

# The "Public Interest or Concern" Test: Have We Resurrected a Standard That Should Have Remained in the Defamation Graveyard?

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## COMMENTS

### THE "PUBLIC INTEREST OR CONCERN" TEST — HAVE WE RESURRECTED A STANDARD THAT SHOULD HAVE REMAINED IN THE DEFAMATION GRAVEYARD?

#### INTRODUCTION

"I shall not today attempt further to define the kinds of material I understand to be embraced . . . and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . ." <sup>1</sup> With these words, former Supreme Court Justice Potter Stewart expressed the inherent difficulty in defining the boundaries of "obscene" expressions deemed unworthy of constitutional protection. Words alone are too often inadequate tools with which to sculpt constitutional constructs. Beyond the definitional problems attending constitutional values lie competing interests. On one side, the first and fourteenth amendments protect free expression. <sup>2</sup> On the other side, states may have a legitimate interest in protecting their citizens from "harmful" speech. <sup>3</sup>

Beginning with the landmark case of *New York Times Co. v. Sullivan*, <sup>4</sup> the United States Supreme Court has struggled to outline the boundaries of constitutionally protected speech within the area of defamation law. <sup>5</sup> The "balance" has alternately favored first amendment press and speech rights and

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1. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

2. The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

The fourteenth amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ." U.S. CONST. amend. XIV, § 1.

3. *See, e.g., Jacobellis*, 378 U.S. at 195.

4. 376 U.S. 254 (1964).

5. At common law, libel (defamatory written or printed communication) and slander (defamatory spoken words or transitory gestures) were considered separate torts. *See* RESTATEMENT (SECOND) OF TORTS § 568 (1977). Technological advances in communication have blurred these distinctions and rendered them largely obsolete. Although some common law distinctions remain, this Comment refers to "defamation" which encompasses both oral and printed communication.

individual rights to redress reputational harm.<sup>6</sup> The balance currently appears to weigh more favorably on the side of individual reputational interests.<sup>7</sup>

There are two general approaches to constitutional analysis in defamation law. One approach examines the subject matter of the defamatory publication. The precise inquiry varies, but the primary focus centers on whether the content of the defamatory publication (or the surrounding issues) is "public" or "private" information. The second approach focuses instead on the status of the plaintiff in the defamation suit. This approach analyzes whether the defamed *individual* is a "public" or "private" figure. It includes some kind of subject matter inquiry within the analysis to determine the plaintiff's status.

The rationale attending *either* approach is that speech involving "public" issues or "public" individuals deserves *some* constitutional margin of error. Conversely, false speech involving "private" issues or "private" individuals may properly be subordinated to reputational and privacy interests. In these cases, constitutional protections are significantly reduced.

In *Dun & Bradstreet, Inc. v. Greenmoss Builders*,<sup>8</sup> the Supreme Court severely restricted, if not completely withdrew, constitutional protection in defamation actions that "do not involve matters of public concern."<sup>9</sup> Unfortunately, the Court has offered minimal guidance as to the meaning and application of this term. Just what *does* constitute "a matter of public concern?" Like "obscenity," the "public concern" standard appears to be a construct elusive of definition. The Justices seem to suggest that, while they may not be able to *define* a "public concern," they'll "know it when [they] see it."<sup>10</sup>

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6. Compare *New York Times*, 376 U.S. at 254 (favoring strong press rights) and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (same) with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (recognizing stronger protection for reputational interests).

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

8. 472 U.S. at 749.

9. *Id.* at 763.

10. See *supra* note 1 and accompanying text. In his dissent in *Dun & Bradstreet*, 472 U.S. at 774 Justice Brennan strongly opposed the "public concern" test as inapposite to defamation cases. He specifically criticized the plurality opinion for its failure to

This Comment discusses the development of and current trends in defamation law. Specifically, the Comment analyzes the "public concern" test recently reintroduced by the Supreme Court in defamation actions.<sup>11</sup> After examining how this test has operated in various jurisdictions,<sup>12</sup> the Comment examines several problems inherent in this subject matter approach. The author theorizes that the public/private distinctions currently employed offer inadequate protection to first amendment guarantees and to societal rights to protect its members' reputation interests as well. In conclusion, the author suggests changes to better accommodate these competing interests.

## I. CONSTITUTIONAL PROTECTION IN DEFAMATION LAW

### A. *New York Times to Gertz*

At common law, courts attempted to balance the competing values of individual reputational interests and societal interests in obtaining relevant information.<sup>13</sup> An elaborate system of privileges evolved to protect defamation defendants.<sup>14</sup> However, reputational interests enjoyed significantly greater protection; defamation defendants who fell outside the cloak of these privileges were held to a standard of strict liability without regard to fault.<sup>15</sup>

In 1964, the United States Supreme Court introduced a constitutional dimension to the area of defamation law. In *New York Times Co. v. Sullivan*,<sup>16</sup> the Court held that public

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define this standard. *Id.* at 784-85 (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting).

11. *See Dun & Bradstreet*, 472 U.S. at 749.

12. This comment discusses the public interest doctrine as applied in defamation law. A similar doctrine not discussed here is applied in tortious invasion of privacy actions. *See generally* Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

13. W. KEETON, PROSSER & KEETON ON TORTS § 113 (5th ed. 1984) [hereinafter KEETON].

14. *Id.* *See generally* RESTATEMENT (SECOND) OF TORTS §§ 585-612 (1977).

15. *See* KEETON, *supra* note 13.

16. 376 U.S. 254 (1964). Respondent Sullivan, a Montgomery, Alabama police commissioner, had filed a defamation action after a full-page advertisement appeared in petitioner's newspaper. The ad, entitled "Heed Their Rising Voices," appealed for public support of the civil rights movement. The ad alleged maltreatment of southern black students engaged in non-violent demonstrations and contained several inaccurate statements. Although Sullivan was not named in the ad, he contended that a reference to "police" imputed the student abuse to him. At trial, the jury awarded Sullivan

officials<sup>17</sup> must prove that critics of their official conduct published with "actual malice."<sup>18</sup> The Court grounded its decision in the free speech and press rights of the first amendment as applied to the states through the fourteenth amendment.<sup>19</sup> The Court recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."<sup>20</sup>

The Court further recognized that within a self-governing society, vigorous debate on public issues would inevitably give rise to some factual misinformation.<sup>21</sup> It held that the publication at issue which protested racial discrimination — "one of the major public issues of our time"<sup>22</sup> — was worthy of

\$500,000 — the full amount claimed. The United States Supreme Court reversed the Alabama Supreme Court's order affirming the verdict. *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962), *rev'd*, 376 U.S. 254 (1964).

17. In *New York Times*, the plaintiff-respondent was an elected public official. The holding of this case extends to appointed officials as well. See *Rosenblatt v. Baer*, 383 U.S. 75 (1966). However, not all public employees are "public officials" subject to the actual malice rule, even if they are defamed in relation to their official conduct. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (holding federally-funded research director to be private individual). The Supreme Court has expressly declined at least twice to specify the precise scope of "public official" status within the constitutional framework. See *New York Times*, 376 U.S. at 283 n.23; *Rosenblatt*, 383 U.S. at 85. See also, Annotation, *Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule Requiring Public Officials to Show Malice*, 19 A.L.R.3d 1361 (1968) for state court treatment of this issue.

