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REVITALIZING *ROSENBLOOM*: THE MATTER OF PUBLIC CONCERN STANDARD IN THE AGE OF THE INTERNET

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Across the nation, health professionals, including plastic surgeons, medical spa doctors and dentists, have come under fire from their own patients, who are taking to the Internet to air their complaints. But many of these doctors are not sitting idly while their reputations are tarnished. Instead, they are fighting back by using defamation law. As doctors increasingly file "online patient review" defamation suits, courts are faced with determining whether the doctor has a high enough profile in the community to be deemed a public figure, a characterization that would force the doctor to prove actual malice—a standard more stringent than what a non-public figure would be held to.

One of the most talked about cases involved Tiffany Craig, an Oregon resident, who wrote in a 2011 blog post that local med spa doctor Jerrold "Jerry" Darm was reprimanded for demanding sex from a patient in exchange for treatment, and that he was required to have a chaperone present when examining female patients.[1] Craig's blog failed to mention that the 10-year-old order was lifted in 2009.[2] Craig tweeted about the

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1. Sally Ho, *Oregon's First Twitter Libel Lawsuit Pits Tigard Doctor Against Portland Blogger*, THE OREGONIAN (Oct. 11, 2011, 9:19 AM), http://www.oregonlive.com/tigard/index.ssf/2011/10/oregons_first_twitter_libel_la.html.

2. *Id.*

blog entry as well.[3] In July 2011, Darm sued Craig for defamation, which garnered significant attention from both the media and legal scholars.[4] Although the case settled in late 2011, Craig had argued that Darm was a prominent local doctor who amounted to a public figure, requiring him to prove actual malice—knowledge of falsity or reckless disregard of the truth—to succeed.[5] She also argued the case involved a matter of public interest, while Darm argued it was not a matter of public interest.[6] Before the case settled, an Oregon district court judge ruled the issue was a matter of public interest and that Twitter was a public forum, but the judge did not address whether the plaintiff was a public figure.[7]

As use of social media and the Internet grows, studies suggest the number of defamation cases is increasing as well.[8] Bloggers are being sued for defamation in courts across the world.[9] Although U.S. courts

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3. *See id.*

4. *See, e.g.*, Eric Goldman, *Doctor Lawsuits Over Online Review by Patients (Or Their Family Members) [Updated July 2013]*, SANTA CLARA LAW DIGITAL COMMONS, (July 15, 2013), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1289&context=historical.

5. Ho, *supra* note 1; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) ("Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.").

6. Ho, *supra* note 1.

7. *See id.*

8. A 2011 study by the legal information firm Sweet and Maxwell found that the number of defamation cases in England and Wales doubled in the first half of 2011. Further, it revealed that the number of cases involving celebrities were down, meaning more average citizens are heading into court. Although most of the evidence supporting an increase in defamation filings in U.S. courts is merely anecdotal, the concern is real given the Internet's international reach and the U.K.'s plaintiff-friendly approach to defamation law. *See* Kelsey Blair, *Social Media Causes Rise in Defamation Cases*, SOCIALTIMES (Aug. 30, 2011, 11:40 AM), http://socialtimes.com/social-media-causes-rise-in-defamation-cases_b76365; Lauren Dugan, *Twitter Defamation Cases Are Heating Up*, MEDIABISTRO (Aug. 17, 2011, 3:15 PM), http://www.mediabistro.com/alltwitter/twitter-defamation-cases-are-heating-up_b12799.

9. Take, for example, a recent case involving U.S. golfer Phil Mickelson, who is suing for defamation in a Quebec court after an anonymous Internet user posted statements about him and his wife online. Mickelson is suing the Internet Service Provider to obtain the identity of the anonymous blogger. *See,* e.g., *Phil Mickelson*

have a long history of deciding defamation cases since the Supreme Court's landmark decision in *New York Times v. Sullivan*,[10] online defamation cases further complicate the tumultuous past of the constitutional defamation doctrine. Under the current approach that began with *Sullivan* in 1964, courts categorize plaintiffs into two categories—public plaintiffs, or private plaintiffs—to determine the burden of proof the plaintiff must satisfy. Public figure plaintiffs are required to show actual malice (a higher degree of fault) while private figure plaintiffs can often succeed by proving a lesser standard of fault (often negligence) with some limitations.[11] Fifty years after *Sullivan*, is this practice of deciding whether someone is a public figure or a private figure still workable? Should appearing in a popular blog post, infamous Tweet, or well-known viral video, turn a person into a public figure for defamation purposes?

Historically, U.S. courts have favored a strong level of First Amendment protection for traditional media defendants, like *The New York Times*, who are involved in defamation cases. Yet, as citizen journalism and blogging become more prevalent as a means of mass communication, is it still viable for courts to distinguish between media and nonmedia defendants in defamation cases? Based on current case law,[12] the courts would likely consider most health professionals to be private figures and most amateur bloggers to be nonmedia defendants. Under such a scenario, the plaintiff would likely be required to show only that blogger was negligent in posting the information if the court did

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Suing Over Internet Postings, THE TORONTO STAR (Feb. 2, 2012), http://www.thestar.com/sports/golf/2012/02/02/phil_mickelson_suing_over_internet_postings.html. Or, consider the 2009 flap involving blogger Rosemary Port, who was outed after anonymously labeling model Liskula Cohen as a "ho" and "skank." *See, e.g.*, George Rush, *Outed Blogger Rosemary Port Blames Model Liskula Cohen for Skank' Stink*, N.Y. DAILY NEWS.COM (Aug. 23, 2009, 7:44 AM), http://www.nydailynews.com/entertainment/gossip/outed-blogger-rosemary-port-blames-model-liskula-cohen-skank-stink-article-1.400409.

10. 376 U.S. 254 (1964).

11. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

12. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *see generally* Hutchinson v. Proxmire, 443 U.S. 111 (1979).

not believe the subject was a matter of public concern.[13] The Darm case—and others like it[14]—raise important questions about the viability of the public/private figure distinction in the Internet age, and suggest that returning to the matter of public concern inquiry may provide more protection for core First Amendment speech. Justice Brennan noted in *Sullivan* that:

> To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained, in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[15]

To protect as much core First Amendment speech as possible, this Article argues that courts should abandon the public/private figure distinction developed in *Sullivan* because that standard is no longer workable for defamation cases arising in the Internet age.[16] Part I begins with an overview of major U.S. defamation jurisprudence and the various

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13. Courts often use the terms "matter of public concern" and "matter of public interest" interchangeably, and as a result, both are used to represent the same concept within this article.

