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PUBLIC CONCERN REVISITED: A NEW ROLE FOR AN OLD DOCTRINE IN THE CONSTITUTIONAL LAW OF DEFAMATION

ARLEN W. LANGVARDT*

Central to the disposition of most, if not all, defamation actions is an appropriate handling of the clash between the defendant's freedoms of speech and press¹ and the plaintiff's interest in protecting his reputation.² Since the Supreme Court's initial recognition that there are constitutional implications inherent in defamation,³ the Court has struggled to define the standards governing such a clash and has found it difficult to fashion a cohesive approach and rationale palatable to all its members.⁴

Describing what he considered judicial floundering in a sensitive constitutional area, Justice Black once observed that the Court had placed itself "in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity."⁵ The Court attempted to extricate itself from the defamation quagmire by fashioning a set of standards requiring varying burdens of proof, depending upon whether the plaintiff was a public official, public figure, or private figure.⁶ Although disagreement continued over whether the court's focus on the status of an allegedly defamed

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1. U.S. CONST. amends. I, and XIV. The first amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Although the first amendment's references to freedoms of speech and press literally prohibit only the federal government from infringing upon such rights, the first amendment freedoms long have been held to be protected from impairment by the states through the due process clause of the fourteenth amendment. *E.g.*, *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

2. *See, e.g.*, *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 342 (1974).

3. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See infra* text accompanying notes 16-22.

4. Witness the various opinions, including concurrences and dissents, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

5. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 171 (Black, J., concurring and dissenting).

6. *See infra* text accompanying notes 16-42.

party effected a proper accommodation of competing constitutional rights and reputational interests,⁷ and over whether the status rules were being applied properly to given fact patterns,⁸ the public official, public figure, and private figure rules appeared likely to lead to a reasonable degree of predictability of results.⁹ A significant portion of the predictability evidently intended by the adoption of such standards has been cut away, however, by the decision of a fragmented Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*¹⁰ Ruling in the context of a private figure plaintiff's libel action, the Court injected (or reinjected¹¹) a "public concern"¹² element into what had been a status-oriented inquiry for purposes of determining the plaintiff's burden of proof.¹³

This article will contain an analysis of the puzzling *Dun & Bradstreet* decision and its ill-defined public concern doctrine, in light of the constitutional cases that preceded the decision and those that have followed it. Inconsistencies and flaws present in the Court's reasoning will be explored, as will the possible and probable implications of the newly-mandated public concern focus. The article will conclude with suggestions concerning directions the constitutional law of defamation should move in the wake of *Dun & Bradstreet*.

THE PRE-*Dun & Bradstreet* SLATE OF CASES

Prior to 1964, the constitutional aspects of defamation had not received judicial recognition. The traditional common law defamation rules involved the imposition of liability without fault on the publisher of a defamatory statement.¹⁴ Damages were presumed to flow from the making of such a statement.¹⁵ In the landmark case of *New York Times Co. v. Sullivan*,¹⁶ the Supreme Court recognized that there are first amendment implications in defamation actions involving public officials as plaintiffs.¹⁷ Acting to ensure the robust debate on public issues intended by the first amendment,¹⁸

7. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

8. See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

9. See Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199, 268 (1976).

10. 105 S. Ct. 2939 (1985).

11. See *infra* text accompanying notes 25-29.

12. 105 S. Ct. at 2946.

13. See *infra* text accompanying notes 33-42.

14. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 114 (4th ed. 1971); 2 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 5.27 (2d ed. 1986).

15. W. PROSSER, *supra* note 14, § 112; 1 F. HARPER, F. JAMES & O. GRAY, *supra* note 14, § 5.14.

16. 376 U.S. 254 (1964).

17. *Id.* at 264-65.

18. *Id.* at 270.

the Court held that public official plaintiffs in defamation actions cannot prevail unless they prove "actual malice."¹⁹ Actual malice was defined by the Court as meaning that the defendant either knew the offending statement was false when he made it, or showed reckless disregard for its truth or falsity.²⁰

In the view of the *New York Times* majority, "erroneous statement is inevitable in free debate,"²¹ making it necessary to insulate from defamation liability the makers of some false statements about public officials (i.e., statements made without actual malice). Otherwise, there would be a significant danger of undue chilling of the first amendment rights of speakers.²² The same actual malice rule was soon extended to plaintiffs who are public figures,²³ largely on the rationale that public figures are not significantly different from public officials in terms of the public's keen interest in their activities or in terms of their role in "ordering society."²⁴

A further extension of the *New York Times* actual malice rules was authorized by a plurality of the Court in *Rosenbloom v. Metromedia, Inc.*²⁵ In that case, which involved a private figure plaintiff as opposed to a public official or public figure plaintiff,²⁶ the plurality opinion indicated that even private figure plaintiffs must prove actual malice in order to prevail, if the defamatory falsehood pertained to the plaintiff's "involvement in an event of public or general concern."²⁷ Appearing to employ the terms "public or general concern" and "public or general interest" interchangeably, Justice Brennan, writing for the three-member plurality,²⁸ observed that the underlying teaching of *New York Times* and its progeny was that the first amendment's impact on defamation law hinges not so much on the plain-

19. *Id.* at 279-80. The Court has also required that actual malice be proved, not merely by a preponderance of the evidence, but by clear and convincing evidence. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971); *New York Times Co. v. Sullivan*, 376 U.S. at 285-86.

20. 376 U.S. at 279-80. The "reckless disregard" aspect of the actual malice standard was later explained as requiring "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth" of his statement before making the statement. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

21. 376 U.S. at 271.

22. *Id.* at 272.

23. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C. J., concurring in the result).

24. *Id.* Chief Justice Warren also stressed that public figures generally have ready access, as do public officials, to the mass media for the purpose of countering criticism or erroneous statements about their activities. *Id.*

25. 403 U.S. 29 (1971).

26. *Id.* at 31.

27. *Id.* at 52.

28. Chief Justice Burger and Justice Blackmun joined Justice Brennan in forming the *Rosenbloom* plurality. 403 U.S. at 30.

tiff's status as it does on whether the defendant's statements dealt with a matter of public or general concern or interest.²⁹

The position taken by the three Justices who dissented in *Rosenbloom*³⁰ was largely vindicated three years later in *Gertz v. Robert Welch, Inc.*³¹ Repudiating the public concern or public interest approach³² taken in *Rosenbloom*, the *Gertz* majority³³ established, for private figure plaintiffs, new fault requirements designed to accommodate the competing first amendment and reputational interests.³⁴ The Court held that "so long as they do not impose liability without fault," the states could fashion their own standards of liability in a defamation action brought by an private figure.³⁵ In the wake of *Gertz*, most states have opted for a negligence requirement, although some have chosen a standard similar to *Rosenbloom* requiring proof of actual malice in cases involving a statement of public concern or interest.³⁶

Concerned about the possible chilling effect that ready availability of presumed or punitive damages could have on speakers' first amendment freedoms, the *Gertz* majority also ruled that the states could not permit recovery of presumed or punitive damages unless the private figure plaintiff went further than the basic fault requirement and proved the defendant's knowledge of falsity or reckless disregard for the truth (actual malice).³⁷

29. *Id.* at 44.

30. Justices Harlan, Marshall, and Stewart. *Id.* at 62, 78.

31. 418 U.S. 323 (1974).

32. *Id.* at 346.

33. The majority was composed of Justices Stewart, Marshall, Blackmun, Powell (who authored the majority opinion), and Rehnquist. *Id.* at 324-25.

34. 418 U.S. at 346-50. Although he would have preferred adhering to the position he took in *Rosenbloom*, Justice Blackmun joined the *Gertz* majority and provided the fifth vote for the positions taken in the majority opinion, because he believed that the Court had been "sadly fractionated" in *Rosenbloom* and that a "definitive ruling" was essential in *Gertz*. *Id.* at 354 (Blackmun, J., concurring).

35. *Id.* at 347. Such a rule was what Justices Harlan and Marshall had advocated in their *Rosenbloom* dissents. 403 U.S. at 64 (Harlan J., dissenting); *Id.* at 86 (Marshall, J. dissenting). The *Gertz* majority, though finding first amendment interests present in defamation actions involving private figure plaintiffs, reasoned that private figure plaintiffs should not have to satisfy the rigorous actual malice test in order to prevail. 418 U.S. at 343. The Court concluded that a lesser burden should be required of such plaintiffs, because they, unlike public officials and public figures, do not have ready access to communications channels in which false statements can be counteracted. Therefore, private figures are "more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Id.* at 344. It was also significant to the Court that private figures, unlike public officials and public figures, have not "voluntarily exposed themselves to increased risk of injury," meaning that private figures are more deserving of recovery in defamation actions than are public officials and public figures. *Id.* at 345.

36. Note, *Private Lives and Public Concerns: The Decade Since Gertz v. Robert Welch, Inc.*, 51 BROOKLYN L. REV. 425, 426-28 (1985).

