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Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category

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Consider the following scenario. After several bouts of severe headaches, a woman visits her doctor to seek relief. The physician orders a series of expensive tests covered by Medicare and supplemental insurance; ultimately, he prescribes a common medication for her condition. Skeptical of the necessity of such elaborate treatment and resentful of the inconvenience and discomfort that it entails, the patient calls her daughter, a neurologist who lives several hundred miles away. From her mother's account, the neurologist concludes that the doctor could readily have arrived at the same diagnosis without the tests to which her mother was subjected. Upset, the mother contacts the chief administrator of the hospital with which the doctor is affiliated. She tells the administrator that her doctor "orders useless tests on people just to line his pockets." Upon learning of the accusation, the doctor brings a suit for defamation.

Obviously, this spare description of these hypothetical events does not establish whether the patient will be found liable for defamation or for how much. A privilege under state law, for example, might defeat the suit. Apart from special circumstances, however, it appears that the magnitude of recovery in such a case may well depend on a court's characterization of whether the patient's assertion involves either a public or private concern. At a minimum, designation as a matter of private concern drastically lowers the level of fault that a plaintiff must show in order to recover presumed or punitive damages.¹ In addition, a finding of a private concern may eliminate the plaintiff's

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1. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); see also *infra* notes 34-46 and accompanying text.

constitutional burden of proving falsity.² Moreover, the United States Supreme Court has intimated that other barriers to recovery in defamation actions may be lightened or removed by the absence of a public concern.³

Given the weight placed on the determination of public or private concern classification, a would-be speaker might reasonably hope for a reliable way of anticipating to which compartment her message would be assigned. Or having blurted her defamatory comment without the benefit of legal consultation, a defendant contemplating settlement might at least expect a confident assessment of the odds and scope of her potential exposure. A decade-and-a-half after the Supreme Court injected the public/private concern dichotomy into defamation doctrine, however, such assurance remains unavailable. The struggle by lower courts to interpret the Court's terse pronouncements on the distinction between public and private concerns has not crystallized into a useful methodology. Rather, courts have generally proceeded by way of ad hoc analyses or *ipse dixit* conclusions. The inability of courts to translate this doctrine into a lucid framework, however, does not represent a failure of judicial imagination. Instead, this Article contends, the enterprise was destined to founder because of the inherent indeterminacy of the distinction between public and private concerns in defamatory expression.

Part I of the Article traces the route to the Court's decision to add the public/private concern inquiry to the complex⁴ body of defamation doctrine, as well as the potential impact of this distinction beyond the context in which it was first promulgated. Part II reviews courts' efforts to categorize defamatory speech in a rational way, seeking to demonstrate that this goal has inevitably eluded them. From a broader perspective, Part III examines the Court's longstanding ambivalence toward elevating speech of a presumably public nature over other expression. Against this backdrop, the Court's decision to distinguish between public and private concerns in defamation amounts to an avoidable choice, not an obligatory standard. At the same time, as Part IV

2. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); see also *infra* notes 58-63 and accompanying text.

3. See *infra* notes 64-69 and accompanying text.

4. The multiplicity of rules and considerations in the Court's defamation regime has been harshly criticized. See, e.g., Robert M. Ackerman, *Bringing Coherence to Defamation Law Through Uniform Legislation: The Search for an Elegant Solution*, 72 N.C. L. REV. 291, 293 (1994) (First Amendment jurisprudence contributing to "disarray" and "chaotic nature" of defamation law); George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 56 (1992); Sheldon W. Halpern, *Of Libel, Language, and Law: New York Times v. Sullivan at Twenty-Five*, 68 N.C. L. REV. 273, 276 (1990) (proposing alternative to "fragmented, confusing and unsatisfying array of criteria and requirements"); *Developments in the Law—The Law of Cyberspace*, 112 HARV. L. REV. 1610, 1615 (1999); Patricia A. Thompson-Hill, Note, *Dun & Bradstreet, Inc. v. Greenmoss Builders: "Matters of Private Concern" Give Libel Defendants Lowered First Amendment Protection*, 35 CATH. U. L. REV. 883, 927 (1986) (libel litigants confronted with "complex, treacherous defamation framework").

shows, withdrawal of this element from defamation doctrine would not require wholesale abolition of the public/private distinction in free speech jurisprudence. The Article concludes that restoration of the regime that prevailed prior to the public/private concern criterion would restore a more defensible balance to the constitutional law of defamation.

I. THE PATH TO AND FROM *DUN & BRADSTREET*

Whether defamatory speech implicates a public or private concern emerged as a touchstone for protection in the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁵ The decision followed a decade in which the Court had repeatedly sought to reconcile society's interest in "free and full interchange of potentially useful information and ideas"⁶ with the individual's stake in redressing "invasion of the interest in reputation and good name."⁷ *Dun & Bradstreet* and subsequent decisions have left lingering uncertainty over the extent to which the presence of a private concern liberates state defamation laws from constitutional restrictions other than the limitations on presumed and punitive damages lifted in that case.

A. From New York Times to Gertz: *The Primacy of Status*

Prior to 1964, the Supreme Court regarded libel as entirely beyond the pale of First Amendment protection.⁸ Defendants were thus subjected to the harsh regime of the common law, which afforded scant protection to defamatory speech.⁹ In most jurisdictions, a publisher of libel was held strictly liable unless it could be proven that the statement was either true or privileged.¹⁰

5. 472 U.S. 749 (1985).

6. David W. Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 200 (1976).

7. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 737 (4th ed. 1971).

8. See, e.g., *Times Film Corp. v. Chicago*, 365 U.S. 43, 48 (1961); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (stating that libelous speech is not "within the area of constitutionally protected speech"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

9. See RODNEY A. SMOLLA, LAW OF DEFAMATION 1-6 (1998) (defamation under common law "was essentially a strict liability tort with most rules stacked in the plaintiff's favor"); see generally Joel D. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1351-64 (1975) (discussing the strict liability aspect of the American common law of defamation prior to 1964); Patrick J. McNulty, *The Gertz Fault Standard and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation*, 35 DRAKE L. REV. 51, 59-61 (1985) (noting that a plaintiff need not prove intent or negligence at common law).

10. See *Peck v. Tribune Co.*, 214 U.S. 185, 189 (1909) (stating that "[i]f the

*New York Times Co. v. Sullivan*¹¹ revolutionized defamation law by supplanting a portion of common law liabilities with abundant constitutional protection for criticism of public officials. Under the actual malice requirement, a public official could recover damages¹² for a defamatory falsehood relating to official conduct only if it could be shown that the defendant either knew that the statement was false or had acted with reckless disregard of whether the statement was false.¹³ The Court rendered this standard even more formidable by demanding that a plaintiff demonstrate with "convincing clarity," rather than the normal preponderance of evidence, that the defendant had acted with actual malice.¹⁴ While *New York Times* did not wholly eradicate the damages of self-censorship,¹⁵ the decision was widely hailed as a landmark defense of freedom of speech and press.¹⁶

publication was libellous [sic] the defendant took the risk . . . [because a] libel is harmful on its face"); McNulty, *supra* note 9, at 59 (noting that "[a] defendant is strictly liable, absent the defenses of truth or privilege, even though his conduct may be innocent or reasonable"); see also LAURENCE H. ELDRIDGE, *THE LAW OF DEFAMATION* § 5, at 15 (1978) (noting that the common law of defamation in the United States was "a part of the tort law of 'strict liability' or 'liability without fault'" until 1974 (footnotes omitted)). The severity and complexity of the common law of defamation have been widely criticized. See, e.g., Eaton, *supra* note 9, at 1350-51, 1356 & n.24 (discussing the common law of defamation and the wide criticism by legal writers of its complexities, anomalies, and inconsistencies); Robertson, *supra* note 6, at 230 ("A bewildering array of rules governed the award of damages for defamation at common law, befitting the complex scheme that determined liability in the first instance." (footnote omitted)).

11. 376 U.S. 254 (1964).

12. The actual malice rule was soon held to apply to criminal cases as well. See *Garrison v. Louisiana*, 379 U.S. 64, 67-75 (1964).

13. *New York Times*, 376 U.S. at 279-80.

14. *Id.* at 279-80. This evidentiary barrier was bolstered by several subsequent holdings. *Garrison* held that the clear and convincing evidence standard entails proof that the statements were made with a "high degree of awareness of their probable falsity." *Garrison*, 379 U.S. at 74. In addition, the standard requires that appellate courts apply de novo review to determine whether the record in fact establishes actual malice with convincing clarity. *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 499 (1984) (stating that in cases concerning First Amendment issues, the appellate court must make an independent examination of the entire record). Moreover, the requirement that the defamatory statement be "of or concerning" the plaintiff has been applied stringently to preclude recovery where the statement's application to the defendant is uncertain. See *Rosenblatt v. Baer*, 383 U.S. 75, 82-83 (1966).

15. See David A. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 435-37 (1975).

16. In an oft-cited paean, Alexander Meiklejohn was quoted approvingly as calling the decision "an occasion for dancing in the streets." Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125.

Three years later, the Court in *Curtis Publishing Co. v. Butts*¹⁷ extended the actual malice rule to speech about nongovernmental plaintiffs who qualified as “public figures.”¹⁸ In his pivotal concurring opinion,¹⁹ Chief Justice Warren emphasized the artificiality of a rigid distinction between public officials and private individuals when many persons outside of government wield power and influence comparable to that of officeholders.²⁰ Application of the *New York Times* standard to members of this group, he concluded, would help to safeguard the public’s right to “be informed on matters of legitimate interest.”²¹

In *Rosenbloom v. Metromedia, Inc.*,²² the Court temporarily severed the link between the actual malice rule and the identity of the plaintiff. Justice Brennan’s plurality opinion²³ expanded the rule’s application to include all defamatory falsehoods concerning “matters of public or general concern”²⁴ irrespective of the plaintiff’s status.²⁵ In practice, the required presence of such a concern or “interest”²⁶ served as a meager limiting principle; as construed by lower courts, virtually any matter found worthy of media coverage was deemed to qualify.²⁷

17. 388 U.S. 130 (1967). The Court also handed down a decision in a companion case, *Associated Press v. Walker*. *Id.*

18. *Id.* at 164-65 (Warren, C.J., concurring) (stating his adherence to the actual malice standard in the case of “public figures”).

19. The result in *Butts* derived from an unusual and somewhat complicated configuration of opinions. For a detailed dissection, see Harry Kalven, Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 275-78.

20. *See Butts*, 388 U.S. at 163-64 (Warren, C.J., concurring).

21. *Id.* at 164-65.

22. 403 U.S. 29 (1971) (Brennan, J., plurality opinion).

23. *See id.* at 31-32 (affirming lower court decision that the *New York Times* actual malice standard applies to private individuals involved in a public event). As in *Butts*, *Rosenbloom*’s holding represented a patchwork of divergent views. Justice Brennan wrote for three Justices of an eight-member Court. Chief Justice Burger and Justice Blackmun joined Justice Brennan’s opinion; Justices Black and White concurred in the judgment.

24. *Id.* at 44.

25. *See id.* (stating that the protection applies to both famous and anonymous persons).

26. *Id.* at 42-43.

27. *See Robertson, supra* note 6, at 206 & n.50 (noting that only 6 of over 100 reported decisions addressing the question clearly concluded that the alleged defamatory publication or broadcast did not deal with matters of public interest).

Given the daunting hurdle posed by the actual malice standard,²⁸ even private individuals faced slim prospects of recovery.²⁹

A few years later, *Gertz v. Robert Welch, Inc.*³⁰ marked a sharp retrenchment from *Rosenbloom*'s permissive standard and restored the centrality of plaintiffs' status in defamation doctrine. Under *Gertz*, the actual malice requirement for threshold liability was confined to public officials and public figures. States could now permit plaintiffs designated as private figures to recover for actual damages upon a showing of negligence.³¹ However, the Court continued to prohibit presumed or punitive damages even for private figures in the absence of a demonstration of actual malice.³²

B. *Dun & Bradstreet and the Revival of Content-Based Standards*

While *Gertz* had apparently rejected basing plaintiffs' evidentiary hurdles on the subject matter of libelous statements,³³ *Dun & Bradstreet*³⁴ reintroduced this approach to defamation doctrine. There, Greenmoss based its suit on a credit report issued by Dun & Bradstreet that falsely stated that Greenmoss had filed for bankruptcy. The error resulted from a mistake by one of Dun & Bradstreet's employees.³⁵ Although the question of whether Dun & Bradstreet acted with reckless disregard was not presented at trial, the Vermont Supreme Court upheld a jury verdict awarding punitive damages to Greenmoss. *Gertz*'s requirement that such damages be supported by a finding of actual malice, the court found, was limited to actions against media defendants.³⁶

28. See Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 471, 489, 498; John A. Neuenschwander, *Is Fame Ever Fleeting?* Contemporary Mission v. New York Times Co., 12 COMM. & L. 27, 27 (1990) (stating that the actual malice standard "is a most formidable barrier that few plaintiffs ever scale").

29. See Eaton, *supra* note 9, at 1373 (suggesting that the actual malice standard provided near immunity to defendants in defamation actions).

30. 418 U.S. 323 (1974).

31. *Id.* at 347 (allowing states to determine standard of liability "so long as they do not impose liability without fault").

32. *Id.* at 349. This apparent principle, however, was modified in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). See *infra* notes 39-41 and accompanying text.

33. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974) (criticizing *Rosenbloom*'s reliance on judicial determination "on an ad hoc basis which publications address issues of 'general or public interest' and which do not"). For the reasonableness of this interpretation of *Gertz*, see *infra* notes 47-52.

34. 472 U.S. 749 (1985).

35. The employee, a fourteen-year-old student paid to review Vermont bankruptcy proceedings, had inadvertently attributed to Greenmoss the bankruptcy of a former employee of the company. *Id.* at 752.

36. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 418 (Vt.

In sustaining the state court's decision, Justice Powell's plurality opinion agreed that *Gertz* did not apply to the case.³⁷ The opinion, however, sidestepped the issue of whether a defendant's nonmedia status diminishes constitutional protection.³⁸ Instead, the opinion characterized *Gertz* as a decision that addressed defamation of a private individual on a matter of public concern.³⁹ Where the falsehood does not involve a matter of public concern, the opinion reasoned, a different constitutional balance should be struck.⁴⁰ Specifically, Justice Powell concluded that the First Amendment permits recovery of presumed and punitive damages in such cases without a showing of actual malice.⁴¹

In determining that Dun & Bradstreet's credit report did not involve a matter of public concern, the plurality assessed the report's "content, form, and context . . . as revealed by the whole record."⁴² Under this test, the plurality identified several factors that weighed against finding a public concern. As "wholly false" speech made "solely in the individual interest of the speaker and its specific business audience," the report could stake no claim to heightened First Amendment protection.⁴³ In addition, because the report was sent to only five subscribers who were bound to keep the information confidential, it did not implicate any "strong interest in the free flow of commercial information"⁴⁴ or promote "uninhibited, robust, and vehement" debate of public issues.⁴⁵ Finally, the hardness and verifiability of credit information, combined with market incentives for accurate credit reporting, diminished concern about the "chilling" effect of libel suits for allegedly false reports.⁴⁶

1983), *aff'd*, 472 U.S. 749 (1985).

37. *Dun & Bradstreet*, 472 U.S. at 757 (Powell, J., plurality opinion). Justices Rehnquist and O'Connor joined Justice Powell's opinion; Chief Justice Burger and Justice White concurred in the judgment.

38. *See id.* at 753 (affirming judgment "for reasons different from those relied upon by the Vermont Supreme Court"). For discussion of a potential media-nonmedia distinction, see *infra* note 62.

39. *Id.* at 751, 756. The concurring Justices endorsed this characterization. *Id.* at 764, 774.

40. *Id.* at 756-61.

41. *Id.* at 763.

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

43. *Id.* at 762.

44. *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)).

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

46. *Id.* at 762-63. Justice Powell noted, however, that the holding did not categorically relegate all credit reporting to diminished constitutional protection. *Id.* at 762 n.8.

C. Dun & Bradstreet: *Criticism and Corollaries*

Dun & Bradstreet has evoked considerable criticism as well as questions about the reach of its rationale that defamatory statements warrant differential protection according to their content. Some of the attack has been directed at the perceived disingenuousness of Justice Powell's depiction of *Gertz* as governing only defamation on matters of public concern. The ostensibly unqualified language of the *Gertz* majority opinion authored by Justice Powell disclosed no such limitation on its holding.⁴⁷ Indeed, *Gertz* invoked as grounds for rejecting the *Rosenbloom* plurality's approach the difficulty of judges' "decid[ing] on an ad hoc basis which publications address issues of 'general or public interest' and which do not."⁴⁸ Other opinions in succeeding terms echoed *Gertz*'s skepticism toward this type of enterprise.⁴⁹ Prior to *Dun & Bradstreet*, commentators⁵⁰ and lower courts⁵¹ had commonly assumed that *Gertz*'s restrictions did not

47. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."); see also Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Definition, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehoods*, 62 TEMPLE L. REV. 903, 976 n.166 (1989) (*Gertz* opinion "appeared to contemplate a set of fault and damages rules triggered by the single factor of the presence of a private figure plaintiff").

48. *Gertz*, 418 U.S. at 346; see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 786 n.11 (1985) (Brennan, J., dissenting) (describing unwillingness to empower courts to decide what speech is of public concern as "precisely the rationale" for repudiating *Rosenbloom*).

49. See, e.g., *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976) (asserting that the *Rosenbloom* test's deficient balancing of competing interests "led us in *Gertz* to eschew a subject-matter test for [on]e focusing upon the character of the defamation plaintiff"); cf. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976) (justifying in part extension of First Amendment protection to commercial speech on grounds that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn").

50. See, e.g., George C. Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811, 820 n.61; Virginia G. Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95, 106 (1983); Donald Meltzer, *Toward a New Standard of Liability for Defamation in Fiction*, 58 N.Y.U. L. REV. 1115, 1116 (1983).