18. *New York Times*, 376 U.S. at 279-80. The Court defined this standard as "knowledge [of falsity] . . . or reckless disregard of whether [the alleged defamation] was false or not." *Id.* at 280.

The actual malice (or "constitutional malice") standard is a subjective inquiry into the publisher's state of mind. It is not destroyed by the presence of animus or ill will. The plaintiff is held to a "convincing clarity" quantum of proof. *New York Times*, 376 U.S. at 285-86. See also *Garrison v. Louisiana*, 379 U.S. 64 (1964); *St. Amant v. Thompson*, 390 U.S. 727 (1968) for later judicial development of this standard.

In their concurring opinions in *New York Times*, Justices Black and Douglas would have extended protection even further than the "actual malice" standard. They advocated an absolute privilege for citizens and the press to "criticize officials and discuss public affairs with impunity." *New York Times*, 376 U.S. at 296 (Black & Douglas, JJ., concurring).

19. See *supra* note 2. The *Sullivan* court rejected respondent's contentions that the case was unworthy of constitutional scrutiny because it was a private civil action and because the publication at issue was a paid commercial advertisement. *New York Times*, 376 U.S. at 265-66.

20. *Id.* at 270.

21. *Id.* at 271.

22. *Id.*

constitutional protection and did not forfeit this insulation because of the factual falsity of some of its statements.<sup>23</sup>

Justice Brennan, who authored the opinion, stated that some erroneous information "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"<sup>24</sup> The Court theorized that the threat of "virtually unlimited"<sup>25</sup> defamation judgments would create media "self-censorship."<sup>26</sup>

*New York Times* clearly offered a qualified constitutional privilege for defamatory publication. However, the precise boundary of that privilege was unclear. State and lower federal courts were particularly divided on the applicability of *New York Times* to "public figures" other than "public officials."<sup>27</sup> The confusion prompted the Supreme Court to address this issue in *Curtis Publishing Co. v. Butts*<sup>28</sup> and its companion case *Associated Press v. Walker*.<sup>29</sup> The Court concluded that the similarity of the issues in these cases to the issues involved in *New York Times* warranted extension of the constitutional protection to "public figures" who were not public officials.<sup>30</sup>

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23. *Id.*

24. *New York Times*, 376 U.S. at 271-72 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).

25. *New York Times*, 376 U.S. at 279.

26. *Id.*

27. See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 134 n.1 (1967).

28. *Id.* at 130.

29. *Id.* In *Curtis*, the plaintiff was a well-known and respected former football coach and the then athletic director at the University of Georgia. The defendant published an article in the *Saturday Evening Post* charging Butts with "fixing" a college football game. In *Walker*, the defendant dispatched an "eye-witness" news report which named plaintiff Walker as the leader of a violent crowd at the University of Mississippi. Walker, a retired army general, allegedly opposed federal marshals as they sought to effectuate a court decree ordering the student enrollment of a black youth. The Supreme Court noted that the "public interest" in both cases was as great as that involved in *New York Times*. *Id.* at 154. The Court found that both claimants commanded this "public interest" independent of the respective publications and would have been labeled "public figures" under ordinary tort law. In addition to the "continuing public interest" both claimants commanded, both had sufficient media access to countermand the defamatory statements. *Id.* at 155. Other considerations included Butts' prominent position and Walker's voluntary involvement in "an important public controversy." *Id.*

30. 388 U.S. at 155. In his plurality opinion, Justice Harlan advocated a lower standard somewhere between negligence and actual malice. Chief Justice Warren's con-

In *New York Times* and *Curtis*, the plaintiffs' status determined the scope of constitutional protection afforded their critics. The "public" issues surrounding these figures merely provided a rationale for extending the protections. However, four years after *Curtis* was decided, the Court abandoned the plaintiff-status analysis in favor of a subject-matter inquiry in *Rosenbloom v. Metromedia, Inc.*<sup>31</sup> The Court applied the actual malice standard in a defamation case involving neither a public official nor a public figure.<sup>32</sup> The Court rejected the public/private distinctions as an artificial means to ascertain interest in "public issues."<sup>33</sup> The Court stated:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety. . . . Whether the person involved is a famous large-scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue.<sup>34</sup>

Although *Rosenbloom* did not command a majority of the Court,<sup>35</sup> the five members who voted to affirm the court of appeals agreed on the preliminary question of the reach of *New York Times* to "matters of public or general interest." Justice Marshall, however, in a dissenting opinion joined by Justice Stewart, severely criticized the "public or general in-

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curing opinion prevailed on the actual malice standard, however, when Justices Black, Douglas, Brennan and White joined in that portion of his opinion. *Id.* at 162.

31. 403 U.S. 29 (1971).

32. *Id.* at 32-33. The petitioner, a distributor of nudist magazines, filed suit after he was characterized as a "smut peddler" on defendant's radio station. Respondent's broadcast followed the arrest of Rosenbloom for violating a Philadelphia obscenity ordinance. *Id.*

33. *Rosenbloom*, 403 U.S. at 41.

34. *Id.* at 43. The "public or general interest" in the case at bar involved petitioner's arrest. See *supra* note 32.

35. The eight participating justices wrote five separate opinions. Justice Brennan's opinion was joined by Chief Justice Burger and Justice Blackmun, and was delivered as the judgment of the Court. *Rosenbloom* represents the greatest number of justices to join in a single opinion. See Comment, *Public Status Over Time: A Single Approach to the Retention Problem in Defamation and Privacy Law*, 1982 U. ILL. L. REV. 951, 954 n.18.

terest test.”<sup>36</sup> Justice Marshall was primarily concerned that lower court *ad hoc* analysis of what constituted public interest would involve courts in the dangerous business of deciding “what information [was] relevant to self-government.”<sup>37</sup>

Without specifically overruling *Rosenbloom*, the Court repudiated the “public concern” test three years later and returned to a plaintiff-status analysis.<sup>38</sup> In *Gertz v. Robert Welch, Inc.*,<sup>39</sup> the Court withdrew the constitutional malice protection from cases involving private figure plaintiffs. The Court’s underlying rationale was two-fold: first, private individuals had little opportunity to redress the harm caused by defamation through self-help; conversely, public figures, like public officials, had “significantly greater access to the channels of effective communication”<sup>40</sup> to contradict or correct erroneous statements. Second, private individuals had not assumed an increased risk of injury. Public figures, like public officials, invited attention and comment through their voluntary involvement in the public sector; therefore, they had relinquished some interest in protecting their good names.<sup>41</sup>

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36. *Rosenbloom*, 403 U.S. at 78 (Marshall & Stewart, JJ., dissenting).

