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THE PRESS AND THE PUBLIC INTEREST:
A DEFINITIONAL DILEMMA

Everette E. Dennis*

Professor Dennis discusses the interests of the press and the public in terms of the content and manner of dissemination of mass information. Through analysis of opinions of noted political scientists, economists, and jurists, he defines the content of these widely divergent interests. Finally, he suggests an operational model for reconciling the rights and expectations of both.

Whether the interest of the press as the issuer of information is necessarily the same as that of the consumer of the information is central to many critiques of the mass media. This conflict of interests between the individual and the mass media is often resolved by invoking the public interest as a mediating principle. While the truism that the press should serve the public interest is accepted by nearly everyone, the satisfactory definition of that concept has proved much more difficult. "[T]here are two distinct interests," wrote philosopher William Ernest Hocking, "only one of them needs . . . protection; to protect the issuer is to protect the consumer." 1 Freedom of the press, Hocking suggested, "has always been a matter of public as well as individual importance. Inseparable from the right of the press to be free has been the right of the people to have a free press." 2

Examining the public interest concept in terms of the motivation for legislative attacks on executive secrecy, Professor Francis E. Rourke noted that the strongest efforts in this area had come initially from the press and the scientific community. This, he said, "reflects the wide variety of interests [but] each . . . can also point to a clear public interest in the success of its special efforts." 3 Professor Rourke continued:

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2. Id. at 169.
The public has an obvious stake in the effective performance of the legislative task, as it does in the availability of information in the hands of executive officials to the media of communications upon which the people depend for knowledge concerning the affairs of government. And the public has no less an interest in keeping open the channels of communications upon which the economic progress of society may be said to depend.  

Rourke's rationale that the public has a deep interest in the free flow of information, and thereby a free press, is frequently echoed by students of government, the press, newsmen and judges. That was what Mr. Justice Brennan had in mind in *New York Times Co. v. Sullivan* when he enunciated a profound national commitment to the principle of debate on public issues which he said should be "uninhibited, robust and wide open." This principle brought an exasperated response from Jerome A. Barron, law professor and authority on access to the news media. Fumed Barron: "newspaper publishers' interests and the public interest are held to be identical," and the result of the *Times* decision was "romantic and lopsidedly pro-publisher."

Clearly, Barron and others believe that the consumer of communication should also have a right to determine what shall constitute freedom of the press. The exercise of this prerogative in Barron's view, would serve the public interest. Such a position is sharply at odds with the 1947 Commission on Freedom of the Press which observed "[that] the work of the press always involves the interest of the consumer; but as long as the consumer is free his interest is protected in the protection of the freedom of the issuer."

This paper will discuss the proposition that the public interest and the interest of the press are one and the same. By probing this oft-quoted hypothesis, an attempt will be made to develop conceptual and operational definitions of what constitutes the interests of the public and of the press. Because there is a paucity of theoretical formulation in this area, construction of a series of working hypotheses is necessarily a first step toward a theory of the public interest and the interest of the press. There is a need for an operational

4. *Id.*
7. *Id.*
system that will interpret and explain the interface between individuals, the press and the larger notion of social utility. The first part of the paper is devoted to a review and analysis of the literature of the public interest, drawing together diverse sources from the disciplines of economics, philosophy and political science. The second part consists of a summary of judicial interpretation and commentary on the press and the public interest. Finally, part three contains a synthesis of the prior parts as well as an analytic framework.

THE SEARCH FOR DEFINITION

Few concepts have attracted as much scholarly probing as the public interest. "It is probable that as much mischief has been perpetrated upon the human race in the name of 'the public interest' as in the name of anything else,"9 wrote Daniel Bell and Irving Kristol as they introduced a new journal titled, *The Public Interest*, in 1965. Although the concept traces its origins to the writings of Plato and Aristotle and has provided the substance for many books, papers and scholarly presentations, the public interest is little more than "a conceptual muddle," as suggested by political scientist Frank Sorauf, who wrote: "Clearly, no scholarly consensus exists on the public interest, nor does agreement appear to be in the offing."10

In part the disillusionment with the concept springs from the vague and confusing meanings that have been attached to it. The rubric of public interest seems to belong to that genre of euphemisms that includes the public welfare, the common good, and the national interest. In part, the problem with the concept is its idealistic and pristine nature as demonstrated in Walter Lippmann's comment that "the public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently."11 The British writer Robert Skidelsky, however, sees the term as a dying metaphor because one man's

metaphor is always another man's reality.\textsuperscript{12}

The despair of the critics notwithstanding, the term is not to be escaped. It is pervasive in the literature of the first amendment and serves as a guiding principle for the courts and the public philosophers. The public interest "is the central concept of a civilized polity [and] its genius lies not in its clarity but in its perverse and persistent moral intrusion upon the internal and external discourse of rulers and ruled alike."\textsuperscript{13}

