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THE PUBLIC INTEREST, DEFAMATION AND THE LAW

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CONTENTS

1. INTRODUCTION

> An attractive and popular creature, it is seen in a variety of very visible and exposed environments, yet it remains elusive, and despite a number of attempts at categorisation, it defies precise definition. Sadly, this enigmatic combination of qualities may precipitate its downfall, for whatever is popular yet misunderstood lies open to abuse and, ultimately, untimely extinction.[1]

So might the concept of the public interest be described in biological terms, for it is employed in a wide variety of public forums, though attempts at definition are sparse and consensus is non-existent. Such overuse of an underdefined term can only lead to confusion and uncertainty in whatever context it appears, which is apt to result in the abandonment of the 'public interest', due to the frustration it provokes, well before its true potential has emerged.

The employment of the public interest concept has increased markedly in recent years within legal contexts[2], though the absence of a corresponding rise in attempts at definition has seen the term become enveloped in an unsightly haze that might most aptly be described as a menacing mushroom-cloud on the jurisprudential horizon. However, just as with nuclear physics, the 'public interest' has as much creative as destructive potential if only a greater level of understanding and foresight were to govern its usage.

In this paper, I propose to analyse the philosophical basis of the public interest concept, and then examine its application within a particular legal context, that of US defamation law, in order to assess its potential as the basis for

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1 An entirely fictitious commentary inspired by vivid childhood memories of David Attenborough wildlife documentaries.

2 Statutory use of the term, once rare, has blossomed in recent years, notably in the Official Information Act 1982, where the phrase "public interest" is included in the long title and appears six times in Part I alone. It is also prominent in the Mental Health Act 1986 and is a key concept in the Whistleblowers Protection Bill which is currently before Parliament. Moreover, a whole body of law entitled "Public Interest Law" has rapidly evolved in the last 20 years (see J Cooper & R Dhavan (eds) *Public Interest Law* (Blackwell, Oxford ,1986)).

a legal test. Thus, I hope to contribute some clarity to an area excessively afflicted with myopia.[3]

2. PHILOSOPHICAL CONCEPTS OF THE PUBLIC INTEREST

The concept of the public interest has a long history in the discourse of political philosophy, but fully-developed treatises are rare and a proliferation of partial and incomplete accounts characterises this area.[4] Much can be gained, however, through an examination of the varying analyses that have been offered.

A. Interests

A necessary preliminary step towards a definition of the public interest is to settle on what is meant by the word 'interest'. Differing meanings of the term are clearly employed in the following contexts:

"I have a great interest in the shapes of leaves";

"It would be in your best interest to listen to what I have to say".

To have an interest in the latter sense conveys a more complex meaning than may be expressed in terms of what captures one's attention and imagination. B.M.Barry states that, "a policy, law or institution is in someone's interest if it increases his opportunities to get what he wants".[5] In thus framing a definition of interest in terms of desire, Barry may be appearing to deny that one can mistake one's interests, whereas it is commonly believed that one can. However, Barry avoids such self-entrapment by claiming that one may *think* that a policy increases one's opportunity to get what

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3 Of course, there is always the danger that, in such an area, any additional material will only add to the confusion created by many conflicting voices. However, such a peril should not be allowed to snuff out the venture before it has begun, lest pessimism destroy a potentially fruitful enterprise.

4 A rare example of a comprehensive account is: RE Flathman *The Public Interest* (John Wiley & Sons, Inc.,New York, 1966).

5 BM Barry & WJ Rees "The Public Interest", in *Pro. Aristotelian Society Supplement* v38 (1964) 1-38, at 4.

one wants, when in fact it does not: this involves mistaking one's interest.

W.J.Rees approaches the concept of 'interest' from a different angle, stating that for a desired activity to give rise to an interest:

> (a) the activity must be one that enhances the ease, prosperity or chances of survival of the person(s) concerned;
> (b) the activity must be one that is liable to be hindered by other people or forces of nature.[6]

This conception varies with Barry's account in that instead of grounding interest in contingent wants and desires, he bases it on the enhancement of underlying and invariant human values.

A third definition is seen in the Marxist idea of 'objective interest', this being what a class would demand if they were fully aware of their social position and the most they could get out of it for themselves.[7]

Finally, J.Plamanetz provides an account of interests in terms of "settled and avowed aspirations of a man or group of men which he or they...believe to be more or less realisable".[8]

A common theme that may be derived from these definitions is that someone's interest is whatever satisfies, to some extent, their underlying or basic desires. This may be modified by adding that something is only in one's interest if it is reasonably attainable in one's social context, for, although it may well be a fundamental desire of one to live for 150 years, it would not be in accordance with common usage to say that it was in one's interest. Moreover, to extend the concept of interest beyond reasonable desires to an infinitude of fanciful wants would deprive it of its focus and much of its meaning.

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6 above n 5, 20.

