Note the Court used the impact on the “reasonable reader”/"reasonable trier of fact" standard in distinguishing material from immaterial variances. *Masson*, 501 U.S. at 515–17, 522, 525 (“[W]ords and punctuation express meaning. Meaning is the life of language.”).

451 *Id.* at 518–20.

452 *Id.* at 520.

453 *Id.* at 592–23. The Court noted that California could adopt this doctrine as a matter of state law on issues of damages, causation, or injury calculations. *Id.* at 523.

454 *Id.* at 522.
defamation theory is exceedingly weak. Consider the following hypotheticals:

—A trash talk radio host (from the right or left) specifically imputes acceptances of bribes while in office to all living former presidents and the current President;\(^4\)

—A member of the bar or law professor imputes corruption in a specific case to the state supreme court;\(^5\)

—A citizen stands in the middle of the town square and holds a placard charging that the mayor and town council are “controlled by the mob”;\(^6\)

—A citizen detained in the town jail in Mayberry claims to have been raped during a blackout—only Andy, Barney, and Goober were in and around the jail during the blackout;\(^7\)

—A public university student charges university trustees with flagrantly violating the open meeting law to conceal illegalities and gross improprieties.\(^8\)

—A small number of law professors at a public university defame their male or female colleagues (a group of fewer than twenty-five) as creating a “pervasive hostile environment.”\(^9\)

Explicit charges, fully inclusive of a small group, and the offended public official sues, alleging that the defendant published with “actual malice”\(^10\)—knowing or reckless disregard by clear and convincing evidence—\(^11\)and further alleges common law malice, as did Officer Dean.\(^12\) What compelling arguments of public policy justify an “impenetrable barrier”\(^13\) based on the broad prohibition of the small group theory espoused by the Virginia Supreme Court in Dean v.

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\(^4\) The group of six includes President George W. Bush and former Presidents Bill Clinton, George Bush, Ronald Reagan, Jimmy Carter, and Gerald Ford.

\(^5\) Cf. Ryckman v. Delavan, 25 Wend. 186, 200-01 (N.Y. 1840) (“But suppose, in the course of such general invective against those who administer our laws, a charge of corrupt and partial decision in a particular case to have been made against ‘all the present judges of the Supreme Court.’ Is not this to the common understanding of men as clear as if Judges Nelson, Bronson and Cowen were distinctly named?”); supra text accompanying notes 79–90 (discussing Garrison). But cf. Owens v. Clark, 6 P.2d 755, 759–60 (Okla. 1931) (holding, in a 5–4 opinion, that a libel of “certain members” of the state supreme court libeled no individual member thereof). It is doubtful, however, that Owens remains good law. See supra note 330.

\(^6\) Cf supra text accompanying notes 294–304.

\(^7\) Under Dean v. Dearing, the difference between three and five to eight people would be meaningless. Presumably, if only Andy and Barney were on duty, neither could sue. The illogic of such a conclusion is breathtaking.

\(^8\) Cf supra text accompanying notes 297–304; infra note 473.

\(^9\) Cf supra text accompanying notes 319, 322, 327.

\(^10\) Opening Brief of Appellant at 2–3, Dean v. Dearing, 561 S.E.2d 686 (Va. 2002) (No. 011154); Appellant’s Appendix at 6, Dean (No. 011154).

\(^11\) Id.; see supra text accompanying notes 25–27, 402.

\(^12\) Opening Brief of Appellant, at 2–3, Dean (No. 011154) ("evil intent"); Appellant’s Appendix at 6, Dean (No. 011154).

\(^13\) Herbert v. Lando, 441 U.S. 153, 170 (1979); see supra text accompanying notes 413–15.
Surely not the specter of seditious libel. Harry Kalven elo-questly postulated that “the presence or absence in the law of the concept of seditious libel defines the society. A society... [that] makes seditious libel an offense, is not a free society...”465 His argument is compelling, perhaps irrefutable, in the context of a civil suit or prosecution by a federal, state, or local governmental body, or maybe even by a large group of government employees collectively defamed. These cases may involve the direct or indirect use by the government of its deep pockets and sometimes vast resources to intimidate and silence its citizen-critics,467 and, in any event, closely parallel seditious libel. But the latter are a far wilderness cry from the individual member of a small group retaining private counsel to sue for disparagement of his or her individual reputation against a person or entity alleged to have acted—like Dearing—with both constitutional and common law malice.469