37. 418 U.S. at 349-50. Justice Harlan had proposed such a rule three years earlier in

The private figure plaintiff who did not prove actual malice but proved the presumably lesser fault requirement established by the forum state was restricted, therefore, to compensation for "actual injury"³⁸ — with actual injury having to be proved by "competent evidence concerning the injury."³⁹

Gertz clearly reaffirmed the *New York Times* actual malice rules⁴⁰ for cases involving public officials or public figures as plaintiffs.⁴¹ In determining that the plaintiff in the case before it was a private figure rather than a public figure, the Court referred to different classes of public figures: first, the all-purpose public figure, meaning one who had achieved "pervasive fame or notoriety" in society; and second (or second and third), the limited-purpose public figure, meaning one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."⁴²

Although there was a disagreement among the Justices in *Gertz* and succeeding cases concerning whether the *Gertz* rules were sound and whether the public figure tests discussed above had been applied properly to the particular facts of the cases,⁴³ the ground rules concerning plaintiffs' burdens of proof in defamation cases seemed relatively clear, as did the standards for classifying plaintiffs. An unresolved issue that persisted, following *Gertz*, was whether the fault requirements enunciated in the series of cases beginning with *New York Times* and ending with *Gertz* applied only where the defendant was a member of the media or in all defamation

his *Rosenbloom* dissent. 403 U.S. at 73 (Harlan, J., dissenting).

38. 418 U.S. at 349. Although the Court declined to give a complete definition of "actual injury," it did state that such term "is not limited to out-of-pocket loss," and that such term would encompass such injuries as "impairment of reputation in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350.

39. *Id.* at 350. There need not be evidence assigning a dollar value to the injury. *Id.* It can be argued, credibly, that with the broad scope given in *Gertz* to what constitutes "actual injury," see *supra* note 38, and with no requirement that the evidence indicate a dollar value for injuries, juries effectively have the ability to "punish" libel and slander defendants by means of large, supposedly "compensatory" damage awards in cases where the plaintiff does not or cannot prove the actual malice necessary to support an award of punitive damages. Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 831-32 (1985).

40. See *supra* text accompanying notes 18-20.

41. 418 U.S. at 342.

42. *Id.* at 351. The Court's reference to being "drawn into" a public controversy appeared to allow for involuntary public figures. Such language essentially has been ignored in subsequent decisions of the Court, leaving one with the distinct impression that the so-called involuntary public figure classification no longer has any viability. See *Wolston v. Reader's Digest Ass'n.*, 443 U.S. 157, 166 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 454, 457 (1976).

43. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. at 361 (Brennan, J., dissenting); *Time, Inc. v. Firestone*, 424 U.S. 448, 484 (1976) (Marshall, J., dissenting).

cases, regardless of the defendant's media or nonmedia status.⁴⁴ Lower courts had split on such questions.⁴⁵ It was expected that such issues would be resolved in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, because it appeared to be a central issue in the case.⁴⁶ As will be seen, the media - nonmedia issue was addressed by the concurring and dissenting Justices, but the resolution of the issue was not significant to the plurality's disposition of the case.⁴⁷

THE *Dun & Bradstreet* DECISION

Some discussion of the *Dun & Bradstreet* facts is essential to an understanding of the decision. As a credit reporting agency that provided paying subscribers with financial and related information concerning businesses, Dun & Bradstreet sent five subscribers a false written report stating that Greenmoss Builders, Inc., a construction contractor, had filed a voluntary bankruptcy petition. Under the terms of the subscription agreement, the subscribers were not to reveal the information to anyone else.⁴⁸ When Greenmoss learned of the report, it notified Dun & Bradstreet of the mistake. Dun & Bradstreet, after verifying the falsity of the report, sent the same five subscribers a corrective notice which stated that a former employee of Greenmoss, not Greenmoss itself, had sought bankruptcy, and that Greenmoss was still doing business as usual. Dun & Bradstreet, however, twice declined the request of Greenmoss to reveal the names of the five subscribers who had been sent the erroneous report. Greenmoss then filed its defamation action in state court in Vermont.⁴⁹

The false report resulted from information provided to Dun & Bradstreet by its employee, a seventeen-year-old high school student who was paid to review bankruptcy court filings.⁵⁰ From the statement of facts given in the Supreme Court's plurality opinion, it is apparent there was negligence on the part of Dun & Bradstreet.⁵¹ Whether there was negligence on

44. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 105 S. Ct. 2939, 2942 n.1 (1985).

45. *Compare* *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied* 459 U.S. 883 (1982) (*Gertz* held not to apply in private figure's suit against nonmedia defendant); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980) (same); and *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978) (same); *with* *Antwerp Diamond Exch. v. Better Business Bureau*, 130 Ariz. 523, 637 P.2d 733 (1981) (*Gertz* held to apply in action involving nonmedia defendant); and *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976) (same).

46. *Wiley & Frank, Complications for Libel Defense Increased by Greenmoss Ruling*, Nat'l. L. J., Oct. 7, 1985, at 32, col. 1. See *infra* text accompanying note 57.

47. See *infra* text accompanying notes 57-64.

48. 105 S. Ct. at 2941.

49. *Id.* at 2941-42.

50. *Id.* at 2942.

51. Justice Powell observed in the plurality opinion that the employee had "inadver-

the part of Dun & Bradstreet evidently was not seriously contested in the litigation, with Dun & Bradstreet essentially conceding the point.⁵² The jury found for Greenmoss and awarded \$50,000 in compensatory damages — actually presumed damages, because Greenmoss apparently did not offer evidence as to actual injury.⁵³ Further, the jury awarded punitive damages of \$300,000.⁵⁴ The presumed and punitive damages were awarded in light of a jury instruction that did not require proof of knowledge of falsity or reckless disregard for the truth (actual malice) as a prerequisite to the recovery of such damages.⁵⁵

Dun & Bradstreet's motion for a new trial was granted by the trial court, in large part because of concern about whether such instruction was proper under *Gertz*.⁵⁶ The Vermont Supreme Court reversed the decision to grant a new trial. That court drew a media-nonmedia distinction, holding that the *Gertz* requirements did not apply in cases involving nonmedia defendants.⁵⁷

The U.S. Supreme Court affirmed the Vermont Supreme Court's decision, but for reasons different from those relied on below.⁵⁸ Justice Powell wrote the plurality opinion and was joined in such opinion by Justices Rehnquist and O'Connor.⁵⁹ A majority was created by Chief Justice Burger's and Justice White's concurrences in the judgment.⁶⁰ Justice Brennan filed a dissenting opinion, in which Justices Marshall, Blackmun, and Stevens joined.⁶¹

Although the plurality simply ignored the media-nonmedia issue, expressing no opinion on it, the presence of such issue in the case generated comments from the other Justices. Such comments make it clear that of the nine Justices, at least a simple majority rejects the notion that the application of the defamation rules required under the first amendment should

tently attributed" to Greenmoss a bankruptcy petition filed by someone else. *Id.* He also noted that even though Dun & Bradstreet's usual practice was to check the accuracy of such reports with the businesses allegedly involved, it did not do so in this instance. *Id.* In his dissent, Justice Brennan noted that the parties were not questioning "the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages." *Id.* at 2957 (Brennan, J., dissenting).

52. Wiley & Frank, *supra* note 46, at 32.

53. 105 S. Ct. at 2942; *id.* at 2965 (Brennan, J., dissenting).

54. *Id.* at 2942.

55. *Id.* at 2943.

56. *Id.* at 2942.

57. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.* 143 Vt. 66, 75, 461 A.2d 414, 418 (1983).

58. 105 S. Ct. at 2942.

59. *Id.* at 2941.

60. *Id.* at 2948 (Burger, C.J., concurring in the judgment); *id.* (White, J., concurring in the judgment).

61. *Id.* at 2954 (Brennan, J., dissenting).

hinge on the defendant's being part of the media.⁶² One can make a credible argument that even though the *Dun & Bradstreet* plurality did not deal with the media-nonmedia issue, the various opinions filed by the Justices collectively should have the practical effect of resolving the media-nonmedia issue, albeit in an unofficial sense and in a backhanded fashion.⁶³ Nevertheless, advocates of a media-nonmedia distinction in defamation actions still have reasonable cause to maintain that such a distinction is viable.⁶⁴

62. In his dissent, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, emphasized that no such distinction should be drawn. *Id.* at 2957-58 (Brennan, J., dissenting). Such dissenters reasoned that first amendment protection does not depend on the identity of the speaker, and that the first amendment does not call for speakers other than the press to have lesser first amendment protection than that received by the press. *Id.* Justice Brennan also noted that a media-nonmedia distinction would involve unworkable difficulties in classifying certain defendants. *Id.* at 2957. Justice White agreed with the four dissenters that no media-nonmedia distinction should be drawn, because in his view, the first amendment gives the organized press no special protection beyond what nonmedia speakers are given. *Id.* at 2953 (White, J., concurring in the judgment). Therefore, at least five members of the Court evidently believe that a media-nonmedia distinction has no legitimate role in the constitutional law of defamation.

63. Indeed, *Dun & Bradstreet* was read that way in *Garcia v. Bd. of Educ.*, 777 F.2d 1403 (10th Cir. 1985). In that case, the court, disagreeing with an argument that the *New York Times* actual malice rule would not apply in a public figure plaintiff's suit against a nonmedia defendant, noted that in *Dun & Bradstreet*, at least five members of the Supreme Court had rejected the notion of a media-nonmedia distinction in defamation cases. *Id.* at 1409, 1410. Similarly, in applying the constitutional fault requirements to a case involving a nonmedia defendant, the Supreme Court of Virginia characterized *Dun & Bradstreet* as a decision that "draws no distinction between media and non-media defendants." *Great Costal Express, Inc. v. Ellington*, 334 S.E.2d 846, 852 (Va. 1985). Such court noted that *Dun & Bradstreet* "makes clear that the question whether to apply the *Gertz* rule prohibiting presumed damages in the absence of *New York Times* malice depends not on the status of the defendant, but rather upon the nature of the defamatory words." *Id.* But see *infra* text accompanying notes 77, 118. Justice Powell's argument about limited circulation, discussed therein, may be a subtle variant of the media-nonmedia distinction. Wiley & Frank, *supra* note 46, at 33.