Some of the definitional vagueness of the public interest is eased by considering the amalgam of individual, parochial interests that comprise the public interest. A lively debate between two economists, Anthony Downs and Gerhard Colm, has done much to enlarge understanding of this aspect of public interest doctrine. In developing his \textit{Economic Theory of Political Action in a Democracy},\textsuperscript{14} Downs suggests that there exist only individual self-interests. In his view it is the demands of individual interests that influence the political system of a democracy because "the government is interested in [each adult citizen's] vote, not his welfare."\textsuperscript{15} Within the framework of his theory, Downs finds that the public interest has utility; specifically it has three functions:

\begin{itemize}
  \item \textbf{First}, it serves as a device by which individual citizens can judge government actions and communicate their judgments to one another.
  \item \textbf{Second}, since the concept implies that there is one common good for all members of society, transcending the good of any one member, appeals to the public interest can be used to co-opt or to placate persons who are required by government policy to act against their own immediate interests.
  \item \textbf{Third}, the concept serves as a guide to and a check on public officials who are faced with decisions regarding public policy but who have no unequivocal instructions from the electorate or their superiors regarding what action to take.\textsuperscript{16}
\end{itemize}

This approach to the public interest brought a sharp response from Gerhard Colm who compared Downs to the "hedonistic and utilitar-
ian philosophers of an earlier epoch who sophistically made allowance for social values." He further charged that Downs had "permitted the public interest a kind of incognito entrance through the back door." The public interest concept, he asserted, is needed because:

First, policy is concerned not only with the welfare of the present but also with that of 'our posterity,' as the United States Constitution calls it . . . .

Second, the tremendous importance of functions related to the United States position in the world makes it especially artificial and labored to interpret all international and defense activities as designated to meet individuals' self-interest in national security and prestige . . . .

Third, the satisfaction of many self-interests has indirect beneficial effects for society as a whole.

Fourth, in a democracy many specific interests are shared by only a minority of the voters (such as the interests of farmers in adequate prices of farm supports).

This leads Colm to an articulation of four analytical perspectives including: the meta-sociological, where there is a unitary value system and one clear, self-evident public interest; the sociological, where public interest is manifested only through social articulations—the expressions of individuals and groups; the legal, where government restricts personal or corporate activity for the public interest; and the economic, wherein the forces of the marketplace determine the public interest. Public interest and individual interests are not mutually exclusive, Colm argues:

Producers and actors who present a play and the people who come to see it are all motivated by self-interest, be it the desire to earn money or to gain fame or to be entertained. Nevertheless, the varying self-interests of all of them will not be satisfied for long unless the producers and the players and the audience find a common ground under the spell of the play as a work of art. To satisfy self-interests, those concerned with a play and those concerned with conduct of government must in some respect transcend their self interests.

Those who attach value judgments to Downs' ideas about individual interests, have suggested a "trickle-down" theory of the public interest. "A 'trickle-down' policy, of course, is one that concen-

18. Id. at 296-97.
19. Id. at 297-99.
20. Id. at 307.
trates its direct benefits on relatively affluent groups, counting on the second, third and fourth-order effects to help the less fortunate," writes Alan Altshuler. He sees the “trickle-down” explanation as potentially useful in refining and examining the public interest.

Even though a political scientist’s 1960 observation that “there is no public interest theory worthy of the name,” remains valid in 1973, there have been some notable attempts in recent years to explicate the concept more fully. One of the best efforts is a brilliant treatise by political scientist Virginia Held, *The Public Interest and Individual Interests*. Before defining the concept in her own terms, she synthesizes the literature of the public interest and proposes three classifications: (1) preponderance theories, (2) the public interest as common interest, and (3) unitary conceptions.

The preponderance theories are based on the assumption that if the public interest has any meaning at all it “cannot be in conflict with a preponderance or sum of individual interests, although this preponderance may be thought to be constituted and to be calculable in very different ways.”

The preponderance theories are traced to the writings of Hobbes, who believed in a preponderance of force; Hume, an exponent of preponderance of opinion; and Bentham, who advanced the idea of superior sum of individual interests. A contemporary application of preponderance theory is the relationship between the Federal Communications Commission and the networks’ programming on television, a kind of lowest common denominator guided by ratings designed to give the public what it says it wants.

In examining the public interest as a common interest, Ms. Held says, “the equation of the public interest with those interests which all members of a polity have in common,” forms the core of this idea. This concept agrees with preponderance theories in not ruling out the possibility of justifiable conflicts of individual interest.

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24. Id. at 43.

