Missouri Law Review

Volume 77
Issue 4 *Fall 2012*

Article 4

Fall 2012

What's It to You: The First Amendment and Matters of Public Concern

Mark Strasser

Follow this and additional works at: https://scholarship.law.missouri.edu/mlr

 Part of the Law Commons

Recommended Citation

Mark Strasser, *What's It to You: The First Amendment and Matters of Public Concern* , 77 Mo. L. Rev. (2012)
Available at: https://scholarship.law.missouri.edu/mlr/vol77/iss4/4

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

What's It to You: The First Amendment and Matters of Public Concern

*Mark Strasser**

I. INTRODUCTION

In *Snyder v. Phelps*,[1] the Supreme Court of the United States struck down a damages award against Reverend Fred Phelps, Sr., reaffirming that the First Amendment protects discussions on matters of public concern.[2] In doing so, the Court underscored the importance of the distinction between matters of public concern and matters of mere private interest. Yet, if that distinction is to do constitutional work, the Court should articulate clear criteria for determining which speech falls into one category and which falls into the other. Regrettably, the Court has sent contradictory signals with respect to how the two can be distinguished. The Court must do more than merely say, "It depends," if there is to be any hope of clarifying this increasingly important area of the law.

This Article traces the development of the "matters of public concern" doctrine, explaining the role that the concept has played in cases ranging from defamation[3] to employment termination to publication of (allegedly) private facts.[4] The Article discusses various inconsistencies in the Court's jurisprudence, both with respect to what counts as a matter of public concern[5] and with respect to the relative importance of the protection of such matters.[6] It concludes that the current jurisprudence cannot help but cause confusion and inconsistent results in the lower courts and must be clarified at the earliest opportunity.[7]

* Trustees Professor of Law, Capital University Law School, Columbus, Ohio. I would like to thank Professor Susan Gilles for her helpful discussions of these and related issues.

1. 131 S. Ct. 1207 (2011).
2. *See id.* at 1215 ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" (omission in original) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985))).
3. *See infra* Parts II.A-B.
4. *See infra* Part II.C.
5. *See infra* Part II.A.
6. *See infra* notes 111-39 and accompanying text.
7. *See infra* Part III.

File: StrasserPaginated.docx Created on: 1/24/13 4:02 PM Last Printed: 11/3/13 8:05 PM

II. MATTERS OF PUBLIC CONCERN

The "matters of public concern" doctrine has changed radically over the last half century. In *New York Times v. Sullivan*, the Court's focus was on discussions of governmental operations,[8] although what was included in the public concern category expanded in subsequent cases. Then, the Court tried to restrict the category, suggesting that there were limits on what counted as a matter of public concern without specifying what those limits were. At the same time that the Court was seeking to limit what counted as a matter of public concern, the Court sent mixed signals about how important it was as a constitutional matter to protect such discussions. These mixed signals resulted in a jurisprudence that not only offers too little specification of what counts as a matter of public concern but that also offers varying degrees of protection for discussions that obviously fall into that category. In short, we have an area of law that is becoming increasingly important and increasingly amorphous at the same time. This Article illustrates this increasing ambiguity by explaining the origins, and subsequent changes, in the public concern doctrine both in defamation and in non-defamation cases.

A. What Counts as a Matter of Public Concern?

In *New York Times v. Sullivan* (*NYT*),[9] the Court noted the long-established proposition that "freedom of expression upon public questions is secured by the First Amendment."[10] The Framers included free speech guarantees within the Constitution, at least in part, because of the dangers posed by "occasional tyrannies of governing majorities."[11] Thus, any examination of the contours of the First Amendment's speech protections should be conducted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[12] The *NYT* Court announced a constitutional "rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[13] This Article explains the development of the public concern doctrine for public officials, public figures, and private individuals, and then

8. 376 U.S. 254, 292 (1964).

9. 376 U.S. 254.

10. *Id.* at 269.

11. *Id.* at 270 (quoting Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), *vacated*, 47 S. Ct. 641 (1927)).

12. *Id.* (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

13. *Id.* at 279-80.

describes some of the ways that the Court has undercut both the clarity and the importance of the very distinctions that it has drawn.

1. Public Officials

The Constitution protects criticism of public officials because the conduct of public officials is a matter of great public concern. In *Garrison v. Louisiana*,[14] the Court explained that where "the criticism is of public officials and their conduct of public business, the interest in [the officials'] private reputation[s] is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth."[15] Yet, the *Garrison* Court explained that the Constitution does not only protect true statements. On the contrary, "even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood."[16] A different rule, e.g., that a false statement creates potential liability whenever made by someone who has enmity for the public official allegedly defamed, runs too great a risk of chilling political speech.[17]

The knowing falsehood is subjected to less forgiving treatment. The *Garrison* Court explained that even at the time of the First Amendment's adoption, "there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration."[18] The fact that the knowing falsehood was used to achieve political ends did not afford such a statement constitutional immunity.[19] "Calculated falsehood[s] . . . 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'"[20]

Once calculated falsehoods have been excluded from consideration, however, much information and opinion about public officials is of public interest and part of protected free speech. The *NYT* Court stated that there is a "paramount public interest in a free flow of information to the people concerning public officials, their servants."[21] Protected speech includes some

14. 379 U.S. 64 (1964).

15. *Id.* at 72-73.

16. *Id.* at 73.

17. *Id.* ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.").

18. *Id.* at 75.

19. *Id.* ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.").

20. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

21. *Id.* at 77.

File: StrasserPaginated.docx Created on: 1/24/13 4:02 PM Last Printed: 11/3/13 8:05 PM

discussions of a more personal nature, because "[f]ew personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation."[22] Accordingly, some personal details about public officials are considered matters of public concern. Of course, some public officials have vast responsibilities while others do not, and the *NYT* Court did not specify the degree of power that would trigger the actual malice standard.[23]

The Court addressed that issue more fully in *Rosenblatt v. Baer*.[24] The *Rosenblatt* Court explained that "the 'public official' designation applies . . . to those . . . government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[25] After all, there is "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 those issues."[26] Because "[c]riticism of government is at the very center of the constitutionally protected area of free discussion[,]"[27] a great deal of discussion about high-ranking officials is protected free speech.

2. The Inclusion of Public Figures and Private Citizens

While government policies and practices are a matter of public concern, they are not the only matters of public concern. The "guarantees for speech and press are not the preserve of political expression or comment upon public affairs."[28] In *Time Inc. v. Hill*,[29] the Court noted "the vast range of published matter which exposes persons to public view, both private citizens and public officials[,]" [30] and worried that there would be a "grave risk of serious impairment of the indispensable service of a free press in a free society if we

22. *Id.*; *see also* Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) ("Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks."). *But see* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 U.S. 749, 767 (1985) (White, J., concurring) ("Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials.").

23. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 n.23 ("We have no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included.").

24. 383 U.S. 75 (1966).

25. *Id.* at 85.

26. *Id.*

27. *Id.*

28. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

29. 385 U.S. 374.

30. *Id.* at 388.

saddle the press with the impossible burden of verifying … the facts associated in news articles with a person's name, picture or portrait, particularly as related to nondefamatory matter."[31] The *Hill* Court thereby suggested that much discussion of private citizens' lives was a matter of public concern and that matters of public concern were not limited to matters of governance.

Curtis Publishing Company v. Butts[32] expanded protections for the media and extended the *NYT*'s standard to public figures as well as to public officials.[33] The *Butts* decision involved two defamation cases that had been consolidated, one involving Wally Butts and the other involving Edwin Walker.[34] Curtis Publishing Company accused Butts, an employee of the Georgia Athletic Association, a private corporation,[35] of giving significant secrets about Georgia's plays and defensive patterns to the University of Alabama's football coach, Paul Bryant.[36] Another publication alleged that General Edwin Walker led a charge against federal marshals who had been sent to maintain order and to enforce a court order requiring the University of Mississippi to desegregate by enrolling James Meredith.[37]

Curtis Publishing argued both that Butts had such a significant role in "state administration"[38] that he should be treated as if he were a public official, and that "the public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials."[39] General Walker, a "man of some political prominence,"[40] had made a number of statements against federal intervention to promote integration.[41]

---

31. *Id.* at 389. The *Hill* test does not impose an impossible burden on false light plaintiffs. *See* Cantrell v. Forest City Publ'g Co., 419 U.S. 245 (1974) (reinstating the trial court's false light damages verdict for a publication made with knowledge of the assertion's falsity or with a reckless disregard for their truth).

32. 388 U.S. 130 (1967).

33. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990) ("[I]n *Curtis Publishing Co. v. Butts*, a majority of the Court determined 'that the *New York Times* test should apply to criticism of "public figures" as well as "public officials."'" (internal citation omitted)).

34. *See Butts*, 388 U.S. at 135 ("These two libel actions, although they arise out of quite different sets of circumstances . . . are best treated together in one opinion.").