64. One finds clear signals, in a recent decision, that some members of the Court still believe a media-nonmedia distinction is appropriate. In *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986), Justice O'Connor's majority opinion held that where the media defendant's speech dealt with a matter of public concern, private figure plaintiffs in defamation actions must prove that the speech was false in order to recover damages from such media defendant. *Id.* at 1559, 1564. Justice O'Connor strained to emphasize that the Court was enunciating a rule in the context of a case involving a media defendant, *id.* at 1559, 1563, 1564, and that the case did not require the Court to decide what standards would apply in an action involving a nonmedia defendant. *Id.* at 1565 n.4. The significance and meaning of Justice O'Connor's attempts to limit the *Hepps* holding in such a fashion is called into serious question, however, when one considers the position taken by Justices Brennan and Blackmun. They joined Justice O'Connor's opinion and provided the necessary swing votes for a five-person majority, but they also joined in a separate concurrence. In such concurrence, Justices Brennan and Blackmun restated their view that no media-nonmedia distinction should be drawn in defamation actions. *Id.* at 1565-66 (Brennan, J., concurring). The necessary implica-

Choosing not to proceed down the media-nonmedia paths, Justice Powell, for the *Dun & Bradstreet* plurality, observed that the above-mentioned jury instruction, in permitting an award of presumed and punitive damages on a showing less than actual malice, would indeed run afoul of *Gertz* — if *Gertz* were considered controlling.⁶⁵ He characterized *Gertz* as a decision that placed restrictions on what a private figure plaintiff could recover for a defamatory statement dealing with a matter of public concern. Noting the *Gertz* requirement that such plaintiffs prove actual malice in order to recover presumed and/or punitive damages, Justice Powell phrased the issue as “whether *this rule* of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.”⁶⁶ Answering such question in the negative, the plurality held that “permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.”⁶⁷

Attempting to justify the thinking that *Gertz*, or at least the portion of *Gertz* dealing with what must be proved in order to recover presumed and punitive damages, required not only an inquiry as to the status of the plaintiff (i.e., public official, public figure, or private figure), but also an inquiry as to the type of speech involved (i.e., public concern or private concern), Justice Powell stressed that all of the Court’s earlier defamation cases which presented first amendment questions had involved matters of public concern.⁶⁸ Speech on such matters was said to be at the core of first amendment protection, whereas speech on matters of private concern was regarded, in Justice Powell’s view, as of lesser first amendment significance.⁶⁹ It was therefore an easy task for the plurality to conclude that the state’s interest in compensating private figure plaintiffs for injury to their reputa-

tion of such concurrence is that Justices Brennan and Blackmun believe any rule stated in *Hepps* should be applied to nonmedia defendants as well as to media defendants. *Id.* The four Justices who dissented in *Hepps* did so on grounds unrelated to any media-nonmedia issue. *Id.* at 1566-71. It therefore appears that unless certain Justices’ positions on the media-nonmedia question have changed since *Dun & Bradstreet* was decided, *see supra* note 62, there still is not a majority favoring a media-nonmedia distinction — despite what Justice O’Connor appeared to be laying the groundwork for in *Hepps*. A definitive statement of the Court’s position on the media-nonmedia question is apparently being left for another day and another set of facts.

65. 105 S. Ct. at 2943.

66. *Id.* at 2941 (emphasis added). The reference to “this rule” must be seen as a narrow reference to the *Gertz* rule on proving actual malice as a prerequisite to recovering presumed and punitive damages, and not as a broad reference to *Gertz* in general. For a discussion of the other rules set forth in *Gertz*, *see supra* text accompanying notes 33-36 and 38-39.

67. *Id.* at 2948.

68. *Id.* at 2944.

69. *Id.* at 2945, 2946. According to the plurality opinion, such a notion was consistent with the Court’s “long recogni[tion] that not all speech is of equal First Amendment importance.” *Id.* at 2945 (footnotes omitted).

tion should outweigh the reduced first amendment importance of speech on a matter of private concern.⁷⁰ The opposite result had been obtained in *Gertz*, when the same state interest had been balanced against what Justice Powell considered a much stronger first amendment interest in furthering speech on matters of public concern.⁷¹ Because the scales tipped in favor of the first amendment interest in *Gertz* but in favor of the state's interest in protecting its citizens' reputations in cases involving matters of private concern, it was reasonable, in Justice Powell's thinking, to conclude that a private concern case would not require the *Gertz* rule on presumed and punitive damages.⁷²

It then became necessary, in light of its characterization of *Gertz*, for the plurality to determine whether the defamatory statements in *Dun & Bradstreet* dealt with a matter of public concern or only private concern. Rather than enunciating a specific test for what constitutes a matter of public concern, Justice Powell turned to *Connick v. Myers*,⁷³ a nondefamation case which dealt with an employment dispute,⁷⁴ for the broad standard that whether a matter of public concern is present must be determined by the statement's "content, form and context . . . as revealed by the whole record."⁷⁵ He then summarily concluded that in view of such factors, *Dun & Bradstreet's* statements about Greenmoss involved no public concern.⁷⁶ In fleeting references at the conclusion of the plurality opinion, Justice Powell made the following further observations concerning why *Dun & Bradstreet's* false and defamatory speech was not of public concern and therefore should receive no special first amendment protection: 1) it was "solely in the individual interest of the speaker and its specific business audience," and was "solely motivated by the desire for profit"; 2) it was circulated on a confidential basis to a limited number of subscribers, meaning there was no significant interest in the free flow of commercial information; and 3) it was similar to advertising in that it was "hardy and unlikely to be deterred by incidental state regulation."⁷⁷

In their concurrences in the judgment, Chief Justice Burger and Jus-

70. *Id.* at 2946.

71. 418 U.S. at 348-49.

72. 105 S. Ct. at 2945.

73. 461 U.S. 138 (1983).

74. *Connick v. Myers* involved an assistant district attorney's unsuccessful claim that her first amendment rights were violated when she was fired following her distribution of a questionnaire concerning internal affairs at the district attorney's office. *Id.* at 148.

75. 105 S. Ct. at 2947 (quoting *Connick v. Myers*, 461 U.S. at 147-48).

76. *Id.* at 2947.

77. *Id.* Justice Powell emphasized, however, that he was not labeling credit reports as commercial speech, but was discussing credit reports alongside advertising "only to show how many of the same concerns that argue in favor of reduced constitutional protection [for commercial speech] apply here as well." *Id.*, n.8.

tice White agreed that if the *Gertz* rules must stand, they should be limited to cases involving matters of public concern, and that only a private concern was involved in *Dun & Bradstreet*.⁷⁸ The substance of each concurrence in the judgment was that *Gertz* was a poorly reasoned decision which should be overruled,⁷⁹ presumably to make way for a return to the common law defamation rules in cases involving private figure plaintiffs.⁸⁰

The four dissenters chided the plurality for unduly restricting the applicability of *Gertz* and for "depart[ing] completely from the analytic framework and result" of *Gertz*.⁸¹ Noting that in *Gertz*, the Court had rejected the public concern approach taken in *Rosenbloom v. Metromedia, Inc.*,⁸² Justice Brennan and those joining his opinion found it impossible to believe that the *Gertz* rules had been intended to require a distinction, in defamation cases, between speech dealing with a public concern and speech referring only to a private concern.⁸³ The dissenters also noted that even if the public concern vs. private concern distinction were a sound one, the speech involved in the case would have to be considered of public concern, because of the importance of information about economic matters⁸⁴ and because the announcement of a local business entity's bankruptcy would be of great significance to person residing in the area where the entity was located.⁸⁵ As for the plurality's reliance on an analogy to commercial speech, Justice Brennan observed that even if the credit report involved in the case at hand were to be considered the virtual equivalent of commercial speech, it would be deserving of substantially greater first amendment protection than what was granted by the plurality in its decision making presumed and punitive damages much more readily available than had been the case.⁸⁶

INCONSISTENCIES AND IRONIES IN THE NEW PUBLIC CONCERN APPROACH

The Surprising Focus on Pubic Concern

Justice Powell's injection (or reinjection) of the public concern element into the defamation rules for private figure plaintiffs reflects various contradictions and inconsistencies that cannot readily be explained. Although Jus-

78. *Id.* at 2948 (Burger, C.J., concurring in the judgment); *id.* at 2953-54 (White, J., concurring in the judgment).

79. *Id.* In addition, the Chief Justice and Justice White suggested that the Court not only dispense with *Gertz*, but also reassess whether to perpetuate the *New York Times* actual malice rule. *Id.* at 2948, 2950.

80. *Id.* at 2952 (White, J., concurring in the judgment).

81. *Id.* at 2959 (Brennan, J., dissenting).

82. *See supra* text accompanying notes 31-35.

83. 105 S. Ct. at 2959 n.11 (Brennan, J., dissenting).

84. *Id.* at 2960.

85. *Id.* at 2961.