7 SI Benn "'Interests' in Politics", in *Pro. Aristotelian Society* v60 (1959-60) 123-40, at 128-29.

8 J Plamenatz "Interests", in *Political Studies* v2 (1954) 1-8, at 1-2.

As an extension of this, 'legal' interests have been characterised as claims with reasons offered in support of them, or, more specifically, as desires which conform with "the jural postulates of society".[9] Thus,

> The case for giving interests legal consideration is not that they are wants but that they are more or less reasonable wants, according to standards which it is the business of the judge or legislator to elicit from the bulk of demands coming forward[10]

B. The Public Interest

Two of the most enduring and influential theories of the *public* interest are those formulated by Bentham and Rousseau. Characteristically, Bentham proposed a purely utilitarian definition, stating that a government measure is in the public interest when the tendency it has to augment the happiness of the community is greater than the tendency it has to lessen it.[11] Thus, he saw it to involve a summation of the interests of members of the public. On the other hand, Rousseau asserted that the public interest was a more transcendent concept than Bentham admitted. He claimed that the public interest consists of universally shared private interests and whatever conforms with 'the General Will', which will occur if a policy is equally in the interest of all members of the concerned group. Thus, to ascertain what is in the General Will, one must ask, "What measure will benefit me in common with everyone else, rather than at the expense of everyone else?".[12]

In general, the line Bentham took equated the interest of the public with whatever advanced the cause of the majority[13], whereas Rousseau believed that something could only be in the public interest if it benefitted everyone equally.

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9 R Pound "A Survey of Social Interests" 57 Harv. LR (1943-44) 1-39.

10 above n 7, 130.

11 TM Benditt "The Public Interest", in *Philosophy and Public Affairs* v.2 (1972-73) 291-311, at 311.

12 above n 5, 11.

13 Bentham's theory does not automatically entail favouring the cause of the majority, for a fundamental minority interest will often prevail over a trivial

Barry's view seems largely coextensive with that of Rousseau, but it is significantly different in that Barry states that the only proposals for public interest should be ones that *treat* everyone in exactly the same way. Thus, a policy whereby individual benefits vary enormously could still be in the public interest if treatment was uniform. In illustration, Barry claims that the only possible policies regarding the act of assault would be,

> (a) that no one should be permitted to assault anyone else (except in certain clearly defined circumstances);
> (b) that everyone should be permitted to assault everyone else.[14]

In short, the public interest, for Barry, is embodied in whatever is in the interest of all individuals "as members of the public".[15] This qualification excludes merely group interests. For example, as a member of the Sport Shooters Association, it may be in one's interest to allow all owners of automatic weapons to be permitted to shoot anything that moves, for this is consistent with the aims of the group, which are presumably to foster the practice of killing harmless and defenceless animals, whereas as a member of the public, one may have a conflicting interest in restricting mindless violence, this being consistent with the good of the wider group. Only the latter can be categorised as a *public* interest. In general, any individual will have a number of specialised group interests according to the pastimes they favour, which will sometimes be in conflict with the interest that they have in common with all others as a member of the public.

Barry continues that the interests shared by few can easily be promoted by them through organisation into, for example, pressure groups and specialist associations, whereas the interests shared by many must be furthered by the State, for it alone possesses the coercive power necessary to prevent

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majority interest. However, in anything but the exceptional case, Bentham's utilitarianism will favour the majority interest.

14 above n 5, 8-9.

15 above n 5, 16-17.

interest groups from doing what they want at the expense of the wider public. This is largely due to the administrative fact that it is far easier to organise a small group with a clear and narrow focus to protest against certain proposals and generally to protect a specialist interest, whereas a group that incorporates every member of a society can only be effectively represented by a body that has sweeping powers and pervasive influence.

Though using somewhat different conceptual terms, Rees substantially agrees with Barry, but he employs a different emphasis. He asserts that a policy is in the public interest if :

> (a) it can be justified by referring to standards based on widely held expectations and desires limited by what appears reasonable in the conditions of society; or
> (b) it is necessary for the maintenance of such standards.[16]

Benditt asserts that the public interest is an idea that addresses particular aspects of the nature of human society, which he characterises as an environment in which the individual well-being of most is dependent in part on the efforts of other members of the group.[17] In such a context, everyone is likely to be more happy if :

> (a) the basic needs of the society's members are taken care of;
> (b) the distribution of burdens and benefits is just.[18]

He explains the latter requirement by arguing that unjust distributions are likely to cause resentment, which, in turn, is likely to be destructive to the happiness of the group.[19] Benditt agrees with Barry that to be in the public interest, a policy must be in the interest of every member of the public, and he further qualifies the conception by stating that the public interest consists of universal interests that are in

16 above n 5, 32.
17 above n 11, 295.
18 above n 11, 295.
19 above n 11, 296.

danger of not being protected or promoted adequately if this is not done by the State or some other political authority.[20] His reason for this addition is that many things may be in the interest of everyone in society without meaningfully comprising part of the public interest. For example, having access to adequate food supplies is undoubtedly in the interest of everyone in twentieth century modern society, but to say that it is in the public interest dilutes the force of the concept by trivialisation through overinclusion. In short, Benditt believes that something is in the public interest if (and only if) :

> (a) it is in the interest of every member of the public (ie. it is essential for the protection and/or improvement of everyone's welfare or well-being);
> (b) the means of serving the interest are out of the hands of most members of the public and thus the interest is only likely to be satisfied by the State.[21]

