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INTRODUCTION

"What qualifies as news?" This question has vexed editors and bureau chiefs for the duration of the American free press experiment. But while the query has remained constant through time, the rhetorical and practical responses it has elicited have been remarkably fluid. Indeed, while the extra-marital dalliances of President Kennedy remained a press-held secret considered taboo for broadcast or publication in the 1960s, the media firestorm that surrounded similar indiscretions helped lead to the impeachment of another president less than forty years later.[1] This anecdotal illustration demonstrates the quandary faced by those who undertake the mass dissemination of opinion and happenings—while it might be the express goal of some to relate "All the News That's Fit to Print,"[2] determining what is "fit" involves a constantly changing assessment framework.

The question of what is and isn't news implicates a complex and sometimes paradoxical relationship between news media and news consumer. It is of course true that media outlets are market actors whose profits are based on circulation or viewership and the advertising rates based on these statistics. As such, it is incumbent upon the collective media to disseminate the information that will

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1. While any study of the "Biggest News Stories" of the 1990s will of course be inexact—other than one that simply measures the number of mentions in major media outlets—perhaps only the O.J. Simpson murder trial approached the Clinton-Lewinsky scandal and subsequent impeachment in terms of news primacy for the decade.

2. The famed motto of *The New York Times*.

best attract business in the form of interested consumers. At the same time, however, the power of media to set a given agenda is evident throughout American history, from Hearst's involvement in the Spanish-American War to Harriet Beecher Stowe's indictment of slavery and Paine's pamphlet that predates the founding of the Republic. Thus emerges a cyclical interaction between media and those who consume it: media actors must react and respond to the demands of the public, unless they decide that they might dictate what the public wants before it knows it wants it. Regardless of the genesis of the interest, the more media focus upon a given incident or subject, the more the public becomes interested in it, leading to more coverage and then to more interest. So continues the circle.

This relational process between disseminator and consumer has been studied at some length by social scientists. The term "information cascade" was coined to describe the "self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception . . . increasing plausibility through its rising availability in public discourse."[3] In other words, "X must be true because everybody says X is true."[4] While such information cascades can at times take on lives of their own, the phenomenon has been harnessed, most notably by political operatives. Candidates for office conduct polls they know will yield favorable results and then release those results to the media, who report on it and (in theory) continue to reinforce the idea of positive perception of the candidate by the public-at-large. This snowball effect can continue to reinforce itself to the point that it becomes a self-fulfilling prophecy.[5] At the axis of this cascade are mass media, which serve as both input devices and output mechanisms with respect to a given story or perception.

As endemic as the idea of information cascades may be to

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3. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 683 (1999).

4. *See* Steven Geoffrey Gieseler, Regarding the Tort Reform Movement and Its Impact on Environmental Enforcement, (unpublished manuscript at 25-26, on file with author) (describing the intentional manipulation of information cascades by interest groups in the context of the debate over tort reform).

5. *Id.* (manuscript at 24). A specific political example—that of John Kerry and the perception of "electability"—will be examined in Part II *infra*.

the study of politics and belief formation, it has tangible implications in other fields as well. Not the least of these is the law governing mass media, particularly the legal regimes that control defamation suits and claims arising from the publication of private facts. These causes of action have, as a component, the question of whether the published information is of public interest, and this component can be dispositive with respect to judgment and available damages.

This Article will examine the phenomenon of information cascades in the context of mass media law's definition of "matters of public concern" and analogous concepts.[6] In doing so, particular attention will be paid to the ways in which the cyclical nature of information cascades can elevate a presumably private matter to the level of "newsworthy." Part I will chronicle constitutional, statutory, and common law formulations of "matter of public concern," looking not only at the prevailing case law but also at the theoretical and public policy rationales underlying the current doctrine. Part II will discuss information cascades, outlining the phenomenon by examining sociological literature and anecdotal illustrations. Part III will conclude by examining the impact of cascades on mass media jurisprudence, detailing the manner in which definitions of "matters of public concern" can be influenced by information cascades and media's role in their promulgation. In short, this Article will look at the extent to which a matter is legally deemed a "matter of public concern" solely because it is in or on the news, and the legal implications thereof.

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6. The term representing the central theme of this article— "matter of public concern"—is enclosed in quotation marks to emphasize that it is a term of art, not a concretely or coherently defined concept. Analogous terminology in privacy actions will be treated similarly unless otherwise noted. To wit, concepts of "newsworthiness" and "matters of public interest" will be treated in identical fashion to the idea of "matters of public concern" unless a distinction is warranted.

I. "MATTERS OF PUBLIC CONCERN" AND MASS MEDIA LAW

A. Development of the Current Regime

1. Doctrinal Antecedents

The modern formulation of "matters of public concern" in mass media jurisprudence was foreshadowed by two Supreme Court opinions in cases involving employment disputes. The first of these, *Thornhill v. Alabama*, was a 1940 case dealing with the constitutional right of laborers to picket their employers.[7] In holding for the picketers, the Court drew a baseline beyond which speech could not be restricted without running afoul of the First Amendment, stating that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all *matters of public concern* without previous restraint or fear of subsequent punishment."[8] Thereby, the Court made two notable choices: First, it introduced the term "matter[s] of public concern" into the legal lexicon. Second, and more importantly, it did so without offering any guidance whatsoever as to how that term should be defined.

Another historical antecedent to the current mass media law regime, the decision in *Connick v. Myers*,[9] clearly anticipated the categorization of speech relating to "public concern" that has since become doctrine.[10] *Connick* dealt with the extent to which a State agency was justified in terminating a worker in retaliation for her causing a "mini-insurrection" via speech critical of management.[11] The discharged worker claimed that her

7. Thornhill v. Alabama, 310 U.S. 88 (1940).

8. *Id.* at 101-02 (emphasis added). *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 675 (1990) (discussing *Thornhill* and its application to *Hustler Magazine v. Falwell*).

9. 461 U.S. 138 (1983).

10. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (discussed at some length immediately *infra*).

11. *Connick*, 461 U.S. at 141. For further discussion in the context of the

termination amounted to state restriction on free speech and was therefore a violation of the First Amendment.[12] Overturning the district court and the affirmation of the Fifth Circuit, the Supreme Court found no such infringement.[13] The *Connick* Court, like the Court in *Thornhill* forty-two years earlier, drew a clear distinction between speech concerning private matters and speech regarding a 'matter of public concern.' In reaching a holding opposite from that of its 1940 predecessor, *Connick* placed the worker's criticisms squarely within the private sphere, affording her speech none of the privileged protection of its public counterpart.[14] In contrasting the two categories the Court deemed "speech concerning public affairs . . . the essence of self-government" and placed such speech upon "the highest rung of the hierarchy of First Amendment values."[15] Despite these lofty accolades, the Court did not offer anything approximating a definition of 'public concern.'