86. *Id.* at 2962.

tice Powell hastened to label the *Gertz* decision as one involving speech of public concern and stretched to make the applicability of *Gertz* (or at least its presumed and punitive damages rule) hinge on the public concern factor, it is no small task to find such a distinction set forth in *Gertz*. A careful examination of the majority opinion in *Gertz* — an opinion written, interestingly enough, by Justice Powell — does not reveal any clear expression of intent that *Gertz's* applicability be confined to public concern cases.⁸⁷ Justices Marshall and Blackmun, who dissented in *Dun & Bradstreet* but helped form the majority in *Gertz*,⁸⁸ clearly did not believe *Gertz* rested on any such intention.⁸⁹ Neither did Justice White, whose dissatisfaction with the *Gertz* rules⁹⁰ made him willing to accept a construction of *Gertz* that rendered such decision inapplicable to the facts of *Dun & Bradstreet*.⁹¹ While doing so, however, Justice White candidly observed that he did not believe Justice Powell really was following the *Gertz* approach — an approach Justice White had thought “was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance.”⁹²

The thrust of *Gertz* cuts against Justice Powell's later attempts to give the decision a limited meaning. The obvious focus in the decision was on the status of the party about whom the allegedly defamatory statements were made, not on the content or nature of the speech.⁹³ The *Gertz* majority fashioned a set of first amendment-based rules geared specifically to whether the plaintiff was a public official, public figure, or private figure.⁹⁴ If the Court really intended that some of such important constitutional

87. Commentators have not tended to read *Gertz* as being limited to cases involving matters of public concern. See, e.g., Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1225 (1976) (noting that in *Gertz*, the Court demonstrated an “announced reluctance” to take such matters as public concern into account along with the status of the plaintiff, and enunciated an “announced preference for making the public or private character of the defamed person dispositive”). See also Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1414 (1975) (observing that none of the rules announced in *Gertz* had any “public interest qualification” attached to them, and that the tenor of the majority opinion “would seem to preclude attaching such a qualification to any of them”). See also Robertson, *supra* note 9, at 236 (reading *Gertz* as plainly requiring that fault be proved by all private figure plaintiffs, without regard for whether they were involved in matters of public or general concern).

88. 418 U.S. at 324.

89. 105 S. Ct. at 2959 n.11 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting).

90. See *supra* text accompanying notes 78-80.

91. 105 S. Ct. at 2953-54 (White, J., concurring in the judgment).

92. *Id.* at 2952-53.

93. See 418 U.S. at 346-52.

94. *Id.* at 342-43, 346-51.

rules should apply only where the speech involved is of a certain content or nature, it is reasonable to conclude that some statement to that effect would have been made in the *Gertz* opinion. Instead, the Court's reasoning in *Gertz* offers every indication that the rules developed in such case were designed to avoid the kind of content determinations *Dun & Bradstreet* now makes necessary.

It must be remembered that *Gertz* discarded the *Rosenbloom* "public concern or public interest" rationale as unworkable.⁹⁵ Ironically, it was Justice Powell who observed, in *Gertz*, that the *Rosenbloom* approach "would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."⁹⁶ That was a task which, in the words of Justice Powell, "[w]e doubt the wisdom of committing . . . to the conscience of judges."⁹⁷ Yet that is precisely the kind of task *Dun & Bradstreet*, with its public concern approach, now commits to the "consciences" of judges. If, at the time *Gertz* was decided, there were dangers inherent in turning lower court judges loose to make *ad hoc* determinations regarding the public concern or interest question, it is difficult to see how the dangers are any less significant today or how *Gertz* credibly can be characterized as a decision hinging, at least in part, on a public concern determination.

What has been accomplished by the *Dun & Bradstreet* plurality is a revitalization of the once discredited *Rosenbloom* public concern doctrine — with a twist. As in *Rosenbloom*, courts must make determinations, at least in cases involving private figure plaintiffs, about whether the allegedly defamatory statements involved matters of public concern. The twist, of course, is that if a public concern is found, the actual malice requirement of *Rosenbloom* is not applied with regard to the defendant's liability. Instead, it is applied only as to the presumed and punitive damages question.⁹⁸ Regardless, however, of whether the actual malice determination pertains to the liability issue or the presumed and punitive damages issue, *Dun & Bradstreet* has embroiled courts in making the very kinds of content discriminations the approach taken in *Gertz* seemed designed to eliminate.

Further inconsistency appears in the *Dun & Bradstreet* plurality's attempt to employ the balancing approach utilized in *Gertz*.⁹⁹ In doing so, the plurality weighed the state's interest in compensating private individuals for injury to reputation against the first amendment interests of the speaker, and found the state interest to be controlling over the reduced first amend-

95. *Id.* at 346.

96. *Id.*

97. *Id.*

98. 105 S. Ct. at 2948.

99. See *Gertz v. Robert Welch, Inc.*, 418 U.S. at 347, 348.

ment interest in protecting speech on matters of private concern.¹⁰⁰ Justice Powell paid only lip service to *Gertz* in employing the balancing approach, however, because he disregarded the *Gertz* statement that punitive damages “are wholly irrelevant to the state interest”¹⁰¹ mentioned above, which state interest was the same in both *Gertz* and *Dun & Bradstreet*.¹⁰² As Justice Brennan noted in his dissent, “[w]hat was ‘irrelevant’ in *Gertz* must still be irrelevant,”¹⁰³ meaning that even if speech on matters of private concern is of reduced first amendment importance, such a lessened first amendment interest still should be sufficient to outweigh the state’s desire to award the “wholly irrelevant” punitive damages. Therefore, if Justice Powell’s balancing act in *Dun & Bradstreet* really had been performed in a fashion consistent with the directives of *Gertz*, the Court would have had to conclude that *Gertz* did apply, at least insofar as it made punitive damages, as opposed to damages for actual injury, quite difficult to collect.

Similarly, the *Dun & Bradstreet* decision is inconsistent with other aspects of *Gertz* that the plurality did not address adequately. In *Gertz*, the Court expressed considerable concern about the “largely uncontrolled discretion” of juries in awarding presumed damages where no proof of actual injury was offered, and about the danger of juries misusing presumed damages to punish unpopular opinion through a large money judgment, instead of to compensate plaintiffs for their injury.¹⁰⁴ The *Gertz* Court concluded that “the States have no substantial interest in securing for plaintiffs such as this petitioner [a private figure plaintiff] awards of money damages far in excess of any actual injury.”¹⁰⁵ Born as a result of such concerns was the *Gertz* rule requiring proof of actual malice as a prerequisite to the recovery of presumed or punitive damages.¹⁰⁶ The concerns expressed in *Gertz* are of equal validity regardless of whether the speech involved dealt with a public concern or merely a private concern. Expansive discretion on the part of the jury in awarding damages unrelated to actual injury is an ominous prospect present in the private concern case, as well as in the so-called public concern case. Moreover, even in a private concern case, it is difficult to see how the state could have any interest, let alone a substantial one, in granting the private figure plaintiff “gratuitous awards of money damages far in excess of any actual injury.”¹⁰⁷ Yet the Powell analysis, in *Dun & Bradstreet*, would countenance such awards by making presumed damages much more readily available, in private concern cases, than they had been thought to be

100. 105 S. Ct. at 2945, 2946.

101. 418 U.S. at 350.

102. 105 S. Ct. at 2945.

103. *Id.* at 2964 (Brennan, J., dissenting).

104. 418 U.S. at 349.

105. *Id.*

106. *Id.* at 349, 350.

107. *Id.* at 349.

after *Gertz*.

The Surprising Absence of a Public Concern in Dun & Bradstreet

Equally hard to square with the Court's previous decisions is Justice Powell's suggestion that the credit report issued by Dun & Bradstreet was not of public concern and did not merit special first amendment protection because it was speech about economic matters in the interest of the speaker and its business audience.¹⁰⁸ In other contexts, the Court has held that speech dealing with economic matters is entitled to full first amendment protection.¹⁰⁹ This is true even if the speech is motivated by a desire to make a profit.¹¹⁰ Although commercial speech merits less than full, but nevertheless substantial, first amendment protection,¹¹¹ speech about economic matters *per se* does not constitute commercial speech, as that term has customarily been applied by the Court. Sometimes the Court has offered a potentially broad definition of commercial speech (e.g., that commercial speech is "expression related solely to the economic interests of the speaker and its audience"),¹¹² but the fact remains that the Court has found commercial speech to be present only in cases involving advertisements, which, by nature, propose a commercial transaction of some sort.¹¹³ Because credit reports do not propose a commercial transaction, they apparently would not be considered commercial speech. Such conclusion was agreed upon by the

108. 105 S. Ct. at 2947.

109. *E.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977). In *Abood*, the Court analyzed a statute that allowed an arrangement whereby certain government employees, who were represented by a union but were not members of the union, could be charged a service fee in an amount equal to the union dues. *Id.* at 211, 235-36. The Court held the statute unconstitutional, insofar as it permitted the use of the service fees for the advancement of political positions the non-members did not choose to support. *Id.* at 232-36. In coming to its conclusion, the Court emphasized 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 Amendment protection." *Id.* at 231 (footnotes omitted; emphasis supplied). See also *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (dealing with constitutionality of statute allowing banning of movies); *Thornhill v. Alabama*, 310 U.S. 88, 101-03 (1940) (dealing with labor dispute).

110. *Burstyn*, 343 U.S. at 501; *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976).

111. *Ohralik v. Ohio Bar Ass'n.*, 436 U.S. 447, 456 (1978); *Virginia State Bd. of Pharmacy*, 425 U.S. at 770.

112. *E.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n.*, 447 U.S. 557, 561 (1980).

113. See, *e.g.*, *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983) (advertising of contraceptives); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (advertising on billboards); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 530 (1980) (advertising of electricity); *Friedman v. Rogers*, 440 U.S. 1 (1979) (advertising by optometrists); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (advertising by pharmacists).