14. *See, e.g.*, Moore v. Hoff, 821 N.W.2d 591(Minn. Ct. App. 2012) (finding that a former employee failed to establish a cause of action for tortious interference based upon a blogger's publishing true statement about the former employee).

15. *Sullivan*, 376 U.S. at 271 (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940)).

16. To examine all relevant case law, the authors conducted a search of both federal and state cases in the Westlaw database using the search queries "Internet /p defamation," "online /p defamation" and "blog /p defamation." In addition, landmark defamation cases, including *New York Times v. Sullivan*, *Curtis Publ'g v. Butts* and *Gertz*, were Shepardized to find additional cases for review. This analysis does not attempt to document each and every instance of defamation involving the Internet and social media. Instead, it attempts to illustrate the difficulties the Internet and social media create with the traditional plaintiff-status based defamation determinations.

standards the Supreme Court has mandated. Next, Part II turns to a review of scholarly work on the state of defamation law, which illustrates a consensus among scholars that the courts should clarify the role of the plaintiff's status. Scholars, however, disagree about how courts should go about offering guidance—with some supporting the public/private figure distinction, and others suggesting a return to the matter of public interest model. Marshaling the scholarly evidence along with legal precedent, Part II concludes that courts should re-think the system of plaintiff classification initiated by *Sullivan* and, instead, focus on whether the alleged defamatory speech involves a matter of public concern. Further, Part III proposes that courts should require all plaintiffs—regardless of public or private status—to prove actual malice in defamation cases involving speech on matters of public concern because it offers more protection for core First Amendment speech, harmonizes the application of defamation law to media and nonmedia defendants, and creates a standard that can be implemented by the judiciary.

I. THE COURTS, DEFAMATION LAW, AND STANDARDS OF PROOF

At common law, the defamation tort was a relatively simple, pro-plaintiff tort. Since the Supreme Court's *Sullivan* decision, the legal landscape has grown increasingly complex. [17] In the decades following *Sullivan*, the Court has ruled on cases that introduced both fault and falsity elements, re-shaping the tort to provide more protection for speech. However, the intricacies of Internet communication necessitate a re-assessment of the elements of defamation to strike a more desirable balance between the protection of an individual's reputation and the facilitation of public discourse.

A. Holding Public Figures to a Higher Standard

In *Sullivan*, the Court held for the first time that the First Amendment's free speech protections limit a defendant's liability for the

17. *Sullivan*, 376 U.S. at 254.

publication of alleged defamatory speech.[18] L.B. Sullivan, the Montgomery, Alabama police commissioner, claimed the *New York Times* defamed him by publishing an advertisement seeking financial support for the civil rights movement.[19] The Court held that public officials could only recover damages in a libel lawsuit if they proved that the defamatory statements were published with actual malice—knowledge of falsity or in reckless disregard of the truth:[20]

> [W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[21]

Justice Brennan's statement draws attention to the nature of the speech as a part of a topic of national importance—a sentiment that lays the groundwork for his later reliance on the matter of public concern standard in *Rosenbloom v. Metromedia*.[22] For example, he noted that "[t]he present advertisement, as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection."[23]

In the same year, the Court extended the *Sullivan* actual malice rule to criminal defamation cases in *Garrison v. Louisiana*.[24] Three years later, in *Curtis Publishing Co. v. Butts*,[25] the Court extended *Sullivan*'s

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18. *Id.* at 279–80 ("The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.").

19. *Id.* at 256–57.

20. *Id.* at 283.

21. *Id.* at 270.

22. 403 U.S. 29 (1971).

23. *Sullivan,* 376 U.S. at 271.

24. Garrison v. Louisiana, 379 U.S. 64 (1964) (applying the *Sullivan* actual malice rule in a criminal libel action against a nonmedia defendant whose alleged defamatory statement was made at a press conference).

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

rationale to public figures by ruling that, like public officials, they must meet a heightened fault standard to succeed in defamation claims.[26] While the Court disagreed as to a specific heightened standard for public figure libel plaintiffs, five justices advocated for a standard at least as strict as actual malice.[27] In his concurring opinion, Chief Justice Warren noted that public figures were not significantly different from public officials in their role in shaping society, and therefore held that there was a strong public interest in their actions and activities.[28] In requiring a higher standard of proof for public officials and public figures, Chief Justice Warren noted the significance of public figures' access to the mass media "both to influence policy and to counter criticisms of their views and activities."[29] Based on its decisions in *Sullivan* and *Curtis Publishing*, the Court established a distinction between public figures and private figures, leaving lower courts with the task of determining on a case-by-case basis which plaintiffs amounted to public figures, who would then have to prove actual malice.

26. *Id.* at 154–55. *Butts* was a companion case to *Associated Press v. Walker*, 388 U.S. 130 (1967). The Court held that the plaintiffs in both cases were public figures. *Id.* Wally Butts was the athletic director at the University of Georgia, and Edwin Walker was a well-known ex-military officer. *Id.* at 135, 139.

27. *Id.* at 155, 162, 170–72. The plurality opinion authored by Justice Harlan argued for a standard higher than negligence but lower than actual malice. *Id.* at 155. Justice Warren, Justice Brennan, and Justice White all agreed that actual malice was the correct standard, and Justice Black and Justice Douglas held that the press should be exempt from any libel suits involving public officials or public figures. *Id.* at 162, 170–72.

28. *Id.* at 164 (Warren, C.J., concurring).