Many writers reject entirely the worth of any concept of the public interest in modern society. One of the major arguments supporting this point of view is that in large and heterogeneous societies, there is no consensus as to the normative foundations on which to build a meaningful concept of the common good:[22]

> In a large and diverse nation, there is no common good to be mediated through discussion; there is no unitary political truth; there are instead irreducibly opposed perspectives and interests.[23]

This view is encapulated in what Clarke E. Cochran refers to as the 'politics of interest' theoretical school, which adheres to the notion that there can be no common good because there is nothing that is good for the community as a whole; there are only goods and interests pursued by individuals and

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20 above n 11, 298.
21 above n 11, 301.
22 C Sunstein "Beyond the Revival", 97 Yale LJ (1988) 1539, at 1556.
23 above n 22, 1572.

groups.[24] Thus, according to this conception, modern society is nothing more than a complex of groups competing for their own interests, and governmental policy reflects the balance of power among the various interest groups.[25] In general, there is no 'public' as such, and invoking the public interest is merely a strategy that groups pursue in order to promote their own cause. From this viewpoint, there is good reason to be suspicious about the State's claim to reflect a unitary public good in its policies. A major vulnerability of most public interest theories is targetted by this criticism in that they require the existence and ascertainability of a 'common good' and universalism of interest that transcends group interests.

However, as Cass Sunstein argues, universalism does not deny the existence of different perspectives, but it does affirm the notion that some claims are better than others, and that a particular claim can be vindicated through rational discussion.[26] From this follows a requirement that in the course of government policy-making, public-regarding justifications are offered after multiple points of view have been consulted and understood.[27] Thus, the belief in the notion of a public interest does not entail that private interests should be prevented from being voiced in the political arena, but that, on the contrary, the legitimacy of a public interest conception is enhanced by the airing of as many conflicting views as possible. A formulation of the public interest requires the transcendence of any particular sub-group context, and this can only be achieved satisfactorily through a thorough awareness of the various views and perspectives in society.

Another school of thought identifies the public interest with the decision-making process of a democracy. Therefore, the public interest is seen to be identical with the democratic

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24 CE Cochran "Political Science and 'The Public Interest'", *Journal of Politics* v36 (1974) 327-55, at 328-29.

25 above n 24, 333.

26 above n 22, 1574.

27 above n 22, 1575.

interest-conflict process, as long as that result is responsive to the substantive community consensus.[28] However, this view is problematic in that it implies that the result of this kind of decision-making process is *inherently* beneficial to society, and therefore all public policy so derived is in the public interest. No procedure, though, is self-justifying, and in the face of competing claims, one must have a substantive basis for mediation. Thus, the public interest must include a moral content that allows judgment of the mediation procedure employed in terms of a normative appraisal of the results it produces.[29] The public interest must incorporate a theory of 'the good'.

This conclusion leads directly to the question, "Who is to decide on the theory of the good that is to be invoked?". If the government is to rule on this matter, then the possibility that it will manipulate 'the public interest' to suit whatever agenda it favours looms large, rendering it no more than a convenient device for deceit. The public itself is the obvious candidate for the decision-making role, though Barry argues that even when an issue is sufficiently publicised to engender a widespread body of opinion, the opinion is likely to be misinformed to the extent that the government is inviting disaster to adopt it[30], as the public falls well short of being a fully rational body. However, it is a central premise of democracy that electors are the only competent judges of their interests, and to deny this is to undermine the very political system under which we live.

As Rees argues, it is the right of any citizen to put their case and it is the moral duty of the legislator and voter to weigh up the claims impartially and decide what best serves the public interest from the standpoint of the basic underlying values that are central to the society.[31] There may be a dispute as to what precise values are universally held, but consensus can only be reached through a comprehensive canvassing of all claims. The public interest is the interest of

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28 above n 24, 341.
29 above n 24, 346.
30 above n 5, 16-17.
31 above n 5, 30.

"no one special"[32]. It is not, as Bentham believed,the interest of the majority, or the *net* interest within society, for this contradicts the centrality of universalism and impartiality that lend the concept its normative power. The idea of justice is also foundational, in that interests can only be said to be reconciled when we feel that justice has been done. The public interest is not simply a matter of getting what we want to the greatest extent possible, as this would allow differential treatment and varying benefits.[33]

Within his comprehensive treatment of the subject, Flathman provides what is possibly the most attractive definition of the public interest that has been proffered in philosophical circles:

> [P]ublic interest is a general commendatory concept used in selecting and justifying public policy. It has no general, unchanging, descriptive meaning applicable to all policy decisions, but a nonarbitrary descriptive meaning can be determined for it in particular cases. This descriptive meaning is properly found through reasoned discourse which attempts to relate the anticipated effects of a policy to community values and to test that relation by formal principles.[34]

Thus, policy-makers in government must take into account moral considerations, community values and individual interests, and give reasons for their decisions in terms of these values.[35] If, and only if, the government strictly abides by these conditions can it be said to be acting in the public interest. It must be noted though that the public interest is not simply to be identified with the result of this process (as it would thereby be reduced to a purely procedural notion), but the result should be open to scrutiny in terms of whether it is consistent with the normative theory of "the good" that is identified by the public itself. Therefore, the process described

32 above n 7, 134.
33 above n 24, 336.
34 above n 4, 82.
35 above n 4.

above is a necessary but not sufficient condition for the government to be said to be acting in the public interest.