35. *Id.*

36. *Id.* at 136.

37. *Id.* at 140 ("The dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the Court's decree and to assist in preserving order.").

38. *Id.* at 146.

39. *Id.*

40. *Id.* at 141.

41. *Id.*

File: StrasserPaginated.docx Created on: 1/24/13 4:02 PM Last Printed: 11/3/13 8:05 PM

The *Butts* plurality noted that both of the allegedly defamed individuals "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able 'to expose through discussion the falsehood and fallacies' of the defamatory statements."[42] Because these individuals were readily distinguishable from private citizens, the plurality concluded that "libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard[.]"[43] Rather, a more demanding standard was to be used – "a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[44] While the language employed by the plurality did not mirror the actual malice standard, that language nonetheless set a high bar for those public figures seeking to collect defamation damages and was later interpreted to be the equivalent of the actual malice standard for public officials.[45]

In *Rosenbloom v. Metromedia, Inc*.,[46] the plurality employed a very protective standard even though no public figures were involved. At issue were broadcasts in which the plaintiff was described as selling "obscene" literature[47] and, with his business associates, as being "smut distributors" and "girlie-book peddlers."[48] A trial court had ruled as a matter of law that the nudist magazines sold by the plaintiff were "not obscene."[49]

The *Rosenbloom* plurality noted that "the police campaign to enforce the obscenity laws was an issue of public interest,"[50] and that the Constitution limits the power of the states to award damages to an individual allegedly defamed.[51] The question before the Court was whether Rosenbloom, a private individual, could be successful in his defamation action if he could prove that the false statements broadcasted about him resulted "from a failure of respondent to exercise reasonable care"[52] or whether, instead, he could only be successful if he proved actual malice – that "the falsehoods were broadcast

42. *Id.* at 155 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

43. *Id.*

44. *Id.*

45. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 (1974) ("Three years after [*New York Times*], a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of 'public figures.'").

46. 403 U.S. 29 (1971), *abrogated by Gertz*, 418 U.S. 323.

47. *Id.* at 36.

48. *Id.*

49. *Id.* at 36.

50. *Id.* at 40.

51. *Id.*

52. *Id.*

with knowledge of their falsity or with reckless disregard of whether they were false or not."[53]

When analyzing whether the actual malice standard should be employed when the plaintiff is a private figure, the plurality noted that "[s]elf-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government."[54] Because "vast areas of economic and social power that vitally affect the nature and quality of life in the Nation"[55] are in "private hands,"[56] it is necessary to protect robust discussion of "far more than politics in a narrow sense."[57]

When suggesting that matters of public concern include far more than politics narrowly construed, the *Rosenbloom* plurality sought to justify using the actual malice standard even when the allegedly defamatory statement was not about a public official or public figure. After all, when "a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved."[58] Because the focus is on the issue itself, the plurality expressed its "commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern[.]"[59] Yet, the focus of Rosenbloom's complaint was not about the police crackdown on obscenity as a general matter, but merely that he had wrongly been accused of selling obscene materials and that the defamatory accusation had resulted in business losses.[60]

The *Rosenbloom* analysis was very protective of speech in a few different respects. First, it employed the actual malice standard even when no public officials or public figures were involved.[61] Second, when deciding whether the issue was a matter of public concern, the *Rosenbloom* plurality viewed the facts before it at an increased level of generality. The matter of public concern was not merely whether Rosenbloom had been wrongly accused of being a smut peddler but, instead, the police crackdown on pornography more generally.[62]

53. *Id.* at 41.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 43.
59. *Id.* at 43-44.
60. *See id.* at 39 (discussing the "actual damages claimed for loss of business").
61. *See id.* at 45.
62. *Id.* at 40.

File: StrasserPaginated.docx Created on: 1/24/13 4:02 PM Last Printed: 11/3/13 8:05 PM

B. A Change in Direction

During the period between *NYT* and *Rosenbloom*, the Court expanded the protections afforded to media against defamation in two respects: the Court expanded the class of plaintiffs who had to establish actual malice in order to be successful in a defamation claim (to include both public officials and public figures),[63] and the Court made it more difficult for plaintiffs who were not public figures to collect damages for reputational harms if the discussion involved matters of public concern. However, in *Gertz v. Welch*[64] and *Time, Inc. v. Firestone*[65] the Court signaled a change in direction.

1. Changes to the Application of the Actual Malice Standard

At issue in *Gertz* were defamatory comments about Elmer Gertz made in an article published in the American Opinion magazine.[66] The magazine ran a series warning of a nationwide conspiracy to discredit local law enforcement[67] and published an article about the murder trial of Richard Nuccio, a Chicago policeman who had shot and killed a youth named Ronald Nelson.[68] In that article, several false statements were made about Gertz, including that he had been an officer of a group advocating the violent overthrow of the government, that he was a Leninist, and that he had been part of an organization that had taken part in planning the 1968 demonstration in Chicago.[69] In its defense, the magazine claimed both that Gertz was a public figure, because he was representing the Nelson family in a civil action against Nuccio, and that the article involved an "issue of public interest and concern."[70]

The Court rejected that Gertz was a public figure[71] and rejected the *Rosenbloom* plurality's conclusion that the actual malice standard should be

63. *See supra* notes 32-45 and accompanying text.

64. 418 U.S. 323 (1974).

65. 424 U.S. 448 (1976).

66. *Gertz*, 418 U.S. at 325-26.

67. *Id.* at 325.

68. *Id.* at 326 ("The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the Communist campaign against the police . . . . The article stated that petitioner had been an official of the 'Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.' It labeled Gertz a 'Leninist' and a 'Communist-fronter.'"); *see also* Robert S. Adler & Ellen R. Peirce, *Encouraging Employers to Abandon Their "No Comment" Policies Regarding Job References: A Reform Proposal*, 53 WASH. & LEE L. REV. 1381, 1405 n.117 (1996).

69. *Gertz*, 418 U.S. at 326.

70. *Id.* at 327.

71. *Id.* at 352 ("[I]t is plain that petitioner was not a public figure.").

used in cases involving matters of public interest even if the plaintiff is a private figure.[72] The *Gertz* Court wanted to avoid the "difficulty of forcing state and federal judges to decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not[.]"[73] Even if such a determination could be made accurately, the Court feared that the distinction would not achieve the correct balance between affording adequate protection of the press and protecting the reputational interests of private figures. The *Gertz* Court argued that the *Rosenbloom* position did too much and too little – "a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*."[74] However, if there were no matter of public concern at issue, then a publisher might be held liable "even if it took every reasonable precaution to ensure the accuracy of its assertions."[75]

When assessing whether the *Gertz* Court was correct that *Rosenbloom* afforded inadequate protection to private figures when the allegedly defamatory material involves a matter of public concern, one should also consider the *Rosenbloom* plurality's recommendation that the private figure be afforded the opportunity to rebut or deny the charges.[76] Perhaps offering an opportunity to rebut the defamatory claims would suffice to protect the private individual's interests,[77] in which case the remedy would then have the salutary effect of not chilling wide-ranging debate about matters of public concern.

A different question is whether the absence of protection afforded by *Rosenbloom* with respect to matters of merely private interest requires correction. For example, the *Gertz* Court held that private individuals could only recover damages for defamation upon a showing of fault.[78] Further, absent

72. *Id.* at 345-46 ("[T]he States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable.").

73. *Id.* at 346.

74. *Id.*

75. *Id.*

76. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 47 (1971) ("If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."), *abrogated by Gertz*, 418 U.S. 323.

77. *But see id.* at 46 ("In the vast majority of libels involving public officials or public figures, the ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story.").

78. *Gertz*, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liabil-

proof of actual malice, the successful defamation plaintiff could only be awarded compensation for actual harms.[79] While those actual harms would not be limited to injury to reputation,[80] the imposition of such limitations (in cases not involving matters of public concern) would have been perfectly compatible with *Rosenbloom*'s more substantial protections for discussions on matters of public interest.

The advantages of the *Gertz* position (as compared to *Rosenbloom*) might seem to be twofold: (1) private plaintiffs who have been defamed in a broadcast on matters of public concern would be able to recover actual damages even if they could not establish actual malice, and (2) it would be unnecessary to determine which discussions implicated matters of public concern and which only implicated matters of private interest. The former is a benefit only if one accepts that *Rosenbloom* restricts recovery too severely. The latter might be thought a benefit if there were some difficulty in drawing the line between matters of public concern versus mere private interest, although the Court subsequently interpreted the *Gertz* approach in such a way that it was still necessary to determine which discussions involved matters of public concern and which did not.[81]

Under the *Gertz* approach, a private individual who was allegedly defamed in a broadcast involving matters of public concern would not have to establish actual malice in order to recover damages. However, a public figure or public official who had allegedly been defamed would need to establish actual malice. After *Gertz*, the issue of who counted as a public official or public figure became even more important.