29. *Id.*

B. Rosenbloom v. Metromedia *and the Matter of Public Concern Standard*[30]

In *Rosenbloom v. Metromedia*,[31] a plurality of the Court, in an opinion written by Justice Brennan, shifted the inquiry away from evaluating a plaintiff's status and ruled that all defamation cases involving speech on matters of public concern required the plaintiff to prove the *Sullivan* actual malice standard.[32] The petitioner, George Rosenbloom, was a distributor of nudist magazines.[33] Local authorities arrested him, seized his books and magazines, and charged him with selling obscene material.[34] The state court judge found that as a matter of law, the publications were not obscene, which led to the jury rendering a verdict in Rosenbloom's favor.[35] After the conclusion of the trial, Rosenbloom sued a radio station that had characterized the publications he sold as "obscene" and referred to him as a "smut distributor []" and "girlie-book peddler []" during its coverage of the arrest and trial.[36] Writing in favor of Metromedia, Justice Brennan opined that the "determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern, albeit leaving the delineation of the reach of that term to future cases."[37] Brennan suggested that "public or general concern" be construed broadly enough to include speech related to government, science, morality, and the arts.[38] In the plurality opinion, Brennan also

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30. Courts and scholars have used various terms to describe this standard. Court opinions and literature refer to this standard as the "public-concern test," the "public-interest test," the "matter of legitimate public interest or concern standard," and other variations of similar construction. *Accord, e.g.*, Snyder v. Phelps, 562 U.S. ___, ___, 131 S.Ct. 1207, 1216 (2011). For purposes of consistency and clarity, the test established in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), and referred to in subsequent court opinions will be referred to in this article as the "matter of public concern standard," unless a different version appears in a quotation.

31. Rosenbloom v. Metromedia, 403 U.S. 29 (1971), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

32. *Id.* at 31–32.

33. *Id.* at 32.

34. *Id.* at 32–33.

35. *Id.* at 36.

36. *Id.*

37. *Id.* at 44–45.

38. *Id.* at 42–44.

reflected on the previous standard of classifying plaintiffs that had developed in *Sullivan* and its progeny. He wrote:

> Further reflection over the years since *New York Times* was decided persuades us that the view of the "public official" or "public figure" as assuming the risk of defamation by voluntarily thrusting himself into the public eye bears little relationship either to the values protected by the First Amendment or to the nature of our society. . . . Voluntarily or not, we are all "public" men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern.[39]

Justice Brennan acknowledged the plaintiff's reputational and privacy interests.[40] However, the societal interests of free speech and free press as protected by the First Amendment led Brennan to rule that the relatively low standard of reasonable care (i.e. negligence) was a constitutionally inappropriate standard for defamatory speech related to matters of public concern. [41] Justice Brennan relied on past precedent to conclude that it was imperative to protect the publication of truthful affairs, which also means sometimes having to protect some erroneous publications as well.[42]

But just three years later, the Court retreated from its holding in *Rosenbloom* in *Gertz v. Robert Welch, Inc.*[43] The case arose out of a magazine article accusing Elmer Gertz, an attorney, of participating in the trial of a Chicago policeman as a part of a Communist conspiracy to discredit local law enforcement.[44] Gertz sued for libel.[45] In its decision, the Court rejected the *Rosenbloom* plurality's matter of public concern

39. *Id.* at 47–48 (citation omitted).
40. *Id.* 48–49.
41. *Id.* at 48–51.
42. *Id.* at 51–52.
43. 418 U.S. 323 (1974).
44. *Id.* at 325–326.
45. *Id.* at 327.

standard.[46] The majority held that when a plaintiff in a defamation case is a private figure, each individual state may establish the appropriate standard of fault—so long as it is not strict liability.[47] The Court held Gertz was a private figure, and that he should not have to be bound by the actual malice rule articulated in *Sullivan*.[48]

After *Gertz*, the plaintiff's status as a public or private figure once again became relevant in evaluating what standard of proof should be applied in defamation cases. Accordingly, states can permit the mere showing of negligence by the publisher of a defamatory falsehood—even if the speech deals with a matter of public concern. The Court gave two reasons for this standard: (1) to promote the state's legitimate interest in allowing a private figure to protect his good name,[49] and (2) to avoid having state and federal judges "decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."[50] The Court also held that a private figure in a defamation action may not recover presumed or punitive damages from a defendant unless the plaintiff can show the defendant acted with actual malice.[51] The Court's critique of the matter of public concern indicated *Gertz* was meant to abolish the standard permanently, but the matter of public concern concept surfaced again in two later defamation decisions along with a host of other cases dealing with the First Amendment.[52]

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46. *Id.* at 345–46.
47. *Id.* at 347.
48. *Id.* at 352.
49. *Id.* at 345.
50. *Id.* at 346.
51. *Id.*
52. *See generally* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (holding that in order to protect the free flow of ideas and opinions on matter of public concern, the First and Fourteenth Amendments prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress without additionally showing a false statement of fact made with actual malice); Branzburg v. Hayes, 408 U.S. 665 (1972) (Stewart, J., dissenting) (noting that while the public interest is advanced by individual privacy, in the case of the reporter-informer relationship, it is in society's interest to create conditions in which information possessed by news sources can reach public attention); Snyder v. Phelps, 131 S. Ct. 1207 (2011) (holding Westboro Baptist Church's speech is a matter of public concern and is therefore deserving of special First Amendment protection).

C. Some States Reject Gertz, *Stand By* Rosenbloom

Courts in Alaska, Colorado, Indiana, New Jersey, and New York have resisted the invitation from the U.S. Supreme Court in *Gertz* to deviate from the *Sullivan* actual malice standard. None of them has adopted a lower fault standard when the plaintiff is a private figure. Instead, each state's high court has adopted some form of the *Rosenbloom* matter of public concern standard, requiring that plaintiffs prove actual malice when the alleged defamatory speech involves a matter of public concern.[53]

In *Walker v. Colorado Springs Sun, Inc.*,[54] the Supreme Court of Colorado recognized in its opinion that there is "no perfect rule to be promulgated which will balance the conflict between the First Amendment right of the press and the injury sustained by a person defamed, more particularly when that person is a Private individual involved in a subject of public or general concern."[55] In defense of its use of the *Rosenbloom* matter of the public concern standard, the court said:

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53. *See, e.g.*, Mount Juneau Enter. v. Juneau Empire, 891 P.2d 829 (Alaska 1995) (holding that plaintiffs are required to prove actual malice on issues of public interests and concern, even if the plaintiff is a private figure); Walker v. Colo. Springs Sun, Inc., 538 P.2d 450 (Colo. 1975) (en banc), *overruled on other grounds by* Diversified Mgmt., Inc. v. Denver Post, Inc., 653 P.2d 1103 (Colo. 1982) (holding that when a defamatory statement has been published concerning a private individual, but involves a matter of public or general concern, the plaintiff is required to prove actual malice); Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446 (Ind. 1999) (holding that the actual malice standard of proof is required in defamation cases involving matters of public or general concern regardless of the status of the plaintiff); Sisler v. Gannett Co., 516 A.2d 1083, 1093 (N.J. 1986) (holding that "[t]he negligence standard . . . is inappropriate in the context of a defamation action that focuses upon published matters of legitimate public concern . . ."); Chapandeau v. Utica Observer-Dispatch, 341 N.E.2d 569 (N.Y. 1975) (holding that when the content of a news article is "of legitimate public concern[,]" the plaintiff must "establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties").