25. Id. at 44 (emphasis in original).
but it defines the public interest in terms of unanimity and compatibility. Common interest theory finds support in the writings of Rousseau who spoke of the common good and the general will. A modern application of this common interest theory would be shared interest and mutual trust. The unitary formulation is based on universal moral precepts and hence,

individual interests cannot justifiably conflict with the public interest or with each other. Only a universal moral order can confer validity, or justifiability, and the same universal order which renders a judgment that a given action or state is right or good cannot also render a judgment that the same action or state is wrong or evil.²⁶

The formulation advanced by Ms. Held is an attempt to outline a norm for public interest that would function within the political and legal systems and would be governed by authoritative rules of conduct. She asserts that

the polity may be understood as a system which validates public interest claims . . . [and] . . . that only the political system provides an effective decision method which could be associated with the term public for claims of what is or is not in the public interest. Any such decision method, or network of methods for a given society is constitutive of a political system.²⁷

This system suggests that “no judgment concerning the public interest can be valid outside the political system whose decision procedures validate claims about it, although judgments concerning . . . the public interest, and the political system can itself be judged in moral terms.”²⁸

How would Ms. Held’s construct be applied? In the instance of the regulation of television programming, for example, there would be at least two levels for consideration. First, the question of the preferences of a majority of the population would be determined empirically. Similarly, the interests of the majority could also be determined empirically, but

[b]oth of these questions would be distinct from that of whether existing programming practices are in the public interest. It might or it might not be considered in the interest of the polity to satisfy majority interest in this field. The question of majority interest might well be the one with which we were concerned, in a particular discussion, but if so, we would do well to use this term, not the public interest. We might conceivably

²⁶ Id. at 136.
²⁷ Id. at 176-77 (emphasis in original).
²⁸ Id. at 183.
decide, for instance, that it is not in the public interest for government to interfere with television programming, no matter what is produced, and that this decision has priority over any evaluation of program content. Discussion of the latter, then, might be in terms of majority interests, of the responsibilities of the networks to minority interests, or of aesthetic considerations, and perhaps not in terms of the public interest at all.\(^{29}\)

The Held system depends, of course, on statutory regulations and the courts as a mechanism for adjudicating public interest disputes.

Perhaps the most useful distinction in this conceptual definition is the clear dividing line between preference and interest. What interests the public, in terms of its wants, desires and tastes may necessarily be in the public interest. For example, in a developing nation, the immediate desires of pre-literate people for a certain content in television programming might not comport with the government's desire to use television as a channel for education and culture. Thus, even in a democracy, majority rule might be in conflict with the public interest. In American society, for example, freedom of speech is a fundamental tenet of constitutional law and of societal values. However, in a single instance the majority of the community might favor censorship. Under Ms. Held's system, public interest doctrine would dictate adherence to societal rules, overturning the immediate will of the majority. In many instances such an approach is essential to the preservation of minority rights, aesthetic values and other public interest concerns.

The public interest definitional dilemma indicated in this section illustrates the still turbulent nature of the debate over this most complex of concepts. The analytical dissections of the public interest by the philosophers, political scientists and economists noted above hopefully provide a broad framework for understanding the application of public interest terminology to the behavior and activities of the press.

### THE LEGAL DIMENSION

**Searching for a Standard**

Virginia Held's assumption that "[only] the polity may be understood as a system which validates public interest claims,"\(^{30}\) moves the definition of the public interest in relation to the press toward

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\(^{29}\) *Id.* at 192 (emphasis in original).

\(^{30}\) *Id.* at 176.
the legal sphere. This is appropriate since the courts frequently have invoked the concept in adjudicating conflicts between individuals and the press. A fragmentary definition of the public interest, based on an aggregate view of these cases, has provided what one legal scholar called "a public interest doctrine" that gives the press relief from damages in such areas as libel.

The notion of the public interest, long a cornerstone of the English common law, was expressed in such terms as *pro bono publico*, the general welfare and others. However, the concept was always related to specific, pragmatic conflicts between individuals and/or collective social entities. In his *Commentaries*, William Blackstone wrote, "the public good is in nothing more essentially interested, than in the protection of every individual's private rights." For the term "public interest" the linkage between the common law and American judicial decisions came in the landmark case of *Munn v. Illinois* wherein private grain elevators located along railroad lines were said to be "affected with a public interest." *Munn* established a basis for direct governmental regulation over certain businesses thought to involve the public business, and therefore, the public interest.