---

ity for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

79. *Id.* at 349 ("It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.").

80. *Id.* at 350 ("[T]he more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.").

81. *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (reinstituting the need to determine whether a plaintiff had been defamed in the context of a discussion of a matter of public interest, and rejecting the *Gertz* limitation on when presumed damages might be awarded). For a discussion of *Dun & Bradstreet*, see *infra* notes 106-34 and accompanying text.

2. Changes in Defining a Matter of Public Concern

In *Time Incorporated v. Firestone*,[82] the Court did two things: it limited who might count as a public figure,[83] and it suggested some limitations on what might count as a matter of (legitimate) public concern.[84] At issue in *Firestone* was whether the following news item was defamatory:

> DIVORCED. By Russell A. Firestone Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife; a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son; in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both sides, said the judge, 'to make Dr. Freud's hair curl.'[85]

Mary Alice Firestone asserted that the announcement contained defamatory claims and asked Time for a retraction.[86] Her request was refused.[87] She then sued for libel, and the trial court awarded her $100,000, a judgment that the Florida appellate courts affirmed.[88]

On appeal before the Court, Time asserted both that Firestone was a public figure and that the divorce involved a matter of public concern.[89] The *Firestone* Court rejected that she was a public figure because she had not assumed "any role of especial prominence in the affairs of society"[90] and because she had not "thrust herself to the forefront of any particular public controversy in order to influence the resolution of the issues involved in it."[91]

Of special interest was the Court's suggestion that the divorce did not involve a matter of public concern.[92] The *Firestone* Court understood that the

82. 424 U.S. 448 (1976).

83. *See* Hanrahan v. Horn, 657 P.2d 561, 564 (Kan. 1983) (suggesting that "[t]he trilogy of cases . . . *Gertz*, *Firestone* and *Wolston*, limits the status of public figure to those who seek to influence the resolution of public questions.").

84. Jacquelyn S. Shaia, *The Controversy Requirement in Defamation Cases and its Misapplication*, 28 AM. J. TRIAL ADVOC. 387, 393 (2004) ("[I]n *Time, Inc. v. Firestone*, however, the Court defined what a 'public controversy' was not.").

85. *Firestone*, 424 U.S. at 452.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 453-54.

90. *Id.* at 453.

91. *Id.*

92. The Court implied that some matters in which the public might be interested do not qualify as matters of public concern, although the Court's comments are ambiguous. *See infra* notes 98-105 and accompanying text.

divorce had been a "cause celebre"[93] and thus might be thought to constitute a "public controversy," [94] which might be taken to mean that Firestone would have to be considered a "public figure." [95] However, the Court rejected the equation of "'public controversy' with all controversies of interest to the public[,]" [96] at least in part, because the Court did not wish to "reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, which concluded that the *NYT* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest."[97]

There are at least two different interpretations of the *Firestone* Court's position. The Court might simply have been denying that anyone who is the focus of a public controversy is thereby made into a public figure. By denying this assumption, the Court would have prevented an end run around *Gertz*. According to the (rejected) line of thinking, anyone who is the subject of a public controversy becomes a public figure. But that would resurrect *Rosenbloom* and bypass *Gertz* in effect. While it would still be true that matters of public controversy would not themselves trigger the actual malice standard, it would nonetheless be true that someone associated with a public controversy would thereby become a public figure and would be subject to the actual malice standard by virtue of her being or becoming a public figure. The *Firestone* Court may merely have been trying to sever the link between an individual's association with a matter of public controversy and that individual being considered a public figure. If that is correct, then the Court may not have been trying to limit what counts as a matter of public concern. Instead, the Court may have been trying to limit who will count as a public figure and who will have to establish actual malice in order to receive damages for injury to reputation.[98]

A different interpretation is that the Court was trying to limit what will count as a matter of public concern. For example, the Court noted that while "the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public[,]"[99] the "[d]issolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*[.]"[100] Here, the Court's statement seems to suggest that the mere fact that a portion of the population is interested in a topic, such as the di-

93. *Firestone*, 424 U.S. at 454.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* (internal citations omitted).
98. *See also* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167 (1979) ("Petitioner's failure to appear before the grand jury and citation for contempt no doubt were 'newsworthy,' but the simple fact that these events attracted media attention also is not conclusive of the public-figure issue.").
99. *Firestone*, 424 U.S. at 454.
100. *Id.*

vorces of the extremely wealthy, does not suffice to establish that the topic is a matter of public concern.[101]

At least one Justice supported the latter position. Justice White in his *Gertz* dissent discussed a series of cases in a footnote, some of which involved publications on matters of public concern and some of which did not.[102] Included within those cases involving issues that were *not* a matter of public concern was the Florida Supreme Court case *Firestone v. Time, Inc.*,[103] which Justice White described in a parenthetical as a "divorce of prominent citizen not a matter of legitimate public concern."[104] It may well be that *Firestone* is making explicit a view that was not discussed in *Gertz* but was nonetheless shared by some members of the Court, namely, that some matters published in newspapers or broadcast on TV or radio are nonetheless not matters of public concern. But pointing out that some contents are legitimately matters of public concern but that others are not suggests that the Court will have to offer some way to distinguish between the two. Else, judges may have to "decide on an ad hoc basis which publications address issues of 'general or public interest' and which do not[,]"[105] which is a result that the *Gertz* plurality clearly wanted to avoid.

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.[106] resurrected the importance of the matter of public concern analysis in the defamation context. At issue was a report distributed by Dun and Bradstreet to five subscribers indicating that Greenmoss, a construction contractor, had voluntarily filed for bankruptcy.[107] The report was false.[108] Not only had the report "grossly misrepresented [Greenmoss's] assets and liabilities[,]"[109] but it was one of Greenmoss's former employees, rather than the company itself, who had filed for bankruptcy.[110]

The jury awarded $50,000 in compensatory damages and $300,000 in punitive damages to Greenmoss,[111] and one of the questions on appeal was whether punitive damages could be awarded absent a showing of actual mal-

101. *See id.* (rejecting the attempt of petitioner "to equate 'public controversy' with all controversies of interest to the public").

102. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 377 n.10 (White, J., dissenting).

103. 271 So. 2d 745 (Fla. 1972).

104. *Gertz*, 418 U.S. at 377 n.10.

105. *Id.* at 346.

106. 472 U.S. 749 (1985).

107. *Id.* at 751.

108. *Id.*

109. *Id.*

110. *Id.* at 752.

111. *Id.*

ice.[112] The plurality read *Gertz* to limit the damages that could be awarded to a private figure on a matter of public concern,[113] and the issue was whether *Gertz* also imposed recovery limitations "when the false and defamatory statements do not involve matters of public concern."[114]

The *Dun & Bradstreet* plurality noted that nothing in the *Gertz* opinion indicated that "a State could not allow recovery of presumed and punitive damages absent a showing of 'actual malice[]' . . . regardless of the type of speech involved."[115] Thus, the plurality read *Gertz* as not speaking to whether punitive damages could be awarded, even absent actual malice, if the discussion merely involved matters of private interest.

The plurality's description of *Gertz* is accurate in that *Gertz* did not expressly distinguish between matters of public concern and matters of mere private interest. But there was a reason for the *Gertz* Court's refusal to make such a distinction. The *Gertz* plurality focused solely on whether the individual was a public official or figure as opposed to a private citizen.[116] An advantage of restricting the focus to the status of the individual was that the lower courts would not be forced to determine which matters were of public concern and which were not,[117] which at least suggests that *Gertz* was *not* reserving judgment about the conditions under which punitive damages could be awarded where the defamatory comments were made about a matter of mere private interest.[118]

The *Dun & Bradstreet* plurality remarked that "speech on matters of purely private concern is of less First Amendment concern."[119] The matter at issue (the plaintiff company's credit worthiness) did not involve a matter of public concern for several reasons; for example, the report was "made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further."[120] The plurality also suggested that "petitioner's credit report concerns no public issue . . . [and] was speech solely in the individual interest of the speaker and its specific business audi-

112. *See id.* at 754 ("The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than 'actual malice.' Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct.").

113. *Id.* at 751 ("the First Amendment prohibit[s] awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows 'actual malice,' that is, knowledge of falsity or reckless disregard for the truth").

114. *Id.*

115. *Id.* at 756-57.

116. *See supra* notes 71-81 and accompanying text.

117. *See supra* note 73 and accompanying text.

118. *See Dun & Bradstreet*, 472 U.S. at 772 (White, J., concurring) ("I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance.").

119. *Id.* at 759 (plurality opinion).