One might well conclude at this point that all the cogitation embodied in the above discussion is all very well, but it does not advance the cause for the systematic application of the public interest to the legislative and judicial arenas, due to a lack of specificity and general vagueness. However, Flathman's claim that "a nonarbitrary descriptive meaning can be determined for the [public interest] in particular cases" should be borne in mind. Having said this, it is certainly true that Flathman's conception of the public interest appears to be elusive and vague when presented as a stark unadorned definition as above. Its adequateness can only be properly judged by assessing how it can be employed in specific practical situations. Flathman himself provides the illustration of the building of an intraurban expressway to demonstrate how public policy decision-making should incorporate the public interest.[36] In such a case, the group interests involved may include those of commuters, property owners and, indirectly, taxpayers. In order to command support for their positions, these groups will generalise their claims by subsuming them within community values. Thus, property owners will not simply argue that they do not wish their houses to be condemned, but perhaps that they are concerned that the destruction of certain types of neighbourhood environments may be harmful to the beneficial growth of the community as a whole. Such a process will identify many of the community values relevant to the decision. Where such values conflict, one can often make a reasoned decision as to how the competing values may be most effectively served in the situation at hand. In a case where two conflicting community values will be equally compromised by opposing decisions, a resolution regarding which value is to be favoured must be made on the basis of logic and detailed evidence.

36 above n 4, 68-82.

For example, with regard to the hypothetical expressway, property owners may list the positive consequences of maintaining neighbourhoods such as theirs, whereupon developers will counter that they are mistaken as to their projection of consequences. The property owners will then attempt to demonstrate the rational validity of their assessment, and gradually each party will be forced into a deeper examination of community values and their importance in this particular situation.

Obviously, there will be occasions on which it will be impossible to be sure which value should be favoured and any decision will be open to the charge of arbitrariness. However, Flathman argues that once a detailed analysis of how conflicting community values are affected has been conducted, the element of whim and caprice in decision-making is limited as far as possible, and the result is greatly preferable to a decision reached without any examination of how the public interest will be served. He also states that although in some situations a policy decision will not be possible on public interest grounds, this is no reason for abandoning the concept in all situations.[37]

Thus, Flathman shows what he means when he states that "a nonarbitrary descriptive meaning can be determined for the [public interest] in particular cases" through demonstrating how his public interest concept may be applied in the environment of municipal public policy. In the following discussion, I will attempt to extend such an application beyond local government policy to national civil law. In particular, I will examine how the concept of the public interest may fruitfully be employed in defamation law. A convenient foundation for such a discussion is US defamation law, where the notion of the public interest has been thoroughly examined and widely applied in the judicial context.

3. THE EVOLUTION OF THE PUBLIC INTEREST CONCEPT IN AMERICAN DEFAMATION LAW

37 above n 4, 72.

Prior to 1964, US defamation law utilised the common law standard developed in the UK. Thus, in order to establish a prima facie case, a plaintiff only had to prove:

(a) that the words complained of referred to him/her

(b) that the words were defamatory of him/her (where a "defamatory" meaning can be assumed of words which "tend to lower the plaintiff in the estimation of right-thinking members of society generally"[38])

(c) that the words were published by the defendant to a third party.[39]

This test is heavily weighted in favour of the plaintiff in that it does not require a showing of fault or dishonest motive on the part of the defendant, or evidence of actual harm to the plaintiff's reputation.[40] Indeed, in order to prevail, a defendant has to prove that their statements were true or otherwise privileged.[41] The burden of proof is thereby squarely placed on the defendant, and, "whatever a man publishes, he publishes at his own peril".[42]

However, the US Supreme Court decision in *New York Times v Sullivan*[43] marks an abrupt and radical departure from the common law defamation standard. The case involved an advertisement that alleged racial discrimination by the police and other municipal officials. The respondent, who was the Commissioner of Public Affairs responsible for police supervision, brought a defamation action. In deciding for the New York Times, the Supreme Court emphasised the special importance of free speech in the US Constitution. The court's decision is based on the First Amendment provision that "Congress shall make no law...abridging the freedom of speech, or of the press"[44] , which also applies to state law by

38 WC Hodge & JES Allin *Torts in New Zealand* (OUP, Auckland, 1988) 380.
39 C Duncan & B Neill *Duncan & Neill on Defamation* (2ed, Butterworths, London, 1983) 21.
40 Restatement of Torts§ 559 cmt. d (1938).
41 above n 40, § 613(2).
42 *Peck v Tribune Co.* 214 US 185 (1909), 189.
43 11 L ed 2d (1964).
44 Constitution of the United States of America, Amendment I.

virtue of the Fourteenth Amendment provision that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".[45]Arguing against the common law practice of placing the burden of proof on the defendant, Brennan J proclaimed,

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions...dampens the vigour and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.[46]

Accordingly, the ratio stated that for a public official plaintiff to succeed in a defamation action, they must prove that the statement was made with "actual malice", which consists of "knowledge that it was false or with reckless disregard of whether it was false or not"[47].