37. *Id.* at 79. Justice Marshall additionally criticized the “public interest test” as inadequate for the protection of individual reputational interests. *Id.*

38. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See also McChrystal, *Reconciling Defamation Law and the Free Enterprise System when the Media Provides Consumer or Investor Information*, 17 TEX. TECH L. REV. 183 (1986). Professor McChrystal asserts that although the *Gertz* Court characterized the *Rosenbloom* standard as a minority position even on the *Rosenbloom* Court, “[t]his is something of a hoax.” *Id.* at 188 n.23. He suggests that when one considers Justice Black’s concurring opinion advocating total libel immunity for the media, coupled with Justice Douglas’ probable opinion had he participated, the *Rosenbloom* standard actually had greater support than *Gertz*. That is, *Gertz*, a five to four decision, obtained a majority only because Justice Blackmun felt obligated to join in the plurality opinion to create one. *Id.*

39. *Gertz*, 418 U.S. at 323. In *Gertz*, petitioner was a prominent attorney representing relatives of a youth murdered by a Chicago police officer in civil proceedings against the officer. Respondent published a magazine article alleging that the trial was a “frame-up” by petitioner as part of a Communist conspiracy to discredit local police. After the jury returned a verdict for petitioner, the District Court for the Northern District of Illinois held that petitioner failed to show actual malice required by *New York Times* and *Curtis*. The court of appeals affirmed. *Gertz v. Robert Welch, Inc.*, 471 F.2d 801 (7th Cir. 1972), *rev’d*, 418 U.S. 323 (1974).

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

41. *Id.* at 345. The rationale underlying the public/private distinctions (i.e., self-help and assumption of risk) were addressed and criticized in the plurality opinion in *Rosenbloom* three years earlier. Justice Brennan stated:

The *New York Times* standard was applied to libel of a public official or public figure to give effect to the first amendment’s function to encourage ventilation of



The Court concluded that as long as the states did not impose liability without fault, they were free to define for themselves the appropriate standard of liability in private figure actions.<sup>42</sup> Justice Powell, who wrote for the majority, outlined the test to ascertain public figure status. The test focused primarily on "the nature and extent of an individual's participation in [a] particular [public] controversy giving rise to the defamation."<sup>43</sup> *Gertz* restricted recovery of punitive and pre-

public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not "hot" news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye . . . the argument loses all of its force.

*Rosenbloom*, 403 U.S. at 46. The Court in *Gertz* virtually ignored Justice Brennan's observations.

42. *Gertz*, 418 U.S. at 347. The vast majority of courts have adopted a negligence standard for cases involving private figure plaintiffs. See, e.g., *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309; 560 P.2d 1216 (1977); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. App. 1980); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Thomas H. Maloney & Sons, Inc. v. E. W. Scripps*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), *cert. denied*, 459 U.S. 883 (1982).

Three states have retained the *Rosenbloom* standard requiring plaintiffs to show actual malice in cases involving a matter of "public concern." See *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, \_\_\_, 538 P.2d 450, 457 (1975); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications*, 162 Ind. App. 671, \_\_\_, 321 N.E.2d 580, 586 (1974), *cert. denied*, 424 U.S. 913 (1976); *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978).

New York has adopted a "gross irresponsibility" standard for private individuals where the case involves a matter of public concern. See *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61, 64 (1975).

43. *Gertz*, 418 U.S. at 352. In *Gertz*, the Court identified two classes of public figures. Individuals in the first category have achieved such prominence and pervasive fame or notoriety that they are "public figure[s]" for all purposes and in all contexts." *Id.* at 351. Examples of individuals in this category include the claimants in *Curtis* and *Walker*. The other category includes individuals who would otherwise be classified as

sumed damages as well. The Court held that the first amendment requires courts to hold plaintiffs to an actual malice standard to recover these damages.<sup>44</sup>

Although *Gertz* enunciated rules providing greater promise to defamation claimants than *Rosenbloom* offered, it appeared that defamatory statements in *any* context merited *some* constitutional protection. That is, common law rules permitting recovery on the basis of strict liability<sup>45</sup> seemed to be abrogated in favor of a rule requiring plaintiffs to show fault. However, in *Dun & Bradstreet, Inc. v. Greenmoss Builders*,<sup>46</sup> the Court held that the *Gertz* safeguards as to proof of damages do not apply when "defamatory statements do not involve matters of public concern."<sup>47</sup> The extent to which *Greenmoss Builders* has also removed constitutional protections as to liability is unclear. Moreover, the resurrection of the "public concern" test<sup>48</sup> raises several issues and problems discussed in the following sections.

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"private" but for their voluntary involvement in a "public controversy" in order to influence the outcome. These individuals are "public figures" for the range of issues related to the controversy. The test for limited-purpose figures involves a two-step analysis. First, courts must ascertain whether a particular "public controversy" existed. If so, the nature and extent of the putative plaintiff's involvement in the controversy is examined. *Gertz*, 418 U.S. at 352. Thus, the *Gertz* test constitutes a plaintiff status analysis which *includes* a subject matter inquiry ("public controversy").

The Court has reemphasized the narrow applicability of "actual malice" to private figures in post-*Gertz* decisions. In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), a wealthy socialite's divorce proceedings were *not* a public controversy within the meaning of *Gertz*, despite the fact that plaintiff herself called press conferences to discuss them with the media. Nor may the defendant *create* a "public controversy" by the very publication that defames an individual. See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). See also *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979) and *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980) for later judicial treatment of the "public controversy" analysis.

44. *Gertz*, 418 U.S. at 349.

45. See *supra* note 13 and accompanying text.

46. 472 U.S. 749 (1985).

47. *Id.* at 763.

48. Federal and state courts generally have employed the terms "public interest" or "public concern" interchangeably to effect presumably the same meaning. Compare *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 382 (S.D.N.Y. 1980) ("public interest") and *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975) ("public concern"). While there may be a qualitative distinction between the two terms, this Comment also refers to them alternately. However, matters that are "of concern to" or "in the interest of" the public embrace substantially less information than what the public finds to be "interesting."

### B. Greenmoss Builders

In *Greenmoss Builders*, a construction contractor sued Dun & Bradstreet, a credit reporting agency, for circulating a false credit report to five subscribers. The report erroneously attributed a bankruptcy petition filed by respondent Greenmoss Builders' former employee to the contractor personally. Dun & Bradstreet's employee, a seventeen-year-old high school student, prepared the mistaken report which the agency failed to verify in accordance with its own routine practice. When respondent learned of the error, he requested both a correction and a list of recipients of the erroneous report. Dun & Bradstreet issued a corrective notice to the five firms, stating that the contractor "continued in business as usual."<sup>49</sup> However, petitioner refused to divulge to the contractor the names of firms who had received the false report. Greenmoss Builders then sued for defamation in a Vermont state court.

At trial, the jury awarded respondent \$50,000 in presumed damages and \$300,000 in punitive damages. The judge granted petitioner's motion for a new trial, agreeing that its instructions allowed the jury to award these damages on a lesser showing than actual malice.<sup>50</sup> The Vermont Supreme Court reversed, finding *Gertz*<sup>51</sup> to be inapplicable because credit reporting agencies were not the "type of media worthy of First Amendment protection" as contemplated by *New York Times* and its progeny.<sup>52</sup>

The United States Supreme Court granted certiorari, ostensibly to eliminate confusion attending "lower courts about when the protections of *Gertz* apply."<sup>53</sup> In affirming the deci-

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See, e.g., *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975); *Rouch v. Enquirer & News of Battle Creek*, 137 Mich. App. 39, \_\_\_, 357 N.W.2d 794, 801 (1984).

