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**DUN & BRADSTREET, INC. v. GREENMOSS
BUILDERS: "MATTERS OF PRIVATE
CONCERN" GIVE LIBEL
DEFENDANTS LOWERED
FIRST AMENDMENT PROTECTION**

Reputation is said to be at the heart of one's dignity;¹ free expression, at the heart of a true democracy.² One clash between these two interests, reputation and free expression, spawned the modern era of defamation³ law just

1. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."). One commentator described the context for considering defamation law in the following terms:

Within the complex group of individual interests of personality is the claim to honor and reputation which Anglo-American law seeks to protect, in the main, by a civil action for libel or slander. There is no need to quote Shakespeare to emphasize the inestimable value of a good name. Consequently, no system of law can fail to take some account of this interest and afford some redress for harm suffered from disparaging or defamatory statements.

Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 99.

2. See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 82 (1971) (Marshall, J., dissenting) ("Our notions of liberty require a free and vigorous press that presents what it believes to be information of interest or importance.").

3. Defamation has been defined as a representation that tends to "[e]xpose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." *Kimmerle v. New York Evening Journal*, 262 N.Y. 99, 100, 186 N.E. 217, 218 (1933). However, this characterization also has been called too narrow, as it excludes such communications as imputation of poverty or insanity, or the assertion that a woman has been raped, which have also been adjudged to be defamatory. W. PROSSER & W. KEETON, *TORTS* § 111, at 773 (5th ed. 1984) (citations omitted). "Defamation is rather that which tends to injure 'reputation' in the popular sense; to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him. It necessarily, however, involves the idea of disgrace . . ." *Id.* Defamation law is actually an umbrella term for the related torts of libel and slander. The most basic distinction between these two historically has been that slander pertained to the spoken word, while libel encompassed that which was printed. Libel has expanded, however, to include pictures, signs, statues, and motion pictures. *Id.* § 112, at 786. See generally Comment, *Liability and Damages in Libel and Slander Law*, 47 TENN. L. REV. 814 (1980). For purposes of this Note, defamation will be used to denote libel.

more than two decades ago in *New York Times v. Sullivan*.⁴ Since that time defamation law has developed haltingly, with each side trading victories and defeats.⁵ No matter who appears to win any one jurisprudential round, however, the proliferation,⁶ complexity,⁷ and sheer expense⁸ of defamation litiga-

4. 376 U.S. 254, 279-80 (1964) (no liability for defamatory statement concerning public duties of a government official unless based upon finding that defendant published the statement with "actual malice"). *Sullivan* was truly a dividing line: before it, defamation concerns were left largely to the states, and after it, each libel case was first considered in light of its possible constitutional implications. For a more complete discussion of this decision, see *infra* notes 61-80 and accompanying text.

5. From a defendant's perspective, defamation law since *Sullivan* can be segmented roughly into two eras, one expansive, followed by one of either no further expansion or a pulling back on previous gains. The first era began with *Curtis Publishing v. Butts*, 388 U.S. 130 (1967). See *infra* notes 81-88 and accompanying text. It ended with *Rosenbloom v. Metro-media, Inc.*, 403 U.S. 29 (1971). See *infra* notes 89-96 and accompanying text. The second era, on balance much more limiting to defamation defendants, began with *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974), and has continued to the present with *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 105 S. Ct. 2939 (1985). See, e.g., Abrams, *The Supreme Court Turns a New Page in Libel*, A.B.A. J., Aug. 1984, at 89.

6. One commentator has cited four reasons for the recent proliferation of libel litigation: The first factor is a new legal and cultural seriousness about the inner self. Tort law has undergone a relaxation of rules that formerly prohibited recovery for purely emotional or psychic injury, a doctrinal evolution that parallels the growth of the "me-generation." A second factor is the infiltration into the law of defamation of many of the attitudes that have produced a trend in tort law over the past twenty years favoring compensation and risk-spreading goals over fault principles in the selection of liability rules. A third cause of the new era in libel is the increasing difficulty in distinguishing between the informing and entertaining functions of the media. The blurring of this line between entertainment and information has affected the method and substance of communications in important ways and highlights the inadequacies of the current legal standards governing defamation actions. The final factor is doctrinal confusion, caused in large part by a pervasive failure to accommodate constitutional and common law values in a coherent set of standards that is responsive to the realities of modern communications. That doctrinal confusion is particularly telling in an environment where cultural trends, such as a heightened concern for the inner self, and legal trends, such as the trend in tort law in favor of strict liability, both work against the ideals of free expression.

Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 PA. L. REV. 1, 11 (1983).

Another comment on the increased frequency of libel suits involving celebrities brought in recent years was prompted by Retired General William C. Westmoreland's \$120-million complaint in 1982 that he was libeled by CBS during a Vietnam documentary. *Westmoreland v. CBS*, No. 82 Civ. 7913 (S.D.N.Y. Feb. 19, 1985) (stipulation of dismissal with prejudice). According to Professor Vincent Blasi of the Columbia Law School, recently "there's been a kind of promiscuity in bringing libel suits, based on a feeling that even if the evidence was fairly flimsy or if the verdict were eventually overturned, the lawsuit had a certain publicity value." Margolick, *Risks in Litigation*, N.Y. Times, Feb. 19, 1985, at B7, col. 1. In *Westmoreland*, the publicity was immense: the political luminaries from the Vietnam War era who testified made the trial appear less a discrete libel suit and more a painstaking reevaluation of that entire period. Following particularly damaging defense testimony and just days prior to the scheduled conclusion of the four-month trial, General Westmoreland withdrew his com-

tion has been painful for both plaintiffs and defendants. All parties emerge from a fray with battered pride and depleted purses.

Foundational and perhaps most problematic in any defamation case is to determine the appropriate level of first amendment protection to be afforded to the challenged statement. What a plaintiff must prove to establish a defendant's liability as well as the standard of proof the plaintiff must meet both hinge on this determination. Moreover, and most crucial financially for

plaint and the case was dismissed. Precipitating the General's withdrawal was a joint statement agreed upon by both sides concerning the allegedly defamatory documentary. Professor Blasi noted that this outcome may spark fear among potential plaintiffs that a defendant may make his or her case more effectively, hurtfully, and credibly at trial than in print or on the air. *Id.*

7. While exacerbated in recent years, this complexity is not new in defamation law, according to some commentators:

[T]here is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities . . . and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm. . . . The actions for defamation developed according to no particular aim or plan.

W. PROSSER & W. KEETON, *supra* note 3, at 771-72.

Another commentator has stated:

The confusion of defamation standards is perhaps best illustrated by identifying some of the distinctions that must currently be made when a defamation action is brought. The plaintiff's public- or private-figure status has become crucial, and in some states the media or nonmedia status of the defendant may also be important. A defendant may claim a common law privilege in addition to its constitutional privilege. The finding whether the two types of privileges are lost may depend on separate determinations of the existence of "malice." Malice currently has two totally different definitions: common law malice (roughly equivalent to ill will) and *New York Times* actual malice (reckless or intentional disregard of the truth).

The complexity inherent in these basic distinctions is indicative of the effect of imposing new constitutional standards in what had already been a confusing area of the law.

See Smolla, *supra* note 6, at 48 (citations omitted). See generally Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603, 608-14 (1983).

8. CBS and General Westmoreland were each said to have spent an estimated three million dollars in connection with their suit. The plaintiff himself is said to have contributed \$20,000 of his own money to mount his case with the balance donated from various public and private sources. Lardner, *Pittsburgh Millionaire Financed Westmoreland's Suit Against CBS*, Wash. Post, Feb. 28, 1985, at A14, col. 1. In the media context, libel litigation alone is not the only expense associated with defamation. The frequency of libel suits has driven up the costs of insurance. As an example, Media Professionals Insurance Inc., a major libel insurer, has reported that its premiums were to be increased 50% to 100%. Hager & Rosenstiel, *Libel Battle: From Courts to Lawbooks*, Los Angeles Times, Feb. 20, 1985, pt. 1, at 12, col. 2 (statement of Larry Worrall, president and general counsel). For a more general account of insurance in libel litigation, see, for example, PRACTICING LAW INSTITUTE, MEDIA INSURANCE AND RISK MANAGEMENT 1985 (1985).

both sides, this conclusion also dictates the nature of damages the plaintiff may recover once he or she proves the defendant's liability.⁹ Thus, the level of first amendment protection to which the challenged statement is entitled is a key decision. To make it, the court views the case as a whole and decides, in essence, whether the case arose in a "public" context or in a "private" context. Until now, the Supreme Court has limited this analysis to the status of the plaintiff, that is, whether the person who was the subject of the allegedly defamatory statement was a public official or figure, or whether that person was a private individual.¹⁰ *Sullivan* first established the constitutional parameters of liability for false, defamatory statements.¹¹ According to *Sullivan* and its progeny, a false, defamatory statement made about a public official or a public figure¹² would not render the defendant guilty of libel unless the plaintiff could prove that the statement was made with actual malice, which the Court defined as knowledge of the statement's falsity or reckless disregard of its truth or falsity.¹³

In *Gertz v. Robert Welsh, Inc.*,¹⁴ the second landmark in the modern era of libel law, the Court rounded out its *Sullivan* ruling. The suit arose out of false statements printed in a magazine article and the decision built upon *Sullivan*'s plaintiff-based test for setting liability prerequisites. It held that a private libel plaintiff was required to prove only that the defendant was at fault¹⁵ in publishing a defamatory falsehood to establish the defendant's liability. In addition, the *Gertz* Court outlined how the plaintiff's public or private status determined the nature of allowable damages. The private libel plaintiff recovered for actual damages to reputation upon a finding of the defendant's fault. However, if he or she failed to prove actual malice, the Court would withhold any presumed and punitive damages.¹⁶

*Dun & Bradstreet, Inc. v. Greenmoss Builders*¹⁷ changed this plaintiff-centered approach to damages. In construing *Gertz*, a splintered Supreme Court made the content of the statement, in addition to the status of the plaintiff, a determinant of first amendment protection. The Court ruled that

9. For a fuller discussion of the types of damages that may be awarded in defamation cases, see *infra* notes 56-59 and accompanying text.

10. One short-lived exception to this trend was *Rosenbloom*, 403 U.S. 29 (1971). For a more complete discussion of *Rosenbloom*, see *infra* notes 89-96 and accompanying text.

11. The facts of the case did not dictate that the court rule on the issue of damages.

12. *Curtis Publishing v. Butts*, 388 U.S. 130 (1967).

13. *Sullivan*, 376 U.S. at 279-80. See *infra* notes 76-77 and accompanying text.

14. 418 U.S. 323 (1974).

15. This fault requirement is irrelevant to establishing strict liability. A finding of fault presupposes that there was an established duty of care which was breached.

16. *Gertz*, 418 U.S. at 350. For a more complete discussion, see *infra* notes 98-143 and accompanying text.

17. 105 S. Ct. 2939 (1985).

a private libel plaintiff need not prove a defendant's actual malice as a prerequisite to recover punitive damages when the defamatory statement concerns a private rather than a public matter.

Dun & Bradstreet, Inc. (Dun & Bradstreet), a commercial credit reporting service,¹⁸ issued a notice to five of its subscribers that Greenmoss, a Vermont building contractor, had filed for bankruptcy.¹⁹ The report was false and trial testimony revealed that Dun & Bradstreet was at fault. The mistake occurred when a seventeen-year-old high school student the service hired to review Vermont's bankruptcy petitions erred by ascribing the ailing financial health of a former Greenmoss employee to the company itself.²⁰ Dun & Bradstreet's usual system of verifying such information with the business itself had broken down.²¹ It issued a correction within approximately one week of the initial notice.²² However, disturbed that the service refused to reveal the recipients of the original report and unconvinced that the second notice would repair the damage to its financial reputation,²³ Greenmoss brought a defamation action in Vermont state court.²⁴ The trial jury awarded Greenmoss \$50,000 in compensatory damages and \$300,000 in punitive damages.²⁵ Dun & Bradstreet moved for a new trial on grounds that the jury instruction was not consistent with *Gertz*: the trial judge had not specifically stated that a private libel plaintiff was required to prove actual malice to be awarded punitive damages.²⁶ The trial judge granted Dun &

18. *Id.* Dun & Bradstreet's subscribers are generally creditors of the reported enterprises. The reports are based on information gathered from the businesses themselves, their banking and credit sources, trade suppliers, and public records, such as bankruptcy petitions. *Greenmoss Builders v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 70, 461 A.2d 414, 416 (1983). See generally Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L.J. 95 (1983).

19. 105 S. Ct. at 2941.

20. 143 Vt. at 71, 461 A.2d at 416.

21. 105 S. Ct. at 2942.

22. *Id.* The second notice stated that a former employee and not the plaintiff had filed for voluntary bankruptcy. The plaintiff was said to have "continued in business as usual." 143 Vt. at 71, 461 A.2d at 416.

23. 105 S. Ct. at 2942. The bank representative to whom the plaintiff had gone for credit and who informed him of the Dun & Bradstreet report testified in court that he did not believe the Dun & Bradstreet assessment. However, the bank declined to consider extending future credit to the plaintiff until the situation was resolved. Later, the bank terminated the plaintiff's credit for reasons the representative testified were not related to the Dun & Bradstreet report. 143 Vt. at 71, 461 A.2d at 416. Following issuance of the second notice, any financial creditors who contacted Dun & Bradstreet about the plaintiff's credit status were told that it had a "blank rating," which meant that its status was "difficult to classify." *Id.* at 72, 461 A.2d at 416.

24. 105 S. Ct. at 2942.

25. *Id.*

26. *Id.* The relevant portion of the jury instruction stated:

If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing

Bradstreet's motion, though he voiced doubt that the actual malice standard applied to nonmedia defendants.²⁷

The Vermont Supreme Court reversed the new trial grant²⁸ ruling that Dun & Bradstreet was not a media entity and that *Gertz* was inapplicable to nonmedia defendants.²⁹ The court conceded that determining which organizations are media and which are not could be difficult in some instances.³⁰ Nonetheless, the court found no difficulty expelling Dun & Bradstreet from the halls of the Fourth Estate, that is, the institutional press, because credit services report only to a finite number of persons. In addition, to receive Dun & Bradstreet's service, subscribers were required to keep all credit information confidential. If Dun & Bradstreet had published reports for public consumption, it would be considered a media entity under the court's

the Erroneous Report, or that Defendant intended to injure the Plaintiff in its business, or that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. Further, if the Report was made with reckless disregard of the possible consequences, or if it was made with the knowledge that it was false or with reckless disregard of its truth or falsity, it was made with malice.

105 S. Ct. at 2943 n.3 (emphasis in original).

27. *Id.* at 2942 & n.1. Following *Gertz*, some states began to consider a defendant's status as a media or nonmedia entity as a factor for determining the level of first amendment protection. See *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982); *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978); *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977). Justice Powell later noted disagreement among the lower courts over when *Gertz* should apply. *Greenmoss*, 105 S. Ct. at 2942 n.1. For a more complete discussion of this media/nonmedia issue, see *infra* notes 201-03 and accompanying text.

