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Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.: The Supreme Court Further Muddies the Defamation Waters

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**DUN & BRADSTREET, INC. v. GREENMOSS BUILDERS,
INC.: THE SUPREME COURT FURTHER
MUDDIES THE DEFAMATION WATERS**

I. INTRODUCTION

The first amendment protects free speech. Defamation law provides compensation for injuries to reputation. When the threat of having to pay that compensation hinders free speech, the two areas of law collide.

The United States Supreme Court recognized this conflict when it first thrust the Constitution into defamation law over twenty years ago in *New York Times Co. v. Sullivan*.¹ In *New York Times*, the Court invoked first amendment principles to make it more difficult for public officials to recover for defamation. At that time, the common law of defamation was a morass of archaic rules based on distinctions precipitated by historic accident.² Cases following *New York Times* resulted in further constitutional encroachment on the common law by making recovery equally as difficult for public figures³ and, finally, private individuals when a matter of public concern was involved.⁴ Constitutional defamation law evolved into as big a quagmire as the common law.

Because much of the common law had been supplanted through extension of *New York Times* to private individuals, the Court became concerned that it had intruded too far on the states' authority to regulate defamation laws. Thus, in *Gertz v. Robert Welch, Inc.*,⁵ the Court began to retreat. However, it did not allow a complete reemergence of common-law defamation principles. Instead, it formulated new rules to apply when private individuals are defamed.⁶

In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁷ the Court retreated even further, leaving private individuals defamed by speech not involving a matter of public concern firmly entrenched in the common

1. 376 U.S. 254 (1964).

2. See *infra* text accompanying notes 108-32.

3. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). See *infra* text accompanying notes 140-42 for a discussion of *Curtis*.

4. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). See *infra* text accompanying notes 143-45 for a discussion of *Rosenbloom*.

5. 418 U.S. 323 (1974). See *infra* text accompanying notes 146-66 for a discussion of *Gertz*.

6. See *infra* text accompanying notes 156-66.

7. 105 S. Ct. 2939 (1985).

law bog. If *Gertz* is viewed as the first step in turning defamation law back to the states, the result in *Greenmoss* is not surprising. The route by which the plurality reached its result, however, is. This Note will challenge the plurality's success in distinguishing *Greenmoss* from *Gertz* and its wisdom in reviving the "matter of public concern" test⁸ as a threshold for triggering the *Gertz* requirements. Additionally, this Note will propose a simplified defamation law framework designed to strike a workable balance between free speech and reputation interests.

II. STATEMENT OF THE CASE

A. *The Facts*

On July 26, 1976, Dun & Bradstreet, a credit reporting agency, sent a report to five of its subscribers stating that Greenmoss Builders (Greenmoss), a construction contractor, had voluntarily filed for bankruptcy.⁹ The report was not only false but a gross misrepresentation of Greenmoss' financial condition.¹⁰ That same day Greenmoss' bank informed Greenmoss' president that it had received the report.¹¹ The president immediately called Dun & Bradstreet's regional office and requested a correction.¹² He also requested the names of the other subscribers who had received the report so that he could personally be sure that they were made aware of the error.¹³

About a week later, upon verifying that the report was false, Dun & Bradstreet issued a corrective statement to the five subscribers involved.¹⁴ It refused, however, to reveal to Greenmoss the names of the firms that had received the report.¹⁵ Greenmoss, dissatisfied with the corrective measures taken by Dun & Bradstreet, brought a defamation action in Vermont state court alleging injury to reputation¹⁶ and seeking

8. See *infra* text accompanying notes 143-45.

9. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2941 (1985).

10. *Id.* The error resulted when one of Dun & Bradstreet's employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, mistakenly reported that Greenmoss had filed a petition for bankruptcy, when, in fact, it was one of Greenmoss' former employees who had filed the petition. Although it was routine for Dun & Bradstreet to verify the accuracy of such reports with the businesses involved, it did not do so before distributing the Greenmoss report. *Id.* at 2942.

11. *Id.* at 2941.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 2942.

16. Greenmoss claimed the damages which resulted from Dun & Bradstreet's report were a damaged business reputation, lost profits, and loss of money expended to correct the error.

presumed¹⁷ and punitive damages.¹⁸

The jury found in favor of Greenmoss and awarded \$50,000 in presumed and \$300,000 in punitive damages.¹⁹ Dun & Bradstreet moved for a new trial, arguing that under *Gertz v. Robert Welch, Inc.*²⁰ presumed and punitive damages were not recoverable unless the plaintiff showed knowledge of falsity or reckless disregard for the truth.²¹ It argued that the jury instructions had permitted an award of such damages based on a lesser standard.²² The trial court granted a new trial but the Vermont Supreme Court reversed, concluding that the rule of *Gertz* did not apply to a private plaintiff who had been defamed by a non-media defendant.²³

B. The Supreme Court Decision

1. The plurality opinion

Justice Powell announced the judgment of the Court in a plurality opinion in which Justice Rehnquist and Justice O'Connor joined. The Court held that when defamation against a private person did not involve a matter of public concern, presumed and punitive damages could be awarded even absent a showing of " 'actual malice' " ²⁴ and that Dun & Bradstreet's credit report did not involve a matter of public concern.²⁵

The Court granted certiorari to resolve the conflict among the state courts as to when the protections of *Gertz* apply.²⁶ The seeds of the con-

Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 69, 461 A.2d 414, 415 (1983), *aff'd*, 105 S. Ct. 2939 (1985).

17. See *infra* text accompanying notes 113-19.

18. See *infra* text accompanying notes 120-21. Greenmoss based its claim for punitive damages on the grounds that Dun & Bradstreet's conduct was insulting, reckless and in total disregard of Greenmoss' rights. *Greenmoss Builders v. Dun & Bradstreet*, 143 Vt. at 79, 461 A.2d at 420.