Two areas of communications law that have helped to fashion a public interest doctrine are the recognition that an individual may maintain an action for defamation and invasion of his privacy. In an early application of the concept, *Post Publishing Co. v. Hallam*, an action for libel, Judge William H. Taft, later President and Chief Justice of the United States, wrote:

> The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed.36

32. 1 W. BLACKSTONE, COMMENTARIES *139 (1769).
33. 94 U.S. 113 (1876).
34. *Id.* at 130.
35. 59 F. 530 (6th Cir. 1893).
36. *Id.* at 540.
Judge Taft's thoughtful articulation of a balancing of individual and societal rights was quoted frequently in libel cases involving public officials and public issues. The Missouri Supreme Court offered a ringing declaration of the public interest in *Diener v. Star-Chronicle Co.*, where Justice Lamm said that:

> The right of freedom of speech, of fair comment with an honest purpose in matters of public concern, is on the foot of pro bono publico and founded on public policy. Free discussion is the foundation on which free government itself is builded [sic]. That lost, all is lost—the two exist or perish together.

The public interest definition in communications cases expanded slowly, finding its first specific support in *McClung v. Pulitzer Publishing Co.* In *McClung* the court ruled that a newspaper’s discussion regarding the allegedly brutal treatment of prisoners in a state penitentiary was a matter of public interest. This decision clarified the role of the courts in defining the public interest: “It is the duty and province of the court to determine whether the matter spoken or written about is a matter of public interest.”

The only issue under discussion was the conduct of a warden of a state penitentiary and from all evidence the articles were substantially true. The decision, however, failed to distinguish between matters in the public interest and of public interest. The newspaper articles, according to the court, were of public interest because they concerned the public acts of public officers. Thus the opinion did not extend public interest to encompass the mere publication of matters of idle curiosity.

Until the enunciation of the malice standard in *New York Times Co. v. Sullivan*, libel cases offered little in the way of clarification of the public interest standard suggested by *McClung*. However, *United States v. Associated Press*, an anti-trust case, suggested a functional rationale for the public interest juxtaposed with the interest of the press. Judge Learned Hand dealt squarely with the question of the public interest raised in the case when he wrote:

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37. 230 Mo. 613, 132 S.W. 1143 (1910).
38. *Id.* at 630, 132 S.W. at 1149.
39. 279 Mo. 370, 214 S.W. 193 (1919).
40. *Id.* at 399, 214 S.W. at 200.
42. 52 F. Supp. 362 (S.D.N.Y. 1943).
Neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.\footnote{Id. at 372.}

Adding support to this statement when the case reached the Supreme Court was Justice Felix Frankfurter who, in a concurring opinion, wrote:

The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.\footnote{Associated Press v. United States, 326 U.S. 1, 28-29 (1945).}

The decisions indicate that the judiciary was making it clear that freedom of the press belonged to the \textit{public-at-large}, not simply to the \textit{owners} of the means of communication. This rationale was reaffirmed in \textit{National Broadcasting Co. v. United States}\footnote{319 U.S. 190 (1943).} where the Court found that the public interest served under the Federal Communications Act is "thus the interest of the listening public in the larger and more effective use of radio."\footnote{Id. at 216.} Although this paper is not concerned with the "public interest, convenience and necessity" standard of the Federal Communications Act, the Court's finding in \textit{National Broadcasting Co.} is often referred to in other cases concerning a public interest dimension.

\textit{A Defense Against Invasion of Privacy}

Judge Learned Hand suggested in \textit{Associated Press} that promotion of truth regarding public matters by furnishing a basis for understanding them was a public interest essential to the vitality of our democratic government.\footnote{52 F. Supp. 362 (S.D.N.Y. 1943).} This functional definition of a public interest in information as a basis for the democratic process is classical Miltonian doctrine. In the privacy cases, however, the public...
interest has often been seen more narrowly as courts have looked at the content of communication. The notion that the public interest could negate an individual's right of privacy has its origins in a series of privacy cases from the 1930's. According to one commentator,

As more newspapers and magazines were brought to trial for alleged privacy violations, the defense of 'published in the public interest' grew. Today, what an editor says is newsworthy, or what the public is interested in, is generally considered privileged publication, immune from a privacy suit.\(^48\)

The basis for the use of the public interest concept as a defense against an action for invasion of privacy was laid in *Sarat Lahiri v. Daily Mirror, Inc.*,\(^49\) in which case a Hindu musician sued a New York newspaper for using his picture in a story about a mystical rope trick. The musician sought relief under a state privacy statute on the grounds that the picture had been used for trade purposes and without his consent. After finding for the defendant, the court said, "A free press is so intimately bound up with fundamental democratic institutions that if the right of privacy is to be extended to cover news items and articles of general public interest, educational and informative in character, it should be the result of a clear expression of legislative policy."\(^50\) After *Sarat Lahiri* the public interest argument was frequently invoked as a defense in privacy suits involving the mass media.\(^51\)

In a number of subsequent cases, the courts have been obliged to balance the interests of individuals with the interests of the community or public. In *Berg v. Minneapolis Star and Tribune*,\(^52\) a privacy suit arising from publicity given to a divorce and custody proceeding, the court stated: "Everyone will agree that at some point the public interest in obtaining information becomes dominant

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49. 162 Misc. 776, 295 N.Y.S. 382 (Sup. Ct. 1937).
50. Id. at 782, 295 N.Y.S. at 388.
52. 79 F. Supp. 957 (D. Minn. 1948).
over the individual's desire for privacy." Unfortunately, because of the unique factual situations found in several cases involving the public interest as a defense, the opinions offer little in the way of a consistent, detailed analysis of the concept.