51. *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1090 (5th Cir.), *reh'g denied*, 744 F.2d 94 (1984), *and cert. denied*, 496 U.S. 1107 (1985); *Bufalino v. Associated Press*, 692 F.2d 266, 274 (2d Cir. 1982), *cert. denied*, 462 U.S. 1111 (1983); *Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840, 844 (Ark. 1979), *cert. denied*, 444 U.S. 1076 (1980); *Cahill v. Hawaiian Paradise Park Corp.*, 543 P.2d 1356, 1363 (Haw. 1975); *Jacron Sales Co. v. Sindorf*, 350 A.2d 688, 693-94 (Md. 1976); *Rutt v. Bethlehems' Globe Publ'g Co.*, 484 A.2d 72, 83 (Pa. Super. Ct. 1984); *Memphis Publ'g Co. v.*

distinguish among private figures' defamation suits by subject matter. It is not surprising, then, that *Dun & Bradstreet* prompted charges that Justice Powell had retrospectively concocted a revised version of *Gertz*.⁵²

Logical consistency aside, observers have also faulted the confusion sewn by *Dun & Bradstreet*'s dichotomy between public and private concerns. Many have contended that looking to the "content, form, and context" of defamatory speech to ascertain its nature supplies little guidance, and that the plurality's reference to a few features of *Dun & Bradstreet*'s credit report failed to infuse this standard with meaningful substance.⁵³ Some have suggested despair that any elaboration of the public concern test can provide consistent notice to potential defamation defendants.⁵⁴ Moreover, the test's addition to the multiple

Nichols, 569 S.W.2d 412, 415-17 (Tenn. 1978).

52. See, e.g., Donald L. Magnetti, "In the End, Truth Will Out" . . . or Will It? "Merchant of Venice," *Act II, Scene 2*, 52 MO. L. REV. 299, 328 (1987); McNulty, *supra* note 9, at 80-85; Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 686 n.327 (1990); Rodney A. Smolla, *Dun and Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1541 (1987). Even Justice White, who like Chief Justice Burger supported the plurality's qualification of *Gertz* but preferred overruling *Gertz* outright, construed *Gertz* as intending to govern defamation of private figures irrespective of subject matter. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 772 (1985) (White, J., concurring).

53. See, e.g., Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 266 (1987); Andrew Jay McClury, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1082 (1995); Post, *supra* note 52, at 668; Michael Greene, Comment, *Dun & Bradstreet v. Greenmoss: Cutting Away from the Protective Mantle of Gertz*, 37 HASTINGS L.J. 1171, 1194 (1986); David B. Katz, Note, *First Amendment—Defamation—Private Individual May Recover Presumed and Punitive Damages Without a Showing of Actual Malice*, 16 SETON HALL L. REV. 785, 806 (1986). The 5-4 dispute within the Court over the characterization of *Dun & Bradstreet*'s report as not involving a matter of public concern has been cited as evidence of the imprecision of the plurality's analysis. See Greene, *supra*, at 1194.

54. See, e.g., Patrick Baude, *Has the Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849, 861 n.36 (1994); Langvardt, *supra* note 53, at 259; McNulty, *supra* note 9, at 54-55; Joan E. Schaffner, Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433, 449 (1990). One writer has gone so far as to assert "something of a consensus among the commentators that the difficulties in developing any principled approach to the public concern test render[s] it essentially standardless." Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 551 n.114 (1998). Rosenthal's comment refers to the public concern criterion in both the defamation and public employee dismissal settings; the relative plausibility of distinguishing between public and private concerns in the latter context is explored in Part III(B)(1). See *infra* notes 298-345 and

permutations of defamation doctrine has been criticized for confronting speakers with a more complex and less fathomable analytic framework.⁵⁵ All this uncertainty, it is argued, induces self-censorship by speakers wary of unpredictable exposure to magnified liability.⁵⁶

Also uncertain is the extent to which the bifurcation of defamatory content into public and private spheres modifies other constraints on private plaintiffs.⁵⁷

accompanying text. For an optimistic appraisal of the feasibility of identifying matters of public concern, see Nadine R. Dahm, Note, *Grand Jury Secrecy v. The First Amendment: A Case for Press Interviews of Grand Jurors*, 23 VAL. U. L. REV. 559, 623-26 (1989) (proposing analysis for content, form, and context standard).

55. See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 473 (1996) (libel law "subject to a bewildering variety of constitutional standards" generally based on extent of public nature of plaintiff and subject matter); see also Don Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 782 (1987); *The Supreme Court, 1984 Term-Leading Cases: Libel Law—Matters of Nonpublic Concern*, 99 HARV. L. REV. 212, 221 (1985).

56. See Deean M. Taylor, *Dun & Bradstreet, Hepps and Milkovich: The Lingering Confusion in Defamation Law*, 1993 ANN. SURV. AM. L. 153, 189.

57. This Article assumes as a paradigm for the issue of whether a defamatory statement involves a matter of public concern a suit by a private figure. In theory, an attack on a public official might have no bearing on the official's performance or capacity and therefore be treated as a matter of private concern outside the *New York Times* standard. However, the Supreme Court has taken an expansive view of statements considered "relevant to [an official's] fitness for office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (allegation of criminal conduct, "no matter how remote in time or place," always relevant for purposes of triggering actual malice rule). See *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300-01 (1971). Courts generally assume that criticism of a public official involves a matter of public concern. See, e.g., *Culliton v. Mize*, 403 N.W.2d 853, 854-56 (Minn. Ct. App. 1987); *State v. Powell*, 839 P.2d 139, 149 (N.M. Ct. App. 1992); *DiSalle v. P.G. Publ'g Co.*, 544 A.2d 1345, 1365 (Pa. Super. Ct. 1988) (describing speech about public officials as "by definition" of public concern). Where the question is specifically analyzed, courts still tend to reach the same conclusion. See, e.g., *Turner v. Devlin*, 848 P.2d 286, 290 (Ariz. 1993); *Moore v. Streit*, 537 N.E.2d 408, 415-16 (Ill. App. Ct. 1989). See Smolla, *supra* note 52, at 1543-44 (stating that defamatory speech about public officials "will almost always qualify as a matter of public concern"). For the view that the range of comment subject to the actual malice requirement should correlate to an official's position in the government hierarchy, see David Finkelson, Note, *The Status/Conduct Continuum: Injecting Rhyme and Reason into Contemporary Public Official Defamation Doctrine*, 84 VA. L. REV. 871 (1998).

A finding of public figure status likewise can be expected to deflect debate about the nature of the defamatory statement. Virtually any defamatory statement about an all-purpose public figure will be regarded as a matter of public concern. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); see Smolla, *supra* note 52, at 1542-43; John C. Ulin, Comment, *First Amendment Crossroads—Extending Constitutional Defamation*

suits besides *Gertz*'s restriction on presumed and punitive damages. In *Philadelphia Newspapers, Inc. v. Hepps*,⁵⁸ decided shortly after *Dun & Bradstreet*, the Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."⁵⁹ In such cases, therefore, the plaintiff is constitutionally obligated to prove the falsity of the speech.⁶⁰ Whatever the implications of this requirement for actions seeking an equitable remedy⁶¹ or brought against a nonmedia defendant,⁶² *Hepps* plainly contemplates the

Protection to Commercial Speech: A Critique of U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia and Some Suggestions, 39 UCLA L. REV. 633, 648 n.77 (1992); see also *Hustler Magazine v. Falwell*, 485 U.S. 46, 47, 56-57 (1988) (requiring "nationally known minister" to show actual malice to recover damages for intentional infliction of emotional distress without explicitly finding that defendant's statement related to matter of public concern). In a different way, defamation about limited-purpose public figures may also inherently qualify as speech involving a public concern. *Gertz*, 418 U.S. at 345. These individuals have "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* Within the context of a defamation suit, then, the plaintiff is classified as a limited public figure only if the defendant's defamatory statement pertained to the plaintiff's active involvement in a public controversy. Gerald G. Ashdown, *Of Public Figures and Public Interest—The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937, 940-41 (1984). Thus, the statement would seem by definition to address a matter of public concern. See Ulin, *supra*, at 648 n.77; see also *Desai v. Hersh*, 719 F. Supp. 670, 674 (N.D. Ill. 1989) (asserting that "absent invasions of privacy, speech about a public figure is generally a matter of public concern"); Arlen W. Langvardt, *Media Defendants, Public Concerns, and Public Plaintiffs: Toward Fashioning Order from Confusion in Defamation Law*, 49 U. PITT. L. REV. 91, 133-40 (1987) (arguing against determinations of public or private concern involving public officials or public figures). The workability of the "public controversy" requirement is discussed in Part III(B)(2). See *infra* notes 346-71 and accompanying text.

58. 475 U.S. 767 (1986).

59. *Id.* at 777.

60. *Id.*

61. See Magnetti, *supra* note 52, at 345-62 (discussing proposed non-monetary remedies that *Hepps* may leave available).

62. Justice O'Connor's opinion for the Court expressly reserved this question. *Hepps*, 475 U.S. at 779 n.4. While the issue of nonmedia defendant liability lies beyond the scope of this Article, it is worth noting that Justice O'Connor's reference to media status seems curious in light of the approach the Justices had recently taken to the question in *Dun & Bradstreet*. While Justice Powell's plurality opinion declined to address whether nonmedia defendants should receive lesser protection, five Justices explicitly rejected the notion of differential protection, see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773, 782-83 (1985) (White, J., concurring; Brennan, J., dissenting), and another appeared to, see *id.* at 783-84 (attributing this position to Chief Justice Burger). Some courts have indicated their understanding that the Court has assigned constitutional significance to the presence or absence of a media defendant. See, e.g., *Straw v. Chase Revel, Inc.*, 813 F.2d 356 (11th Cir.), *cert. denied*,

possibility that its holding may not apply to speech of private concern. Thus, in a suit arising out of speech assigned to this category, states may be entitled to compel defendants to demonstrate the truth of their defamatory statements.⁶³

Perhaps even more ominous for defendants are the implications for the fault requirement of *Dun & Bradstreet's* emphasis that *Gertz's* analysis was premised on the appearance of a public concern.⁶⁴ Since the negligence required under *Gertz* had been established in the Vermont courts,⁶⁵ Justice Powell's opinion needed only to address the modification of *Gertz's* restrictions on presumed and punitive damages where a private concern was involved. However, if the private figure/private concern configuration presents a different calculus of interests than that found in *Gertz*, then it may follow that *Gertz's* fault requirement does not apply to that situation. Justice White immediately embraced this interpretation of the plurality's reasoning,⁶⁶ a number of lower courts have also indicated their view that the Court has eliminated the fault requirement in "private-private" cases.⁶⁷ Some commentators as well regard, as a plausible if not inevitable

484 U.S. 856 (1987); *Schneider v. Pay'N Save Corp.*, 723 P.2d 619, 625 (Alaska 1986); *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 502 (S.C. 1998); *but see In re IBP Confidential Bus. Documents Litig.*, 797 F.2d 632, 642, 647 (8th Cir.), *reh'g denied*, 800 F.2d 787 (1986), *and cert. denied*, 479 U.S. 1088 (1987); *Britton v. Koep*, 470 N.W.2d 518, 521 (Minn. 1991); *Park v. Capital Cities Communications, Inc.*, 585 N.Y.S.2d 902 (App. Div.), *appeal dismissed*, 607 N.E.2d 815 (N.Y. 1992), *and leave to appeal dismissed in part, denied in part*, 613 N.E.2d 961 (N.Y. 1993). The notion of heightened protection for media defendants has encountered widespread criticism. *See, e.g.*, Langvardt, *supra* note 57, at 110-11; Taylor, *supra* note 56, at 169-73; Anne Benaroya, Note, Philadelphia Newspapers v. Hepps Revisited: A Critical Approach to Different Standards of Protection for Media and Nonmedia Defendants in Private Plaintiff Defamation Cases, 58 GEO. WASH. L. REV. 1268, 1285-98 (1990); Linda Kalm, Note, The Burden of Proving Truth or Falsity in Defamation: Setting a Standard for Cases Involving Nonmedia Defendants, 62 N.Y.U. L. REV. 812, 833-53 (1987); *but see* Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631 (1975).

63. This inference was later reinforced by the Court's opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), which attributed to *Hepps* the proposition that "a statement in matters of public concern must be provable as false before there can be liability under state defamation law, at least . . . where a media defendant is involved." *Id.* at 19-20 (emphasis added). It may be telling that this passage did not reserve judgment on matters not of public concern in the same way that the principle's reference to media defendants was stated as its minimum application. *See id.* at 20 n.4 (deferring resolution of cases involving nonmedia defendants).

64. *See Dun & Bradstreet*, 472 U.S. at 756-57 (Powell, J., plurality opinion).

65. *Id.* at 752-55.

66. *Id.* at 773-74 (White, J., concurring).

67. *See, e.g.*, *Polson v. Davis*, 895 F.2d 705, 708 (10th Cir. 1990); *Mutafis v. Erie Ins. Exch.*, 775 F.2d 593, 595 (4th Cir. 1985); *Sleem v. Yale Univ.*, 843 F. Supp. 57, 61-62 (M.D.N.C. 1993); *Ross v. Bricker*, 770 F. Supp. 1038, 1043-44 (V.I. 1991); *Post v. Regan*, 677 F. Supp. 203, 208 (S.D.N.Y.), *aff'd*, 854 F.2d 1315 (2d Cir. 1988), *and cert. denied*, 488 U.S. 1043 (1989); *but see Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127

reading of *Dun & Bradstreet*, that the Court opened the door to the imposition of strict liability in such cases.⁶⁸ Moreover, the *Hepps* opinion may have hinted at this possibility in noting that in private figure/private concern cases, “the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.”⁶⁹

II. DISCERNING A LINE BETWEEN PUBLIC AND PRIVATE CONCERNS: THE FUTILE PURSUIT IN THE LOWER COURTS

Courts’ efforts to locate a principled boundary between public and private concerns in defamation cases have not been encouraging. If not altogether devoid of content, the concept of speech addressing matters of public concern has proved sufficiently murky to give courts vast discretion in deciding whether to place a libelous statement in this category. While perhaps some vagueness could be relieved by clarification from the Supreme Court, the pervasive unpredictability of courts’ treatment of the issue suggests the intractable difficulty inherent in the concept itself.

A. *The Phenomenon of Summary Classification*

The sparse guidance provided by *Dun & Bradstreet*’s content-form-context standard may be discerned from the frequency with which it is ignored. While courts occasionally seek to analyze these factors in a systematic way,⁷⁰ the analysis routinely consists of a conclusory pronouncement of the type of concern involved. It is not unusual for a court simply to issue an unadorned statement that the defamatory expression “is purely private”⁷¹ or that the statement

F.3d 122, 128 (1st Cir. 1997); *U.S. Healthcare v. Blue Cross of Greater Philadelphia*, 898 F.2d 914 (3d Cir.), *cert. denied*, 498 U.S. 816 (1990); *Wilson v. Slatalla*, 970 F. Supp. 405, 413 (E.D. Pa. 1997); *Pearle v. E.F. Hutton, Inc.*, 664 F. Supp. 1490, 1505-06 (D.D.C. 1987).

68. *See, e.g.*, Randall P. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 n.1 (1985); Lewis, *supra* note 55, at 774-75; McNulty, *supra* note 9, at 83; Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 57 (1992); Smolla, *supra* note 52, at 1545-48; Taylor, *supra* note 56, at 181.

69. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).

70. *See, e.g.*, *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 999 F. Supp. 137, 140-43 (D. Me. 1998); *Ayala v. Washington*, 679 A.2d 1057, 1065-68 (D.C. 1996). Even the extended discussion in *Levinsky’s*, however, came only after a remand for the purpose of developing a record to determine whether the speech in question involved a public concern. *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 133-34 (1st Cir. 1997).

71. *Mullen v. Solber*, 648 N.E.2d 950, 952 (Ill. App. Ct. 1995); *see Ramirez v. Rogers*, 540 A.2d 475, 477 (Me. 1988) (stating that the case involves “a matter that is not of public concern”).

“concerned a public issue.”⁷² Other opinions, foregoing even this kind of express declaration, obliquely classify the defamation by referring to the relevant authority or category. In these instances, a court may signal its determination that a slander involved a private concern by finding *Dun & Bradstreet* “to be controlling in this case,”⁷³ or convey its assumption that the speech addressed a public concern by noting *Hepps*’s rule governing proof of falsity.⁷⁴ Any number of variations on these examples may be found.⁷⁵

In some instances, a terse description or characterization of the defamatory speech is apparently thought to constitute sufficient exegesis on the issue of public concern. Thus, a court can justify deeming expression to involve a matter of public concern by observing that an article “purported to give investment advice to its readership,”⁷⁶ or that a travel guide reported sexual harassment suits against the manager of a youth hostel “open to the general population.”⁷⁷ Conversely, one court professed in an aside that it had “little doubt” as to the private nature of “accusations by a competitor that a dentist [was] stealing patients and acting unprofessionally voiced in that dentist’s office to a very small group of people.”⁷⁸ Other courts have similarly offered passing capsule

72. *Lee v. Dong-A Ilbo*, 849 F.2d 876, 879 (4th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989). *See, e.g., Yesner v. Spinner*, 765 F. Supp. 48, 52 (E.D.N.Y. 1991) (stating that the action “clearly . . . involves a private-figure plaintiff concerning matters not of public concern”); *Vern Sims Ford, Inc. v. Hagel*, 713 P.2d 736, 741 (Wash. Ct. App. 1986), *review denied*, 105 Wash. 2d 1016 (1986) (asserting that statements “do not involve a matter of public concern but rather a private business dispute”).

73. *Hirsch v. Cooper*, 737 P.2d 1092, 1095 (Ariz. Ct. App. 1986).

74. *Cunningham v. United Nat’l Bank of Wash.*, 710 F. Supp. 861, 863 (D.D.C. 1989).

75. *See, e.g., Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 932 (M.D.N.C. 1997), *aff’d in part, rev’d in part on other grounds*, 194 F.3d 505 (4th Cir. 1999) (indicating presence of public concern by noting applicability of constitutional principles under *Gertz*); *Machleder v. Diaz*, 618 F. Supp. 1367, 1373 (S.D.N.Y. 1985), *aff’d in part, rev’d in part on other grounds*, 801 F.2d 46 (2d Cir. 1986), *and cert. denied*, 479 U.S. 1088 (1987) (implicitly finding public concern by citing actual malice requirement for punitive damages); *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1092 n.2 (Ala. 1988) (invoking *Dun & Bradstreet* to defend constitutionality of state law’s application to cases involving matters not of public concern); *Dunlap v. Wayne*, 716 P.2d 842, 846 (Wash. 1986) (acknowledging that balance between free speech and reputation “tips differently” when statement is about private concern); *Story v. Shelter Bay Co.*, 760 P.2d 368, 375 (Wash. Ct. App. 1988) (referring to “lessened protection *Dun & Bradstreet* affords communications made in private disputes”).

76. *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 362 (11th Cir.), *cert. denied*, 484 U.S. 856 (1987).

77. *Shaari v. Harvard Student Agencies, Inc.*, 691 N.E.2d 925, 928 (Mass. 1998).