28. *Greenmoss Builders v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983). The interlocutory order certified five questions of law for consideration by the state supreme court. The court's disposition on the first four negated the need to address the fifth. These questions were:

- (1) Did the trial court err in granting defendant's motion for a new trial on all issues?
- (2) If the answer to the first question is in the affirmative, should the court have entered judgment on the verdict?
- (3) If the answer to the first question is in the affirmative, should the court have ordered a new trial on: (a) damages only? (b) compensatory damages only? (c) punitive damages only?
- (4) Did the court err in denying all motions of the defendant for judgment notwithstanding the verdict?
- (5) If the answer to the fourth question is in the affirmative, should the court have: (a) granted defendant's motion to enter judgment for the defendant on the issue of punitive damages, notwithstanding the verdict? (b) granted the motion of the defendant for judgment on the issue of compensatory damages, notwithstanding the verdict? (c) granted judgment for the defendant on all issues?

143 Vt. at 70, 461 A.2d at 415. The court answered questions (1) and (2) in the affirmative and questions (3)(a) through (c) and question (4) in the negative. *Id.* at 80, 461 A.2d at 421.

29. The Court did not provide a cogent rationale for its conclusion. It did, however, reject Dun & Bradstreet's assertions that media and nonmedia defendants have "equally compelling" first amendment rights. *Id.* at 73, 461 A.2d 417.

30. *Id.* at 73, 461 A.2d at 417.

analysis.³¹ Whether *Gertz* should apply to nonmedia defendants was a case of first impression in Vermont and the court turned for guidance to other jurisdictions that had decided the issue. The Oregon Supreme Court, for example, had concluded in the negative because “[t]he crucial elements . . . which brought the United States Supreme Court into the field of defamation law are missing.”³² As a result, a state’s tort law is applied with no constitutional implications. A Vermont state jury could assess punitive damages to nonmedia defendants even if the defendants had not acted with actual malice. With respect to *Dun & Bradstreet*, the court held that the inapplicability of *Gertz* rendered any confusion in the jury instruction harmless error.³³

The Supreme Court, in a highly divided decision, affirmed, but on other grounds. Justice Powell, for the plurality,³⁴ found that the *Gertz* dictate of finding actual malice prior to eligibility for punitive damages applied only to public speech.³⁵ He asserted that speech on matters of private concern carried much less constitutional weight when balanced against the state’s interest in providing recourse for damage to reputation.³⁶ He thus concluded that the *Gertz* actual malice requirement should not apply to less constitutionally significant forms of speech.³⁷ Justice Powell then determined that *Dun & Bradstreet*’s report was merely a matter of private concern and thus not within the constitutional protections of *Gertz*.³⁸ This led the plurality to conclude that the trial court’s jury instructions were adequate and that the appellate court’s reversal of the new trial motion was correct.

In a brief concurring opinion, Chief Justice Burger agreed that *Gertz* was limited to matters of public concern.³⁹ However, he also urged that it be

31. *Id.*

32. *Harley-Davidson Motorsports*, 279 Or. at 366, 568 P.2d at 1362-63. “There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.” *Id.* at 366, 568 P.2d at 1363.

33. 143 Vt. at 79, 461 A.2d at 421.

34. Justices Rehnquist and O’Connor joined Justice Powell’s opinion. Chief Justice Burger and Justice White each wrote separate concurrences.

35. *Greenmoss*, 105 S. Ct. at 2944. While not asserting that *Gertz* explicitly held that it was limited to public speech, Justice Powell drew that conclusion from the context of the case. *Id.* at 2944 n.4. See *infra* note 177 and accompanying text. But see *infra* notes 222-26.

36. 105 S. Ct. at 2945. Justice Powell chronicled decisions in which the Court had not always accorded different types of speech equal first amendment protection, including in this group fighting words, commercial speech, securities information and proxy statements. *Id.* at 2945 n.5.

37. *Id.* at 2946. Justice Powell noted that speech on matters of public concern lay at the heart of first amendment protection. *Id.* at 2945 (quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

38. *Id.* at 2947. Justice Powell based this factual determination on the “content, form, and context” of the credit report. See *infra* notes 183-87 and accompanying text.

39. 105 S. Ct. at 2948 (Burger, C.J., concurring).

overruled.⁴⁰ Justice White began his separate concurrence by noting the vindicatory function of the common law of defamation. He concluded that the landmark *Sullivan* case had struck an “improvident balance” between the public’s interest in its officials and those officials’ interest in their reputations.⁴¹ Justice White suggested that both plaintiffs and the press would be served better by overruling *Gertz* and reinstating common law adjudication overseen by a vigilant judiciary allowing only reasonable awards.⁴²

Justice Brennan’s dissent⁴³ construed *Gertz* unequivocally to prohibit the damages awarded to Greenmoss.⁴⁴ He then criticized the majority’s erosion of that benchmark precedent to arrive at its result. Justice Brennan also stated that *Gertz* recognized the fundamental principle that regulations that may chill protected speech must be no broader than necessary to effectuate legitimate state interests.⁴⁵ Justice Brennan noted that the plurality adjudged the state’s interest in *Gertz*⁴⁶ and that in the instant case to be identical.⁴⁷ The dissent concluded, therefore, that the presumed and punitive damages disallowed in *Gertz* must similarly be avoided in the instant case

40. *Id.* (Burger, C.J., concurring). Chief Justice Burger, who dissented in *Gertz*, stated that he continued to believe *Gertz* was “ill-conceived.” See *infra* note 189 and accompanying text.

41. 105 S. Ct. at 2950 (White, J., concurring). Justice White suggested alternatives to the constitutional malice burden *Sullivan* places on plaintiffs such as limiting recoverable damages, limiting or forbidding punitive and presumed damages, and allowing a public official to receive a judgment that a published statement was false. *Id.* at 2952 (White, J., concurring in judgment). Justice White also appeared to refer to the procedure utilized during the federal district court case of *Sharon v. Time, Inc.*, No. 83-4660 (S.D.N.Y. Jan. 31, 1985). *Greenmoss*, 105 S. Ct. at 2950 n.2. In that instance, United States District Judge Abraham D. Sofaer instructed the jury to make separate, interim verdicts on the elements necessary for Sharon to prevail. In that case, the elements were defamation, falsity, and actual malice. The jury announced each result as it was reached. See *infra* note 254 and accompanying text.

42. 105 S. Ct. at 2953 (White, J., concurring).

43. Justice Brennan was joined by Justices Marshall, Blackmun, and Stevens. *Id.* at 2954.

44. 105 S. Ct. at 2957 (Brennan, J., dissenting). See *infra* notes 200-01, 208 and accompanying text.

45. 105 S. Ct. at 2964 (Brennan, J., dissenting). See the discussion *infra* notes 204-05 and accompanying text; see also *infra* notes 243-44 and accompanying text.

46. The *Gertz* Court found that the state had a strong, legitimate interest in compensating private individuals for wrongful injury to reputation. 418 U.S. at 342-45. Such a state interest was different than that when public figures were involved in defamation cases, primarily because private persons neither voluntarily expose themselves to increased risk of injury nor have access to the media to rebut defamatory remarks. *Id.* at 345. See *infra* notes 108, 129, and accompanying text.

47. 105 S. Ct. at 2964 (Brennan, J., dissenting). The plurality presumably found the state interest of protecting private persons that was present in *Gertz* to be identical to that in the instant case because Greenmoss Builders had the “minuses” characteristic of private persons noted *supra* note 46 and accompanying text.

even if the speech was merely of a private,⁴⁸ economic⁴⁹ nature. In addition, Justice Brennan rejected the majority's "public concern" definition as amorphous and irreconcilable with first amendment principles.⁵⁰ Finally, he asserted that credit reporting qualifies as a public concern under any reasonable definition.⁵¹

Following a synopsis of common law defamation, this Note will review the hallmark of libel law's modern era: the assignment of "public" or "private" status to delimit liability and remedies. It will then examine *Greenmoss*' "public concern" determinant in light of this jurisprudence and the *Greenmoss* dissent. This Note will conclude that *Greenmoss* further confounds an already complex area of law. It will then suggest that the competing interests of free expression and reputation are better accommodated by preserving *Gertz*' narrow opportunity for punitive and presumed damages while vindicating reputation through a combined litigation framework of separate verdicts and declaratory judgments.

I. THE EMERGENCE OF "PUBLIC" OR "PRIVATE" STATUS OF THE PLAINTIFF AS A CENTRAL ELEMENT OF LIBEL LITIGATION

From the sixteenth century to the present, libel has been a common law concern. In the modern libel era, the Supreme Court has carved out liability and damages standards for particular constitutional consideration and has otherwise left the state common law undisturbed. This coexistence of the state common law and the constitutional dimension of defamation has created an intricate legal patchwork whose pattern remains incomplete and sometimes elusive. It is always of interest but not always of comfort for those who must use it. To more fully understand the implications of *Greenmoss*, a rudimentary description of the salient common law defamation principles⁵² is appropriate. A survey of changes made by the injection of first

48. 105 S. Ct. at 2960, 2962 (Brennan, J., dissenting). See *infra* note 214 and accompanying text.

49. 105 S. Ct. at 2960-61 (Brennan, J., dissenting). See *generally infra* note 175.

50. 105 S. Ct. at 2960 (Brennan, J., dissenting). See *infra* notes 235-51 and accompanying text for a more complete discussion of the "public concern" definition.

51. 105 S. Ct. at 2961 (Brennan, J., dissenting). See *infra* notes 213-14 and accompanying text. The wrangling between the plaintiff and the defendant did not end with the high court ruling. Following the Supreme Court decision, Dun & Bradstreet sent *Greenmoss* president Preston Peters a check for \$572,000, which represented the \$350,000 verdict and simple interest accumulated over five years. *Greenmoss*' president contended that the payment should have been \$65,000 more to reflect the interest on the judgment sum compounded annually. Dun & Bradstreet's general counsel, A. Buffum Lovell, did not agree. Peters remarked that the parties may again find themselves "'back on square one'—in court." *MANHATTEN, INC.*, Sept. 1985, at 9, col. 4.

52. A full exposition of the common law of defamation is beyond the scope of this Note.

amendment standards into this area of law will follow.

*A. State Common Law Action to Federal Constitutional Concern:
The Origin of the Plaintiff-Based Determinant for
First Amendment Protection*

To prevail in a common law defamation action, a plaintiff must prove that a statement which is defamatory⁵³ has been published in a manner in which the subject can be readily identified.⁵⁴ Two general categories of defamation exist under the state common law: libel per se and libel per quod. The former is, as its name implies, defamatory on its face. In the latter, libel per quod, the harmful nature is not readily apparent but instead relies on extrinsic factors for its defamatory meaning.⁵⁵

If the plaintiff succeeds in establishing liability, a full range of remedies may be ordered.⁵⁶ The court has at its disposal three categories of money damages: actual or compensatory; punitive or exemplary; and nominal. Actual damages may be further subdivided into general and special awards. General awards redress the usual reputational harm one expects a false, defamatory statement to cause. As such, this loss may be presumed under common law. These presumed general damages may include a sum for mental distress and loss of friends and associates, in addition to loss of employment and business profits.⁵⁷ Special damages, the other type of actual

For more comprehensive works on the early development of this area of law, see generally Donnelly, *supra* note 1; Veeder, *History and Theory of the Law of Defamation* (pts. 1 & 2), 3 COLUM. L. REV. 546 (1903), 4 COLUM. L. REV. 33 (1904). For a more contemporary overview of this area, see generally W. PROSSER & W. KEETON, *supra* note 3, §§ 111-116A.

53. See *supra* note 3 for a more complete definition of defamation.

54. See D. GILLMOR & J. BARRON, *MASS COMMUNICATION LAW: CASES AND COMMENT* 197-201 (4th ed. 1984). Publication, in the defamation context, is accomplished when someone who is not the subject of the statement nor authorized by the subject communicates the statement to a third party. *Id.* at 198.

55. For further discussion of these two types of libel, see, e.g., R. SACK, *LIBEL, SLANDER AND RELATED PROBLEMS* 94-101 (1980); see also D. GILLMOR & J. BARRON, *supra* note 54, at 189.

56. See generally D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 7.2 (1973). Non-monetary remedies include injunctions, declaratory judgments and retractions. See R. SACK, *supra* note 55, at 361-65; see generally *infra* notes 254-63 and accompanying text for discussion of a proposed litigation scheme. Regarding retractions, some states, such as Alabama during the time of the *Sullivan* controversy, conditioned a public official's recovery of punitive damages on the defendant's refusal to issue a retraction.

57. The amount of general or compensatory damages a jury may award to a successful plaintiff under the common law will often take into consideration some of the following factors: the nature of the defamation; the form and permanency of the publication; the degree of circulation; the degree to which the statement was believed; the nature of the plaintiff's reputation in the community; the defendant's good faith in publishing the defamation; and the defendant's subsequent conduct. D. DOBBS, *supra* note 56, at 513-20. Such a jury award need

damages, are not readily foreseeable from an injury to reputation. For a plaintiff to recover these, therefore, he or she must prove that the defamatory publication proximately caused the special damage.⁵⁸ The falsely defamed plaintiff is entitled to punitive damages under the common law if the defendant published the defamatory falsehood with malice, that is, careless indifference to the plaintiff's rights and feelings or bad faith, ill will, spite, or bad motives.⁵⁹ Nominal damages, the third category of damages, are usually awarded to the victim of a false, defamatory statement who has not claimed any actual loss. Under common law, the defamation defendant has three possible defenses: truth, an absolute or qualified privilege to defame, and the assertion that the challenged statement was merely the expression of an opinion.⁶⁰

This was the legal apparatus in place on March 29, 1960, when a full-page editorial advertisement appeared in the *New York Times* soliciting financial support for three causes: student civil rights demonstrators, Dr. Martin Luther King Jr.'s legal defense on a pending perjury indictment, and the right-to-vote campaign. The advertisement also chronicled questionable tactics police used in confrontations with civil rights activists.⁶¹ On the strength of that advertisement, which the courts considered in *New York Times v. Sullivan*,⁶² libel law emerged as a constitutional concern.

not reflect an exact financial loss. Instead, it may be a rough estimate of the probable extent of actual loss anyone is likely to suffer even though such loss is not calculable in concrete terms. *Dalton v. Meister*, 52 Wis. 2d 173, 188 N.W.2d 494, cert. denied, 405 U.S. 934 (1971).

58. See D. DOBBS, *supra* note 56, at 520-22.

59. See R. SACK, *supra* note 55, at 329-31. For a brief treatment of the origin of punitive damages, see *Rosenbloom*, 403 U.S. at 78-87 (Marshall, J., dissenting), discussed *infra* note 96; see also D. DOBBS, *supra* note 56, at 522-23.

60. Truth of the facts asserted in the challenged statement has evolved as an absolute defense in virtually all civil libel actions. The underlying rationale here is that no one has a right to a better reputation than he or she deserves. See generally F. HARPER & F. JAMES, *THE LAW OF TORTS* § 5.20 (1956); see also R. SACK, *supra* note 55, at 129-52. Blanket protection for publishing defamatory statements is rare. Persons involved in conducting government business constitute the largest category of those who possess such an absolute privilege to defame. Qualified privileges, however, will only protect a defendant absent a showing of malice. For a more complete discussion of the defenses open to defamation defendants, see W. PROSSER & W. KEETON, *supra* note 3, §§ 114-116.

Notably, the Vermont Supreme Court said that the state had not extended to credit reporting agencies of that jurisdiction any common law privilege to defame. *Greenmoss Builders v. Dun & Bradstreet, Inc.*, 143 Vt. at 76, 461 A.2d at 419.

61. 376 U.S. at 254, 257-58. Entitled *Heed Their Rising Voices*, the advertisement referred to "truckloads of police armed with shotguns and tear-gas [who] ringed the Alabama State College Campus" and padlocked a dining hall of protesting students "to starve them into submission." *Id.* at 257. It also chronicled acts of repeated arrests and violence against Dr. King attributable to "Southern violators [of the Constitution]." *Id.*

62. *Id.* at 254.