49. *Greenmoss Builders*, 472 U.S. at 751-53.

50. The trial judge expressed doubts as to the applicability of the *Gertz* rule requiring proof of actual malice but granted the motion "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d] it." *Id.* at 752.

51. See *supra* note 44 and accompanying text.

52. *Greenmoss Builders, Inc. v. Dun & Bradstreet*, 143 Vt. 66, 73-74, 461 A.2d 414, 417-18 (1983), *aff'd on other grounds*, 472 U.S. 749 (1985).

53. *Greenmoss Builders*, 472 U.S. at 753. The Court then cited state cases with contrary holdings as to the applicability of *Gertz* to non-media defendants. *Id.* at 752 n.1. However, the plurality opinion probably created further confusion on this issue; nowhere in the opinion did Justice Powell directly address the applicability of *Gertz* on

sion of the Vermont Supreme Court, Justice Powell's plurality opinion, joined by Justices Rehnquist and O'Connor, noted that constitutional safeguards mandated by earlier cases (*New York Times* through *Gertz*) all involved expression "on a matter of undoubted public concern," or "*public speech*."<sup>54</sup> The speech involved in the case at bar was of "purely private"<sup>55</sup> concern, the plurality stated, meriting less constitutional protection.<sup>56</sup> The plurality concluded that the rule enunciated in *Gertz* conditioning recovery of presumed or punitive damages

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a defendant-status basis. The opinion *did* emphasize distinguishing characteristics of "credit reporting" from other types of communication, however. *Id.* at 761-63. Although the distinctions were carefully couched in language about types of protected speech (a subject matter analysis), the plurality opinion smacks of a defendant-status analysis as well. ("[T]he market provides a powerful incentive to a *credit reporting agency* to be accurate, since false credit reporting is of no use to creditors." *Id.* (emphasis added)).

Justice White, in an opinion concurring with the result, and Justice Brennan, in dissent, ignored the defendant-status distinction drawn by the plurality and focused on Justice Powell's subject matter standard. See *Greenmoss Builders*, 472 U.S. at 772-73, 784-86 (White, J., concurring, Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting). Justice White stated:

Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.

*Id.* at 773 (footnote omitted).

Thus, if the "confusion" causing the Court to hear the case was eliminated to any extent, it was only because the concurring and dissenting opinions created a five-member position on this issue.

54. *Greenmoss Builders*, 472 U.S. at 757 n.4 (emphasis in the original).

55. *Id.* at 759. The plurality failed to define the terms and "private speech" and "private concern" anywhere in its opinion. Justice Brennan severely criticized this in his dissent. He observed that "[w]ithout explaining what is a 'matter of public concern,' the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not . . ." *Id.* at 785 (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting) (emphasis in original).

Nor did the plurality offer a meaningful test to help classify public and private concerns. The opinion merely stated that the classification would depend on the "content, form, and context [of the expression] . . . as revealed by the whole record." *Id.* at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)). The guidance the plurality offered here was inadequate. Moreover, as the dissent pointed out, the case from which the plurality drew its "test" explicitly limited the public/private distinction to the context of government employment situations. *Greenmoss Builders*, 472 U.S. at 789-90 n.14.

56. See *Greenmoss Builders*, 472 U.S. at 758-59

on a showing of actual malice was inapplicable in cases that did "not involve matters of public concern."<sup>57</sup>

The plurality treated the issue in *Greenmoss Builders* as a question of first impression outside the scope of *Gertz*.<sup>58</sup> Justice Brennan strongly rejected this contention in his dissent. Even Justice White, who was expressly dissatisfied with *Gertz* and thought it should be overruled,<sup>59</sup> admitted in his concurrence:

It is interesting that Justice Powell declines to follow the *Gertz* approach in this case. I had thought the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance.<sup>60</sup>

The dissent in *Greenmoss Builders* sharply criticized the reintroduction of the public interest or concern test. The criticism first focused on the lack of definitional guidance for this standard.<sup>61</sup> Moreover, Justice Brennan believed that the public's concern for the financial health of its community properly justified protection for Dun & Bradstreet's credit report under "any reasonable definition of 'public concern' consistent with . . . precedents."<sup>62</sup>

The dissent then criticized the elimination of restrictions on presumed and punitive damages. Relying on *Gertz*, Justice Brennan discussed the chilling effect on speech that punitive damages in defamation actions promoted. He believed these damages to be "*wholly irrelevant*"<sup>63</sup> to the state interest in pro-

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57. *Id.* at 763.

58. *Id.* at 757. The Court stated: "We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern." *Id.*

59. *Greenmoss Builders*, 472 U.S. at 773. Justice White had dissented in *Gertz*, believing that the first amendment did not require protection of defamatory statements involving private individuals. See *Gertz*, 418 U.S. at 398 (Burger, C.J., Douglas, Brennan & White, JJ., dissenting).

Chief Justice Burger, who filed a dissenting opinion in *Gertz*, also expressed his belief that *Gertz* should be overruled. See *Greenmoss Builders*, 472 U.S. at 764 (Burger, C.J., concurring).

60. *Greenmoss Builders*, 472 U.S. at 772.

61. See *supra* note 55.

62. *Greenmoss Builders*, 472 U.S. at 789.

63. *Id.* at 794 (quoting *Gertz*, 418 U.S. at 350) (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting) (emphasis in the original).

protecting its citizens and would have limited respondent to actual damages proved. He concluded that first amendment values would be unnecessarily diminished if courts were free to award unrestrained damages on an *ad hoc* basis.<sup>64</sup> The dissenting opinion in *Greenmoss Builders* raised several salient problems that were given superficial treatment in the plurality opinion.

To what extent has the Supreme Court deconstitutionalized defamation law? Under *Gertz*, a plaintiff had to show *some* degree of fault to recover *any* damages.<sup>65</sup> The facts in *Greenmoss Builders* strongly indicate that Dun & Bradstreet negligently disseminated the credit report.<sup>66</sup> Given that the Court held that *Gertz* was inapplicable, does it follow that the same result would be obtained where *no* fault of the defendant is shown? May a plaintiff now recover under the common law rule of strict liability<sup>67</sup> where "defamatory statements do not involve matters of public concern?"<sup>68</sup> Justice White's concurring opinion supports this interpretation. He stated, "[a]lthough Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this."<sup>69</sup>

The applicability of the *Greenmoss Builders* decision to public figures and public officials is equally unclear. Nothing in the opinion limits the holding to private individuals. Would the same result be obtained if Dun & Bradstreet issued an erroneous credit report declaring the bankruptcy of entertainer Frank Sinatra, for example? Of President Ronald Reagan? The *Greenmoss Builders* opinion appears to require a threshold subject matter inquiry regardless of plaintiff status. The state of *any* individual's *personal* finances arguably consti-

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64. *Greenmoss Builders*, 472 U.S. at 796 (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting).