54. *Walker*, 538 P.2d 450.

55. *Id.* at 457–58.

> Our ruling here results simply from our conclusion that a simple negligence rule would cast such a chilling effect upon the news media that it would print insufficient facts in order to protect itself against libel actions; and that this insufficiency would be more harmful to the public interest than the possibility of lack of adequate compensation to a defamation-injured private individual.[56]

In refuting the argument that the matter of public concern standard is too difficult to apply, the Colorado Supreme Court reasoned that determining what constitutes a matter of public concern, while seemingly difficult, would be a matter of law left up to experienced judges, rather than a question of fact, which may present difficulties for juries.[57]

In *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*,[58] the Indiana Court of Appeals for the Third District expressed a similar sentiment:

> The general or public interest test for applying the 'malice' privilege standard will involve the trial courts in the task of deciding what information is or is not relevant to the promotion of free expression. While it is true that this task will not always be easy, the courts have traditionally assumed the role of ultimate arbiters of disputes concerning conflicting constitutional policies. The contention that the judiciary will prove inadequate for such a role would be more persuasive were it not for the sizable body of federal and state cases that have employed the concept of a matter of general or public interest to reach decisions in libel cases involving private citizens. The public interest

56. *Id.* at 458.

57. *Id.* at 459.

58. Aafco Heating & Air Conditioning Co. v. Nw. Publ'n., Inc., 321 N.E.2d 580 (Ind. Ct. App. 1974).

> is necessarily broad; recent decisions dealing with a panoply of topics and events, ranging from organized crime to the quality of food served in a particular restaurant, will assist trial courts in defining the proper scope of the public interest test.[59]

Although states like Colorado and Indiana have continued to apply the *Rosenbloom* standard instead of following the U.S. Supreme Court's holding in *Gertz*, the Court revisited the matter of public concern standard in two new contexts.

D. Reviving The Matter of Public Concern Standard: Dun & Bradstreet, Inc. v. Greenmoss, Inc. *and* Philadelphia Newspapers, Inc. v. Hepps

Twelve years after *Gertz*, the Court limited the second part of its holding in *Gertz* with *Dun & Bradstreet, Inc. v. Greenmoss, Inc.*,[60] and revisited the matter of public concern standard as it applies to the defamation tort. Defendant Dun & Bradstreet, a credit reporting agency, sent a report to five of its subscribers that wrongly stated that plaintiff Greenmoss Builders, a construction contractor, filed for bankruptcy.[61] The Court upheld a Vermont court's award of presumed and punitive damages to Greenmoss Builders on a showing of less than actual malice.[62] The plurality reasoned that *Gertz*'s limitation on punitive and presumed damages was inapplicable to the case because the speech did not involve matters of public concern, and therefore, was of "less First Amendment concern."[63] In balancing the interest of a private individual's right to protect his reputation with the First Amendment interest in protecting free speech, a plurality of the Court concluded that when speech is not a matter of public concern, it should receive less constitutional protection.[64] After *Dun & Bradstreet*, lower courts dealing with private figures once again have to consider whether the speech at

59. *Id.* at 590.
60. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).
61. *Id.* at 751.
62. *Id.* at 763.
63. *Id.* at 759.
64. *Id.*

issue deals with a matter of public concern when the plaintiff seeks presumed and punitive damages.

One year later, the Court made the matter of public concern standard relevant again in yet another context. In *Philadelphia Newspapers, Inc. v. Hepps*,[65] the Court held that the First Amendment requires that defamation plaintiffs bear the burden of proving the defamatory statement is false when the speech addresses a matter of public concern.[66] Maurice Hepps, the plaintiff, was a private figure and the principal stockholder of a corporation that owned a chain of convenience stores.[67] The defendant newspaper printed a series of stories linking the company to organized crime and improper influence of the state government.[68] The Court found the speech touched on a matter of public concern and, therefore, *Hepps* had the burden of proving the speech was false.[69] The Court reasoned that state laws that place the burden on media defendants to prove truth threaten to chill speech on matters of public concern by causing the media to fear liability even as a result of publishing true speech.[70] Although it appeared *Gertz* put an end to the matter of public concern standard, the Court re-introduced this analysis in *Hepps* and *Dun & Bradstreet*, despite its earlier criticisms that the standard was too difficult for courts to apply. Since deciding this series of cases from the 1980s, the Court has not revisited the issue.

II. DISSATISFACTION WITH THE STATE OF DEFAMATION LAW

Many scholars agree that current defamation standards are confusing, often contradictory, and offer little predictability for parties. Because of these issues, scholars have called for the Court to revisit defamation law to provide new clarity and consistency to an old legal doctrine.[71] First Amendment scholar Rodney Smolla has argued that too

65. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).
66. *Id.* at 779.
67. *Id.* at 767.
68. *Id.*
69. *Id.* at 778.
70. *Id.* at 777.
71. Rodney Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1 (1983) (calling the conflicting defamation doctrines "unacceptable").

much focus has been given to the purported clash between speech and reputation, and that "not enough energy has been devoted to the more technical tasks of straightening out" defamation rules so they "stand a chance" of balancing the competing interests of speech and reputation.[72]

However, scholars are divided on how the Court should deal with the mess of defamation law. Some scholars align with the Court's decision in *Gertz* and argue against using the matter of public concern standard in defamation analysis.[73] For example, law professor Arlen Langvardt concluded that defamation law would be better served without the matter of public concern standard because of the lack of guidance that the Court has given lower courts as to how to apply it.[74] Law professor Nat Stern agreed with Langvardt's criticisms of the matter of public concern standard and called the standard "so vague and subjective, courts can (and often do) arrive in good faith at opposite characterizations of essentially similar expression."[75] Refining the standard would be worthwhile to Stern if it had been originally demanded by "doctrinal necessity," but he concluded it was not.[76] He recommended the Court return to the original understanding of *Gertz*, requiring a private figure to prove actual malice for special damages

72. *Id.* at 63.

