The Power of Public Concern and First Amendment Values: Insulating Speech in Sports and Entertainment from Tort Liability for Others' Actions

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Article

The Power of Public Concern and First Amendment Values:
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Clay Calvert*

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Introduction

When should First Amendment interests in free expression shield speakers from civil liability for harm to others caused by third parties who allegedly followed or otherwise were inspired by the speakers’ words? Two recent federal court opinions – Higgins v. Kentucky Sports Radio, LLC involving post-game coverage by sports commentators about a college basketball referee, and Stricklin v. Stefani2 pivoting on a singer’s words to her concert audience – illustrate similar yet distinct methodologies for analyzing this important question. The speech of the commentators in Higgins allegedly “incited the harassment”4 by listeners and readers of referee

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1 The First Amendment to the U.S. Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. Amend. I. The Free Speech and Free Press Clauses were incorporated nearly a century ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding “that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States”).


4 Higgins, 951 F.3d at 732.
John Higgins and his roofing business in what the court aptly called a “trolling campaign.” The words of Gwen Stefani in Stricklin urging concert goers in the back of a pavilion to “come down a little closer” allegedly triggered a throng of people to rush toward the stage and, in the process, caused plaintiff Lisa Stricklin to break a leg when she was “trampled and forcibly pushed into a wall.” Blending words with injuries wrought by those who heard them, and mixing at times constitutional concerns for protecting speech with tort law interests, the 2020 decision by the United States Court of Appeals for the Sixth Circuit in Higgins and the 2018 ruling by United States District Court Judge Robert J. Conrad, Jr. in North Carolina in Stricklin are the focus of this Article.

The two cases are especially important because both hinged on messages that, according to their respective courts, did not fit within a category of expression that falls outside the ambit of First Amendment protection. More specifically, the words of the defendants in Higgins and

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6 Stricklin, 358 F. Supp. 3d at 522.

7 Id. at 523.

8 See generally Clay Calvert, The Voyeurism Value in First Amendment Jurisprudence, 17 CARDOZO ARTS & ENT. L.J. 273, 273–74 (1999) (“Over the years scholars and jurists have offered a laundry list of reasons to protect expression under the First Amendment. The freedoms of speech and press, for example, are said to promote and to protect discovery of truth, democratic self-governance, self-realization, dissent, tolerance, and honest government.”) (internal citations omitted); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 878–79 (1963) (asserting that in a democratic society, “free expression is necessary (1) as ensuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society”).

9 There are multiple interests and policies underlying tort law. See generally Kenneth S. Abraham & G. Edward White, The Puzzle of the Dignitary Torts, 104 CORNELL L. REV. 319, 319 (2019) (“Tort liability is imposed not only to protect against and compensate for bodily injury, damage to property, emotional distress, and economic loss, but also to protect individual dignity of various sorts and compensate for invasions of individual dignity.”); F. Patrick Hubbard, The Nature and Impact of the “Tort Reform” Movement, 35 Hofstra L. Rev. 437, 446 (2006) (observing that goals of tort law include providing “an incentive to avoid wrongful conduct,” serving a “sense of fairness” or corrective justice, and “compensation of victims”); Joseph H. King, Jr., Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law, 57 SMU L. Rev. 163, 163 (2004) (identifying multiple goals of tort law including, but not limited to, “preserv[ing] the peace by eliminating some of the impetus for victims to seek revenge or self-help by violent means,” spreading losses “to a wider class of market participants beyond the immediate victims,” “allocat[ing] losses to defendants who represent suitable entry points for spreading losses and signaling to consumers that compensating such injuries are costs of the activity to be reflected in the prices charged,” “deter[ing] unreasonably dangerous conduct or creat[ing] incentives for safer conduct or activities,” and the corrective justice notion “of using tort liability as a vehicle for reestablishing the moral balance between the parties”); Benjamin Shnurni & Yuval Sinai, Liability Under Uncertain Causation? Four Talmudic Answers to a Contemporary Tort Dilemma, 30 B.U. INT’L L.J. 449, 460 (2012) (encapsulating the goals of tort law as “compensation, corrective justice and restitution (restitutio in integrum), distributive justice and optimal deterrence”); Jay Tidmarsh, A Process Theory of Torts, 51 WASH. & LEE L. Rev. 1313, 1321–22 (1994) (highlighting “the more pedestrian goals of deterrence, compensation, convenience, and fairness that tort law sets as its own internal purposes”).

10 See infra notes 68 and 135 (addressing how the courts in Higgins and Stricklin determined that the speech at issue in them did not fit within the contours of an unprotected category of expression).

11 The United States Supreme Court has held that several categories of expression generally are not safeguarded by the First Amendment’s Free Speech Clause. See United States v. Alvarez, 567 U.S. 709, 717 (2012) (identifying unprotected categories of expression as including incitement to violence, obscenity, defamation, speech integral to
Stricklin did not rise to the level of an incitement to unlawful action as defined by the United States Supreme Court more than fifty years ago in Brandenburg v. Ohio. Brandenburg, as Professor Leslie Gielow Jacobs recently wrote, “defines the circumstances in which protected abstract advocacy of unlawful conduct crosses the constitutional line and becomes unprotected ‘incitement’ of it.”

Despite the commonality of implicating speech that was presumptively protected by the U.S. Constitution, the courts reached opposite conclusions about whether the defendant-speakers could be held tortiously responsible for harm caused to the plaintiffs. In particular, Judge Conrad in Stricklin decided that the First Amendment did not shield Gwen Stefani from liability under a negligence theory, while the Sixth Circuit in Higgins determined that the First Amendment did, in fact, protect the defendant sports commentators and their show’s owner from liability for multiple torts, including negligence. While the distinct facts in the two cases obviously affected those outcomes, it is the different methodologies or frameworks the courts employed for determining whether First Amendment interests justified safeguarding the defendants from tort accountability that are critical for this Article.

As explained in greater detail later, the Sixth Circuit in Higgins concentrated its assessment of whether the First Amendment provided a buffer of protection from tort liability on whether the speech was about a matter of public or private concern. In doing so, the Sixth Circuit’s approach embraced the dichotomous First Amendment test fashioned by the U.S. Supreme Court a decade

12 Brandenburg v. Ohio, 395 U.S. 444 (1969). The Court held: the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Id. at 447.

13 Leslie Gielow Jacobs, “Incitement Lite” for the Nonpublic Forum, 85 BROOKLYN L. REV. 149, 149 (2019). See Christian F. Wells, Assumptions About “Terrorism” and the Brandenburg Incitement Test, 85 BROOKLYN L. REV. 111, 111 (2019) (noting that “Brandenburg’s standard has become a pillar of free speech law” and adding that it permits “government officials to protect public safety by punishing only speech intended and likely to create an imminent danger of harm, while protecting even the most abhorrent of speakers from suppression of their speech simply because government officials fear or dislike it”).

14 See Stricklin, 358 F. Supp. 3d at 530 (concluding that “Stefani’s statement is not entitled to the protection of the First Amendment. The First Amendment does not preclude Plaintiff from bringing a negligence claim against Stefani”).

15 See Higgins, 951 F.3d at 732 (concluding that “the First Amendment safeguards the radio station’s right to comment on Higgins’ performance and the fans’ reaction to it and that is so even if the station and its hosts might have exercised their First Amendment rights more responsibly.”). After the plaintiff filed an amended complaint, Higgins involved seven causes of action: intentional infliction of emotional distress, invasion of privacy, tortious interference with a business relationship, civil conspiracy, negligence, harassment and harassing communications. Id. at 733.

16 See id. at 734 (“Whether the First Amendment presumptively shields commentary from liability turns on whether the speech involves a ‘public or private concern.’”) (quoting Snyder v. Phelps, 562 U.S. 443, 451 (2011)).
ago in the speech-based tort case of Snyder v. Phelps. Under Snyder, as one commentator recently observed, “the First Amendment is an external limit that precludes a state from imposing liability for speech of public concern.”

The Sixth Circuit’s ruling in Higgins thus carries heightened importance because it fleshes out—within an analysis of sports commentary—the metes and bounds of when speech is of public concern. Such elucidation is direly needed today because while “the public concern test dominates much of First Amendment analysis in the speech-torts context, little has been written to clarify the contours of this test.” Indeed, as the author of this Article remarked in the immediate aftermath of Snyder, “the line delineating the public and private provinces is anything but bright.”