120. *Id.* at 762.

ence."[121] But this is a surprising view to take. The credit report at issue would have been of interest to various individuals other than the speaker and the audience, including Greenmoss Builders, the Greenmoss employees, the Greenmoss creditors, and anyone who was thinking of doing business with Greenmoss.[122] Indeed, the harm to Greenmoss from this defamatory report would have been much greater had the report appeared in a newspaper, if only because of all of the actions that might have been taken in light of that false and damaging report. But that wider interest in Greenmoss's creditworthiness suggests that the topic might well have been of public concern.

Perhaps the case should be limited to its facts. For example, the plurality seemed to believe that the commercial nature of the information was important,[123] reasoning both that commercial speech would be less likely to be chilled even if punitive damages could be awarded absent actual malice[124] and that because the market itself would provide a "powerful incentive"[125] to provide accurate information, "any incremental 'chilling' effect of libel suits would be of decreased significance."[126] The dissent also suggested that the case should not stand for a broad principle, given the "idiosyncratic facts."[127]

Regrettably, rather than clarify the jurisprudence with respect to matters of public concern, *Dun & Bradstreet* only muddied the waters. Both the plurality and Justice White in concurrence seemed to emphasize the subject matter when making the determination that the communication at issue did not involve a matter of public concern,[128] but the subject matter of Greenmoss's

121. *Id.*

122. *See id.* at 789 (Brennan, J., dissenting) ("[A]n announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located"); *see also* Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred*,* 44 Liquormart*, and* Bartnicki, 40 HOUS. L. REV. 697, 745 (2003) ("But the Court went on to hold that a report about a company's bankruptcy wasn't a matter of 'public concern,' something that would surprise the company's employees, creditors, and customers, as well as local journalists who might well cover the bankruptcy of even a small company in their small town.").

123. *See Dun & Bradstreet*, 472 U.S. at 762 ("[T]he speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others." (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771-72 (1976))).

124. *See id.* at 762-63.

125. *See id.*

126. *Id.* at 763.

127. *Id.* at 776 (Brennan, J., dissenting).

128. *See id.* at 786 ("Justice White . . . [in] his opinion does indicate that the distinction turns on solely the subject matter of the expression and not on the extent or conditions of dissemination of that expression. Justice Powell [writing for the plurality] adumbrates a rationale that would appear to focus primarily on subject matter." (internal citation omitted)).

alleged bankruptcy would have been of great concern to many in the community.[129] Further, the interest in such matters would not merely have reflected a possibly inappropriate curiosity about the lives of the very wealthy,[130] but would have affected the interests and lives of a variety of community members.

Dun & Bradstreet is perhaps more understandable if one deemphasizes the subject matter and instead focuses on the fact that the community members having a legitimate interest in Greenmoss's financial condition would never have had access to that information, because those who received the credit report were bound by a confidentiality agreement not to give that information to anyone else.[131] However, in other cases, the Court has suggested that something can be a matter of public concern even if it is the subject of a private conversation, [132] so the fact that the report was confidential does not provide a satisfying explanation of why a bankruptcy would not be a matter of public concern.

The Court's defamation jurisprudence has been anything but consistent. In some cases, the Court has emphasized whether the individual was a public rather than a private figure,[133] at least in part, because the Court would then not have to determine which matters were of public concern and which were not. However, in other cases, the Court has focused on whether the content was a matter of public concern,[134] and that determination now can play an important role in determining what damages are available to a private figure who has allegedly been defamed. Basically, the Court seems to appreciate that there are difficulties in drawing lines both when determining who is a public figure and when determining what counts as a matter of public concern. Regrettably, at least in the defamation context, the Court has not been very helpful in providing the criteria to be used when making either of these important determinations.

C. Matters of Public Concern in Non-Defamation Contexts

The Court has had occasion to discuss what constitutes a matter of public concern in a wide range of contexts ranging from decisions about whether public employee speech is constitutionally protected to decisions about whether published information contained in a public record is afforded constitutional guarantees to decisions about whether speech in a private setting is nonetheless protected because a matter of public concern. Regrettably, the

129. *See supra* note 122 and accompanying text.

130. *See supra* note 100 and accompanying text (discussing the interest that some community members have in the details of the divorces of the very rich).

131. *See Dun & Bradstreet*, 472 U.S. at 762.

132. *See infra* notes 166-71 and accompanying text.

133. *See supra* Part II.A.

134. *See supra* Part II.B.2.

Court has not afforded sufficient guidance to determine which contents involve matters of public concern in these cases either.

1. Employee Speech

In *Pickering v. Board of Education*,[135] the Court underscored the importance of protecting discussions of matters of public concern, even when the individual engaging in the discussion is a private citizen. Marvin Pickering was a high school teacher[136] who authored a letter to the editor in a local newspaper criticizing, among other things, the School Board's "allocation of financial resources between the schools' educational and athletic programs."[137] The School Board fired Pickering for writing the letter, charging "that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration."[138] The Board believed that the false statements not only "damaged the professional reputations" of various individuals, but "would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district."[139]

The *Pickering* Court recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general[,]"[140] but nonetheless rejected that the Constitution permits teachers to be forced to surrender their "First Amendment rights . . . as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work[.]"[141] The Court noted that "an accusation that too much money is being spent on athletics by the administrators of the school system . . . clearly concerns an issue of general public interest."[142] In addition, with respect to the question of whether the schools needed more money (and whether a tax increase was justified), "free and open debate is vital to informed decision-making by the electorate."[143] The Court emphasized the overriding "public interest in having free and unhindered debate on matters of public importance"[144] and held that "absent proof of false state-

135. 391 U.S. 563 (1968).
136. *Id.* at 564.
137. *Id.* at 566.
138. *Id.* at 566-67.
139. *Id.* at 567.
140. *Id.* at 568.
141. *Id.*
142. *Id.* at 571.
143. *Id.* at 571-72.
144. *Id.* at 573.

ments knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment[,]"[145] at least where the teacher is speaking as a private citizen.[146]

2. Matters of Public Record

What counts as a matter of public concern has been an important issue in other kinds of cases as well. For example, *Cox Broadcasting Corporation v. Cohn*[147] involved the publication of the name of a young rape and murder victim in violation of Georgia law.[148] The name was uncovered from an examination of public records[149] and was published in TV broadcasts.[150] The young woman's father sued the network for invasion of privacy.[151]

The TV station claimed that the young woman's name was a matter of public interest, although state public policy said that it was not.[152] The *Cohn* Court understood that there were very important competing considerations involving privacy on the one hand and the ability of the press to cover judicial proceedings on the other.[153] The Court decided to frame the issue narrowly, namely, "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records – more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."[154]

The *Cohn* Court noted that the press has the great responsibility to "report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental opera-

145. *Id.* at 574.

146. Where the speech is offered in the individual's official capacity, a different analysis is employed. *See infra* notes 286-87 and accompanying text (discussing *Garcetti*).

147. 420 U.S. 469 (1975).

148. *See id.* at 471 (discussing Georgia law which "which makes it a misdemeanor to publish or broadcast the name or identity of a rape victim").

149. *Id.* at 472-73.

150. *Id.* at 473-74.

151. *Id.* at 474-75 ("Although the privacy invaded was not that of the deceased victim, the father was held to have stated a claim for invasion of his own privacy by reason of the publication of his daughter's name.").

152. *See id.* at 475 ("[T]he Georgia court countered the argument that the victim's name was a matter of public interest and could be published with impunity by relying on [Georgia law] as an authoritative declaration of state policy that the name of a rape victim was not a matter of public concern.").

153. *Id.* at 491 ("In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society.").

154. *Id.*

tions."[155] According to the Court, the press's responsibility is especially weighty in discussions of judicial proceedings because "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."[156]

In response to the claim that the plaintiff's privacy had been breached though the publication of his daughter's identity, the Court said, "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are . . . events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."[157] In *Cohn*, though, the issue was not whether discussions of the way that the prosecution was fulfilling its legal responsibilities was a matter of public concern, but merely whether the publication of the identity of the victim in particular was a matter of public concern triggering constitutional protection.[158]

The Court justified protecting the publication of the information by suggesting that the state itself must have believed it important that the public have access to the information: "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served."[159] The state presumably believed that the public interest was served by having the information in a public record, although the state obviously did not believe that publication of the victim's name served the public interest, which is why such publication had been expressly prohibited. Thus, the state disagreed with the Court that "a public benefit is performed by the reporting of the true contents of the records by the media[,]"[160] at least insofar as that reporting included a rape victim's name.

Ultimately, the Court was not really trying to determine whether the state in fact believed that publication of a rape victim's name was in the public interest. The *Cohn* Court concluded that "the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."[161] Even if the state had come to the conclusion that such publication injured important private interests without any offsetting benefits for the public, the Court held that the Constitution precluded the state from putting that policy judgment into effect.

The *Cohn* Court recognized that there were important privacy interests at stake, but reasoned that "[i]f there are privacy interests to be protected in

155. *Id.* at 492.