L.B. Sullivan, the Montgomery commissioner in charge of the police force, brought his claim against the *Times* charging that the advertisement was libelous.⁶³ Under Alabama law, he would prevail if he proved that the *Times* had published the advertisement and that the advertisement identified him.⁶⁴ Trial witnesses substantiated Sullivan's assertions.⁶⁵ As a result, truth of all the facts in the advertisement was the only possible obstacle to establishing the newspaper's defamation liability. The *Times* could not assert this truth defense, however, because it was "uncontroverted" that the advertisement included inaccuracies.⁶⁶ The jury in the Circuit Court of Montgomery County did find the advertisement constituted libel per se under Alabama law.⁶⁷ Based on this liability, the jury rendered a general verdict awarding Sullivan \$500,000 in damages and Alabama's highest court affirmed the decision.⁶⁸ The Supreme Court reversed and remanded the case.⁶⁹

Justice Brennan, for a unanimous Court,⁷⁰ drew the rationale for the reversal from the vehement controversy engendered by the Sedition Act more than a century earlier.⁷¹ That federal statute made it a crime to publish, with the intent to defame, a false statement about the President or the Congress. But criticism of public officials for their public conduct was "the central meaning of the First Amendment",⁷² Justice Brennan wrote, a truth crystallized in the national conscience during that time.⁷³ Justice Brennan noted that underlying the state's present-day strong interest in public ex-

63. *Id.* at 256. Sullivan's claim was deemed without support against four Alabama clergy named in the advertisement as supportive of the solicitation without their knowledge. *Id.* at 260, 286.

64. *Id.* at 262.

65. *Id.* at 258, 288.

66. *Id.* at 258.

67. *Id.* at 262.

68. 273 Ala. 656, 144 So. 2d 25 (1962).

69. 376 U.S. at 292.

70. Justices Black and Goldberg filed separate concurrences. Justice Douglas joined both opinions. *Id.* at 293 (Black, J., concurring); *id.* at 297 (Goldberg, J., concurring).

71. Sedition Act of 1798, ch. 74, 1 Stat. 596. The penalties it imposed were a \$5,000 fine and up to five years in prison. From its inception the statute sparked controversy. So widespread and profound were the objections to it that fines paid under it were returned in accord with congressional mandate. In addition, President Thomas Jefferson pardoned those convicted under its terms. The act had a 1801 sunset clause. Though never passed on by any court, it is presently treated as if the Supreme Court had ruled that the Act was unconstitutional. 376 U.S. at 276. See generally L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 205, 208-09.

72. 376 U.S. at 273.

73. *Id.* at 274-76.

change was “the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁷⁴ This debate is “essential to the security of the Republic,” he concluded.⁷⁵ Through it, the people peaceably promote their will, ensuring the government’s stability and the sovereignty of its citizens. The Court preserved this central first amendment purpose in its holding that the Constitution dictates that no public official could prevail in a libel action against critics of his or her public conduct unless it was proven that the defamatory statement was made with “actual malice.”⁷⁶ The Court defined actual malice as “knowledge that [the statement] was false or [made] with reckless disregard of whether it was false or not.”⁷⁷ Thus, no longer would the common law’s motives such as spite and revenge have to catalyze a defamation defendant’s conduct.

This new actual malice test incorporated three corollary principles. It shifted away from the defendant the burden of proving the truth of a statement. The Court reasoned that legally proving truth is so difficult that possible government critics would fall silent in fear of meeting this requirement.⁷⁸ Justice Brennan further reasoned that, without relieving the potential defendant of this burden of proving truth legally, the quality of public debate would be diminished because truthful statements would be eliminated in addition to false ones. Secondly, the Court stated that the actual malice standard demanded that such malice be demonstrated with convincing clarity rather than with any lower level of evidentiary proof.⁷⁹ Finally, the Court

74. *Id.* at 270.

75. *Id.* at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

76. *Id.* at 279-80.

77. *Id.*

78. *Id.* at 279. The Court earlier had said that erroneous statements are inevitable in free debate and that they must be tolerated if freedom of expression is to have the “breathing space” that it “need[s] . . . to survive.” *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). Justice Brennan reiterated this point in his *Gertz* dissent. He concluded that the *Gertz* majority would promote media self-censorship. 418 U.S. at 365 (Brennan, J., dissenting). Commentators would fear proving in a court of law that what they believe and know to be true, could be legally proven as the truth under the strictures of courtroom scrutiny. *Id.* at 365-66 (Brennan, J., dissenting).

79. *Sullivan*, 376 U.S. at 285-86. Some of the issues connected with proving actual malice with convincing clarity are discussed *infra* note 87 in the context of *Herbert v. Lando*, 441 U.S. 153 (1979). While the Court did not explicitly state the reason for this principle, the apparent rationale is to nurture a favorable climate for potential government critics by using legal methods that will shore up the protection of robust expression. The convincing clarity standard has been described as “a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases. . . . It has been said that proof must be ‘strong, positive and free

held that appellate courts are free to comb trial records in proper libel cases to examine whether challenged statements are worthy of constitutional protection, and, if they are, to ensure judgments do not intrude on free expression.⁸⁰

Sullivan most profoundly changed the aspects of common law defamation relevant to this Note by focusing on the status of the defamation plaintiff in order to determine what type of burdens he or she must carry to prevail. It thus made it more difficult to prove defamation liability when a person made a false statement criticizing a government official's performance of his or her public duties. By instituting the "actual malice" standard, *Sullivan* also took the venomous motives out of common law malice.

The Supreme Court expanded the scope of *Sullivan* in *Curtis Publishing v. Butts*.⁸¹ *Butts* concerned the alleged fixing of a 1962 football game between the University of Georgia and the University of Alabama.⁸² Justice Harlan, in the majority opinion, concluded that the *Saturday Evening Post*, hungry for a "sophisticated muckraking" reputation,⁸³ had libeled Wally Butts, the

from doubt' . . . and 'full, clear and decisive'" *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 871, 330 N.E.2d 161, 175 (1975).

80. *Sullivan*, 376 U.S. at 285 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)). The Court recommitted itself to its ruling of independent appellate review in *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984). *Bose*, a product disparagement case, arose out of the respondent's published assertions that sound from petitioner/manufacture's stereo equipment "tended to wander about the room." *Id.* at 488. The Supreme Court ruled that, while the record did show falsity in the Consumer Reports article, it did not demonstrate clear and convincing proof that the falsehood was made with actual malice. Justice Stevens, for the six-member majority, wrote:

The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. . . . Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Id. at 510-11.

Bose, however, came under fire recently by the United States Court of Appeals for the District of Columbia Circuit in *Tavoulareas v. Piro*, 759 F.2d 90 (D.C. Cir. 1985). In a lengthy opinion reinstating a jury verdict and award against the Washington Post, Judge George MacKinnon concluded that appellate review should not question a trial court jury's factual findings. *Id.* at 107-08. Instead, the inquiry should be limited to whether those findings resulted in actual malice under the law. In dissent, Judge J. Skelly Wright found that such a narrowly-construed appellate court role would in fact render its independent review "a mirage." *Id.* at 147 (Wright, J., dissenting). The en banc appellate panel later vacated the majority of that decision, ordering an en banc rehearing. 763 F.2d 1472 (D.C. Cir. 1985).

81. 388 U.S. 130 (1967).

82. *Id.* at 135-37.

83. *Id.* at 158.

athletic director of the University of Georgia.⁸⁴ During his analysis, Justice Harlan noted briefly a truth so fundamental that it often goes unrecognized: libel is premised on the content of speech.⁸⁵ This fact taken alone would appear to invite regulation based upon content; arguably, because emphasis on speech content permeates libel law, a content classification would introduce no foreign evil into the scheme. However, Justice Harlan then stated that in his opinion the improper conduct, which produced the false publication, must remain the focus in any defamation action rather than the content of the publication. Only in this way, he wrote, can the tension between speech and press freedoms and libel actions be eased.⁸⁶

Chief Justice Warren's concurrence in *Butts* is also significant because in it he specified that the rigorous *Sullivan* standard applied to public figures as well as to public officials.⁸⁷ Thus, in a case involving a public figure plaintiff, he or she would have to prove that the defendant acted with actual malice in order to be liable for harm caused by the false, defamatory statement. In so writing, Chief Justice Warren noted the virtually identical media access of those in the public eye by election or appointment and those in the public eye without benefit of official conferral of their status.⁸⁸

84. *Id.* at 158, 161. Justice Harlan, who also wrote for the Court in *Butts*' companion case, *Associated Press v. Walker*, 388 U.S. 130 (1967), followed the *Sullivan* lead and articulated in *Butts* a heightened burden for public figures to bear in libel litigation. 388 U.S. at 155. In *Walker*, the Court relied on the same heightened public figure standard to absolve the wire service from libel liability. The case arose from deadline coverage of actions of political activist/retired General Edwin Walker during the rioting surrounding James Meredith's 1962 enrollment at the University of Mississippi. *Id.* at 140-41. In holding for defendant *Associated Press*, the Court noted that its correspondent had been on the scene, his dispatches were essentially internally consistent, and that there had been need for immediate dissemination of the information. *Id.* at 158-59.

85. *Id.* at 152.

86. *Id.* at 152-53. Justice Harlan stated specifically:

[N]either the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. *Impositions based on misconduct can be neutral with respect to content of the speech involved*, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

Id. (emphasis added).

87. *Id.* at 164 (Warren, C.J., concurring).

88. *Id.* (Warren, C.J., concurring). The next year in *St. Amant v. Thompson*, 390 U.S. 727 (1968), having expanded the applicability of the *New York Times v. Sullivan* test to public figures, the Court refined exactly how the test was to apply in any particular instance. Candidate Phil A. St. Amant, in a televised speech, had read an affidavit which contained references to the passing of money between petitioner Thompson and St. Amant's political opponent. *Id.*

Following *Butts*, the Court had recognized two paths leading to public status: by virtue of one's office, as in *Sullivan*, or by virtue of one's position, as in *Butts*. In *Rosenbloom v. Metromedia*,⁸⁹ a Philadelphia magazine distributor prompted the Court to recognize a third path to public status: one's connection to an issue or event that has captured the public's attention. The

at 728-29. In reversing the Louisiana Supreme Court and finding for St. Amant, Justice White emphasized that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *Id.* at 731. He also reiterated the need to show that the defendant "in fact entertained serious doubts as to the truth of his publication." *Id.*

Exactly how to determine when such doubts existed on the part of the defamation defendant was most prominently addressed in *Herbert v. Lando*, 441 U.S. 153 (1979). The case arose out of the plaintiff's attempts to compel discovery. The motion was granted and the defendants filed an interlocutory appeal. On appeal the case was remanded. Petition for certiorari to consider the discovery issue was then granted. Because the justices' varying perspectives on this issue provide insight into their overall attitudes about the institutional press and the conflicting interests within defamation law, some of those opinions are noted here. Anthony Herbert, a former army colonel, had been the subject of a 1973 CBS program concerning his allegation of a military cover up of Vietnam atrocities. *Id.* at 155-56. He sued, claiming that the program portrayed him as a liar and compromised the value of his forthcoming book. *Id.* at 156. Herbert conceded that he was a public figure subject to the dictates of *Sullivan*. *Id.* The district court ruled that he was entitled to engage in pretrial discovery of evidence to bolster his claim that producer Barry Lando pursued the story without the requisite care and objectivity. 73 F.R.D. 387, 395 (S.D.N.Y. 1977). The appellate court's remand contended that such a detailed inquiry into the editorial process would certainly compromise the first amendment principles that *Sullivan* was fashioned to safeguard. 568 F.2d 974, 984 (2d Cir. 1977). The Supreme Court reversed. 441 U.S. 153 (1979).

Justice White wrote for the majority that evidence concerning one's state of mind and the editorial process are not new and that the court of appeals' decision to grant an effectively absolute privilege to the journalist's editorial process was an unwarranted departure from its previous rulings. *See* 441 U.S. at 161-69. He reasoned that erecting "an impenetrable barrier" into the thoughts, opinions and conclusions of the publishers would effectively strip the plaintiff of his or her ability to prove actual malice with convincing clarity. *Id.* at 170. This, in turn, would unacceptably skew the balance struck in *Sullivan* between freedom of expression and an individual's right to a good reputation. While Justice White conceded that such an inquiry might unearth new media liability, he concluded that the first amendment would not be implicated because only speech containing reckless error would be discouraged. *Id.* at 173. Justice Brennan's partial dissent advocated the existence of an editorial privilege on a case-by-case basis following a plaintiff's prima facie showing of defamatory falsehood to a trial judge. *Id.* at 197 (Brennan, J., dissenting in part).

Justice Stewart dissented on the ground that "actual malice" as used in the *Sullivan* test is wholly divorced from any vile motives on the part of the publisher. *Id.* at 199 (Stewart, J., dissenting). Therefore, he concluded that inquiry into the editorial process was simply not relevant to a libel suit in which *Sullivan* is the standard. *Id.* Justice Marshall, in a separate dissent, suggested foreclosing discovery of the substance of editorial conversations because other methods of uncovering reckless disregard are available. *Id.* at 209-10 (Marshall, J., dissenting). The case was recently dismissed when the United States Court of Appeals for the Second Circuit considered the libel claim on its merits. *Herbert v. Lando*, No. 85-7014 (2d Cir. Jan. 15, 1986).

89. 403 U.S. 29 (1971).

Court reevaluated its previous decisions to pinpoint whether, at base, it was truly the event or issue rather than the person that triggered the heightened liability requirements of *Sullivan*. A local radio station referred to Rosenbloom, the magazine distributor, as one of several "girlie-book peddlers"⁹⁰ engaged in the "smut literature racket."⁹¹

At the outset, Justice Brennan, writing for the plurality of a fragmented Court,⁹² reasoned that enforcement of obscenity laws was an issue of public interest.⁹³ He discarded as a strained legal fiction the public figure/private individual dichotomy in defamation cases.⁹⁴ Justice Brennan concluded that the nature of the event, and not the status of the plaintiff, was the key determinant of the level of first amendment protection to be accorded the challenged statement.⁹⁵ Thus, the plurality held that *Sullivan's* rigorous actual malice standard also applied when a private libel plaintiff was embroiled in an event of public or general concern.⁹⁶

Rosenbloom changed defamation law by transferring the Court's focus

90. *Id.* at 34.

91. *Id.*

92. The decision lacked solid support from its inception. Justice Douglas did not participate in the case. Of the eight justices deciding it, five registered separate opinions with each opinion gaining the support of no more than three justices. In fact, the fragmented state of the Court in *Rosenbloom* actually swayed at least one vote in *Gertz*. In a brief concurring opinion there, Justice Blackmun stated:

The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom's* diversity. If my vote were not needed to create a majority, I would adhere to my prior view [expressed in the Brennan *Rosenbloom* plurality]. A definitive ruling, however, is paramount.

418 U.S. at 354 (Blackmun, J., concurring) (citations omitted).

93. 403 U.S. at 40.

94. *Id.* at 41.

95. *Id.* at 43. Justice Brennan observed that:

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

Id.