In contrast to the Sixth Circuit’s public-concern approach, Judge Conrad in Stricklin focused his analysis of whether the First Amendment safeguarded the speech of Gwen Stefani from tort responsibility on whether her words furthered “the exposition of ideas, search for truth, and the vitality of a society” or, in contrast, whether they amounted to low-value speech under the Supreme Court’s 1942 ruling in the fighting-words case of Chaplinsky v. New Hampshire. Conrad concluded they fell into the latter category, reasoning—while quoting snippets of Chaplinsky’s famous dictum in the process—that:

17 Snyder v. Phelps 562 U.S. 443 (2011). In Snyder, the Court held that whether the First Amendment protected the Reverend Fred Phelps and members of the Westboro Baptist Church from tort liability based on their speech near a funeral for a U.S. soldier killed in Iraq "turn[ed] largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." Id. at 451. See Joseph Russomanno, "Freedom for the Thought That We Hate": Why Westboro Had to Win, 17 COMM. L. & POL’y 133, 148 (2012) (observing that "the Court took it upon itself to determine whether the speech at issue in Snyder v. Phelps was on matters of public concern. If so, First Amendment protection would be more likely to overcome a tort liability claim").


21 Stricklin, 358 F. Supp. 3d at 527.


23 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). See Robert M. O’Neil, Hate Speech, Fighting Words, and Beyond—Why American Law is Unique, 76 ALB. L. Rev. 467, 472 (2012) (asserting that Chaplinsky “has been persistently cited with sufficient deference to imply that uttering ‘fighting words’ remains a recognized exception to First Amendment freedoms”).

24 In Chaplinsky, the Court reasoned that: There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Chaplinsky, 315 U.S. at 571–72. See Norman T. Deutsch, Professor Nimmer Meets Professor Schauer (and Others): An Analysis of “Definitional Balancing” as a Methodology for Determining the “Visible Boundaries of the First Amendment”, 39 Akron L. Rev. 483, 500–01 (2006) (describing the above-quoted language from Chaplinsky as “a well-known dictum” that “seems to have been the origin of the notion that definitional balancing is a technique that limits the scope of the First Amendment through a comparative balancing of competing speech and government regulatory interests”); John F. Wiercienski, The Curse of Chaplinsky, 24 CAP. U. L. Rev. 331, 332 (1995) (describing the language quoted above from Chaplinsky as “dictum” and a “remarkable statement that some speech is less deserving of constitutional protection than other speech”).
Stefani's statement is of the same character of speech which the Supreme Court has held to have "no essential part of any exposition of ideas" and has "such slight social value as a step to truth that any benefit that may be derived from [the statement] is clearly outweighed by the social interest in order and morality.\textsuperscript{25}

Stefani thus could be held liable under a negligence theory for her speech, a rather rare result.\textsuperscript{26}

In brief, while the court in \textit{Higgins} focused its examination on drawing a \textit{Snyder}-like line demarcating speech about matters of public concern from expression relating to private items, the court in \textit{Stricklin} centered its approach on distinguishing between high-value speech that serves goals such as truth discovery and the macro-level "vitality of a society,"\textsuperscript{27} on the one hand, and low-value speech that "hinder[s] the principles and purposes undergirding the First Amendment,"\textsuperscript{28} on the other. Not only does the \textit{Stricklin} values-based approach borrow from \textit{Chaplinsky}, as noted above,\textsuperscript{29} but it also reflects the First Amendment-based thinking of Justice Stephen Breyer. Breyer contends that when considering cases involving First Amendment issues, courts should "appeal more often and more directly to the values the First Amendment seeks to protect."\textsuperscript{30} For example, when determining the level of scrutiny to apply to test the validity of laws regulating speech, Breyer asserts that "[t]he First Amendment requires greater judicial sensitivity both to the Amendment's expressive objectives and to the public's legitimate needs for regulation than a simple recitation of categories, such as 'content discrimination' and 'strict scrutiny,' would permit."\textsuperscript{31}

With this overview in mind, Part I of this Article next focuses on the Sixth Circuit's analysis of the First Amendment-protection issue in \textit{Higgins}.\textsuperscript{32} Part II then turns to Judge Conrad's
different approach to that same question in Stricklin. Part III follows by comparing the two methodologies, and it considers whether the choice of a different tactic in each case might have affected its outcome. Finally, Part IV concludes by synopsizing the analysis and suggesting that both frameworks have benefits and drawbacks.

I. Commentary About a Referee’s Performance and Fan Reaction to It: Matters of Public Concern

The unanimous three-judge decision by the Sixth Circuit in Higgins v. Kentucky Sports Radio, LLC in early 2020 sheltered from civil liability a trio of defendants: 1) Kentucky Sports Radio (“KSR”), which broadcasts to more than forty stations in the Bluegrass State; 2) Matthew Jones, a “popular talk show host” on KSR who became “a high-profile critic” of plaintiff John Higgins, an NCAA men’s basketball referee, after Higgins allegedly blew several foul calls that went against the University of Kentucky (“UK”) during the Wildcats’ loss to the University of North Carolina in the 2017 NCAA championship tournament; and 3) Drew Franklin, a writer for KSR’s internet site who “published a series of articles criticizing Higgins’ calls.” At bottom, Higgins’ lawsuit against KSR, Jones and Franklin was premised on the referee’s belief that they either sparked or exacerbated a troll storm against Higgins and his Omaha-based roofing business, Weatherguard Roofing. The antagonistic onslaught of messages included more than 180 fake negative reviews, multiple false requests for service, thousands of phone calls that crashed the business’s voicemail system and even personal threats, at least a dozen of which sparked a criminal investigation. In a nutshell, the defendants’ speech purportedly was to blame for the bevy of injurious words and actions of others – namely, angry UK fans — “who pinned the loss [to North Carolina] on Higgins.”

Importantly, however, the troll assault targeting Higgins did not involve doxing by the defendants. Doxing, which is slang for dropping documents, typically entails collecting an individual’s personal identifying information and then releasing it on the internet, with the goal of having that person become an object of vitriol and harassment. As one recent article described it, “[i]n a doxing campaign, the initial post will often be innocuous; it may only be a person’s name and their cellphone number. But the intent behind the post is often clear: it is a request for internet trolls to harass the named individual.” More succinctly, it “involves placing enough information online that an angered mob can terrorize an individual.”

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33 Infra notes 131–172 and accompanying text.
34 Infra notes 173–211 and accompanying text.
35 Infra notes 212–217 and accompanying text.
36 Higgins, 951 F.3d 728 (6th Cir. 2020).
37 Id. at 732.
38 Id.
39 Id.
40 Id. at 731–32.
41 Id. at 732.
42 See id. (noting that Higgins sued “Kentucky Sports Radio and some of its contributors for his business losses, alleging that their post-game coverage of him and his roofing business incited the harassment”).
43 See id. at 733 (describing the trolling campaign against Higgins, his business and his family).
44 Id. at 731–32.
In *Higgins*, it was UK fans – not the defendants – who discovered and then publicly released on the internet the name of Higgins’ roofing business, as well as the URL where agitated Wildcats’ devotees could post negative reviews about it on Higgins’s Facebook page. As the Sixth Circuit observed, “the adverse fan reaction preceded [KSR’s] coverage, as a fan posted the video that identified Higgins’ roofing business before Jones’ post-game show and the fan community anonymously coordinated retaliation online without the station’s prodding.”

*Higgins* thus is readily distinguished from another recent trolling case, *Gersh v. Anglin.* There, the defendant – a white nationalist named Andrew Anglin – was directly involved in the doxing. Specifically, Anglin published on his website, the *Daily Stormer*, victim-plaintiff Tanya Gersh’s “phone numbers, email addresses, and social media profiles, as well as those of her husband, twelve-year-old son, friends, and colleagues. Anglin asked readers to ‘Tell them you are sickened by their Jew agenda to attack and harm the mother of someone whom they disagree with.’” In a separate case, *Dumpson v. Ade,* Anglin also engaged in doxing that sparked a troll campaign. In this case, the target was Taylor Dumpson, the first female African American student-government president at American University.

If the defendants in *Higgins*, by way of contrast to Andrew Anglin, had nothing to do with the initial doxing, then why did they draw Higgins’s legal wrath for the troll attack? Apparently, what prompted the referee’s belief that the defendants were culpable were some quips and comments on KSR by Jones and several postings by Franklin on its website addressing the trolling. All of this commentary, from Higgins’s perspective, “fanned the flames of his harassment.”