The First Amendment provides no protection for crackpots, calculating liars, purveyors of sourceless rumor, “purposeful avoid[ers] of truth,”470 and a myriad of others who engage in disseminating “calculated falsehood.”471 It boggles the mind and makes the First Amendment look like Dickens’s proverbial ass472 to protect the fabricator who does incalculable calculated injury by the consciously predetermined ploy of winking, blinking, and nodding but naming no names when all but the clueless know or can easily find out who was targeted. Only in the never-never-world of First Amendment jurisprudence would such warped logic even be contemplated. It boggles the mind to think of the artificial distinctions that will arise and the artificial line-drawing that will be necessitated by a distinction between small group governmental entities and non-governmental entities. The individual trustees of a public university could not sue while

465 Kalven, supra note 5, at 205.
466 See supra text accompanying notes 30–65, 187–368.
467 See supra text accompanying notes 202–07, 218–19.
468 See supra text accompanying notes 258–40, 288–333.
469 Opening Brief of Appellant at 2–3, Dean (No. 011154); Appellant’s Appendix at 6, Dean (No. 011154). A special prosecutor later found no evidence of wrongdoing by any present or past officer of the Elkton Police Department. Appellant’s Appendix at at 28–29, 61, Dean (No. 011154). Note that common law malice is an additional requirement in most states for punitive damages, ELDER, supra note 2, § 9:6, at 33–34, which is authorized but not required by the First Amendment. See Cantrell v. Forest City Publ’g Co., 419 U.S. 245, 251–53 (1974) (differentiating between the common-law governmental requirement and the constitutional “actual malice” constraint).
471 For a detailed analysis of the case law on constitutional malice, see ELDER, supra note 2, at ch. 7.
472 CHARLES DICKENS, OLIVER TWIST ch. 51 (“If the law supposes that’ said Mr. Bumble, . . . ‘the law is a ass—a idiot.”).
those of a private university could.  

The lawyers in a small city law office could not sue, but the members of a candidate for attorney general's law firm could. A small group of public high school teachers accused of improprieties with students could not sue, but, on the same allegations, the English faculty at a private high school could. And what constitutes a governmental entity or group? A jury? A group of independent contractors with the government? Or does it apply to garden variety public employees not likely to be deemed public officials under Rosenblatt (for example, the mechanics at a small police garage or the nurses at a small government clinic)? The quagmire unleashed by Dean is, indeed, one whose "outer boundaries ... are difficult to perceive." If the Dean rule applies in the mere public employee, non-"public official" scenario, the defendant is self-catapulted from liability for negligently disseminating defamation into the realm of absolute

475 See Levert v. Daily States Pub. Co., 49 So. 206, 206-08, 211 (La. 1909) (allowing a member of the board of trustees of Tulane University to sue for an imputation of scandal to the board of trustees, and concluding that the libel "impeached the integrity of every individual member who participated in the proceedings"). The Court noted that the trustees were persons of "more or less prominence in the community" with "well known" connections to the University. Although, unnamed, plaintiff-trustee was "necessarily one of its objects, and it must have been so understood by those who knew that he was a member of the board." Id. at 211.

476 See Boyce & Isley PLLC v. Cooper, 568 S.E.2d 893, 900-01 (N.C. Ct. App. 2002) (upholding a claim by the unnamed lawyers in a firm of four); supra note 130.

477 See supra text accompanying note 327.

478 The status of jurors as "public officials" is unclear. Compare Macon Telegraph Publ'g Co. v. Elliott, 302 S.E.2d 692, 695 (Ga. 1983) (implying that plaintiff-petit juror was a private individual), with Standke v. B.F. Darby & Sons, 193 N.W.2d 139, 142-45 (Minn. 1971) (holding grand jurors subject to New York Times as "public officials," "public figures," or matters of "public interest"). Note that the latter was issued prior to Gertz's repudiation of the subject matter test in favor of a status approach to applying the New York Times standard or Gertz's negligence minimum. See supra note 150.