The public interest-privacy standard controlling most contemporary decisions follows that enunciated in *Time, Inc. v. Hill.* The plaintiffs were members of a family held hostage in its home by escaped convicts. The family's harrowing experience was subsequently fictionalized in a play and in magazine coverage of that play. The Court, which found no invasion of privacy, held that:

> [T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

> We have no doubt that the subject of the *Life* article, the opening of a new play linked to an actual incident, is a matter of public interest.

In defining "actual interest" Justice Brennan said that it is a matter of the public interest within the scope of protection afforded by the constitutional guarantees of speech and press. Furthermore, an "erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, 'it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need... to survive'..." As a result of the *Hill* decision newsworthiness became linked with the public interest doctrine.

The standard announced in *Hill* was applied in *Frank Man v. Warner Bros., Inc.*, wherein a professional musician brought suit under the New York privacy statute because he had been included in a movie about the Woodstock rock festival where he had appeared on stage. In denying the plaintiff's request for an injunction against showing the film, the court wrote, "the uncontroverted and incontrovertible fact is that the motion picture in which the plaintiff says he appears presents a true account of what actually happened at

53. Id. at 962. See also Koussevitzky v. Allen, Towne and Heath, Inc., 188 Misc. 479, 68 N.Y.S.2d 779 (Sup. Ct. 1947).
54. 385 U.S. 374 (1967).
55. Id. at 387-88.
56. Id.
an event of great public interest.”\textsuperscript{58} As the above mentioned cases indicate, the interest of the public is defined as that which is newsworthy and captures public attention. This rather limited view of the public interest is but a minor facet of the concept of public interest inherent in Judge Hand’s “multitude of tongues” statement. The notion expressed in the privacy applications of public interest is a kind of “trickle-down” theory in which individual news stories of public interest are also deemed to be in the public interest. That seems to be the essence of judicial thinking on the matter.

\textit{The Public Interest and Libel}

Recent libel cases have followed the invasion of privacy cases assuming that what is of public interest is in the public interest. The landmark case of \textit{New York Times Co. v. Sullivan},\textsuperscript{59} which broke new ground by fashioning a malice rule\textsuperscript{60} also reiterated “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.”\textsuperscript{61} Through \textit{New York Times} and its progeny, the malice rule has been expanded to include private citizens caught up in public events. The principle here seems to be that unfettered communication on public issues and matters is in the public interest.

One of the first post-\textit{New York Times} cases to deal specifically with the term, “public interest,” was \textit{Williams v. The Daily Review},\textsuperscript{62} in which the court held that “the scope of the term ‘public interest’ in California [was] not limited to matters relating solely to public officials.”\textsuperscript{63} The limitations of the public interest principle inherent in \textit{New York Times} was examined in \textit{Walker v. Associated

\textsuperscript{58} Id. at 51.
\textsuperscript{59} 376 U.S. 254 (1964).
\textsuperscript{60} The Court stated that a public official cannot recover 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. Id. at 279-80.
\textsuperscript{61} Id. at 270-71.
\textsuperscript{62} 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965).
\textsuperscript{63} Id. at 417, 46 Cal. Rptr. at 143.
The immunity does extend to 'fair' comment or criticism on matters of public interest or concern. 'Public interest,' however, does not confer upon a newspaper or anyone else the privilege of publishing defamation merely because it has 'news value,' and the public would like to read it. The privilege is limited to those matters which are of legitimate concern to the community as a whole because they materially affect the interest of all the community. The comment must be 'fair' and directed and confined to the facts which are a matter of public concern, and not go beyond them by attacking the personal character of the individual involved.68

Arguing that a public interest doctrine has emerged in the New York Times progeny which have applied the Times rule to libels resulting from a discussion of public issues, one commentator asserts:

Fundamental to the application of the first amendment to the law of libel is the concept that the first amendment was designed to protect and foster the circulation of ideas, or at least some ideas that are of social importance. An important corollary to this concept is the recognition that the circulation of falsehood is of marginal social utility.66

Further, "New York Times and its progeny indicate that the first amendment leaves little room for actionable libel where government is involved, and that some falsehood must be tolerated to avoid a 'chilling effect' on first amendment rights."67

W. H. Flamm and others contend that several corporate and individual libel cases have begun to etch a definition of the public interest. The post-Times cases concerned with public issues have moved away from the necessity for any determination of whether a plaintiff was a public figure. Under the public figure principle, three factors were considered:

1. the importance of the defendant's activities, which were measured by balancing the value of the defendant's service to society against the risk of harm posed to individuals by that activity; (2) whether the plaintiff was entitled to protection in light of his past activity; and (3) whether the plaintiff had a means of self defense.68

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65. Id. at 733.
67. Id. at 965.
68. Id. at 961.
All this, Flamm says, has been replaced by an “unabashed application of the public issue test to corporate and individual defendants alike.”