Colloquially put, the theory seemingly was that, while the defendants may not have struck the match that ignited the fire, they certainly stoked the conflagration.

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48 As the Sixth Circuit described it:

Soon after the game, fans discovered that Higgins owned a roofing business: Weatherguard Roofing. Its URL is www.rooferes.com, a portmanteau of “roof” and “referee.” A video posted by an anonymous user, titled “John Higgins’ Sabotage of Kentucky,” depicted Higgins standing by a truck bearing the insignia of his business. In text at the bottom of the video, it suggested that viewers “[w]rite a review of him here[:]

http://www.facebook.com/rooferees.”

49 Higgins, 951 F.3d at 732.

50 See id. at 736 (emphasis in original).


52 See id. at 970 (describing Anglin as the publisher of “an alt-right website, the Daily Stormer, which derives its name from Der Stürmer, an unofficial pro-Nazi propaganda tabloid,” and adding that “Anglin wrote and published on his website an article calling for his readers to take part in ‘an old fashioned Troll Storm’ against Tanya Gersh”).


55 The doxing in this case occurred when Anglin published on the Daily Stormer “Dumpson’s name, photo, and direct links to her Facebook account and the AU Student Government Twitter account with which Ms. Dumpson was associated as AU Student Government President.” Id. at *3. After Anglin published that information, “Dumpson’s Facebook accounts and the AU, AU Student Government, and AU Student Government President Twitter accounts were targeted” with racist messages. Id.

56 Higgins, 951 F.3d at 736.
Just how did the defendants allegedly do that? In the immediate aftermath of UK’s loss to North Carolina, Jones blasted Higgins’s officiating.56 He also went further, however, and discussed how some UK fans were considering leaving harsh Yelp reviews about Higgins’s roofing company and trolling him.57 Jones told listeners he did not believe they “should troll the guy”58 and he cautioned that leaving bad reviews was wrong.59 Nonetheless, Jones also characterized some of the abusive comments posted on Higgins’s Facebook page as “funny”60 and asked if the authors of those remarks wanted to take a crack at writing for KSR.61 In brief, Jones outwardly played both sides of the fence — warning fans not to troll Higgins, but laughing, for example, after one guest on his show initially called the fans’ behavior irresponsible but then wryly whispered that they should “keep it up.”62

Defendant Drew Franklin, in a series of articles on KSR’s website, not only criticized Higgins’s play calling, but also addressed the harassment of the referee. Much like Jones, Franklin somewhat straddled the line between condemning it, on the one hand, and pandering to the actions of fans who engaged in it, on the other. For instance, Franklin made it clear that he disagreed with attacking Higgins’s roofing business and stressed that KSR did not condone such activity.63 Yet, he also reproduced on KSR’s website “some of the fake and abusive reviews that fans posted”64 and discussed how some UK fans were “really lighting up John Higgins’ [sic] roofing business.”65 Although he did not directly post the link to Higgins’s Facebook page where people could leave reviews, Franklin did furnish a link to a video created by an anonymous user specifying where fans could access it.66

Should constitutional concerns for free speech shield KSR, Jones, and Franklin from civil liability for such on-air and internet-posted expression? The Sixth Circuit answered in the affirmative, holding that “the First Amendment safeguards the radio station’s right to comment on Higgins’ [sic] performance and the fans’ reaction to it and that is so even if the station and its hosts might have exercised their First Amendment rights more responsibly.”67 In the process, the appellate court concluded that the defendants’ speech did not fall within the scope of an unprotected category of expression, including incitement to unlawful action.68 However, simply because speech does not fit within a categorical carve-out from First Amendment protection does not mean that it is automatically immune from tort liability.69

56 Id. at 732 (“In his post-game coverage, Jones criticized the way Higgins called fouls and didn’t call them. He described the officiating as ‘putrid,’ and pointed out that Higgins had been ‘part of some of Kentucky’s most painful losses.’”).
57 Id.
58 Id.
59 See id. (“He read one email from a listener who contemplated ‘leaving a bad review on John Higgins’ roofing Yelp page.’ . . . Jones responded that this would be a ‘bad thing to do and would constitute ‘harassment.’”) (internal citation omitted).
60 Id. at 733.
61 Id.
62 Id.
63 Id. at 732–33.
64 Id. at 733.
65 Id. at 733.
66 Id. at 732.
67 Id.
68 Id. at 736–39.
69 See Anderson, supra note 26, at 782 (“The courts have universally assumed that tort liability is neither exempted from nor foreclosed by the First Amendment. As long as that is so, courts must decide how to decide what the First Amendment permits.”).
Instead, the usual approach in speech-tort cases is to decide if First Amendment interests in protecting free expression justify the modification of “the normal dimensions of established tort law by carving out a subset of cases in which defendants are completely exempt from liability.”⁷⁰ or, alternatively, whether “to simply allow tort law to apply normally with the full complement of tort damages … [and to] explicitly reject the proposition that the First Amendment plays a meaningful role in the analysis.”⁷¹ In short, courts must determine whether First Amendment concerns justify the “constitutionalization of tort law,”⁷² meaning “the injection of constitutional principles … into the substance of common law causes of action.”⁷³

This approach to speech-tort jurisprudence launched in 1964 when the U.S. Supreme Court constitutionalized state libel law in New York Times Co. v. Sullivan.⁷⁴ The Court in Sullivan noted that “libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”⁷⁵ Articulating those standards, the Sullivan Court held that when public officials sue for libel based on false statements about their official conduct, the First Amendment interest in protecting “uninhibited, robust, and wide-open”⁷⁶ public debate requires “a federal rule.”⁷⁷ That rule overlays state libel law, and it requires public-official-plaintiffs to prove the fault standard known as actual malice.⁷⁸ The actual malice rule was later extended by the Court to apply in libel cases brought by public figures, not just public officials.⁷⁹

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⁷⁰David S. Han, Rethinking Speech-Tort Remedies, 2014 WIS. L. REV. 1135, 1150.
⁷¹Id. at 1152.
⁷⁵Sullivan, 376 U.S. at 269.
⁷⁶Id. at 270.
⁷⁷Id. at 279.
⁷⁸Id. at 279–80. The Court defined the actual malice rule in Sullivan as requiring a public-official plaintiff to prove that the defendant published the defamatory statement at issue “with knowledge that it was false or with reckless disregard of whether it was false or not.” Id. at 280. See Mary-Rose Papandrea, Media Litigation in a Post-Gawker World, 93 TUL. L. REV. 1105, 1139 (2019) (“In Sullivan, the Supreme Court ‘constitutionalized’ the law of defamation, holding that public officials must demonstrate actual malice to recover any damages.”).
⁷⁹Curtis Pub’g Co. v. Butts, 388 U.S. 130 (1967). See William P. Robinson III, Ronald M. Feit & Katherine M. King, The Tie Goes to the Runner: The Need for Clearer and More Precise Criteria Regarding the Public Figure in Defamation Law, 42 U. HAW. L. REV. 72, 84–85 (2019) (noting that in Butts, “the Supreme Court significantly expanded the scope of” the actual malice rule to “apply to allegedly defamatory statements made about” public figures); Nat Stern, Unresolved Antitheses of the Limited Public Figure Doctrine, 33 Hous. L. REV. 1027, 1033 (1996) (pointing out that “the Court in Curtis Publishing Co. v. Butts effectively extended the actual malice rule to speech about public figures”).