78. *Ross v. Bricker*, 770 F. Supp. 1038, 1043 n.3 (V.I. 1991).

depictions of the defamation at issue as a substitute for extended consideration of the expression's content, form, and context.⁷⁹

Perhaps these *ipse dixit* conclusions derive from a sense that the nature of defamatory speech is more or less self-evident. The *Dun & Bradstreet* plurality's sketchy analysis may well have encouraged the attitude that a court knows a public or private concern when it sees it.⁸⁰ If this belief did underlie these classifications, however, the belief is deeply susceptible to challenge. As will be argued in the following section,⁸¹ every example cited thus far (both in text and footnotes)—as well as many others to be discussed that offer somewhat more discussion—can be plausibly regarded as falling into the opposite category from that selected by the court.

Admittedly, cases exist in which the court's abbreviated discussion might arguably be defended as involving speech whose nature is intuitively obvious. It is understandable, for example, that a court would not feel compelled to expatiate on its assumption that a false report of the plaintiff's having AIDS⁸² does not involve a public concern. Other defamatory expression might also seem to fall naturally into the private realm without elaboration: an employer's criticism of a former employee's performance,⁸³ a suggestion that an elderly newsstand operator was forced to quit work because of pregnancy,⁸⁴ allegations arising out of domestic relations,⁸⁵ assertions of financial delinquency lacking

79. See, e.g., *Medical Lab. Management Consultants v. American Broad. Co.*, 30 F. Supp. 2d 1182, 1192 n.11 (D. Ariz. 1998) (stating that secretly taped meeting with medical laboratory's owner for use on broadcast dealing with faulty pap smear testing was of public concern because it involved "[i]nformation about a medical issue with potential life and death consequences affecting millions of women"); *Veilleux v. National Broad. Co.*, 8 F. Supp. 2d 23, 34 (D. Me. 1998) (finding public concern where television program alleging improper behavior by truck driver "addressed issues of public safety on interstate highways and federal regulation of the trucking industry").

80. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating of hard-core pornography that "I know it when I see it").

81. See *infra* Part II(B).

82. *People v. Ryan*, 806 P.2d 935, 939 (Colo.), *cert. denied*, 502 U.S. 860 (1991).

83. See *Davis v. Ross*, 107 F.R.D. 326, 330 (S.D.N.Y. 1985); *Schneider v. Pay'N Save Corp.*, 723 P.2d 619, 620, 625 (Alaska 1986); *Weissman v. Sri Lanka Curry House, Inc.*, 469 N.W.2d 471, 471, 473 (Minn. Ct. App. 1991); *Geyer v. Steinbronn*, 506 A.2d 901, 904, 914 (Pa. Super. Ct. 1986).

84. See *Peoples Bank and Trust Co. of Mountain Home v. Globe Int'l Publ'g, Inc.*, 978 F.2d 1065, 1067, 1068 n.2 (8th Cir. 1992), *on remand sub nom. Mitchell v. Globe Int'l Publ'g, Inc.*, 817 F. Supp. 72 (W.D. Ark.), *and cert. denied*, 510 U.S. 931 (1993).

85. See *Peroutka v. Streng*, 695 A.2d 1287, 1289, 1293 (Md. 1997) (reference to wife as an "emotionally abused" spouse); *King v. Tanner*, 539 N.Y.S.2d 617, 618-19, 621 (Sup. Ct.), *reargument denied*, 545 N.Y.S.2d 649 (Sup. Ct. 1989) (defendant's naming plaintiff as father of her child); *Johnson v. Johnson*, 654 A.2d 1212, 1213, 1216 (R.I. 1995) (former husband calling former wife a "whore"); see also *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 769, 778 n.44 (Okla. 1989) (elders of church

apparent larger reverberations for the community,⁸⁶ or accusations of bigoted behavior.⁸⁷ By the same token, the connection of some expression to a definite public concern may appear so manifest as not even to warrant the discussion that it receives: an assertion that the nation was at risk of an outbreak of a dangerous disease,⁸⁸ criticism of a newspaper article about restricted public access to part of a nuclear generating station,⁸⁹ rebuttal of a press conference called to question the recruiting techniques of certain religious organizations,⁹⁰ and an accusation that the plaintiff had assassinated a presidential candidate.⁹¹

Still, as noted above, not every truncated examination of the public concern issue represents an unexceptionable conclusion about the nature of the litigated expression. Moreover, a cursory treatment of even relatively uncontroversial cases is hardly a satisfactory way to develop coherent doctrine. The frequent paucity of analysis in “easy” and debatable cases alike, rather, reflects a hollowness at the core of the public concern concept. This perception is reinforced by the rarity with which courts attempt to give substantive definition to the concept,⁹² and the extent to which they vary when they do. Formulations include speech that “relates to the ordering of government and society at large,”⁹³ that “is intended to effect political or social change or that is otherwise related to enlightened self-government,”⁹⁴ that pertains to “a matter worthy of or the

referring to former congregation member as “fornicator”).

86. *See* Ransopher v. Chapman, 791 S.W.2d 686, 686-87 (Ark. 1990) (calling building contractor a liar and cheat); Dexter’s Hearthside Restaurant, Inc. v. Whitehall Co., 508 N.E.2d 113, 114-16 (Mass. App. Ct.), *review denied*, 511 N.E.2d 620 (Mass. 1987) (listing liquor store as having delinquent account); Touma v. St. Mary’s Bank, 712 A.2d 619, 620-22 (N.H. 1998) (announcing foreclosure of plaintiff’s restaurant).

87. *See* Rety v. Green, 546 So. 2d 410, 414 n.2, 425 (Fla. Dist. Ct. App. 1989) (letter by defendant stating that plaintiff had directed harsh anti-Semitic remarks at defendant).

88. *See* Texas Beef Group v. Winfrey, 11 F. Supp. 2d 858, 861-62 (N.D. Tex. 1998).

89. *See* Knudsen v. Kansas Gas and Elec. Co., 807 P.2d 71, 78-79 (Kan. 1991).

90. *See* George v. International Soc’y for Krishna Consciousness of Cal., 4 Cal. Rptr. 2d 473, 501, 509-10 (Ct. App. 1992), *reh’g denied and opinion modified* (Mar. 2, 1992), *review denied and ordered not to be officially published* (Apr. 29, 1992).

91. *See* Khawar v. Globe Int’l, Inc., 965 P.2d 696, 699, 708 (Cal. 1998), *cert. denied*, 119 S. Ct. 1760 (1999).

92. The Michigan Supreme Court conceded in one case what appears to be the tacit position of most courts: “[P]ublic interest’ is an elusive term, and . . . we do not undertake here to establish the parameters of [the] term.” Rouch v. Enquirer & News of Battle Creek, 398 N.W.2d 245, 266 (Mich. 1986), *vacated*, 487 N.W.2d 205 (Mich. 1992), *and cert. denied*, 507 U.S. 967 (1993).

93. Ayala v. Washington, 679 A.2d 1057, 1065 (D.C. 1996).

94. *In re* IBP Confidential Bus. Documents Litig., 797 F.2d 632, 642, 647 (8th Cir.), *reh’g denied*, 800 F.2d 787 (1986), *and cert. denied*, 479 U.S. 1088 (1987).

subject of public debate and a part of the nation's free exchange of ideas,"⁹⁵ or that "present[s] an issue about which the public had a legitimate need for information."⁹⁶ While these approaches obviously overlap in significant ways, their similarity is at a level of abstraction that almost drains them of coherent meaning. The fuzzy and mysterious line between public and private concerns thus "appears to encourage *ad hoc* resolutions of the issue."⁹⁷

B. *The Protean Profiles of Public and Private Concerns*

It is possible, of course, for a doctrine's theoretical deficiencies to be redeemed by useful practical results. An examination of *Dun & Bradstreet's* framework for classifying defamation, however, confirms its inadequacy as a guide to decisionmaking and restraint on judicial discretion. While it would be an exaggeration to say that the content-form-context standard invariably supports equally plausible findings of a public or private concern,⁹⁸ the standard has been elastic enough to accommodate contradictory impulses and subjective predilections. The latitude afforded by this approach can be observed in several clusters of cases.

1. Medical Misconduct

Criticism of physicians and other professional caregivers—by patients, the media, and even fellow caregivers—is not uncommon. It is therefore not surprising on occasion to find these individuals as plaintiffs in defamation

95. *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 999 F. Supp. 137, 140 (D. Me. 1998).

96. *Smiley's Too, Inc. v. Denver Post Corp.*, 935 P.2d 39, 42 (Colo. Ct. App. 1996). The discretion vested in courts by the *Dun & Bradstreet* standard may be suggested as well by the broad and various terminologies employed in referring to matters of public concern: e.g., statements "of public import," *McNally v. Yarnall*, 764 F. Supp. 838, 847 (S.D.N.Y. 1991); matters "of public interest," *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1504 (D.D.C. 1987); *Parker v. Evening Post Publ'g Co.*, 452 S.E.2d 640 (S.C. Ct. App. 1994), *cert. denied*, 516 U.S. 1172 (1996); matters "of general interest," *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); expression on "issues . . . which are of public importance," *Ayala v. Washington*, 679 A.2d 1057, 1066 n.6 (D.C. 1996); or statements "reasonably related to matters warranting public exposition," *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 874 (N.D.N.Y. 1995), *aff'd*, 112 F.3d 504 (2d Cir. 1996).

97. Arlen W. Langvardt, *Defamation in the Employment Discharge Context: The Emerging Doctrine of Compelled Self-Publication*, 26 DUQ. L. REV. 227, 233 n.27 (1988) (referring to *Dun & Bradstreet* standard for defamation).

98. Cf. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950) (enumerating over two-dozen pairs of contradictory canons of statutory construction).

actions. Broadly speaking, statements that call a caregiver's competence or conduct into question might plausibly be regarded as involving a matter of either public or private concern. From one perspective, a reflection on "the performance and capability of a doctor providing medical care"⁹⁹ is necessarily important to the community and thus of public concern. On the other hand, it can be argued that these derogatory comments are encompassed by the traditional rule that a charge of inadequate performance of professional duty constitutes libel per se¹⁰⁰ and hence falls into the private domain. As it turns out, courts have effectively embraced versions of both of these positions. Admittedly, no single paradigm can resolve every setting in which this type of defamation might arise—what the Court calls its content, form, and context. Even taking these variations into account, however, these differences in classification seem to hinge more on judicial value judgments than on predictable adherence to the *Dun & Bradstreet* formula.

Some contrasting outcomes in this area appear explicable only as either outright contradictions or products of highly dubious distinctions. For example, charges of incompetence directed at an Arizona ophthalmologist¹⁰¹ and dishonesty to a Virgin Islands dentist¹⁰² were summarily determined to involve matters of private concern.¹⁰³ By contrast, statements that cast doubt on a Pennsylvania chiropractor's "ethical and professional character"¹⁰⁴ were designated a matter of public concern.¹⁰⁵ Of course, as is generally true,¹⁰⁶ grounds can be discovered for distinguishing and thus reconciling these divergent holdings. While the Arizona and Virgin Islands courts declined to explore public policy, the Pennsylvania court cited the state's comprehensive regulation of chiropractors as evidence that "the quality of chiropractic services rendered in this Commonwealth is a matter of public concern."¹⁰⁷ However,

99. *Connolly v. Labowitz*, 519 A.2d 138, 141 (Del. Super. Ct. 1986) (noting but rejecting defendant's argument for public concern classification); see generally ROY PORTER, *THE GREATEST BENEFIT TO MANKIND* (1997).

100. See *Cantrell v. American Broad. Co.*, 529 F. Supp. 746, 752 (N.D. Ill. 1981); *Vojak v. Jensen*, 161 N.W.2d 100, 104 (Iowa 1968); *K Corp. v. Stewart*, 526 N.W.2d 429, 431 (Neb. 1995).

101. *Hirsch v. Cooper*, 737 P.2d 1092, 1094 (Ariz. Ct. App. 1986) (defendant allegedly remarking that "I wouldn't send my dog or cat" to plaintiff doctor).

102. *Ross v. Bricker*, 770 F. Supp. 1038, 1041 (V.I. 1991) (accusing plaintiff of stealing patients).

103. *Id.* at 1043 n.3; *Hirsch*, 737 P.2d at 1095.

104. *Dougherty v. Boyertown Times*, 547 A.2d 778, 784 (Pa. Super. Ct. 1988).

105. *Id.*

106. See Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 215 (1931).

107. *Dougherty*, 547 A.2d at 784.

Arizona physicians¹⁰⁸ and Virgin Islands dentists¹⁰⁹ are also subject to regulatory schemes that might have been invoked to divine legislative creation of a public concern there as well.

The strongest ground for distinguishing among the above decisions, *viz.*, “context,” actually illustrates the troubling plasticity of that notion. The doctor and dentist were maligned in relatively intimate and informal settings by others in the profession,¹¹⁰ whereas the charges against the chiropractor appeared in a letter to a newspaper from a former patient.¹¹¹ Arguably, the “form” of the latter signals a decisive willingness to contribute to public discourse; that interpretation, however, implies that the other two defendants could have achieved public concern designation by embodying their remarks in similar letters. This seems an artificial distinction on which to rest such important stakes, and would create perverse incentives for broader dissemination of defamatory comments.

More defensibly, a victim of shoddily administered health care (assuming the truth of her charges) may presumably be seeking to advance the public good by alerting others to this danger. By contrast, another member of the plaintiff’s field—especially a competitor—might reasonably be suspected of having a private axe to grind; in this “context,” the defendant’s disparagement could be viewed as not implicating a matter of public concern. Indeed, the *Dun & Bradstreet* plurality may have opened the door to this type of reasoning by stressing that *Dun & Bradstreet*’s credit report was in the agency’s “individual interest”¹¹² and “solely motivated by the desire for profit.”¹¹³ Unfortunately, however, this sort of contextualizing provides ample scope for judicial speculation and manipulation. Here, it might be equally conjectured that an ex-patient’s complaint to a newspaper represents a vindictive response to a perceived slight or disappointing therapeutic result. Conversely, even casual criticism by a knowledgeable fellow caregiver might be seen as addressed to a threat to community health and hence of public importance. Classification as a public or private concern thus rests on courts’ evaluation of events and personalities. As in other areas—notably Establishment Clause

108. See ARIZ. REV. STAT. ANN. § 32-1451 (West 1992 & Supp. 1999).

109. See V.I. CODE ANN. tit. 3, § 418(a)(14) (1995).

110. Another ophthalmologist allegedly commented in a telephone conversation that “I wouldn’t send my dog or cat to [the plaintiff].” *Hirsch v. Cooper*, 737 P.2d 1092, 1094 (Ariz. Ct. App. 1986). A dental assistant for a competitor of the plaintiff in *Ross* shouted her accusation in the plaintiff’s office “to a very small group of people.” *Ross v. Bricker*, 770 F. Supp. 1038, 1043 n.3 (V.I. 1991).

111. *Dougherty v. Boyertown Times*, 547 A.2d 778, 780 (Pa. Super. Ct. 1988).

112. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 747, 762 (1985).

113. *Id.*

jurisprudence¹¹⁴—context becomes, in large measure, what judges shape rather than what they find.

Nor can the comparison just cited be dismissed as an isolated anomaly. For example, comments calling into question the qualifications of a surgeon to perform augmentation breast surgery and of a child psychologist to work with children would appear at first blush to occupy proximate if not identical bands of the spectrum of concerns. Nevertheless, courts invoked *Dun & Bradstreet's* approach to discern a public concern in the one case but not the other. The charges against the psychologist, found to involve a private concern,¹¹⁵ were made by a pediatrician in a telephone conversation with school officials,¹¹⁶ the alleged deprecation of the surgeon, part of a television program highlighting the dangers of augmentation surgery, was found to address a public concern.¹¹⁷ One obvious difference between the two cases is the presence of the broadcast medium. However, while *Hepps* raised the possibility that media defendants might be entitled to greater protection, this was treated as an element separate from the public concern criterion, not as a proxy for it.¹¹⁸ Moreover, the reference to the surgeon to illustrate the program's broader theme should not obscure the fundamental similarity of the defamatory content in these two instances. Indeed, the contrasting contexts can rationally be viewed as supporting a stronger case for public concern classification of the comments about the psychologist. Unlike the station seeking material where it could find it, the defendant pediatrician presumably sought to advance a specific public good: protecting vulnerable schoolchildren from an assertedly incompetent counselor. In any event, the protection afforded criticism should not vary with judicial perceptions of whether the defendant has surrounded it with appropriate expressive accouterments.

A final comparison from this subgenre of defamation further suggests the incongruities fostered by the malleable public concern concept. In the abstract, criticism of a doctor's research, published in a letter to a medical journal by

114. Compare *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (examining validity of city-sponsored display of creche "in the context of the Christmas season"), with *Lynch*, 465 U.S. at 705-06 (Brennan, J., dissenting) (contending that Court's focus on holiday "context" ignores city's support for religious symbolism). See Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 852 (arguing that "[t]o adopt the Court's wide-angle inquiry and include the secular context of the government religious activity . . . would validate nearly every governmental religious practice"); see also Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 479-80 (illustrating how resolution of Establishment Clause challenges to placement of religious displays on public property hinges on perspective that court chooses to adopt under "endorsement" test).

115. *Saunders v. VanPelt*, 497 A.2d 1121, 1124 n.2 (Me. 1985).

116. *Id.* at 1124.

117. *Metcalfe v. KFOR-TV, Inc.*, 828 F. Supp. 1515, 1533 (W.D. Okla. 1992).

118. See *supra* note 62 and accompanying text.

another doctor, would seem to have a more public reach than insinuating improper practice by a particular obstetrician. When these issues arose, however, courts found the opposite.¹¹⁹ Again, both form and context provide colorable but dubious grounds for distinction. The reference to the obstetrician appeared in a newspaper article attacking the putatively excessive rate of Caesarian sections in Louisiana; the court therefore linked the reference to the “national debate” over alternative means of delivery and, more broadly, public concern over “the medical treatment of women in this country.”¹²⁰ While plausible—and consistent with the approach taken in the breast surgery case—this reasoning should have been available to the critic of medical research as well. Criticism of the plaintiff’s research on fibromyositis¹²¹ can be comparably tied to the “national debate” over appropriate treatment for devastating diseases and public concern over the adequacy and damages of newly developed medications. The embodiment of the criticism in a letter rather than an article should detract little, if at all, from its public nature (nor did it when directed at the Pennsylvania chiropractor). If anything, the letters section of a medical journal is presumably a forum for airing public concerns. Moreover, as an indication of the breadth of factors that a court may consider as it chooses, the court here took notice of the state’s peer review mechanism for monitoring physicians; the private functioning of this mechanism was said to demonstrate that the letter’s reflection on the plaintiff’s qualification was not a matter of public concern.¹²² Louisiana also had a private peer review mechanism,¹²³ in a case where the plaintiff’s performance as an obstetrician was brought more sharply into focus. However, the court there apparently felt that the statute’s existence had no bearing on the classification of the defamatory passage.