2. Defamation Law and "Matters of Public Interest"

The jurisprudential lineage of the modern defamation regime starts with the Supreme Court's landmark opinion in *New York Times Co. v. Sullivan.*[16] This case was born out of an advertisement, published by the *New York Times* in 1960, which alleged abuses of power by Alabama police officers in response to nonviolent civil rights protests.[17] A Montgomery city official, L.B. Sullivan, claimed that the charges made in the ad were false, and that as the supervisor of the police department against which the charges were levied, the ad defamed him.[18] Sullivan brought suit and won a judgment for $500,000, which was upheld by the

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"public concern test," see Cynthia Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category,* 59 GEO. WASH. L. REV. 1, 4 (1990).

12. *Connick*, 461 U.S. at 138.

13. *Id.*

14. *Id.* at 145.

15. *Id.* (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)).

16. 376 U.S. 254 (1964).

17. *Id.* at 256-57.

18. *Id.* at 256.

Alabama Supreme Court and appealed to the U.S. Supreme Court.[19] In one of the more famous decisions of the twentieth century, the Court reversed the Alabama court, holding that even though some of the ad's allegations were indeed false, a public official could only recover damages for statements related to his official conduct upon proof that the defendant acted with "actual malice"; that is, that the alleged defamer's statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[20]

The distinction made in *New York Times* between public officials and private plaintiffs has significant implications for the definition of "matters of public interest." Echoing the elevation of public and political speech elucidated in *Thornhill* and *Connick*, the Court explicitly imported the idea that certain content-based categories of speech deserve heightened constitutional protection into the realm of defamation law. Borrowing Justice Brandeis's praise of speech on public matters in *Whitney v. California*,[21] the opinion in *New York Times* had the precedential effect of distinguishing, for First Amendment purposes, speech that concerns the public and speech that does not. While the explicit mandate of *New York Times* and its progeny[22] was to require a showing of actual malice in order to sustain a defamation action by a public official, the practical effect was to introduce into defamation law the idea that speech on public matters—particularly ones of political significance—should be the most unfettered of all categories of speech.[23] Yet once again, the Court displayed

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19. *Id.* at 254.

20. *Id.* at 280.

21. 274 U.S. 357 (1927). "Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government." *Id.* at 375 (Brandeis, J., concurring).

22. *See generally* Rosenblatt v. Baer, 383 U.S. 75 (1966) (holding that a public works supervisor was a public official for defamation purposes); *see also* Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971) (unanimously holding that a candidate for office is a public official and must show actual malice to recover in defamation).

23. The distinction drawn between "matters of public concern" and other categories of media expression has garnered a considerable deal of criticism from the academy. These critiques will be dealt with at some depth in Part I

unwillingness or inability to define or even describe what constituted such valued speech, an omission with ramifications as lasting as those of the Court's explicit holding.

The heightened protection for speech regarding public officials guaranteed by *New York Times* was girded by the assumption that such speech must necessarily concern the public. It was inevitable, however, that a case would arise combining a private plaintiff with speech that was arguably "of public concern." For while *New York Times* embodied the sentiment that most (if not all) speech regarding a public official concerned the public,[24] it did not logically follow that the only "matters of public concern" were those surrounding such officials. Some speech pertaining to a private plaintiff could indeed be found to concern the public. This inevitability was first acknowledged in 1971 in *Rosenbloom v. Metromedia,*[25] where a plurality of the Court held that a private plaintiff should be denied recovery where the allegedly defamatory speech (in this instance, a television news report) concerned a matter of public interest.

In *Rosenbloom*, two Justices reasoned that the actual malice standard of *New York Times* should apply to all 'matters of public or general concern' regardless of the plaintiff's status.[26] Justice Black went further by advocating absolute immunity for speech on such matters.[27] Though Justice White's concurrence implicitly applied the standard to "official actions of public servants"[28]—thus for the first time offering some kind of guidance as to what qualified as a "matter of public concern"—such a definition was only alluded to and largely ignored. The fractured nature of the opinion required a more solid resolution, the opportunity for which was offered three years later in *Gertz v. Welch.*[29]

(B) *infra.*

24. *See Monitor Patriot*, 401 U.S. at 273 ("anything which might touch on an official's fitness for office" is afforded the heightened protection of the actual malice standard); *see also* Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (echoing the *New York Times* holding).

25. 403 U.S. 29 (1971).

26. *Id.* at 31-32.

27. *Id.* at 57 (Black, J., concurring).

28. *Id.* at 62 (White, J., concurring).

29. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

While *Gertz* is a famous and precedent-setting opinion, it includes contradictions remarkably relevant to the examination at hand. The *Gertz* Court held that where a media actor putatively defames a private individual by reporting on a "matter of public concern," states should be given the authority to fashion and enforce legal remedies of their own choosing (to the exclusion of a strict liability regime).[30] Citing the greater access to channels of rebuttal ("self-help") available to public figures as compared to private individuals, the Court rejected extension of the *New York Times* standard to private plaintiffs.[31] Among the potential risks of such an extension, according to Justice Powell, would be the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."[32]

The seminal case decided in the wake of *Gertz* revealed that Justice Powell's warning against ad hoc determinations of "general or public interest" had not been heeded. In that case, *Dun & Bradstreet v. Greenmoss Builders,*[33] the holding and the rule it promulgated necessitate just that kind of ad hoc determination. Refining *Gertz,* the Court in *Dun & Bradstreet* held that where a private plaintiff is defamed via "speech on matters of purely private concern,"[34] states should have the latitude to award punitive and presumed damages even in the absence of a showing of actual malice.[35] This standard necessarily requires just the type of case-by-case public/private distinction warned against in *Gertz.* This problem was not lost on the four dissenting Justices in *Dun & Bradstreet,* who explicitly confronted the malleability of such determinations of "matters of public concern":

> Without explaining what *is* a "matter of public concern," the plurality opinion proceeds to

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30. *Id.* at 345-46. The holding essentially refuted the reasoning articulated in *Rosenbloom*, in that it declined to extend the *New York Times* standard to private plaintiffs.

31. *Id.* at 344-45.

32. *Id.* at 346.

33. 472 U.S. 749 (1985).

34. *Id.* at 759.

35. *Id.* at 761.

> serve up a smorgasbord of reasons why the speech at issue here is not, and on this basis affirms the [lower] courts' award of presumed and punitive damages.
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> . . . Even accepting the notion that a distinction can and should be drawn between matters of public concern and matters of purely private concern, however, the analyses presented [in the opinion and Justice White's concurrence] fail on their own terms. Both, by virtue of what they hold in this case, propose an impoverished definition of "matters of public concern" that is irreconcilable with First Amendment principles.[36]

The "definition" offered by the plurality and criticized in Justice Brennan's dissent is in reality nothing more than a specific justification for finding that the speech at issue in *Dun & Bradstreet* (a credit report) was not a "matter of public concern." In determining that the credit report was outside the ambit of "public concern," the plurality noted that the report was "solely in the individual interest of the speaker and its specific business audience,"[37] and that there was "no credible argument that this type of credit reporting requires special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open.'"[38] The plurality's "smorgasbord" of generalities may have been adequate to explain the narrow holding with respect to credit reports, but it offers very little in the way of a solid framework for the vast majority of cases involving the "public concern" doctrine.