Dun & Bradstreet dissenters¹¹⁴ and the plurality, with Justice Powell being careful to emphasize that he was only comparing the credit report at issue to advertising, and was not labeling such credit report commercial speech.¹¹⁵

More important, however, than determining what label to place on credit reports is the notion that regardless of whether credit reports are entitled to full first amendment protection or are some kind of commercial speech analogue meriting less than full first amendment protection, there is a high degree of public interest in the kind of information contained therein. Important economic decisions having potentially far-reaching consequences are based on such information. Indeed, the interest in such information may be greater, for some recipients, than the interest in the day's pressing political issues.¹¹⁶ It is therefore anomalous that the plurality cavalierly dismissed the credit report in *Dun & Bradstreet* as being a matter of mere private concern.¹¹⁷

Justice Powell's apparent belief is that the limited circulation of the credit report at issue¹¹⁸ points to a conclusion that it did not involve a matter of public concern.¹¹⁹ Such belief does not find specific support in the case law. Indeed, in a nondefamation context, the Court has held that one's first amendment rights are not lost simply because he decides to publish statements only to a limited audience instead of to the public generally.¹²⁰ The same approach to first amendment protection should be taken in the defamation context. The nearsightedness of Justice Powell's limited circulation argument was emphasized by Justice Brennan, who stated as follows:

Perhaps more importantly, *Dun & Bradstreet* doubtless provides thousands of credit reports to thousands of subscribers who receive the information pursuant to the same strictures imposed on the recipients in this case. As a systemic matter, therefore, today's decision diminishes the free flow of information because *Dun & Bradstreet* will generally be made more reticent in providing information to all its subscribers.¹²¹

114. 105 S. Ct. at 2963 (Brennan, J., dissenting).

115. *Id.* at 2947 n.8.

116. *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 563; *Virginia Bd. of Pharmacy*, 425 U.S. at 763.

117. 105 S. Ct. at 2947.

118. See *supra* text accompanying note 48.

119. 105 S. Ct. at 2947.

120. *Givhan v. Western Line Consol. School Dist.* 439 U.S. 410, 415-16 (1979). The specific holding in *Givhan* was that a public employee does not lose first amendment protection where the otherwise constitutionally protected speech (for which the public employee allegedly was fired) was communicated privately to the employee's supervisor, rather than to the public in general. *Id.*

121. 105 S. Ct. at 2965 n.18 (Brennan, J., dissenting).

The plurality's focus on the extent of circulation is an exaltation of form over substance.

Even if, for whatever reason, the credit report merits some but not full first amendment protection (a theory to which the plurality professes at least some allegiance¹²³), the ready availability of presumed and punitive damages, as allowed in *Dun & Bradstreet*, does not give meaningful protection to even a first amendment interest of reduced importance. Allowance of presumed and punitive damages on a showing less than actual malice endangers first amendment freedoms by cutting a swath broader than necessary to further the protection of reputation interest present in a defamation action.¹²³ The plurality's decision concerning presumed and punitive damages therefore violates the fundamental principle that "state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate [reputational] interest involved."¹²⁴

The Punitive Damages Problem

A final anomaly created by the *Dun & Bradstreet* decision is that with the elimination of the burden of proving actual malice to recover punitive damages in private concern cases, another part of defamation law has fallen clearly out of step with the legal rules governing recovery of damages in other tort cases. Defamation law's allowance of presumed damages, without proof of actual injury, has always been something of an oddity.¹²⁵ Now, if private figure plaintiffs in defamation cases involving matters of private concern may recover punitive damages on only a showing of negligence, as was the situation in *Dun & Bradstreet*,¹²⁶ plaintiffs will be obtaining awards of punitive damages on the basis of punitive damages rules which are considerably less stringent than those applied in tort law generally.

Ordinarily, a defendant in a tort action may be held liable for punitive damages where his conduct was "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."¹²⁷ Such standard, designed to cover reprehensible behavior, clearly contemplates a degree of fault more serious than mere negligence.¹²⁸ The actual malice standard of knowledge of falsity or reckless disregard for the truth much more

122. *Id.* at 2946.

123. See Ingber, *supra* note 39, at 830-32.

124. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 530, 565-66 (1980).

125. *Gertz*, 418 U.S. at 349. See Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747 (1984).

126. See *supra* text accompanying notes 51-52 and *infra* text accompanying notes 189-99.

127. RESTATEMENT (SECOND) OF TORTS § 908 (2) (1979).

128. *Id.*, comment b.

closely resembles, than does negligence, the kind and degree of fault ordinarily required before an award of punitive damages may be obtained. Yet, after *Dun & Bradstreet*, if a defendant negligently made a false and defamatory statement, of private concern, about a private figure, such defendant could be assessed punitive damages, but if the same defendant instead negligently operated his motor vehicle and thereby injured the same plaintiff, such defendant almost certainly would not be found to have shown the degree of culpability necessary to justify an award of punitive damages.¹²⁹ It becomes especially ironic that such results could be obtained in the respective cases just described, when one recognizes that the defamation action would call into play an issue concerning the defendant's first amendment interests and rights, but the automobile negligence case would not involve any considerations of such significance.

Dun & Bradstreet's UNANSWERED QUESTIONS AND IMPLICATIONS

The most expedient way of dealing with the questions raised by *Dun & Bradstreet* would be to pass off the decision as one peculiar to the erroneous credit report context, and to confine the decision to its facts.¹³⁰ The language employed by the plurality does not permit the case to be read so narrowly, however.

The Difficulty of Determining What Constitutes a Public Concern

Without question, *Dun & Bradstreet* mandates an inquiry not only into the status of the plaintiff, but also into the subject matter of the allegedly defamatory speech,¹³¹ at least in the case of a private figure plaintiff.¹³² The subject matter inquiry is necessary for the purpose of determining whether the speech was of public concern — a now critical factor on which hinges the applicability of, at a minimum, the *Gertz* rule on presumed and punitive damages.¹³³ The chief question left unanswered by *Dun & Bradstreet* is the question of what constitutes a public concern, or, to be more specific, what standards are to be used in determining whether speech in a particular defamation case dealt with a matter of public concern. Given the *Gertz* majority's disapproval of the *ad hoc* judicial determinations that would be necessary if *Rosenbloom's* public concern or interest theory were not

129. See *supra* text accompanying notes 127-28.

130. Sanford, *High Court: Quirky Case Makes Murky Libel Law*, Legal Times, July 15, 1985 at 13, col. 2.

131. See *supra* text accompanying notes 66-77.

132. The plurality opinion makes it apparent that Greenmoss was a private figure. 105 S. Ct. at 2941.

133. See *supra* text accompanying notes 66-77, and *infra* text accompanying notes 189-99.

discarded,¹³⁴ the *Dun & Bradstreet* plurality exhibited a surprising willingness to have courts engage in case-by-case determinations of whether speech touched upon a matter of public concern.¹³⁵ Yet the Court failed to set forth any meaningful standard to guide the making of such determinations.

Of course, the plurality did indicate that whether speech dealt with a public concern is to be determined on the basis of its "content, form, and context . . . as revealed by the whole record."¹³⁶ Such a purported test is in reality no test at all. It amounts to little more than a message to judges and attorneys that no standards are necessary because they will, or should, know a public concern when they see it.¹³⁷ The problems with such approach are that judges may not always know it when they see it, and that different judges can be expected to have different views of what they see.

The *Dun & Bradstreet* decision can be likened to someone's directing another party to search for the directing party's lost wallet, without giving such other party a description of the wallet or its contents. Such other party knows what kind of appearance a wallet generally has, and he may even come back from his search with a wallet in hand, but whether he has the correct wallet is another question. Similarly, a judge having to decide whether a given statement dealt with a public concern probably has a general awareness of, or feel for, what he believes may constitute a public concern, but he does not have knowledge of how far the concept of public concern extends. Since different judges' respective general awarenesses of what are public concerns cannot be expected to coincide in all particulars (or even be very similar, for that matter) there is a significant danger that the necessarily *ad hoc* determinations will lead to inconsistent results on the now important public concern question.¹³⁸ That danger, which prompted a rejection of *Rosenbloom* by the *Gertz* majority,¹³⁹ does not bode well for first amendment freedoms, because a court's erroneous determination that

134. 418 U.S. at 346. See also *Federal Communications Comm'n v. Pacifica Found.*, 438 U.S. 726, 761 (Powell, J., concurring) (comments to effect that judges should not be in business of making judgments about sorts of speech that are more or less valuable, for first amendment purposes).

135. Sanford, *supra* note 130, at 13.

136. 105 S. Ct. at 2947 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)).

137. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (Justice Stewart's much-noted "I know it when I see it" discussion of "hard-core pornography").

138. Sanford, *supra* note 130, at 13. See Ingber, *supra* note 39, at 839 (expressing dismay about any set of defamation rules requiring courts to determine the relative importance of speech). See also Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811, 820 (1981) (expressing similar point of view); Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 944-56 (1983) (discussing the difficulties courts have had in deciding what is a "public controversy," for purposes of applying defamation law regarding public figures).

139. 418 U.S. at 346.

no public concern existed may lead to disastrous consequences for a negligent defendant, in terms of presumed and punitive damages. Besides judges' inability to make consistent determinations on the public concern question absent some ground rules or standards for making such decisions, neither the makers of statements nor such parties' attorneys have any reliable way of predicting the extent of the legal difficulties and financial burdens they may encounter if their statements turn out to be false and a jury finds them negligent. The uncertainty would seem likely to lead to a chilling of first amendment rights.