The Court also later held that the actual malice rule applies when libel plaintiffs—regardless of whether they are public officials, public figures or private persons—seek punitive damages for defamatory speech regarding a matter of public concern. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (holding 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”); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 761 (1985) (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of ‘actual malice,’”) (emphasis added); see also Nicole B. Casarez, Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming, 32 DUQ. L. REV. 667, 680–81 (1994) (explaining that while “the Supreme Court in Gertz precluded the recovery of punitive and presumed damages in libel cases involving private plaintiffs and public issues except on a
In brief, actual malice modifies state libel law to balance First Amendment interests with tort law concerns.\textsuperscript{80} The Supreme Court subsequently stretched the actual malice rule to cover speech-based claims for intentional infliction of emotional distress (“IIED”) involving satirical and parodic expression about public figures and public officials in \textit{Hustler Magazine v. Falwell}.\textsuperscript{81} Perhaps most significant, at least for purposes of this Article and the Sixth Circuit in \textit{Higgins}, is the Supreme Court’s 2011 ruling in \textit{Snyder v. Phelps}.\textsuperscript{82} It held there that whether Westboro Baptist Church members were civilly liable under multiple theories – a jury ruled against them on IIED, intrusion upon seclusion and civil conspiracy claims\textsuperscript{83} – for messages on signs they hoisted near a funeral for a U.S. soldier turned largely on “whether that speech [was] of public or private concern, as determined by all the circumstances of the case.”\textsuperscript{84}

In \textit{Snyder}, the Court concluded that the signs, which included offensive messages such as “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You’re Going to Hell,” were protected by the First Amendment from tort liability because they “relate[d] to broad issues of interest to society at large, rather than matters of ‘purely private concern.’”\textsuperscript{85} As Chief Justice John Roberts explained for the eight-justice majority:

> While these messages may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import. The signs certainly convey Westboro’s position on those issues, in a manner designed … to reach as broad a public audience as possible.\textsuperscript{86}

In reaching this pro-First Amendment conclusion, the Court offered a disjunctive, two-part test for sussing out when speech regards a matter of public concern. Under this formula, speech is of public concern either “when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community’ … or when it ‘is a subject of legitimate news interest; showing of actual malice,” the Court in “\textit{Dun & Bradstreet} held that punitive and presumed damages could be recovered on a lesser showing of fault” when private plaintiffs sue for libel over speech about matters of private concern).\textsuperscript{87}

\textsuperscript{80} See supra notes 8-9 (identifying both First Amendment and tort law interests).
\textsuperscript{81} 485 U.S. 46 (1988). The Court in \textit{Falwell} concluded:
> that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with “actual malice,” i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

\textsuperscript{82} 562 U.S. 443 (2011).
\textsuperscript{83} Id. at 450.
\textsuperscript{84} Id. at 451.
\textsuperscript{85} Id. at 454 (quoting \textit{Dun & Bradstreet} v. Greenmoss Builders, 472 U.S. 749, 759 (1985)).
\textsuperscript{86} Id.
that is, a subject of general interest and of value and concern to the public.”\textsuperscript{87} The \textit{Snyder} Court added that a trio of factors – the speech’s content, form and context – must be analyzed as part of the public concern determination.\textsuperscript{88} It also remarked that speech is “of only private concern”\textsuperscript{89} when its only function is to serve the interests of the speaker and a narrowly confined, specific audience to whom the speech was directed.\textsuperscript{90}

It was this dichotomy from \textit{Snyder} between speech about matters of public and private concern that the Sixth Circuit in \textit{Higgins} adopted and on which it rested its judgment that First Amendment interests shielded KSR, Jones and Franklin from liability.\textsuperscript{91} As the appellate court wrote, “[w]hether the First Amendment presumptively shields commentary from liability turns on whether the speech involves a ‘public or private concern.’”\textsuperscript{92}

Although the Sixth Circuit confessed that “[n]o bright line separates”\textsuperscript{93} matters of public concern from those of a private nature, it ultimately concluded that the defendants’ speech fell “on the protected side of the line”\textsuperscript{94} as “a matter of public concern.”\textsuperscript{95} How the Sixth Circuit reached that conclusion is important. It is so not only because \textit{Higgins} now stands for the proposition – at least, within one federal circuit – that sports journalists are free to comment on the harsh and aggressive reactions of fans who target referees for abuse, but also because it sheds light on relevant factors and variables courts might evaluate when deciding if the public-concern defense applies and blocks tort liability.

In \textit{Higgins}, the Sixth Circuit’s examination of the public concern issue had two levels of analysis. First, the court began at a macro level by considering whether sports, including college basketball, are matters of public concern.\textsuperscript{96} Second, it then drilled down to the micro level of whether media commentary about both officiating and fans’ reactions to it are also matters of public concern.\textsuperscript{97}

Key indicia of public concern at the macro level for the Sixth Circuit were both financial and journalistic. As to the former variable, the court pointed out not only that sports nationwide are a business worth multiple billions of dollars – an enterprise it dubbed “the sports-industrial complex”\textsuperscript{98} – but also that universities hold significant financial stakes in the success or failure of their basketball teams during the NCAA championship tournament.\textsuperscript{99} In terms of journalistic indicators that sports are of public concern, the court highlighted the dual facts that daily newspapers across the United States feature sections dedicated to sports coverage and that some

\textsuperscript{87} Id. at 453 (quoting, respectively, Connick v. Myers, 461 U.S. 138, 146 (1983), and City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004)) (internal citation omitted).
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. The \textit{Snyder} Court used the case of Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1984), to illustrate this example of a private matter—namely, an individual’s credit report that “was sent to only five subscribers to the reporting service, who were bound not to disseminate it further.” \textit{Snyder}, 562 U.S. at 453.
\textsuperscript{91} See Higgins v. Kentucky Sports Radio, 951 F.3d 728, 734–36 (6th Cir. 2020) (adopting and applying \textit{Snyder’s} dichotomy between speech about matters of public and private concern).
\textsuperscript{92} Id. at 734 (quoting Snyder v. Phelps, 562 U.S. 443, 451 (2011)).
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 736.
\textsuperscript{96} Id. at 734–35.
\textsuperscript{97} Id. at 735–36.
\textsuperscript{98} Id. at 735.
\textsuperscript{99} Id. at 734–35.
periodicals are completely reserved for sports as a topic. Additionally, the Sixth Circuit noted what this Article calls “communal” indicators that sports are a matter of public concern—namely, that they provide fodder both for shared conversations and memories, as well as for enhancing a university’s popularity as an institution, as indicated by admission figures.

The macro-level conclusion that sports and college basketball games are matters of public concern under a Snyder analysis is important because it means that topics of public concern stretch far beyond the fact-specific confines of Snyder. The speech at issue in Snyder, the Supreme Court determined, was of public concern because it related to “the political and moral conduct of the United States and its citizens, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy.” Higgins, in contrast, makes it transparent that topics of public concern need not be freighted with such moral gravitas or carry serious-minded implications for either government policies (i.e., gays in the military) or well-established religious institutions plagued by alleged priestly misdeeds. In brief, the institution that is men’s college basketball in the United States counts as much for purposes of public concern-based First Amendment protection as does speech about the institution of Catholicism around the globe.

The key facet of the Snyder Court’s definition of public concern that makes this leap or extension possible is Snyder’s expansive language—quoting from a prior opinion—that “speech is of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community.” The critical words here are those comprising the elastic phrase “other concern to the community.” The word “other,” in particular, provides a vast empty vessel that can be filled like a chalice by courts with whatever they deem is “fairly considered”—not even the more proximate “directly” considered or “clearly” considered, but simply “fairly” so—of interest to a “community.”

Furthermore, the community in Higgins arguably was not geographically confined to the boundaries of the state of Kentucky. Rather, it was a community united by a shared interest—namely, an interest in UK men’s basketball. This strongly intimates that the Snyder test for public concern allows for consideration of communities of interest, not merely those physically bounded by lines on a map. Fans of UK basketball living anywhere in the world, for example, might have been able to access KSR’s website and read Drew Franklin’s postings about Higgins.

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100 Id. at 735.
101 Id. (discussing Flood v. Kuhn, 407 U.S. 258 (1972)).
105 The author uses the phrase communities of interest in a decidedly non-geographic sense, thus distinguishing that term’s meaning from its deployment in the context of electoral districts that are necessarily physically bounded. See Kim Forde-Mazrui, Jural Districting: Selecting Impartial Jurors Through Community Representation, 52 VAND. L. REV. 353, 359 (1999) (observing that the U.S. Supreme ‘Court permits legislatures to consider race and other demographic factors to identify ‘communities of interest’ for inclusion within particular electoral districts’) (emphasis added); Mike Turzai, Rodney A. Corey & James G. Mann, The Protection Is in the Process: The Legislative Reapportionment Commission, Communities of Interest, and Why Our Modern Founding Fathers Got It Right, 4 U. PA. J. L. & PUB. AFF. 353, 363–64 (2019) (“Communities of interest include ‘[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area’ and may be reflected in the cores of existing districts.”) (quoting Nat’l Conference of State Legislatures, Redistricting Law 2010 at 184 (2009), http://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting_2010.pdf.) (emphasis added).
106 The website for Kentucky Sports Radio is found at https://kentuckysportsradio.com/.
Moving to the micro level of commentary about officiating and fans’ opinions of it, the court expressed the view that if play calling may have affected a game’s result, then “fans have every right to read about, and discuss” it.\textsuperscript{107} Notably, the first part of that contention regarding the right to read about it taps directly into the unenumerated First Amendment right to receive speech.\textsuperscript{108} In other words, Higgins was about more than simply safeguarding the right of KSR and its employees to speak; it was also about protecting the right of KSR’s listeners and readers to receive speech that interested them. In short, both speaker and audience interests – the First Amendment’s non-oppositional duality of stakeholders – rested in the balance in Higgins.