Thus, the two most distinguishing features of the *Dun & Bradstreet* opinion—its narrowness and its vagueness—render it essentially useless as future guidance. In this regard, it serves as a

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36. *Id.* at 785-86 (Brennan, J., dissenting). *See* MARC FRANKLIN, ET AL., MASS MEDIA LAW 357 (6th ed. 2000) (noting that the dissenters in *Dun & Bradstreet* viewed the standard applied by the majority as "irreconcilable with First Amendment principles").

37. *Dun & Bradstreet*, 472 U.S. at 762.

38. *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

sort of legal "unfunded mandate" to which courts are forced to adhere but are given no direction on how to do so. The most generally applicable formulation of "public concern" offered by the plurality was that whether "speech addresses a matter of public concern must be determined by [its] content, form, and context . . . as revealed by the whole record."[39] This test is so broad so as to be meaningless, requiring future courts to engage in just the kind of standard-less determination *Gertz* sought to avoid. The only clear contours of "public concern" are that speech directly related to the political realm is always a "matter of public concern," and that anything else requires an ad hoc assessment.[40]

3. Privacy Actions and "Newsworthiness"

As integral as "matters of public concern" are in the defamation regime, comparable concepts are even more central in tort actions for public disclosure of private facts.[41] Under the moniker of "newsworthiness," the concept of information that warrants public interest is prominent enough in the field to be deemed the "linchpin" of the cause of action.[42] The centrality of "newsworthiness" to the privacy torts is conceptually related to the heightened protection of speech on "matters of public concern" in defamation law. Because the First Amendment requires that speech dealing with public officials be given a wide protective berth,[43] actions for public disclosure of private facts usually involve plaintiffs who are not public officials. A private plaintiff seeking

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39. *Id.* at 761 (alteration in original) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

40. *See* Estlund, *supra* note 11, at 35-36.

41. A basic formulation of this cause of action is:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652D (1977).

42. 62A AM. JUR. 2D *Privacy* § 186 (2004).

43. *See supra* note 22 and accompanying text.

redress for disclosure of putatively private facts has, as his chief bar to recovery, the burden of showing that the facts at issue were not "newsworthy."[44] This assignment of the burden of proof is significant; it reveals that despite concern about private individuals being thrust into the public light against their wills, the law is still unwilling to place a de facto prior restraint upon such speech by presuming it illegal.

More attention has been paid to fashioning a workable definition of "newsworthiness" for the privacy torts than to defining "matters of public concern" for purposes of defamation law. The definition of "newsworthiness" is not absolute and is necessarily devised and applied on an ad hoc basis. Nonetheless, because privacy actions tend to involve plaintiffs who are not obviously public figures, courts are under increased pressure to delineate the concept. The result is not an absolute, Supreme Court-authored definition of the concept, but rather a collection of lower court holdings that address the issue to varying degrees.

Perhaps the case that offers the most guidance with respect to "newsworthiness" in actions for public disclosure of private facts is *Diaz v. Oakland Tribune*,[45] decided by the California Court of Appeals in 1983. The court held that a newspaper column revealing a local student council leader as a transsexual was not "news" and thus could give rise to liability in an action for public disclosure. The court offered various factors for assessing "newsworthiness." At different points in the opinion, the court maintains that "newsworthiness" is contingent upon "contemporary community mores and standards of decency;"[46] whether a given private fact "warrant[s] . . . public inspection;"[47] and finally, a three-part test (adopted from a California Supreme Court holding) weighing "'[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety.'"[48]

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44. 62A AM. JUR. 2D *Privacy* § 186 (2004).
45. 188 Cal. Rptr. 762, 9 Media L. Rep. 1121 (Cal. Ct. App. 1983).
46. *Id.* at 772.
47. *Id.* at 762.
48. *Id.* at 772 (alteration in original) (quoting Briscoe v. Reader's Digest

If the courts in noteworthy defamation cases might be chastened for not offering enough guidance, the court in *Diaz* might be conversely guilty of offering so much that none of it is functional. To have "newsworthiness" comprised of so many different components in fact paralyzes any effort to fashion a comprehensible definition. Still, the formulation in *Diaz* is notable for two main reasons. First, by making community mores central to a determination of "newsworthiness," *Diaz* anticipates the theory that "newsworthiness" ceases where the dissemination of private facts serves no purpose other than an appeal to morbid curiosity or mere sensationalism.[49] This concept has taken root in privacy actions across the United States, echoed nearly verbatim by Chief Judge Posner in his opinion in *Haynes v. Alfred A. Knopf* in 1993.[50] Indeed, this idea has cemented itself to the extent that it serves as the basis for both elements of the claim: that the disclosure (1) would prove highly offensive to reasonable sensibilities and (2) is not of legitimate public concern.[51]

Diaz's second notable feature is its institutionalization of the three-prong test recounted above.[52] This test for "newsworthiness," while not the last word in the field, does compliment the "contemporary mores" ideal by setting an outer boundary for what kind of speech is to be afforded the highest degree of First Amendment protection. Adopted by a number of courts in California and elsewhere,[53] the ordering of the elements in the test is neither random nor insignificant. The first prong of the

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Assoc., 483 P.2d 34, 43 (Cal. 1971)).

49. 62A AM. JUR. 2D *Privacy* § 187 (2004).

50. 8 F.3d 1222, 1232 (7th Cir. 1993) ("An individual, and more pertinently perhaps the community, is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.").

51. *Id.*; FRANKLIN, *supra* note 36, at 424.

52. *See supra* note 48 and accompanying text.

53. 62A AM. JUR. 2D *Privacy* § 187 (2004) (citing the following cases as adopting the test: Forsher v. Bugliosi, 608 P.2d 716 (Cal. 1980); Kapellas v. Koffman, 459 P.2d 912 (Cal. 1969); Goodrich v. Waterbury Republican-American, Inc., 448 A.2d 1317 (Conn. 1982)). *See* Honig v. Nashville Banner Pub. Co., 10 Med. L. Rptr. 2139 (Tenn. Ct. App. 1984).

test determines the "social value" of the published facts. In accordance with the Supreme Court's concern about chilling speech on issues important to the public, this prong is paramount. When "social value" is found, the second and third prongs of the test ("depth of intrusion" and "accession to public notoriety") are almost always subsumed.[54] Thus, an interesting yet disheartening paradox emerges: although the law of public disclosure appears to provide more guidance in defining "newsworthiness," the analysis may in essence be nothing more than the vague "matters of public concern" test used in defamation cases.