156. *Id.* (citing Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

157. *Id.*

158. *See infra* notes 229-48 and accompanying text (discussing the publication of a name in *B.J.F.*).

159. *Cohn*, 420 U.S. at 495.

160. *Id.*

161. *Id.*

judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information."[162] States might try to protect the information in other ways, e.g., by permitting the records to be sealed.[163] Or, the states could rely on the good judgment of the media.[164] Of course, Georgia was obviously not confident that the media would exercise good judgment, which is why it passed legislation preventing publication of a victim's identity, and it is not clear why the state's balancing of the implicated constitutional interests – including the name within the public records but precluding publication of the victim's identity – was a compromise that the Constitution precluded the state from making.

3. Private Communications

Cohn involved a very public TV broadcast. The media obviously thought both that the general topic and the victim's identity were matters of public interest and concern.[165] Suppose, however, that a particular communication is not broadcast and instead is merely part of a private conversation. Could that subject matter nonetheless be a matter of public concern?

In *Givhan v. Western Line Consolidated School District*,[166] the Court made clear that communications might involve matters of public concern even if they are not published to a wide audience. Bessie Givhan was a teacher who had been fired after complaining in private to her principal about the school's employment practices, which Givhan believed to be racially discriminatory in purpose or effect.[167] The Court rejected that "private expression of one's views is beyond constitutional protection,"[168] and remanded the

162. *Id.* at 496.

163. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1159 (2002) (discussing conditions under which records might be sealed).

164. *See Cohn*, 420 U.S. at 496 ("Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast." (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974))).

165. As to whether the victim's name was of legitimate interest, that is a different question. Some courts have rejected the suggestion that something being "newsworthy" alone makes it a matter of public concern. *See* Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 218-19 (Cal. 1998) ("If 'newsworthiness' is completely descriptive – if all coverage that sells papers or boosts ratings is deemed newsworthy – it would seem to swallow the publication of private facts tort, for 'it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest.'" (citation omitted)).

166. 439 U.S. 410 (1979).

167. *Id.* at 413.

168. *Id.*

case for a determination of whether Givhan "would have been rehired *but for* her criticism."[169]

Here, the Court did not require that the discussion be published in a newspaper or on the radio in order to qualify as a matter of public concern. The Court also did not discuss the contents of Bessie Givhan's comments. One could not tell from the Court's opinion whether she was complaining about her own unfair treatment or, instead, about the school's failure to take adequate steps to achieve a more racially integrated school.[170] Because the content of the speech was not discussed, it was simply unclear after *Givhan* whether an individual who asserted to her employer that she believed that she had been the victim of discriminatory treatment would have been discussing something that would qualify as a matter of public concern and receive First Amendment protection.[171]

---

169. *Id.* at 417; *see also* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (remanding the case for a determination of whether the teacher who lost his job would not have been hired even had he not made certain statements protected by the First Amendment). The *Doyle* Court worried that a "rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Id.* at 285.

170. It is clear from the Fifth Circuit opinion that Givhan was not focusing on the treatment that she herself had received. The Fifth Circuit Court of Appeals described the contents of her complaint to the principal:

> Relatively early in Leach's tenure as principal Givhan gave him a list or lists of what he termed "demands" and she termed "requests." These requests all reflect Givhan's concern as to the impressions on black students of the respective roles of whites and blacks in the school environment. She "requested," among other things: (1) that black people be placed in the cafeteria to take up tickets, jobs Givhan considered "choice"; (2) that the administrative staff be better integrated; and (3) that black Neighborhood Youth Corps ("NYC") workers be assigned semi-clerical office tasks instead of only janitorial-type work.

See Ayers v. W. Line Consol. Sch. Dist., 555 F.2d 1309, 1313 (5th Cir. 1977), *vacated sub nom.* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979).

171. Such an individual might be protected from retaliation as a matter of federal law. *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 43 (2005) ("[M]any nondiscrimination statutes, including Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, explicitly prohibit retaliation").

File: StrasserPaginated.docx Created on: 1/24/13 4:02 PM Last Printed: 11/3/13 8:05 PM

D. Distinguishing Between Matters of Public Concern and Matters of Mere Private Interest

Connick v. Myers[172] provided the Court with the opportunity to provide more guidance with respect to which matters were of public concern and which were not. At issue were the actions of Sheila Myers, an Assistant District Attorney in New Orleans,[173] who "strongly opposed" her transfer to a different section of the criminal court.[174] Myers discussed with "Dennis Waldron, one of the first assistant district attorneys," her opposition to the move, among other matters.[175] Myers, who was told that many of her concerns were not shared by others in the office,[176] "prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[177] She distributed the questionnaire, an action Waldron interpreted as "creating a 'mini-insurrection' within the office."[178] Harry Connick, the District Attorney, then fired Myers, allegedly because of her refusal to accept the transfer.[179]

Myers claimed that she had been fired because of her exercise of the protected right of free speech.[180] The district court found that the ostensible reason for her termination had been pretextual and that she had actually been fired for distributing a questionnaire involving matters of public concern.[181] Because the state failed to establish that the questionnaire's distribution caused substantial interference in the workplace, the district court held that Myers had to be "reinstated, and awarded backpay, damages, and attorney's fees."[182]

On appeal, Connick argued that the questionnaire "concerned only internal office matters and that such speech is not upon a matter of 'public concern.'"[183] The Court accepted Connick's assessment for the most part,[184] although the Court rejected the contention that Myers's speech "was wholly without First Amendment protection[.]"[185]

172. 461 U.S. 138 (1983).
173. *Id.* at 140.
174. *Id.*
175. *Id.* at 141.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 142.
182. *Id.* at 141-42.
183. *Id.* at 143.
184. *See id.* ("[T]here is much force to Connick's submission.").
185. *Id.*

The Court explained that Myers's speech was afforded constitutional protection, although the degree to which it was protected depended upon whether the speech at issue was a matter of public concern or, instead, merely of private interest. Speech about matters of merely private interest is not "totally beyond the protection of the First Amendment."[186] However, it is important to understand the limited degree of protection the Court was affording the private speech – the Court was merely denying that such speech "falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction."[187] The Court explained that "an employee's false criticism of his employer on grounds not of public concern may be cause for his discharge but would be entitled to the same protection in a libel action accorded an identical statement made by a man on the street." [188] For example, a false assertion about an important public official would not be libelous, absent actual malice.[189]

While the constitutional protection afforded to private speech might mean that an employee would not be liable for defamation damages for her false description of a high-ranking government employee, it is nonetheless true that the job protection afforded by the First Amendment for speech on matters of mere private interest is nonexistent in most cases. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[190] In many cases involving private speech made by a public employee, First Amendment protections have not even been triggered and thus the federal courts are not the appropriate forum to hear the personnel disputes.[191]

Yet, some of the speech in Myers's questionnaire did involve matters of public concern, and there had to be some way to determine which speech fell into the public concern category and which did not.[192] The Court explained, "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as re-

186. *Id.* at 146-47.

187. *Id.* at 147.

188. *Id.*

189. *See id.* at 162.

190. *Id.* at 146.

191. *See id.* at 147 ("[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." (citing Bishop v. Wood, 426 U.S. 341, 349-50 (1976))).

192. *See id.* at 149.

File: StrasserPaginated.docx Created on: 1/24/13 4:02 PM Last Printed: 11/3/13 8:05 PM

vealed by the whole record."[193] When viewing the questionnaire in light of the totality of the circumstances, the Court considered "the questions pertaining to the confidence and trust that Myers' coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court."[194]

Yet, the Court's conclusion that the questionnaire as a general matter did not involve matters of public concern is rather surprising. The answers to the questionnaire on several of these issues would cast light on the operation of the District Attorney's office, which would be of legitimate interest to the public.[195] However, the Court decided that only one of the questions on the questionnaire concerned a matter of public concern, namely, whether any of the assistant district attorneys ever felt pressured to work in political campaigns of those supported by the office.[196]

If only one of the fourteen questions[197] involved a matter of public concern, then the Court's decision that Myers had not been fired for addressing a matter of public concern might seem correct because almost all of the questionnaire involved matters of merely private interest.[198] However, a closer examination of the facts suggests that Myers may well have been fired for her discussions of matters of public concern. Connick had objected in particular to two questions on the questionnaire: whether the assistant district attorneys had confidence in and could rely on their superiors and whether any of the assistant district attorneys had ever felt pressured to work in political campaigns.[199] Even if one assumes that the level of confidence in the trustworthiness and reliability in the assistant district attorneys' superiors was not a

193. *Id.* at 147-48.

194. *Id.* at 148.

195. *See id.* at 156 (Brennan, J., dissenting) ("It is hornbook law, however, that speech about 'the manner in which government is operated or should be operated' is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment." (citing Mills v. Alabama, 384 U.S. 214, 218 (1966))).