19. *Greenmoss*, 105 S. Ct. at 2942.

20. 418 U.S. 323 (1974).

21. *Greenmoss*, 105 S. Ct. at 2942.

22. *Id.*

23. *Id.* The Vermont Supreme Court held that "the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of 'nonmedia' speakers 'must be struck in favor of the private plaintiff defamed by a nonmedia defendant.'" *Id.* (quoting *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 75, 461 A.2d 414, 418 (1983), *aff'd*, 105 S. Ct. 2939 (1985)).

24. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2946 (1985).

25. *Id.* at 2947.

26. *Id.* at 2942. The Court contrasted *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982), *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980), *Rowe v. Metz*, 195 Colo. 424, 579 P.2d 83 (1978) and *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 568 P.2d 1359 (1977), in which courts found *Gertz* inapplicable to private figure suits against nonmedia defendants, with *Antwerp Diamond Exch. v. Better*

flict were planted in *New York Times Co. v. Sullivan*,²⁷ where the Court for the first time imposed first amendment limitations on state defamation law. The conflict ripened in the *Gertz* decision ten years later.²⁸

In *New York Times*, the Supreme Court recognized that the first amendment protected freedom of expression on issues of public interest and that "debate on public issues should be uninhibited, robust, and wide-open" ²⁹ To protect this freedom of expression from the chilling effect of state libel laws, the *New York Times* Court held that a public official could recover damages for defamation only by proving that "the false statement was made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not" ³⁰ The Court extended the actual malice requirement to libels of public figures in *Curtis Publishing Co. v. Butts*,³¹ a case that also involved a public issue.³² Additionally, in *Rosenbloom v. Metromedia, Inc.*,³³ the Court applied the *New York Times* protections to any plaintiff as long as the defamatory remarks involved "a matter of public or general interest."³⁴ However, in *Gertz* the Court retreated from *Rosenbloom* by expressly limiting the *New York Times* protections to defamations of public officials and figures.³⁵

Writing for the plurality in *Greenmoss*, Justice Powell noted that the *Gertz* Court applied a balancing test by weighing first amendment concerns against the legitimate state interest of compensating individuals for injury to reputation.³⁶ Because of the type of speech usually involved in the defamation of public officials and figures, the first amendment concerns outweighed a limited state interest.³⁷ When the libel concerned a

Business Bureau, 130 Ariz. 523, 637 P.2d 733 (1981) and *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976), in which the courts found *Gertz* applicable in such suits. *Greenmoss*, 105 S. Ct. at 2942.

27. 376 U.S. 254 (1964).

28. *Greenmoss*, 105 S. Ct. at 2943-44.

29. *Id.* at 2943 (quoting *New York Times*, 376 U.S. at 270) (emphasis added by *Greenmoss* Court).

30. *Id.* (quoting *New York Times*, 376 U.S. at 280). See *infra* text accompanying notes 133-39 for a discussion of *New York Times*.

31. 388 U.S. 130 (1967). See *infra* text accompanying notes 140-42 for a discussion of *Curtis*.

32. *Greenmoss*, 105 S. Ct. at 2943.

33. 403 U.S. 29 (1971). See *infra* text accompanying notes 143-45 for a discussion of *Rosenbloom*.

34. *Greenmoss*, 105 S. Ct. at 2943-44 (quoting *Rosenbloom*, 403 U.S. at 44).

35. *Id.* at 2944. See *infra* text accompanying notes 146-66 for a discussion of *Gertz*.

36. *Greenmoss*, 105 S. Ct. at 2944-45.

37. *Id.* at 2944. See *infra* text accompanying notes 149-52 for a discussion of why the *Gertz* Court concluded the state interest was limited when a public figure or public official was the plaintiff.

private person, however, the *Gertz* Court found the state to have a stronger interest. Because private persons did not voluntarily expose themselves to an increased risk of defamation and had less access to channels for rebutting false statements than did public officials and figures, first amendment concerns diminished.³⁸

In an attempt to reach an accommodation between the competing state and first amendment interests, Justice Powell noted that the *Gertz* Court placed a limitation on damages. It held that a state could not allow recovery of presumed or punitive damages without showing actual malice.³⁹ Although the *Gertz* Court did not unequivocally limit this prohibition to matters of public concern, Justice Powell concluded that nothing in the *Gertz* decision "indicated that this same balance would be struck regardless of the type of speech involved."⁴⁰ He argued that because *Gertz* was decided in the context of public speech, its holding could not be automatically applied to cases involving private speech.⁴¹

Justice Powell concluded that the *Gertz* requirement of showing actual malice to recover presumed and punitive damages applied only to defamatory statements of public concern. The plurality reasoned that the first amendment did not protect all speech equally. Only speech regarding " 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.' "⁴² While speech involving public issues demanded full first amendment protection, "speech on matters of purely private concern [was] of less First Amendment concern."⁴³ Justice Powell concluded that the Constitution's role in regulating state libel law was limited when matters of public concern were not involved.⁴⁴

According to Justice Powell, when the type of speech involved deserves less constitutional protection, the state's interest becomes more significant.⁴⁵ He noted that under the common law of defamation, damages were presumed because though the defamatory statement certainly resulted in serious harm, proof of actual damage was often impossible.⁴⁶ The plurality reasoned that this rule of presumed damages "further[ed] the state interest in providing remedies for defamation by insuring that

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

39. *Id.*

40. *Id.*

41. *Id.* at n.4.

42. *Id.* at 2945 (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978)).