Recent corporate libel cases have dealt with public issue and public interest standards. In United Medical Laboratories v. Columbia Broadcasting System, the Court of Appeals for the Ninth Circuit declared that stories concerning administration of public health are in the public interest. The defendant, CBS, broadcast a series of exposés of fraud in the medical laboratory business which raised questions about the plaintiff's medical laboratory. The court, in reviewing the case, recognized that:

[T]he fundamental basis on which all of the Court's First Amendment thrusts into various fields thus far presented has rested [is] the right of the public to have an interest in the matter involved and its right, therefore, to know or be informed about it.

In Bon Air Hotel, Inc., v. Time, Inc., Sports Illustrated magazine ran an article that brought to light the exorbitant prices charged for accommodations at an Augusta, Georgia hotel during the Master's Golf tournament. The theme of the article was the dishevelment and general decline of the hotel. The court ruled that the public interest in the subject matter of the story brought the publisher within constitutionally protected areas of free expression. A legal scholar's comment on these cases suggested that, “Clearly, the court's primary emphasis was upon the public’s interest in the things done by these companies; concern for the status of the injured parties was reduced to a secondary level.”

Recent libel cases involving individuals have also used a public issue-public interest standard. Five cases involving organized crime are in point. Cerrito v. Time, Inc. and Konigsberg v. Time, Inc. both grew out of a Life magazine series on organized crime. Plaintiff Cerrito claimed that he had been defamed by a statement that

69. Id. at 964.
70. 404 F.2d 706 (9th Cir. 1969).
71. Id. at 710.
73. Id. at 708.
74. Comment, supra note 31, at 969.
he was the head of a Cosa Nostra family in San Jose, California. The court in the case applied the *New York Times* malice rule because:

> There can be no doubt that organized crime is a subject about which the public has an interest and a right to be informed. The vast expenditures of money by all branches of government, both state and federal, into [investigation of] the workings and extent of organized crime indicates the [highest] interest of the public, as well as its right to know or be informed.\(^7\)

In *Konigsberg*, the plaintiff brought a libel action against *Life* magazine for asserting, *inter alia*, that he was a Cosa Nostra killer and had disposed of a body in the basement of a New Jersey congressman's home. The court found that organized crime and the plaintiff's relationship to the alleged illegal activities of a congressman were matters of public interest justifying application of the actual malice standard to libel action.\(^8\)

*Time, Inc. v. Ragano*\(^7\) and *Wasserman v. Time, Inc.*\(^8\) involved slightly different interests. In *Wasserman*, the publication in *Life* magazine of a picture of lawyers eating lunch with reputed gangsters was said to be in the public interest. In *Ragano*, a case involving the same publication, two lawyers were identified as being Cosa Nostra "hoodlums" when in fact they were attorneys for the "hoodlums." The court said that actual malice had to be shown because of the great public interest in the case. In a similar action, *Time, Inc. v. McLaney*,\(^6\) a story in a magazine article about the influence of a reputed gangster in the election of the premier of the Bahamas, was also declared to be in the public interest.

Another public interest case, *Gertz v. Robert Welch, Inc.*,\(^8\) involved an attorney who had represented the family of a man shot by the police in Chicago. The attorney brought a libel action because of a story in *American Opinion* magazine which had called him a "communist fronter." The court ruled that the attorney had thrust himself into the vortex of an important public controversy.

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\(^7\) 302 F. Supp. at 1073.
\(^8\) 312 F. Supp. at 852.
\(^7\) 427 F.2d 219 (5th Cir. 1970).
\(^7\) 322 F. Supp. 997 (N.D. Ill. 1970).
and that that article clearly dealt with a matter of public interest, and thus was protected by the first and fourteenth amendments. In reaching its decision in *Gertz*, the court stated:

The rationale for affording First Amendment protection to matters of public interest, as implied by *Hill*, ... is that our system of government places great value on society's open discussion of not only public officials (*Sullivan*) and public figures (*Butts*), but also matters of public interest (*Hill*). A person allegedly defamed by matter pertaining to the public interest must satisfy a heavy burden, i.e. a showing of actual malice, in order to recover therefor. The rationale of *Time, Inc. v. Hill* has been applied to several decisions of the Courts of Appeal recently, all of which extend the guarantee of free speech to matters of public interest.