2. Business Misconduct

Like health care providers, business executives and their companies are often attacked for allegedly failing to observe professional standards. Similarly, as a general proposition, accusations of unethical behavior and other lapses in business judgment can reasonably be placed in either a public or private framework. In one sense, business misconduct on a significant scale is inherently public because of its impact on the affected community and the questions it raises about appropriate policy responses. On the other hand, *Dun*

119. *Compare* *Connolly v. Labowitz*, 519 A.2d 138 (Del. Super. Ct. 1986), with *Romero v. Thomson Newspapers, Inc.*, 648 So. 2d 866 (La.), cert. denied, 515 U.S. 1131 (1995).

120. *Romero*, 648 So. 2d at 870-71.

121. *Connolly*, 519 A.2d at 141-42.

122. *Id.* at 141.

123. See LA. REV. STAT. § 37:1270(B)(5) (1988 & Supp. 2000).

& *Bradstreet* appeared to reject this brand of logic when it refused to hold decisive that bankruptcy of a local company is “of potentially great concern to residents of the community” and that knowledge about the incidence of bankruptcy would “inform citizen opinions about questions of economic regulation.”¹²⁴ Again, the latitude permitted by the vague content-form-context approach has allowed courts to adopt either perspective.

Perhaps the most vivid demonstration of almost unfettered discretion in this area is divergent classifications in strikingly similar circumstances. For example, courts have chosen to view alleged malfeasance by bank officials through both broad and narrow lenses. In *Sisler v. Gannett Co.*,¹²⁵ the plaintiff sued over allegations that he had obtained an improper loan from the bank of which he was former president. Casting the pertinent context in sweeping terms—the “public dangers . . . inherent in insider-dealing with a bank” and the “public’s interest in the conduct of the banking industry”—the New Jersey Supreme Court accordingly found a public concern present.¹²⁶ In *Dunlap v. Wayne*,¹²⁷ by contrast, the Washington Supreme Court assumed that a savings and loan manager’s alleged “kickback” in the form of securing financing from his real estate partnership would relate to a private concern.¹²⁸

As with earlier comparisons, it is not hard to imagine how each of these courts could have resolved the public concern issue in the same way as the other. Certainly, the abuse of the savings and loan managerial position alleged in *Dunlap* poses “public dangers” and at least indirectly implicates the “public’s interest in the conduct of the banking industry.” Conversely, the *Sisler* court could have treated the plaintiff’s putative self-dealing as garden-variety impropriety with no more demonstrable public reverberations—arguably less—than Greenmoss’s bankruptcy would have produced. That the defendant newspaper chose to make the loans to Sisler the topic of several articles should not justify the different classifications when the underlying charges are essentially similar. Indeed, the articles’ specific focus on Sisler’s alleged machinations¹²⁹ deprives their libel of the broader context found to support a public concern elsewhere.¹³⁰ In the related area of public figure doctrine,¹³¹ the

124. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 789 (1985) (Brennan, J., dissenting).

125. 516 A.2d 1083 (N.J. 1986).

126. *Id.* at 1090.

127. 716 P.2d 842 (Wash. 1986).

128. *Id.* at 846.

129. *See Sisler*, 516 A.2d at 1085.

130. *See Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515 (W.D. Okla. 1992); *supra* text accompanying note 117; *see also Romero v. Thomson Newspapers, Inc.*, 648 So. 2d 866 (La. 1995); *supra* text accompanying notes 119-20.

131. For a discussion of the relationship between the “public controversy” requirement for limited public figures and the public concern criterion under *Dun & Bradstreet*, *see infra* Part III(B)(2).

Supreme Court has forbidden defendants from “creat[ing] their own defense” by bringing formerly obscure plaintiffs into public consciousness;¹³² analogous reasoning could bar comparable bootstrapping here. Moreover, this explanation of *Sisler*, tenuous to begin with, does not account for the designation of a public concern where suggestions of impropriety by a bank vice-president were allegedly made by bank employees.¹³³

Even if one somehow discounts the contrasting classifications in the banker suits, it is still hard to rationalize different characterizations of defamatory attacks on the practices of automobile dealers. In *Parker v. Evening Post Publishing Co.*,¹³⁴ the challenged article examined a suit against the plaintiff’s dealership for various infractions, in particular discussing an asserted ““straw purchase”” to the customer bringing the suit.¹³⁵ In *Vern Sims Ford, Inc. v. Hagel*,¹³⁶ the defendant was a disgruntled buyer who disseminated a flier describing the dealership and one of its salespersons as thieves. The *Parker* court ruled that the article involved a matter of public concern;¹³⁷ the court in *Vern Sims* perceived only a “private business dispute.”¹³⁸ The gist of the defendant’s expression in each case, however, was the same: that the plaintiff’s dealership had engaged in unscrupulous business practices. While the newspaper piece in *Parker* doubtless offered the more thoughtful and elegant critique, distinguishing these cases on this basis entails an evaluation of the comparative quality of the two expressions—an enterprise of highly questionable validity.¹³⁹ Moreover, given the longstanding significance of leafleting in American society,¹⁴⁰ newspaper articles cannot be presumed inherently superior to fliers as vehicles for promoting public causes. Indeed, Hagel’s pointed attack on those responsible for the dealership’s alleged transgressions lends color to his claim that the fliers were designed “to warn people that what happened to him could happen to them.”¹⁴¹ *Parker*, on the other hand, simply acquired his dealership after the transactions that gave rise to the lawsuit discussed in the article and was therefore exposed to potential successor liability. His peripheral connection to these transactions compelled the court to portray the relevant public concern in broad strokes to encompass his role: the public’s concern with

132. *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979).

133. *See* *Cunningham v. United Nat’l Bank of Wash.*, 710 F. Supp. 861, 863 (D.D.C. 1989).

134. 452 S.E.2d 640 (S.C. Ct. App. 1994), *cert. denied*, 516 U.S. 1172 (1996).

135. *Id.* at 645.

136. 713 P.2d 736 (Wash. Ct. App. 1986).

137. *See Parker*, 452 S.E.2d at 645.

138. *Vern Sims*, 713 P.2d at 741.

139. *See* *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56 (1988); *Cohen v. California*, 403 U.S. 15, 21 (1971).

140. *See* BERNARD BAILY, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 1-21 (1967).

141. *Vern Sims*, 713 P.2d at 741.

“lawsuits and other items of public record,” the “particular importance” of “allegations of fraud and unfair trade practices,” the public’s “valid interest” in learning about “the pitfalls of some consumer credit transactions,” and the public’s “legitimate interest” in “being informed of potential methods for collecting a judgment.”¹⁴²

The disposition of other suits brought by business plaintiffs appears to be, if not altogether arbitrary, often reliant on fairly superficial indicia. Most notable, again, is the apparent equating of media interest with public concern. Thus, where a meeting with a medical laboratory’s owner was secretly taped for a nationally televised program about faulty pap smear testing, the court summarily concluded that the pertinent subject matter was “[i]nformation about a medical issue with potential life and death consequences affecting millions of women.”¹⁴³ Similarly, a network news program’s undercover investigation of a supermarket chain was assumed without elaboration to involve a matter of “public interest,” that is, public concern.¹⁴⁴ These rulings, though defensible, are too facile; other findings of public concern seem even more strained and shaped by conscious judicial policy. In *Dairy Stores, Inc. v. Sentinel Publishing Co.*,¹⁴⁵ the New Jersey Supreme Court deemed a newspaper article questioning the purity of the plaintiff’s drinking water to involve a public concern, because drinking water is “an essential of human life.”¹⁴⁶ In *Smiley’s Too, Inc. v. Denver Post Corp.*,¹⁴⁷ an article reporting complaints against the plaintiff dry cleaner was judged to touch on a public concern in that it “presented an issue about which the public had a legitimate need for information.”¹⁴⁸ While the court’s observations about water and dry cleaning are indisputable, they suggest grounds for discerning a public concern in the disparagement of virtually any product or service. Where the criticism is aired by the press, and thus presumably has “affected many consumers,”¹⁴⁹ courts may be particularly inclined to frame the applicable concern in public terms.

The flip side of preferential treatment for media coverage of commercial plaintiffs, of course, is diminished protection for nonmedia speakers. Among these defendants, the public/private nomenclature may tempt courts to base classification on whether the statements at issue nominally relate to governmental entities. Given the vagueness of the content-form-context standard, it is understandable that courts groping for an intelligible line might

142. *Parker v. Evening Post Publ’g Co.*, 452 S.E.2d 640, 645 (S.C. Ct. App. 1994).

143. *Medical Lab. Management Consultants v. American Broad. Co.*, 30 F. Supp. 2d 1182, 1192 n.11 (D. Ariz. 1998).

144. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923, 932 (M.D.N.C. 1997), *aff’d in part and rev’d in part on other grounds*, 194 F.3d 305 (4th Cir. 1999).

145. 516 A.2d 220 (N.J. 1986).

146. *Id.* at 230.

147. 935 P.2d 39 (Colo. Ct. App. 1996).

148. *Id.* at 42.

149. *Id.*

resort to such a tangible distinction. Placing form ahead of functional impact, however, risks the kind of artificiality and distortion for which the Court's constitutional state action doctrine has long been criticized.¹⁵⁰ Thus, when a sheet metal company was charged with performing slipshod renovation work,¹⁵¹ and civil engineers were accused of conducting defective boundary surveys,¹⁵² the presence of a municipal client in each case facilitated the conclusion that the defamation pertained to a public concern.¹⁵³

This link to government aside, comparable charges of malfeasance deemed of private concern could also lay claim to address "subject[s] about which the general public would take an interest."¹⁵⁴ For example, while the validity of a subdivision's boundary lines obviously contained interest to others besides "the speaker and a specific business,"¹⁵⁵ so did the issue raised by the defendant in *Story v. Shelter Bay Co.*¹⁵⁶ Story, a resident of a community developed by Shelter Bay, had accused the company of various misdeeds. That Story's complaints touched a wider audience was attested by other residents' having joined her suit against the company for specific performance and damages;¹⁵⁷ yet, the court summarily relegated Story's communications to the realm of "private disputes."¹⁵⁸ Similarly, twenty neighborhood residents in *Gasden v. Louis*¹⁵⁹ co-signed the defendant's letter complaining of various depredations by the principals of a construction company at a neighborhood site. Despite this manifestation of widespread community concern, underscored by the letter's dispatch to the town's trustees and police,¹⁶⁰ the court tersely determined that the letter was "not about a matter of public concern."¹⁶¹

150. See Henry J. Friendly, *The Public/Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1290-91 (1982); Ira Nerka, *A New Deal for the Protection of Fourteenth Amendment Rights: Challenging the Doctrinal Basis of the Civil Rights Cases and State Action Theory*, 12 HARV. C.R.-C.L. L. REV. 297 (1977); Mark V. Tushnet, *Shelley v. Kraemer and Theories of Equality*, 33 N.Y.L. SCH. L. REV. 383, 389-91 (1988).

151. *J & J Sheet Metal Works, Inc. v. Picarazzi*, 793 F. Supp. 1104, 1105-07 (N.D.N.Y. 1992).

152. *Nizam-Aldine v. Oakland*, 54 Cal. Rptr. 2d 781, 783-86 (Ct. App. 1996).

153. See *J & J Sheet Metal Works*, 793 F. Supp. at 1112-13; *Nizam-Aldine*, 54 Cal. Rptr. 2d at 789.

154. *J & J Sheet Metal Works*, 793 F. Supp. at 1113.

155. *Nizam-Aldine*, 54 Cal. Rptr. 2d at 790.

156. 760 P.2d 368 (Wash. Ct. App. 1988).

157. *Id.* at 370.

158. *Id.* at 375.

159. 687 N.E.2d 481 (Ohio Ct. App. 1996), *appeal not allowed*, 677 N.E.2d 816 (Ohio 1997).

160. *Id.* at 487.

161. *Id.* at 490.

One final species of defamation, attacks on competitors, highlights the inherent subjectivity of the public concern determination in the business setting. Criticism of commercial rivals would seem to lend itself particularly well to a consistent philosophy. Absent a compelling claim on public attention, such criticism might be seen as part of everyday disputes of the business world, and hence presumptively of private concern. The latitude for characterizing both content and context, however, enables courts to divine a public concern where equitable considerations suggest the desirability of greater protection. As usual, the pursuit of both these approaches discourages belief in a principled constraint on judicial discretion.

Some courts have hewed to the assumption that jabs at a competitor amount to private mudslinging notwithstanding indicia of wider public ramifications. In *Snead v. Redland Aggregates Ltd.*,¹⁶² the head of an American railroad company sued two British corporations for misappropriation of trade secrets and breach of confidential relationship over the corporations' development of a new type of train car pioneered by Snead's company. A press release explaining the suit, which accused the corporations of "international theft," "industrial espionage," and "international piracy,"¹⁶³ provoked a counterclaim for libel. In holding these epithets to implicate only private concerns, the Fifth Circuit declined to couch the charges in terms of "international competition and industrial espionage."¹⁶⁴ Nor did the interest generated within the railroad and construction industries, reflected by coverage of Snead's press release in industry publications,¹⁶⁵ persuade the court to depart from its premise that "ordinarily [intellectual property] disputes between two parties will be matters of private concern."¹⁶⁶ In *Ramirez v. Rogers*,¹⁶⁷ the Maine Supreme Court refused to even ponder the possibility that the defendant's statements related to a public concern. There, the owner of a gymnastic school had alleged that the owner of a competing school was under investigation by the Attorney General in connection with children at her school and that the Department of Human Services had received complaints about her.¹⁶⁸ The obvious implication—of official suspicion of mistreatment of children at the plaintiff's school—could easily be viewed as a matter of public concern. After settling the plaintiff's status as a private figure, however, the court abruptly ruled that no public concern was involved.¹⁶⁹

At the same time, courts have extracted a public concern from disputes that could readily have borne the opposite designation. *Levinsky's Inc. v. Wal-Mart*

162. 998 F.2d 1325 (5th Cir. 1993), *cert. dismissed*, 511 U.S. 1050 (1994).

163. *Id.* at 1328.

164. *Id.* at 1330.

165. *Id.*

166. *Id.*

167. 540 A.2d 475 (Me. 1988).

168. *Id.* at 477.

169. *Id.*

*Stores, Inc.*¹⁷⁰ vividly demonstrates the leeway available to courts to weigh content, form, and context according to their chosen scale. Levinsky's sued over the reported comment of a Wal-Mart Store manager that calls to a certain Levinsky's store were sometimes put on hold for twenty minutes or not answered at all.¹⁷¹ In deciding the comment's classification, the court issued several concessions indicating the presence of a private concern: that the manager's comment did not implicate the national debate on the worth of Wal-Mart in the marketplace,¹⁷² that instead the relevant context for assessing the comment was the competition between the two retailers,¹⁷³ and that the speech could reasonably be perceived as "a private attack by one individual on another."¹⁷⁴ Nonetheless, the court concluded in a foggy *deus ex machina* that the statement raised a matter of public concern when "properly understood in a broader competition/customer service context."¹⁷⁵ This judgment rested on a jumble of considerations simply listed at the end of the court's analysis: a Levinsky's radio advertisement trumpeting the superiority of its clothing selection to Wal-Mart's, a reporter's interview that elicited the offending comment, the subsequent newspaper article on Levinsky's containing the comment, and "the content of the statement itself."¹⁷⁶ The reference to the Levinsky's ad, which took several jibes at gaps in Wal-Mart's selection,¹⁷⁷ suggests that Levinsky's to some extent provoked retaliatory remarks by Wal-Mart. Thus, the court's sense of rough justice may have influenced its choice of classification as a means of raising the barrier to recovery for an attack that Levinsky's brought on itself. If so, this attitude injects an indeterminate equitable element into an already unpredictable doctrine.

A decision by the Eleventh Circuit, *Straw v. Chase Revel Inc.*,¹⁷⁸ invites similar speculation. Both Straw and Revel published magazines designed to bring together people interested in potential investment opportunities. In an editorial, Revel disparaged Straw's publication as "offer[ing] the least of any publication" in this field and advised potential readers that they would do better reviewing their newspaper's classified business opportunities themselves.¹⁷⁹ On its face, this slap at a competing journal appears to involve a private business squabble as much as the dispute over train car design in *Snead*. Like Levinsky's

170. 999 F. Supp. 137 (D. Me. 1998).

171. *Id.* at 139. A second claim for defamation had been dismissed by the First Circuit as a nonactionable statement of opinion. See *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 129-30 (1st Cir. 1997).

172. See *Levinsky's*, 999 F. Supp. at 140 n.4, 143.

173. See *id.* at 141.

174. *Id.* at 142.

175. *Id.*

176. *Id.* at 143.

177. *Id.* at 139 n.1.

178. 813 F.2d 356 (11th Cir.), *cert. denied*, 484 U.S. 856 (1987).

179. *Id.* at 358.

however, Straw had fired the first shot at his rival: he had earlier reported (truthfully) in his magazine that the American Entrepreneur Association, founded by Revel, had filed for bankruptcy.¹⁸⁰ Perhaps this was why the court chose to view Revel's defamation in the context of an "article . . . purport[ing] to give investment advice to its readership"; such advice, the court noted without elaboration, is a matter of public concern.¹⁸¹ Again, though, speakers cannot forecast with confidence when courts will take this kind of factor into account to equitably adjust the flexible scope of public concerns.

3. Employee Misconduct

Another recurring scenario that displays the wavering line between public and private concerns is defamation arising out of the plaintiff's status as employee. Of course, variation in individual circumstances precludes a per se rule governing all accusations of employee misconduct. Still, if the public/private concern distinction had meaningful content, one might expect at least an inchoate framework for reviewing such charges to have evolved: e.g., a presumption that the charge represents a private matter, barring a conspicuous link to public debate. However, not only has a coherent framework failed to develop, but the divergent results in these types of cases suggest classification techniques that are highly subjective if not random.