Additionally, the Sixth Circuit was clear in its analysis of the public concern inquiry that “criticism comes with the territory” of being a referee.\textsuperscript{109} This observation is somewhat akin to the Supreme Court’s stance that “public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.”\textsuperscript{110} More colloquially, if one is a referee for an NCAA men’s basketball game – particularly so during March Madness tournament time – then one must just shake it off and move on when commentators simultaneously rebuke one’s performance and provide fans with the opportunity to ventilate festering frustrations. Thus, seemingly enhancing the notion for the Sixth Circuit that KSR’s speech was about a matter of public concern was the fact that Higgins was akin to a public figure. The appellate court reasoned that “[t]hose who step into the public limelight, even temporarily, must face the hazard that sometimes comes with it. Should they find a commentator’s discussion of their foray into public life unsavory, they cannot easily ‘cry Foul!’”\textsuperscript{111} The court pointed out that Higgins exploited his fame as a referee by selecting the play-on-words website address of “rooferees.com” for his business.\textsuperscript{112}

Tied to the notion that criticism comes with the territory of being a referee, the Sixth Circuit suggested, albeit somewhat sub silentio, a cathartic or therapeutic rationale for protecting speech like that engaged in by KSR, Jones, and Franklin when they addressed fans’ reactions to Higgins’s officiating. Specifically, the court remarked that fans were allowed to channel their “emotions into heated, though usually temporary, criticism of referees.”\textsuperscript{113} Although noting that some sports enthusiasts occasionally have resorted to physical violence against officials, the underlying theory of the Sixth Circuit seemingly embraces Justice Louis Brandeis’s view “that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies.”\textsuperscript{114} As Professor Ashutosh Bhagwat interprets it, “[t]he basic thought behind free speech as a safety valve is that

\textsuperscript{107} Higgins, 951 F.3d at 735.
\textsuperscript{108} See Stanley v. Georgia, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (observing that the First Amendment’s freedom of speech and press include both “the right to receive” speech and “the right to read” speech); see also Marc Jonathan Blitz, Constitutional Safeguards for Silent Experiments in Living: Libraries, The Right to Read, and a First Amendment Theory for An Unaccompanied Right to Receive Information, 74 UMKC L. Rev. 799, 800 (2006) (“It is now well established that the First Amendment protects not only the rights of people to engage in speech but also the right of audiences to receive it.”); Margot E. Kaminski, Privacy and the Right to Record, 97 B.U. L. Rev. 167, 189 (2017) (“The First Amendment . . . provides corollary protections beyond the core protection of speech, including the right to distribute, the right to receive, the right to read, freedom of inquiry, freedom of thought, and freedom of expressive association.”) (emphasis added).
\textsuperscript{109} Higgins, 951 F.3d at 735.
\textsuperscript{111} Higgins, 951 F.3d at 740 (quoting Menier Patriot Co. v. Roy, 401 U.S. 265, 274 (1971)).
\textsuperscript{112} Id. at 736.
\textsuperscript{113} Id. at 735.
\textsuperscript{114} Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
permitting citizens to speak their minds allows them to feel engaged with the system as well as to ‘blow off steam,’ and so tends to deflect discontented individuals and groups from violence or revolution.”115 In a nutshell, if free speech can serve as a safety valve for preventing violence in the political realm, then it may serve a similarly significant function in the domain of sports.

Furthermore, the Sixth Circuit indicated that when speech addresses matters of public concern – here, “Higgins’ [sic] calls and the public’s reaction to them”116 – First Amendment protection is not lost simply because those listening or reading may be doing so for either ignoble emotional gratification or squalid non-intellectual purposes. As Judge Jeffrey Sutton explained for the appellate court, “some Kentucky fans likely tuned in to Kentucky Sports Radio’s coverage of Higgins solely for the schadenfreude. But even if its discussion served only that purpose, the discussion’s ‘inappropriate or controversial character’ would not influence our analysis as to ‘whether it deals with a matter of public concern.’”117 In other words, it is the subject matter that counts for whether something is of public concern, not how the audience uses, digests or otherwise processes the information about it.

Finally, the Sixth Circuit’s decision is important because the court indicated that the public-concern defense against tort liability is not vitiated or lost merely because the defendant-speakers failed to be evenhanded, detached or temperate in their discussion of the topic.118 The Sixth Circuit, in fact, readily acknowledged that KSR’s Jones and Franklin “at times took too much glee in reporting on the misery of others.”119 Furthermore, it remarked that the duo “might have exercised their First Amendment rights more responsibly.”120 Despite failing to exercise greater journalistic self-restraint, however, the defendants were still protected by the public-concern defense. This, of course, is a key victory for sports journalism generally and, in particular, for sports columnists and pundits. It harkens back to the Supreme Court’s observation in Miami Herald Publishing Co. v. Tornillo121 more than forty-five years ago that “treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.”122

The implicit reaffirmation of this maxim in Higgins is important because it pushes back against the relatively recent trend identified by Professor Amy Gajda of “courts increasing impatience with all of journalism as it pushes against the bubble of First Amendment protection for what counts as news.”123 In Higgins, of course, the issue was what counts as a matter of public concern rather than what counts as news. The difference, however, between the two concepts – public concern and news – already is thoroughly muddled. That is largely because the Supreme Court’s yardstick for matters of public concern articulated in Snyder partially defines it in terms of “a subject of legitimate news interest.”124 Indeed, the Sixth Circuit in Higgins adopted this same

115 Ashutosh Bhagwat, Free Speech Without Democracy, 49 U.C. DAVIS L. REV. 59, 91 (2015). See RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 13 (1992) (“If societies are not to explode from festering tensions, there must be valves through which citizens may blow off steam. Openness fosters resiliency; peaceful protest displaces more violence than it triggers; free debate dissipates more hate than it stirs.”).
116 Higgins, 951 F.3d at 736.
117 Id. (quoting Rankin v. McPherson, 483 U.S. 378, 387 (1987)).
118 Id. at 740.
119 Id. at 736.
120 Id. at 732.
123 Id. at 258.
phrasing. If news therefore is considered similar to – if not, perhaps, quite synonymous with – public concern, then Higgins represents a triumph of judicial deference to journalistic judgment. And such deference was provided even if that meant protecting what First Amendment framers James Madison might well have referred to as one of the press’s “noxious branches.”

Something the Sixth Circuit did not do when analyzing the public concern issue is worth noting. In particular, while the appellate court in Higgins observed that the public concern determination involves consideration of “the ‘content, form, and context’ of the speech” – the same three factors that the Supreme Court in Snyder declared important – it did not separately analyze these three variables. In other words, the Sixth Circuit did not structure or break down its public-concern analysis into three discrete sections – one dedicated to examining the content, one for reviewing the form and one for scrutinizing the context. Instead, it seemingly applied them in a more holistic fashion.

The bottom line is that the Sixth Circuit’s determination that the defendants in Higgins addressed matters of public concern, along with the court’s conclusion that their speech did not constitute unlawful incitement, provided a crucial First Amendment buffer against tort liability for the actions of irate KSR listeners and readers who trolled John Higgins and his roofing business. The next Part illustrates a different approach – one not centered on a dichotomy between speech of public and private concern – for deciding if the First Amendment offers protection against tort liability when a defendant’s words allegedly cause listeners to harm someone.

II. A High-Value v. Low-Value Approach for Insulating Speech from Tort Liability

\textit{Stricklin v. Stefani} centered on whether singer Gwen Stefani could be held liable under a negligence theory for a broken leg and emotional injuries plaintiff Lisa Stricklin sustained at a Stefani concert in Charlotte, North Carolina. The injuries occurred when Stricklin was pushed into a pavilion wall by a wave of fans rushing toward the stage after the singer invited them to “just come on down” and fill in some empty seats up front. A key issue was whether the First Amendment offered protection against tort liability when a defendant’s words allegedly cause listeners to harm someone.