65. See *supra* note 42 and accompanying text.

66. See *supra* note 49 and accompanying text. It is unlikely that anyone would seriously dispute that a reasonable credit reporting agency would verify a report prepared by a relatively inexperienced high school student.

67. See *supra* notes 13-15 and accompanying text.

68. *Greenmoss Builders*, 472 U.S. at 763.

69. *Id.* at 773-74 (White, J., concurring).

tutes a private rather than a public concern. If so, the *Greenmoss* decision potentially permits both "public" and "private" individuals to recover presumed and punitive damages absent proof of actual malice and possibly even without proof of negligence.

Furthermore, the decision purportedly eschews a media/non-media distinction.<sup>70</sup> If so, the same result should occur if the *Wall Street Journal* had falsely published the same credit report. If, as suggested above, the threshold subject matter inquiry is made regardless of plaintiff's status, what result would be obtained if the *Wall Street Journal* published an erroneous report on the personal credit of Frank Sinatra or President Reagan? Are these also "private" concerns unworthy of a constitutional malice standard?

The plurality opinion considered the limited availability of the report an important factor in its classification of the "speech."<sup>71</sup> The recipients of Dun & Bradstreet's credit reports agreed not to disseminate information received. The plurality's emphasis on this factor suggests that they employed an *audience* analysis in their decision. One author has characterized this decision as anomalous in that the Court appears to extend increased constitutional protection when false information reaches a *greater* number of people.<sup>72</sup>

Finally, a significant problem attending the *Greenmoss Builders* decision is its apparent resurrection of a previously rejected standard.<sup>73</sup> The "public interest or general concern" standard is ill-defined and has generated confusion and incon-

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70. See *supra* note 53 and accompanying text.

71. See *Greenmoss Builders*, 472 U.S. at 762. The plurality found there was no "strong interest in the free flow of commercial information" because the credit report was available only to subscribers who could not further disseminate the information. *Id.* (quoting *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 764 (1976)).

Most states recognize a common law qualified privilege protecting credit agencies that circulate false information. The privilege is based on the recognition of a legitimate business need for a free flow of credit information. See generally Annotation, *Sufficiency of Showing Malice or Lack of Reasonable Care to Support Credit Agency's Liability for Circulating Inaccurate Credit Report*, 40 A.L.R.3d 1049 (1971). The State of Vermont, in which the *Greenmoss Builders* case arose, does not recognize this privilege.

72. See R. ROTUNDA, J. NOWAK & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.35 (1986).

73. See *supra* notes 36-39 and accompanying text.

sistencies within lower courts.<sup>74</sup> These concerns, discussed in section III, led the Court to repudiate this problematic standard only three years after its inception in *Rosenbloom v. Metromedia, Inc.*<sup>75</sup>

### C. Philadelphia Newspapers

Subsequent to the *Greenmoss Builders* decision, the Court decided another case in which the public interest test was employed. In *Philadelphia Newspapers, Inc. v. Hepps*,<sup>76</sup> the Supreme Court held that where a media defendant's defamatory speech involves a matter of public concern, private figures have the burden of proving falsity of the speech as well as fault.<sup>77</sup> In this case, a franchisor corporation and its franchisees sued a newspaper for publishing a series of articles linking the plaintiffs to organized crime and political corruption. In a 5-4 decision,<sup>78</sup> the Supreme Court reversed Pennsylvania's highest court, agreeing with the trial court that the Pennsylvania statute allocating the burden of proof of falsity to the defendant was unconstitutional. The Court stated:

One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law. When the speech is of public concern but the

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74. See *infra* notes 130-38 and accompanying text.

75. 403 U.S. 29 (1971). See *Gertz*, 418 U.S. at 346. The majority of the Court in *Gertz* believed that the public interest or concern test articulated in *Rosenbloom* inadequately served both first amendment values and states' interests in redressing reputational harm. *Id.* One commentator states that the *Gertz* majority sensed the *Rosenbloom* standard nearly destroyed the common law of defamation. See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1409 (1975) [hereinafter Eaton].

76. 106 S. Ct. 1558 (1986).

77. *Id.* at 1563.

78. Justice O'Connor wrote the majority opinion, in which Justices Brennan, Marshall, Blackmun and Powell joined. Justice Brennan filed a concurring opinion, in which Justice Blackmun joined. Justice Stevens filed a dissenting opinion, in which Chief Justice Burger and Justices White and Rehnquist joined.



plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.<sup>79</sup>

Interestingly, three out of the four justices in the dissenting opinion were in either the plurality or concurrences in *Greenmoss Builders*. The dissent sharply criticized the majority's reliance "on the discredited analysis of the *Rosenbloom* plurality,"<sup>80</sup> stating that "where private-figure libel plaintiffs are involved, the First Amendment does *not* 'requir[e] us to tip [the scales] in favor of protecting true speech' merely because that speech addresses 'matters of public concern.'" <sup>81</sup>

Unfortunately, the *Philadelphia Newspapers* case offered no further guidance on the public interest test and suffered the same analytical infirmities discussed earlier and in the following section.

## II. THE "PUBLIC INTEREST OR CONCERN" STANDARD

### A. *How the Standard has Operated in State Courts*

Even before the United States Supreme Court introduced the "public interest" standard in *Rosenbloom v. Metromedia, Inc.*,<sup>82</sup> some state and federal courts extended increased protection to defendants when defamatory statements involved "public issues" or "public interests."<sup>83</sup> Most of the courts treated the cases as a logical extension of the principles expressed in *New York Times Co. v. Sullivan*<sup>84</sup> and *Curtis Pub-*

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79. *Id.*

80. *Id.* at 1571 (Stevens, J., dissenting).

81. *Id.*

82. 403 U.S. 29 (1971).

83. *See, e.g.,* *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969); *United Medical Laboratories, Inc. v. Columbia Broadcasting Sys.*, 404 F.2d 706 (9th Cir. 1968); *cert. denied*, 394 U.S. 921 (1969); *Pearson v. Fairbanks Publishing Co.*, 413 P.2d 711 (Alaska 1966); *Cohen v. New York Herald Tribune, Inc.*, 63 Misc. 2d 87, 310 N.Y.S.2d 709 (1970); *All Diet Food Distrib. Inc. v. Time*, 56 Misc. 2d 821, 290 N.Y.S.2d 445 (1967).

84. 376 U.S. 254 (1964). *See supra* notes 19-26 and accompanying text.

*lishing Co. v. Butts*.<sup>85</sup> The Supreme Court of Alaska grounded its decision instead upon the rationale attending the common law privilege of fair comment.<sup>86</sup>

*Gertz v. Robert Welch, Inc.*<sup>87</sup> permitted states to define their own standards of liability so long as strict liability was not applied.<sup>88</sup> Five states have expanded first amendment protections in defamation actions beyond those required in *Gertz*.<sup>89</sup> Indiana,<sup>90</sup> Colorado,<sup>91</sup> Alaska<sup>92</sup> and Michigan<sup>93</sup> have expressly adopted the *Rosenbloom* standard of liability.<sup>94</sup> These jurisdictions require plaintiffs to prove actual malice where defamatory expressions relate to a matter of public interest or concern.<sup>95</sup> New York conditions recovery in these instances upon proof that the defendant was "grossly irresponsible."<sup>96</sup>

Three general themes appear consistently throughout defamation cases decided in these jurisdictions. First, the judiciary does not define the public interest test or offer meaningful guidelines for its application. Second, the opinions in jurisdictions employing the test supply very little analysis to support

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85. 388 U.S. 130 (1967). See *supra* note 30 and accompanying text. See *Cohen*, 63 Misc. 2d at 96, 310 N.Y.S.2d at 718-19; *All Diet Food Distrib., Inc.*, 56 Misc. 2d at 824, 290 N.Y.S.2d at 447-48.