Dun & Bradstreet appears destined to lead to determinations, both judicial and nonjudicial, about the relative importance of speech. Such a trend in defamation jurisprudence is constitutionally suspect,¹⁴⁰ and is capable of lending itself to such seemingly bizarre results as the imposition of different constitutional rules on different speakers who are part of the same media, or different constitutional rules depending upon which specific section of a publication contained the offending statement.¹⁴¹ Although such scenarios are only possible and not probable, they point up the difficulties inherent in *Dun & Bradstreet's* public concern approach.

Encountering the Semantic Maze

The decision about the meaning and scope of *public concern* is complicated by the semantic maze the Supreme Court has created in its defamation decisions over the past dozen years.¹⁴² The Court has spoken of "public controversies," in the context of determining whether a plaintiff became a public figure, for purposes of defamation law, by "thrust[ing himself] to the forefront of particular public controversies."¹⁴³ It appeared to use the terms "public concern" and "public interest" interchangeably in *Rosenbloom*.¹⁴⁴ It used only the term "public concern" in *Dun & Bradstreet*.¹⁴⁵

As used in the public figure context, *public controversy* also has an unclear scope,¹⁴⁶ but the Court has emphasized that such term contemplates something more than mere newsworthiness or general interest.¹⁴⁷ Therefore, *public controversy* and *public interest* must not be interchangeable terms. Presumably, *public concern*, as used in *Dun & Bradstreet*, means something different from *public controversy*. If the two terms meant the

140. See Ingber, *supra* note 39, at 839.

141. Sanford, *supra* note 130, at 13; Wiley & Frank, *supra* note 46, at 33.

142. See Eaton, *supra* note 87, at 1423-25.

143. *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)).

144. See *supra* text accompanying notes 26-29.

145. 105 S. Ct. at 2941, 2948.

146. Note, *supra* note 138, at 944.

147. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976).

same thing, there would have been no reason for the Court to use a different term in *Dun & Bradstreet*. Just what constitutes the difference goes unaddressed in the plurality opinion.

Justice Powell's insistence, in *Dun & Bradstreet*, on calling *Rosenbloom's* approach a "public interest" theory¹⁴⁸ and on ignoring *Rosenbloom's* clear use of "public interest" and "public concern" as if they meant the same thing,¹⁴⁹ suggests an ominous thought: that in the view of the plurality, a matter of public concern somehow is different from a matter of public interest, and the two therefore must be accorded different constitutional treatment. The futility of requiring subtle distinctions, for purposes of the constitutional aspects of defamation law, among matters of public controversy, public concern, and public interest,¹⁵⁰ is exceeded only by the absurdity of requiring such subtle distinctions without providing those who must make the distinctions any intelligible basis on which to make them.

What the Cases Reveal About Public Concerns

Because of the lack of specificity, in *Dun & Bradstreet*, concerning what constitutes a public concern, one must attempt to determine the meaning and scope of the term by using whatever guidance may be found in the Court's previous cases. It is not difficult to conclude that so-called "political speech" would be included within any reasonable notion of what is a public concern.¹⁵¹ It is to be hoped, however, that the boundaries of the public concern doctrine would not be fixed so narrowly, because strictly political matters and other matters pertaining to the operation of government, important as they are, do not constitute the only subjects on which members of the public focus their attention and concern.¹⁵² Although one may make a substantial argument to the effect that the public concern doctrine "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period,"¹⁵³ the *Dun & Bradstreet* plurality's determination that no public concern was involved in that case indicates that such an argument is unlikely to win favor.

148. 105 S. Ct. at 2944.

149. See *supra* text accompanying notes 26-29.

150. Justice Powell's opinion also suggests a need for an inquiry as to the extent of circulation of the defamatory statement. 105 S. Ct. at 2947. See *supra* text accompanying notes 118-21.

151. See *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530 (1980); *Carey v. Brown*, 447 U.S. 455 (1980); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

152. See, e.g., *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

153. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

Examination of the fact patterns and results in the Supreme Court's pre-*Dun & Bradstreet* defamation cases may be of some use in determining what constitutes a public concern, because the *Dun & Bradstreet* plurality indicated that such cases generally involved matters of public concern.¹⁵⁴ The clues given by such cases are not always reliable or easy to reconcile, however, as will be seen.¹⁵⁵ Such cases reveal that matters of public concern, for defamation purposes, are present in the following sorts of situations: a newspaper advertisement critical of government officials' interference with and handling of peaceful protests concerning racially discriminatory practices in the South;¹⁵⁶ a magazine article alleging that a prominent former college football coach had conspired to fix an important game;¹⁵⁷ radio reports that a private individual was distributing obscene literature;¹⁵⁸ and a magazine article alleging that an attorney was a convicted criminal and a Communist who had played a significant role in a Communist plot to have an unmeritorious criminal charge brought against a police officer.¹⁵⁹

In its first post-*Dun & Bradstreet* defamation decision, *Philadelphia Newspapers, Inc. v. Hepps*,¹⁶⁰ the Court found a public concern to be present where the purportedly defamatory statements linked the plaintiffs to organized crime and alleged that the plaintiffs had used organized crime connections to influence government operations.¹⁶¹ The Court labeled the case as one involving a public concern, without elaborating on *Dun & Bradstreet's* public concern requirement or setting forth any standards for determining what constitutes a public concern.¹⁶²

With regard to what is not a public concern, one would be relatively safe, for instance, in concluding that a report of even a highly publicized, noteworthy divorce trial would not necessarily be considered a matter of public concern. That was the situation in *Time, Inc. v. Firestone*,¹⁶³ in which the Court, incident to a finding that the plaintiff was not a public

154. 105 S. Ct. at 2944.

155. See *infra* text accompanying notes 168-69.

156. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

157. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Although the Court paid attention to the "public issues" question in *Butts* and its companion case, *Associated Press v. Walker*, the Court's real focus was on the question whether public figures should bear an added burden of proof in order to prevail in a defamation action. *Id.* at 134, 155; *id.* at 163-64 (Warren, C.J., concurring in the result). See *supra* text accompanying notes 23-24.

158. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

159. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

160. 106 S. Ct. 1558 (1986).

161. *Id.* at 1559, 1560, 1563.

162. *Id.* at 1559, 1563. For a statement of the actual holding of *Hepps*, see discussion *supra* note 64.

163. 424 U.S. 448 (1976).

figure, saw no public controversy present in the facts.¹⁶⁴ *Firestone*, which was not cited in the *Dun & Bradstreet* plurality opinion, dealt with the public controversy question as opposed to the public concern question,¹⁶⁵ but it is reasonable to conclude that the *Dun & Bradstreet* plurality would regard the *Firestone* facts as presenting neither a public controversy nor a public concern. That is because calling a report of a divorce a matter of public concern would lend support to an argument that a report of a bankruptcy (as in *Dun & Bradstreet*) should be considered a matter of public concern. Although it would seem logical to maintain that all reports of court filings and judicial proceedings should be considered matters of public concern,¹⁶⁶ *Dun & Bradstreet* and *Firestone* have shut the door on such a broad argument.¹⁶⁷

The cases just discussed offer only limited guidance as to how public concern problems are to be approached. Neither are the cases easy to reconcile. For instance, it is difficult to see how a report that a company declared bankruptcy does not involve a matter of public concern,¹⁶⁸ but a report that a private individual sold obscene literature (as in *Rosenbloom*) does deal with a matter of public concern.¹⁶⁹ Quite simply, the Supreme Court, in enunciating the public concern doctrine in *Dun & Bradstreet* and adhering to it in *Hepps*,¹⁷⁰ has given lower courts very few specifics to rely on when they make the public concern determination.¹⁷¹

Because *Dun & Bradstreet* was decided rather recently, few lower courts have yet had to decide how to apply the decisions. In *Davis v. Ross*,¹⁷² the district court concluded that there was no public concern in connection with allegedly false and defamatory statements made by singer-actress Diana Ross about her former employee in a letter sent by Ross to

164. *Id.* at 454-55.

165. *See supra* text accompanying notes 143-47.

166. *Cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (invasion of privacy action in which defendant held protected from liability for correct report of information contained in public records of criminal proceeding).

167. 105 S. Ct. at 2947; 424 U.S. at 454-55.

168. *Dun & Bradstreet* so held, 105 S. Ct. at 2947, at least where the company did business only in a limited area or certain locality, as would seem to have been what Greenmoss Builders did. *See id.* at 2941-42. A question left unanswered by the *Dun & Bradstreet* plurality is whether a subject of public concern would be present where the false report of a bankruptcy is about a business firm whose alleged bankruptcy, if it actually had occurred, would have had widespread effects on numerous parties in various localities or across the country. *See Wiley & Frank, supra* note 46, at 33.

169. For a similar argument, *see Dun & Bradstreet v. Grove*, 404 U.S. 898, 905-06 (1971) (Douglas, J., dissenting from denial of cert.).

170. *See supra* text accompanying notes 160-62.

171. *See supra* text accompanying notes 73-77.

172. 107 F.R.D. 326 (S.D.N.Y. 1985).

third parties.¹⁷³ The same conclusion was reached by the Supreme Court of Virginia in *Great Costal Express, Inc. v. Ellington*,¹⁷⁴ which involved an employer's false statement to the effect that an employee had attempted to bribe a shop foreman in an effort to have unauthorized modifications made to a company truck.¹⁷⁵ In both *Davis* and *Great Costal Express*, the courts made the private concern determination without any particular discussion of the issue.