The rule in *New York Times v Sullivan* has been significantly extended through a series of Supreme Court cases. *Curtis Publishing Co. v Butts* [48] held that the test should apply not just to public *officials* but to any public *figure,* while *Rosenbloom v Metromedia, Inc.*.[49] extended the test to all "communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous".[50]

Rosenbloom was a pivotal case in that it altered the focus for constitutional protection from the status of the plaintiff to the subject-matter of the involved statement. The court found that basing protection of speech on the public/private plaintiff status distinction was an artificial and indirect mode of ascertaining what speech involves matters of the public interest, which is the core concern of the First Amendment. The court's reasoning is embodied in the following statement:

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45 above n 44, Amendment XIV.
46 above n 43, 706.
47 above n 43, 706.
48 388 US 130 (1967).
49 403 US 29 (1971).
50 above n 49, 43-44.

> If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not "voluntarily" choose to become involved. The public's primary interest is in the event; the private focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety...Whether the person involved is a famous large-scale magazine distributor or a "private" businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue.[51]

The Supreme Court returned to a plaintiff-status based test in *Gertz v Robert Welch, Inc.*[52], by removing comprehensive constitutional protection from speech that involves a private-figure plaintiff, reasoning that relative to public figures, private individuals have little opportunity to redress harm through public channels of communication, and they have not voluntarily assumed an increased risk of injury.[53] Therefore, they must automatically be afforded greater legal protection. The test that was employed, focused on "the nature and extent of an individual's participation in [a] particular [public] controversy giving rise to the defamation".[54] In private-figure plaintiff actions, freedom was to be given to individual states to define an appropriate standard of liability, provided that strict liability was not imposed (thus preventing a return to common law standards).[55]

The developing trend of confusion and self-contradiction within the Supreme Court continued in *Dun & Bradstreet Inc. v Greenmoss Builders*[56], which returned the focus of constitutional protection to speech involving "matters of

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51 above n 49, 41.
52 418 US 323 (1974).
53 above n 52, 345.
54 above n 52, 352.
55 above n 52, 347.
56 472 US 749 (1985).

public concern"[57], again relegating the plaintiff-status test, that originated in *New York Times,* to the periphery.

The court threw the subject-matter distinction into sharp relief by not specifying what level of protection must be afforded to speech involving private matters, thus opening up the possibility of a return to common law strict liability in such cases.[58]

The decision in *Philadelphia Newspapers v Hepps*[59] reinforced this approach by placing its emphasis on public *concern* rather than public *figures* and by stating that a purely private matter did not require a change in the common law standard.[60]

In general, at various points in the 30 years since *New York Times*, the level of constitutional protection that was held to be provided for over and above the common law standard has varied according to a number of different tests (plaintiff-status test; media/nonmedia distinction[61]; subject-matter test), applied singly or in combination. Currently, the US Supreme Court appears to favour the subject-matter test as the sole criterion, holding that constitutional protection is available for comment that is of public concern or is in the public interest.

4. CRITIQUES OF THE PUBLIC CONCERN/INTEREST TEST

The public concern/interest test has attracted a great deal of criticism in the context of defamation law. A major cause for disquiet is that the Supreme Court has never provided a comprehensive definition of what the public interest involves and how the standard is to be applied. In *Greenmoss*, the court held that a matter of public concern

57 above n 56, 758-759.
58 above n 56, 759-760.
59 475 US 767 (1986).
60 above n 59, 775.
61 See discussion in AW Langvardt "Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law" 49 Univ. of Pittsburgh LR (1987) 91, at 114-123.

must be determined on the basis of the statement's "content, form, and context...as revealed by the whole record".[62] Cynthia Estland accurately decribes this as a "strikingly vacuous formulation".[63] The decision in *Hepps* failed to rectify this vagueness by way of clarification, seemingly content with the presumption that "judges will know it when they see it".[64] This approach fosters inconsistent judicial determination and, in failing to provide guidelines on which members of the public might hope to determine whether their speech may be labelled as defamatory or not, it has a chilling effect on speech and it provokes self-censorship (the antithesis of the aim in *New York Times*), for few people will be willing to risk a costly libel suit.

Many lower court decisions demonstrate how the public concern test has led to confusion and inconsistency.

The Indiana Court of Appeals, adopting the *Rosenbloom* test, curiously ruled that once a public interest was found, it became "unimportant...whether the public has a *legitimate* interest in [the] issue"[65] , thus seemingly conflating the distinction between what the public *finds* interesting and what is in the public interest.

A later case in the same court involved an article concerning a model who was being used to promote the Indianapolis 500 motor race. The article implied that the model had been involved in illegal sexual activities and the newspaper in which it was published was consequently sued for defamation. The court held that, as there was a public interest in the Indianapolis 500, the defamation also involved a matter of the public interest, even though the race was not at issue.[66]

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62 above n 56, 761.

63 CL Estland "Speech on Matters of Public Concern; The Perils of an Emerging First Amendment Category" 59 George Washington LR 1, 32.