43. *Id.* at 2946.

44. *Id.*

45. *Id.*

46. *Id.*

those remedies [were] effective."⁴⁷ Justice Powell concluded that because speech of private concern deserved less constitutional protection, the state interest supported the award of presumed and punitive damages without the necessity of showing actual malice.⁴⁸

The plurality next addressed whether Dun & Bradstreet's credit report involved a matter of public concern.⁴⁹ Justice Powell concluded that it did not because it was speech that only interested the speaker and its limited business audience.⁵⁰ He noted that because the report had such limited distribution, it could not be said to have contributed greatly to the " 'free flow of commercial information.' "⁵¹ The plurality further reasoned that the type of speech involved, solely motivated by profit, was unlikely to be deterred by "incidental state regulation."⁵² Finally, the market's demand for accurate credit reports decreased the significance of the " 'chilling' " effect caused by the threat of libel suits.⁵³

In sum, the plurality concluded that because defamation of private persons not involving a matter of public concern was less deserving of first amendment protections, the *Gertz* standard requiring a showing of actual malice to recover presumed and punitive damages did not apply. Because the credit report had only a limited audience, was solely motivated by profit, and was unlikely to be chilled by the threat of libel suits, the plurality concluded it did not involve a matter of public concern.

2. Concurring opinions

Chief Justice Burger and Justice White each filed a separate concurring opinion.⁵⁴ Chief Justice Burger repeated the belief he had expressed in his *Gertz* dissent that defamation law involving private individuals be left to evolve in the states regardless of the type of speech involved.⁵⁵ Although he conceded that *Gertz* was "the law of the land" and must be

47. *Id.*

48. *Id.*

49. *Id.* at 2947.

50. *Id.* The Court argued that this interest did not warrant special protection because it was false and clearly damaging to the victim's business reputation. *Id.*

51. *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976)). Under the terms of their subscription agreement, the Dun & Bradstreet subscribers who received the report could not distribute it to anyone else. *Id.*

52. *Id.* The Court reasoned that speech solely motivated by profit was less likely to be deterred than speech not so motivated. *Id.*

53. *Greenmoss*, 105 S. Ct. at 2948.

54. *Id.*

55. *Id.* (Burger, C.J., concurring). Chief Justice Burger argued that the Court in *Gertz* had "embark[ed] 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)).

followed in appropriate cases,⁵⁶ he agreed with the plurality that *Gertz* was inapplicable to a defamation that did not involve a matter of public concern.⁵⁷ He urged, however, that the Court overrule *Gertz*.⁵⁸

Justice White took the position that not only was *Gertz* erroneously decided, but so was *New York Times v. Sullivan*. He argued that in considering the competing interests of a fully informed public and a defamation victim's right to vindication, the Court in *New York Times* had struck an improper balance.⁵⁹ He reasoned that first amendment values protecting the flow of information necessary to make informed choices concerning self-government were not served by circulating false statements about public officials.⁶⁰ Because of the difficulty in overcoming the *New York Times* actual malice standard, these false statements were likely to go uncorrected, leaving the public misinformed.⁶¹ By leaving the lie uncorrected, the *New York Times* rule left the public official without a remedy for damage to reputation even though the protection of one's good name was a basic consideration of our constitutional system.⁶² The *New York Times* rule, he concluded, fostered both pollution of the stream of public information and destruction of the reputation and professional lives of defeated plaintiffs by falsehoods that might have been corrected had reasonable efforts been made to verify the facts.⁶³

Instead of increasing the plaintiff's burden in *New York Times* to a nearly impossible level, Justice White suggested a better solution to balance the competing interests: the Court should have retained the common-law standard of liability⁶⁴ but limited the recoverable damages to a level that would not have unjustifiably threatened the press.⁶⁵ He rea-

56. *Id.* (Burger, C.J., concurring).

57. *Id.* (Burger, C.J., concurring).

58. *Id.* (Burger, C.J., concurring).

59. *Id.* at 2950 (White, J., concurring).

60. *Id.* (White, J., concurring).

61. *Id.* (White, J., concurring). Justice White pointed out that if a public official could not prove knowing or reckless falsehood, a burden very difficult to meet, his complaint would be dismissed and there would be no jury verdict of any kind in his favor, even if the publication in question was admittedly false. Therefore, the lie would stand and the public would continue to be misinformed. *Id.* (White, J., concurring).

62. *Id.* at 2951 (White, J., concurring). Justice White explained that protecting one's name reflected "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." *Id.* (White, J., concurring) (quoting *Gertz*, 418 U.S. at 341).

63. *Id.* (White, J., concurring).

64. See *infra* text accompanying notes 114-27 for an explanation of the common-law standard of liability. See *infra* notes 221-24 and accompanying text for a proposed negligence standard of liability for all defamation plaintiffs.

65. *Greenmoss*, 105 S. Ct. at 2952 (White, J., concurring). To limit recoverable damages, Justice White suggested that punitive damages could have been monitored or entirely forbid-

soned that such an approach would result in allowing public officials, upon proving the falsity of a statement, to vindicate their reputations and correct the misinformation.⁶⁶ He concluded that "both First Amendment and reputational interests would have been far better served" by such an approach.⁶⁷ Reasoning that the Court had "undervalued the reputational interest at stake in such cases," Justice White argued that the common-law rules should have been retained for private defamation.⁶⁸

Justice White agreed with the dissent that no distinction could be drawn between media and non-media defendants.⁶⁹ He explained that the first amendment did not protect media defamation defendants any more than anyone else exercising their freedom of speech.⁷⁰ To make such a distinction in defamation cases would make no sense because it would give the most protection to defendants that reached the most readers thereby polluting the communication channels with the most misinformation and causing the most damage.⁷¹

Additionally, Justice White recognized that the plurality had not addressed the question of whether the *Gertz* fault requirement would also be inapplicable to defamations that did not involve a matter of public concern.⁷² He concluded that if the *Gertz* rule regarding the recovery of presumed and punitive damages was inapplicable in such cases, the requirement of finding some kind of fault on the part of the defendant must be inapplicable also.⁷³ Therefore, defendants in such cases would be strictly liable for defaming private plaintiffs unless protected by a com-

den. He also suggested that presumed damages could have been eliminated or limited as in *Gertz*. *Id.* (White, J., concurring). For a description of a bill currently before the House Judiciary Committee that closely resembles Justice White's idea, see *infra* note 224 and accompanying text.