73. *See, e.g.*, Arlen W. Langvardt, *Public Concern Revisited: A New Rule For An Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241 (1986) (arguing the Court should reinstate the original understanding of *Gertz* because of the Court's lack of guidance on how to apply the matter of public concern standard); David W. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199 (1976) (concluding *Gertz*'s plaintiff categorization method is a compromise between the interests of free speech and an individual's reputation and lays out a more stable standard than the matter of public concern standard); Nat Stern, *Private Concerns of Private Plaintiffs: Revising A Problematic Defamation Category*, 65 MO. L. REV. 597 (2000) (arguing the public concern standard is "vague and subjective" and that *Dun & Bradstreet* contradicts the Court's holding in *Gertz*); Stephen J. Mattingly, Note, *Drawing a Dangerous Line: Why the Public-Concern Test in Constitutional Law of Defamation is Harmful to the First Amendment, and What Courts Should Do About It*, 47 LOUISVILLE L. REV. 739 (2009) (advocating that use of the public concern test is a threat to the First Amendment, as government officials would be deciding what constitutes matters worthy of being debated).

74. Langvardt, *supra* note 73, at 270.

75. Stern, *supra* note 73, at 653.

76. *Id.*

rather than muddy the waters with the standard set forth in *Dun & Bradstreet,* which requires courts to distinguish whether the speech at issue involves a matter of public concern.[77] Stern argued "the cost in deterred speech from the unpredictable public concern test is literally incalculable. Whatever the cost, however, it outweighs the negligible benefit of an unworkable standard."[78] Law professor Cynthia Estlund argued the matter of public concern standard has actually lessened the protection of speech, despite its appearance of being more speech protective.[79] Estlund reasoned that:

> The public concern test rests on an unduly constricted vision of public discourse. It undermines the capacity of the citizenry to bring hitherto "private" and particularized grievances onto the public agenda, and it inevitably leads to the suppression and the deterrence of speech that is important to public debate. These serious flaws are inherent in the nature of the public concern test, and would similarly plague any content-based category of privileged or disfavored speech that assigned the function of explicitly sorting out "speech that matters" from speech that doesn't.[80]

Estlund called on the Court to seek out different doctrinal tools that do not require courts to determine what is or is not a public issue worthy of debate.[81]

Yet other scholars argue the matter of public concern standard is viable, making it the preferred option over the categorization of plaintiffs.[82] Law professor Gerald Ashdown recognized that although

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77. *Id.*

78. *Id.* at 653.

79. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of An Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1 (1990); s*ee also* Mattingly, *supra* note 71.

80. *Id.* at 55.

81. *Id.* at 55.

82. *See, e.g.*, David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. TELECOMM. & HIGH TECH. L. 403 (2011) (rendering *Gertz*'s plaintiff

scholars and lawyers would like distinguishable jurisprudential categories, sorting out public officials, the various categories of public figures, and private individuals does not leave "the kind of breathing space a healthy notion of free expression can tolerate."[83] Ashdown argued that libel analysis should be focused on the subject matter discussed rather than the character or notoriety of the individuals involved in a defamation action.[84]

Based on this, Ashdown concluded the *Rosenbloom* decision was "the more sensitive and sensible approach" to libel cases versus *Gertz*'s messy categorical approach that distinguishes between public and private figures.[85] Even with a narrow view of the First Amendment, Ashdown made the case that limiting fully protected discussion to matters concerning public policy or governmental operations would provide more "constitutional consistency and integrity" and be consistent with traditional First Amendment values.[86] He argued that:

> Although the *Rosenbloom* public interest analysis provides greater breathing space for free expression, courts should at least recognize the constitutional need for *New York Times* protection for the discussion of public policy matters. Evidently, this confusion over the necessary scope of a subject matter approach has led some courts to adopt a negligence standard for defamatory

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categorization standard obsolete with such profound changes to the media landscape and advent of digital media); Gerald Ashdown, *Of Public Figures and Public Interest – The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937 (1984) (arguing plaintiff categorization is unworkable and that the public concern standard is a more sensible approach); R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27 (1987) (acknowledging the public concern standard comes with difficulties but concludes it is preferred over a more convenient standard); Robert E. Drechsel, *Defining "Public Concern" in Defamation Cases Since* Dun & Bradstreet v. Greenmoss Builders, 43 FED. COMM. L.J. 1 (1990) (identifying ways the Court can ascertain what type of speech should be classified as a matter of public concern).

83. Ashdown, *supra* note 82, at 951.

84. *Id.*

85. *Id.*

86. *Id.* at 951–52.

> publications about private individuals without solicitude for first amendment values.[87]

Ashland emphasized the need to require defamation plaintiffs to prove actual malice whenever the subject matter of the publication pertains to a matter of public concern—even if the plaintiff would otherwise be considered a private figure.[88]

Law professor R. George Wright conceded that determining what types of speech pertain to a matter of public concern can be difficult, but he pointed out that some of the most challenging problems in legal analysis involve difficult and amorphous concepts that are essential to the adjudication of cases.[89] Wright advocated for standards that increase the consistency and predictability of the application of the matter of public concern standard instead of rejecting it in favor of a standard "more convenient" and "less controversial" that does not directly address fundamental free speech concerns like robust public debate.[90] Wright argued assigning speech to broad categories like "economic" or "commercial" to determine whether the topic is a matter of public concern is an ineffective approach.[91] For example, Wright explained a president's budgetary decisions may be a matter of public concern, while an individual's financial situation may not be.[92] He concluded courts must scrutinize the speech at issue, but that the standard can be applied in defamation actions without evaluating plaintiff status.[93]

Scholars are also specifically beginning to recognize the problems current defamation doctrine presents in the digital age.[94] For

87. *Id.* at 955–56.

88. *Id.* at 954.

89. Wright, *supra* note 80, at 28.

90. *Id.* at 30. *Contra* Lat & Shemtob, *supra* note 82 (arguing the plaintiff categorization method is more difficult to apply in the age of the Internet).