Where employees have been dismissed because of alleged wrongdoing, some courts have regarded the subsequent defamation suits as involving a matter of private concern. However, this classification has tended to be the product of barely examined assumptions rather than considered analysis.¹⁸² Thus, it is difficult if not impossible to discern a thread that distinguishes these cases from others in which defamatory comments about a terminated employee were held to relate to public concerns. For example, it is understandable that insinuations of an employee's participation in unauthorized bond trading and financing for an insurance brokerage and consulting company, incurring losses of large magnitude, could be viewed as touching a matter of public concern.¹⁸³ Less apparent, though, is why a company's accusation of an employee's involvement in a scheme to systematically steal grain should necessarily be viewed in a different light.¹⁸⁴ Whatever the disparity in the monetary consequences in the

180. *Id.* at 358, 361 n.4.

181. *Id.* at 362.

182. *See, e.g.*, *Davis v. Ross*, 107 F.R.D. 326, 330 (S.D.N.Y. 1985); *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1091 n.3 (Ala. 1988); *Crump v. P & C Food Markets, Inc.*, 576 A.2d 441, 446 (Vt. 1990).

183. *See Post v. Regan*, 677 F. Supp. 203 (S.D.N.Y.), *aff'd*, 854 F.2d 1315 (2d Cir. 1988), *and cert. denied*, 488 U.S. 1043 (1989).

184. *See Nelson*, 534 So. 2d at 1088, 1091 n.3.

two cases, a stable and predictable constitutional standard can hardly rest on such quantitative distinctions.¹⁸⁵

Some cases suggest that the form of an employer's accusation can arbitrarily influence a court's choice of classification. *Pearce v. E.F. Hutton Group, Inc.*¹⁸⁶ arose from a report commissioned by Hutton to investigate a scandal in which the firm ultimately pled guilty to extensive mail and wire fraud. Pearce brought suit over the report's reference to his role in the fraudulent practices. In finding the asserted defamation to involve a matter of public concern, the court pointed out that the report "was not simply made available to a narrowly defined group but was made widely available through public distribution."¹⁸⁷ In *Mott v. Anheuser-Busch, Inc.*,¹⁸⁸ an internal investigation resulted in dismissal of three employees for filing false reports on the effluent emitted by a wastewater treatment plant. As in *Pearce*, the plaintiff sued over the company's public announcement of his alleged participation in the illegal conduct; here, too, the court determined that the statements fell "within the sphere of legitimate public concern."¹⁸⁹ While assigning weight to the breadth of dissemination draws some support from *Dun & Bradstreet*,¹⁹⁰ and *Pearce's* and *Mott's* finding of a public concern also rested on other considerations,¹⁹¹ it is still troubling that a company's decision to publicize its employees' alleged misdeeds may help it to gain additional constitutional protection. Conversely (and ironically), statements "made privately in the employment context about an employee" tilt toward classification as a private concern and hence greater exposure to liability.¹⁹² By airing a charge more widely and inflating its significance, employers may persuade courts to view the relevant matter in the kind of expansive terms adopted in *Pearce*¹⁹³ and *Mott*.¹⁹⁴

185. See *Post*, 677 F. Supp. at 208 (asserting that the "size of the loss" made the events at defendant company relating to defamatory comments of public concern).

186. 664 F. Supp. 1490 (D.D.C. 1987).

187. *Id.* at 1504.

188. 910 F. Supp. 868 (N.D.N.Y. 1995), *aff'd*, 112 F.3d 504 (2d Cir. 1996).

189. *Id.* at 874.

190. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (noting that defamatory credit report was made available to only five subscribers under confidentiality agreement).

191. For example, the court in each case appeared to be influenced by the high visibility of the defendant company and its activities. See *Mott*, 910 F. Supp. at 874 (noting that statements at issue "related to illegal activities by a nationally recognized corporation"); *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1504 (D.D.C. 1987) (noting that scandal over fraud at E.F. Hutton "received enormous publicity"). This factor, though, still raises the question of an unpredictable sliding scale. See *supra* notes 183-85 and accompanying text.

192. *Crump v. P & C Food Markets, Inc.*, 576 A.2d 441, 446 (Vt. 1990).

193. See *Pearce*, 664 F. Supp. at 1504 (emphasizing the "central role in the American economy" of banking and securities industries).

194. See *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 874 (N.D.N.Y. 1995).

A specific comparison further illumines the inordinate role that the public spotlight may play in classifying allegations of employee misconduct. In two cases where the plaintiff was named as a truck driver who had engaged in illegal activity, courts found a public concern present. *Ryan v. Herald Ass'n*,¹⁹⁵ stemmed from a newspaper story about illegal dumping which reported that Ryan had hauled hazardous waste; the court held that the relevant matter of the defamation was "illegal dumping of hazardous waste."¹⁹⁶ In *Veilleux v. National Broadcasting Co.*,¹⁹⁷ a television news magazine program about long-distance trucking alleged that the plaintiff truckers had committed various violations of federal regulations. Here, the court determined that the defamatory statements implicated "the issue of long-distance trucking and highway safety."¹⁹⁸

While it is hard to quibble with these characterizations and their assignment to the category of public concern, it is also difficult to distinguish these cases—except superficially—from the defamation claimed in *Great Coastal Express, Inc. v. Ellington*.¹⁹⁹ Ellington was also a truck driver; he was dismissed for seeking to tamper with the device that limited the speed at which his truck could travel. This accusation, which was relayed to Ellington by the company's general manager, was held to involve "no matter of public concern."²⁰⁰ Yet, the problem of excessive speed by truckers is of public concern in much the same way as was illegal dumping in *Ryan*, and indeed relates precisely to the "issue of long-distance trucking and highway safety" identified in *Veilleux*. The obvious difference, once again,²⁰¹ is that the charge against Ellington was not included in a media news story. However, this circumstance does not diminish the degree of public concern for the matter involved. It does, though, give employers an incentive to contrive ways to charge employees with misconduct in a form that casts employers as commentators on wider societal problems.²⁰²

aff'd, 112 F.3d 504 (2d Cir. 1996) (finding that Anheuser-Busch's environmental violations "implicate issues of environmental safety and public health").

195. 566 A.2d 1316 (Vt. 1989).

196. *Id.* at 1319 n.2; *see also* *Machleder v. Diaz*, 618 F. Supp. 1367, 1371-73 (S.D.N.Y. 1985), *aff'd in part and rev'd in part on other grounds*, 801 F.2d 46 (2d Cir. 1986), *and cert. denied*, 479 U.S. 1088 (1987) (television broadcast allegedly suggesting that plaintiff's company was responsible for dumping chemical wastes on adjacent lot treated as matter of public concern).

197. 8 F. Supp. 2d 23 (D. Me. 1998).

198. *Id.* at 34.

199. 334 S.E.2d 846 (Va. 1985).

200. *Id.* at 852.

201. *See supra* notes 62, 118, 143-49 and accompanying text.

202. The Supreme Court's decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), to extend substantial First Amendment protection to advertising of prescription drug prices and other commercial speech provides an instructive analogy. The Court noted that a pharmacist "could cast himself as a commentator on store-to-store disparities in drug prices, giving

4. Threats to Public Safety

Charges of unfitness for sensitive positions highlight the barely restrained discretion available to courts under the public concern criterion. From one perspective, an allegation that an individual poses a danger to public safety inherently involves a matter of public concern.²⁰³ In some settings, though, courts may elect to focus more narrowly on the private relationship between the individual and her accuser. The disposition in three cases illustrates courts' freedom to pursue either approach.

*Rabren v. Straigis*²⁰⁴ illustrates the ease with which a personal attack can be translated as a contribution to public discourse. The defendant, who had formed an association of area harbor pilots, purportedly accused members of a competing pilots association of incompetence, drunkenness, and involvement in waterfront corruption and racketeering.²⁰⁵ In ruling the statements to involve a matter of public concern, the court declared that "in this part of the country" harbor pilots' performance in guiding seagoing vessels was a matter of concern "not only for the safety of the vessels but for the public in general."²⁰⁶ While this comment is unexceptionable, similar observations could be made about the statements judged to be of private concern in *Cooper v. Portland General Election Corp.*²⁰⁷ Cooper, an employee of a company providing maintenance services at a nuclear power plant, had his security clearance suspended based on a letter by the plant's security chief. The letter referred to information received by the plant's operator "indicat[ing] that [Cooper's] presence . . . would constitute a security threat to the plant."²⁰⁸ In terms reminiscent of the *Rabren* opinion, the court acknowledged that security at the facility "is certainly a matter that concerns the public *welfare and safety*."²⁰⁹ Here, though, the court characterized the defendant's statements as pertaining to "personal management" and accordingly held them to involve "a purely private matter between private parties."²¹⁰

The contrasting labels applied to the statements in these two cases can be explained, but only tenuously defended, by the different forms in which they were issued. Rabren's remarks were volunteered to a newspaper reporter for

his own and those of a competitor as proof. We see little point in requiring him to do so, and little difference if he does not." *Id.* at 764-65.

203. See *Lee v. Dong-A Ilbo*, 849 F.2d 876, 879 (4th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (indicating that report of identification of plaintiff as North Korean agent "concerned a public issue").

204. 498 So. 2d 1362 (Fla. Dist. Ct. App. 1986).

205. *Id.* at 1363.

206. *Id.*

207. 824 P.2d 1152 (Or. Ct. App. 1992).

208. *Id.* at 1154.

209. *Id.* at 1155.

210. *Id.*

publication,²¹¹ whereas the statements in *Cooper* “were not published in a way that made them available to the general public.”²¹² This distinction again elevates cosmetic differences over substantive proportionality in the public concern analysis. If the criticism of the plaintiff harbor pilots had been delivered by private reprimand, it would have involved no less concern for “the safety of the vessels” and “the public in general.” Conversely, *Cooper*’s reliability at the power plant affected the public safety to the same degree regardless of the amount of publicity it received. Indeed, it may reasonably be speculated that even a single suspect individual’s presence at a nuclear facility looms more frightening in the public mind than an entire coterie of rogue harbor pilots. Whatever the comparison, it was surely true in both cases, not just *Rabren*, that the statements at issue were not “solely in the individual interest of the speaker and . . . [his] . . . specific . . . audience.”²¹³

The calibration of protection in the area of public safety according to the defamatory expression’s packaging is underscored by the fine distinctions made in *Ayala v. Washington*.²¹⁴ *Ayala*, an airline pilot, sued *Washington*, his former lover, for accusing him of having used marijuana while off duty. The allegation appeared in a series of letters over the span of a few months: two addressed to *Ayala*’s employer and one sent to the Federal Aviation Administration (“FAA”). One of *Washington*’s letters to the airline spelled out the obvious import of her charge: “I plead and pray that you will take the necessary action to save the lives of unsuspecting passengers that board[] the [aircraft] that [Ayala] is in charge of.”²¹⁵ Nevertheless, the court found both letters to the airlines to be of private concern because they “merely communicated information regarding the alleged misconduct of a single private individual,” even though the misconduct admittedly “could have a significant effect on public safety.”²¹⁶ *Washington*’s letter to the FAA, on the other hand, had also criticized the agency’s apparent discount of accusations that she had earlier lodged against *Ayala*: “I forgot he’s an airline pilot and a man. I’m just a nonessential woman and lowly governmental employee. So [Ayala] . . . probably is being helped to cover up his violations, and I’m condem[n]ed and called crazy.”²¹⁷ Because *Washington* had asserted that “the agency’s failure to give credence to her charges is the result of discrimination against her as a woman and as a non-elite,” her speech in this instance lay “at the very core of the First Amendment” and thus was on a matter of public concern.²¹⁸

211. *Rabren v. Straigis*, 498 So. 2d 1362, 1363 (Fla. Dist. Ct. App. 1986).

212. *Cooper*, 824 P.2d at 1155.

213. *Rabren*, 498 So. 2d at 1363 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)).

214. 679 A.2d 1057 (D.C. 1996).

215. *Id.* at 1060.

216. *Id.* at 1068.

217. *Id.* at 1069.

218. *Id.*

While allegations that government decisionmaking has been tainted by discrimination are certainly of public concern, distinguishing the *Ayala* letters on this basis demonstrates the distorting effects of contextualization. If an airline pilot's alleged use of marijuana is not of public concern (a proposition seemingly at odds with *Rabren*'s perception of harbor pilots), an accusation of such conduct should not be transformed by mention in a complaint about agency process that transcends the topic of flight safety. By the *Ayala* court's logic, even a simple claim that Ayala had fathered an illegitimate child might be treated as a matter of public concern if directed to a government entity and hitched to a charge that the entity's unresponsiveness is due to violation of an unrelated constitutional norm.²¹⁹ Even if this sort of distinction can be supported by reference to abstract principles, it supplies muddled guidance to speakers subject to this regime and none at all to those in jurisdictions where a different view could prevail. The availability of alternative perspectives on this question, and the multiplicity of possible approaches to the single problem of public safety suggested by just three cases, reinforce the discouraging prospects for consistent application of the public concern criterion.

219. The manner in which a public framework can be superimposed on an otherwise ostensibly private matter is illustrated by a comparison of *Staheli v. Smith*, 548 So. 2d 1299 (Miss. 1989), and *Grossman v. Smart*, 807 F. Supp. 1404 (C.D. Ill. 1992). *Staheli* was a college professor who brought a defamation action against his dean, who had criticized *Staheli*'s performance when opposing his unsuccessful bid for tenure. Noting, *inter alia*, that the "context" of the debate over *Staheli*'s merit was "essentially an employment dispute," the court found no public concern present. *Staheli*, 548 So. 2d at 1305. *Grossman* raised the question of an assistant professor's fitness in a different context. In a widely circulated letter, defendant *Smart* accused a university of racially preferential employment practices. *Purnell*, one of the plaintiffs, was a law school professor at the university. *Smart* allegedly included as an attachment to his letter a copy of *Purnell*'s law school transcript indicating that *Purnell* had failed two courses. Because the transcript was circulated in "the context of University's hiring procedures," the court found that it involved a matter of public concern. *Grossman*, 807 F. Supp. at 1411. While each of these determinations is defensible—as classifications generally are under the vague public concern standard—they also suggest incentive for the manipulating defamatory criticism to avoid private concern designation. Even if *Smart* had actually borne a personal grudge against *Purnell* and simply sought to embarrass him, *Smart* could have achieved enhanced constitutional protection by disseminating *Purnell*'s transcript in the manner that he did. Conversely, while university rules may restrict the form of a dean's evaluation of a tenure candidate to a "confidential setting," *Staheli*, 548 So. 2d at 1305; it probably would not strain the academic imagination to devise broader terms in which to couch a decanal critique: e.g., academic excellence, public funding, or free speech itself.

5. Sexual Aggression

The scope and gravity of sexual predation, whether through assault or harassment, have risen dramatically in the public consciousness in recent times;²²⁰ this problem must certainly be considered a matter of public concern. The question of whether a particular individual has committed such an offense, however, would seem presumptively to occupy a different status. Nevertheless, the vague contour of the content-form-context approach tests the ability to distinguish between simple accusations and those that are an integral part of speech on a matter of public concern.

Two cases suggest the difficulty of drawing such a line in a principled fashion. In *Shaari v. Harvard Student Agencies, Inc.*,²²¹ the plaintiff managed a youth hostel. A travel guide published by the defendant stated that “[w]omen should not stay here, nor should men who don’t want to encourage harassment”;²²² the advice was based on suits for sexual harassment brought by three different women against the plaintiff the previous year.²²³ Assessing the plaintiff’s defamation claim, the court ruled the speech at issue to address a matter of public concern: *viz.*, “the existence of multiple sexual harassment claims against the proprietor of a youth hostel open to the general population.”²²⁴ In *Carney v. Santa Cruz Women Against Rape*,²²⁵ the plaintiff’s name appeared on a list of sexual assailants in a newsletter published by the defendant (“SCWAR”), a women’s antirape group. The court held that the accusation involved a matter of public concern because “[t]he content, form and context of the newsletter portray a publication dedicated to addressing the general topic of sexual assault and harassment.”²²⁶

These decisions do not rest on the rationale that an individual’s sexual aggression amounts to a matter of public concern *per se*; they do, however suggest ready means by which a speaker can enshroud an accusation in a protective context. Both the “consumer guide[’s]”²²⁷ counsel to avoid Shaari’s hostel and the SCWAR newsletter’s identification of men who reportedly had been ““hassling/assaulting/raping”” women²²⁸ were designed to alert potential victims of the alleged offender. In that sense, neither was “solely in the

220. See JOSEPHINE DONAVAN, FEMINIST THEORY 195 (1992); MONA HARRINGTON, WOMEN LAWYERS 105-21 (1994); Nan Stein, *No Laughing Matter: Sexual Harassment in K-12 Schools*, in TRANSFORMING A RAPE CULTURE 311-28 (Emilie Buchwald et al. eds., 1993).

221. 691 N.E.2d 925 (Mass. 1998).

222. *Id.* at 926.

223. *Id.*

224. *Id.* at 928.

225. 271 Cal. Rptr. 30 (Ct. App. 1990).

226. *Id.* at 37.

227. *Shaari v. Harvard Student Agencies, Inc.*, 691 N.E.2d 925, 928 (Mass. 1998).

228. *Carney*, 271 Cal. Rptr. at 37.

individual interest of the speaker and its specific business audience” or “motivated solely by the desire for profit.”²²⁹ While doubtless true, these observations might reasonably be made about most publicly aired charges of sexual violence or harassment; or at least a litigation-conscious accuser might readily craft a format that incorporates these indicia of public concern. While a court could theoretically peer behind the facade of an ostensible public service announcement, expression that otherwise meets judicial criteria for matters of public concern should not be discredited by the speaker’s subjective aim.²³⁰ Moreover, this is an especially sensitive area for judicial investigation of suspected motives. Permitting inquiry into the “real” purpose of an accusation might, for example, have allowed Carney to explore whether the newsletter’s reference to him had resulted from a personal grudge against him by a member of SCWAR. Evaluating charges of sexual assault or harassment at face value, then, courts might find themselves distinguishing not so much between matters of public and private concern, as between speakers of greater and lesser sophistication.

Nor can the implications of this inclusive approach be limited to allegations of sexual aggression. The *Carney* court’s choice to “focus[] on the broad topic of the newsletter in general, dealing with matters of sexual harassment and assault, rather than the specific accusation that a private individual committed a specific crime,”²³¹ could be exercised in other areas of public concern as well. For instance, murder, arson, and child abuse are also topics of “pressing public

229. *Id.* (distinguishing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)).