479 The better reasoned cases involving independent contractors have not treated them as "public officials." See Elder, supra note 24, at 640-43. The cases are not uniform, however. See id. at 634-37. As to "public figure" status of such, most independent contractor cases have followed Hutchinson v. Proxmire, 443 U.S. 111, 133-36 (1979) (finding that plaintiff independent contractor did not have "such access to the media that he should be classified as a public figure"). See supra note 417; see also ELDER, DEFAMATION, supra note 2, § 5:22, at 170-75 (discussing government contractors).

480 See supra note 2; § 5:1.

481 This has been criticized. See id.; Elder, supra note 24, at 636-37 & nn. 287, 675-78.

482 See supra note 24, at 629-25, 640-43, 659-79; Elder, supra note 2, § 5:1, at 24-33, § 5:24, at 177. It would be difficult to justify a dichotomy between private persons receiving a public paycheck and those receiving a paycheck from private sources. Indeed, this might raise equal protection problems.

483 Herbert v. Lando, 441 U.S. 153, 170 (1979) (cautioning against an editorial process immunity of defamation defendants); see supra text accompanying notes 418-19.

484 For an extended discussion of Gertz, see Elder, supra note 2, at ch. 6.
immunity—a constitutional *deux pas* achieved by slyly disparaging a small governmental entity or group but not naming names. It boggles the mind.

**CONCLUSION**

No support exists in the jurisprudence of the Court, lower court precedent, fundamental fairness, public policy, or common sense for the potentially open-ended abuse of reputation envisioned by the court’s decision in *Dean*. The Seventh Circuit’s analysis in *Saenz v. Playboy Enterprises, Inc.*, again seems particularly apt. Rejecting the district court’s reliance on *New York Times-Rosenblatt* to bar libel by implication, the court held that a publisher could not “trammel a public official by ‘surreptitious and insidious implication’ under the pretense of governmental critique.” The court continued:

To deny a public official the opportunity to demonstrate the defamatory innuendo of a publication, even one critical of governmental conduct, is to open Pandora’s Box from which countless evils may spring. A legal fiction denying the existence of clearly discernable, though not explicit charges [or the *Dean* scenario of defamation of the entity rather than the specific individual member thereof], exposes public officials to baseless accusations and public mistrust while promoting an undisciplined brand of journalism [or public discourse by public officials such as Dearing] both unproductive to society and... unprotected by constitutional considerations.

Clearly, *New York Times*’ tough standards impose devastating obstacles to redress by public officials attempting to vindicate their reputations, leaving many deserving individuals skewered on the high altar of negligence-is-never-enough. To ratchet up defendants’ protection to the level of absolute immunity by the calculatedly devious ruse of maligning a small governmental collective is unconscionable. Think of the Officer Deans of the world and the countless others in small towns, villages, and hamlets, elected and unelected, who are known by name, face, and reputation by all. That is the nature of small town life. When a community leader, the local

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485 By this subterfuge defendant jumps from negligence over reckless disregard to absolute immunity! For the author’s criticism of the same attempted *deux pas* in the context of the highly dubious doctrine of “neutral reportage,” particularly as applied to private persons, see *Elder*, supra note 2, § 3:27.

484 841 F.2d 1309 (7th Cir. 1988).

485 Id. at 1317 (citation omitted).

486 Id.


488 See *Elder*, supra note 2, at ch. 7, § 7:2.
newspaper, or any citizen-critic imputes specific charges of criminality and corruption to the police force, the city council, or the like, the local populace knows who the targeted individuals are—the trial court conceded as much in Dean. These small town police officers and officials are highly visible members of society—this is especially true of those who wear a uniform and a badge and carry a weapon. Their reputations are important to them and society, as recognized by the fact that most state constitutions specifically protect this basic interest. Leaving them and their reputations hanging in Dearingesque effigy, remediless against the small group defamer, would make them "but gilded loam or painted clay." They deserve better. The First Amendment is not and should not be a bar to holding the defamer liable if New York Times' "mighty fortress" can be surmounted.

489 See supra text accompanying note 376.
490 See supra text accompanying notes 403–04, 409, 434, 440–44.
492 WILLIAM SHAKESPEARE, THE TRAGEDY OF KING RICHARD II, act 1, sc. 1, line 179.