66. *Id.* (White, J., concurring).

67. *Id.* (White, J., concurring).

68. *Id.* (White, J., concurring).

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

70. *Id.* (White, J., concurring). Justice White cited *Henry v. Collins*, 380 U.S. 356 (1965) and *Garrison v. Louisiana*, 379 U.S. 64 (1964) as cases where the Court had applied the *New York Times* rule to non-media defendants. He also cited *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (press does not have a monopoly on the first amendment or the ability to enlighten) and *Pell v. Procunier*, 417 U.S. 817 (1974) (press has no independent first amendment right of access to prisons) to support his proposition that the media is not entitled to any special first amendment protections. *Greenmoss*, 105 S. Ct. at 2953 n.4 (White, J., concurring).

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

72. For a discussion of the *Gertz* fault requirement, see *infra* text accompanying notes 156-57.

73. *Greenmoss*, 105 S. Ct. at 2953 (White, J., concurring). Justice White made this conclusion without offering any support. For a discussion of why he is probably correct, see *infra* text accompanying notes 193-98.

mon-law privilege or the defense of truth.⁷⁴

Justice White argued that the press would be no worse off financially if the common-law rules of defamation applied and the judiciary kept damages under control.⁷⁵ He noted how expensive it was to defend a defamation suit even if damages were not ultimately recovered.⁷⁶ He also argued that the threat of libel suits would not intimidate a successful and powerful press into withholding news it reasonably believed to be true.⁷⁷

Ultimately, Justice White agreed that *Gertz* did not apply to the case at bar because *Gertz* should be overruled, and the defamatory publication, Greenmoss' credit report, did not involve a matter of public concern.⁷⁸

3. The dissent

Justice Brennan wrote the dissenting opinion in which Justice Marshall, Justice Blackmun and Justice Stevens joined.⁷⁹ The dissent argued that to the extent it deterred truthful speech, all libel law involved first amendment values.⁸⁰ Under the first amendment, any restraint on speech must be "narrowly tailored to advance a legitimate government

74. See *infra* text accompanying notes 122-27. Although this would not leave all defamation of private individuals to the common law as Justice White suggests (see *supra* text accompanying note 68), at least the first amendment would no longer be involved in defamations that did not involve a matter of public concern. In his view, this would be a step in the right direction.

75. *Greenmoss*, 105 S. Ct. at 2953 (White, J., concurring).

76. *Id.* (White, J., concurring). To illustrate the expense of defamation litigation, Justice White noted the long and complicated discovery in which plaintiffs must engage to meet their burden of proof. Plaintiffs must investigate the workings of the press, including how a news story is developed and, after *Herbert v. Lando*, 441 U.S. 153 (1979), the state of mind of the reporter and publisher. Justice White suggested that "the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds." *Greenmoss*, 105 S. Ct. at 2953 (White, J., concurring). He also suggested that a legislative solution to the damages problem might be appropriate. *Id.* (White, J., concurring).

77. *Id.* (White, J., concurring).

78. *Id.* at 2953-54 (White, J., concurring). Justice White offered no argument in support of these conclusions.

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

80. *Id.* at 2955 (Brennan, J., dissenting). Justice Brennan compared defamation law to state efforts to control obscenity (citing *Miller v. California*, 413 U.S. 15 (1973)), ensure loyalty (citing *Speiser v. Randall*, 357 U.S. 513 (1958)), protect consumers (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976)), oversee professions (citing *Zauderer v. Office of Disciplinary Counsel*, 105 S. Ct. 2265 (1985)) "or pursue other public welfare goals through content-based regulation of speech." *Id.* at 2955-56 (Brennan, J., dissenting).

interest.”⁸¹ Justice Brennan concluded that recovery of presumed and punitive damages in libel actions failed to meet first amendment standards even in private defamations.⁸² In *Gertz*, Justice Brennan reasoned, the Court restricted defamation plaintiffs who did not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. This standard provided adequate protection of the legitimate state interest involved.⁸³

The dissent conceded that when the defamatory statement criticized a private party, states enjoyed a great deal of leeway to compensate for actual damage to the individual's reputation.⁸⁴ The dissent concluded, however, that “[t]he requirement of narrowly tailored regulatory measures . . . always mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than a showing of actual malice.”⁸⁵ Justice Brennan argued that this approach struck the best balance between the guarantee of free speech and the states' interest in protecting reputation.⁸⁶

According to the dissent, there was no question that for an award of actual damages, Greenmoss must establish the standard of fault articulated by the Court in *Gertz*.⁸⁷ The only issue presented was whether Greenmoss had to meet the *Gertz* requirement of showing actual malice to be awarded presumed and punitive damages.⁸⁸ Agreeing with Justice White, Justice Brennan stated that the applicability of *Gertz* could not be based on whether the alleged defamation was by a media defendant.⁸⁹

81. *Id.* at 2956 (Brennan, J., dissenting) (quoting *Lowe v. SEC*, 105 S. Ct. 2557, 2586 (1985) (White, J., concurring)).