91. Wright, *supra* note 82, at 38..

92. *Id.*

93. *Id.*

94. *See, e.g.*, Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000) (discussing the trend of "John Doe" defamation suits where corporations bring suits against an unknown individual for allegedly libelous statements made about them on the Internet); Thomas D. Brooks, Note, *Catching Jellyfish in the Internet: The Public-Figure Doctrine and Defamation on Computer Bulletin Boards*, 21 RUTGERS COMPUTER & TECH. L.J. 461

example, law professor Lyrissa Barnett Lidsky studied the trend of "John Doe" defamation lawsuits where corporations and their officers bring the suit against an unknown individual for allegedly libelous statements made about them on the Internet.[95] Lidsky noted these lawsuits are generally not about collecting damages, but are usually brought for symbolic reasons, some of which she believed are worthy while others are not.[96] Although some Internet users are held accountable for their speech as a result of these lawsuits, the suits also threaten legitimate criticism. Lidsky argued that existing legal doctrines are not responsive to the threats posed to public discourse via the Internet.

Lidsky's research discussed the new realm of discourse that got its start online. "The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to 'publish' their views on matters of public concern."[97] Lidsky characterized the Internet as a "powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse," thus helping everyday individuals shape public policy.[98] At the same time, Lidsky is not naïve to the fact that the Internet can also have real effects on an individual's reputation with its ability to spread messages widely, quickly, and in a repetitive manner.[99] The problem for libel law, Lidsky noted, is figuring out a way to balance protecting an individual's reputation without diminishing the Internet as a place for public discourse.[100] "Although commentators and the Supreme Court have been preoccupied principally with the chilling effect of defamation law on the mass media, chilling-effect arguments have particular resonance in cases involving 'nonmedia' defendants like those typically sued in the new Internet libel cases."[101] The problem, Lidsky concluded, is that these lawsuits threaten to suppress legitimate critical speech online along with regulating

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(1995) (identifying potential problems that could arise in applying the public figure standard in the age of the Internet).

95. Lidsky, *supra* note 94, at 858–60.

96. *Id.* at 859.

97. *Id.* at 859.

98. *Id.* at 860.

99. *Id.* at 864.

100. *Id.* at 864.

101. *Id.* at 888–89.

intentional falsehoods.[102] Lidsky argued current defamation doctrines are no fit for cyberspace.[103]

In 1995, then-law student Thomas Brooks identified three potential problems that could arise in applying the "public figure" standards in the age of the Internet.[104] Brooks argued three elements of public figure classification would become crucial in defining public figures in online defamation suits based off of courts' application of *Sullivan*: (1) whether the plaintiff had access to the media; (2) whether there was a public controversy; and (3) to what degree the plaintiff injected himself into this controversy.[105] Brooks argued that the diversity of Internet news groups and bulletin boards made the question of access crucial to online defamation cases.[106] Access remains a critical question as today's websites focus more on user engagement and participation. The modern Internet user traded in early forms of bulletin boards for social networking websites like Facebook, Twitter, and LinkedIn and interactive websites like Pinterest (where users can link to their favorite ideas and images online). Early Internet newsgroups have transformed into online-only news publications like The Huffington Post, or local news hubs like Patch.com, where users can contribute content and comments. Just as it was in 1995, individuals may not be subscribers or have access to all platforms and, therefore, may not have the ability or opportunity to reply to the allegedly defamatory statement.[107] Without access to the particular medium, courts may find the plaintiff to be a private figure, thus allowing a lower standard of proof than "actual malice."[108]

However, Brooks notes that courts may also recognize how easy it is to respond on many of these forums and conclude the plaintiff had sufficient access to the media to be classified as a public figure.[109] He pointed out that many comment forums and bulletin boards eliminate intermediate editors that plaintiffs would have to go through to respond

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102. *Id.* at 888.
103. *Id.*
104. Brooks, *supra* note 94, at 461.
105. *Id.* at 462.
106. *Id.* at 479–80.
107. *Id.* at 482.
108. *Id.* at 489.
109. *Id.* at 482.

via the traditional media.[110] In terms of classifying whether the matter is a public concern, based on Supreme Court precedent, Brooks concluded in 1995 that any messages posted on online bulletin boards or news groups would not likely be deemed a public concern and work in the favor of plaintiffs.[111] Finally, Brooks purported it may be easier to argue that a plaintiff has asserted himself into a controversy online because courts have often been willing to find this when the plaintiff has engaged in the use of advertising, which is much easier online.[112] Brooks hypothesized in 1995 that plaintiffs involved in online defamation cases would less likely be classified as public figures, although he believed it might become more likely in cases involving commercial users.[113] Defendants utilizing online forums, he believed, may routinely be held to a negligence standard in libel cases as opposed to the actual malice standard.[114]

David Lat, the founder and managing editor of the legal website Above the Law, and Zach Shemtob, an assistant professor in criminal justice and criminology, argued that "profound changes to the media landscape have rendered *Gertz* obsolete" as a standard for analyzing defamation lawsuits.[115] Lat and Shemtob critiqued *Gertz*'s ability to address who is a public figure in the age of the "microcelebrity."[116] The authors presented the idea that instead of a world with a few well-known celebrities (also known to the courts as all-purpose public figures) and millions of "nobodies" (known to the courts as private figures), digital media has created a world of "minor celebrities," including reality TV stars and prominent bloggers.[117] The Internet, they argued, has fragmented our culture into "microcultures" that produce "niche celebrities" known to small groups of people.[118] Based upon these changes in the media, Lat and Shemtob proposed returning to the

110. *Id.*
111. *Id.* at 485.
112. *Id.* at 488.
113. *Id.* at 489–90.
114. *See id.*
115. Lat & Shemtob, *supra* note 82, at 403–04.
116. *Id.* at 413 (citing CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006)).
117. *Id.*
118. *Id.*

Rosenbloom rule and applying the actual malice standard in cases involving matters of public concern. They stated:

> [T]echnology has eroded privacy in so many different ways. As Justice Brennan declared in *Rosenbloom*, "[v]oluntarily or not, we are all 'public' men to some degree . . . . In this day and age—of blogs, where our private misadventures can be written about at length; of streaming video and YouTube, where said misadventures can be seen and heard by total strangers; of Facebook, where "friends" can post pictures of us, against our will (maybe we can "de-tag," but we can't remove); of full-body scanners at the airport—Justice Brennan's words ring more true than ever, for better or worse. We are more "public" and more interconnected than ever.[119]

The authors believed the *Rosenbloom* matter of public concern standard can overcome criticisms of creating a regime that would be "too favorable" to defendants.[120] The authors pointed to Colorado, Alaska, Indiana, New Jersey, and New York, who already employ standards similar to *Rosenbloom* in state courts.[121] They also argued "*Rosenbloom* results in a more favorable regime for publishers and speakers, [and] it simply reflects the law evolving to accommodate advances in communications technology."[122] According to Lat and Shemtob applying old defamation rules to new media represents a poor public policy decision, as "[i]t would prevent society from reaping the full rewards of new communications technologies by inhibiting speech."[123]

119. *Id.* at 415–16.
120. *Id.* at 416.
121. *Id.*
122. *Id.* at 416–17.
123. *Id.* at 417.

III. A PROPOSAL FOR REQUIRING PROOF OF ACTUAL MALICE WHEN THE DEFAMATORY SPEECH INVOLVES A MATTER OF PUBLIC CONCERN

A. The Internet and the Nature of Modern Defamation Jurisprudence

In *Reno v. ACLU,*[124] an early case where the Supreme Court considered regulation of the Internet, Justice John Paul Stevens wrote:

> [The Internet] provides relatively unlimited, low-cost capacity for communication of all kinds. The Government estimates that "[a]s many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999." This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.[125]

Justice Stevens christened the Internet as the "new marketplace of ideas," and wrote that as a matter of constitutional tradition, the Court must "presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it.[126] The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[127] Just as it was in 1997, Justice Stevens' cautionary advice about regulating the Internet continues to be relevant in a number of areas of law that threaten to chill speech online—including the Court's inaction in addressing conflicting defamation doctrines related to plaintiff status.

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124. 521 U.S. 844 (1997).
125. *Id.* at 870.
126. *Id.* at 885.
127. *Id.*

A return to the *Rosenbloom* matter of public concern standard provides a greater uniformity across defamation law, which is defined individually at the state level in compliance with the constitutional mandates. By abandoning the plaintiff status distinctions in favor of the matter of public concern standard, the courts would provide more consistent protection to core First Amendment speech regardless of the status of the person who was spoken about. In the digital age, where speakers and audiences are often separated by vast geographic distances, this standard could harmonize the law across states. Whereas Alaska, Colorado, Indiana, New Jersey and New York alone require all plaintiffs to prove actual malice, under the *Rosenbloom* matter of public concern standard, all plaintiffs in all fifty states would have to prove actual malice to recover in defamation cases involving matters of public concern. Such a uniform standard prevents the type of forum-shopping that often occurs in Internet defamation cases, where plaintiffs who have been defamed online search for jurisdictions with the most pro-plaintiff standards to file suit. Re-instituting the *Rosenbloom* standard levels the playing field for all Internet speakers by preventing plaintiffs from seeking out a plaintiff-friendly forum and then attempting to argue the website was targeted to the particular venue. Given courts' uncertain history in addressing choice of law, community, and other issues related to Internet defamation,[128] a return of the *Rosenbloom* standard provides defendants with much-needed harmonization in an area where the law is murky at best.

If the Supreme Court were to re-institute *Rosenbloom* in a fashion similar to Colorado, it would further add predictability to the law by removing from the jury the often-difficult question of whether the plaintiff is a public or private figure. Instead, as Colorado notes, the question of whether the speech addresses a matter of public concern is a question of law for the judge to decide[129]—an inquiry the legal system

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128. *See generally* Amy Kristin Sanders, *Defining Defamation: Community in the Age of the Internet*. 15 COMM. L. & POL'Y 231 (2010) (examining the definition of community in defamation lawsuits by comparing factors used by courts to define community in print and broadcast defamation cases with those used in Internet defamation cases).

129. Walker v. Colorado Springs Sun, Inc., 538 P.2d, 450, 459 (Colo. 1975) ("We rule that [the determination that a matter is of public interest or concern] is a question of law for the court.").

undertakes in a variety of cases. Just as certain plaintiffs (take golfer Tiger Woods, for example) are quite clearly public figures, some topics (take a community leader's purported involvement in a widespread mortgage scandal)[130] are quite clearly matters of public concern.

Predictability of the law in this area serves a greater function than simply helping attorneys and plaintiffs evaluate the merits of their case; it provides both media and nonmedia speakers with the ability to better decide when and what to publish.[131] As the journalism industry transitions from an institutional press model into a model that relies on participatory journalism, it is even more important that we protect speech on matters of public concern—and encourage all speakers to share information that citizens need to make informed decisions.

Substituting the *Rosenbloom* matter of public concern standard in place of plaintiff status determinations is almost certain to expedite defamation claims by streamlining the legal process. As mentioned above, a number of defamation cases, those paralleling the *Dun & Bradstreet* and *Hepps* line of cases, already require some evaluation of whether the subject involved is a matter of public concern. Thus, in these types of cases, the return of the *Rosenbloom* standard would eliminate the additional evaluation necessary to determine plaintiff status. Such a streamlining of the process should be particularly welcome by judges working in an already-overburdened legal system. Additionally, judges presiding in U.S. courts frequently make determinations about whether issues are a matter of public concern when adjudicating invasion of privacy cases where newsworthiness is raised as a defense.[132]

Supreme Court Justices and scholars have been concerned that the public concern standard would be difficult to apply. However, in an examination of fifty-seven lower court decisions, Professor Robert Drechsel demonstrated some consistency among courts in their

130. *See* Moore v. Hoff, 821 N.W.2d 591 (Minn. Ct. App. 2012) (concerning the public controversy surrounding a blogger's statement that was deemed non-defamatory).

131. Drechsel, *supra* note 82, at 20 (arguing the media-nonmedia distinction appears to be used to avoid otherwise difficult subjective decisions about the content and importance of speech, but that this ultimately leaves the mass media more protected and private individuals more vulnerable).