125 Higgins, 951 F.3d at 734.
126 See Mary-Rose Papandrea, Citizen Journalism and the Reporter’s Privilege, 91 MINN. L. REV. 515, 580 (2007) ("A newsworthiness standard . . . involves essentially the same inquiry as a ‘public concern’ test.").
127 James Madison wrote that:
   Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits.
128 Higgins, 951 F.3d at 734 (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).
129 Snyder, 562 U.S. at 453.
130 For example, in addressing what Jones and Franklin said—the context, in other words—the Sixth Circuit also referenced the context in which those statements were made. See Higgins, 951 F.3d at 736 ("Higgins objects that [KSR] . . . should have left his roofing business out of it. But the commentators did not attack the business in its own right; they discussed it in the context of their general issues with Higgins, which concerned ‘the way [he] called the game.’") (emphasis added).
132 Id. at 521–524.
133 Id. at 522–23.
134 To hold Stefani liable for negligence, Stricklin had to “show that Stefani owed Plaintiff a duty of reasonable care, (2) Stefani breached that duty, (3) Stefani’s breach was an actual and proximate cause of Plaintiff’s injury, and (4) Plaintiff suffered damages as the result of Stefani’s breach.” Id. at 525. Stricklin alleged that “as a direct and proximate
Amendment would shield Stefani from such tort liability, much as it protected the defendants in *Higgins* from legal accountability.

As with *Higgins*, the speech in *Stricklin* did not fall within a category of expression that is unprotected by the First Amendment. Stefani asserted that this necessarily meant she was immune from Lisa Stricklin’s negligence claim, but U.S. District Judge Robert J. Conrad, Jr., held otherwise. Judge Conrad reasoned that “the relevant task before the Court is to examine the statements and surrounding circumstances and weigh how those statements either further or hinder the principles and purposes undergirding the First Amendment.” He stressed that there was no Supreme Court precedent standing for the broad proposition that just because speech does not fit into an unprotected category of expression means that it therefore is insulated from tort liability. Judge Conrad explained that his First Amendment principles-and-purposes analysis pivoted on whether Gwen Stefani’s words “further[ed] the exposition of ideas, search for truth, and the vitality of a society” — a finding that would safeguard her from Lisa Stricklin’s lawsuit — or, in contrast, whether they “actually disserve society by creating the potential for disorder and danger.” He concluded the singer’s speech fit within the latter category, thus allowing Stricklin’s negligence claim to proceed without any First Amendment defense.

Judge Conrad’s reasoning for deciding whether the First Amendment supplied a defense to tort liability differs from that in *Higgins*, which turned only on what might be considered a somewhat simplistic — or, at least, decidedly reductionist — on-off switch of whether or not the speech was about a matter of public concern. Judge Conrad’s approach borrows unabashedly from the Court’s 1942 *Chaplinsky v. New Hampshire* decision. The Court found there that regulating some types of speech has “never been thought to raise any Constitutional problem” because those varieties are of “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Judge Conrad’s methodology explicitly tracked the exposition of ideas and truth discovery facets of *Chaplinsky*. In other words, Judge Conrad appropriated *Chaplinsky’s* analysis for determining whether speech falls completely outside the ambit of First Amendment shelter — whether it fits into one of the “well-defined and narrowly result of Stefani’s negligence, *Stricklin* sustained serious bodily injuries as well as emotional damages in terms of pain and suffering and mental anguish.”

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135 See id. (“The Court agrees that Stefani’s statements do not fall squarely within one of the previously recognized categorical exemptions to First Amendment protection.”).

136 See id. (“Stefani asserts that because her statements do not fall into one of the exceptions to the First Amendment, she cannot be held liable in tort. . . . However, the Court disagrees that the First Amendment immunizes all other speech falling outside these categories, including negligent speech which results in bodily injury to others.”).

137 Id. at 527.

138 See id. (“The Supreme Court has not held that all other speech is automatically entitled to broad First Amendment protection.”).

139 Id.

140 Id.

141 See id. at 530 (holding that “Stefani’s statement is not entitled to the protection of the First Amendment. The First Amendment does not preclude Plaintiff from bringing a negligence claim against Stefani”).

142 315 U.S. 568 (1942).

143 Id. at 572.

144 Id.

145 See *Stricklin*, 358 F. Supp. 3d at 527 (“Statements exist outside of these [unprotected] categories which do not further the exposition of ideas, search for truth, and the vitality of a society, but on the contrary, actually disserve society by creating the potential for disorder and danger. Stefani’s statements are of such tenor.”).
limited classes of speech”¹⁴⁶ that can be regulated without “rais[ing] any Constitutional problem”¹⁴⁷ – and applied it to determine whether presumptively protected speech should be immunized from tort liability.

The analysis in *Stricklin* thus focused not upon whether Stefani’s speech was about a matter of public concern, but rather whether:

- it was “intended to further the marketplace of ideas or to aid in ‘the common quest for truth and the vitality of society as a whole.’”¹⁴⁸
- it played “no essential part of any exposition of ideas” and has ‘such slight social value as a step to truth that any benefit that may be derived from [the statement] is clearly outweighed by the social interest in order and morality.”¹⁴⁹
- letting Lisa Stricklin proceed with her negligence claims “against Stefani (and thus ‘punishing’ her for her speech) would curtail the exposition of ideas, the ‘common quest for truth,’ or ‘the vitality of society as a whole.’”¹⁵⁰
- “imbuing Stefani’s invitation with artistic significance”¹⁵¹ – the singer contended that her invitation to fans to come down to the front of the pavilion was nobly intended “to enhance the[j]r feel and experience of her music”¹⁵² – was of sufficient First Amendment value to protect her from tort liability.

This methodology not only is rooted in *Chaplinsky*, but it is tethered to traditional theories and rationales for justifying why speech necessitates protection. In particular, with its reference to the marketplace of ideas and the search for truth, Judge Conrad’s approach directly taps into what Dean Rodney Smolla calls “perhaps the most powerful metaphor in the free speech tradition.”¹⁵³ The marketplace theory for why speech merits protection centers on the belief that free expression “contributes to the promotion of truth.”¹⁵⁴ It was instantiated in First Amendment jurisprudence more than a century ago by Justice Oliver Wendell Holmes, Jr., in his dissent in *Abrams v. United States*.¹⁵⁵ Today, as Professor Vincent Blasi explains, “truth seeking” is a basic value “served by a robust free speech principle.”¹⁵⁶

Furthermore, Judge Conrad’s focus on whether the speech at issue plays a role in elucidating ideas and helps society thrive as a whole hints at the democratic self-governance.

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¹⁴⁶ *Chaplinsky*, 315 U.S. at 571.
¹⁴⁷ Id. at 572.
¹⁴⁹ Id. at 530 (quoting *Chaplinsky*, 315 U.S. at 572) (change in original).
¹⁵⁰ Id. (quoting *Bose Corp.*, 466 U.S. at 503–504).
¹⁵¹ Id. at 528.
¹⁵² Id.
¹⁵³ SMOLLA, supra note 115, at 6.
¹⁵⁵ Justice Holmes averred in *Abrams* that:

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

rationale for safeguarding expression. As the Supreme Court explained more than fifty years ago, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”158 Indeed, as Professor Ashutosh Bhagwat recently wrote, “a broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance.”159 This theory ties to Judge Conrad’s reference to speech that serves “‘the vitality of society as a whole’”160 because the democratic self-governance theory embodies a collectivist value or goal – namely, what philosopher-educator Alexander Meiklejohn once called “the voting of wise decisions.”161 In brief, Judge Conrad’s concern with whether speech promotes a vital society tracks the democratic self-governance theory’s emphasis on “present[ing] views for the betterment of society.”162

When considered from this free-speech theory perspective, Judge Conrad’s test indubitably tracks what he declared would be his guidepost for resolving if the First Amendment provided a barrier against tort liability: whether Stefani’s words to her audience “further[ed] or hinder[ed] the principles and purposes undergirding the First Amendment.”163 Applying his criteria and framework to the facts of the case, Conrad reasoned that all Stefani’s speech was intended to do was “to prompt action”164 and, in particular, was “intended to produce immediate action.”165 The implication, of course, is that her speech was not designed to generate some reflective thought process or rational debate or discussion about something serving society’s larger interests or the discovery of truth about anything.166 Put differently, Stefani’s speech may have advanced people toward the stage, but it did not advance the discovery of the truth, society’s vitality or the exposition of any ideas. In fact, Conrad concluded that Stefani’s speech was of the same low-value nature as the type of speech the Supreme Court in Chaplinsky decreed regulatable without raising constitutional concerns.167 There was greater value in punishing it – namely, in furthering the

157 See generally Robert C. Post, Reply to Bender, 29 Ariz. St. L.J. 495, 495 (1997) (asserting “that the value of democratic self-governance is the most powerful explanation of the general pattern of First Amendment decisions”).