96. *Id.* at 52. *Rosenbloom's* dissenting opinions are perhaps more significant than the plurality result. In his dissent, Justice Harlan noted that private persons are less likely to secure access to channels of communication to rebut defamatory falsehoods. *Id.* at 70 (Harlan, J., dissenting). In addition, he stated that those who exercise freedom of speech and press have a duty of reasonable care. He thereby rejected strict liability. *Id.* (Harlan, J., dissenting). He also construed the first amendment to limit punitive damages, even in private libel cases, to those situations in which actual malice is proved. *Id.* at 73 (Harlan, J., dissenting). In addition, Justice Harlan would "hold unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a

from the libel plaintiff, where it had been riveted since *Sullivan*, to the event giving rise to the litigation. This pronouncement, weakened as it was by the host of differing opinions, also failed to provide guidelines for determining the existence of an event of public or general interest.⁹⁷ In addition, the *Rosenbloom* plurality specifically ruled only on the issue of sustaining a libel action, and not on the issue of damages. But at the same time *Rosenbloom* was being considered by the Supreme Court, a case that addressed both of these issues was working its way through the federal court system.

B. Gertz v. Robert Welsh, Inc. Reaffirms the Court's Commitment to the Plaintiff-Based Determinant for First Amendment Protection

In *Gertz v. Robert Welsh, Inc.*,⁹⁸ the Court furthered its "continuing effort to define the proper accommodation between [the] competing concerns" that defamation law and the first amendment present.⁹⁹ The Court decided that a defendant who publishes a defamatory falsehood about a private individual may not escape liability simply by claiming the expression is privileged because it involves an issue of public interest.¹⁰⁰ In addition, the Court held that the private libel plaintiff could recover only compensatory damages absent proof of the defendant's actual malice.¹⁰¹ The plaintiff in the case, at-

reasonable and purposeful relationship to the actual harm done." *Id.* at 77 (Harlan, J., dissenting).

Justice Marshall, in a dissent joined by Justice Stewart suggested that the plurality's public or general interest test for determining *Sullivan*'s applicability to a defamation case would require the courts to determine "what information is relevant to self-government." *Id.* at 79 (Marshall, J., dissenting). The dissent found that this result would ill serve private individuals "thrust into the public eye by the distorting light of defamation," and not advance the state's interest in protecting them. *Id.* (Marshall, J., dissenting). Thus, both Justices Harlan and Marshall articulated the same concerns on the issue of liability. Justice Marshall further explained that punitive damages resulted from an 18th-century English finding that such damages were within the jury's broad discretion. *Id.* at 82 (Marshall, J., dissenting). These awards evolved essentially as private fines, serving the same deterrent and punitive functions as criminal penalties. In these penalties Justice Marshall saw the potential for self-censorship by the press heightened by jury discretion limited only by the requirement that awards not be excessive. The dissent reasoned that "the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls." *Id.* at 84 (Marshall, J., dissenting). Going further than Justice Harlan, Justice Marshall emphasized that the most prudent course for both plaintiffs and defendants would be to do away with punitive and presumed damages completely, restricting awards to proven, actual losses. *Id.* (Marshall, J., dissenting).

97. The *Greenmoss* dissent similarly criticized the *Greenmoss* plurality for its lack of guidelines. See *infra* note 215 and accompanying text. See also *infra* notes 244-47 and accompanying text.

98. 418 U.S. 323 (1974).

99. *Id.* at 342.

100. *Id.* at 346.

101. *Id.* at 349-50.

torney Elmer Gertz, had sought damages for the family of a youth killed in 1968 by a Chicago police officer. The *Gertz* suit arose out of the erroneous charges published in the John Birch Society periodical *American Opinion* that Gertz was a "Leninist" who had helped plan the violence at the Democratic National Convention in Chicago as part of a conspiracy to promote communism.¹⁰²

Justice Powell, writing for the five-member majority, articulated the two competing societal values at issue as the need to avoid self-censorship by the news media¹⁰³ and the need to compensate individuals "for the harm inflicted on them by defamatory falsehood[s]."¹⁰⁴ He acknowledged the hardship *Sullivan* worked upon public figures who were victims of defamatory falsehoods.¹⁰⁵ Moreover, he concluded that the position advocated in *Rosenbloom* simply pushed *Sullivan* too far: it unacceptably compromised the state interest in protecting private individuals.¹⁰⁶ At the base of this conclusion was Justice Powell's acknowledgment that self-help is the "first remedy"¹⁰⁷ open to any victim of a defamatory falsehood. He reasoned that private individuals generally have less media access and therefore they are less able to help themselves by attracting the media machinery to counter the falsehoods. They are more vulnerable to defamation injury and thus more deserving of recovery.¹⁰⁸ Moreover, the Court stated that *Rosenbloom's* public or general interest test not only inadequately serves plaintiffs, but treats defendants unjustly as well. Under *Rosenbloom*, a private individual caught up in a matter of general or public interest could not sustain a libel

102. *Id.* at 326. The monthly magazine in the 1960's had mounted an effort to warn Americans of a conspiracy to discredit local law enforcement officials and to replace them with a nationwide, communist-inspired police force. *Id.* at 325. As part of this effort, the magazine commissioned an article on the trial of Richard Nuccio, the officer charged with murdering the Chicago youth. The assertions about Gertz were a part of this article. *Id.* The magazine was sold nationwide with reprints distributed in Chicago. *Id.* at 327.

103. *Id.* at 341.

104. *Id.* Defamatory falsehoods were the issue in *Gertz*. Trial testimony revealed that many of the article's statements about Gertz were patently false. *Id.* at 326. In addition, *American Opinion's* managing editor had not attempted to verify or substantiate the charges. *Id.* at 327. An editorial preface to the article stated that its author conducted "extensive research" into the case. *Id.* Gertz' picture appeared in the article with the caption: "Elmer Gertz of Red Guild harasses Nuccio." *Id.*

105. *Id.* at 342.

106. *Id.* at 346. Justice Powell then reiterated a principal point of Justice Marshall's *Rosenbloom* dissent, that a general or public interest test would require the state and federal judiciary to make ad hoc decisions as to what information is important to self-government. *See supra* note 96.

107. 418 U.S. at 344.

108. *Id.* at 344, 345. This, of course, has been a recurring, consistent rationale for the different treatment of private individuals and public figures. *See supra* note 46 and accompanying text; *see also supra* note 96. *Cf. infra* note 121 and accompanying text.

action without meeting the *Sullivan* standard. As a result, a private individual, perhaps the object of an intense flurry of media attention, would be swiftly deprived of it and of any means of help. That person would also be stripped of any judicial means of compensation without proving actual malice.¹⁰⁹ At the same time, a defendant who had exercised all reasonable care, but nonetheless mistakenly presented false information on a matter wholly unrelated to an issue of public or general interest, could be penalized by presumed and punitive damages.¹¹⁰ Besides the undesirable outcomes themselves, the precursor of each one is an independent evil, the exercise of determining whether there exists an issue of public or general interest.¹¹¹

Justice Powell contended that a test for liability less burdensome than the actual malice standard better met the interest of the state in gaining compensation for a defamed private citizen's injury to reputation on the one hand and of the media¹¹² to publish without strict liability for all defamatory statements on the other.¹¹³ Under this ruling, individual states would be free to fashion their own standards for liability in cases involving private libel plaintiffs.¹¹⁴ However, to accommodate the other side of the scale, the

109. 418 U.S. at 346.

110. *Id.* This is another example of the intellectual thicket of libel law that *Greenmoss* exacerbates. See *infra* note 221 and accompanying text. It is also appropriate that this anomalous result arises under the *Rosenbloom* subject matter classification. This fact gives further credence to the assertion that the two tests are similar. See *infra* notes 237, 244, and accompanying text.

111. The danger of this prospect was discussed most convincingly by Justice Marshall in his *Rosenbloom* dissent. See *supra* note 96.

112. The specific reference in *Gertz* to communications media spawned state litigation on whether its holding had equal force when the defendant was not a member of the media. However, it is unlikely that such a distinction was intended. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* (2d ed. 1983)

The Court suggested the possibility of a difference in libel standards between the speech and press clauses of the first amendment by specifically using such terms as "publisher," "broadcaster," and "press" in this part of its holding. However the reference was only an offhand one and in fact there may be no distinctions between freedom of speech and freedom of the press.

Id. at 950-51. See PRACTICING LAW INSTITUTE, *COMMUNICATIONS LAW* 40-43 (1977) [hereinafter *COMMUNICATIONS LAW*] for a survey of how states have decided the applicability of *Gertz* to nonmedia defendants and private matters. Although the Supreme Court has yet to decide this issue, the Court, and Justice Stewart in particular, have addressed it. See *infra* notes 160, 174, 200-03, and accompanying text.

113. 418 U.S. at 347-48. While a comprehensive examination of the correctness of ever allowing punitive damages in defamation litigation is not the main focus of this Note, it is of great concern to jurists and other scholars and observers. See *supra* note 96; see also *infra* notes 252, 264.

114. Since *Gertz* was decided, many states have chosen their own standards for defamation liability. Several have settled on simple negligence. Other, undecided states, have indicated a tendency toward standards less strict than actual malice. A few states have chosen the actual malice standard. *COMMUNICATIONS LAW*, *supra* note 112, at 32-35.

Court prohibited liability without proof of fault¹¹⁵ and permitted the award of damages only to compensate actual injury when a state instituted any test less arduous than actual malice.¹¹⁶ Presumed and punitive damages were barred without the actual malice showing.

The Court expressed several reasons for denying the opportunity for punitive and presumed damages. First, Justice Powell feared that the "largely uncontrolled discretion" of juries to award presumed damages would compound the potential for compromising the exercise of first amendment freedoms.¹¹⁷ Justice Powell was even more critical of punitive damages in the defamation context. He noted that jury discretion in such awards "unnecessarily exacerbates the danger of media self-censorship."¹¹⁸ He also observed that the awards themselves are "wholly irrelevant" to the governmental interest, compensating harm to reputation, that underlies a negligence standard for private defamation victims unable to help themselves.¹¹⁹

This decision thus redirected a court's attention onto the person about whom the defamatory statement was made to determine whether the *Sullivan* standard created liability. This status of the plaintiff also determined the nature of allowable damages. Justice Powell also noted, however, that few persons have achieved the fame to render them public figures in all instances.¹²⁰ More commonly, he explained, an individual may be a public figure for purposes of a particular public controversy and the limited range of issues associated with it.¹²¹ Thus, the Court's opinion recognized the implicit tie between public figure status and the existence of an issue of public interest.¹²² For the instant case, however, the Court ruled that Gertz was not a public figure for the issues involved and remanded the case for a new

115. 418 U.S. at 346-47.

116. *Id.* at 350.

117. *Id.* at 349. Justice Powell also noted the potential for presumed damages to be used to punish unpopular opinions. *Id.* Additionally, he indicated that the state had no substantial interest in providing private individuals with "gratuitous" awards in excess of any actual injury. *Id.*

118. *Id.* at 350.

119. *Id.* Justice Powell suggested that such awards "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." This sentiment was expressed by Justice Marshall in his *Rosenbloom* dissent. See *supra* note 96.

120. 418 U.S. at 351.

121. *Id.* Justice Powell noted that such a person "voluntarily injects himself or is drawn into a particular public controversy." *Id.* For a discussion of this "limited public figure" principle in later cases, see *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See *infra* notes 145-63 and accompanying text for a more complete discussion of this issue.

122. This recognition indeed is one, perhaps the only, meritorious quality of the *Greenmoss* public concern determinant. For a fuller discussion, see *infra* note 234.

trial.¹²³

In a brief dissent, Chief Justice Burger characterized the *Gertz* majority as abandoning defamation law's "traditional thread" of strict liability for private libel plaintiffs¹²⁴ by sustaining media liability only on a showing of negligence in publishing defamatory statements concerning private individuals.¹²⁵ His position appeared to have been based on the fact that *Gertz* was an attorney handling an unpopular case. The Chief Justice was particularly troubled that the *Gertz* requirement of negligence for liability could conceivably undercut an accused's right to counsel by making attorneys on societally unacceptable cases ripe targets for irresponsible members of the media.¹²⁶

Justice Brennan dissented from the majority by calling for continuation of the *Sullivan* actual malice standard of liability for private individuals involved in an event of public or general interest.¹²⁷ He began by refuting, as he had in his *Rosenbloom* opinion,¹²⁸ the public figure's enhanced media access, the primary rationale for treating private individuals differently from public officials or public figures.¹²⁹ Justice Brennan also rejected the assertion that the judiciary would be totally incapable of divining which matters are of general or public interest.¹³⁰ While difficult in some instances, he noted that judges would find guidance in the growing body of state case law applying this public or general interest test.¹³¹ As to damages, Justice Brennan maintained that simply limiting money awards to actual injury did not adequately protect the first amendment: a damage award, regardless of its name, must still be paid. Even actual damages are too heavy a burden for

123. 418 U.S. at 352.

124. *Id.* at 354-55 (Burger, C.J., dissenting).

125. *Id.* at 355 (Burger, C.J., dissenting).

126. *Id.* (Burger, C.J., dissenting).

127. *Id.* at 361 (Brennan, J., dissenting).

128. *Rosenbloom*, 403 U.S. at 45-46.

129. 418 U.S. at 362-63 (Brennan, J., dissenting). Justice Brennan found that the ability public persons have to attract the media is tenuous at best and "will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story." *Id.* at 363 (Brennan, J., dissenting) (quoting *Rosenbloom*, 403 U.S. at 46-47 (Brennan, J., dissenting)). In addition, he maintained that voluntariness in the way public figures come to prominence is an invalid way to distinguish these persons from private individuals. In Justice Brennan's view, everyone, whether voluntarily or not, is exposed to some degree of public view; public figures have not flung wide their intimate lives nor private individuals "carefully shrouded" theirs. *Id.* at 364 (Brennan, J., dissenting) (quoting *Rosenbloom*, 403 U.S. at 48 (Brennan, J., dissenting)).

130. *Id.* at 368-69 (Brennan, J., dissenting).

131. *Id.* at 369 (Brennan, J., dissenting). This assertion is also appropriate with reference to *Greenmoss* due to the Supreme Court's failure to promulgate guidelines in that case.

many small news organizations to bear.¹³²

Justice White, in a separate dissent,¹³³ reached a result vastly different from that of Justice Brennan. In essence, Justice White urged retention of the common law's libel *per se*. He did so in recognition of the law in the fifty states that private citizens deserve the protection of their reputations that strict liability provides for facially libelous falsehoods.¹³⁴ He summarized the early development of defamation law¹³⁵ and repudiated the sweeping changes the Court had made¹³⁶ without benefit of proper briefing or oral argument.¹³⁷ Noting that common law defamation and its consequences were in place when the first amendment was adopted,¹³⁸ Justice White observed that he saw no evidence that the first amendment nor "present circumstances" required the changes the majority had made.¹³⁹ Justice White viewed *Sullivan* as wholly consistent with the first amendment aim of protecting critics of government. The *Gertz* majority, however, had gone far afield of this first amendment purpose by increasing the burden on private libel plaintiffs to establish liability without regard to the award of damages. Instead, Justice White suggested that limiting general and punitive damages would be a better approach to protect the media from large libel judgments.¹⁴⁰ Justice White also criticized as without constitutional significance

132. *Id.* at 367-68 (Brennan, J., dissenting).

133. *Id.* at 369 (White, J., dissenting).

134. *Id.* at 389 (White, J., dissenting).

135. Of particular note, in Justice White's view, is the vindicatory function fulfilled by the common law of defamation:

At the very least, the rule allowed the recovery of nominal damages for any defamatory publication actionable *per se* and thus performed "a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom."