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

83. *Id.* (Brennan, J., dissenting). As Justice Brennan explained, the *Gertz* Court reasoned that authorizing presumed damages allowed juries to award unpredictable amounts which bore no relation to actual injury. In addition, punitive damages were found by the *Gertz* Court to be irrelevant to the state interest because they did not compensate for actual injury. As a result, the *Gertz* Court concluded that the award of presumed and punitive damages in defamation cases without showing actual malice was not narrowly tailored to protect a legitimate state interest and was, therefore, an unnecessary inhibition of the “vigorous exercise of First Amendment freedoms.” *Id.* (Brennan, J., dissenting) (quoting *Gertz*, 418 U.S. at 349).

84. *Id.* at 2957 (Brennan, J., dissenting).

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

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

87. *Id.* (Brennan, J., dissenting). For a discussion of the *Gertz* fault requirement, see *infra* text accompanying notes 156-57.

88. *Greenmoss*, 105 S. Ct. at 2957 (Brennan, J., dissenting). See *infra* text accompanying notes 158-66 for a discussion of the *Gertz* limitation on presumed and punitive damages.

89. *Greenmoss*, 105 S. Ct. at 2957 (Brennan, J., dissenting). “Such a distinction is irreconcilable with the fundamental First Amendment principle that “[t]he inherent worth of . . . 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.* (Brennan, J., dissenting)

Justice Brennan maintained that the credit reporting at issue involved a matter of public concern and, therefore, deserved the *Gertz* protections. He suggested that the plurality had found the credit report not to be a matter of public concern but rather a matter of economic concern.⁹⁰ In rejecting this position, Justice Brennan contended that the Court had consistently rebuffed the argument that speech concerning economic matters deserved less first amendment protection.⁹¹ He argued that “[s]peech about commercial or economic matters . . . is an important part of our public discourse.”⁹² The dissent determined that Dun & Bradstreet’s credit reporting was a matter of “public concern” as that term had been defined by the Court’s precedents.⁹³

According to Justice Brennan, speech that is ultimately sold for profit loses none of its constitutional protection.⁹⁴ A local company’s bankruptcy could be a matter of great concern to residents of the community because of the possible economic repercussions.⁹⁵ Because credit reporting was a matter of public concern, the dissent argued, it “should receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions.”⁹⁶

Moreover, Justice Brennan argued that even if credit reporting was considered a matter of purely *private concern*, it still should have received the first amendment protections provided by *Gertz*.⁹⁷ Noting that even commercial speech, which may be more closely regulated than other types of speech, still receives substantial first amendment protection,⁹⁸

(quoting *First Nat’l Bank v. Bellotti*, 435 U.S. 765 (1978)). Justice Brennan explained that although the press was protected to ensure the vitality of first amendment guarantees, this did not mean other speakers deserved less protection. *Id.* at 2958 (Brennan, J., dissenting).

90. *Id.* at 2960 (Brennan, J., dissenting).

91. *Id.* (Brennan, J., dissenting) (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952), *AFL v. Swing*, 312 U.S. 321, 325-26 (1941), *Thornhill v. Alabama*, 310 U.S. 88, 101-03 (1940) and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231-32 & n.28 (1977)).

92. *Id.* at 2961 (Brennan, J., dissenting). Justice Brennan suggested that the “myriad of daily economic and social phenomenon” that surrounded people shaped their choices in the voting booth. *Id.* (Brennan, J., dissenting).

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

94. *Id.* (Brennan, J., dissenting) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976), *Smith v. California*, 361 U.S. 147, 150 (1959), and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

95. *Id.* at 2961-62 (Brennan, J., dissenting).

96. *Id.* at 2962 (footnote omitted) (Brennan, J., dissenting).

97. *Id.* (Brennan, J., dissenting) (emphasis in original).

98. *Id.* (Brennan, J., dissenting). The dissent defined commercial speech as “advertisements that ‘do no more than propose a commercial transaction.’” *Id.* (Brennan, J., dissenting) (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)). The dissent then noted that even commercial speech receives substantial first amendment protection because “[s]o long as we preserve a predominantly free enterprise economy, the alloca-

Justice Brennan argued that credit reporting should be afforded at least as much protection from "the chilling potential of unrestrained presumed and punitive damages awards."⁹⁹

The dissent first noted that the fundamental premise of the first amendment was that "'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'"¹⁰⁰ Justice Brennan argued that, in conformity with this premise, Dun & Bradstreet's credit reports disseminated information that contributed to "private discourse essential to our well-being."¹⁰¹

Additionally, the dissent noted that the common law of most states recognized a qualified privilege for credit reports which typically required a showing of bad faith or malice before allowing recovery for false and defamatory credit information.¹⁰² Justice Brennan concluded that recognition by the common law of the susceptibility of credit reporting to the chill of libel should be respected.¹⁰³

Finally, the dissent relied on *Gertz* to support its assertion of full first amendment protection for private speech. According to Justice Brennan's interpretation of *Gertz*, the *Gertz* Court recognized that "regulatory measures that chill protected speech [must] be no broader than necessary to serve the legitimate state interest asserted."¹⁰⁴ In his view, the *Gertz* Court held that in defamation actions "punitive damages, designed to chill and not to compensate, were 'wholly irrelevant' to the furtherance of any valid state interest."¹⁰⁵ Justice Brennan reasoned that

tion of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensable." *Id.* (Brennan, J., dissenting) (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976)).

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

100. *Id.* (Brennan, J., dissenting) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

101. *Id.* (Brennan, J., dissenting). In support of his position, Justice Brennan quoted Justice Douglas:

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. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . . The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication.