196. *Id.* at 149 (majority opinion).

197. *See id.* at app. A.

198. The Court seemed to believe that the questionnaire had been distributed to provide the basis for a no-confidence vote. *See id.* at 152 ("[I]t requires no unusual insight to conclude that the purpose, if not the likely result, of the questionnaire is to seek to precipitate a vote of no confidence in Connick and his supervisors."). Further, the Court implied that the analysis would have been different if the subject matter had been more clearly a matter of public concern. *See id.* ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.").

199. *Id.* at 141 ("Connick particularly objected to the question which inquired whether employees 'had confidence in and would rely on the word' of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.").

matter of public concern,[200] that would mean that half of the questions of particular concern to the District Attorney who fired Myers involved a matter of public concern. One might then expect at least a remand to discern whether that question in particular had played a substantial role in the firing.[201] Instead, the Court upheld the firing, suggesting that when "close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate."[202]

In other contexts, the Court has been rather worried about how political patronage can compromise First Amendment rights, and the charge that there was pressure to work in political campaigns is of great public concern. In *Rutan v. Republican Party of Illinois*,[203] the Court explained,

> Employees who find themselves in dead-end positions due to their political backgrounds . . . will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they actually hold, in order to progress up the career ladder. Employees denied transfers to workplaces reasonably close to their homes until they join and work for [a particular party] will feel a daily pressure from their long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[204]

Arguably, the questions that were of special concern to Connick (as well as some of the other questions) involved matters of public concern. Of course, even if the questions that elicited a negative reaction from Connick had involved matters of public concern, that would not have resolved whether the speech at issue was constitutionally protected. An additional considera-

---

200. *But see* Eugene Volokh, Response, *The Trouble with "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 577 (2011):

> Yet *Connick* involved Assistant District Attorney Myers's criticisms of the competence, ethics, and trustworthiness of high-level D.A.'s office employees, coupled with requests for further information relevant to such criticisms. Such speech deals with a topic that could be of intense public concern, and such speech is quite relevant to how "democratic public opinion" could be formed.

201. *Connick*, 461 U.S. at 141 (discussing whether the employee's engaging in First Amendment activities had played a substantial role in the dismissal).

202. *Id.* at 151-52.

203. 497 U.S. 62 (1990).

204. *Id.* at 73.

tion would have involved the degree to which the distribution of the questionnaire had disrupted or would be likely to disrupt office operations.

Employers are not required to wait until harm has occurred before acting to prevent a breakdown in office operations.[205] Thus, the fact that the district court had already found that there was no demonstration that the questionnaire had undermined office efficiency generally or even Myers's ability to perform effectively[206] did not settle whether there was a reasonable likelihood that Myers's questionnaire would disrupt the workplace. Perhaps when finding that the questionnaire did not involve a matter of public concern the Court was instead implicitly suggesting that the questionnaire was too disruptive, so it did not matter whether that questionnaire merely involved matters of interest to Myers.

Yet, merely because it is not necessary to establish that harm actually occurred to justify a firing does not mean that an individual can be fired because of the mere possibility that a particular communication would lead to decreased efficiency in the office.[207] There was a possibility that Pickering would not have been able to work as efficiently with his colleagues after his letter to the editor was printed, although the Court suggested that such fears were unjustified.[208] There was some possibility that the relationship between Givhan and her principal had been damaged as a result of her conversation, but the question for the court on remand in that case was whether Givhan would have been rehired but for her comments[209] rather than whether her comments might reasonably have been thought to impair her relationship with her employer.

The *Connick* Court did not remand the case to address whether the questionnaire was likely to cause a breakdown in office operations.[210] Indeed, it might be noted that the questionnaire might have improved office operations. Suppose, for example, that the answers to the questionnaire confirmed Wal-

205. *Connick*, 461 U.S. at 152 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.").

206. *See id.* at 142 (noting the district court's finding that "the state had not 'clearly demonstrated' that the survey 'substantially interfered' with the operations of the District Attorney's office"); *id.* at 151 ("[T]here is no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities.").

207. *See* Waters v. Churchill, 511 U.S. 661, 673 (1994) (discussing "government employers' reasonable predictions of disruption").

208. *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 569-70 (1968) ("The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here.").

209. *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 417 (1979).

210. *See Connick*, 461 U.S. at 154.

dron's view that many in the office did not share Myers's concerns. In that event, office efficiency might have been promoted rather than undermined.

Connick also suggests that a speaker's motivation may affect whether her speech is a matter of public concern – the Court noted that "the focus of Myers's questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors."[211] Yet, the Court did not explain why the individual's motivation would have affected whether particular contents involved matters of public concern and, in any event, failed to consider some of the ways that this "ammunition" might have been used.

The District Attorney feared that the next battle would take place in the press – he worried that the "question concerning pressure to work in political campaigns . . . would be damaging if discovered by the press."[212] His fear was understandable. There might well have been a public furor if it were reported in the press both that the assistant district attorneys felt pressured to work in political campaigns and that those same attorneys had no confidence in the abilities or trustworthiness of their superiors. The public might well have wondered about how justice was being administered in New Orleans, which could have resulted, in the words of the *Cohn* Court, in "the beneficial effects of public scrutiny upon the administration of justice."[213]

Suppose that the responses to the questionnaire established that Myers's reactions to office conditions were not idiosyncratic but, instead, were similar to those of many of the other individuals working there. If those results were reported publicly, then there might well have been some negative short-term effects. But those short-term negative effects would likely have been the result of public furor over how the District Attorney's office was run, and it is hard to imagine how the Court could describe results that might have led to a public furor over the operations of the District Attorney's office as involving matters of mere private interest. Even if the Court had been correct that only one of the questionnaire questions had been a matter of public concern, the existing jurisprudence would have required a remand at the very least to determine whether Myers's having asked that question had played an important role in her firing.

The Court's standard with respect to what counts as a matter of public interest often varies from that articulated in *Connick*, as illustrated by the Court's opinion in *Rankin v. McPherson*.[214] *Rankin* involved a remark made by Ardith McPherson, who was a "deputy in the office of the Constable of Harris County, Texas."[215] Upon hearing that there had been an attempt to

211. *Id.* at 148.

212. *Id.* at 141.

213. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) (citing Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

214. 483 U.S. 378 (1987).

215. *Id.* at 380.

assassinate President Reagan, she said, "[I]f they go for him again, I hope they get him."[216] Her comment was made to her boyfriend[217] but was apparently overheard by a deputy constable who, unbeknownst to her, was in the room at the time.[218] The deputy reported the remark to Constable Rankin, who fired McPherson.[219]

The *Rankin* Court considered the statement in context and found that it "plainly dealt with a matter of public concern[,]"[220] expressly rejecting that the fact that it had been made in a private conversation operated to "vitiate the status of the statement as addressing a matter of public concern."[221] The Court noted that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[222] Further, once it is established that speech concerns a matter of public interest, then the fact that the speech was part of a private conversation "will rarely, if ever, justify discharge of a public employee."[223]

There was no evidence that the content of the speech would have impaired office efficiency,[224] and Rankin had not been thinking of workplace efficiency considerations when firing McPherson.[225] Indeed, in his concurrence, Justice Powell noted that the "risk that a single, offhand comment directed to only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on the fanciful."[226]

The *Rankin* Court focused on the subject matter of the speech – the attempted assassination of President Reagan – and concluded that the topic was a matter of great concern.[227] Neither the viewpoint nor the context in which the comments were made played much a role in the analysis, which was surprising given the *Connick* requirement that "the content, form, and context of a given statement, as revealed by the whole record"[228] be considered.

---

216. *Id.* at 381.

217. *Id.*

218. *Id.*

219. *Id.* at 381-82.

220. *Id.* at 386. *But see id.* at 397 (Scalia, J., dissenting) ("McPherson's statement does not constitute speech on a matter of 'public concern.'").

221. *Id.* at 386 n.11 (majority opinion) (citing Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414-16 (1979)).

222. *Id.* at 387.

223. *Id.* at 388 n.13.

224. *Id.* at 388-89 ("While McPherson's statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office.").

225. *Id.* at 389 ("Constable Rankin testified that the possibility of interference with the functions of the Constable's office had *not* been a consideration in his discharge of respondent and that he did not even inquire whether the remark had disrupted the work of the office.").

226. *Id.* at 393 (Powell J., concurring).

227. *Id.* at 386 (majority opinion).