161 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948). See Robert Post, Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. COLO. L. Rev. 1109, 1119 (1993) (“Meiklejohn’s work displays a structure of analysis that is common to all versions of the collectivist theory of the First Amendment. The theory postulates a specific ‘objective’ for public discourse, and it concludes that public debate should be regulated instrumentally to achieve this objective.”); see also Ronald J. Krotoszynski, Jr., The Chrysanthemum, the Sword, and the First Amendment: Disentangling Culture, Community, and Freedom of Expression, 1998 Wis. L. Rev. 905, 911 (observing that “Professor Alexander Meiklejohn pioneered the argument that the central purpose of the First Amendment is to facilitate democratic self-governance”).


163 Stricklin, 358 F. Supp. 3d at 527.

164 Id. at 528.

165 Id. at 529.

166 See id. at 528 (concluding that Stefani’s speech “was not intended to further the marketplace of ideas or to aid in ‘the common quest for truth and the vitality of society as a whole’”) (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 503-504 (1984)).

167 On this determination, Conrad wrote that he:

finds that Stefani’s statement is of the same character of speech which the Supreme Court has held to have “no essential part of any exposition of ideas” and has “such slight social value as a step to truth that any benefit that may be derived from [the statement] is clearly outweighed by the social interest in order and morality.”
interest of “incentiviz[ing] performers to abide by the safety precautions in place at concert venues and to maintain and promote order and safety during performances”168 – than there was in protecting it. Stefani’s effort to add First Amendment luster to her invitation by calling to the judge’s attention the fact that moving closer would enhance fans’ listening experience failed to gain any traction with Conrad.169 Subsequent to Conrad allowing Stricklin to proceed with her negligence claim, the parties settled the case in early 2019, thus eliminating the possibility of a decision by the U.S. Court of Appeals for the Fourth Circuit.170

Judge Conrad, it should be noted, made no mention whatsoever in his opinion of the term “public concern” or even the U.S. Supreme Court’s decision in Snyder v. Phelps. He did, however, cite the Fourth Circuit’s 2009 ruling in Snyder v. Phelps – before the case reached the U.S. Supreme Court – to buttress other propositions.171 Perhaps the reason Conrad did not follow or not to cite the Supreme Court’s Snyder approach was that he perceived Snyder as only pertaining to tort claims for intangible emotional injuries, whereas Stricklin involved physical harm to the plaintiff. As Conrad queried, “how does the First Amendment apply when a plaintiff seeks damages for bodily harm allegedly resulting from the defendant’s speech? That is the question with which the Court is tasked today.”172

With this review in mind of the contrasting methodologies in Higgins and Stricklin for determining if the First Amendment afforded the respective defendants a wall of protection against tort liability stemming from harm caused by third parties who heard or read their words, the next Part briefly compares the two approaches, drilling more deeply into the First Amendment roots of the public-concern test.

III. A Tale of Two Approaches for Determining First Amendment Protection or Different Sides of the Same Coin?

The Higgins approach for providing First Amendment protection from tort liability – a methodology embracing Snyder’s 2011 focus on whether speech is about a matter of public or private concern – implicates a constitutional concern long pre-dating Snyder. For example, its 2001 opinion in Bartnicki v. Vopper173 pivoted on the publication on a radio talk show of truthful

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168 Id. at 530.
169 Id.
170 See id. at 528 (holding that “imbuing Stefani’s invitation with artistic significance does not immunize her from being held accountable for negligence and the resulting harm which flowed from her statements”).
171 See Stipulation of Dismissal at 1, Stricklin v. Stefani, No. 3:17-CV-397-RJC-DCK (W.D N.C. Mar. 12, 2019) (providing that Stricklin and Stefani “stipulate to the dismissal of all of Plaintiff’s claims in this action with prejudice, with each party to bear their own attorneys’ fees and costs”); see also Joyce Hanson, Gwen Stefani, Concertgoer Settle Stamped Injury Suit, LAW 360, Mar. 13, 2019, https://www.law360.com/media/articles/1138287/gwen-stefani-concertgoer-stampede-injury-suit/ (quoting Stricklin’s attorney, Larry Economos, as stating that “[i]t’s a confidential settlement, so I’m not able to discuss the amount of money involved in the settlement other than to say that it was satisfactorily resolved between Ms. Stefani and Ms. Stricklin” and that “[t]he case was certainly an interesting case, and we’re glad to get it settled. I would expect that the opposing party was glad to get it settled, too.”).
172 In particular, Conrad quoted Snyder v. Phelps, 580 F.3d 206 (4th Cir. 2009), as standing for the principle that the First Amendment applies to tort cases in which plaintiffs seek recovery for reputational, mental and emotional injuries purportedly caused by speech. Id. at 526. He also cited the Fourth Circuit in Snyder to support the notion that courts must make an independent review of the entire record when a tort claim might impinge on First Amendment interests in free expression. Id. at 527.
173 Id. at 526 (emphasis added).
information about possible violence during labor negotiations.\textsuperscript{174} That information had been obtained illegally through an intercepted telephone conversation.\textsuperscript{175} The Court protected the disclosure of the information, reasoning that enforcement of a federal statute banning disclosure of such illegally intercepted messages “implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern.”\textsuperscript{176} Penning the majority opinion in \textit{Bartnicki}, Justice John Paul Stevens observed that the Court thirty years earlier in \textit{New York Times Co. v. United States}\textsuperscript{177} had rejected imposing a prior restraint on the press that would have banned it from publishing the contents of a stolen, classified study about U.S. involvement in Vietnam.\textsuperscript{178} The Court in \textit{New York Times Co.}, Stevens noted, “upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party.”\textsuperscript{179}

The concept of public concern also is talismanic when it comes to protecting the speech of government employees.\textsuperscript{180} It has, in fact, “been the touchstone of public employee speech cases for decades.”\textsuperscript{181} As Justice Sonia Sotomayor encapsulated it in 2014 when delivering the Court’s opinion in the government-employee speech case of \textit{Lane v. Franks},\textsuperscript{182} the first step in the legal analysis to determine if the First Amendment applies focuses on “whether the speech in question ... is speech as a citizen on a matter of public concern.”\textsuperscript{183} Sotomayor emphasized that “[s]peech by citizens on matters of public concern lies at the heart of the First Amendment.”\textsuperscript{184}

Furthermore, the public concern principle implicitly animated the Supreme Court’s adoption of the actual malice standard in defamation law in \textit{New York Times Co. v. Sullivan}.\textsuperscript{185} The Court there wrote that it “consider[ed] this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”\textsuperscript{186} The term “public issues” in that statement serves as a virtual surrogate in \textit{Sullivan} for...
matters of public concern. Indeed, subsequent to *Sullivan*, the Court made it apparent that whether a private-figure plaintiff must prove actual malice to collect punitive damages in a libel case depends on whether the speech is about a matter of public or private concern. Additionally, the Court later held that whether a private-figure plaintiff has the burden of proving a statement’s falsity in cases involving a media defendant turns on whether the speech is of public concern.

In brief, protecting speech on matters of public concern, when viewed from this *Sullivan*-and-progeny perspective, is a key First Amendment value that ties to the First Amendment theory of democratic self-governance described earlier. As Thomas E. Kadri notes:

> One reason courts hold speech on matters of public concern so dear is that First Amendment theory and doctrine have lauded access to information as essential to the public’s ability to engage in self-government. This listener-focused justification “views the public, in its role as the electorate, as ultimately responsible for political decisions,” and thus the First Amendment creates a presumption that the public is “entitled to all information that is necessary for informed governance.”

Justice William Brennan, who authored *Sullivan*, was influenced in writing that opinion by Alexander Meiklejohn, who often is identified as a leading proponent of the theory of democratic self-governance. No less than Harvard Law School Professor Cass Sunstein dubs it “a relatively uncontroversial working hypothesis, that the *Sullivan* decision rested on Professor Meiklejohn’s conception of the First Amendment.”