The most workable guidance pertaining to "newsworthiness" and "matters of public concern" is found in the Restatement (Second) of Torts:

> In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.[55]

This description clearly tracks the formulation of "newsworthiness" in *Diaz*. The Restatement breaks new ground, however, and implicates the role of the media as standard-setters, in the following Comment: "Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news.' To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves

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54. *Id.*

55. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977). *See also* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (discussing and applying a tentative draft of what would later be adopted as section 652D of the Restatement (Second)).

defined the term, as a glance at any morning paper will confirm."[56]

In essence, the Restatement endorses a standard for defining "matters of public concern" in which something is "newsworthy" by virtue of it being in the news. The Restatement approach highlights the potential impact of information cascades on the determination that a given issue "newsworthy" or a "matter of public concern." While those implications will be dealt with at considerable length *infra*, the impact can now be distilled to the general idea that the standards of those who disseminate the news greatly influence what is legally determined "newsworthy." Thus, while the Restatement and the courts that follow it employ a more coherent paradigm of "public concern" than the existing common law of defamation or privacy, it is one that, in a sense, allows the inmates to run the jail.

As is often the case with the various Restatements, this concept has been integrated into the common law. New York courts, for example, implemented this definition of "newsworthiness," which is not surprising due to the numbers and influence of the publishers within that jurisdiction. New York law makes clear that what the media decide is a "matter of public concern" will be given the presumption of validity that can be overcome only by a showing of "gross irresponsibility" and a lack of "due consideration for [the] standards" that govern professional journalism.[57]

B. A Theoretical Critique of the Current Regime

It would be challenging to find comprehensive praise of the contemporary "public concern" doctrine within the legal academy or profession. Indeed, even the judges and justices who have authored the opinions that collectively comprise the common law regime appear to do so reluctantly, as evidenced by the fractured and sometimes contentious nature of the decisions and dissents that populate the field.[58] Practitioners too may find the relative chaos in

56. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

57. *Id.*; Huggins v. Moore, 726 N.E.2d 456 (N.Y. 1999); Gaeta v. New York News, Inc., 465 N.E.2d 802 (N.Y. 1984).

58. Judicial ambivalence about defamation law and the First

this area a mixed blessing: the lack of consistent guidelines allows for great latitude in the pursuit of various objectives, but also makes projections of success exceedingly difficult.

At the risk of oversimplification, criticism of the doctrines relating to "matters of public concern" and "newsworthiness" in mass media law tends to fall into one of two categories. The first type of criticism rejects the very existence of such content-based categories of protected speech. The second major criticism—not in any sense exclusive of the first, but rather a reflection of the practical realization that such categorical protection is not likely to evaporate any time soon—argues that if such tests for "public concern" and "newsworthiness" must exist, they should exist in more defined and practically applicable incarnations. Criticism of the current prevailing regime, and even the judicial opinions that support and further it, recognize that the doctrine in question is so vague and inconsistent that it is virtually unworkable. Grappling with "matters of public concern" and "newsworthiness" is all the more difficult because of the essential and honored First Amendment concerns implicated.

1. The Dangers of "Defining-In" Matters of Public Concern

For all of the fissures in the collective dialogue over the "public concern" doctrine, one consensus can be gleaned: if there is to be a value-system ranking of different content-based categories of speech, then political speech should be at the top of the list. This

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Amendment occurs even at the highest level. In his concurrence in *Dun & Bradstreet*, Justice White recalled:

> I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 767 (1985) (White, J., concurring).

is not a novel concept, for this theme recurs in the decisions discussed above from *Thornhill* to *New York Times* and to the present.[59] Subscribers to this idea believe that the dissemination and sharing of speech relating to political matters is so fundamentally central to democratic self-government that no other type of speech should supersede it in a hierarchy of values. This desire to protect speech of a political nature has led some to take the concept to its extreme; that is, to limit constitutional protection *only* to speech that "concerned with governmental behavior, policy or personnel."[60] Most readily ascribed to Judge Robert Bork,[61] such an approach would solve the obvious problem of differentiating speech on "matters of public concern" from that on purely private matters by limiting the former to a very narrow and more easily defined sub-category of political speech.

This proposed limitation of First Amendment protection to explicitly political speech, and even the more temperate "public concern" doctrine as it now exists, finds disfavor with a great number of scholars. Before *Connick* gave expression related to public affairs a more protected status, speech was grouped into two categories: speech afforded full First Amendment protection, and speech that for various reasons was precluded from receiving such protection.[62] The default level of protection could be described as

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59. *See* Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political . . . truth."); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("[M]aintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system.") (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 687 (1989) ("Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.").

60. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27-28 (1971). Bork has since repudiated his support of such narrow tailoring. *See* Estlund, *supra* note 11, at 44.

61. *See* Post, *supra* note 8, at 671.

62. Fred Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 281 (1981) (discussing lesser First Amendment protection afforded to various categories of expression such as obscenity and commercial speech).

"full," with content-based categories such as commercial speech or obscenity excluded from that protection's ambit. Professor Fred Schauer deems this pre-*Connick* regime a "defining out" approach; that is, speech was presumed to be fully protected unless it was excluded or "defined-out" from that broad categorization.[63] By contrast, the current "public concern" and "newsworthiness" regimes represent a "defining-in" approach, in which full constitutional protection is granted only to speech that is identified as "newsworthy" or a "matter of public concern."[64]

This "defining-in" framework raises two noteworthy problems. The most obvious difficulty has to do with the "defining" itself, which has been discussed herein in the examination of the "matters of public concern" and "newsworthiness" doctrines and will be further undertaken *infra*. The second problem with "defining-in" protected speech is a more general worry that limiting default-level First Amendment protection to only certain types of speech amounts to abrogating the Constitution itself. This is an endemic fear, not only for scholars but also for the very Justices who have authored (and, of course, dissented from) the opinions legitimizing such an approach. Professor Robert Post writes that "defining-in" speech to be granted the utmost constitutional respect subverts the very self-government rationale that the defining-in approach purports to serve.[65]

Where full First Amendment protection is afforded only to speech that is defined-in to the "public concern" category, it is inevitable (due to the inherent vagueness of the "public concern" test) that some speech not explicitly political—yet still beneficial to the public discourse and the overall aim of efficient and just self-government—will not be "defined-in."[66] For example, discourse regarding such issues as the role of motherhood, the meaning of American citizenship,[67] or even tales of everyday, private citizens

63. *Id.* at 280-81.

64. *Id.* at 279-80.

65. Post, *supra* note 8, at 671.

66. *Id.*

67. *Id.* Post offers these two examples of important issues that are not expressly political and thus might be excluded from a "defined in" concept of "public concern."

who have faced down problems and emerged triumphant would not be deemed overtly central to the democratic political process. Speech on all of these topics would be excluded from the highest level of First Amendment protection by a rule like the one Judge Bork once suggested. Nonetheless, all are instructive to those who might read or see or hear them; people who, by exposure to such stories, may make more informed decisions about the society in which they live and the roles they wish to play in that society.