Matters of private concern expressly or impliedly were found to be present, again with little discussion of the issue, in post-*Dun & Bradstreet* decisions set in these factual contexts: a pediatrician's false statements to school officials concerning the competence and employment record of a psychologist who had a contract with a school system to do testing on school pupils;¹⁷⁶ and a real estate investor's purported statements to the effect that a savings and loan branch manager had sought "kickbacks" in return for making financing arrangements for a partnership in which the investor was a partner.¹⁷⁷ No public concern existed, according to the Fourth Circuit, in *Mutafis v. Erie Insurance Exchange*,¹⁷⁸ where an insurance company's intra-office memorandum described the plaintiff insured as having Mafia connections.¹⁷⁹ *Mutafis* illustrates the difficulties lower courts can be expected to encounter when they must determine whether a statement that ordinarily would seem to deal with a matter of public concern¹⁸⁰ nevertheless becomes a matter of mere private concern when one takes into account the *Dun & Bradstreet* plurality's hints about an apparent need to consider the extent of circulation of the defamatory statement.¹⁸¹

173. *Id.* at 330.

174. 334 S.E.2d 846 (Va. 1985).

175. 334 S.E.2d at 848, 849, 851-52.

176. *Saunders v. Van Pelt*, 497 A.2d 1121, 1124 n.2 (Me. 1985). Citing *Dun & Bradstreet*, the *Saunders* court noted that the defendant's statement did not involve "an issue of public interest." *Id.* at 1124 n.2 (emphasis supplied). Presumably, the court meant to use the term *public concern* rather than the *public interest* term it actually employed. Although the misstatement was harmless in *Saunders*, one should remember what the *Dun & Bradstreet* plurality's use of the *public concern* and *public interest* terms suggests: that the subjects to which such terms properly are attached are neither coextensive nor entitled to the same constitutional treatment. See *supra* text accompanying notes 148-150. The specifics of the conceptual and constitutional differences between the two go unexplored in *Dun & Bradstreet*.

177. *Dunlap v. Wayne*, 105 Wash. 2d 529, 535, 716 P.2d 842, 846 (1986).

178. 775 F.2d 593 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1952 (1986).

179. *Id.* at 594-95.

180. Allegations connecting a party with organized crime are of the sort held to have dealt with a matter of public concern. See *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). See also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975) (invasion of privacy action in which Court noted that matters having to do with crime "are without question events of legitimate concern to the public").

181. 105 S. Ct. at 2947. See *supra* text accompanying notes 76-77, 118-21.

Two lower court cases decided since *Dun & Bradstreet* involved fact situations prompting conclusions that matters of public concern were present. In *Machleder v. Diaz*¹⁸² a "false light" invasion of privacy action wherein the district court held that *Dun & Bradstreet* and *Gertz* were controlling with regard to a private figure plaintiff's claim for punitive damages,¹⁸³ the court implicitly concluded that the offending statements, contained in a television report regarding dumping of chemical wastes, dealt with a subject of public concern.¹⁸⁴ The Third Circuit found that a matter of public concern was present in *McDowell v. Paiewonsky*,¹⁸⁵ where the plaintiff, a contractor, was referred to in the course of statements about a notorious construction project concerning which a government official was thought to have a conflict of interest.¹⁸⁶ In *McDowell*, which actually was a public figure case,¹⁸⁷ the court appeared to assume that "public controversy" and "public concern" are interchangeable terms.¹⁸⁸ The court's seeming confusion regarding the two terms was harmless in *McDowell's* factual context¹⁸⁹ and understandable, given the Supreme Court's creation of a semantic blur in its defamation decisions.¹⁹⁰ It must be remembered, however, that the two terms cannot always be expected to lead to the same result when applied to a given set of facts.¹⁹¹

It should not be surprising that the courts making public concern-private concern determinations in the wake of *Dun & Bradstreet* have tended

182. 618 F. Supp. 1367 (S.D.N.Y. 1985), *rev'd in part on other grounds and aff'd in part*, 801 F.2d 46 (2d Cir. 1986).

183. *Id.* at 1373, 1375.

184. *Id.* at 1369, 1373, 1375. On appeal, the Second Circuit reversed the district court's entry of judgment for the plaintiff on the false light publicity claim, but did so on grounds unrelated to whether *Dun & Bradstreet's* public concern approach applied. 801 F.2d at 57-58. The Second Circuit never reached such issue, choosing instead to reverse the false light publicity judgment on the ground that here had been no false portrayal of the plaintiff. *Id.* Therefore, the appellate court had no occasion to deal with whether *Dun & Bradstreet* was applicable or with whether a subject of public concern was present under *Machleder's* facts.

185. 769 F.2d 942 (3d Cir. 1985).

186. *Id.* at 948.

187. *Id.*

188. *Id.*

189. The alleged conflict of interest that was the subject of the supposedly defamatory statement had also been the subject of a legislative committee hearing approximately a week before the alleged defamation took place. *Id.* This would indicate the presence of a "public controversy," as that term was used in *Gertz* and *Firestone*. See *supra* text accompanying notes 42, 143, 146-47. Because the real issue in *McDowell* was whether the plaintiff was a limited purpose public figure, 769 F.2d at 948, some determination of whether there was a public controversy was required. See *supra* text accompanying notes 143, 146-47. Any blurring, by the *McDowell* court, of "public controversy" and "public concern" therefore was harmless, because there was a public controversy present under the facts.

190. See *supra* text accompanying notes 142-50.

191. See *supra* text accompanying notes 146-50.

to do so in a summary fashion, with little or no analysis.¹⁹² *Dun & Bradstreet* itself, with its abbreviated treatment of how public concern-private concern issues are to be resolved and its failure to enunciate meaningful standards for such determinations,¹⁹³ has the effect of encouraging "knee-jerk" resolutions of such issues. The likelihood of principled results is minimized by such a haphazard approach to the public concern-private concern matter. Lower court decisions such as *Mutafis*¹⁹⁴ and *McDowell*¹⁹⁵ offer indications of the problems courts may face in deciding how to apply the new public concern doctrine called for by *Dun & Bradstreet*. As more courts have to decide their respective cases in light of *Dun & Bradstreet*, the practical difficulties of applying such decision can be expected to become apparent.¹⁹⁶

The Unclear Reach of the Public Concern Doctrine

Another major question left unanswered by *Dun & Bradstreet* is whether the decision affects only the scope of the *Gertz* rule on obtaining presumed and punitive damages, or whether the decision goes further and eradicates, at least for private concern cases, *Gertz's* initial requirement that a private figure plaintiff prove some degree of fault (at least negligence) in order to prevail.¹⁹⁷ The only question actually involved in *Dun & Bradstreet* was whether a private figure plaintiff in a defamation action must prove actual malice in order to recover presumed and punitive damages, where the subject matter of the false and defamatory statement was of only private concern.¹⁹⁸ At the outset of the plurality opinion, Justice Powell appeared to take care to limit the scope and effect of the decision to that one question.¹⁹⁹

Nevertheless, some of the plurality opinion's language about the applicability of *Gertz* is phrased quite broadly, without being limited to the presumed and punitive damages aspect of *Gertz*.²⁰⁰ In view of such statements

192. See *supra* text accompanying notes 172-77.

193. See *supra* text accompanying notes 134-37.

194. For a discussion of the Fourth Circuit's decision in *Mutafis v. Erie Ins. Exchange*, see *supra* text accompanying notes 178-81.

195. For a discussion of the Third Circuit's decision in *McDowell v. Paiewonsky*, see *supra* text accompanying notes 185-91.

196. See *supra* text accompanying notes 132-41. Cf. Robertson, *supra* note 9, at 206 (discussing unworkable nature of the earlier public concern approach taken in *Rosenbloom*).

197. See *supra* text accompanying notes 31-37. It is clear that *Dun & Bradstreet's* holding on presumed and punitive damages has swept away, from private figure-private concern cases, the *Gertz* rule that a plaintiff who proves a degree of fault less severe than actual malice must prove actual injury. See *supra* text accompanying notes 38-39.

198. 105 S. Ct. at 2941.

199. *Id.*

200. *Id.* at 2942-45, 2946 n.7.

in the opinion, one could make a plausible argument that *Dun & Bradstreet* has eliminated, for private figure-private concern cases, all of the fault requirements set out in *Gertz*, not just the presumed and punitive damages rule. The argument would be grounded on the idea that if the Court, in *Gertz*, was referring only to private figure-public concern cases when it set forth the actual malice rule for recovery of presumed or punitive damages, then it must have been referring only to the same sort of cases when it enunciated the requirement that some fault, at least negligence, must be shown in order for the plaintiff to recover. Justice White, in his concurrence in the judgment, indicated his belief that *Dun & Bradstreet* does sweep that broadly in its cutting back on *Gertz*,²⁰¹ but his dissatisfaction with *Gertz* in general²⁰² may explain why he would be willing to embrace such an expansive view of *Dun & Bradstreet's* effect. Justice White may not be alone in his reading of *Dun & Bradstreet*, however.²⁰³

Although the kind of argument described in the preceding paragraph is by no means baseless and would seem, in some respects, to follow from what the plurality did say, it would not be wise to read *Dun & Bradstreet* in such a broad fashion.²⁰⁴ The effect of the decision should be limited to the single issue presented by the facts, that being the issue concerning what must be proved in order for the plaintiff to recover presumed and punitive damages. Because the *Dun & Bradstreet* facts did not call for the Court to

201. *Id.* at 2953 (White, J., concurring in the judgment).