Why is all of this important? Because it illustrates that the public-concern methodology for fending off tort claims that was used by the Sixth Circuit in *Higgins* is deeply rooted in First Amendment concerns and values. The real difference, then, between it and the First Amendment principles-and-purposes approach embraced in *Stricklin*—a tack that also relies on First Amendment concerns such as truth discovery, the marketplace of ideas and the exposition of ideas—

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187 Others have made this connection. See Catherine Hancock, Origins of the Public Figure Doctrine in First Amendment Defamation Law, 50 N.Y.L. SCH. L. REV. 81, 118 (2005) (observing “the Sullivan vocabulary of public concern” and noting “the public concern idiom of Sullivan”); Richard H. Weisberg, The First Amendment Degraded: Milkovich v. Lorain and a Continuing Sense of Loss on its 20th Birthday, 62 S.C.L. REV. 157, 161 (2010) (noting “Sullivan’s insistence . . . that factual falsehoods play a special and constitutionally protected role in moving audiences to assess and improve the informational flow on matters of public concern”) (emphasis added).

188 See supra notes 78–80 (addressing the actual malice rule).

189 See Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 761 (1985) (“In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of actual malice.”).

190 See Philadelphia Newspapers v. Hepps, 475 U.S. 767, 468–69 (1986) (“Here, we hold that, at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.”).

191 See supra notes 157–162 and accompanying text (addressing democratic self-governance theory).


that serve society as a whole—it is one of the scope or sweep of the analysis. In brief, the Higgins approach distills the question of constitutional protection down to a single determination: Is the speech at issue of public concern? The public concern concept thus is laden with the entire weight of the First Amendment when that constitutional provision butts heads up against potential tort liability for a defendant-speaker.

At least two possible problems exist with such a reductionist methodology. First, in any given case, there may be other First Amendment values at stake—speaker self-realization and self-fulfillment through expression, for example—instead of whether a matter is of public concern. A second difficulty, as the Sixth Circuit acknowledged in Higgins, is the amorphous nature of public concern, with distinguishing matters for public concern from those of a private nature being no easy feat. In the tort case of Gersh v. Anglin noted earlier, the district court also focused its First Amendment-defense analysis on whether the speech was public concern. Chief U.S. District Judge Dana Christensen characterized the Supreme Court’s rulings as only providing “a sketchy outline of the public concern test.”

Such ambiguity provides judges with ample leeway for deciding whether speech relates to a subject of public concern. In some ways, then, Kentucky Sports Radio was fortunate that the Sixth Circuit panel was willing to broadly construe matters of public concern beyond the topics of politics, government spending/funding and alleged criminal wrongdoing and stretch it to apply to officiating in college sports. As noted earlier, the aspect of Snyder’s test for matters of public concern that allows courts to consider “any matter of political, social, or other concern to the community” facilitates this notable expansion.

One might wonder how Stricklin would have turned out if Judge Conrad had used the Snyder public-concern test rather than his multiple-variable approach addressing whether the speech at issue “either further[ed] or hinder[ed] the principles and purposes undergirding the First Amendment.” The author of this Article suspects the outcome would have been identical, especially considering the content, form and context of Gwen Stefani’s speech—all three of the

195 Supra notes 137-152 (describing the considerations in Judge Conrad’s analysis in Higgins).


197 Higgins v. Kentucky Sports Radio, LLC, 951 F.3d 728, 734 (7th Cir. 2020) (“No bright line separates one from the other.”).

198 See supra notes 50-52 and accompanying text (addressing Gersh v. Anglin).


200 Id. at 965.


202 See Lane v. Franks, 573 U.S. 228, 241 (2014) (holding that testimony about “corruption in a public program and misuse of state funds” are subjects “of significant public concern”).


204 See supra note 104 (addressing this language from Snyder).

key factors enumerated in Snyder for deciphering when speech is of public concern. In particular, Stefani’s speech—taking the form of short-lived, ephemeral spoken words—was intended to serve solely the near-term, immediate private interests of her audience members who were contextually situated in one small location (a concert pavilion) at one brief point in time (during the concert). The content was a mere invitation to physically move forward, not one to ruminate, ponder or discuss anything. The private interest was, according to Stefani, enhancing her fans’ personal enjoyment of her songs during this one-time musical event. Her words were not intended to benefit anyone else outside of the physical confines of the concert pavilion or beyond the duration of her performance that day. In short, both outside of the concert venue in Charlotte, North Carolina, and after the concert ended on July 23, 2016, her spoken words served no interest at all, be it private or public.

On the other hand, the application of Judge Conrad’s approach to the factual scenario in Higgins arguably might not have protected KSR, Jones and Franklin. It will be recalled that Conrad reasoned that words that “do not further the exposition of ideas, search for truth, and the vitality of a society, but on the contrary, actually disserve society by creating the potential for disorder and danger,” do not merit First Amendment protection. In Higgins, neither the defendants nor their audience members were trying to discover the truth, such as it were, about Higgins’s officiating. Rather, they were simply mad at both it and him, and they vented their frustrations. The defendants’ speech regarding a basketball game certainly was not promoting the vitality of society; instead, it carried—and actually may have had—the potential for danger and disorder to Higgins, his business and his family. Perhaps, then, the defendants in Higgins were lucky the Sixth Circuit did not apply Judge Conrad’s framework in Stricklin.

Regardless of such academic speculation, the bottom line is that the Higgins and Stricklin approaches to deciding whether the First Amendment shields a speaker from tort liability are somewhat akin to opposite sides of the same coin. Both, in other words, are moored to considerations of First Amendment interests and values, but they address different ones. To extend the coin analogy a bit further, one side of the coin—the Stricklin side—simply is heavier, as it is weighted down by a consideration of multiple variables. Judge Conrad’s approach certainly demonstrates that the application of Snyder’s public-concern test is not an automatic one in tort cases involving speech.

IV. Conclusion

This Article analyzed and illustrated how Higgins and Stricklin represent different methods for deciding whether First Amendment interests are sufficient to ward off tort claims when a

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206 See Snyder, 562 U.S. at 454 (“In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”) (emphasis added).
207 Stricklin, 358 F. Supp. 3d at 522–23.
208 Id. at 528.
209 See id. at 522 (identifying the date and location of the concert).
210 Id. at 527.
211 See Higgins v. Kentucky Sports Radio, LLC, 951 F.3d 728, 733 (6th Cir. 2020) (“Threats also came to Higgins and his family. The business received over 800 threatening calls, and Higgins’ home phone received over 30 calls. At least a dozen provided the basis for a criminal investigation. When Higgins refereed a Final Four game that year, a bodyguard accompanied him.”).
defendant’s speech allegedly provokes others to action. On one level, *Higgins* is a definitive victory for sports journalists who express their views not only about referees and officiating, but also regarding fans’ reaction to such game calling. On a larger level, *Higgins* represents an important First Amendment triumph both for an expansive application of *Snyder*’s public-concern principle and for permitting journalistic discretion over the manner in which matters of public concern are covered. As the Sixth Circuit put it, the defendants “might have exercised their First Amendment rights more responsibly,” but the fact that they failed to do so did not vitiate constitutional protection. Finally, the Sixth Circuit’s analysis of the public-concern question is significant because it illustrates how a court might proceed by moving from a macro-level examination of the topic (in this case, sports and college basketball generally) down to a micro-level review of the subject matter in a given case (commentary on a basketball referee’s officiating and fans’ reaction to it).

*Stricklin* offers an alternative approach to the public-concern test adopted by the Supreme Court in *Snyder* and deployed nearly a decade later by the Sixth Circuit in *Higgins*. Judge Conrad never invoked *Snyder*’s public-concern nomenclature. He turned, instead, to the question of whether speech “further[ed] the exposition of ideas, search for truth, and the vitality of a society” or whether it “actually disserve[d] society by creating the potential for disorder and danger.” As the Article pointed out, this approach borrows from the U.S. Supreme Court’s approach in *Chaplinsky v. New Hampshire* for deciding when a category of speech falls outside the ambit of First Amendment protection. Not only was Gwen Stefani’s speech not shielded from liability under Conrad’s approach, but the Article argued that the speech of the defendants in *Higgins* also might not have been protected. If that latter argument were, in fact, correct, then which test a court applies may make a critical constitutional difference in tort cases pivoting on a defendant’s words.

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212 Id. at 732.
213 See supra notes 96–97 (encapsulating this two-tiered approach to matters of public concern in *Higgins*).
215 Id.
216 See supra notes 21–29 (addressing Judge Conrad’s approach in relation to the one taken in *Chaplinsky*).
217 See supra notes 210–211 (examining *Higgins* through the lens of Judge Conrad’s approach).