2. The Failures of the "Public Concern" and "Newsworthiness" Tests

Judicial opinions in cases ranging from employment rights to defamation to public disclosure of private facts reveal that defining what is a "matter of public concern" or "newsworthy" is quite nearly a losing proposition from the start. Some of the finest legal minds in the nation have undertaken the task, and the fact that so many other fine minds have disparaged the results is but some of the proof that they have failed. This is not an aspersion upon their capabilities but a reflection of the extreme difficulty inherent in separating that which "concerns the public" from that which does not. In a dissent from one of the Court's obscenity decisions, Justice Brennan offered the following lamentation, which just as readily could have pertained to the "public concern" doctrine:

> [A]fter [sixteen] years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas . . . can reduce the vagueness to a tolerable level. . . . Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts [that the] meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them.[68]

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68. Paris Adult Theatre v. Slaton, 413 U.S. 49, 84 (1973) (Brennan, J., dissenting).

What, then, is the alternative? Are these concepts in media law destined to suffer from inconsistency and vagueness, left to define "matters of public concern" by Justice Stewart's famous obscenity standard of "I know it when I see it"?[69] Unfortunately, that appears to be the standard to which efforts to define "matters of public concern" and "newsworthiness" have been reduced—an ad hoc undertaking in which the definition fluctuates according to the "experience, outlook, and even idiosyncrasies" of the decision-maker.

Professor Robert Post maintains that the vagueness of the various incarnations of "public concern" and "newsworthiness" tests is a direct result of the difficulty in defining the terms themselves.[70] Post writes that "public concern" can take on one of two distinct meanings. The first of these meanings, which he terms the "normative" conception of "public concern," relates to speech on issues directly pertinent to democratic self-government.[71] There is a clear parallel between this "normative" conception and the category of speech that Judge Bork and others have wished to see as the only category granted full protection by the First Amendment.[72] Post asserts that it is this "normative" conception of "public concern" that underlies most of the existing jurisprudence; it explains the *New York Times* distinction between public officials and others and serves as the starting point for various judicial opinions lauding speech integral to the democratic process.[73] In outlining the "normative" approach, Post points out that under this conception of "public concern," fully protected speech is fairly easy to identify.[74] Indeed, were it the only category of speech to be protected, as Bork once suggested, the doctrine of "public concern" would be much simpler but also much closer to an abomination of constitutional proportions.[75] In "defining-in" only that which is explicitly political, ancillary issues that are nonetheless valuable to

69. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
70. Post, *supra* note 8, at 668-69.
71. *Id.* at 669.
72. *See supra* notes 60-61 and accompanying text.
73. Post, *supra* note 8, at 669-70.
74. *Id.* at 670.
75. *Id.* at 670-71.

the art of self-government are excluded from protection.[76]

Post's second conception of "public concern" illuminates the obvious flaws within the regime. The "descriptive" conception of "public concern" relates to speech that is "public" in an empirical sense; quite literally, this category of speech is public because the public already knows about it.[77] Lest this be deemed an oversimplification, Post cites cases in which speech has been deemed to implicate "matters of public concern" based upon statistical surveys indicating interest by a "significant number of persons."[78] While this conception may actually prove "more democratic" by allowing for the full protection of speech where the collective public displays an interest, it too raises serious questions. This conception leaves relevant definitions vulnerable not only to the "idiosyncrasies" of which Justice Brennan warned but also to

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76. *See supra* notes 66-67 and accompanying text. To illustrate this principle, Post uses the alleged impetus behind Warren and Brandeis' famous law review article, *The Right to Privacy*. He maintains that Warren in particular sought to remove constitutional protection from speech regarding private matters because, as an elite Bostonian, he was aghast at newspaper accounts of his various dalliances. Post writes that while on the surface these accounts may have appeared entirely "private," they in fact implicated very serious issues such as class inequities, the redistribution of wealth via the income tax, and the introduction of the welfare state. By removing this type of speech from the ambit of protection, it quelled an avenue of public discourse on these important subjects. Post, *supra* note 8, at 671-72 (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)).

77. Post, *supra* note 8, at 669.

78. *Id.* at 672-73 (citing the following cases as examples: Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1295 & n.20 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980); Harris v. Tomczak, 94 F.R.D. 687 (E.D. Cal. 1982)). This approach was anticipated but not endorsed in 1971 by Justice Marshall, who wrote:

> [A]ssuming that under the rule announced [in *Rosenbloom v. Metromedia*] courts *are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject*, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 79 (1971) (Marshall, J, dissenting) (emphasis added).

media-driven information cascades.

The foremost problem with the "descriptive" conception of "public concern" is that by "defining-in" issues for which there is merely quantitative evidence of popularity, full First Amendment protection may be extended to matters that appeal only to morbid interests or sensationalism.[79] In today's Information Age, there are billions around the world interested in the prurient details of celebrities' extra-marital affairs and other such trivialities.[80] While one might hope that the guidance offered in cases such as *Diaz*—that matters such as these are not to be deemed "newsworthy"—would be followed, some recent jurisprudence quashes that hope.[81] To place such mere titillations on par with political speech would border on the perverse. Yet truth be told, political apathy and modern celebrity culture might lead such stories to garner more interest than an ongoing campaign for President.[82] The descriptive approach, like the normative approach, creates the same risks associated with any "defining-in" categorization of speech. A "defining-in" regime that is based on a quantitative measure of public appeal will inevitably exclude from full First Amendment protection as-of-yet unpublicized stories that would nonetheless be

79. *Id.* at 673.

80. While this Article was in progress, rumored affairs of one of the world's most famous athletes, British soccer star David Beckham, were behind what can only be described as a media frenzy. An April 2004 *Google News* search of the footballer's name turned up an amazing 6310 hits (nearly as many as Vice President Dick Cheney); nearly all related to his alleged marital infidelity.

81. *See, e.g.*, Michaels v. Internet Entm't Grp., Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1998) (holding that a television tabloid story on a stolen Pamela Anderson sex video was protected as regarding a matter of "legitimate public concern" because of Anderson's status as a "sex symbol").

82. This trend was illustrated by the public outcry that resulted when an episode of *American Idol* was preempted by a Presidential press conference regarding the status of the war in Iraq. The Fox Network, which broadcasts *American Idol*, publicly debated whether to air the talent show or the press conference, at one point actually deciding to air *Idol* with a running crawl at the screen bottom summarizing the happenings of President Bush's answers. *See* Sarah Rodman, *Bush Comes to Shove for "American Idol" Tonight*, BOSTON HERALD, Apr. 13, 2004, at 3.

valuable to self-governance.[83]

The latter concern anticipates the impact that information cascades may exert on the legal definitions of "newsworthiness" and "matters of public concern." While an analysis of media influence will be undertaken in Part III *infra*, suffice it to say that leaving the definition of "public concern" to rest upon empirical measures of public interest invites a regime of media agenda-setting that threatens free and honest public discourse. If non-political speech receives full constitutional protection only when it finds the most favor with the public,[84] the very purpose of the First Amendment's free speech clause is in jeopardy.