230. Consideration of possible personal motives might well have changed the results in cases like *Ayala*, *see supra* notes 214-19 and accompanying text, and *Rabren*, *see supra* notes 204-06 and accompanying text. Washington’s charge of marijuana use by *Ayala* might have been dismissed as a former lover’s vindictive flaying, while the *Rabren* court could have taken into account the defendant’s economic motive for casting doubt on the competence of members of a rival union. Also, both *Carney* and *Shaari* involve collective enterprises, where determining motive encounters additional practical difficulties. In part because of such obstacles, the Supreme Court in weighing constitutionality has largely foresworn searching for illegitimate legislative motives. *See United States v. O’Brien*, 391 U.S. 367, 383 (1968); *McCray v. United States*, 195 U.S. 27, 56 (1904); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *YALE L.J.* 1205, 1212-23 (1970). Even in the few areas like equal protection where illicit motive may constitute grounds for invalidation, the Court has erected formidable evidentiary barriers. *Personnel Adm’r v. Feeney*, 442 U.S. 256, 272 (1979). *See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW* 1509 (2d ed. 1988); Robert G. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 *U. ILL. L. REV.* 961, 1023-34.

231. *Carney v. Santa Cruz Women Against Rape*, 271 *Cal. Rptr.* 30, 37 (Ct. App. 1990).

concern."²³² It is one thing when a serious offense is attributed to someone in the setting of a prosecution or other state process; the link to the public sphere provides a tangible basis for finding a public concern.²³³ *Hepps* itself involved allegations that the plaintiffs had ties to organized crime which they used to influence the state's governmental processes; this was thus speech that "concerns the legitimacy of the political process, and therefore 'matters.'"²³⁴ In the absence of such a link, courts are left to their own subjective devices in determining whether the wrongdoing at issue "matters."²³⁵ While this arrangement is more speech-protective than the practice of confining public concern classification to expression overtly tied to governmental activity, it still exposes defendants to the vagaries of judicial value judgments.

6. Other Examples

The areas discussed thus far do not, of course, exhaust the instances in which a court's view of the public or private nature of defamatory speech could reasonably be viewed in a different light. Characterization of the matter involved and its relevant context can be stretched or contracted to accommodate a court's sense of the appropriate level of protection in a variety of settings. A few additional examples suggest the reach of this phenomenon.

A court's power to indulge its predilections in deciding whether a matter of public concern is involved is suggested by *McNally v. Yarnell*.²³⁶ The defendant

232. *Id.*

233. *See, e.g.,* *Wiemer v. Rankin*, 790 P.2d 347, 352 (Idaho 1990) (finding public concern where alleged insinuation that plaintiff murdered his wife appeared in article criticizing prosecutor's investigation of wife's death); *Rouch v. Enquirer & News of Battle Creek*, 398 N.W.2d 245, 267 (Mich. 1986), *vacated*, 487 N.W.2d 205 (Mich. 1992), *and cert. denied*, 507 U.S. 967 (1993) (holding that "a report of an arrest and the facts used to establish the probable cause for the arrest amount to speech of public concern" where newspaper article named plaintiff as arrested suspect in rape investigation and reported details of rape); *Jacobson v. Rochester Communications Corp.*, 410 N.W.2d 830, 836 n.7 (Minn. 1987) (finding, in case where broadcast story falsely stated that plaintiff was in prison because of failure to note reversal of plaintiff's arson conviction, that "the news report describing Jacobson's trial and his activities were matters of 'undoubted public concern'" (quoting *Dun & Bradstreet*, 472 U.S. at 756 (Powell, J., plurality opinion))).

234. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

235. *Compare, e.g.,* *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 502 n.7 (S.C. 1998) (accepting stipulation that "matter of public interest [i.e., concern]" was involved where plaintiff was misquoted as saying that murdered teenager's family gave her no support to continue her education), *and Sartain v. White*, 588 So. 2d 204, 213 (Miss. 1991) (finding accusation that defendants were murderers, robbers, and terrorists not to involve a matter of public concern in the context of "a dispute between a respectable family as the accused and an accuser with a rather notorious past").

236. 764 F. Supp. 838 (S.D.N.Y. 1991).

Yarnell was an art historian who commented unfavorably on the authenticity and value of certain art works by John LaFarge that the plaintiffs were seeking to sell. While conceding that “the topic of LaFarge may not be of interest to the population as a whole,” the court found Yarnell’s statements were of public concern in that they “affect the market for and the tax implications of donating LaFarge’s works among the segment of the population that trades such works as well as the community of scholars with an interest in LaFarge.”²³⁷ However admirable the court’s impulse to shield esthetic criticism, the proposition that public concern can be adjusted to target an interested “segment of the population” leaves little restraint on judicial classification of defamatory speech. Under this approach, a court can choose to recognize or ignore an interested mini-“public” according to its sympathy for the affected group. Some speech might thus be relegated to private concern classification because its potential recipients receive less solicitude than the affluent investors and erudite scholars in *McNally*.

A potential for broader discrimination inherent in the public concern determination may be gleaned from *Wilson v. Slatalla*.²³⁸ The plaintiff there sued the authors and publisher of a book about a group of computer hackers who illegally accessed the computer system of major corporations. A named member of the group, the plaintiff specifically objected to statements concerning “the ability of the [group’s] members to breach the security and threaten the integrity of large computer systems.”²³⁹ In assessing the nature of the statements, the court ventured that “the Book contributes to ‘robust debate on public issues’ and is not a matter of ‘private pique.’”²⁴⁰ While gratifyingly protective in this instance, the court’s reasoning raises recurring concerns over the breadth of context on which courts are free to focus. The danger here is less that a differently inclined court might have found a private concern by isolating the allegedly defamatory statements from the larger public discussion of computer penetrability (although this possibility exists). Rather, it lies in the intimation that the court’s acknowledgment of the statements’ public dimension stemmed from the heft of the book’s account. A more narrowly framed accusation perhaps would have obscured the connection to public debate; an e-mail by another member of the plaintiff’s group, for example, might have been considered a “private pique.”

This type of disparity again underscores the potential incongruities of the content-form-context formula. The nature of an individual’s participation in a scheme to gain access to corporate computer systems does not depend on the medium in which it is reported. If private, it does not gain retroactive public import by inclusion in a book; if public, its significance is not diminished by

237. *Id.* at 847.

238. 970 F. Supp. 405 (E.D. Pa. 1997).

239. *Id.* at 413.

240. *Id.* (citations omitted).

mention in private correspondence. Alternatively, if *Dun & Bradstreet* did indeed contemplate this sort of variability, then the public concern standard is at best manipulable—offering protection to speakers sufficiently shrewd or well-advised to have attacked their target in a suitable manner. At worst, this approach is capricious, hinging on the fortuity of the defendant's having chosen a judicially acceptable vehicle for addressing a public matter.

Another possible danger is the temptation for classification to be colored by the court's perception of the truth or falsity of the plaintiff's statements.²⁴¹ In *Forrester v. WVTM TV, Inc.*,²⁴² the plaintiff sued a television station in libel for broadcasting a videotape showing him slapping his six-year-old son at the boy's youth league baseball game. The scene appeared in a story about adults placing excessive pressure on children in sports. The court observed that this theme—whether adults were “emphasizing to five-and-six-year-olds the importance of winning over the importance of enjoying the game and developing good sportsmanship”—was obviously a matter of public concern.²⁴³ While certainly true, it does not necessarily follow that Forrester's behavior toward his son formed a part of that concern. The incident did take on a public aura by virtue of the station's decision to feature it in the broadcast story. As many examples already cited have shown, though, the idea of context is fluid enough that the court also had discretion to view the disciplinary act as a private matter. The court emphasized that the video and reporters' accompanying explanations recounted the episode accurately; the suit in fact was ultimately defeated on this ground.²⁴⁴ It is not unfair to speculate that the court may have viewed the matter in a different light had it believed that the station had falsely portrayed Forrester's conduct. In that case, the equities would have tilted toward the plaintiff, and the pertinent context could have been narrowed to enhance the opportunity for recovery.

In *Sartain v. White*,²⁴⁵ the impact of the defendant's credibility on the classification of her speech was not merely hypothetical. Sartain had accused the Whites of terrible deeds, including murder and terrorism. Ordinarily, the court conceded, it would regard “accusations of this nature” as a matter of public

241. A somewhat analogous problem arises in the jurisprudence of standing. The Supreme Court has sometimes been accused of confusing proper standing to assert a constitutional claim with the merits of the claim. See Nancy Levit, *The Caseload Conundrum, Constitutional Restraint and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321, 342 (1989); Robert A. Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 480-81, 512 (1972); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663-64 (1977).

242. 709 So. 2d 23 (Ala. Civ. App. 1997).

243. *Id.* at 26.

244. *Id.*

245. 588 So. 2d 204 (Miss. 1991).

concern.²⁴⁶ However, the court minced few words in describing Sartain as something of a crank and her charges as essentially frivolous.²⁴⁷ Accordingly, the accusations, “in this context and emanating from this source,”²⁴⁸ were denied public concern classification.

A final illustration of the ambiguous classification of much expression involves charges of courtroom misconduct. Arguably, any alleged involvement in the maladministration of justice inherently constitutes a matter of public concern. In practice, however, courts have refrained from applying this principle. In one case, an accusation that the plaintiff lawyer was practicing law (and in particular appearing in court) “drunk” was summarily assumed to address a matter of private concern.²⁴⁹ In another, a letter asserting, *inter alia*, that the plaintiff court reporter had a “practice of modifying transcripts” was declared “clearly” to involve a matter not of public concern.²⁵⁰ The problem, once again, is not that these determinations are demonstrably flawed; it is that an opposite ruling in each case would have been reasonable as well. Another court could have regarded the quality of courtroom practice as a matter of public concern encompassing the charge at issue, especially where the accuser was a fellow lawyer and the setting (or “context”) was a “crowded courtroom.”²⁵¹ Likewise, it is not at all “clear” that a court reporter’s routine modification of transcripts lacks substantial public implications.

III. THE AVOIDABILITY OF PUBLIC CONCERN DETERMINATION

As Part II documents, public concern’s conceptual indeterminacy opens a wide realm for subjective judicial discretion. As a result, speakers are discouraged from criticism on potentially “private” matters, and substantially similar defamatory expression is subject to disparate protection. Had *Dun & Bradstreet*’s framework been compelled by established doctrine, these effects might be seen as unfortunate but inevitable costs of a clear constitutional mandate.²⁵² The *Dun & Bradstreet* plurality, however, was under no such compulsion; it simply elected to embrace one branch of an ambiguous jurisprudential ancestry.

246. *Id.* at 213.

247. *See id.* (referring to Sartain’s “oral tirades within a neighborhood,” her “rather notorious past,” and her having “used, misused and played litigation games”).

248. *Id.*

249. *Mullen v. Solber*, 648 N.E.2d 950, 952 (Ill. App. Ct. 1995).

250. *Yesner v. Spinner*, 765 F. Supp. 48, 49, 52 (E.D.N.Y. 1991).

251. *Mullen*, 648 N.E.2d at 951.

252. In a sense, the Court has viewed the denial of First Amendment protection to material found obscene under its imprecise standards in this light. *See Miller v. California*, 413 U.S. 15, 24 (1973); *id.* at 27 n.10 (quoting *Roth v. United States*, 354 476, 491-92 (1957)).

A. *The Limited Function of Public Concern in Free Speech Doctrine*

Admittedly, the notion that speech on public issues occupies a special position under the First Amendment has a long jurisprudential pedigree. Thus, it required no originality for Justice Powell to observe that “[i]t is speech on ‘‘matters of public concern’’ that is ‘at the heart of the First Amendment’s protection’’²⁵³ and that ‘‘speech on public issues occupies the ‘‘highest rung of the hierarchy of First Amendment values’’ and is entitled to special protection.’’²⁵⁴ Nor would it have been difficult for Justice Powell to locate similar sentiments elsewhere, in both the Court’s pronouncements²⁵⁵ and scholarly commentary.²⁵⁶

253. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (Powell, J., plurality opinion) (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (citing *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940))).

254. *Id.* at 759 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted)).

255. *See, e.g.*, *FCC v. League of Women Voters*, 468 U.S. 364, 375-76 (1984) (stating that communication regarding matters of public importance ‘‘is entitled to the most exacting degree of First Amendment protection’’); *Casey v. Brown*, 447 U.S. 455, 466 (1980) (describing ‘‘[p]ublic issue picketing’’ as ‘‘an exercise of . . . basic constitutional rights in their most pristine and classic form’’ (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963))); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) (referring to discussion of governmental affairs as ‘‘speech indispensable to decisionmaking in a democracy’’); *Pickering v. Board of Educ. of Township High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 573 (1968) (identifying the ‘‘public interest in having free and unhindered debate on matters of public importance’’ as the ‘‘core value’’ of Free Speech Clause); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (asserting that a ‘‘major purpose’’ of First Amendment was ‘‘to protect the free discussion of governmental affairs’’); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (positing ‘‘maintenance of the opportunity for free political discussion’’ as a ‘‘fundamental principle of our constitutional system’’); *see also* *Time, Inc. v. Hill*, 385 U.S. 374, 389-91 (1967) (showing of actual malice required for recovery for invasion of privacy resulting from publication of nondefamatory false or misleading report of a ‘‘matter of public interest’’). Since *Dun & Bradstreet*, the Court has continued to voice this philosophy. *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (‘‘At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.’’). For a review of the history of ‘‘[t]he idea that speech on public issues has a special place at the heart of the First Amendment,’’ see Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 13-20 (1990).

256. *See, e.g.*, ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 18-19, 22-27 (1948) (describing positive significance of public issue speech in context of American democracy and the traditional town meeting); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 300-01 (1978) (asserting that First Amendment ‘‘in principle’’ protects only ‘‘political speech’’); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (asserting that

It is also true that the public issue motif had found specific resonance in the Court's prior opinions on defamation.²⁵⁷ *New York Times* repeatedly exalted free debate on public issues.²⁵⁸ *Garrison's* extension of the *New York Times* actual malice rule to criminal cases flowed from the premise that "speech concerning public affairs is . . . the essence of self-government"²⁵⁹ and the goal that "[d]ebate on public issues" be "uninhibited."²⁶⁰ In barring actions that equate impersonal attacks on government activity with defamation of particular officials, *Rosenblatt v. Baer*²⁶¹ similarly sought to vindicate the "strong interest in debate on public issues."²⁶² Sharply distinguishing between actual malice and negligence, *St. Amant v. Thompson*²⁶³ declared the necessity of shielding some erroneous expression to "insure the ascertainment and publication of the truth about public affairs."²⁶⁴ *Greenbelt Cooperative Publishing Ass'n v. Bresler*²⁶⁵ overturned a libel verdict arising out of accusations at a city council meeting that the plaintiff's negotiating strategy in attempting to extract concessions from the city amounted to "blackmail." The Court declared the subject matter of the newspaper reports of this charge—"public meetings of the citizens of a community concerned with matters of local governmental interests and importance"—to be "of particular First Amendment concern."²⁶⁶ And of course

"[c]onstitutional protection should be accorded only to speech that is explicitly political"); Kalven, *supra* note 16, at 208 (noting the historical importance of free public speech regarding "the stewardship of public officials"); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255-57 (identifying freedom to discuss public issues as crucial to the informed judgment that is necessary for voting, which is the process by which the public governs).

257. For an overview, see Richard Barkley, Note, *The Evolution of a Public Issue: New York Times Through Greenmoss*, 57 U. COLO. L. REV. 773 (1986).

258. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (expressing "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); *id.* at 272 ("Whatever is taken from the field of libel is taken from the field of free debate." (citation omitted)) (referring to reports of officials' conduct); *id.* at 278 (asserting threat to First Amendment freedoms where spectre of libel judgments intimidate "those who would give voice to public criticism"); *id.* at 279 n.19 (acknowledging that "[e]ven a false statement may be deemed to make a valuable contribution to public debate") (citing JOHN STUART MILL, ON LIBERTY 15 (Oxford ed. 1947)); *id.* at 292 (characterizing good-faith criticism of government as "the very center of the constitutionally protected area of free expression").

259. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

260. *Id.* at 73. See *supra* note 12 and accompanying text.

261. 383 U.S. 75 (1966).

262. *Id.* at 85.

263. 390 U.S. 727 (1968).

264. *Id.* at 732.

265. 398 U.S. 6 (1970).

266. *Id.* at 11.

the short-lived regime of *Rosenbloom* aimed to prevent defamation law from “stifling public discussion of matters of public concern.”²⁶⁷

Nevertheless, these recurring tributes to speech on public issues did not chart an inevitable path to the point at which the Court arrived in *Dun & Bradstreet*. As noted earlier, the Court itself had recognized in *Gertz* the difficulty of ad hoc judicial determination of the public or private character of expression.²⁶⁸ Others have since elaborated on the inherent “lack of any principled method of determining what kinds of issues ought to be excluded from the domain of public discourse.”²⁶⁹ Thus, a “normative” conception of public concern undemocratically imposes a judicially selected roster of appropriate topics, while a “descriptive” conception measured by breadth of current circulation excludes ostensibly weighty issues that have not yet registered in the public consciousness.²⁷⁰ As the latter flaw suggests, issues of public moment are typically rooted in “private” dynamics:

Matters such as abortion, homosexuality, violence in the home, the ‘right to die,’ AIDS, drug abuse, and surrogate parenthood—among the most intensely private kinds of concerns one can imagine—are today at the forefront of public debate and the legislative agenda. They came to be so only through communications among solitary individuals struggling with ‘personal’ concerns.²⁷¹

Moreover, according inferior protection to one sector of a class of expression is in tension with the principle of equality in free speech jurisprudence. The Court has stated that “our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First

267. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 47 (1971). See *supra* notes 22-29 and accompanying text.

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

269. Post, *supra* note 52, at 673.

270. See Post, *supra* note 52, at 669-73.

271. Estlund, *supra* note 255, at 31. For attacks on the public/private distinction transcending the free speech setting, especially from the perspective of Critical Legal Scholarship, see Gerald E. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1597 (1982); Peter Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263, 264-65 (1984); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 162 (1982); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1561 n.242 (1983); Christopher Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441 (1982).

Amendment protection.”²⁷² In an even more sweeping formulation, the Court declared that “above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”²⁷³ Elsewhere the Court has asserted that apolitical speech is not relegated to inferior status under the First Amendment.²⁷⁴

Dun & Bradstreet’s subordination of speech on “private” matters can be reconciled with these affirmations of equality, but in a superficial and unsatisfying way. The Court’s endorsements of evenhandedness have typically been issued in settings where the government has sought to suppress the expression of opinion.²⁷⁵ Defamation actions, on the other hand, seek redress for the effects of false statements of fact regardless of viewpoint.²⁷⁶ In addition, as the *Dun & Bradstreet* plurality noted, the Court “on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others.”²⁷⁷ Like obscenity and fighting words, defamation has traditionally been included on this list of disfavored categories.²⁷⁸

Diminished protection for certain defamatory content, however, stretches the “two-level theory”²⁷⁹ of free speech beyond its modern underpinnings. Even

272. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977).

273. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

274. *See, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971) (stating that “[w]holly neutral facilities . . . come under the protection of free speech” (citation omitted)); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (asserting that guarantees of free speech and press “are not the preserve of political expression or comment upon public affairs”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (finding it “immaterial whether the beliefs sought to be advanced . . . pertain to political, economic, religion, or cultural matters”); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (declaring that “[n]o official . . . can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”); *Bridges v. California*, 314 U.S. 252, 269 (1941) (rejecting proposition that “the freedom . . . guaranteed [in the Constitution] for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression”). For analysis of the antidiscrimination theme in free speech doctrine, see Kenneth L. Karst, *Equality as a Central Principle of the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 38-42 (1973); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 914 (1987).

275. *But see Time, Inc. v. Hill*, 385 U.S. 374 (1967) (invalidating damages for nondefamatory false report of plaintiffs’ experience as hostages in their home).

276. *See TRIBE, supra* note 230, at 878 (describing laws confined to compensating individuals for injury to reputational interests as “ideologically neutral”).

277. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (Powell, J., plurality opinion).

278. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (stating that “there is no constitutional value in false statements of fact”); *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

279. *See TRIBE, supra* note 230, at 928-44; *see also* MARTIN REDISH, *FREEDOM OF EXPRESSION* 55-56 (1984); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 233-34

“lesser” categories of expression are not exempt from the Court’s disapproval of selective restrictions on speech. In *R.A.V. v. St. Paul*,²⁸⁰ the Court rejected “the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression.”²⁸¹ To be permissible, differential treatment of a content-defined subclass must not undermine core First Amendment values. For example, the discrimination may be based wholly on “the very reason the entire class of speech at issue is proscribable,”²⁸² or on the subclass’s association “with particular ‘secondary effects’ of the speech.”²⁸³ Neither rationale, however, applies to exposing defamatory speech on matters of private concern to greater penalties. Unlike a prohibition on only obscenity whose prurience is most patently offensive—an illustration given in *R.A.V.*²⁸⁴—harsher treatment of “private” defamatory speech does not aim at one portion of an intrinsic element of defamation. Nor does it seek to curb “secondary effects” peculiar to expression on matters of private concern. Instead, the *Dun & Bradstreet* plurality reasoned that the inferior value of this type of speech entailed a different balance between First Amendment and reputational interests than that struck in *Gertz*.²⁸⁵

R.A.V. did allow other bases for selective restriction “so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.”²⁸⁶ Under a regime that singles out speech judged not to address matters of public concern, however, that possibility exists. *R.A.V.* itself established that the impermissible suppression may lurk in a restriction’s “practical operation.”²⁸⁷ There the Court struck down an ordinance forbidding display of a symbol that “one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”²⁸⁸ The ordinance was construed to reach only fighting words that met this description. In practice, the Court concluded, the ordinance sought to tilt the debate between advocates of tolerance and their opponents by limiting the verbal arsenal of the latter; the city had “no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury rules.”²⁸⁹

(1993).

280. 505 U.S. 377 (1992).

281. *Id.* at 384.

282. *Id.* at 388.

283. *Id.* at 389 (citation omitted).

284. *Id.* at 388.

285. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-61 (1985) (Powell, J., plurality opinion).

286. *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992).

287. *Id.* at 391.

288. *Id.* at 380-81.

289. *Id.* at 391-92.

The potential for favoritism from heightened penalties for speech deemed private is more subtle than in *R.A.V.*, but it is still substantial. While the state directly enforced the restriction in *R.A.V.* through the machinery of its criminal law, the suits permitted by *Dun & Bradstreet* are initiated by private parties for damages. As the Court stated in rejecting the plaintiffs' state action argument in *New York Times*, however, what matters is "not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."²⁹⁰ Moreover, the specter of massive damages may well be more intimidating to speakers than the possibility of conviction for a misdemeanor.²⁹¹

A related but more profound distinction is that unlike the explicitly content-based restriction in *R.A.V.*, reduced protection for defamation on private subject matter does not seem to align the state against the proponents of a particular message. While the distinction has some substance, the surface neutrality of a rule expediting greater damages for defamation is deceptive. As discussed earlier, the vague public concern standard invites speakers to embellish intuitively private expression with the trappings of public discourse.²⁹² As also suggested, the ability and awareness to fashion these more elevated constructions are not distributed evenly across all strata of society. The result is not only that an advantaged speaker can avoid legal consequences visited upon someone lacking the resources to frame the same accusation as artfully.²⁹³ Rather, given the wavering line between public and private concern, the concerns of the educated and affluent are more likely to be raised to public stature, while those more prevalent among the inarticulate and dispossessed remain submerged in the private sphere. This systematic amplification of one group's voice augments the already formidable dominance of those at the higher end of the socioeconomic spectrum in setting the public agenda. In other areas, the Court has taken into account disparate impact on the poor in striking down ostensibly neutral restrictions on speech.²⁹⁴

290. *New York Times Co. v. Sullivan*, 376 U.S. 251, 265 (1964).

291. Compare *id.* at 278 (characterizing Alabama law of civil libel as "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law" (citation omitted)), with ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990) (ordinance establishing misdemeanor violated in *R.A.V.*).

292. See *supra* text accompanying notes 39-46; cf. *Ollman v. Evans*, 750 F.2d 970, 1036, cert. denied, 471 U.S. 1127 (1985) (Scalia, J., dissenting in part) (objecting to protection of "cooly crafted libel").

293. A realistic example captures this phenomenon:

[T]he well-heeled newspaper publisher planning an expose of private corruption may be wisely advised by its counsel to articulate the social and political implications of its revelations and may thus escape punitive damages under *Dun & Bradstreet*. The solitary citizen who pens a letter to the editor out of exasperation over her personal experience with similar misconduct may not be so fortunate.

Estlund, *supra* note 255, at 38-39.

294. See *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (invalidating

Finally, even if the considerations just cited do not compel the conclusion that the *Dun & Bradstreet* plurality plainly erred, they raise sufficient doubt to warrant retraction of the public concern criterion for a more fundamental reason. In requiring the presence of a public concern to qualify for the protection that *Gertz* had apparently provided to all speech by private figures, the *Dun & Bradstreet* Court turned its back on the historic role of speech on matters of public concern. As Professor Cynthia Estlund has observed, that speech has repeatedly served as a “vehicle for expanding the realm of freedom of speech.”²⁹⁵ Thus, speech on public issues has traditionally operated as “a kind of one-way doctrinal ratchet that was invoked to expand protections without expressly limiting them.”²⁹⁶ *Dun & Bradstreet* transformed this function by employing the public concern concept to shrink the scope of protection.²⁹⁷ The product—an amorphous, manipulable standard that deters speech and derives from a contrived reading of *Gertz*—did not justify this reversal.

B. Leaving Other Public/Private Constructs Intact

A potential objection to the above logic is that it might be thought to challenge other ways in which the public or private nature of speech fixes the degree of its protection. In particular, both the free speech rights of public employees and designation of defamation plaintiffs as public or private figures rest largely on judicial characterization of the matter involved. The Court’s reluctance to retract *Dun & Bradstreet*’s particular public/private distinction may stem in part from resistance to undermining the legitimacy of this dichotomy in those other settings. While public-private determinations in these other contexts are open to criticism, they stand on a more defensible foundation than *Dun & Bradstreet*’s dubious formulation.

blanket ban on summoning residents to door for purpose of distributing handbills while noting that “door to door distribution of circulars is essential to the poorly financed causes of little people”); see also *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (striking down “nondiscriminatory” flat license tax on distribution of religious pamphlets and noting that “[t]his method of disseminating religious beliefs can be crushed and closed out” by burden of cumulative taxes); Estlund, *supra* note 255, at 38-39.

295. Estlund, *supra* note 255, at 19.

296. Estlund, *supra* note 255, at 28.

297. The *Dun & Bradstreet* plurality’s approach was not entirely unprecedented. The Court in its then recent decision in *Connick v. Myers*, 461 U.S. 138 (1983), had also employed the idea of distinguishing between matters of public and private concern as a means of limiting the protection of certain expression. For further discussion of *Connick*, see *infra* Part III(B)(1). Professor Estlund regards the two decisions as similarly deficient. See Estlund, *supra* note 255, at 49 (decrying danger that role of public concern determinations in *Dun & Bradstreet* and *Connick* will be extended to other areas).

1. Dismissal of Public Employees

The public concern test emerged as the touchstone of protection of public employees' speech in *Connick v. Myers*,²⁹⁸ where the Court held that the First Amendment did not encompass workplace expression on matters that fail to meet this criterion.²⁹⁹ *Connick* narrowed the approach earlier taken in *Pickering v. Board of Education*,³⁰⁰ which had set forth a more flexible balancing test. *Pickering* was a public school teacher fired for writing a letter to the editor of the local newspaper criticizing the board of education and superintendent of schools for their handling of past revenue proposals and the level of expenditures on school athletic programs. In overturning the dismissal, the Court announced its task as "arriv[ing] at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."³⁰¹ In contrast, *Connick* set forth a two-step analysis for determining whether a public employee's speech constitutes proper grounds for dismissal.³⁰² As a threshold requirement, the speech must qualify as expression pertaining to a matter of public concern; if not, the Court's First Amendment inquiry comes to an end.³⁰³ If the speech can be "fairly characterized as constituting speech on a matter of public concern,"³⁰⁴ the Court then conducts the *Pickering* balancing exercise.³⁰⁵

The disposition of the claim in *Connick* indicated that both phases of the analysis pose significant hurdles to complaining employees. Myers, an assistant district attorney, objected to her proposed transfer to a different section of the criminal court. She prepared and distributed to other assistant district attorneys a questionnaire soliciting their views on the office transfer policy, office morale, the level of confidence in supervisors, and other matters.³⁰⁶ District Attorney

298. 461 U.S. 138 (1983).

299. *Id.* at 147.

300. 391 U.S. 563 (1968).

301. *Id.* at 568.

302. This analysis parallels the process adopted for determining whether a public employee's dismissal has comported with procedural due process. The Court first determines whether the employee has a property interest in retaining her position by virtue of a statutory or comparable entitlement. *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577-78 (1972). If so, the Court then assesses the adequacy of the procedures afforded for protecting the employee's interest. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

303. *Connick*, 461 U.S. at 146.

304. *Id.*

305. *Id.* at 150.

306. *Id.* at 155-56.

Connick then fired Myers for her refusal to accept the transfer and her "insubordination" in circulating the questionnaire.³⁰⁷

In reviewing Myers's challenge to her discharge, the Court found that the bulk of the questionnaire could not "be fairly considered as relating to any matter of political, social, or other concern to the community."³⁰⁸ Instead, the Court regarded the questions as reflecting Myers's disgruntlement with her transfer and dissatisfaction with the office status quo.³⁰⁹ Where the speech at issue is of a personal nature, the Court declared its adherence to the proposition that "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."³¹⁰

The Court did acknowledge one of the questionnaire's inquiries as pertaining to a matter of public concern: a question asking whether Myers's fellow assistant district attorneys ever felt pressured to work in political campaigns.³¹¹ Under the *Pickering* balancing test, however, the government's interest in "the effective fulfillment of its responsibilities to the public"³¹² here outweighed Myers's interest in distributing the questionnaire in the office.³¹³ While Connick did not show that the questionnaire had impaired Myers's ability to perform her responsibilities³¹⁴ or undermined the operation of the office,³¹⁵ the Court believed that an employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."³¹⁶

Connick's approach has been subjected to considerable criticism on a number of grounds. Some observers have questioned the basic notion of gauging the entitlement of employee speech to First Amendment protection according to whether the speech implicates a matter of public concern.³¹⁷ More commonly, commentators have attacked the particular version of the public concern test as promulgated and applied in *Connick*. A number have criticized what they view as *Connick's* crabbed conception of matters of public concern,

307. *Id.* at 141.

308. *Id.* at 146.

309. *Id.* at 148.

310. *Id.* at 147.

311. *Id.* at 149.

312. *Id.* at 150.

313. *Id.* at 151-54.

314. *Id.* at 151.

315. *See id.* at 153 (finding support for Connick's "fears that the functioning of his office was endangered").

316. *Id.* at 152.

317. *See* Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 25-29, 38-51 (1987); *The Supreme Court, 1982 Term-Leading Cases: Rights of Public Employees*, 97 HARV. L. REV. 164, 167-70 (1983).

as demonstrated by the exclusion of Myers's inquiries into the working conditions of the district attorney's office.³¹⁸ Some have particularly faulted the degree of deference accorded public employers' apprehension of disruption as grounds for employee discipline.³¹⁹ Moreover, as in the defamation context,³²⁰ *Connick's* concept of "matters of public concern" has been criticized as too vague a basis for determining employees' rights of expression.³²¹ Some observers have pointed to apparent contradictions in lower court approaches to document the broad discretion in determining what constitutes a matter of public concern.³²²

Notwithstanding the force of these criticisms, *Connick's* framework could survive the abandonment of the public concern test in defamation. Unlike *Dun & Bradstreet's* holding, which is based on an abstract and questionable judgment that speech on matters of private concern is less worthy of protection, *Connick's* regime is rooted in practical concerns about the administration of government. *Connick's* differential protection of public employees' speech flows from a legitimate desire to avoid making every criticism of a public official potential grounds for a constitutional case.³²³ Without some sort of mechanism for screening out essentially personal grievances, courts could be faced with a flood of litigation over employee challenges to dismissals linked to something that they had said.³²⁴ The threat of such litigation could substantially hamper effective governance. However debatable the level of deference displayed to the employer's judgment in *Connick*,³²⁵ it is hard to dispute the Court's belief in the need for significant managerial latitude free of intrusive judicial oversight.³²⁶

318. See, e.g., Estlund, *supra* note 255; Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597, 648-49 (1986); Massaro, *supra* note 317, at 37-38.

319. See, e.g., Massaro, *supra* note 317, at 33-37; Jonathan A. Marks, Comment, *Connick v. Myers: Narrowing the Scope of Protected Speech for Public Employees*, 5 U. BRIDGEPORT L. REV. 337, 361 (1984); Kermit Roosevelt, Note, *The Costs of Agencies: Waters v. Churchill and the First Amendment in the Administrative State*, 106 YALE L.J. 1233, 1240 (1997).

320. See *supra* notes 53-56 and accompanying text.

321. See, e.g., Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 IND. L.J. 43, 75 (1988); Massaro, *supra* note 317, at 27-33; Rosenthal, *supra* note 54, at 547-67; D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. CHI. L. REV. 249, 258 (1990).

322. See, e.g., Allred, *supra* note 321, at 50-75; Smith, *supra* note 321, at 257-62.

323. See *Connick v. Myers*, 461 U.S. 138, 149 (1983).

324. See Rosenthal, *supra* note 54, at 546-47.

325. See *Connick*, 461 U.S. at 152 (asserting need for "wide degree of deference" to employer's judgment).

326. See *id.* at 146. As Justice O'Connor has explained:

[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by

Thus, some means of identifying employee speech eligible for heightened constitutional protection, though imperfect, seems inevitable.³²⁷

Perhaps the strongest indication of the weight of these considerations is the extent to which criticism has focused not on *Connick's* distinction between speech on matters of public and private concern, but on its application of that distinction. At the outset of his dissent, Justice Brennan chastised the Court for refusing to treat Myers's speech about "the manner in which government is operated" as a matter of public concern.³²⁸ In addition, he objected to the Court's weighting the context of employee speech twice: both as a factor in determining whether it involves a matter of public concern and then in deciding whether the speech impeded the functioning of the office.³²⁹ Finally, Justice Brennan argued that insofar as Myers's questionnaire concededly addressed at least one matter of public concern, *Connick* should not have been able to fire her without demonstrating that her speech in fact disrupted the office.³³⁰ As previously noted, most critical commentary has echoed Justice Brennan in disputing the form of *Connick's* public concern test rather than the existence of a public concern criterion.³³¹

As for difficulties with vagueness, the basic dichotomy between ordinary employee complaints and broader commentary suggests at least potentially clearer guidance than the open-ended categories of public and private concern in defamation.³³² Lower courts have expressed their understanding that the thrust of *Connick's* public concern test is its exclusion of "mundane employment grievances."³³³ Moreover, while the distinction between employee speech on

law with doing particular tasks. Agencies hire employees to help do those tasks as efficiently as possible. When someone is paid a salary so that she will contribute to an agency's effective operation, the government employer must have some power to restrain her.

Waters v. Churchill, 511 U.S. 661, 674-75 (1994) (O'Connor, J., plurality opinion).

327. Cf. Clark A. Remington, Note, *A Political Speech Exception to the Regulation of Proxy Solicitations*, 86 COLUM. L. REV. 1453, 1468-69 (1986) (asserting need for distinction, though difficult to make, between proxies advancing political goals and other proxies in order to effectuate proxy rules).

328. *Connick v. Myers*, 461 U.S. 138, 156 (1983) (Brennan, J., dissenting) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

329. *Id.* at 157-58.

330. *Id.* at 158.

331. See *supra* notes 317-18 and accompanying text.

332. Even a thoughtful critic of the use of a public concern test in both *Connick* and *Dun & Bradstreet* has conceded that there is "a commonsense difference between purely personal gripes and gossip on the one hand, and proposals for political reform on the other." Estlund, *supra* note 255, at 4.