202. *Id.* at 2950, 2952-53 (White, J., concurring in the judgment). See *supra* text accompanying notes 78-80.

203. In *Mutafis v. Erie Ins. Exch.*, 775 F.2d 593 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1952 (1986), the court spoke in very broad terms concerning *Dun & Bradstreet* and appeared to imply that none of the *Gertz* rules would apply in a private figure-private concern case. *Id.* at 595. Whether the court really intended to mean what it implied is not certain, however, because the court was speaking in response to an argument that the plaintiff should have had to prove actual malice. *Id.* at 594. Therefore, the court may have intended to mean only that the actual malice rule of *Gertz* would not apply, even though its remarks painted with a broader brush. One commentator, in a brief mention of *Dun & Bradstreet*, appears to assume that after such decision, principles of liability without fault would control a private figure-private concern case. Bezanson, *Libel Law and the Realities of Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226, 227 n.1 (1985).

204. It would seem Justice Powell could not have intended that *Dun & Bradstreet* sweep so broadly as to eradicate all fault requirements from private figure-private concern cases. In the *Gertz* majority opinion he authored, Justice Powell criticized *Rosenbloom* by stating that under *Rosenbloom's* discredited approach of requiring actual malice to be proved as a precondition to the defendant's liability in all cases involving statements which were of public concern or interest, "a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions." 418 U.S. at 346. Such statement appears to indicate Justice Powell's belief in the importance of a basic fault requirement in all defamation cases involving private figure plaintiffs — even those cases not involving matters of public concern. See Robertson, *supra* note 9, at 236 (reading *Gertz* as imposing on all private figure plaintiffs a requirement of proving fault).

deal with the basic fault requirement,²⁰⁵ the Court did not directly address any issue in that regard. Those who must decide how to apply the decision, therefore, should not lightly assume that the plurality intended its remarks to be decisive of any issue other than the issue actually presented by the case. Because eradication of all fault requirements in private figure-private concern cases would be such a drastic alteration of existing defamation rules²⁰⁶ and such a significant retreat in first amendment terms, we should not believe the Supreme Court has done that, unless the Court directly tells us so. It has not told us so in *Dun & Bradstreet*,²⁰⁷ which, narrowly read, should be confined to the presumed and punitive damages issue actually raised.²⁰⁸

A "worse case" scenario would have the Court not only eradicating all fault requirements in private figure-private concern cases, but also taking a giant leap of illogic and ruling that the actual malice requirement imposed on public officials and public figures (as part of their burden of proof on the liability issue)²⁰⁹ does not apply to cases involving statements of only private concern, as opposed to statements of public concern.²¹⁰ It is difficult to see how statements about public figures could very often be considered to be of only private concern, and it is exceedingly so with regard to statements about public officials.²¹¹ Nevertheless, a Court bent on requiring the kinds of content determinations called for by the *Dun & Bradstreet* plurality could be able to conjure up rules along those lines.

205. See *supra* text accompanying notes 51-52 and *supra* note 51.

206. See *supra* text accompanying notes 32-35 and *supra* note 196.

207. Neither has the Court told us so in *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986). After discussing *Dun & Bradstreet's* holding that actual malice need not be proved in order for a private figure plaintiff to recover presumed or punitive damages in a case involving only a private concern, Justice O'Connor noted that in a private figure-private concern case, the first amendment "do[es] not necessarily force any change in at least some of the features of the common-law landscape." *Id.* at 1565. Although such statement falls well short of stating clearly that *Dun & Bradstreet* left intact, for all private figure cases, the basic fault requirement of *Gertz*, the Court's language can be read as implying (or at least not ruling out) the notion that even in a private figure-private concern case, the plaintiff must prove some fault in order to prevail.

208. *Dun & Bradstreet* was read in that fashion by the Supreme Judicial Court of Massachusetts in *New England Tractor-Trailer Training of Connecticut, Inc. v. Glove Newspaper Co.*, 395 Mass. 471, 480 N.E.2d 1005 (1985). Reasoning that *Dun & Bradstreet* established only that a private figure plaintiff in a private concern case need not prove actual malice in order to recover presumed or punitive damages, the court concluded that the basic "fault requirement of *Gertz* [is] intact regardless [of] whether the private parties are suing on matters of public or private concern." 395 Mass. at 477 n.4, 480 N.E.2d at 1009 n.4. See also *Dunlap v. Wayne*, 105 Wash. 2d 529, 540, 541, 716 P.2d 842, 850 (1986) (continuing to require a private figure plaintiff in a private concern case to prove negligence as a necessary element of his case); *Great Coastal Express, Inc. v. Ellington*, 334 S.E.2d 846, 853 (Va. 1985) (same).

209. See *supra* text accompanying notes 16-24.

210. See *Wiley & Frank*, *supra* note 46, at 32, 33.

211. See *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

The scenario just described would involve such an extreme stretching of *Dun & Bradstreet* that the changes of its becoming reality should not be great. Nevertheless, if one takes literally some language contained in the Court's first post-*Dun & Bradstreet* decision, *Philadelphia Newspapers, Inc. v. Hepps*,²¹² one could conclude that the Court is laying the groundwork for a rule requiring the making of public concern-private concern distinctions in cases involving public officials or public figures as plaintiffs. After discussing its prior decisions regarding the constitutional aspects of defamation, the Court observed, in *Hepps*, that "[w]hen the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law."²¹³

Although the actual malice rules for public officials and public figures were developed out of concern for preserving and promoting the first amendment interest of lively debate on public issues,²¹⁴ the Court has never gone so far as to state clearly that the actual malice rules imposed on public official and public figure plaintiffs do not apply if the offending statements somehow can be shown to be of only private concern. The Court still has not gone that far, even with the gratuitous language in *Hepps* about public officials, public figures, and public concerns. Nevertheless, such language is unsettling, because if the Court is envisioning a public concern-private concern distinction as part of the public official and public figure rules, it would be embarking on an uncharted course characterized not only by uncertainty, but also by a virtual guarantee that first amendment rights will be chilled.²¹⁵ It is to be hoped, therefore, that the Court is not inclined to go the way hinted at in *Hepps* and superimpose its public concern preoccupa-

212. 106 S. Ct. 1558 (1986).

213. *Id.* at 1563. The quoted statement's mention of "a media defendant" is another example of Justice O'Connor's apparent wish to solidify (or at least preserve the possibility of) some sort of media-nonmedia distinction in defamation actions. See *supra* note 64.

214. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

215. The difficulties associated with making a public concern-private concern distinction in a private figure case, see *supra* text accompanying notes 131-38, would be present to an even greater degree if lower courts were expected to decide, meaningfully, whether a statement was of merely private concern even though it involved a public official or figure—a person about whom the citizenry had a keen interest or concern. In such a situation, inconsistent results would be likely, as would a tendency, on the part of potential speakers, to refrain from speaking freely about public officials or public figures. They would so refrain out of fear that a false statement made innocently about such a party could lead to disastrous financial consequences for the speaker, if the court hearing the public official's or public figure's defamation action decided that the offending statement dealt only with a matter of private concern and therefore did not justify application of the actual malice rule. The solution to such constitutional dilemma, of course, is to apply the actual malice rules to all cases involving public figure plaintiffs (as is done now), without requiring courts to make the sticky public concern-private concern determination.

tion on what presently is a workable, understandable set of rules for public officials and public figures.

CONCLUDING SUGGESTIONS IN RESPONSE TO THE NEW PUBLIC CONCERN APPROACH

The public concern approach taken in *Dun & Bradstreet* and perpetuated in *Hepps* is so ill-conceived and poorly-defined that defamation law would be better served without it, at least so long as it remains in its present nebulous state. The court should seriously consider a wholesale abandonment of the *Dun & Bradstreet* plurality's restrictions on *Gertz's* applicability and should reinstate, as the governing standards for all private figure plaintiff cases, the constitutional rules set forth in *Gertz*,²¹⁶ without requiring the troublesome public concern-private concern determination. Although there is nothing magical or perfect about *Gertz* (or *Gertz* as it was thought to be before *Dun & Bradstreet*²¹⁷), the old *Gertz* pastures appear decidedly greener now that the Court has led defamation law to the edge of the *Dun & Bradstreet* swamp.

It is probably more realistic to assume that *Dun & Bradstreet's* public concern approach will remain viable than to assume that it will be discarded.²¹⁸ If the public concern doctrine called for by the plurality is to be applied by lower courts in any reasonable and consistent fashion, the Supreme Court must, in future cases, define the contours of the public concern concept and must enunciate clear standards for determining when a public concern is present. Similarly, the Court should attempt to set forth guidelines to aid judges, attorneys, and parties in working their way through the semantic maze of public controversies, public concerns, and public interests.²¹⁹ Finally, the Court must clarify, at its earliest opportunity, that *Dun & Bradstreet* affects only *Gertz's* presumed and punitive damages rule, without affecting *Gertz's* basic fault requirement and the fault requirement imposed on public officials and public figures. If the Supreme Court does not provide direction of the sort mentioned here, the constitutional law of defamation will be headed back toward Justice Black's defamation quagmire — assuming it is not already there.

216. See *supra* text accompanying notes 31-39.

217. See *supra* note 87 and *supra* text accompanying note 87-99.

218. Indeed, the *Hepps* decision indicates the Court's adherence to the doctrine. 106 S. Ct. at 1559, 1563.

219. See *supra* text accompanying notes 142-50.