II. INFORMATION CASCADES: THEORY AND PRACTICE

As 2003 turned into 2004, John Kerry's campaign for president was in shambles. A wealthy and visible senator who had been a favorite of the liberal establishment since his anti-war activism of the early 1970s, Kerry had once been the prohibitive front-runner in the race to challenge President George W. Bush. But along the way his run met hurdles. Kerry was temporarily weakened by the scare of prostate cancer, and more permanently dogged by accusations that he was too haughty and aloof to connect with the voters who determine the early Democratic primaries. Much, if not all, of Kerry's momentum had been assumed by Vermont Governor Howard Dean, a candidate from literally out of nowhere who had begun to take on the air of inevitability as presumptive nominee—before a single primary vote had been cast. In late December, Kerry found himself trailing Dean by thirty points in the polls, and was forced to take out a mortgage on his wife's Boston home in order to fund his campaign in the face of dwindling financial support.[85]

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83. Post, *supra* note 8, at 673.

84. The explicitly political, by any reasonable definition, will always enjoy the utmost protection. As has been shown to this point, the real concern is over the protection afforded those issues that on their face might not appear to implicate self-government, but that in fact are indispensable to the public dialogue.

85. This entire account, while repeated ad nauseum in the media for

Less than a month later, Kerry had, for all intents and purposes, locked up the nomination. How could this have happened? To be sure, a few strategic initiatives helped Kerry's cause. He outspent his rivals in the first primary (caucus, as it were) state, Iowa, thus raising his profile among undecided voters. He also began to emphasize his record as a war veteran, appealing to Midwestern sensibilities and the perceived need for a president, post-9/11, with a strong foreign policy background.[86] However, exit polls revealed that one factor in particular attracted Iowa voters to Kerry and eventually led him to victory: they voted for him because he was "electable."[87]

How, one might ask, could someone's "electability" come into play when not a single vote had yet been cast? After all, one is "electable" by definition if he is likely to receive votes, and one receives votes based on a litany of professional and personal characteristics—experience, integrity, magnetism, etc.—that belonged (or didn't belong) just as much to the polling-in-single-digits Kerry as they did to nominee Kerry. Something else was obviously in play, and that something was a textbook example of an information cascade.

Kerry's campaign, aided by a Democratic establishment worried about selecting Governor Dean as its standard-bearer, had begun to accentuate the perception that Dean would not fare well in a general election contest against President Bush. Kerry himself began to introduce the idea that primary voters should vote for him precisely because more people *would* vote for him. Voters who may have been uninitiated with respect to the candidates' actual qualities took to this idea—based in large part on its growing prominence as a news item—and apparently decided that they

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nearly two months, is recounted nicely in Douglas Waller, *How John Kerry Won Iowa*, TIME (Online Ed.), *at* www.time.com/time/election2004/article/0,18471,579103,00.html (Jan. 20, 2004).

86. *Id.*

87. *See, e.g.*, William Saletan, *Kerried Away: The Myth and Math of Kerry's Electability*, SLATE MAG., *at* http://slate.msn.com/id/2095311/ (Feb. 10, 2004) (noting that "[i]f people support Kerry because they think he's electable, he goes up in the polls, which makes him look more electable").

should vote for Kerry because other people would as well.[88] In essence, the only change in Kerry's strategy was to suggest that people would vote for him if other people voted for him. By the weekend before the caucus, Kerry caught Dean in the polls. Kerry wound up receiving twice as many votes as Dean, a victory that eventually propelled him to the Democratic nomination, explicitly by virtue of the fact that voters thought that other voters would pick Kerry as their candidate.[89]

Defined as a "self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception of increasing plausibility through its rising availability in public discourse,"[90] the information cascade has long been studied in the fields of economics and social science. Economists wished to examine the impact of these cascades on stock prices, which of course are dependent on what others are willing to pay for a share of a public corporation. Social and political scientists (and political operatives), as illustrated in the Kerry example, have tied voting patterns to this form of collective belief formation. There is scant literature however, regarding the role played by mass media in furthering information cascades. No study has detailed the potential link between cascades and certain aspects of the "public concern" and "newsworthiness" doctrines. In order to undertake that examination, it is necessary to further explore the theory underlying the very concept of information cascades themselves.

Simply put, information cascades result when those who are charged with making a decision lack information. Far from being irrational or whimsical, the genesis and proliferation of such a

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88. It should of course be noted that Governor Dean's meteoric rise and just-as-dramatic fall were both also prime examples of information cascades. The public really knew nothing about the man other than that other people were beginning to jump on (and then off) his bandwagon. Dean kept doing the same thing he had done for nearly two years on the trail. Yet once the "Dean can't be elected" ball began rolling, it was impossible to stop.

89. Waller, *supra* note 85. Those voters who based their selection on the criteria other than "electability"—such as "agrees with you on issues"—almost unanimously picked someone other than Kerry. *See* Saletan, *supra* note 87 (discussing the first 14 democratic primaries).

90. Kuran & Sunstein, *supra* note 3, at 683.

cascade is based on the rational choice of decision-makers to act as free-riders upon the informational disposition already attained by others.[91] Decision-makers, confronted with either inability or unwillingness to accumulate information sufficient to make an informed choice on a matter, instead rely upon the revealed choices of others to formulate opinions.[92] Some scholars maintain that the simpler a decision is to make, the more likely an information cascade is to occur. More abstract ideas (economists often cite financial decisions of heightened complexity) do not lend themselves so readily to the process.[93]

Information cascades are closely linked with concepts such as game theory and heuristics in that they are premised on the propensity of rational actors to make behavioral decisions contingent upon the actions of others.[94] Information cascades need not be seen in a pejorative light; in theory, if the decision made at the ground-floor of the cascade is "right," then a strict adherence by those later in the process may actually prove beneficial. So too can cascades serve as an efficient use of resources on the part of a decision-maker who wishes not to incur the costs, real and transactional, of personally gathering enough cogent information on which to base a decision.

That said, the potentially harmful effects of information cascades are not difficult to identify. To begin, most would agree that a more personally well-informed public is socially desirable. A decision-making populace that takes its cues solely from the actions of a few (typically elite) actors strays quickly from democracy to paternalistic oligarchy—a societal condition even further illegitimized if those decision-making elites are un-elected. Where a cascade has developed to the point that its veracity is essentially

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91. Theresa A. Gabaldon, *The Role of Law in Managing Market Moods: The Whole Story of Jason, Who Bought High*, 69 GEO. WASH. L. REV. 111, 119 (2000) (reviewing ROBERT J. SHILLER, IRRATIONAL EXUBERANCE (2000)).

92. *Id.*

93. *Id.* at 119-20.

94. Professor Cass Sunstein, perhaps the legal academy's foremost authority on matters of cascades and heuristics, posits that much of what informs the propensity to make decisions based on the cues of others is an endemic human aversion to undertaking cost-benefit analyses. *See* Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751, 778-79 (2003).

unquestioned by the decision-making public, the accumulation of relevant information may altogether cease while the cascade continues to promulgate itself as a result of a "herd" mentality.[95] The unfortunate result can be the virtual institutionalization of a bad idea with nobody left to question it via newly obtained information. As one commentator succinctly stated, "[i]f information flows freely, it is as possible that bad policy choices will spread as [will] good policy choices. There is a [sic] substantial literature on 'information cascades' that demonstrates that the contagion process often overwhelms the quality of an idea."[96] Another notable feature is the virtual impossibility of predicting an informational cascade in an effort to protect against potential deleterious outcomes.[97] Economists have noted this feature since the phenomenon was first described—someone who could predict a cascade with respect to a stock could make himself an incredibly wealthy person.[98]

For better or for worse, the results of an information cascade can be dramatic. If enough people decide to halt their pursuit of relevant and independently obtained information, their reliance on the choices of others can replicate behavior on a mass scale. Even a small-scale decision made at the starting point of a cascade can multiply through dissemination to the masses and effectuate large-scale behavior changes at the cascade's "end."[99] One example of this cascade-driven amplification offered by a number of scholars is related to box-office receipts for movies; the

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95. Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1045-46 (2003).