Id. at 2963 (Brennan, J., dissenting) (quoting *Dun & Bradstreet, Inc. v. Grove*, 404 U.S. 898, 905-06 (1971) (Douglas, J., dissenting from denial of certiorari)).

102. *Id.* at 2963 (Brennan, J., dissenting) (citing Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GA. L. REV. 95, 99-105 (1983)).

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

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

105. *Id.* (Brennan, J., dissenting) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350

the state interest in *Gertz* and the case at bar were identical. In each case, the state had an interest in compensating its citizens for damage resulting from defamatory speech. Therefore, in *Greenmoss*, as in *Gertz*, unrestrained presumed and punitive damages provided protections broader than necessary to serve the state interest even if the speech was simply the equivalent of commercial speech.¹⁰⁶ The dissent concluded that allowing such damages "on less than a showing of actual malice simply exacts too high a toll on First Amendment values."¹⁰⁷

To summarize, the dissent concluded that protection of the type of speech at issue in *Greenmoss* was admittedly not the central purpose of the first amendment. *Gertz*, however, made clear that the first amendment required restraint on presumed and punitive damage awards even for private commercial expression. According to Justice Brennan, all libel law implicates first amendment values to the extent that it deters true speech which would otherwise be protected by the first amendment. The first amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate government interest. State rules authorizing presumed and punitive damages allow juries largely uncontrolled discretion to assess damages which bear no necessary relation to the actual harm caused. The dissent argued that the *Gertz* approach, requiring at least a showing of fault and proscribing recovery of presumed and punitive damages on less than a showing of actual malice, best accommodates the values of free speech and the states' interest in protecting reputation.

III. THE LAW OF DEFAMATION

A. *The Common Law Background*

The common law of defamation developed as both a deterrent to attacks on personal reputation and to compensate those whose reputations had been damaged by such attacks.¹⁰⁸ At common law, defamation consisted of the torts of libel and slander, libel being a written defamation

(1974)). What the *Gertz* Court actually held was that "punitive damages are wholly irrelevant to the state interest [compensation for injury, not punishment] that justifies a negligence standard for private defamation actions." *Gertz*, 418 U.S. at 350. Justice Brennan assumed that in private defamation cases, punishment was not a valid state interest.

106. *Greenmoss*, 105 S. Ct. at 2964 (Brennan, J., dissenting).

107. *Id.* at 2965 (Brennan, J., dissenting).

108. PROSSER AND KEETON ON THE LAW OF TORTS 771-848 (W. Keeton 5th ed. 1984) [hereinafter KEETON]. For a thorough discussion of the history of the common law of defamation, see generally Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903).

and slander an oral one.¹⁰⁹ For various historical reasons, different rules developed for governing these similar areas of law.¹¹⁰

Defamation is defined as a communication tending "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."¹¹¹ At common law, a plaintiff established a prima facie case by showing that the defendant made a defamatory statement and was responsible for communicating it to a third party.¹¹²

Libel, on the other hand, was actionable per se when the defamatory meaning of the statement was apparent on its face.¹¹³ Slander was also actionable per se, but only in specific instances.¹¹⁴ Because of the difficulty of proving pecuniary injury, when a defamation was actionable per se, the jury was instructed that it was to presume that actual damage existed and to award general damages.¹¹⁵ The plaintiff was not required to introduce evidence of actual damages to recover.¹¹⁶ If the defamation was not actionable per se, the plaintiff had to prove special damages to

109. KEETON, *supra* note 108, at 771.

110. Veeder, *supra* note 108, at 547. Prior to the dawn of the printing press, early English common law granted a remedy only for defamatory speech. In the early seventeenth century, when the absolute monarchy in England realized the potential harm the printing press could inflict on the crown, rather than add a cause of action for written defamation to the English common law, Roman law was imported for use in the Star Chamber. *Id.*

The Star Chamber, which had almost unlimited authority, was composed of the highest dignitaries of Church and State. The theory upon which its jurisdiction was based was that there were certain wrongs which the ordinary courts of law could not effectively remedy and which could not be immediately corrected by legislation. The Star Chamber was viewed as the court of unrestrained power that was needed to carry out substantial justice. It disregarded forms, was bound by no rules of evidence and appointed and heard only its own counsel. *Id.* at 562-63.

The original common-law doctrine of defamation became known as the law of spoken defamation, or slander. The doctrine imported from Roman law and administered through the Star Chamber became the law of written defamation, or libel. *Id.* at 547.

111. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

112. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1353 (1975).

113. KEETON, *supra* note 108, at 795. If the statement is only defamatory when additional facts are known, then the statement was considered libel per quod. An example of libel per quod is a newspaper report that plaintiff had given birth to twins. The additional fact was that she had only been married one month. *Id.* at 796 n.37.

114. Slanders are actionable per se only when they are: 1) accusations of crime; 2) accusations that a person suffers from a loathsome disease (usually a venereal disease); 3) defamations affecting a person's business, trade, or professional reputation; or 4) accusations of sexual unchastity or perversion. *Id.* at 788-93.