228. Connick v. Myers, 461 U.S. 138, 147-48 (1983).

The Court was given another opportunity to clarify the criteria by which to determine whether speech implicated a matter of public concern in *The Florida Star v. B.J.F.*[229] The issue in *B.J.F.* revolved around a Florida statute prohibiting the publication of the name of a victim of a sexual offense.[230] This time the information had not been part of a public judicial record but, instead, had been obtained from a police report placed in a pressroom.[231]

Rather than use the opportunity to clearly articulate the standard for determining whether speech is a matter of public concern or private concern, the Court focused on whether the state could impose liability for publication of truthful speech. As had been true in *Cohn*,[232] the *B.J.F.* Court listed some of the ways that the government could keep such information private: "The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination."[233] After discussing these options, the Court concluded that where "information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."[234]

In this case, the *B.J.F.* Court appreciated that the State had significant interests in preventing publication of the victim's identity[235] but nonetheless refused to uphold liability.[236] The Court did not examine whether the published information was a matter of public concern, instead focusing on the state's imposition of liability for the publication of "truthful speech."[237] The Court worried that "if liability were to be imposed, self-censorship would result[,]"[238] downplaying the fact that the publication of the victim's name

229. 491 U.S. 524 (1989).

230. *Id.* at 526.

231. *Id.* at 527.

232. *See supra* notes 159-163 and accompanying text.

233. *B.J.F.*, 491 U.S. at 534.

234. *Id.*

235. *Id.* at 537 ("At a time in which we are daily reminded of the tragic reality of rape, it is undeniable that these are highly significant interests, a fact underscored by the Florida Legislature's explicit attempt to protect these interests by enacting a criminal statute prohibiting much dissemination of victim identities.").

236. *Id.* at 541 ("[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order, and that no such interest is satisfactorily served by imposing liability under [a state statute] to appellant under the facts of this case.").

237. *Id.* at 538.

238. *Id.*

was against the paper's internal policy anyway, so the imposition of liability would presumably not do much additional chilling.[239]

Both the *B.J.F.* majority and Justice Scalia in concurrence emphasized that Florida had prevented publication by the press but had not, in addition, punished publication of the information by private individuals. The Court wrote, "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the small-time disseminator as well as the media giant."[240] Justice Scalia argued in a similar vein: "I would anticipate that the rape victim's discomfort at the dissemination of news of her misfortune among friends and acquaintances would be at least as great as her discomfort at its publication by the media to people to whom she is only a name."[241] But such a view ignores some of the actual harms that the state was likely trying to prevent.

When B.J.F.'s name was published, she began receiving harassing phone calls.[242] Indeed, the day after publication, B.J.F. received a call from someone threatening to rape her again.[243] At this point, the rapist had not been caught,[244] so B.J.F. had no way to know whether the caller was her rapist or was, instead, someone committing a prank. While it is fair to suggest that "gossip"[245] might be hurtful, and it would be uncomfortable and embarrassing for B.J.F. to meet with friends and acquaintances who had (or might have) become aware of her ordeal,[246] those feelings would not compare to the absolute terror that resulted after the general dissemination of the information and the resulting harassing calls. While there would be no guarantee that a friend or acquaintance would not also decide to make a prank call, the state reasonably may have believed that such an event was much less likely to take place if there were no general dissemination of the information.

Justice White's dissent addressed the issue that would seem to have been central in light of the prevailing jurisprudence, namely, whether the inclusion of B.J.F.'s name was a matter of public concern. He concluded, "There is no public interest in publishing the names, addresses, and phone numbers of persons who are the victims of crime."[247] Arguably, the publication of a name adds credibility to a story,[248] although there might be other

239. *Id.* at 528 ("In printing B.J.F.'s full name, The Florida Star violated its internal policy of not publishing the names of sexual offense victims.").

240. *Id.* at 540.

241. *Id.* at 542 (Scalia, J., concurring).

242. *Id.* at 542-43 (White, J., dissenting).

243. *See id.* at 543.

244. *Id.* at 542.

245. *Id.* (Scalia, J., concurring).

246. *See id.*

247. *Id.* at 553 (White, J., dissenting).

248. Clay Calvert & Mirelis Torres, *Staring Death in the Face During Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity*

ways to enhance credibility without incurring some of the risks resulting from exposure of the victim's identity.

Perhaps it does not matter whether the communication involves a matter of public concern as long as the information is truthful.[249] But if that is so and if the First Amendment treats the media and private individuals similarly,[250] then one would expect much more protection for public employees who make *accurate* criticisms on the job – one would expect that punitive measures taken against such individuals, such as firings or demotions, would "require[] the highest form of state interest to sustain [their] validity[,]"[251] but that is not the case.[252]

The Court added yet another twist to the difficulties attendant on distinguishing between matters of public versus merely private interest in *Waters v. Churchill*.[253] The *Waters* Court addressed the following difficulty: suppose that an employer fires a public employee for her speech on what is believed to be a matter of private concern but which turns out to be speech involving a matter of public concern.[254] Should the reviewing court examine the employment action in light of the employer's understanding that the speech was

of Authenticity, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 87, 97 (2011) ("[U]sing real names adds credibility to a story.").

249. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 101-02 (1979) ("[A] penal sanction for publishing lawfully obtained, truthful information . . . requires the highest form of state interest to sustain its validity."). *But see* Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (permitting a promissory estoppel claim to be advanced against a newspaper for publishing truthful information notwithstanding its promise to refrain from publishing that information).

250. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 773 (White, J., concurring) ("[T]he First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech."); *id.* at 783 (Brennan, J., dissenting) ("We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection."); *see also B.J.F.*, 491 U.S. at 540 ("When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant."); *id.* at 542 (Scalia, J., concurring) (suggesting that the media and private individuals must be held to the same standard).

251. *Daily Mail Publ'g Co.*, 443 U.S. at 102.

252. *See, e.g.*, Waters v. Churchill, 511 U.S. 661, 681 (1994) (noting that "potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had").

253. 511 U.S. 661.

254. *Id.* at 664 ("In this case, we decide whether the *Connick* test should be applied to what the government employer thought was said, or to what the trier of fact ultimately determines to have been said.").

a matter of mere private concern or instead in light evidence that the speech in fact involved matters of public concern?[255]

At issue were comments made by Cheryl Churchill to Melanie Perkins-Graham about what it was like working in the obstetrics department of a public hospital.[256] Perkins-Graham described some of Churchill's comments as "unkind and inappropriate."[257] Further, Perkins-Graham said to Churchill's superior that management "could not continue to 'tolerate that kind of negativism' from Churchill."[258]

Churchill had a much different understanding of the conversation. Churchill had been concerned about a particular hospital policy on "cross-training."[259] Under this policy, "nurses from one department could work in another when their usual location was overstaffed."[260] This "policy threatened patient care because it was designed not to train nurses but to cover staff shortages."[261] Churchill had also suggested that some of the "staffing policies threatened to 'ruin' the hospital because they 'seemed to be impeding nursing care.'"[262] Two individuals who overheard the conversion corroborated Churchill's description of it.[263]

The proper characterization of the conversation would seem to be important. If it was of mere private concern, e.g., merely involved Churchill's badmouthing her superiors out of anger or spite because she objected to a change in her duties,[264] then the speech would not be protected and great deference would be given to the employer decision to terminate.[265] However, if the speech involved a matter of public concern, e.g., patient safety, then the speech would have much more protection. The employer would have to

255. *See id.* at 668 ("Should the court apply the *Connick* test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for itself?").

256. *See id.* at 664-65.

257. *Id.* at 680 (internal quotations omitted).

258. *Id.*

259. *Id.* at 666 (internal quotations omitted).

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* ("Koch's and Welty's recollections of the conversation match Churchill's.").

264. *See* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 466 (1995) ("[P]rivate speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer.").

265. *See Waters*, 511 U.S. at 674 ("[W]e have refrained from intervening in government employer decisions that are based on speech that is of entirely private concern.").

show that it was reasonable to believe that the speech would lead to disruption at the workplace.[266]

The Court remanded the case for a determination of whether Churchill was fired for her speech on the occasion in question or, instead, for other reasons.[267] Nonetheless, the *Waters* Court seemed to undermine the "speech on matters of public concern" jurisprudence in a few different respects. First, the Court would not even say whether "Churchill's criticism of cross-training . . . was speech on a matter of public concern[,]"[268] which is surprising because hospital policies affecting patient care would seem to be of great interest to the public. As discussed in detail below, the Court circumvented this determination by concluding it was unprotected as "disruptive" speech.

Even it if was a matter of public concern, however, the speech would not be protected if it was "disruptive."[269] That on its face is not a change in the jurisprudence, because the *Pickering* Court also considered the effect the speech would have on the workplace.[270] The surprising part of the *Waters* analysis was in what would count as disruptive – the Court suggested that the standard would be met if the speech discouraged someone from transferring into the department.[271] But that means that if Churchill was issuing a warning about patient safety concerns and those concerns made someone reluctant to join the department, then Churchill could be fired for addressing a matter of great public concern.

It is one thing to say that she should have been fired for her comments that were of merely private interest.[272] But it is quite another to suggest that paradigmatic speech on matters of public concern would justify a firing

266. *See id.* at 673.