96. David Lazer & Viktor Mayer-Schönberger, *Governing Networks: Telecommunication Deregulation in Europe and the United States*, 27 BROOK. J. INT'L L. 819, 837 (2002).

97. John Cassidy, *Chaos in Hollywood: Can Science Explain Why a Movie is a Hit or a Flop?*, NEW YORKER, Mar. 31, 1997, at 36-37.

98. *Cf.* Gabaldon, *supra* note 91, at 119 (describing the potential effects of a market-related information cascade as follows: "If investors respond to their possession of limited information by watching other investors, who in turn are watching other investors, a great deal of activity can be triggered by the decisions of a very few.").

99. Daniel Greenwood, *Essential Speech: Why Corporate Speech is Not Free*, 83 IOWA L. REV. 995, 1018 n.68 (1998).

only reliable indicator of how much money a movie will make is how much it made the week before, and the difference of a few million dollars on an opening weekend can end up making a difference of tens or even hundreds of millions of dollars in total profits.[100]

III. INFORMATION CASCADES AND MASS MEDIA LAW

The role of mass media in creating and furthering information cascades has been both understudied and underestimated. This role has increased exponentially with the creation and popularization of the Internet. It is almost certainly the case that the anonymous, impersonal nature of the Internet permits promulgation of information cascades that would have been impossible before its introduction. Internet media are also prone to cascade-creation because of the prevalence and speed of email discussion lists, news postings, websites, and other Internet protocols.[101] Information cascades born and fueled in cyberspace are also among the most "pure" examples of the phenomenon because the decision is being disseminated in an anonymous

100. Cassidy, *supra* note 97, at 37. Information cascades have also been used to explain aspects of the American judicial system. Scholars are split as to whether the cascade phenomenon can explain the reliance on precedent that characterizes our system of common law. Some would answer in the affirmative, citing information cascades and a sociological analog, path dependency, as the root principle underlying judicial *stare decisis*. *See, e.g.*, Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583, 638 (2003) (terming the association between common law formation and information cascades "persuasive"). Others dismiss such an association, arguing that the wealth of information available to an opinion-writing judge makes the likelihood of a negative informational cascade promulgating itself in anything approaching perpetuity quite low. *Cf.* Eric Talley, *Precedential Cascades: An Appraisal*, 73 S. CAL. L. REV. 87, 92 (1999) (arguing that although it is "possible for precedent to manifest some cascade-like characteristics, the necessary conditions for such phenomena to occur appear somewhat implausible. In particular, . . . practices within the judiciary—such as long judicial tenures, written opinions, and the hierarchical appeals processes—tend to reduce the likelihood of a 'bad' precedential cascade.").

101. *See* CASS SUNSTEIN, REPUBLIC.COM 80-84 (2001).

fashion.

Thus, while the Information Age has the capability of reducing the necessity and employ of information cascades by providing decision-makers with less expensive and more readily available information, the paradoxical effect may actually be proliferation of cascades. This may prove particularly harmful due to the general lack of norms and ethics governing Internet (quasi-) journalism. It is true that even mainstream media have come under attack of late due to scandals rooted in bias and fabrication, but the generally accepted canon of professional journalistic ethics is largely absent in cyberspace.

Mainstream media connect information cascades to the "public concern" doctrine. Nearly all of the seminal defamation and privacy cases have arisen in the mass media context, and thus the relationship between traditional media and the pertinent legal regimes is relatively clear. It is, in fact, the existence of a mass media apparatus that gives rise to a collective "public" that may (or may not) be "concerned" with a given subject-matter or issue. Without such channels of mass information dissemination, both information cascades and "matters of public concern" would be limited in scope to personal interactions and word-of-mouth. Print, radio, and television media make widespread belief formation possible. As Professor Post describes it:

> Widely distributed speech itself becomes a shared stimulus of the kind necessary for the creation of public discourse; thus the "emergence of the mass media and of the 'public' are mutually constructive developments." If speech about well-known matters deepens public experience, widely distributed speech makes even heretofore secret matters well-known and thus extends the range of public experience.[102]

The power of media to further an agenda can be—and has been—used in manners both benevolent and self-serving. Whether

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102. Post, *supra* note 8, at 677 (quoting A. GOULDNER, THE DIALECTIC OF IDEOLOGY AND TECHNOLOGY 95 (1976)).

or not a topic is, of its own accord, ("normatively") a "matter of public concern," a rational media actor will necessarily promote and further coverage of stories that appeal most to the public (are of "descriptive" public concern). In addition, the recent media tendency is not only to cover a story, but to also "cover the coverage" of the story. Particularly prevalent in coverage of criminal trials and political races, the media themselves becomes the primary focus, with other media actors commenting upon the quality, veracity, and (most often) frequency of coverage of a given event.[103] The result can be, ostensibly, a furtherance of the very interest that the story purportedly seeks to condemn; for example, a story bemoaning the "horse-race" coverage of a political race likely does nothing more than increase public interest in that aspect of the electoral campaign. When combined with the innovation of the twenty-four hour cable news cycle, the potential for the mass repetition of issues both "normatively" worthy and unworthy of public interest is great indeed.

Mass media are not merely procedurally prone to the genesis of informational cascades. They are also inherently susceptible to a "herd mentality" with regard to substantive coverage. This tendency is manifest most clearly (and famously) in the political realm. This Article opened with a contrast between media treatment of the sexual escapades of President Kennedy and that of his successor some thirty years later, Bill Clinton. Two possible explanations for this discrepancy relate to the media's role in the Watergate scandal of another president, Richard Nixon. First, the media establishment became more wary, as did the public, of any and all governmental action due to the perceived mishandling of the war in Vietnam and the malfeasance of the Nixon administration during Watergate. This distrust led the media to focus with renewed fervor on their role as "watchdogs" of democracy; willing and ready to uncover the misdeeds of government actors.

Perhaps more importantly, however, the coverage of the

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103. An explicit example of this phenomenon is the weekly Fox News program *Fox News Watch*, in which columnists and pundits review the media's performance for the preceding week.