115. R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 346 (1980).

116. *Id.*

recover.¹¹⁷ If special damages were shown, general damages could also be awarded.¹¹⁸

Although general damages were presumed in per se defamations, they were still intended to be an approximate compensation to the plaintiff for actual injury.¹¹⁹ Punitive damages, however, could be awarded to punish the defendant and to deter future similar behavior.¹²⁰ Generally, they were awarded only if the trier of fact found the defendant to be guilty of malice in the common-law sense of reckless or careless indifference to the plaintiff's rights and feelings, or bad faith, ill will, spite, vengeance or bad motives.¹²¹

To recover, the plaintiff had only to show that the defamatory statement was made.¹²² Proof that the statement was false was unnecessary.¹²³ If the defendant could prove the statement was true, no liability attached.¹²⁴ Moreover, the doctrine of absolute privilege applied to statements during judicial, legislative or other governmental proceedings, resulting in absolute immunity from defamation liability.¹²⁵ In addition, speakers acting to further specific interests were given qualified privileges.¹²⁶ This conditional protection was lost if the privilege was abused or exceeded.¹²⁷

Thus libels or slanders actionable per se gave rise to a presumption

117. KEETON, *supra* note 108, at 793-95. To prove special damages, the plaintiff generally had to show specific evidence of pecuniary loss. *Id.*

118. *Id.* at 794. General damages were typically defined as "a sum which, as far as money can do it, will compensate the plaintiffs for the injuries which have resulted directly and [are] a natural consequence of the statements referred to in' the offending communication." R. SACK, *supra* note 115, at 347 (quoting *Hogan v. New York Times Co.*, 211 F. Supp. 99, 116 (D. Conn. 1962), *aff'd*, 313 F.2d 354 (2d Cir. 1963)).

119. R. SACK, *supra* note 115, at 347.

120. *Id.* at 349.

121. *Id.* at 350.

122. KEETON, *supra* note 108, at 804.

123. Eaton, *supra* note 112, at 1353. The Supreme Court recently held that in defamation actions brought by private figure plaintiffs against media defendants, the plaintiff bears the burden of proving the falsity of the statement. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986).

124. KEETON, *supra* note 108, at 839.

125. *Id.* at 815-24.

126. Specific interests that give rise to a qualified privilege are: 1) interest of the publisher; 2) interest of others; 3) common interest of the publisher and his audience; 4) communications to one who may act in the public interest; 5) fair comment on matters of public concern; and 6) reports of public proceedings. *Id.* at 824-39.

127. A qualified privilege could be abused in various ways: the speaker might step outside the scope of his privilege (i.e., publication to a larger audience than necessary); the speaker might communicate the defamation maliciously (in the sense of ill will); or the speaker might knowingly (or, in some jurisdictions, negligently) publish a falsehood. *Id.* at 832-35.

of damages without proof of actual harm.¹²⁸ Libels per quod¹²⁹ and slanders not actionable per se required proof of special damages as a prerequisite to recovery.¹³⁰ In these cases, once special damages were shown, general damages could also be recovered.¹³¹ In either case, when a plaintiff proved malice, he could also recover punitive damages.¹³²

B. *The Supreme Court Decisions*

Defamation law and the first amendment collided in 1964 in the Supreme Court's landmark decision in *New York Times Co. v. Sullivan*.¹³³ Prior to *New York Times*, the law of defamation had been left to the states. One commentator has suggested that the Court's failure to address the issue earlier reflected a recognition that the states were aware of the constitutional concerns and were handling them adequately through common-law rules.¹³⁴ The Court finally tackled the issue in *New York Times* because "the news media were in serious danger of 'running out of breath,' of becoming unduly timid in the face of unreasonable though indirect pressures . . ."¹³⁵

In *New York Times*, the Court for the first time held that the first amendment limits the reach of state defamation laws. Noting that "freedom of expression upon public questions is secured by the First Amend-

128. See *supra* text accompanying notes 113-16.

129. See *supra* note 113 and accompanying text.

130. See *supra* text accompanying note 117.

131. See *supra* text accompanying note 118.

132. See *supra* text accompanying notes 119-21.

133. 376 U.S. 254 (1964). Sullivan, an elected Commissioner of the City of Montgomery, Alabama, alleged that he had been libeled by statements in a full-page ad that ran in the *New York Times* on March 29, 1960. The ad, which supported non-violent civil rights demonstrations by southern black students, accused the police of, among other things, ringing the Alabama State College campus armed with shotguns and tear-gas, padlocking the students' dining hall in an attempt to starve them into submission and arresting Dr. Martin Luther King seven times. It was admitted that some of the statements were not accurate. Sullivan claimed that the word "police" was a reference to him as the Montgomery Commissioner who supervised the police department. *Id.* at 256-58.

134. Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 27 (1965). As Professor Berney points out, the *New York Times* Court adopted a rule that was formulated over half a century earlier in *Coleman v. MacKlennan*, 78 Kan. 711, 98 P. 281 (1908). Berney, *supra*, at 5. In *Coleman*, the Kansas Supreme Court argued that freedom of the press included protection from measures used by either the judicial or executive branches to stifle just criticism or quiet public opinion. *Coleman*, 78 Kan. at 719, 98 P. at 284. Recognizing the necessity of free and general discussion of public matters to enable people to make intelligent choices, *id.*, the *Coleman* court for the first time formulated a new rule giving a "qualified or conditional privilege for nonmalicious misstatement of fact on matters of public interest." Berney, *supra*, at 9. Although the majority of states did not adopt the *Coleman* rule, they did extend a qualified privilege for comment, opinion or criticism. *Id.*

135. Berney, *supra* note 134, at 23 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

ment”¹³⁶ and that “debate on public issues should be uninhibited, robust, and wide-open,”¹³⁷ the Court reasoned that the threat of civil liability would “chill” this debate: “Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.”¹³⁸ To calm this fear, the Court held that a public official could not recover damages for defamatory falsehood “unless he proves that the statement was made with ‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”¹³⁹

Once the link between defamation law and the first amendment was established, there was no stopping the resulting chain of cases. In *Curtis Publishing Co. v. Butts*,¹⁴⁰ the Court extended the *New York Times* standard to “public figure” plaintiffs.¹⁴¹ In his concurring opinion, Chief Justice Warren reasoned that public figures were on the same footing with public officials regarding the potential chilling effect their defamation suits could have on public debate.¹⁴²

Four years later, in *Rosenbloom v. Metromedia, Inc.*,¹⁴³ a plurality of the Court extended the *New York Times* standard to defamation of private individuals in connection with a matter of public concern. Justice Brennan reasoned that a matter of public interest did not become less so simply because a private individual, rather than a public official or public figure, was involved.¹⁴⁴ He concluded that to encourage robust debate, the constitutional protection embodied in *New York Times* must be extended “to all discussion and communication involving matters of public

136. *New York Times*, 376 U.S. at 269.