267. *Id.* at 682 ("A reasonable factfinder might therefore, on this record, conclude that petitioners actually fired Churchill not because of the disruptive things she said to Perkins-Graham, but because of nondisruptive statements about cross-training that they thought she may have made in the same conversation, or because of other statements she may have made earlier.").

268. *Id.* at 680; *see also id.* (describing the decision as to whether this was a matter of public concern was "something we [members of the Court] need not decide").

269. *Id.* at 681.

270. *See, e.g.*, Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 571 (1968) ("In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board.").

271. *Waters*, 511 U.S. at 680 ("Discouraging people from coming to work for a department certainly qualifies as disruption.").

272. *See id.* at 681 (suggesting that the discharge would be upheld if it was based on "the part of the speech that was . . . not on a matter of public concern").

File: StrasserPaginated.docx Created on: 1/24/13 4:02 PM Last Printed: 11/3/13 8:05 PM

merely because it was negative and such negative speech might make the department a less attractive place to work.[273]

The *Waters* opinion reduced protection for matters of public concern in yet another respect by asserting that even if the comments on a matter of public concern are not disruptive, the firing will still be upheld as long as the employer reasonably believed that the comments were of private interest.[274] In addition, the *Waters* plurality noted that Churchill's firing would be upheld as long as she was "discharged . . . only for the part of the speech that was either not on a matter of public concern, or on a matter of public concern but disruptive, [and it would then be] . . . irrelevant whether the rest of the speech was . . . both on a matter of public concern and nondisruptive."[275]

After *Waters,* the jurisprudence on the First Amendment protections for a public employee speaking as a private citizen[276] on a matter of public concern[277] is that such an employee or independent contractor[278] cannot have her employment terminated because of her speech, as long as the continued contractual relationship would not impair the "efficiency, efficacy, and responsiveness of service to the public[.]"[279] In the case of a contractor who does not have day-to-day contact with the employer, it is less likely that speech on matters of public concern would impair effectiveness.[280] Nonetheless, if such a showing of impaired effectiveness could be made, the severance of the contractual relationship would be upheld.[281]

---

273. *But see* United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 470 (1995) (noting that "immediate workplace disruption" is required (citing *Waters*, 511 U.S. at 664)).

274. *See Waters*, 511 U.S. at 677 ("We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer *reasonably* found them to be.").

275. *Id*. at 681.

276. The individual who is speaking in her official capacity does not enjoy this First Amendment protection. Garcetti v. Ceballos, 547 U.S. 410, 424 (2006) ("[T]he First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.").

277. *See* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 671 (1996) ("Umbehr spoke at the Board's meetings, and wrote critical letters and editorials in local newspapers regarding the County's landfill user rates, the cost of obtaining official documents from the County, alleged violations by the Board of the Kansas Open Meetings Act, the County's alleged mismanagement of taxpayers' money, and other topics.").

278. *See id.* at 673 ("[I]ndependent contractors are protected, and . . . the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection.").

279. *Id.* at 674.

280. *See id.* at 678 (agreeing that "speech threatens the government's interests as contractor less than its interests as employer").

281. *Id.* at 685 ("The Board will also prevail if it can persuade the District Court that the County's legitimate interests as contractor, deferentially viewed, outweigh the free speech interests at stake.").

The Court continues to send mixed messages about the degree to which discussions on matters of public concern should be protected. In *Bartnicki v. Vopper*,[282] the Court suggested that the First Amendment protected the publication of illegally intercepted speech[283] that was accurate[284] and on a matter of public concern.[285] However, in *Garcetti v. Ceballos*,[286] the Court explained, "Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."[287] But *Garcetti* means that the state can punish an individual for speaking about matters of public concern even when her criticisms are accurate, if she is doing so in her official capacity. But it is not clear why the state's interest in the articulation of accurate information on matters of public concern is any less weighty merely because a government employee is fulfilling her duty as an employee by speaking.

The Court's characterization of matters of public concern outside of the defamation context has not been especially helpful in delimiting the category. Sometimes, the Court has offered a very forgiving standard by implying that almost anything contained in a public record qualifies as a matter of public interest. At other times, the Court has implied that the reason that someone has discussed a particular topic might itself determine whether that subject matter is of public interest. In addition, the Court has sent very mixed signals about the value of speech on matters of public concern, sometimes implying that such speech must be protected at great cost and at other times suggesting that such speech can readily be sacrificed to promote a variety of other interests.

E. Snyder and an Inclusive Test for Matters of Public Concern

The Court continued its inconsistent approach to what constitutes a matter of public concern in *Snyder v. Phelps*,[288] where the Court offered a very forgiving standard. The *Snyder* Court wrote, "Speech deals with matters of

282. 532 U.S. 514 (2001).

283. The publisher of the information was not the individual who had illegally intercepted the transmission. *Id.* at 525 ("[R]espondents played no part in the illegal interception. Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception.").

284. *See id.* at 527 ("As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979))).

285. *See Bartnicki*, 532 U.S. at 534 ("[P]rivacy concerns give way when balanced against the interest in publishing matters of public importance.").

286. 547 U.S. 410 (2006).

287. *Id.* at 418-19.

288. 131 S. Ct. 1207 (2011).

public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,'[289] or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'"[290] Such a formulation would seem to include a great deal, since "any matter of political, social or other concern to the community" would include a whole host of subjects including, for example, a local company's bankruptcy.

Yet, the *Snyder* Court argued that *Dun & Bradstreet* "provides an example of speech of only private concern,"[291] notwithstanding that a local company's bankruptcy would presumably be of social and financial concern to many members of the community. The *Snyder* Court quoted with approval the *Dun & Bradstreet* Court's claim that "information about a particular individual's credit report 'concerns no public issue' [and is] . . . 'speech solely in the individual interest of the speaker and its specific business audience.'"[292] Indeed, the *Snyder* Court believed its analysis of *Dun & Bradstreet* confirmed by the fact that "the particular report was sent to only five subscribers to the reporting service, who were bound not to disseminate it further." [293]

The *Snyder* Court's analysis illustrates how confusing the "matters of public concern" jurisprudence is. First, it is of course true that a company's bankruptcy would not merely affect the speaker and the audience but would affect a host of other individuals too. Further, the *Snyder* Court failed to consider why there was a confidentiality agreement with respect to the credit report. If that information would not have been of interest to anyone else, then there would have been no reason to preclude the recipients of the information from spreading the word. (No one would have been interested anyway.) The only reason that the confidentiality condition was included was that the information was valuable, i.e., would be of interest to others.

As *Snyder* further illustrates, the Court has offered an inconsistent approach regarding what constitutes a matter of public concern, both with respect to what qualifies and with respect to how much protection such discussions should be afforded. The existing jurisprudence virtually guarantees confusion in the lower courts and differential treatment of relevantly similar cases.

III. CONCLUSION

The *NYT* Court emphasized the importance of protecting discussions of matters of public concern, and the Court expanded the definition of and pro-

289. *Id.* at 1216 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

290. *Id.* (quoting San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

291. *Id.*

292. *Id.* (quoting Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985)).

293. *Id.* (citing *Dun & Bradstreet*, 472 U.S. at 762).

tection for matters of public concern in various cases following that decision. However, in *Gertz*, the Court changed direction, belying its commitment to encourage the robust exchange of ideas and views on matters affecting the public welfare.

The Court continued to offer an inconsistent approach in subsequent cases. In *Pickering*, the Court expressly recognized that state employees may have special insights on matters affecting the public and that they must be afforded protection when seeking to educate the public. While recognizing that speech on public matters cannot be protected at all costs, the Court nonetheless erred on the side of protecting such speech. In cases since then, however, the Court has manifested less and less of a commitment to protecting speech on matters of public concern.

Perhaps most disappointing in this area has been the Court's unwillingness to offer helpful criteria in identifying what counts as a matter of public concern. Sometimes, the Court implies that accurate information must be protected. At other times, the Court has suggested that non-confidential, accurate information about government functioning need not be protected if revealing that information would be disruptive, even if the disruption that would result would be due to the public furor in reaction to the disclosure. Information that would seem paradigmatically about a matter of public concern, e.g., about whether a local company had filed for bankruptcy, is described as being of merely private interest. Information that would seem paradigmatically private, e.g., the identity of a rape victim, is protected when divulged. In short, the Court has been sending mixed signals about which information qualifies as a matter of public concern and about how much protection matters of public concern should receive.

The Court's mixed signals not only provide no guidance to lower courts but also suggest to those wishing to discuss matters of general importance that they may be doing so at their own risk. The Court must offer clarity about both what counts as a matter of public concern and about the kind of protection that its discussion will receive; else, the public will be denied access to information that affects its interests with all of the consequent costs that a lack of such information is sure to bring.