Id. at 372 (White, J., dissenting) (quoting RESTATEMENT (SECOND) OF TORTS § 569 comment b (1938)).

136. Justice White highlighted the changes. First, the plaintiff must prove fault in addition to the mere publication of a libel *per se*. *Id.* at 375-76 (White, J., dissenting). Second, the plaintiff must prove actual injury despite the inherent harmful nature of some libels and the difficulty of proving such injury. *Id.* at 376 (White, J., dissenting). Third, a plaintiff is foreclosed from even a judgment for nominal damages, which would at least provide the "judicial declaration that the publication was indeed false," due to this newly-installed requirement to prove fault in addition to falsity. *Id.* (White, J., dissenting). Fourth, in instances of *libel per quod*, general damages could no longer be awarded without proof of special injury. *Id.* (White, J., dissenting). Finally, punitive damages would be prohibited even if ill will or a vile motive existed if the *Sullivan* actual malice test was not met. *Id.* (White, J., dissenting).

137. *Id.* at 380 (White, J., dissenting).

138. *Id.* at 381-82 (White, J., dissenting).

139. *Id.* at 376-77 (White, J., dissenting).

140. *Id.* at 391 (White, J., dissenting).

any distinction between reckless disregard of the truth and negligence, though the majority would allow punitive damages for the former and bar them in the latter instance.¹⁴¹ Moreover, Justice White concluded, the independent appellate court examination established by *Sullivan* safeguards against excessive judgments that would be “a forbidden intrusion” on free expression.¹⁴² “For almost 200 years,” he asserted, “punitive damages and the First Amendment have peacefully coexisted.”¹⁴³

These well-reasoned dissenting opinions notwithstanding, *Gertz* confirmed that a heightened threshold for liability of defamation defendants was determined by the public or private status of the libel plaintiff rather than the event with which the plaintiff was involved. In so doing, *Gertz* repudiated *Rosenbloom*, though it did not expressly overrule it. *Gertz* also firmly established that eligibility for particular damage awards is to be apportioned according to the plaintiff’s status.¹⁴⁴ The Court next addressed how one is adjudged either a public figure or private individual in defamation litigation.

C. Skeletal Requirements for Determining Plaintiff’s “Public” or “Private” Status

In *Time, Inc. v. Firestone*,¹⁴⁵ the Supreme Court held that the estranged wife of a wealthy industrialist was not a public figure, even though she was at the center of a much celebrated divorce and had held press conferences during the course of the judicial proceedings. The Court gave two specific reasons for its conclusion: first, the plaintiff, Firestone, had not chosen to publicize her marriage troubles, but instead had been compelled to enter the public judicial forum to dissolve the relationship;¹⁴⁶ and, second, while di-

141. *Id.* at 396 (White, J., dissenting). Justice White found it difficult to identify a violation of the constitution when a defamation defendant is subject to punitive damages merely to deter departure “from those standards of care ordinarily followed in the publishing industry.” In his view, such a violation is particularly difficult to find when common law malice is present. *Id.* (White, J., dissenting). See *infra* notes 194-95 and accompanying text for Justice White’s proposal for a preferred approach to defamation law. No one welcomes falsehoods and no one welcomes an irresponsible press. However, to find no constitutional wrong in this deterrence is to diminish the breathing space that *Sullivan* preserved. Finding no such wrong also severs the freedoms of speech and press, distinguishing between media and nonmedia entities. *Greenmoss* did not forthrightly address this issue. However, taken as a whole, the decision reaffirms that the source of speech should not dictate its constitutional protection. See *infra* note 176 and accompanying text.

142. *Id.* at 397-98 (White, J., dissenting) (quoting *Sullivan*, 376 U.S. at 285). See *supra* note 80 and accompanying text.

143. 418 U.S. at 398 (White, J., dissenting).

144. For an enlightening, personal account of this seminal case, see Gertz, *Gertz on Gertz: Reflections on the Landmark Libel Case*, TRIAL, Oct. 1985, at 66.

145. 424 U.S. 448 (1976).

146. *Id.* at 454.

voice battles of the rich may be of interest to some members of the public, they are not the type of public controversy contemplated in *Gertz* to render one a limited public figure.¹⁴⁷ Justice Rehnquist, writing for the majority, noted that to characterize a divorce proceeding as a bona fide public controversy and to adjudge Firestone a public figure on that ground would revive *Rosenbloom*.¹⁴⁸ As a result of the finding that the plaintiff was a private individual, the *Firestone* Court held that the account of the divorce judgment appearing in *Time* magazine would not be accorded *Sullivan*'s first amendment protections. The Court remanded the case to determine if the fault required by *Gertz* as a prerequisite to recover compensatory damages in fact existed.¹⁴⁹

The Court strengthened the criterion of voluntary action to become a public figure outside of the strictly judicial context in *Wolston v. Reader's Digest Ass'n*.¹⁵⁰ The Supreme Court built on *Firestone*'s dictate that a libel plaintiff may not become a public figure as a result of being compelled to act. *Reader's Digest* asserted that *Wolston*'s refusal in 1958 to testify before a grand jury investigating Soviet intelligence matters rendered him a public figure as to that subject.¹⁵¹ Justice Rehnquist's majority opinion rejected this contention by stating that *Wolston*'s choice not to answer the subpoena could not be equated with injecting himself into the forefront of a public controversy.¹⁵² Far from volunteering to be a public figure, Justice Rehnquist found that *Wolston* had been "dragged unwillingly into the controversy."¹⁵³

This same reasoning is also at the heart of *Hutchinson v. Proxmire*,¹⁵⁴ decided the same day as *Wolston*. By conferring the "Golden Fleece of the Month Award"¹⁵⁵ on particular funding agencies, Senator William Proxmire denigrated the government support of a behavioral scientist's research as a waste of taxpayer's money.¹⁵⁶ *Hutchinson*, the scientist, brought suit for damage to his professional and academic reputation.¹⁵⁷ In addition to speaking about the "award" in a speech on the Senate floor, Senator

147. *Id.*

148. *Id.*

149. *Id.* at 464.

150. 443 U.S. 157 (1979).

151. *Id.* at 166. The refusal was said to be due to ill health. *Id.* at 168.

152. *Id.* at 166.

153. *Id.*

154. 443 U.S. 111 (1979).

155. *Id.* at 114.

156. *Id.* *Hutchinson* researched the objective measures of aggression in primates. *Id.* at 115. Several agencies were interested in his findings to solve problems that arise when humans are confined in close quarters for long periods. *Id.*

157. *Id.* at 118.

Proxmire cited it in two newsletters, a press release, and on a television interview show, although Hutchinson was not always referred to by name.¹⁵⁸ Writing for the majority, Chief Justice Burger noted that the Court had never decided the question of whether the *Sullivan* standard applied to an individual defendant in addition to a media defendant.¹⁵⁹ The Court also declined to do so in the instant case concluding that Hutchinson was not a public figure. This rendered unnecessary a decision on whether the *Sullivan* standard might apply to an individual, such as the Senator.¹⁶⁰ The Court reasoned that neither successfully competing for federal research grants nor gaining access to media after the "Golden Fleece" award announcement rendered Hutchinson a public figure.¹⁶¹ The Chief Justice also concluded that no specific public controversy existed.¹⁶² Thus, Hutchinson was not required to adhere to the more rigorous *Sullivan* standard to prevail.¹⁶³

The *Firestone-Wolston-Proxmire* trilogy reaffirms once again the Court's adherence to the plaintiff-based determinant for shaping defamation litigation. Despite the continued commitment to the plaintiff-based approach that these cases represent, however, making the approach actually work remains an unattained goal. These cases, *Firestone* in particular, underscore just how difficult it is to decide whether a public controversy exists, and if so, how the libel plaintiff has acted in relation to it. The Supreme Court simply has not provided concrete, comprehensive guidelines to aid trial courts in this task. As a result, they have produced confused, sometimes conflicting results.¹⁶⁴

158. *Id.* at 116-17.

159. *Id.* at 133 n.16.

160. *Id.* See, e.g., *supra* note 112 and accompanying text.

161. 443 U.S. at 134-36.

162. *Id.* at 135. The Chief Justice observed that at most respondents "point to concern about general public expenditures. But that concern is shared by most and relates to most public expenditures; it is not sufficient to make Hutchinson a public figure." *Id.*

163. The Supreme Court reversed and remanded the case. *Id.* at 136. Justice Brennan dissented on the ground that he viewed legislators' criticism of unnecessary government expenditures as a legislative act protected by the constitution's speech or debate clause. *Id.* (Brennan, J., dissenting). The district court had earlier granted a summary judgment for Senator Proxmire that the United States Court of Appeals for the Seventh Circuit had affirmed, 579 F.2d 1027 (1978), precipitating the high court's hearing the case.

164. One court articulated the difficulty: "How and where do we draw a line between public figures and private individuals? They are nebulous concepts. Defining public figures is much like trying to nail a jellyfish to the wall." *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). As to the public controversy requirement instituted by the *Firestone-Hutchinson-Wolston* trilogy, one observer noted that the Court had left five issues unresolved: the definition of the requirement itself; the degree of its particularity; the required nexus between the voluntariness and public controversy considerations in the public figure test; whether the public controversy must exist prior to the alleged defamation; and, which party was assigned the burden of proof. Note, *Defining a Public Controversy in the Constitutional Law of Defamation*, 69 VA. L. REV. 931, 942-44 (1983). As a result, the observer concluded,

In addition, the few Supreme Court contributions on the plaintiff-based determinant that do exist apply more directly to liability rather than to damages. Until now, the absence of direct Supreme Court guidance has been even more pronounced on this issue. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*¹⁶⁵ the Supreme Court offered the first post-*Gertz* analysis for damage award eligibility in libel litigation.

II. *DUN & BRADSTREET, INC. V. GREENMOSS BUILDERS*: "PUBLIC" AND "PRIVATE" STATUS OF SPEECH DETERMINES NATURE OF ALLOWABLE DAMAGES

Dun & Bradstreet, Inc. v. Greenmoss Builders began when a Waitsfield, Vermont developer of custom homes and condominiums brought a defamation action charging that Dun & Bradstreet issued a credit report that falsely represented the company's financial health to five of the agency's subscribers.¹⁶⁶ Dun & Bradstreet lost that action and was assessed \$50,000 in compensatory damages and \$300,000 in punitive damages.¹⁶⁷ It did, however, successfully move for a new trial on the grounds that the court's jury instructions did not stress the *Gertz* dictate that a private libel plaintiff must prove actual malice to be awarded punitive and presumed damages.¹⁶⁸ The Vermont Supreme Court reversed the new trial grant, ruling that *Gertz* did not apply to nonmedia entities.¹⁶⁹ That decision focused on the reasoning that no constitutional implications attach when a defamation defendant is not a media member because no threat of compromise to robust public debate exists.¹⁷⁰

The Supreme Court ruled that a private libel plaintiff need not demonstrate that a libel defendant published a defamatory statement with actual malice as a prerequisite to recovering punitive or presumed damages, when the defamatory statement was a matter of private rather than public concern. *Greenmoss* is a distinct departure from the established *Gertz* jurispru-

lower courts generally have relied on an ad hoc determination of existence of a public controversy. *Id.* at 944-50. The result has often been confusion and inconsistency. One of the attempts at formulating an objective approach was *Waldbaum v. Fairchild Publications*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980). See Note, *Waldbaum v. Fairchild Publications, Inc.: Giving Objectivity to the Definition of Public Figures*, 30 CATH. U.L. REV. 307 (1981); see also Note, *Public Figures, Private Figures and Public Interest*, 30 STAN. L. REV. 157 (1977).

165. 105 S. Ct. 2939 (1985).

166. *Id.* at 2941.

167. *Id.* at 2942.

168. *Id.*

169. *Id.*

170. For a detailed discussion of the facts of the case and the holdings of the lower courts, see *supra* notes 18-33 and accompanying text.

dence and its scope was somewhat of a surprise¹⁷¹ to those familiar with its history. The Supreme Court granted certiorari to the Vermont Supreme Court¹⁷² and heard arguments in the case during its 1983 term. Thereafter, the Court restored the case to its calendar for reargument during the next term and solicited briefs on two issues:¹⁷³ first, whether the *Sullivan* and *Gertz* rulings concerning presumed and punitive damages should apply to suits against nonmedia defendants;¹⁷⁴ and, second, whether these same rulings should also apply to speech of a commercial or economic nature.¹⁷⁵

171. See, e.g., Kamen, *Supreme Court Broadens Basis For Libel Awards*, Wash. Post, June 27, 1985, at A10, col. 5.

172. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 464 U.S. 959 (1983).

173. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 104 S. Ct. 3583 (1984).

174. *Id.*

175. *Id.* The anticipated result on this issue was a Supreme Court determination as to whether credit reports are "commercial speech." Such speech has had distinct first amendment treatment through the commercial speech doctrine. That doctrine is traced back to a 1942 case in which an ordinance that prohibited public distribution of a handbill advertising a decommissioned Navy submarine exhibited for profit was upheld as constitutional. The Supreme Court reaffirmed that municipalities may not unduly burden public distribution of information and opinions. The Court also held, however, "[w]e are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). This conclusion, that commercial speech was outside the protection of the first amendment, remained in force for more than 30 years. Then a series of cases began to chip away at it; now little remains of the commercial speech doctrine. This progression began in *Bigelow v. Virginia*, 421 U.S. 809 (1975). In that case, the conviction of a newspaper editor who accepted advertisements for low-cost abortions in New York was set aside as infringing constitutionally-protected speech. "The central assumption made by the Supreme Court of Virginia was that the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisements. Our cases, however, clearly establish that speech is not stripped of First Amendment protection merely because it appears in that form." *Id.* at 818 (citations omitted). The trend continued with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). A law making a Virginia pharmacist guilty of unprofessional conduct for advertising prices of prescription drugs was struck down as violating the first and fourteenth amendments. The Court called "beyond serious dispute" that: "speech does not lose its First Amendment protection because money is spent to project it Speech likewise is protected even though it is carried in a form that is 'sold' for profit and even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Id.* at 761 (citations omitted). The Court noted that the "purely economic" interest of the advertiser does not disqualify him or her from first amendment protection. *Id.* at 762. Moreover, "the particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. The Court also called the free flow of commercial information "indispensable" in fostering a consumer's intelligent economic decisions. *Id.* at 765. Justice Blackmun then stated:

And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

However, Justice Powell's plurality opinion, in which Justices Rehnquist and O'Connor joined, did not clearly resolve either of these questions.¹⁷⁶

Justice Powell focused instead on the public or private status of the defamatory statement. His legal conclusion was that *Gertz* did not apply to issues of private concern. He arrived at that conclusion by first interpreting *Sullivan* and its progeny, particularly *Gertz*, as restricted to the public issues those cases involved.¹⁷⁷ Justice Powell found expression on such issues to be at the core of first amendment concerns.¹⁷⁸ He then considered the applicability of *Gertz* to private matters outside of this core first amendment purpose. In an assertion disputed by the dissent, Justice Powell emphasized that "nothing" in *Gertz* indicated that the balance of the state's interest in awarding presumed and punitive damages to redress harm to reputation on one side and the harmful effect of such damages on public speech on the other would be struck in precisely the way it was in *Gertz* "regardless of the type of speech involved."¹⁷⁹ In fact, speech not of the core first amendment variety,¹⁸⁰ Justice Powell maintained, warranted different treatment under

Id. (footnotes omitted).