333. *Sanguigni v. Pittsburgh Bd. of Pub. Educ.*, 968 F.2d 393, 399 (3d Cir. 1992); see *Flanagan v. Munger*, 890 F.2d 1557, 1564 (10th Cir. 1989) (stating that public concern test is intended to determine whether employee's speech "takes on significance outside the workplace or whether it deals primarily with an employee's personal

matters of public and private concern can be uncertain, some ambiguity in this area may be inescapable. In this regard, it should be noted that proposed alternatives to the *Connick* test are also susceptible to varying interpretations. For example, one commentator³³⁴ has proposed a standard drawn from the four-part test for “incidental limitations on First Amendment freedoms” promulgated in *United States v. O’Brien*.³³⁵ The last two prongs of the *O’Brien* test require that the governmental interest advanced by such a restriction be “unrelated to the suppression of free expression” and that the restriction be “no greater than essential to the furtherance of that interest.”³³⁶ As has been noted elsewhere, this test is neither precise nor even necessarily speech-protective.³³⁷ Other standards, involving two-step analyses and balancing exercises,³³⁸ leave ample room for divergent applications. Even *Pickering*’s original form of balancing, while shielding more employee speech than *Connick*, hardly provides a crystal forecast of permissible workplace expression.

employment problem”); *Southside Pub. Sch. v. Hill*, 827 F.2d 270, 273 (8th Cir. 1987) (finding expression of public concern where plaintiffs were “not asserting a private grievance respecting employment or working conditions”); *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) (stating that the test is “whether the speech at issue . . . was made primarily in the plaintiff’s role as citizen or primarily in his role as employee”); *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985), *cert. denied*, 476 U.S. 1159 (1986) (construing *Connick* as embodying principle that “all public employee speech that by content is within the general protection of the First Amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely ‘personal concern’ to the employee—most typically a private, personnel grievance”); *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (distinguishing between employee speech designed to bring issue of public concern to attention of public and speech intended “to further some purely private interest”); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (regarding public employees’ speech as not of public concern when “it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public’s evaluation of the performance of governmental agencies”).

334. See Rosenthal, *supra* note 54, at 573-82.

335. 391 U.S. 367, 376 (1968).

336. *Id.* at 377.

337. See Nat Stern, *In Defense of the Imprecise Definition of Commercial Speech*, 58 Md. L. REV. 55, 140-42 (1999).

338. One proposal would permit government regulation of employee speech if the government could regulate the same speech directly through criminal sanctions. If it could not, step two would ask “whether any government interests exist that might justify restriction of the speech because the speaker happens to be a public employee.” Massaro, *supra* note 317, at 67. Another proposed approach would first require proof that the employee’s speech actually caused disruption of government efficiency. Even if such proof were provided, the state could not discipline the employee if she could “demonstrate that the speech was more valuable to the public than the disruption it caused.” Smith, *supra* note 321, at 269.

Moreover, unlike *Dun & Bradstreet*, which sharply diminished *Gertz's* safeguards, *Connick's* standard does not necessarily entail substantial curtailment of employees' free expression. In *Rankin v. McPherson*,³³⁹ decided a few years after *Connick*, the Court demonstrated that protection for statements on matters of public concern extends well beyond the workplace-related examples mentioned in the *Connick* opinion.³⁴⁰ *McPherson*, a clerical employee in a constable's office, was fired for a remark that she made to a co-worker after hearing of the attempted assassination of President Reagan: "[I]f they go after him again, I hope they get him."³⁴¹ Indicating its view that *McPherson's* statement amounted to no more than a commentary on the President's policies,³⁴² the Court found that the remark "plainly dealt with a matter of public concern."³⁴³ In balancing *McPherson's* interest in making her statement against the state's interest in the efficient functioning of the constable's office, the Court ruled in favor of *McPherson* because her remark posed a "minimal" danger to the office's successful operation.³⁴⁴ This protective impulse has been emulated by numerous lower court decisions where employee speech could plausibly be construed as touching on a matter of public concern.³⁴⁵ These developments do

339. 483 U.S. 378 (1987).

340. The Court in *Connick* indicated that statements would be considered of public concern if they are "of public import in evaluating the performance" of a public official, seek to inform the public that the public entity is "not discharging its governmental responsibilities," or attempt to "bring to light actual or potential wrongdoing or breach of public trust" by a public official. *Connick v. Myers*, 461 U.S. 138, 148 (1983).

341. *Rankin*, 483 U.S. at 381 (footnote omitted).

342. *See id.* at 386-87.

343. *Id.* at 386.

344. *Id.* at 390-91.

345. *See, e.g.*, *Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996) (holding that high school guidance counselor's disclosure of school board's alleged violations of open-meetings law and writing articles for newspaper on such topics as the sharing of household tasks by working couples addressed matters of public concern); *Wyrwal v. Saco Sch. Bd.*, 70 F.3d 165, 170 (1st Cir. 1995) (teacher criticizing her own department and suggesting possible law violations by school engaged in protected speech); *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 396 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996) (city engineer's allegation of misuse of public funds and potential danger to community's citizens because work on dam had not been done deemed to involve a matter of public concern); *Davis v. Ector County*, 40 F.3d 777, 782 (5th Cir. 1994) (employee's allegation of public officials' sexual harassment of public employees considered of public concern even if employee had mixed motives in making disclosure); *Hall v. Marion Sch. Dist. No. 2*, 31 F.3d 183, 192-93 (4th Cir. 1994) (teacher's letters to editor of local newspaper asserting school board's mismanagement of taxpayers' money addressed matter of public concern); *Frank v. Relin*, 1 F.3d 1317, 1329 (2d Cir.), *cert. denied*, 510 U.S. 1012 (1993) (comment by employee in district attorney's office that district attorney in case avoided disclosure of information because it would be helpful to the defense addressed a matter of "serious" public concern); *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 915-17 (11th Cir. 1993) (criticism by

not prove that *Connick's* doctrine should be retained in its present form. However, they do suggest that *Connick* poses less threat to free expression than *Dun & Bradstreet*, and that the shortcomings of a public concern test in the employment setting can be remedied by refining rather than abolishing *Connick's* approach.

2. Identification of Limited Public Figures

The logic of withdrawing *Dun & Bradstreet's* public concern test could be seen as threatening the integrity of the Court's public figure doctrine. While that doctrine does not employ a public concern criterion, its reliance on identification of public controversies makes it vulnerable to similar criticism. The determination of public or private status, however, has more coherence and imposes fewer burdens than attempting to classify the content of plaintiff's speech.

Of the three types of public figures recognized by the Court in *Gertz*,³⁴⁶ by far the most frequently recognized is the voluntary limited public figure.³⁴⁷ To

employee of municipal housing authority of authority's pre-leasing practice and maintenance problems addressed matters of public concern notwithstanding personal component of complaint); *Powell v. Gallentine*, 992 F.2d 1088, 1090-91 (10th Cir. 1993) (professor's allegations of grade fraud addressed matter of public concern); *Sheetz v. The Morning Call, Inc.*, 946 F.2d 202, 212 (3d Cir. 1991) (report of domestic violence by off-duty police officer recently named "officer of the year" involved matter of public concern); *Gillette v. Delmore*, 886 F.2d 1194, 1197-98 (9th Cir. 1989), *appeal after remand*, 979 F.2d 1342 (9th Cir. 1992), *and cert. denied*, 510 U.S. 932 (1993) (firefighter's comments to fire and police personnel criticizing manner in which police and firefighters treated patient in drug-induced, yet conscious, state involved matter of public concern).

346. 418 U.S. 323 (1974). The *Gertz* Court recognized all-purpose public figures, limited public figures, and involuntary public figures. *See id.* at 344-45.

347. *See* Eric M. Jacobs, Comment, *Protecting the First Amendment Right to Petition: Immunity For Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine*, 31 AM. U. L. REV. 147, 152 (1981). The *Gertz* opinion suggests that general purpose public figures number relatively few. *See Gertz*, 418 U.S. at 345. This view has been borne out by subsequent lower court decisions. *See* Gerald G. Ashdown, *Gertz and Firestone: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 680-81 (1977) (noting that "[o]nly plaintiffs such as William F. Buckley and Johnny Carson, both of whom were designated public figures by lower courts, would seem to meet the Court's standard" (footnotes omitted)); *see generally* Michael J. Gunnison, Note, *General Public Figures Since Gertz v. Robert Welch, Inc.*, 58 ST. JOHN'S L. REV. 355, 370, 379 (1984) (discussing a survey of defamation cases that revealed few instances in which the federal bench had relied on the general-purpose public figure theory to justify an application of the *New York Times* standard). A more recent search by the Author disclosed a continuing paucity of adjudicated general public figure cases. As for involuntary public figures, *Gertz* acknowledged that these would be "exceedingly rare." *Gertz*, 418 U.S. at 345. In fact, later Court decisions and lower court

attain this stature, plaintiffs must have “thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”³⁴⁸ Such persons assume the position of a public figure “for a limited range of issues.”³⁴⁹ In *Gertz* and three subsequent cases, the Court rejected the defendants’ attempt to assign this status to the plaintiffs, either because any dispute involved did not qualify as an appropriate public controversy, or because the plaintiffs had not “thrust [themselves] into the vortex”³⁵⁰ of that controversy.³⁵¹

The public controversy requirement has been faulted as both inconsistent and vague. Some have contended that it is impossible to reconcile the requirement with *Gertz*’s criticism of the *Rosenbloom* plurality for having assigned judges to identify issues of “general or public interest.”³⁵² The imprecision of the term has been seen as a source of manipulation and confusion.³⁵³ In *Time, Inc. v. Firestone*,³⁵⁴ for example, a magazine incorrectly

developments suggest the near impossibility of a plaintiff being characterized as an involuntary public figure. See Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1091-95 (1996).

348. *Gertz*, 418 U.S. at 345.

349. *Id.* at 351.

350. *Id.* at 352.

351. See *Wolston v. Reader’s Digest Ass’n*, 443 U.S. 157, 167-69 (1979) (“A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.”); *Hutchinson v. Proxmire*, 443 U.S. 111, 134-36 (1979) (stating that the plaintiff had not “thrust himself” into public controversy or “assumed any role of public prominence”); *Time, Inc. v. Firestone*, 424 U.S. 448, 453-55 (1976) (holding that the publicized divorce proceedings of private figures was “not the sort of ‘public controversy’ referred to in *Gertz*”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974) (holding that attorney who brought wrongful death action on behalf of family of boy shot to death by police officer did not inject himself into controversy over criminal prosecution of officer).

352. See *Gertz*, 418 U.S. at 346 (noting the Court’s “doubt [of] the wisdom of committing this task to the conscience of judges”). But see *Time, Inc. v. Firestone*, 424 U.S. 448, 487 (1976) (Marshall, J., dissenting) (stating that “[t]he Court resists this result by concluding that the subject matter of the alleged defamation was not a ‘public controversy’ as that term was used in *Gertz*”); *TRIBE, supra* note 230, at 880-81 (noting that the test for determining if plaintiffs have voluntarily injected themselves into a public controversy requires judges “to determine whether a controversy is ‘public,’ a determination indistinguishable . . . from whether the subject matter is of public or general concern” (footnote omitted)); *Ashdown, supra* note 347, at 683-84 (asserting that the Court’s definition of limited public figures “exacerbated the exact problem it professed to have found in *Rosenbloom*” by adding the requirement of a public controversy).

353. See John Hilbert, Comment, *A Criticism of the Gertz Public Figure/Private Figure Test in the Context of the Corporate Defamation Plaintiff*, 18 SAN DIEGO L. REV. 721, 729-38 (1981) (noting confusion and inconsistency over the meaning of a public controversy); Note, *The Editorial Function and the Gertz Public Figure Standard*, 87

specified adultery as the grounds on which the scion of a wealthy and well-known family had been granted a divorce after highly publicized proceedings.³⁵⁵ In the libel suit brought by his wife, the Court refused to consider her a limited public figure.³⁵⁶ While the divorce may have amounted to a “cause célèbre,” and thus an object of public interest, it did not in the Court’s eyes constitute the sort of public controversy that *Gertz* required.³⁵⁷ *Firestone* has been sharply criticized for narrowly characterizing the relevant controversy and eligible disputes.³⁵⁸ The apparent lack of uniformity among lower court approaches has further contributed to an impression of a malleable and subjective standard.³⁵⁹

As with *Connick*’s framework, however, these criticisms do not compel abolition of the *Gertz* limited public figure standard. Unlike *Dun & Bradstreet*’s public/private concern dichotomy—which was explained by a strained and even contradictory reading of *Gertz* as well as a questionable balancing

YALE L.J. 1723, 1742 (1978) (contending that *Gertz* failed to adequately define terms such as “public controversy” and did not provide specific criteria for lower courts to apply); Eileen Carroll Prager, Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157, 176-77 (1977) (suggesting that “by varying the perimeters of ‘the controversy’ the Court can determine the public or private status of the plaintiff and, ultimately, the outcome of the case before it”); Todd S. Swatsler, Comment, *The Evolution of the Public Figure Doctrine in Defamation Actions*, 41 OHIO ST. L.J. 1009, 1030-31 (1980) (stating that the public controversy requirement “often does more to blur than to elucidate the relevant issues”).

354. 424 U.S. 448 (1976).

355. *Id.* at 458.

356. *Id.* at 455.

357. *Id.* at 354. The Court also found that Mrs. Firestone did not voluntarily seek the publicity that her legal dispute received because the law compelled her to go to court to obtain her divorce and that press conferences called by her represented “an attempt to satisfy inquiring reporters” rather than an effort to shape the outcome of the trial. *Id.* at 454, 455 n.3.

358. See *id.* at 487-88 (Marshall, J., dissenting) (asserting that Mrs. Firestone appeared to satisfy the public figure criteria of *Gertz*, but that “[t]he Court resists this result by concluding that the subject matter of the alleged defamation was not a ‘public controversy’ as that term was used in *Gertz*”); James P. Naughton, Comment, *Gertz and the Public Figure Doctrine Revisited*, 54 TUL. L. REV. 1053, 1071 (1980) (criticizing *Firestone* opinion for having “engaged in *ad hoc* content analysis”); Note, *Divining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 941 n.56 (1983) (suggesting “reaction to Firestone’s divorce” or “domestic conflicts generally” as alternative characterizations of controversy).

359. See Alexander D. Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of New York Times v. Sullivan*, 25 ST. LOUIS U. L.J. 501, 518-25 (1981) (noting the inconsistency with which courts have applied the *Gertz* distinction between public figures and private individuals, leading to “a maze of seemingly irreconcilable cases”); Note, *Divining a Public Controversy*, *supra* note 358, at 931 (asserting that most courts attempting to define public controversy “have sunk into a morass of *ad hoc* rulings”).

exercise—*Gertz* rests on a substantial foundation. Implicit in the original extension of the actual malice rule for public officials to speech about public figures³⁶⁰ was the existence of a category of individuals falling outside these two groups. Moreover, *Gertz*'s principal rationale for distinguishing between public and private plaintiffs informs the public controversy requirement. By "invit[ing] attention and comment,"³⁶¹ public figures are said to assume the risk of injury from defamatory falsehoods.³⁶² Conversely, private individuals have not voluntarily exposed themselves to this risk and therefore have "relinquished no part of [their] interest in the protection of [their] good name."³⁶³ Private victims of defamation were therefore viewed by *Gertz* as "more deserving of recovery."³⁶⁴ It was thus consistent with this overriding "normative consideration"³⁶⁵ to define the predominant group of public figures as those who had assumed an active role in public controversies.

In practice, the public controversy requirement has not spawned an arbitrary conception of limited public figures. While courts have not followed a uniform approach to identifying limited public figures, divergences fall into discernible patterns. As this Author has argued elsewhere, courts tend to adopt either a formal model of strict adherence to the discrete elements of the *Gertz* test or to a less rigidly compartmentalized equitable model.³⁶⁶ The persistence of an equitable impulse suggests the value of revising *Gertz*'s formulation. However, equitable analysis can be incorporated by modifying rather than abandoning *Gertz*'s classification scheme.³⁶⁷

The validity of a public controversy criterion can also be accepted without embracing this theory. Even a thoughtful critic of the public concern test in both the defamation and public employment settings³⁶⁸ considers the public controversy requirement a potentially constructive analytical tool in limited public figure determinations. She has proposed substituting an empirical method of identifying public controversies for the judicial assessment of topical worthiness implicit in *Firestone*.³⁶⁹ Thus modified, the public controversy

360. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164-65 (1967) (Warren, C.J., concurring). Both *Butts* and the plaintiff in a companion case, *Associated Press v. Walker*, see *id.* at 130, were found to be public figures. See *id.* at 154-55. The result in *Butts* derived from an unusual and somewhat complicated configuration of opinions. For a detailed dissection, see Kalven, *supra* note 19, at 275-78.

361. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

362. See *id.* (noting the increased risk of voluntary exposure).

363. *Id.* at 345.

364. *Id.*

365. *Id.* at 344.

366. See Stern, *supra* note 347, at 1043-44 (summarizing this thesis).

367. See Stern, *supra* note 347, at 1101-02.

368. See generally Estlund, *supra* note 255.

369. See Estlund, *supra* note 255, at 51.

requirement can provide a relatively objective means of helping to determine public figure status.³⁷⁰

Finally, one can point to a small but telling indication that the experience of the *Gertz* regime has differed from that of *Dun & Bradstreet*. As early as 1980, a commentator could plausibly assert that the public figure test “has evolved into a reasonably concrete set of guidelines.”³⁷¹ A decade-and-a-half after *Dun & Bradstreet*, the case law does not support a comparable observation about the public concern test for defamation, and the prospects seem bleak that it ever could.

IV. CONCLUSION

This Article began with a hypothetical designed to illustrate the indeterminacy of the concept of “public concern” as a criterion for classifying defamatory expression. Case law confirms the intuition that derogation of the doctor in this instance could be rationally viewed as implicating a matter of either public or private concern. On the one hand, a physician’s competence and integrity presumably matter to the community. More broadly, such a comment can be linked to the national debate over the quality and cost of health care. On the other hand, the form and content of the complaint could support a finding that the defendant was primarily venting an individual grievance. As is so often the case, neither a determination that the complaint addressed a public concern nor a ruling that only a private concern was involved could be considered plainly wrong. Because the standard is so vague and subjective, courts can (and often do) arrive in good faith at opposite characterizations of essentially similar expression.

This unsatisfactory scheme might be worth trying to salvage if it had been compelled by doctrinal necessity and could be substantially improved by further refinement. *Dun & Bradstreet*’s public concern test, however, contradicts the Court’s own prior critique in *Gertz* of ad hoc judicial assessments of the importance of speech. Experience has confirmed the inherent futility of attempts to mold these assessments into a coherent system of principled decisionmaking.

It is not too late for the Court to restore the original understanding of *Gertz*’s regime. The apparently unqualified application of *Gertz*’s protections to all “private individuals”³⁷² represented a reasoned exercise in balancing free speech and reputational concerns. Through carefully calibrated requirements for

370. See Estlund, *supra* note 255, at 51-52.

371. Naughton, *supra* note 358, at 1078-81.

372. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974).

damages, the *Gertz* Court sought to steer a middle ground between *Rosenbloom*'s overinclusive barrier to defamation suits and the draconian rigors of the common law. *Dun & Bradstreet* imposed a new and inevitably confusing layer of complexity on this manageable framework. The cost in deterred speech from the unpredictable public concern test is literally incalculable. Whatever that cost, however, it outweighs the negligible benefit of an unworkable standard.