132. *See id.* at 15 ("[I]n at least three-fourths of the 'public concern' cases, the allegedly defamatory material was either provided to or disseminated by the mass media.").

determination of which speech constitutes a matter of public concern and which does not.[133] Drechsel's analysis showed speech about "politics and campaigns; operations of financial institutions; conduct of government and public officials; illegal or questionable business practices with ramifications for the general public; public health and safety; criminality and criminal justice; recruitment methods of religious cults; pornography; and athletics" are often deemed matters of public concern.[134] Matters not of public concern are:

> [speech involving] employers' allegations of wrongdoing by employees or customers without ramifications for the general public; personal disputes between businesses and disgruntled customers; job recommendations; intra-professional disputes; intra- or inter-organizational business without ramifications for the general public; a paternity claim; a recommendation or tenure at a state university; inaccurate credit reports; and aspersions made in commercial advertising.[135]

With some established categories already in place and successfully utilized by some courts, other courts could make a smooth transition to evaluating defamation cases based on matters of public concern.

The courts of the five U.S. states mentioned above[136] are not alone in evaluating whether a matter is of public concern. It seems the notion of public concern is playing a larger jurisprudential role across the globe. In Argentina, for example, "[t]he public interest standard as 'an exemption from punishment' is one of the most significant legal developments" in the attempts to decriminalize defamation.[137] Canadian

133. *Id.* at 10–14.

134. *Id.* at 12–13.

135. *Id.* at 13–14.

136. *See supra* Part I.C.

137. CHARLES J. GLASSER JR., INTERNATIONAL LIBEL AND PRIVACY HANDBOOK: A GLOBAL REFERENCE FOR JOURNALISTS, PUBLISHERS, WEBMASTERS AND ATTORNEYS 8 (3d ed. 2013).

courts have recently recognized "the value of protecting statements even when they cannot be proven true" by allowing the defense of "public interest responsible communication," wherein the courts must determine if the speech involved matters of public concern.[138] Similarly, Australia allows a public interest defense "where the material published discusses government or political matters and publication of the material was reasonable in the circumstances."[139]

Finally, the very nature of the Internet makes the *Gertz* approach to categorizing public figures even more untenable. It seems as notions of privacy fade and the voyeur culture[140] continues to thrive, the exceptions to the *Gertz* rule—the limited-purpose and involuntary public figures—threaten to overtake the rule that protects private figures under the current system. As a society, do we really believe that a college student videotaped singing in her dorm room becomes a public figure—required to prove actual malice—simply because the doctored video her roommate posted to YouTube goes viral? It hardly seems that this is the type of speech that Alexander Mieklejohn envisioned the First Amendment protecting when he wrote about self-governance.[141] Determining when a plaintiff rises to the level of a limited-purpose public figure—or even worse, an involuntary public figure—will only get more difficult as the Internet further fuels our "microcelebrity" culture. Although society's notion of who constitutes a public figure may be changing (making these inquiries particularly dicey given that they are often jury questions) it seems we might find a bit more stability in the topics that judges are willing to consider as matters of public concern. After all, it is hard to imagine a situation in which our singing college student video would constitute a matter of public concern.

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138. *Id.* at 42.

139. *Id.* at 136.

140. *See generally* CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE, 2 (2000) (discussing the issues surrounding "mediated voyeurism," which is defined as "the consumption of revealing images of and information about others' apparently real and unguarded lives, often yet not always for purposes of entertainment but frequently at the expense of privacy and discourse, through the means of the mass media and Internet").

141. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (arguing democracy cannot reach its essential ideal if those in power can withhold criticism and stifle the free flow of information and democratic ideas).

B. A Proposal for a Three-Part Evaluation When It Is Not Apparent That the Subject Matter Is of Public Concern

In situations where it is not readily apparent to a court that the speech involves a matter of public concern—social or political speech—the authors propose that courts use a common-sense, holistic evaluation that includes some of the factors that Drechsel noticed courts are already employing.[142] First, courts should look at the medium used to disseminate the defamation. Speech that is a matter of public concern is more likely to have been distributed through a mass medium or well-known/frequently-used Internet platform.[143] Second, courts should consider the status of the plaintiff within the context of the situation.[144] Finally, courts should examine the subject matter of the speech and consider whether it is of public interest or merely of interest to the public.[145] Matters of public concern should inform the audience of some good or harm or other concern of the community.[146] With courts already having to make these determinations under *Dun & Bradstreet* and *Hepps*, it is only logical that it becomes the standard for defamation when new technologies have made the plaintiff status determinations more difficult.

CONCLUSION

The law will never be all things to all parties, but harmonization of state laws in light of the international reach of the Internet provides a solid start at providing the type of predictable outcomes that plaintiffs and attorneys desire: predictable outcomes that media and nonmedia defendants require to serve the historic function of providing the public with the information necessary to make important decisions related to self-governance in a democracy. No standard is perfect, but the

142. Drechsel *supra* note 82, at 14–18.

143. *Id.* at 14–15.

144. *See id.*

145. *See* Brian Cathcart, *Is there any Difference Between the Public Interest and the Interest of the Public?*, THE INTERNATIONAL FORUM FOR RESPONSIBLE MEDIA BLOG (Aug. 10, 2011), http://informm.wordpress.com/2011/10/08/is-there-is-any-difference-between-the-public-interest-and-the-interest-of-the-public-brian-cathcart/ (concluding the public can also have interest in a story of public interest, but the distinction frames how to initially think about the issue at play).

146. *Id.*

Rosenbloom standard continues to haunt defamation jurisprudence through its progeny in *Dun & Bradstreet* and *Hepps*, both of which require the courts to traverse the sticky wicket that many legal scholars believe the matter of public concern standard to be. Replacing the plaintiff status inquiry with a matter of public concern standard simply acknowledges this challenge and brings it to the forefront—placing the onus on judges to do what they routinely do: Make tough legal decisions after examining the relevant law in conjunction with the fact pattern presented. It seems this approach is no more ad hoc than requiring a jury to figure out whether someone is a limited-purpose public figure, and if so, whether the defamatory statement concerns the purpose for which the plaintiff has become a public figure. In the law, there are few easy answers and many tough questions; this Article simply suggests streamlining the process to eliminate one of those tough questions—whether a plaintiff is a public figure—by relying more readily on the answer to a second tough question—whether the matter is of public concern—that is already a required piece of the defamation equation.