Other recent decisions which have weakened the commercial speech doctrine are *Bates v. State Bar*, 433 U.S. 350 (1977) (striking down the Arizona State Bar disciplinary rule banning all attorney advertising); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (New York Public Service Commission regulations that totally ban promotional advertising by electric utility, for the purpose of increasing conservation, stricken as overbroad).

176. See *Greenmoss*, 105 S. Ct. at 2958-59 (Brennan, J., dissenting). Justice Brennan maintained that:

The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government. . . . Accordingly, at least six Members of this Court (the four who join this opinion and Justice White and the Chief Justice) agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.

Id. (Brennan, J., dissenting) (citations omitted). Justice Brennan then noted that Justice Powell's opinion "does not expressly reject the media/nonmedia distinction, but does expressly decline to apply that distinction to resolve this case." *Id.* at 2959 n.10 (Brennan, J., dissenting).

177. *Id.* at 2943-44.

178. *Id.* at 2945-46. Cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (speech on public issues occupies "highest rung of the hierarchy of First Amendment values") (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); *accord* *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978) (speech on matters of public concern is "at the heart of the First Amendment's protection"); *Sullivan*, 376 U.S. at 269 (The constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.") (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

179. *Greenmoss*, 105 S. Ct. at 2944.

180. *Id.* at 2945. Underlying Justice Powell's analysis was the principle that all speech was not equal and thus accorded identical first amendment protection. He noted that obscene speech, fighting words, and commercial speech have all been provided no protection or less

Gertz. With private rather than public concerns to be considered in libel litigation, the balance shifted: the interest in awarding presumed and punitive damages outweighed the interest in free expression on such private concerns.¹⁸¹ Finally, Justice Powell suggested that the futility of proving actual damage to reputation necessitated the award of presumed damages in order to provide adequate protection for something as precious as one's good name.¹⁸²

Justice Powell next addressed whether Dun & Bradstreet's credit notice constituted a matter of public concern.¹⁸³ In deciding that the report's "content, form and context"¹⁸⁴ revealed it to be a purely private matter, Justice Powell found three factors persuasive: the report was of interest solely to the speaker and its specific business audience,¹⁸⁵ its circulation was limited to five subscribers,¹⁸⁶ and the speech was unlikely to be chilled by punitive damages because it was motivated by profit-seeking.¹⁸⁷

While joining with Justice Powell to form the majority result in favor of Greenmoss Builders, the separate concurrences of Chief Justice Burger and Justice White substantively have more in common with each other than with Justice Powell's opinion. The Chief Justice, noting that he had dissented in

than full first amendment status. He supplemented this showing of different treatment of varying types of speech by noting the acceptability of state licensing of lawyers, psychiatrists and public school teachers when the same action as to union organizers had been determined violative of the first amendment. *Id.* at 2945 n.5.

181. *Id.* at 2944-46. One example of a purely private matter is the unauthorized letter a motorcycle dealer sent to his distributor complaining of bad service rendered by a competing dealer. *Harley-Davidson Motorsports v. Markley*, 279 Or. at 361, 568 P.2d at 1359. *See, e.g., COMMUNICATIONS LAW, supra* note 112, at 40-43.

182. *Greenmoss*, 105 S. Ct. at 2946.

183. *Id.* at 2947. This characterization of a "matter of public concern" is central to a determination of the free speech rights of public employees. The interest competing with the employee's right to speak on such matters is the right of an employer to efficiently manage an organization. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (firing of teacher who wrote letter to newspaper criticizing school budget allocations an infringement of protected first amendment speech). In *Connick v. Myers*, 461 U.S. 138 (1983), the Supreme Court upheld the termination of an assistant district attorney for distributing a questionnaire to elicit employee views on items such as a grievance committee, office transfers, and pressure to work in the political campaigns of office-supported candidates. *Id.* at 155 (Appendix to Opinion of the Court). By a five-member majority, the Court ruled that the questionnaire, as a whole, did not address a matter of public concern. *Id.* at 154. Therefore, no balancing of the competing free speech and effective management issues was necessary. *Id.* at 146. Justices Marshall, Blackmun, and Stevens joined in a dissent written by Justice Brennan. *Id.* at 156 (Brennan, J., dissenting). *See generally* Note, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U.L. REV. 429 (1984).

184. *Greenmoss*, 105 S. Ct. at 2947 (quoting *Connick*, 461 U.S. at 147-48).

185. 105 S. Ct. at 2947.

186. *Id.*

187. *Id.*

Gertz, declared that *Gertz* is limited to matters of general public importance¹⁸⁸ and called for it to be overruled.¹⁸⁹ Concluding that the instant case “relates to a matter of essentially private concern,” Chief Justice Burger agreed with Justice Powell that *Gertz* was inapplicable.¹⁹⁰

After reflecting upon the development of modern defamation law, Justice White, in his concurrence, concluded that *Sullivan* struck an “improvident balance” between the public’s interest in its officials and the reputational interest of the person being defamed.¹⁹¹ He continued to adhere to the underlying assumption of *Sullivan* that the free flow of information is crucial in a self-governing country. Nonetheless, Justice White was convinced that *Sullivan* and *Gertz* were “severe overkill” for accomplishing their legitimate purpose.¹⁹² Moreover, false statements about public officials, which *Sullivan* protects absent a showing of actual malice, pollute the information stream with falsehoods and actually undercut the first amendment’s goal of transmitting information to citizens.¹⁹³ Justice White reasserted the position he expressed in his *Gertz* dissent that the common law approach was preferable for private libel plaintiffs. This approach provided what libel plaintiffs usually want most, restoring their good names.¹⁹⁴ Further, limits on recoverable damages would ensure that the media were not dissuaded from aggressively doing their jobs.¹⁹⁵ Notwithstanding his own objections to *Gertz*, however, Justice White noted that the plurality ostensibly relied on it but, in fact, reinterpreted it.¹⁹⁶ He concluded that *Gertz* was intended for all cases of false facts injurious to reputation.¹⁹⁷

In his dissent,¹⁹⁸ Justice Brennan articulated two principles upon which the full Court agreed: first, that *Sullivan*’s actual malice requirements applied to public officials and public figures, and, second, that the *Gertz* punitive damages formulation should be maintained for matters of public

188. *Id.*

189. *Id.* at 2948 (Burger, C.J., concurring). Chief Justice Burger preferred instead to return to the pre-*Gertz* era “to allow this area of law to continue to evolve as it [had] up to [then] with respect to private citizens rather than embark on a new doctrinal theory which [had] no jurisprudential ancestry.” *Id.* (Burger, C.J., concurring) (quoting *Gertz*, 418 U.S. at 355 (Burger, C.J., dissenting)). See *supra* notes 124-25 and accompanying text.

190. *Greenmoss*, 105 S. Ct. at 2947.

191. *Id.* at 2950 (White, J., concurring). See, e.g., *supra* note 41 and accompanying text.

192. 105 S. Ct. at 2952 (White, J., concurring).

193. *Id.* at 2951 (White, J., concurring). Justice White also noted that the incidents of reputations destroyed when reasonable investigatory efforts could have avoided these “grossly perverse results.” *Id.* (White, J., concurring).

194. *Id.* at 2953 (White, J., concurring). See *supra* note 135 and accompanying text.

195. 105 S. Ct. at 2953 (White, J., concurring).

196. *Id.* at 2952-53 (White, J., concurring). See *infra* note 226 and accompanying text.

197. 105 S. Ct. at 2952-53 (White, J., concurring).

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

concern.¹⁹⁹ He also rejected the distinction between media and nonmedia defendants urged by respondent Greenmoss Builders. The worth of speech, he observed, is not dependent on its source.²⁰⁰ Instead, the traditional focus of the courts has been to promote the first amendment. He concluded that the argument that *Gertz* should be limited to the media “misapprehends” the relevant case law.²⁰¹ Further, to make such a distinction would plunge the courts into the quagmire of deciding who is a member of the institutional press.²⁰² Justice Brennan refuted the idea that the small number of subscribers and the specialized nature of the information constituted a clear media/nonmedia line “consistent with First Amendment principles.”²⁰³

The conviction underlying Justice Brennan’s opinion is that libel regulation is analogous to other state measures which deter speech otherwise protected by the first amendment.²⁰⁴ Moreover, the partial constitutionalization of defamation law developed because the state measures presented

199. *Id.* (Brennan, J., dissenting). In outlining this common ground, Justice Brennan may be narrowing the opinion’s future precedential scope.

200. *Id.* at 2957 (Brennan, J., dissenting) (quoting *Bellotti*, 435 U.S. at 777).

201. *Id.* at 2958 (Brennan, J., dissenting). Justice Brennan emphasized: “We protect the press to ensure the vitality of First Amendment guarantees. This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection.” *Id.* (Brennan, J., dissenting). This media/nonmedia dichotomy was addressed quite profoundly by Justice Potter Stewart in 1975. He stated that the free press clause, wholly distinct from the clause guaranteeing freedom of speech, extends protection to an institution. “The publishing business is, in short, the only organized private business that is given explicit constitutional protection” Stewart, “*Or of the Press*,” 26 *HASTING L.J.* 631, 633 (1975). “If the Free Press guarantee meant no more than the freedom of expression, it would be a constitutional redundancy.” *Id.* Justice Stewart further explained that the primary purpose of the free press guarantee was “to create a fourth institution outside the Government as an additional check on the three official branches.” *Id.* at 634. See Nimmer, *Introduction—Is Freedom of the Press a Redundancy? What Does it Add to Freedom of Speech?*, 26 *HASTINGS L.J.* 639, 656 (1975). This view of the institutional press as imbued with a separate purpose and requiring distinct treatment underlies *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977) (free press clause extricates editorial judgment from some discovery procedures in a civil action), *rev’d*, 441 U.S. 153 (1979). For the Supreme Court discussion on this issue, see *supra* note 88.

Justice Brennan relies extensively on *Bellotti* in this section of his dissent. In that case the Supreme Court struck down a Massachusetts statute that prohibited corporations from attempting to sway the outcome of referendums concerning public issues that affected their assets or business. *Bellotti*, 435 U.S. 765. Justice Powell, who wrote the *Bellotti* majority opinion, noted that the institutional press does have a distinct role in the scheme of self-government. However, he concluded that “[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.” *Id.* at 777.

202. 105 S. Ct. at 2957 (Brennan, J., dissenting). Justice Brennan highlighted this difficulty by attempting to categorize *Dun & Bradstreet*. *Id.* at 2957 n.6 (Brennan, J., dissenting).

203. *Id.* at 2957 n.6 (Brennan, J., dissenting).

204. *Id.* at 2955 (Brennan, J., dissenting). Justice Brennan specifically noted measures to control obscenity, as well as others to ensure loyalty, protect consumers or oversee professions through regulation of speech.

such a grave potential compromise to the first amendment. Such potential danger necessitated the use of delicately crafted tools to ensure protection of free expression.²⁰⁵ He found that the unconstrained availability of presumed and punitive damages is “too blunt a regulatory instrument” to satisfy the first amendment’s anathema of content-based regulation.²⁰⁶ This was true even when the alleged libel did not directly implicate speech at the core of the first amendment.²⁰⁷ These perils in turn gave birth to *Gertz*. Justice Brennan vehemently attacked what he saw as Justice Powell’s dilution of the scope of the protections *Gertz* instilled.²⁰⁸ He asserted that the plurality’s detailed explanation of the balancing in *Gertz* actually side-stepped its primary dictate that any regulation in this area must be narrowly tailored to its purpose.²⁰⁹ In Justice Brennan’s view, *Gertz* went beyond this to find that punitive damages were not merely too broad to accomplish their purpose of redressing harm to reputation but “wholly irrelevant” to it.²¹⁰ He stated that the existence in many states of a common law, qualified privilege for credit reports belied the fact that this type of speech was susceptible to being chilled.²¹¹ Justice Brennan asserted that credit reporting did not comport with the Court’s definition of commercial speech, which is accorded less, though still substantial, first amendment protection.²¹² Moreover, speech of an economic nature should never be relegated to lower first amendment standing even if the majority’s public concern determinant were to be instituted.²¹³ Therefore, even in the event that the credit report were adjudged

205. *Id.* at 2956 (Brennan, J., dissenting).

206. *Id.* (Brennan, J., dissenting).

207. *Id.* (Brennan, J., dissenting). Justice Harlan earlier also perceived a great threat in sanctions which were too broad and too available. He thus urged in his *Rosenbloom* dissent that the Court restrict punitive damages when only private persons and their private concerns were involved. *See supra* note 96.

208. *Id.* at 2959 n.11 (Brennan, J., dissenting) (“One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern.”) *Accord see supra* notes 196-97 and accompanying text (discussing Justice White’s concurrence).

209. *Cf. Lowe v. SEC*, 105 S. Ct. 2557, 2585-86 (1985) (White, J., concurring in result); *accord Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 565-66 (1980).

210. 105 S. Ct. at 2964 (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 350). *But see id.* at 2944 n.4 (Powell, J.) (all such statements in *Gertz* referred only to the public speech context).

211. *Id.* at 2963 (Brennan, J., dissenting). Vermont, however, had no such privilege for credit reporting services. *See supra* note 60 and accompanying text; *see also generally* Maurer, *supra* note 18, at 99-105.

212. 105 S. Ct. at 2962 (Brennan, J., dissenting). *See supra* note 175, for a discussion of the commercial speech doctrine.

213. 105 S. Ct. at 2962 (Brennan, J., dissenting).

to be private, it was still worthy of first amendment protection.²¹⁴ Finally, Justice Brennan criticized Justice White and Justice Powell for proclaiming a public concern determinant for protection without guidelines for the lower court judges and jurors who will be called upon to grapple with it.²¹⁵

III. THE MEANING OF *GREENMOSS* AND A MODEST PROPOSAL

A. *The Greenmoss Decision: Creating a New Layer in Libel Litigation*

The Court in *Dun & Bradstreet, Inc. v. Greenmoss Builders* materially changed the direction of defamation law. First, the decision requires the trial court to determine the public or private status of the challenged expression as well as of the litigants. As a result, a subject matter classification, a mechanism the Court allows only under the narrowest circumstances in order to preserve freedom of expression,²¹⁶ now determines when a defamation defendant is susceptible to presumed and punitive damages. Under *Greenmoss* these damages will be more available, implicating, by powerful analogy, the fundamental first amendment principle that measures which directly inhibit freedom of expression must be precisely defined in order to be sustained.²¹⁷ Second, the *Greenmoss* determinant's scant definition impedes the efficacy of libel litigation. The practical effect of the decision may be illustrated by one scenario it actually establishes and by another it suggests. When a private libel plaintiff, as determined by cases beginning with *Sullivan* and ending with *Hutchinson*, brings an action, the defendant may be liable for the defamatory falsehood upon a finding of fault.²¹⁸ Before *Greenmoss*, the suit would end with the plaintiff entitled to those damages determined by the jury as compensation for the injury. If the plaintiff could prove actual malice, punitive damages would be added to this sum. After *Greenmoss*, with the same private libel plaintiff, the jury would make the same liability

214. *Id.* (Brennan, J., dissenting). Cf. *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905 (1971) ("The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression." (Douglas, J., dissenting from denial of cert.)).

215. 105 S. Ct. at 2960 (Brennan, J., dissenting).