64 A comment that was originally applied to decisions involving obscenity in *Jacobellis v Ohio* 378 US 184 (1964), 197, but frequently adapted to convey judicial attitudes with regard to the public interest.

65 *AAFO Heating & Air Conditioning Co. v Northwest Publications* 162 Ind. App. 671 (1974), 673.

66 *Cochran v Indianapolis Newspapers, Inc.* 372 NE 2d 1211 (Ind. App. 1978).

This approach to public interest defamation is mirrored in *Gaeta v New York News, Inc.*[67], where a newspaper published a series of articles regarding the State's policy of transferring mentally ill patients from hospitals to nursing homes. One article focused on the plaintiff's husband, who had been relocated under this programme. The writer reported that psychiatrists attributed his mental condition to a "messy divorce and the fact that [his] son killed himself because his mother dated other men".[68] The New York Court of Appeals found that as the state practice at issue involved a subject of public concern, and the article's nature was not changed by using a single case in illustration, the statement itself was of public concern.[69]

In such cases, it is clear that "[t]he public concern test...is applied so broadly that private/public distinctions are virtually meaningless".[70]

The almost unlimited discretion that is accorded US judges in defamation cases as a result, leads to constitutional concerns. In his dissenting judgment in *Rosenbloom*, Marshall J focused on this issue by pointing out that lower court analyses of what constituted the public interest would involve courts in the dangerous practice of deciding "what information is relevant to self-government".[71] Such *ad hoc* judicial legislation is apt to raise pointed questions regarding the separation of powers and the constitutional role of the judiciary. As Langvardt states,

> courts should not be making judgments whether a certain matter is important enough or public enough for citizens properly to take into account in determining whether someone is fit for public office".[72]

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67 465 NE 2d 802.
68 above n 67, 803.
69 above n 67, 805.
70 DV Joy "The 'Public Interest or Concern' Test-Have We Resurrected a Standard that Should have Remained in the Defamation Graveyard?" 70 Marquette LR (1987) 647, at 667.
71 above n 49, 79.
72 above n 61, 139.

The possibility of overcoming these distinct problems by narrowing down the concept of public interest/concern has been variously described by commentators as a "remote"[73] prospect, involving an "unconquerable maze"[74] and "a problematic and unacceptable standard".[75] A solution based on narrowing down the concept of public interest/concern, so that it yields relatively predictable results, would necessarily favour some people's views of the public interest over those of others and it would constitute "an intolerable restriction on the freedom of public debate".[76] For example, Robert Bork once proposed that First Amendment protection should be limited to "criticisms of public officials and policies, proposals for the adoption or repeal of legislation or constitutional provisions and speech addressed to the speech of any government unit".[77] However, this would exclude from protection most literature and art, and indeed much speech involving controversial matters that were yet to crystalise into specific proposals for government action.[78] Thus, though an adequately predictable standard may be available, it is not a desirable test to adopt due to its extreme exclusivity. Langvardt concludes that "perhaps the term *public concern* defies definition in any meaningful sense".[79]

The writers who attack the public concern test imply that the alternative they advocate (the plaintiff-status test) is not prone to the very objections that they raise regarding the public interest standard. However, the lower courts display just as much confusion and vagueness in applying a plaintiff-status test as they demonstrate when faced with the subject-matter test. A case in point is *Brewer v Memphis Publishing Co.*[80], in which the court held that an article linking an alleged affair between a woman and Elvis Presley and the

73 above n 63, 42.
74 above n 61, 132.
75 above n 70, 671.
76 above n 63, 43.
77 R Bork "Neutral Principles and Some First Amendment Problems" 47 Ind. LJ 1, 20.
78 above n 63, 43.
79 above n 61, 128.
80 626 F.2d 1238 (1980), 452 US 962 (1980).

woman's divorce was privileged, as the woman and her husband were public figures, due to the fact that they had previously been a beauty queen and a professional football player respectively. The court reasoned that, "the First Amendment requires that the press be afforded...protection vis-a-vis those who have sought its coverage, either through direct invitation or by participating in activities whose success depends in large part on publicity".[81] Thus, anyone who has been involved in a public event is to be deemed a public figure, which seems to extend the concept to absurd proportions.

The public concern test has frequently been charged with opposing the thrust of the *New York Times* decision:

> *New York Times* and *Butts* have been regarded by the Court as establishing an actual malice rule that is triggered by the presence of one factor, a public plaintiff. An attempt now...to require the public concern determination...would amount to a cutting back on...the actual malice rule as it has evolved over the years".[82]

However, Chadwick refutes this claim, stating that, "the question of whether a particular statement implicates a matter of public concern is central to the reasoning, if not the language, of every major Supreme Court decision".[83] For example, the judgment in *New York Times* states "we consider this case against a background of a profound national commitment to the principle that debate on *public issues* should be uninhibited, robust and wide-open".[84] Moreover, in *Rosenblatt v Baer*[85], the court held that "[t]here is, first, a strong interest in debate on *public issues*, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of

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81 above n 80, 1255.
82 above n 61, 128.
83 J Chadwick "A Conflict in the Public Interest: Defamation and the Role of Content in the Wake of *Dun & Bradstreet v Greenmoss Builders*" 31 Santa Clara LR (1991) 997, at 1000.
84 above n 43, 269 (emphasis added).
85 383 US 75.

those issues".[86] *Waldbaum v Fairchild Publications*[87] (discussed later) also demonstrates that application of the Supreme Court status-based test must in fact centre on an analysis of the subject-matter of the concerned statement.