Watergate scandal sold papers—and made two reporters into celebrity journalists, subjects of a motion picture, and eventually household names. It is only natural that this factored in to the frenzied coverage of the Clinton scandal; once the story broke (on the Internet, notably, by Matt Drudge),[104] no outlet or reporter would be outdone in its (or his) coverage. The echo chamber of sorts led naturally to a cascade of epic proportions, and not necessarily a negative one—citizens should be kept apprised of the actions of their elected officials. The difference between the treatment of Kennedy and Clinton does evidence an extremely increased vulnerability to cascades over thirty years, due in large part to the increased vigilance, self-interest, and visibility of mass media. All of these factors contribute to the complex relationship between information cascades and the legal concept of "public concern."

IV. CONCLUSION

Information cascades significantly influence the attention paid by the public to a given issue. Furthermore, it is clear that media play an important and even indispensable role in sustaining the life of an information cascade, by virtue of its ability to continually disseminate the already-formulated viewpoints of others to those who lack information. What is easy to lose in this syllogism of sorts—but crucial to an examination of the media's role in fashioning "public concern"—is that the very fact that a story is being publicized furthers the information cascade. The public's concern with a given topic is in reality a function of the amount of attention it is paid in the various media. As such, it is possible that media themselves can act as standard-setters in a regime where

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104. For a concise yet comprehensive background of Matt Drudge's website, *The Drudge Report,* (www.drudgereport.com) see http://en.wikipedia.org/wiki/Drudge_Report (last visited February 8, 2005). Ironically enough, most such primers on Drudge are not complete without references to the libel suit brought against him by Clinton aide Sidney Blumenthal, a case that turned explicitly on the very First Amendment issues that are the focus of this Article. *See* Blumenthal v. Drudge, 992 F. Supp. 44 (D.C. 1998).

quantitative publicity equals legal protection.[105]

The standard's inherent vulnerability to manipulation—conscious or unconscious, benevolent or self-interested—is all but absent where the speech at issue is explicitly political or normatively "of public concern." The ideal of free-flowing political speech is so rightly engrained into the American self-government experiment that anything approaching the abrogation of such would be viewed as an abomination.[106] This sentiment is reflected in the law governing defamation and public disclosure of private facts, and is almost always manifest in judicial opinions that implicate the First Amendment.[107] Thus, as instructive as a discussion of the Clinton scandal and the media's coverage thereof may be to an understanding of the media's role in information cascades, such explicitly political speech is not at all threatened by the vagueness and ineffectiveness of the current regime.

The media's roles as catalysts and ongoing propagators of information cascades *is* important for First Amendment purposes with respect to: (1) *Dun & Bradstreet*-style private plaintiffs in defamation actions and (2) plaintiffs bringing causes of action for public disclosure of private facts. These are the causes of action wherein definitions of "matters of public concern" and "newsworthiness" are nearly dispositive to the success of a claim. Furthermore, they are the arenas in which the definitions of these terms are most ill-formed and open to ad hoc subjectivity. The absence of concrete guidelines permits courts to employ "descriptive" concepts of "public concern," in which case the deciding factor in deeming an issue "of public concern" may often

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105. *See supra* notes 56-57 and accompanying text.

106. One need only observe the visceral reaction of scholars and citizens alike to the Alien and Sedition Acts to fully grasp this concept. *See, e.g.*, JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951).

107. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) ("[M]aintenance of the opportunity for free political discussion . . . is a fundamental principle of our constitutional system.") (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)); Thornhill v. Alabama, 310 U.S. 88, 95 (1940) ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political . . . truth."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("public discussion is a political duty").

be the amount of news coverage it has received. This, obviously, creates a perverse incentive for news organizations to reveal and repeat defamatory comments and private facts, in hopes that by doing so they will ignite public interest and thereby earn the heightened protection afforded to speech on matters of "public concern."[108] Thus, solely by virtue of the media's use of information cascades, a seemingly private matter may be elevated to an issue of "public concern" both practically and legally.

The primary goal of the current legal regime and any attempts to refine or replace it is to locate an equitable medium between competing interests. On one end of this metaphorical spectrum is freedom of expression, protected by the First Amendment as perhaps the most cherished of all American freedoms and philosophically the source from which all of our other freedoms emanate. At the other end of this spectrum is the right to privacy and dominion over one's personal life, a right protected by the causes of action discussed to this point, neither of which is frivolous or without worth. The challenge of reconciling these competing interests is at the core of the examination of the "public concern" doctrine, and is made all the more difficult by the phenomenon of information cascades and the influence they can and do exert upon an already quite convoluted regime. Media-driven cascades also impact another balance that must be struck—this one between allowing for a legitimate and open public debate on matters only implicitly relevant to self-government, while protecting the privacy of actors involved in issues which may be "public" only by virtue of the self-interest of media in making them so. How, then, to improve upon the current state of jurisprudential affairs?

One suggestion has been to afford speech potentially inviting the "public concern" and "newsworthiness" tests the same "defining-out" presumption of validity as prevails in nearly every other category of free speech jurisprudence.[109] In this view, merely requiring plaintiffs to bear the burden of showing a *lack* of

108. *See supra* text accompanying notes 77-78.

109. Estlund, *supra* note 11, at 41.

"newsworthiness" is not enough;[110] courts should start with the presumption that all speech is fully protected, and then exclude (by "defining-out") speech that should not be afforded full protection. Because "we can avoid more errors of under-inclusion by defining out rather than defining in,"[111] this standard would create a broader category of protected expression that a speaker would have to exceed (or "get out of") to lose protection, as opposed to the current framework of "getting in" (via finding "public concern" or "newsworthiness") to gain protection.[112] Although this proposal has merit, such a system would still lend itself to the vagueness and ad hoc definition fashioning that plagues the current regime, and would change little more than the semantics of jury instructions and black-letter law.

Entirely more pessimistic but more rooted in practicality are the views of those like Professor Post, who see little chance of even theoretical reconciliation between the two competing interests in the defamation and public disclosure realms.[113] Even a practical overhaul of the legal regimes cannot be accomplished in a neutral fashion;[114] any new system would, depending on circumstances, favor one or the other of the interests at stake, as is the case now with any court's determination of a matter as public or private, "newsworthy" or sensationalistic. So too would any potential revision be open to the realities of information cascades and the role of media in such—this influence became inescapable the instant the mass media became "mass" in scale. Ironically enough, the best way to combat these inherent problems is simply to allow for and encourage an open dialogue on their existence, creating, in essence, an information cascade regarding the prevalence of information cascades. The search for an appropriate balance

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110. In a claim for public disclosure of private facts, the plaintiff must prove that: (1) the defendant publicized information about the plaintiff's private life; (2) disclosure of that information "would be highly offensive to a reasonable person," and; (3) the information disclosed "*is not of legitimate concern to the public.*" RESTATEMENT (SECOND) OF TORTS § 652D (1977) (emphasis added).

111. *Id.* (quoting Schauer, *supra* note 62, at 281).

112. *Id.*

113. Post, *supra* note 8, at 684.

114. *Id.*

between First Amendment freedoms and the privacy rights protected by publication torts must be informed by an appreciation for the prevalence and power of information cascades. Predictably, the interests of society and its citizens will be best served when people can make informed decisions based upon the free exchange of ideas.