The public interest criteria of these cases and of *Time, Inc. v. Hill*, which lent support to the idea of public interest in a public issue, were given some clarification in *Rosenbloom v. Metromedia, Inc.* In *Rosenbloom* radio news stories about a man charged with (and later acquitted of) the sale of pornography were held to be in the public interest. *Rosenbloom* extended the *Times* malice standard to private individuals caught up in public events:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual did not 'voluntarily' choose to become involved. The public's primary interest in the event, the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety.

As the aforementioned cases indicate, the concept of public interest as understood in a libel action is not unlike that in privacy cases. Free and robust discussion of issues is the primary value of the first amendment. At this juncture apparently any discussion of a public issue that does not involve actual malice under the *Times* and *Rosenbloom* formulations is in the public interest. The only discussion that does not have social utility, under this doctrine, is that which is a deliberate and knowing falsehood.

The public interest doctrine in communications law cases has arisen at a time when the public interest concept is a topic of lively conversation in the legal community. The so-called "Nader's Raid-
ers" and other similar groups launch their attacks in the name of "the public interest." Furthermore, there is a new area of public interest law which has grown in part out of legal aid programs established originally by the Office of Economic Opportunity. Because so much of American life has been defined by the courts as "affected with the public interest," a noted scholar and jurist, Judge Sterry R. Waterman of the Court of Appeals for the Second Circuit has called for a redefinition of the public interest so that "this enlargement [of] the administration of law may, in truth, become the instrumentality for social justice." Judge Waterman asks rhetorically, "Isn't there a public or private accommodation still possible between our right to be left alone and the denial of that right to us as more and more of what we do is affected with the public interest?"

MEDIA INTEREST AND PUBLIC INTEREST

In a variety of polemic treatises over the years, spokesmen for the communications industry in America have maintained that they operate in the public interest. This is a traditional view of the first amendment and is solidly grounded in the cases previously cited. It is, most commentators agree, a negative interpretation of the first amendment, focusing on the phrase, "Congress shall make no law," a command that has been interpreted as a shield against interference with the free flow of information. Clearly this interpretation favors the issuer of communication. It is an ultimate triumph for the "trickle-down" theory of mass communication and press freedom. By allowing the purveyors of communication maximum freedom, the means for the free flow of information to the public is determined.

Arguing for a positive interpretation of the first amendment, law professor and authority on mass media Jerome Barron takes sharp issue with the "trickle-down" theory. He sees this traditional interpretation of the first amendment as abrogating individual rights of communications access to a small number of vital voices in the marketplace of ideas. Barron's model, however, may be likened

89. Id. at 936.
to a pinball machine. He would add more voices to the marketplace and while they would shoot their messages on different vectors, the ultimate result would be pinballs moving in the same direction and within a fixed range which may be designated as "press freedom." According to this view, the diversity of many voices rather than the stable force of a few, best serves freedom and the public interest.

While the argument centering on the question of whether the press interest and public interest are synonymous rages, the work of the public philosophers and the jurists has helped to clarify its components. They do not, however, offer any objective criterion for deciding what is in the public interest. Since one ultimate controlling mechanism for adjudicating the public interest and sorting it out among a range of individual and private interests is the courts, one would hope to find guidance in the opinions of the judiciary. But any expectation for definition from this sector is quickly cooled since the courts have consistently blended public interest into an ambiguous rhetorical concept. As most of the decisions previously reviewed indicate, the courts have said that what is of public interest is in the public interest. Such a position suggests that the public interest is a larger superstructure than the preferential information demands of individuals, although their needs and wants fall under the concept's general rubric.

In American society the Constitution is the ultimate statement of the public interest. Operation of the society under the provisions of the Constitution, which imply and specifically state general goals, is in the public interest. Thus, a free press is a means by which the public interest is transmitted and eventually achieved. It is the visible barometer, the expression of performance. If one accepts this general precept, the public's interest is much more than giving the public what it wants. Preferential choice needs to be consistent with constitutional rules. Inherent in our constitutional government is the assumption that the process of democracy is delegated—as a public trust—to public servants and officials. In delegating this trust, society takes an important step in the view of audience researcher Robert Silvey, who wrote:

It is as though society says in effect to the public servant: 'It is up to you to look after our interests. You must immerse yourself in your subject, because we haven't time to do so. There may come times when we
shall demand that you take a certain course which you, having weighed it in the light of your knowledge and experience, will tell us is not in fact in our interest. Though you are our servant you must, in such a case, refuse to obey us. You will be right to do so, for though at the time you will be refusing to give us what we want, you will, paradoxically, be doing what in the long run we want you to do.90

So it is that the courts find themselves adjudicating press freedom cases. In this process they must be concerned not only with the aggregate preferences of society, but also with larger constructs of freedom for the social order—as well as for the individual. It has been in such a spirit that the courts have decided that:

- a. The free flow of information is in the public interest.
- b. Information about public affairs is of public interest and in the public interest.
- c. The publication of newsworthy information is in the public interest.
- d. Communications diversity is in the public interest.
- e. Government regulation of certain communications activities “affected with a public interest” is in the public interest.
- f. Matters of public interest or matters in the public interest are usually immune from libel and privacy recovery.