216. See *infra* note 241 and accompanying text. Prior to Justice Rehnquist's statement in *Firestone*, 424 U.S. at 456, the Court had avoided stressing subject matter criteria. See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."); *Sullivan*, 376 U.S. at 271 ("The constitutional protection does not turn upon 'the truth, popularity or social utility of the ideas and beliefs which are offered.'" (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963))).

217. See *infra* notes 243-44, for a brief discussion of the overbreadth and void-for-vagueness doctrines.

218. The actual standard of fault, of course, is left to the individual states in accord with *Gertz*. See *supra* note 114 and accompanying text.

determination based on fault. It would then determine whether the challenged statement was a matter of public concern. If it was public, the result would be the same as above: the successful plaintiff would receive compensatory damages and punitive damages only on the finding of actual malice. If, however, the challenged statement was a matter of private concern, the plaintiff could, based only on the defendant's fault, receive punitive damages.²¹⁹

In the scenario that *Greenmoss* suggests, a public official or public figure, as determined by the *Sullivan-Butts* decisions, prevails by demonstrating the defendant's actual malice. Before *Greenmoss*, the plaintiff would receive only actual damages and the suit would end following the jury's decision on an award necessary to compensate the public figure for reputational injury. After *Greenmoss*, the jury would also assess the nature of the challenged statement. If the statement were public, *Gertz* requires that the actual malice that leads to liability also produces punitive damages for the plaintiff. If the statement were private, however, *Greenmoss* suggests that the court may award punitive damages without proof of actual malice. Thus the *Greenmoss* ruling and implications present a puzzle and a thicket. The puzzle is how trial courts will recognize a matter of *Greenmoss* "public" as opposed to "private" concern.²²⁰ The thicket is an intellectual one caused by the discomfort of knowing that this determination may trigger a court's vastly different defamation treatment of articles in the very same publication.²²¹

The cornerstone of *Greenmoss* is, of course, the public concern determinant for allowable damages. But prior to any close examination of it, two prefatory matters bear attention: Justice Powell's characterization of *Gertz* and the source of the public concern test. Justice Powell creates the analytic maneuvering room to introduce the test by shrinking the scope of *Gertz* to public speech alone. He does this while feigning allegiance to the landmark decision.

Justice Powell was technically correct when he stated that *Gertz* did not

219. This instance describes the *Greenmoss* facts.

220. Justice Brennan's *Gertz* dissent asserted that trial courts could draw guidance from the accumulated case law to determine the existence of a matter of public concern. 418 U.S. at 369 (Brennan, J., dissenting). See *supra* notes 130-31 and accompanying text. This has become an even less persuasive proposition in light of Justice Brennan's rejection of the *Greenmoss* public concern determinant partially for lack of guidelines. See *supra* note 215 and accompanying text.

221. One commentator described this new first amendment hierarchy with "editorials and 'political' news items at its apex, 'economic' and business news somewhere further down, Parade magazine next, followed finally by advertisements and classified." Wiley & Frank, *Complications for Libel Defense Increased by Greenmoss Ruling*, NAT'L L.J., Oct. 7, 1985, at 33, col. 4. "This analysis would seem to leave unclear only the proper legal standard to be applied to the comics." *Id.*

decide how a future court would balance the state's interest in compensating private individuals against the first amendment interest "regardless of the type of speech involved."²²² Concededly, the Court did not proclaim any comprehensive result for all types of expression because that was not the issue before it; the case centered on categories of persons rather than on categories of speech. Indeed, the only category of speech *Gertz* explored was defamatory falsehoods. The issue was how to treat varying types of persons aggrieved by this speech. Undeniably, *Gertz* arose in a public context, just as Justice Powell asserted. The challenged statements were published in a magazine disseminated throughout the nation.²²³ However, because categories of speech were not squarely before the Court, *Gertz* belies no intent to be restricted to public speech alone. This is made clear by the plurality, which refers to the "context" of *Gertz* rather than relying upon restrictive language in the decision itself.²²⁴ That the limitation to public speech is inherent in the context is unpersuasive. This flaw is not only underscored by the dissent²²⁵ but by Justice White's concurrence as well. Although Justice White did not assent to its tenets, he correctly recognized that the *Gertz* holding extended to all false reports.²²⁶ The *Greenmoss* plurality, therefore, gives no convincing reason for its compression of *Gertz*. Yet this reinterpretation of *Gertz* is the gateway to its *Greenmoss* decision.²²⁷

The public concern test is further weakened by its development in an un-

222. See *supra* note 179 and accompanying text.

223. See *supra* note 102 and accompanying text.

224. 105 S. Ct. at 2944 n.4. See generally *supra* note 179 and accompanying text.

225. 105 S. Ct. at 2959 (Brennan, J., dissenting). See *supra* note 208 and accompanying text.

226. 105 S. Ct. at 2952-53 (White, J., concurring). See *supra* notes 196-97 and accompanying text. The concurrence of Justice White, which called for *Gertz* to be overruled, is preferred if for no other reason than that it correctly perceived the importance of that seminal ruling.

227. In a footnote, Justice Powell charges that the dissent's view of *Gertz* would, in effect, constitutionalize all of common law libel. 105 S. Ct. at 2946 n.7. By way of example he asserted that a woman whose character was compromised by the comments of a jealous neighbor would have "no effective recourse" without proving actual malice by clear and convincing evidence. This misapprehends the nature of the *Greenmoss* case. *Greenmoss* concerns damages, not liability. In the above example, the dissent's view poses no threat to liability. Under *Gertz*, this woman no doubt would be adjudged a private figure. Therefore, the neighbor's liability would be determined not by a specified Supreme Court dictate, but by the state's own standard of fault that could range from negligence to actual malice; she would be accorded all actual damages. Moreover, as noted earlier, the actual damages included in this calculus can include recovery for mental anguish and humiliation. See *supra* notes 57-59 and accompanying text. In this regard, Justice White's observation that most libel plaintiffs, whether public figures or private individuals, are more interested in restoring their good names than in recovering monetary damages is particularly instructive. 105 S. Ct. at 2953 (White, J., concurring). See *supra* note 135 and accompanying text. This assertion is supported in at least one instance. Ariel Sharon is quoted as having said that the \$50 million damages he was seeking in his suit against Time, Inc. was not important to him; he sought that sum simply "to have the case be

related area of law, the public employee context of *Connick v. Myers*.²²⁸ This reliance is questionable as it misapprehends the full nature of the interests involved in these cases. When dealing with government employees, the state interest is "the maintenance of employee efficiency and discipline,"²²⁹ a factor essential for the government "to perform its responsibilities effectively and economically."²³⁰ This consideration is weighed against the freedom of speech of the individual employee. In defamation cases, however, both parties to a suit possess these personal, rather than governmental or monetary, interests. While litigated as the state's right to redress reputational harm to its citizens, one must remember that the true plaintiff in any defamation action is usually the individual citizen. That person has a strong interest in a good name,²³¹ or, at least, in a name not sullied falsely, with reckless disregard of the truth of the damning remark. The opponent brings to the defamation litigation the freedom of expression, another "individualized," nongovernmental interest.²³² Thus, the concerns in government employment and in defamation cases diverge widely. As a result, the public concern determinant most fully developed in the government employee setting does not effectively transfer into the defamation sphere.²³³ This foreign origin of the public concern determinant seriously undercuts the *Greenmoss* plurality's heavy reliance upon it.²³⁴

taken seriously." Denton, *Time Item on Sharon Found False*, Wash. Post, Jan. 19, 1985, at A8, col. 6.

228. 461 U.S. 138 (1983). See *supra* notes 183-84 and accompanying text.

229. *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring in part).

230. *Id.* (Powell, J., concurring in part).

231. See generally *supra* notes 1, 6.

232. Of course this freedom is not absolute and carries with it responsibilities. See, e.g., *Breard v. Alexandria*, 341 U.S. 622, 642 (1951) ("freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved."). See also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771 (false advertising claims not protected); *Roth v. United States*, 354 U.S. 476, 483 (1957) (obscene speech not protected); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (first amendment would not protect the false shouts of fire in a theater).

233. Justice Brennan fully recognized this fact when he noted that *Connick* limited its distinction between public and private concern to the government employment context. 105 S. Ct. at 2962 n.14 (Brennan, J., dissenting) (citing *Connick*, 461 U.S. at 148 & n.8).

234. The *Greenmoss* test is not wholly without merit. Designed to function in conjunction with the *Sullivan-Butts-Gertz* public figure test for liability, this coupling of tests is an honest and positive recognition of the interplay between the person and the event and of the true inquiry that courts had heretofore labeled solely its plaintiff-based analysis. Justice Powell recognized the existence of this person-and-event connection in *Gertz* when he observed that an individual could be a public figure for some specified public controversy. The *Firestone* analysis underscores this interdependence although Justice Rehnquist did not so identify it. One of the rationales for finding *Firestone* a private person for defamation purposes was that divorces of the rich were not the "sort of 'public controversy' referred to in *Gertz*." 424 U.S. at

Having explored the issues tangential to the public concern determinant, an examination of the test itself and its jurisprudential setting is appropriate. Generically, the *Greenmoss* test is a subject matter classification. In this way, as Justice Brennan points out, it is analogous to other state measures which impinge on the freedom of expression.²³⁵ Its operation and effect "must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied."²³⁶ As a result, the test should comport at least minimally with fundamental principles of constitutional law. In addition, *Greenmoss*' public concern test resembles the "public event" determination briefly instilled by the Court in *Rosenbloom*.²³⁷ Indeed, these two tests are similar enough that the reasons for the recantation of *Rosenbloom* reveal the defects of the new *Greenmoss* framework as well.

A measure which may deter exercise of the freedom of expression, such as a subject matter classification, is dangerous. The peril is not in its mere existence, however, but in its potential. It has within it the power to violate the first amendment.²³⁸ The *Gertz* Court acknowledged the danger of potential first amendment compromises when Justice Powell, later the author of *Greenmoss*, expressed the Court's doubt of the wisdom of committing the task of determining what is of general or public interest to the conscience of judges. In conferring this power upon the courts, Justice Powell feared that neither of the competing interests would be adequately served.²³⁹ This led to the demise of *Rosenbloom*.²⁴⁰ In *Firestone*, Justice Rehnquist underscored that subject matter classifications often improperly balance these competing interests. "It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff."²⁴¹ In practice, the

454. See *supra* notes 144-48, 162, and accompanying text; see also J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 112, at 951-52.

235. *Greenmoss*, 105 S. Ct. at 2955-56 (Brennan, J., dissenting). See *supra* note 204 and accompanying text.

236. *Speiser v. Randall*, 357 U.S. 513, 520 (1958), quoted in *Greenmoss*, 105 S. Ct. at 2956 (Brennan, J., dissenting).

237. 403 U.S. 29 (1971). See *supra* notes 89-97 and accompanying text.

238. See *supra* note 216. As the *Greenmoss* plurality correctly points out, the existence of such a classification is not reprehensible in itself because freedom of expression is no absolute right; see, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 112, at 865-67.

239. 418 U.S. at 346.

240. See *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting). See also *supra* note 96. Justice Marshall added that this approach also threatens the private plaintiff's ability to succeed using a lower standard because "all human events are arguably within the area of 'public or general concern.'" 403 U.S. at 79 (Marshall, J., dissenting).

241. 424 U.S. at 456.

new public concern test would require precisely these same decisions on the part of trial judges and juries. It appears that even Justice Brennan, who crafted the *Rosenbloom* general interest standard, has acknowledged the difficulty. His *Greenmoss* dissent repudiates the test as exceeding the bounds of acceptable subject matter criteria.²⁴²

What is an acceptable subject matter classification in light of this latent danger is tied to how precisely it accomplishes its legitimate purpose. When even one iota broader than it must be to accomplish its task, this classification intolerably violates the Constitution and is disallowed.²⁴³ One cannot measure how narrowly a scheme is tailored to its purpose when little clarity exists as to the scheme itself. Here, uncertainty as to the elements of the test constitutes an additional obstacle to its adherence to fundamental constitutional principles.²⁴⁴ Indeed, this is a puzzle.

242. See *supra* notes 204-06 and accompanying text.

243. See *supra* note 207 and accompanying text. General, though fundamental, constitutional law principles, which recognize the importance of freedom of speech, dictate that "even when the state does have the power to regulate an area, it 'must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.'" *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940), quoted in J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 112, at 868. Moreover, such measures must be designed with "narrow specificity." *NAACP v. Button*, 371 U.S. at 433 (citing *Cantwell*, 310 U.S. at 311). A measure is overbroad when it brings within its prohibitions protected as well as unprotected speech. Justice Brennan was correct when he stated that the requirement of narrowly tailored regulatory measures simply prohibits presumed and punitive damages on less than an actual malice showing. 105 S. Ct. at 2956 (Brennan, J., dissenting).

244. The *Rosenbloom* and *Greenmoss* tests also share a lack of specificity. It is quite telling that Justice Marshall's disapproval of Justice Brennan's *Rosenbloom* public event test for liability, lack of guidelines for lower courts, is precisely the criticism that Justice Brennan, writing the *Greenmoss* dissent, had for the *Greenmoss* plurality's public concern test. Justice Marshall found in *Rosenbloom*: "My Brother Brennan does not try to provide guidelines or standards by which courts are to decide the scope of public concern." 403 U.S. at 79 (Marshall, J., dissenting). In *Greenmoss*, Justice Brennan attempted without success to cull the key factors for this public concern determination from the plurality's virtually nonexistent discussion. 105 S. Ct. at 2960 (Brennan, J., dissenting). See *supra* note 215 and accompanying text.

First amendment freedoms are "delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of the sanctions." *Button*, 371 U.S. at 433, quoted in J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 112, at 872. Therefore, vagueness in a measure may be fatal: it gives insufficient guidance as to what expression comes within its prohibitions. The two doctrines of overbreadth and vagueness are distinct but closely related. Were the *Greenmoss* public concern determinant to be tested against these principles, it would fail on both. As to vagueness, it gives no guidance to courts or to individuals subject to it as to what expression could expose them to the hefty monetary punishment of punitive damages. As to overbreadth, Justice Brennan was correct when he concluded that the increased availability of punitive damages and the attendant jury discretion that this framework creates, is "too blunt" an instrument to be tolerated in light of the first amendment interest. *Greenmoss*, 105 S. Ct. at 2956 (Brennan, J., dissenting). This is the reason such an instrument negatively impacts even "private" speech. See *supra* notes 48, 207, 214, and accompanying text.

The public concern test is variously characterized as determining "matters of public concern";²⁴⁵ matters of "general public importance";²⁴⁶ and a "matter of public importance."²⁴⁷ The only insight into what this means is, in reality, a veiled and inept distinction between media and nonmedia entities. The Court concluded that the credit report was merely a private matter relying partly on the fact that only five persons received the information.²⁴⁸ The Court thus tumbled into a circulation-based definition of "media": large enough numbers somehow make one valid "media." This suggests that only items transmitted by "valid" media are of public concern.

Justice Powell's second definitional guide also builds on this media notion and is equally unhelpful. That the credit report was only of interest to its specific business subscribers²⁴⁹ simply cannot be the basis for determining whether an expression is of public concern. This analysis ignores the subscriber-supported communications technologies in an era of narrow casting in which programming is designed for small audiences who are willing to pay for it. In this way, such programming is offered to a customer in a relationship similar to the one Dun & Bradstreet has with its own subscribers. Because few avail themselves of the opportunity to subscribe to the programming does not automatically mean that the programming is not of interest, or importance, to others.²⁵⁰ Thus, it is conceivable that, under Justice Powell's view, programming for which viewers subscribe through enhanced cable services may not be deemed of public concern because it is supported only by a relatively small, interested subscriber base. Using Justice Powell's media terminology, the exclusive subscriber relationship of the customer and operator makes the provider a nonmedia entity. In fact, it is beyond dispute that cable is a form of media.²⁵¹

In sum, the plurality has recreated its own recent history, albeit in modified form. It has promulgated an unusable and untenable subject matter classification. In so doing, it returns defamation litigation to the dangerous path that *Gertz* already once corrected. *Greenmoss* now requires the Court to right itself once again.