86. *Pearson*, 413 P.2d at 713. See generally KEETON, *supra* note 13, § 115 for a discussion on the privilege of fair comment on matters of public concern.

87. 418 U.S. 323 (1974).

88. See *supra* note 42 and accompanying text.

89. See *infra* notes 84-87, 90.

90. See *AAFCO Heating & Air Conditioning Co. v. Northwest Publications*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1975).

91. See *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975).

92. See *West v. Northern Publishing Co.*, 487 P.2d 1304 (Ala. 1971).

93. See *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978).

94. See *supra* notes 31-32 and accompanying text.

95. In addition, a "public interest" privilege has been recognized under Utah law when public health and safety was involved and when there was a "legitimate issue" with respect to governmental bodies and public institutions. See *Seegmiller v. KSL, Inc.*, 626 P.2d 968, 978 (Utah 1981). California has recognized a statutorily qualified privilege where publications concerned a matter of public interest. See *Rollenhagen v. City of Orange*, 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981).

96. See *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). Under the "gross irresponsibility" standard, a plaintiff must establish by a preponderance of the evidence that a defendant acted "without due considerations for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

the conclusions courts reach. Third, the public interest doctrine has been so broadly applied that, with very little exception, practically every aspect of human conduct is held to be a matter of general public interest or concern. Several examples of these three themes are discussed below.

In *Rosenbloom*, the Supreme Court expressly declined to outline the parameters of the public interest or concern standard.<sup>97</sup> Defamation cases decided in jurisdictions employing a threshold subject matter inquiry exhibit a similar definitional deficiency even within principal cases that adopt the standard.<sup>98</sup>

*Chapadeau v. Utica Observer-Dispatch, Inc.*,<sup>99</sup> the case in which New York adopted the public interest standard, is one such example. The court of appeals held that "where the content of [an] article is *arguably* within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition"<sup>100</sup> a private individual is held to a "gross irresponsibility" standard of proof.<sup>101</sup> The court of appeals offered no test to ascertain the boundaries of "legitimate" public concern. The phrase "warranting public exposition"<sup>102</sup> begs the same definitional question.<sup>103</sup>

The Indiana Court of Appeals adopted the *Rosenbloom* standard in *AAFO Heating & Air Conditioning Co. v. North-*

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97. See *Rosenbloom*, 403 U.S. at 44-45.

98. See *infra* notes 93-104 and accompanying text.

99. 38 N.Y.2d at 196, 341 N.E.2d 569, 379 N.Y.S.2d 61. In *Chapadeau*, the plaintiff was a public school teacher who had been arrested and charged with felony criminal possession of heroin and a hypodermic needle. The defamatory publication at issue erroneously linked the plaintiff with a group of others arrested on misdemeanor drug charges. *Id.*

100. *Id.* at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64 (emphasis added).

101. See *AAFCO Heating & Air Conditioning Co.*, 162 Ind. App. 671, 321 N.E.2d 580.

102. *Chapadeau*, 38 N.Y.2d at 199, 341 N.E.2d at 571, 379 N.Y.S.2d at 64.

103. In *Chapadeau*, the court of appeals found that in light of the plaintiff's "occupation and the nature of the crime his arrest was a matter of public interest." *Chapadeau*, 38 N.Y.2d at 199, 341 N.E.2d at 570, 379 N.Y.S.2d at 64. A lower court decision decided subsequent to *Chapadeau* stated that an issue was "clearly" of public concern if it involved "public business." See *Cottom v. Meredith Corp.*, 65 A.D.2d 165, \_\_\_, 411 N.Y.S.2d 53, 57 (1978). The court followed this circular definition with a discussion of matters that do *not* constitute "public concern," namely "gossip" and "matters directed to a limited audience." *Id.*

*west Publications*.<sup>104</sup> The court stated that “[t]he public interest is necessarily broad”<sup>105</sup> and simply cited previous cases decided under *Rosenbloom*. This court held that once a public or general interest was found, it became “unimportant . . . whether the public ha[d] a legitimate interest in [the] issue.”<sup>106</sup> Not surprisingly, no case decided in this jurisdiction has been held to be a “private concern.”

The Supreme Court of Colorado has been equally unwilling to articulate a definition of the public interest standard. In the case that adopted this standard, plaintiffs, owners of an antique shop, brought a defamation action against a media defendant who published a series of articles and editorial letters.<sup>107</sup> The publication charged that plaintiffs knowingly resold antiques that were burgled from an elderly woman. Without discussion, the court merely stated that it agreed with the trial court that the subject involved a matter of public interest.<sup>108</sup> In a more recent case in the same jurisdiction, the Colorado Supreme Court expressly declined to define the subject matter standard.<sup>109</sup> The court stated, “We need not precisely define the outer boundaries of the term ‘public or general concern’ at this point, for the activities involved here are clearly within them.”<sup>110</sup>

Another significant problem accompanies the consistent absence of judicial definition of the public interest standard. The second theme recurring throughout the *Rosenbloom*-type jurisdictions is the virtual absence of *analysis* within the cases that pass on the issue.<sup>111</sup> A few court decisions have sprinkled

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104. 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1975). In *AAFCO*, a furnace company filed a defamation suit after a media defendant published a series of ten articles suggesting that plaintiff's heater might have caused a house fire that killed two people. *Id.* at 673, 321 N.E.2d at 582.

105. *Id.* at 686, 321 N.E.2d at 590.

106. *Id.* at 680, 321 N.E.2d at 586 (emphasis added).

107. *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975).

108. *Id.* at 456.

109. *Diversified Management, Inc. v. Denver Post*, 653 P.2d 1103 (Colo. 1982).

110. *Id.* at 1108. In this case, real estate dealers sued a media defendant after it published an article questioning the propriety of plaintiffs' financial dealings. *Id.* at 1104.

111. *See supra* notes 107-09.

occasional explanations or reasons among their decisions.<sup>112</sup> However, the vast majority of opinions employing a threshold subject matter inquiry summarily recount the facts and then hold that the issues surrounding a case are "clearly,"<sup>113</sup> "unquestionably,"<sup>114</sup> or "certainly"<sup>115</sup> of public interest or concern.