Indeed, there are strong grounds for arguing that the status test strays much *further* from the *New York Times* justifications for speech protection than the subject-matter test. This is due to the fact that through focusing on who the plaintiff is, many decisions have effectively given *carte blanche* to anyone to say anything they like about certain people, irrespective of the public value of the comment. An illustrative case is *Carson v Allied News Co.*[88], in which Johnny Carson and his second wife, Joanna Holland, were found to be public figures with regard to reports that Carson had moved his show to Hollywood so as to be near Holland, while he was still married to his first wife.

Therefore, whereas *New York Times* introduced constitutional protection for certain statements so as to facilitate the "interchange of ideas for the bringing about of political and social changes desired by the people"[89], the status test may be used to protect defamatory statements that make no contribution to such an "interchange of ideas" whatsoever, as long as the victim is of sufficient notoriety.

Gertz justifies imposition of the plaintiff-status test in large part by arguing that "public figures" have voluntarily assumed the risk of greater public scrutiny by thrusting themselves into the public eye.[90] However, as was stated in *Rosenbloom*,

> the idea that certain "public figures" have voluntarily exposed their entire lives to public inspection, while private individuals

86 above n 85, 85-86 (emphasis added).
87 627 F.2d 1287 (DC Cir 1980), *cert. denied*, 449 US 898 (1980).
88 529 F.2d 206 (7th Cir. 1976).
89 above n 43, 269.
90 above n 52, 350.

> have kept theirs carefully shrouded from public view is, at best, a legal fiction.[91]

Chadwick adds that the "mere statistical probability that one who attracts public curiosity will eventually be libeled is not sufficient justification to assert that they have voluntarily assumed the risk of such libels".[92]

Indeed, in thus affording public figures scant protection from defamatory statements, no matter how ludicrous or depraved, the plaintiff-status test is likely to discourage people from entering the public arena, either in an official or unofficial capacity, which is certainly contrary to the values inherent in the First Amendment. By contrast, "a content-based analysis will encourage the courts to consider the issues that lie at the heart of the conflict between constitutional protections of free expression and the societal interest in protecting individual reputation".[93]

In general, therefore, it is certainly the case that the public interest/concern test in US defamation law has caused many problems in application due to its lack of judicial definition. However, the alternative that is invariably proposed of basing constitutional protection on plaintiff status is prone to many of the same problems and it also fails to focus on what should be the core of protection: speech that concerns matters of the public interest.

Thus, it is submitted that the public interest/concern test is a preferable standard in that it adheres much more closely to the values addressed by the First Amendment by concentrating on public *issues* rather than public (and sometimes merely notorious) *speakers*. However, this is a standard that should also be abandoned in defamation law if it effectively suppresses free speech by virtue of its vagueness and therefore its proneness to inconsistent application.

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91 above n 49, 47-48.
92 above n 80, 1015.
93 above n 80, 1061.

5. THE VIABILITY OF A PUBLIC INTEREST TEST IN DEFAMATION LAW

The question accordingly remains: "Is the concept of the public interest capable of definition to a degree of precision that will support a legal test whereby consistent judicial application will be facilitated?"

Chadwick offers a proposal for a public interest test adapted from the public figure standard that was devised in *Waldbaum v Fairchild Publications*.[94] In this case, the court adopted a three-step process through which to determine whether someone may be considered to be a public figure for the purposes of a particular controversy:

> (i) A public controversy must be involved, i.e. a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants;
> (ii) The plaintiff must have been purposely trying to influence the outcome or realistically have been expected, due to their position in the controversy, to have an impact on its resolution;
> (iii) The alleged defamation must have been germane to the plaintiff's participation in the controversy.[95]

Chadwick's test is as follows:

I. Is a public controversy involved?

> A. Is there a "real dispute," i.e. an issue where there is substantial and reasonable variance of opinion among those addressing it, such that assertions as to the conduct of persons involved will not automatically be dismissed as spurious and false?
> B. Will the outcome of the dispute affect the general public, or a significant segment of it, in an appreciable way; i.e. will its ramifications be felt by a significant number of persons who are not direct participants?

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94 above n 87.
95 above n 87, 1296.