245. 105 S. Ct. at 2945 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101 (1940)).

246. *Id.* at 2948 (Burger, C.J., concurring).

247. *Id.* at 2953 (White, J., concurring).

248. *Id.* at 2947. See *supra* note 38 and accompanying text.

249. 105 S. Ct. at 2947.

250. This was precisely Justice Marshall's message in his *Rosenbloom* dissent when he stated his fears in leaving the decisions of what is important to self-government to the conscience of judges and juries. See *supra* note 96. In addition, information relating to a company's financial health may be of great importance not only to creditors but to employees or a local economy as well.

251. See, e.g., *Greenmoss*, 105 S. Ct. at 2957-58 nn.6-7 (Brennan, J., dissenting).

B. *Greenmoss Reconsidered: A Modest Proposal for Effective Defamation Litigation*

Defamation is a particularly complex area of law, a fact highlighted recently by the fragmented *Greenmoss* opinion. Trial courts are already called upon to decide the public or private status of a defamation plaintiff without significant guidance from the Supreme Court. In *Greenmoss*, the Court has created another layer of inquiry with equally little direction. The reduction of first amendment protection for the exercise of unfettered expression that *Greenmoss* produces need not have happened. Instead, the *Greenmoss* Court could have left *Gertz* intact and still protected the reputation interests of private libel plaintiffs. *Gertz* struck an appropriate balance between the competing interests of compensating defamed individuals and of preserving the exercise of free expression to the extent that it instilled some fault standard for liability and narrowed the possibility for punitive damages.²⁵² Thus, it is worthy of judicial allegiance rather than the reinterpretation the *Greenmoss* plurality gave it. To increase the incidence of punishment when a private individual is the libel plaintiff is to assert, in essence, that expression is somehow less precious a freedom when exercised in private, that is, when expression is whispered rather than roared. This cannot be.²⁵³ However, the wholly legitimate goals of defamed individuals to be vindicated and compensated can be much better served within the *Gertz* framework than is presently the common experience.

Justice White alluded to one aspect of the proper course to improve libel litigation when he referred to separate verdicts as a means of restoring a

252. This discussion is framed in the context of not eroding *Gertz*, which acknowledged the inappropriateness of punitive damages absent the actual malice finding "where the underlying aim of the law is to compensate for harm actually caused." *Rosenbloom*, 403 U.S. at 73 (Harlan, J., dissenting), quoted in *Greenmoss*, 105 S. Ct. at 2956 (Brennan, J., dissenting). See *supra* note 96. This, of course, was the impetus for Justice Powell's conclusion in *Gertz* that punitive damages are "wholly irrelevant" to the state's legitimate compensatory purpose. *Gertz*, 418 U.S. at 350. See, e.g., *supra* notes 112-13 and accompanying text. However, the author is convinced that the most prudent constitutional course is to abolish the possibility of punitive damages in the context of libel litigation altogether. In this, the author finds Justice Marshall's *Rosenbloom* dissent highly persuasive. See *supra* note 96; see also *Spokane Truck & Dray Co. v. Hofer*, 2 Wash. 45, 25 P. 1072 (1891) ("punitive damages cannot be allowed on the theory that it is for the benefit of society at large [which is protected by the criminal law], but must logically be allowed on the theory that they are for the sole benefit of the plaintiff, who has already been fully compensated; a theory which is repugnant to every sense of justice"), quoted in R. SACK, *supra* note 55, at 351 n.47.

253. See *United States v. UAW*, 352 U.S. 567, 595 (1957) ("But the size of the audience has heretofore been deemed wholly irrelevant to First Amendment issues. One has a right to freedom of speech whether he talks to one person or to one thousand."). See generally M. NIMMER, *NIMMER ON FREEDOM OF SPEECH* § 3.02 (1984).

defamed plaintiff's scarred reputation.²⁵⁴ Such separate verdicts, as opposed to one general verdict, are not new to tort litigation. They require the jurors to answer the specific, interim questions which lead to their overall verdict. In the context of defamation litigation concerning a private individual, the trier of fact must make six determinations: first, the challenged statement was defamatory; second, the statement was false; third, the defendant acted negligently (or consistent with that state's standard for liability, if it is not negligence); fourth, what damage award would compensate the plaintiff for the actual harm of the false, defamatory, negligently inflicted statement;²⁵⁵ fifth, the defendant acted with actual malice; and sixth, what amount in punitive damages would deter the defendant's conduct in the future.²⁵⁶ These separate determinations expose defamatory falsehoods, thus paving the way for the plaintiff to regain the confidence of and friendly intercourse with right-thinking persons.²⁵⁷ Moreover, should the ultimate outcome of the case be appealed, a reviewing court would have a fuller, more specific record on which to make the independent examination that *Sullivan* instituted.²⁵⁸

The purely vindicatory function of the separate verdicts, as distinguished from the compensatory function, is greatly enhanced when such verdicts are coupled with a judicial pronouncement as to the true nature of the challenged statement. This declaration would follow affirmative answers to the first and second questions posed to the jury. That is, the jury would have found the challenged statement to be both defamatory and false. Declara-

254. *Greenmoss*, 105 S. Ct. at 2950 n.2 (White, J., concurring). Justice White's discussion in *Gertz* is also helpful in underscoring the importance of the vindicatory function of defamation common law. See *supra* notes 135, 227, and accompanying text.

United States District Court Judge Abraham D. Sofaer, presiding over the *Sharon* case, uniquely used such separate verdicts by requiring the jurors to announce their conclusion on each issue as their deliberations proceeded. See *supra* note 41. The questions there, of course, were tailored to public figure defamation litigation. While Judge Sofaer's goal was for the trial to produce a just result, the separate announcements were particularly appropriate in the context of the "media circus" attending that internationally watched case. The announcements provided separate media events for each stage of decisionmaking. As it turned out, this enhanced Sharon's ability to vindicate his reputation in connection with the massacre of hundreds of Palestinian refugees in Beirut. See Kaplan, *The Judge's Postmortem of the Sharon Libel Trial*, NAT'L L.J., Mar. 18, 1985, at 1, col. 1. This media byproduct of the separate announcements is, of course, unlikely in a private defamation case, leaving the primary merit of a just result with as little confusion as possible in jury instructions.

255. The trial judge, of course, would closely examine this amount to ensure that these damages are truly compensatory and not merely disguising presumed damages.

256. Purposefully absent from these inquiries are the questions whether the defendant is a member of the media and whether the challenged statement is a matter of public concern.

257. See *supra* note 3 for a definition of defamation.

258. See *supra* notes 80, 142, and accompanying text. The Court's inability to determine exactly what went into the jury's general verdict in that case was the reason it was remanded. *Sullivan*, 376 U.S. at 284.

tory relief alone is said to have little appeal to the plaintiff confident of proving fault and thus able to receive compensatory damages.²⁵⁹ However, when a declaratory pronouncement is not an alternative to litigation but a part of it²⁶⁰ injected after the second jury verdict, it actually achieves the same goal as the vindicatory function of libel per se liability. It has a significant advantage, however, as it meets this goal without the violation to free expression that true liability brings. In this way, the court is functioning as a substitute for the private individual's lack of access to the media to rebut defamatory falsehoods.²⁶¹ The true liability finding, under *Gertz*, would only come following the jury's affirmative verdict as to the third question, that of fault. Moreover, by providing some relief for the plaintiff while maintaining the free exercise of expression interests of the defendant, the approach focuses in more closely on achieving its legitimate purposes. Thus, it more closely comports with fundamental constitutional law principles; it is one of the essential, "finer" instruments for handling these issues to which the *Greenmoss* dissent referred.²⁶²

Finally, for extremely rare instances, individual states would be free to take extraordinary measures²⁶³ to ensure that the private libel plaintiff is fully compensated for harm. As an example, the plaintiff could be allowed to petition the court during a specified time, such as between twelve and fifteen months from the initial judgment, for consideration of additional compensatory damages. This new action would be limited solely to this damages issue. If the plaintiff could demonstrate by clear and convincing proof that he or she suffered continued injury as the direct outgrowth of the earlier defamatory falsehood, the court could assess additional, reasonable compensatory damages. However, to discourage frivolous or nuisance suits, the court would also be free to deny any additional sums and to order that

259. See R. SACK, *supra* note 55, at 364; see also D. DOBBS, *supra* note 56, at 526 ("As appealing as this kind of remedy [the declaratory judgment] is for certain limited kinds of defamation, it is so clearly inadequate for the destruction of a man's career, that it holds little chance of wide use."). The notion of declaratory judgments cases involving the freedom of expression is not foreign to the members of the Court. Justice Brennan suggested such a remedy coupled with an order to correct in print the falsehood. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (Brennan, J., concurring), *noted in* Lewis, *supra* note 7, at 616 nn.7-8.

260. In confining this discussion to the context of defamation litigation, the author in no way intends to diminish the importance of summary judgments in this field. Such a disposal of the case at as early a stage as possible is overwhelmingly the preferred result. Similarly, this approach is not intended to substitute for or in any way weaken the strong appellate review established in *Sullivan*. See *supra* note 80 and accompanying text.

261. See *supra* notes 107-08 and accompanying text.

262. See *supra* notes 204-07, 243-44 and accompanying text.

263. This is consistent with the latitude *Gertz* established for states to continue developing their own defamation jurisprudence. See, e.g., *supra* note 114 and accompanying text.

the plaintiff pay all of defendant's court costs and attorney's fees associated with the second action. While such a call for more litigation might appear to further burden already crammed and backlogged dockets, it is really a trade-off in a post-*Greenmoss* world. With *Greenmoss*, the trial court is obligated to negotiate the tortures of the public concern determinant during the initial case, eating up precious court resources. Here, however, with the built-in deterrent of court costs and attorney's fees, the additional litigation would be utilized only rarely.

In sum, when separate verdicts are used in conjunction with both a declaratory pronouncement and the latitude established in *Gertz* for states to ensure that private libel plaintiffs are adequately compensated, society reaps twin benefits: helping restore the plaintiff's reputation while not compromising the defendant's freedom of expression.²⁶⁴

Had the proposed approach been followed in *Greenmoss*, at the conclusion of the presentation of evidence including proof of injury, the trial judge would divide the jury's charge and deliberations into separate components. First, the jury would have made a finding on whether the challenged statement was defamatory, relying for guidance on the state's decisional law.²⁶⁵ Secondly, the jury would have decided whether the credit report issued by Dun & Bradstreet was false. According to trial testimony, the answer here would be yes. Going no further in the proceeding, the trial court would have then issued a statement delineating the falsity and defamation of Dun & Bradstreet's initial report and clarifying the subsequent "blank rating."²⁶⁶ This would have given a public, judicial pronouncement of the statement's

264. Other reforms have also been proposed. One of the most prominent is that of Marc A. Franklin, Richman Professor of Law at Stanford University. Central to his plan is that absolutely no punitive damages would ever be allowed in libel cases. Secondly, he would eliminate the distinction between public and private figures. For those not interested in a money award, he would have states offer the option of a "no-fault" proceeding. Here a potential plaintiff would first seek a retraction by the defamation defendant. If that is denied, a judge would preside at a hearing to determine the truth or falsity of a published statement. Upon a finding of falsity, the judge would order a retraction by the media defendant. If a plaintiff cared to pursue money damages, however, he or she could do so with the loser required to pay the winner's attorney's fees. In this way frivolous suits for money damages would be discouraged. Franklin, *Good Names and Bad Law: A Critique of Libel Law and A Proposal*, 18 U.S.F.L. REV. 1, 35-49 (1983). This proposal has sparked some concern that it will leave judges and juries to decide the official truth in a case. This is said to be a danger in a free society and would also create "a hornet's nest of petty litigation." Hager & Rosenstiel, *Libel Battle: From Courts to Lawbooks*, Los Angeles Times, Feb. 20, 1985, pt. 1, at 12, col. 6.

265. The jury decides the defamatory nature of the particular statement following the judge's determination whether the statement may be so as a matter of law. H. OLECK, OLECK'S TORT LAW PRACTICE MANUAL § 217 (1982).

266. See *Greenmoss Builders v. Dun & Bradstreet*, 143 Vt. 66, 72, 461 A.2d 414, 416 (1983).

falsity and that Greenmoss Builders had thereby been wronged.²⁶⁷ This declaration would have implied that harm was a direct outflow of a false, defamatory statement. This declaration would be the sole remedy at this juncture rather than monetary damages. Thus, it would have vindicated the defamed, private individual while not potentially chilling expression.

Following the false and defamatory findings, however, the trier of fact's duties would not have ended. The jury would have then decided whether the defendant was at fault in communicating the defamatory falsehood. Again, in the instant case, because Dun & Bradstreet's routine procedure for verifying all information prior to publishing its reports had not been followed, it would likely have been found to be at fault. This would have triggered the jury's further decision as to whether Greenmoss would be entitled to compensatory damages, both general and special. Such an amount would have been, according to the court's instruction to the jury, reasonably related to the measure of injury which the plaintiff had presented to the jurors. As is currently the case, the trial judge could modify any jury award he or she deemed excessive to compensate for demonstrated injury. The last jury inquiry would have been whether, as demonstrated by clear and convincing proof, the defendant had acted with actual malice. If so, the private libel plaintiff would also be entitled to punitive damages, in accord with *Gertz*. If not, the initial suit would have drawn to an end. However, had the injury continued, Greenmoss could seek to prove with convincing clarity that the injury continued at a subsequent suit instituted during the period specified by the state.

IV. CONCLUSION

In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, the Supreme Court forced libel litigants into a more complex, treacherous defamation framework. The Court reconstrued its landmark *Gertz* decision and made presumed and punitive damage awards contingent on an inappropriately borrowed "public concern" determinant. The *Greenmoss* plurality narrowed free expression protection using a subject matter classification too broad and too vague to comport with established first amendment principles. Two of the gravest aspects of *Greenmoss* are the unsettling analysis with which the plurality arrived at its result and the lack of guidance it provided for lower courts. Libel litigation produces hardships for both plaintiffs and defend-

267. This step could be particularly effective in the *Greenmoss* case if the court declaration was sent to all those who received the original, false report. Dun & Bradstreet's confidential relationships with its subscribers could be guarded by revealing the names to the court only and making that information a sealed part of the judicial record.

ants; its present configuration dilutes the law's ability to effectively protect either party's interests. *Greenmoss* has made a bad situation worse. Indeed *Greenmoss*' ultimate significance may lie in the litigation it is sure to spawn, requiring the Court to reconsider²⁶⁸ and, one hopes, to rectify the direction of its defamation law jurisprudence.

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268. In so doing, the Court would be in accord with Justice Harlan, who changed his view from the time the Court decided *Butts* to the time it considered *Rosenbloom*: "Where matters are in flux . . . it is more important to re-think past conclusions than to adhere to them without question [as] the problem under consideration remains in a state of evolution" 403 U.S. at 72 n.3 (Harlan, J., dissenting).