In his dissenting opinion in *Rosenbloom*, Justice Marshall strongly criticized the subject matter standard because, *inter alia*, it required courts ("not anointed with any extraordinary prescience")<sup>116</sup> to determine the legitimacy of public interest in a particular topic.<sup>117</sup> In *Gertz*, Justice Powell reiterated Justice Marshall's criticism and further stated that he "doubt[ed] the wisdom of committing this task to the conscience of judges."<sup>118</sup> These criticisms are particularly well-founded when lower court judges making *ad hoc* decisions about constitutional safeguards offer little rationale to support their holdings.<sup>119</sup> Arguably, some matters are of such exceptional importance to society that a judge may properly decide *a priori* and without discussion that the issue is or is not of

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112. See, e.g., *Diversified Management, Inc.*, 653 P.2d at 1103; *Cottom v. Meredith Corp.*, 65 A.D.2d 165, 411 N.Y.S.2d 53 (1978); *Cohen v. New York Herald Tribune*, 63 Misc. 2d 87, 310 N.Y.S.2d 709 (1970).

113. See, e.g., *Gay v. Williams*, 486 F. Supp. 12, 16 (D. Ala. 1979) (involving alleged drug smuggling); *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, \_\_\_, 445 N.Y.S.2d 156, 161-62 (1981) (involving intermediate care facility for mentally handicapped children).

114. See *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, \_\_\_, 416 N.E.2d 557, 560, 435 N.Y.S.2d 556, 559 (1980) (involving international heroin trafficking); *DeLuca v. New York News, Inc.*, 109 Misc. 2d 341, \_\_\_, 438 N.Y.S.2d 199, 204 (1981) (involving medically disabled public school teacher improperly drawing salary); *Commercial Programming Unlimited v. Columbia Broadcasting Sys., Inc.*, 81 Misc. 2d 678, 687, 367 N.Y.S.2d 986, 996 (1975) (involving alleged deceptive practices of vocational schools).

115. See, e.g., *National Nutritional Foods Ass'n v. Whelan*, 492 F. Supp. 374, 382 (S.D.N.Y. 1980) (involving the qualities and marketing of health foods); *Goldman v. New York Post Corp.*, 58 A.D.2d 769, 770, 396 N.Y.S.2d 399, 400 (1977) (where real estate operators were called "sex lords" in article on massage parlors); *All Diet Food Distrib., Inc. v. Time*, 56 Misc.2d 821, 824, 290 N.Y.S.2d 445, 448 (1967) (involving health food store/restaurant). See also *Freeze Right Refrigeration & Air Conditioning Servs., Inc. v. City of New York*, 101 A.D.2d 175, 475 N.Y.S.2d 383 (1984) (alleged deceptive practices of air-conditioner repair shops).

116. 403 U.S. at 79 (Marshall, J., dissenting).

117. *Id.*

118. *Gertz*, 418 U.S. at 346.

119. See *supra* notes 105-09.

public interest or concern. Nevertheless, this exceptional type of decision has unfortunately become the rule.

The definitional and analytical problems discussed above relate to and possibly create a third difficulty. The public concern standard is consistently applied so broadly that private/public distinctions are virtually meaningless. In all but the most unusual cases, *many* topics are discussed simultaneously. The breadth a court will extend to a particular issue often determines whether the matter is of "public" or "private" concern.

The facts in *Gaeta v. New York News, Inc.*<sup>120</sup> illustrate this precise problem. In this case, the former wife of a mentally ill patient sued a newspaper and its reporter after defendants published a series of articles concerning the state's program of transferring some mentally ill patients from hospitals to nursing homes. One article featured plaintiff's ex-husband who had been transferred under this program. The article stated that psychiatrists attributed the patient's condition to a "messy divorce and the fact that [the patient's son] killed himself because his mother dated other men."<sup>121</sup> The New York Court of Appeals held that the transfer of mental patients to nursing homes and their experiences with the elderly and infirm was "a subject of public business and concern, itself plainly warranting public exposition."<sup>122</sup> The court further held that the "familiar journalistic technique of featuring the experiences of a single individual, as exemplifying in human terms the plight of many [did not] change the character of the article."<sup>123</sup>

No one would dispute that a state program dealing with the mentally ill or the elderly and infirm is of public concern under *any* reasonable definition. However, the defamatory statements in *Gaeta* had absolutely nothing to do with the transfer program or the patient's experiences in the nursing home. The court of appeals broadened the scope of an otherwise legitimate inquiry by impermissibly including personal

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120. 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984).

121. *Id.* at \_\_\_, 465 N.E.2d at 803, 477 N.Y.S.2d at 83. The true source of this "diagnosis" was the patient's sister, not a psychiatrist. *Id.*

122. *Id.* at \_\_\_, 465 N.E.2d at 805, 477 N.Y.S.2d at 85.

123. *Id.*

information about an individual completely unrelated to the article. How did the marital misconduct allegedly committed by the patient's long-estranged wife even *reasonably* relate to the transfer program of the State of New York? The court of appeals apparently grounded the "reasonable relation"<sup>124</sup> in the "familiar journalistic technique"<sup>125</sup> by singling out one person to appeal to many. Under this analysis, what *personal* information would *ever* be characterized as "private?" Few human situations are *so* distinctive that *some* others have not shared similar experiences.

In a case decided by an Indiana appellate court, the defendant, while reporting on alleged political corruption, juxtaposed photos and statements of the plaintiff, a former *Playboy* model and "Miss Hurst Golden Shifter" of the Indianapolis 500 auto race.<sup>126</sup> The article gave the defamatory impression that the plaintiff engaged in illegal sexual activities. The court found a public interest existed in the Indianapolis 500, even though the Indianapolis 500 was not at issue.<sup>127</sup> Certainly every interesting area of an individual's life should not be considered in the subject matter equation. The public interest here, local political corruption, was unrelated to plaintiff's occupation and outside interests.

A few courts employing the public interest doctrine *have* restricted its scope, however. A federal district court applying Michigan law held that a matter of public concern existed when a newspaper published a series of articles linking plaintiffs' business with local prostitution activities.<sup>128</sup> However, in its companion case, brought by a woman whose photo was published in the same series of articles, the court drew the line.<sup>129</sup> The court refused to extend the public interest privilege where the woman, who was a passerby and *not* a prosti-

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124. See *supra* text accompanying note 94.

125. *Gaeta*, 62 N.Y.2d at \_\_\_, 465 N.E.2d at 805, 477 N.Y.S.2d at 85.

126. See *Cochran v. Indianapolis Newspapers, Inc.*, 372 N.E.2d 1211 (Ind. App. 1978).

127. *Id.* at 1219. The court also found that plaintiff was a public figure under *Curtis*. *Id.*

128. *Apostle v. Booth Newspapers, Inc.*, 572 F. Supp. 897, 902 (W.D. Mich. 1983).