II. Is the statement pertinent to the plaintiff's participation in that controversy?

III. Does the plaintiff's involvement in the events giving rise to the controversy predate the making of the defamatory statement?[96]

Upon all elements of the test being satisfied, the "actual malice" standard would be applied, whereas otherwise the individual state's common law would operate. Chadwick asserts that the first element, by requiring a "real dispute", would ensure that the standard was not extended to fanciful or irrelevant assertions. Moreover, as the outcome must affect a "significant number of persons who are not direct participants", the focus of the First Amendment (facilitating speech regarding truly public issues) is addressed. The second element is designed to prevent every aspect of a person's life from being "fair game", and the requirement that the controversy must predate the defamatory statement prevents the defendant manufacturing a controversy in order to attack the plaintiff's reputation.[97]

6. A PROPOSAL

In order to assess whether Chadwick's test can be accommodated within a philosophical notion of the public interest and yet is sufficiently narrowly constructed to constitute a workable legal standard, one must establish first where the public interest stands with respect to defamation. Thus, "What is the universal consensus in society (based on widely held underlying expectations and desires) as to the values of free speech and reputation, and how may these values be reconciled in the specific area of defamation law?".[98]

Free Speech

It is central to democratic theory that the public are to be the only ultimate judges as to how society should be run. It

96 above n 83, 1059.
97 above n 83, 1060.
98 see above n 10-35 and accompanying text.

follows that, pursuant to this, the public should have access to all information that is pertinent to the running of public affairs. Therefore, individuals who assume a public role and are thus representatives of the people, must be accountable to them, in that they may validly be the objects of public debate regarding their suitability for the role and the performance of their function.

Reputation

"Reputation" is generally regarded as a good that is to be guarded jealously. Once it has been compromised, it is often irreparably damaged, and so provisions must be in place to protect this "delicate jewel" from unjustified blows.

Common Ground

In a democracy, the public interest in free access to information only extends to material that has a bearing on the conduct of public affairs. This interest does not extend to the private lives of public figures unless such private conduct can be seen to impinge on one's suitability for a public representative role. Any interpretation of what sorts of conduct may be open to defamatory discussion must take into account the public interest in encouraging people to engage in public life, and in protecting reputation. Thus, a fairly narrow interpretation is required, and such matters as sexual affiliation and consensual sexual practice will generally fall outside such bounds.[99]

Moreover, the private lives of public figures who play no role in government, such as prominent sportspeople and movie stars, are of no general universal value to the public. Therefore, it should be a case of "publisher beware" with regard to untrue gossip.

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99 Of course, many people would argue that sexual practice does impinge on one's suitability for public office, in that it can be argued that a person who cheats on their spouse will also cheat on the public when their temptation is aroused. However, this parallel involves a tenuous connection (many philandering governmental figures have led irreproachable public lives), and the interest in encouraging public participation must militate against its overuse.

Chadwick's formulation addresses these matters and it fairly represents a correct balance between the competing public interests in free speech and reputation. However, the test he devised is too general in that it may still yield inconsistent judicial decisions, thereby having a chilling effect on free speech. All the questions posed within the test are of a general nature, which could be interpreted in a wide variety of ways. Therefore, I propose that a legal test should build on Chadwick's base, but it should be more narrowly defined, while avoiding the trap of arbitrarily excluding ideas of the public interest that are genuinely held in a society.[100] Thus, for example, one could stipulate that the private lives of public figures who do not fill official governmental roles are strictly off-bounds to untrue assertions. Moreover, it could be ruled that the private lives of official figures should only be open to false comment if a clear connection could be established between their private conduct and their public functions so as to demonstrably impinge upon the fulfilment of their duties.

These are, of course, speculative suggestions, and the details of a defamation standard based on the public interest would have to be arrived at through intense public enquiry, using Chadwick's test as a sound starting-point. Legislative enactment would be the most satisfactory method of entrenching a public interest standard, for it would provide for suitably open public involvement and thorough parliamentary discussion of any ramifications.

In any area of the law, a public interest standard would have to tread the fine line between being so broad that judicial application would be unpredictable, thereby resulting in a dangerously chilling effect on free speech; and being so narrow that many of the population's conceptions of the public interest would be excluded. Legislative enactment may be able to take us a long way towards a satisfactory compromise, but to some extent the judiciary will be unavoidably involved in defining the public interest for the

100 see above n 71-77 and accompanying text.

people in individual cases. It is submitted that the level of discretion necessitated by the use of a legal public interest standard would by no means be intolerable in a democracy. Indeed, it is a realistic hope that a body of judicial precedent would be built so that predictable results occurred,[101] while the test employed fairly represented general views of the public interest in a heterogeneous society.

7. CONCLUSION

The public interest is indeed an elusive creature, but it is real, and, I submit, it is capable of being crystalised into a useful judicial standard.

The abstract notions of political philosophers such as Benn, Barry and Rees have been developed into a more practical form by Flathman, who demonstrates that public policy decision-makers may fruitfully apply a public interest standard that minimises arbitrariness and provides a reasoned solution.

US defamation law then provides an example of an attempt at using the public interest within a judicial environment, and the *Waldbaum* formulation of a public figure test steers a path amid surrounding confusion towards a workable solution. Chadwick's adaptation of the *Waldbaum* test is capable of further refinement, and this could lead to a viable and valuable public interest standard in defamation law. The impetus would thus be provided for a more systematic and soundly-based application of the term "public interest" across the many areas of the law in which it currently proliferates without adequate definition.

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101 In New Zealand, a more consistent line of precedent than that which has evolved in the US would be facilitated by a judicial structure that is much smaller, simpler, and more directly hierarchical.

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