Although these statements provide the foundation for defining the public interest in regard to media behavior, it is first necessary to dispense with the suggestion that the public interest is a mere myth. The reasoning of Professor Hans Morgenthau is useful in performing this task:

I happen to believe that there is a possibility by rational political analysis to arrive at certain objective conclusions which define in negative terms what it is not. So, you see, if you assume that the national interest is a mere fiction, a mere ideological justification and rationalization of particular parochial interests, you have nothing to go on except the rivalry of different and frequently incompatible powerful interests, each claiming to be the national interest.91

Thus by the very act of being free, the press operates in the public interest. However, as Barron points out, because freedom

90. Silvey, Giving the Public What It Wants, 199 CONTEMPORARY REVIEW 261 (1961).
of the press belongs to all of the people, the press, as an issuer of communication, has no right to prevent the communication of others. Activities by the press that drive out competition, encourage censorship, or prevent free discussion and debate on matters of public concern are at odds with the notion of positive freedom of the press. They are, therefore, not in the public interest. Thus the public interest and the media interest are congruent only when there is a viable relationship between issuer and consumer of communication that is operating to the satisfaction of both. This does not mean simply giving the public what it wants; rather, it entails acquainting the public with the broad range of possibilities and then allowing it to make a free choice within that extensive panoply. When immediate whims and curiosity-seeking by the issuer or the consumer conflict with other social rights, the government, through the court system, should act as the regulator. For example, the interest in a celebrated trial may be quite high and the media may want to cover it in all aspects. However, such coverage might conflict with an individual's right to a fair trial. In such an instance it is up to the courts to sort out the conflicting interests and values.

If communication law cases were decided in a public interest framework, a quite precise, measurable definition of the public interest would no doubt emerge. That definition would be dynamic, flexible and accommodating, while at the same time it would provide a standard and a rationale for media behavior.

Government, however, is not the only check and balance between purely private interests and the public interest. In examining other entities that also advance and protect the public interest, the public health model of disease prevention is useful. The public health model suggests three levels of prevention—primary, secondary and tertiary. When applied to the public interest problem at hand it can be expressed schematically as it is in Figure 1.

At the primary level, prevention of public interest violations could be accomplished through informal educational processes in which the various parties in society would interact and settle their differences privately. In this arena, the universities, especially schools of journalism, have a broad mandate to teach ethics and responsible performance. Ideally, all disputes could be settled in this free and informal forum.
At the secondary level of prevention, watchdog agencies would monitor press behavior and attempt to curb abuses and point out public interest violations. These agencies would include such public interest bodies as Ralph Nader's Center for the Study of Responsive Law and John Gardiner's Common Cause. Further, the press could be more directly influenced through press councils, communications task forces and foundations, journalism reviews and professional groups.

Finally, and only after the other two levels had failed, would the prevention measures of the tertiary level be employed. This would include the courts, the legislature and the executive branch of government.

As previously discussed, the public interest and the press interest would be contiguous when maximum freedom and minimal interference exists in both. Operationally, the press interest/public interest would be measured in terms of the degree to which the press fostered the free flow of information and satisfied the justifiable information needs of its consumers. Only when such a balanced ratio is achieved will the interest of the press and the interest of the public be one and the same.
Private, corporate and individual interests advanced for purely self-serving purposes although at times these purposes may coincide with "the public interest".

Primary level-informal relationships, agreements, codes of ethics, etc. Secondary level agencies and public interest guardians; Tertiary level, courts, government.

Figure 2. A SYSTEM OF PUBLIC INTEREST/PRESS INTEREST

Figure 2 illustrates such a scheme in which the public interest would begin to define itself. It would be the reaction of the press to higher-order interests expressed in the Constitution, blended with the interests of individuals and groups in society. The input for this information pool would be the expressions of public and private interests related directly to the issuer of communication or indirectly to the issuer through the consumer. This interplay between issuer and consumer would determine the appropriate messages to be communicated to society and hopefully would solidify the public interest content of those messages. All conflicts would be adjudicated through the primary, secondary and tertiary processes indicated above. Monitoring such an operational system would yield a system of public interest/press interest with attendant doctrine and methodologies. Only then could the public interest be determined with any validity and certainty.