129. See *Parnell v. Booth Newspapers, Inc.*, 572 F. Supp. 909 (W.D. Mich. 1983).

tute, was "not the focus of the alleged public interest publication."<sup>130</sup>

In another case, an appellate court in Michigan refused to extend the state's public interest privilege in a case where a newspaper falsely published that plaintiff was arrested for rape.<sup>131</sup> The court held that while criminal activities were of public interest to a certain extent, details of crimes such as the names of victims and suspects were merely matters the public found interesting.<sup>132</sup> These statements did not rise to the level of public interest warranting protection.<sup>133</sup> The distinction drawn by this court appears to be a sensible approach where the subject matter at issue is criminal activity. It recognizes the substantial reputational interest at stake and does not unduly restrict press rights. Courts in other jurisdictions employing a threshold subject matter analysis have consistently held false criminal charges worthy of constitutional protection.<sup>134</sup>

### B. *Additional Problems Generated by the Standard*

In his dissenting opinion in *Rosenbloom v. Metromedia, Inc.*,<sup>135</sup> Justice Marshall predicted that the public interest standard would require increased judicial supervision and would generate inconsistent decisions.<sup>136</sup> The problems attending the public interest doctrine have generated much

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130. *Id.* at 914.

131. *Rouch v. Enquirer & News of Battle Creek*, 137 Mich. App. 39, 357 N.W.2d 794 (1984). In this case, plaintiff was arrested for the crime but was not officially charged. The actual offender was later apprehended. *Id.* at \_\_\_, 357 N.W.2d at 797.

132. *Id.* at \_\_\_, 357 N.W.2d at 804.

133. *Id.*

134. *See, e.g., Fazekas v. Crain Consumer Group Div.*, 583 F. Supp. 110 (S.D. Ind. 1984) (driver accused of illegally modifying race car); *West v. Northern Publishing Co.*, 487 P.2d 1304 (Alaska 1971) (cab company accused of illegally furnishing liquor to minors); *Vinci v. Gannett Co.*, 71 Misc. 2d 146, 335 N.Y.S.2d 738 (1972) (burglary).

*See also Gay v. Williams*, 486 F. Supp. 12 (D. Ala. 1979). In this case, a media defendant published a wire service story linking plaintiff to international drug trafficking. The district court applied Alaska law in a diversity action and found a public interest in the *series of articles themselves*. *Id.* at 16. In *O'Connell v. Gannett Co.*, 77 Misc. 2d 344, 353 N.Y.S.2d 144 (1974), a case involving a disputed land transaction, the court also held that the *publication itself* was the public interest. *Id.* at 347, 353 N.Y.S.2d at 148.

135. 403 U.S. 29, 78 (1971) (Marshall, J., dissenting).

136. *Id.* at 81.



scholarly criticism.<sup>137</sup> Commentators have consistently rejected the public interest standard as a viable means to achieve the balanced ends envisioned by *New York Times Co. v. Sullivan*.<sup>138</sup> In light of the pervasive definitional and analytical problems previously discussed, even the *few* interests that were held to be "private" concerns would undoubtedly be characterized as "public" by other courts. *Matus v. Triangle Publications, Inc.*,<sup>139</sup> a case decided by the Pennsylvania Supreme Court subsequent to *Rosenbloom* and prior to *Gertz v. Robert Welch, Inc.*<sup>140</sup> discusses this precise problem.

The defendant in *Matus* was a radio talk show host who complained on the air about the price that plaintiff, a garage owner and snowplow operator, had charged to plow his home driveway.<sup>141</sup> Defendant warned listeners to "watch out for this kind of thing going on."<sup>142</sup> Several listeners then called the station to relate similar experiences which were discussed on the air.

The court found the defamatory remarks to be a "matter of private pique."<sup>143</sup> The court refused to grant constitutional malice protection and affirmed the judgment. The dissenting justice would have extended the privilege, believing that "a dissatisfied customer's mere statement that he was forced to pay too high a price for a particular service [was not] actionable."<sup>144</sup>

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137. See, e.g., Eaton, *supra*, note 75, at 1349; Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968) [hereinafter Nimmer]; Note, *Gertz v. Welch: Reviving the Libel Action*, 48 TEMP. L.Q. 450 (1975).

138. 376 U.S. 254 (1964). See Nimmer, *supra* note 137, at 939-42. Professor Nimmer identifies three serious problems attending *ad hoc* balancing. First, since no rule is applied, only interests are weighed, creating uncertainty. Second, the balance disfavors free speech. Finally, Professor Nimmer feels that the judiciary abdicates the balancing process to the legislature. *Id.*

139. 445 Pa. 384, 286 A.2d 357 (1971), *reh'g denied*, (1972).

140. 418 U.S. 323 (1974).

141. *Matus*, 445 Pa. at 386, 286 A.2d at 358. During a newscast break defendant received a call from his wife informing him of the price. When he returned to the air, defendant engaged the newscaster in conversation and related the \$35 price he had paid. 445 Pa. at 387, 286 A.2d at 359.

142. *Id.* at 388, 286 A.2d at 359.

143. *Id.* at 398, 286 A.2d at 365.

144. *Id.* at 400, 286 A.2d at 365 (Roberts, J., dissenting).

The Supreme Court of Pennsylvania apparently believed that the defendant had abused his media position. Perhaps if the radio station's sportscaster, for example, had interrupted a play-by-play baseball account to air personal consumer grievances, the holding could be reconciled to principles attending the subject matter analysis, namely, the free flow of "public" information. Consumer talk shows are broadcast daily throughout the nation with far more serious complaints of services and products than in *Matus*. These open-line media programs are appropriate forums to discuss consumer information. Would the result have changed if, under the facts, a radio listener had called and discussed Matus' prices? Under a subject matter analysis, defamatory expression should not forfeit protection merely because the speaker is also a media employee. The Pennsylvania Supreme Court appeared to employ a *defendant* status inquiry in its opinion. *Matus* also exemplifies the unpredictability obtained under a public interest analysis. Justice Marshall predicted this exact problem in his dissenting opinion in *Rosenbloom*.<sup>145</sup>

### CONCLUSION

Justice Marshall's fears have proven to be well-founded; opinions decided under a threshold subject matter approach indicate that it is a problematic and unacceptable standard. The Supreme Court's decision to resurrect the public interest or concern test in *Dun & Bradstreet, Inc. v. Greenmoss Builders*<sup>146</sup> was ill-advised. This test has served to enhance neither first amendment values nor reputational interests. This decision is particularly disturbing when the floodgate to presumed and punitive damages is so casually opened.

However, perhaps the solution does not lie in the standards of liability. More than one commentator has suggested that an individual's reputation interests would be further served if an effective forum were provided to defamed parties to correct erroneous information and to rebut the injurious speech.<sup>147</sup>

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145. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 81 (Marshall, J., dissenting).

146. 472 U.S. 749 (1985).

147. See, e.g., Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983); Nim-

Justice White has twice suggested that standards of proof be eliminated for defamation plaintiffs who seek merely to vindicate their names through declaratory judgments.<sup>148</sup> Although the Court has thus far ignored these recommendations, perhaps these proponents are right and the solution to achieving an appropriate balance lies in the area of remedies. The Court would be well-advised to explore these alternatives that do not provide undefined restrictions on speech.

The United States Supreme Court has vascillated for too long on how much protection will be afforded particular speakers under specific circumstances. This vascillation creates an imbalance and uncertainty for everyone. The Court has a responsibility to resolve these uncertainties. Until it does, protections for first amendment values and for reputational interests will remain illusory constructs.

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mer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 950 (1968).

148. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 772 n.3 (White, J., concurring); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 391-92 (White, J., dissenting).