137. *Id.* at 270.

138. *Id.* at 278.

139. *Id.* at 279-80.

140. 388 U.S. 130 (1967). *Curtis* was decided together with a companion case, *Associated Press v. Walker*. *Id.* In *Curtis*, plaintiff was privately employed by the University of Georgia as athletic director. Defendant, the Saturday Evening Post, published an article accusing him of conspiring to “fix” a football game between the University of Georgia and the University of Alabama. *Id.* at 135. In *Walker*, defendant’s news dispatch described a riot that broke out because of federal efforts to enforce a court order to enroll a black student in the University of Mississippi. The dispatch stated that Walker, a private citizen, had taken command of the crowd and had personally led a charge on the federal marshalls who were present to assist in carrying out the court order. *Id.* at 140.

141. *Id.* at 155.

142. *Id.* at 164-65 (Warren, C.J., concurring).

143. 403 U.S. 29 (1971). In *Rosenbloom*, plaintiff, a magazine distributor arrested for possession of obscene literature, sued defendant radio station for referring to him as a “girlie-book peddler” and a distributor of “smut or filth” in news stories. *Id.* at 32-35.

144. *Id.* at 43.

or general concern, without regard to whether the persons involved are famous or anonymous.”¹⁴⁵

Only three years later in *Gertz v. Robert Welch, Inc.*,¹⁴⁶ a majority of the Court rejected the *Rosenbloom* plurality's extension of the *New York Times* standard and again limited the actual malice rule to defamations involving public officials and public figures.¹⁴⁷ The *Gertz* case arose when a Chicago policeman named Nuccio shot a young man and was convicted of second degree murder. Elmer Gertz, an attorney, was retained by the victim's family to file a civil suit against Nuccio.

Robert Welch, Inc. owned a magazine that was an outlet for the views of the John Birch Society. The magazine published an article claiming Nuccio had been framed as part of a communist campaign against the police. It stated Gertz had been an official of the Marxist League for Industrial Democracy, an organization that advocated violent overthrow of the government. It also labeled Gertz a “Leninist” and a “Communist fronter.”¹⁴⁸

Though the Court deemed Gertz a private individual defamed by speech involving a matter of public concern, it refused to continue to hold plaintiffs in his position to the same standard required of public officials and public figures.¹⁴⁹ In rejecting the position staked out by the *Rosenbloom* plurality, the Court reasoned that private individuals generally have less access to channels of effective communication than do public officials and figures, thereby reducing their opportunity to correct false statements. Because private individuals are more vulnerable to injury, states possess a greater interest in protecting them.¹⁵⁰ The Court also noted that unlike public officials and public figures, private individuals do not voluntarily become involved in public controversies and thus do not “voluntarily expose[] themselves to increased risk of injury from defamatory falsehood concerning them.”¹⁵¹ Accordingly, the Court concluded private parties are more deserving of protection and, therefore, recovery than are public officials and public figures.¹⁵²

Moreover, the *Gertz* Court rejected the *Rosenbloom* “‘public or general interest’ test.”¹⁵³ Under *Rosenbloom*, only private plaintiffs defamed

145. *Id.* at 43-44 (footnote omitted).

146. 418 U.S. 323 (1974).

147. *Id.* at 346.

148. *Id.* at 325-26.

149. *Id.* at 343.

150. *Id.* at 344.

151. *Id.* at 345.

152. *Id.*

153. *Id.* at 346.

by speech involving a matter of public concern were required to meet the *New York Times* standard. The *Gertz* Court repudiated this principle, reasoning that such a test "would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not" ¹⁵⁴ In rejecting the public interest test, the Court concluded that it inadequately served both of the competing values at stake—the state's interest in reputation and the constitutional protection of free speech. ¹⁵⁵

Although the Court overruled the extension of the *New York Times* actual malice requirement to private individuals, it did restrict the common-law rights of private individuals to recover for defamation. The Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of [a] defamatory falsehood injurious to a private individual." ¹⁵⁶ In defense of the new rule, the Court noted that this approach "recognize[d] the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shield[ed] the press and broadcast media from the rigors of strict liability for defamation [under the common-law rules]." ¹⁵⁷

Furthermore, the *Gertz* Court held that absent a showing of knowledge of falsity or reckless disregard of the truth, states cannot permit recovery of presumed or punitive damages; only actual injury can be compensated. ¹⁵⁸ The Court stated that in allowing states to impose liability on the publisher or broadcaster of a falsehood that defamed a private party on a less demanding showing than that required by *New York Times*, it recognized the strong and legitimate interest states have in compensating private individuals for injury to reputation. ¹⁵⁹ However, that state interest extends only as far as compensation for actual injury. ¹⁶⁰ The Court reasoned that when injury is presumed from the fact of publication alone, ¹⁶¹ thus permitting damage awards for injury to reputation without proof of the injury, there is an increased likelihood that the

154. *Id.*

155. *Id.* The test inadequately serves the interests the first amendment was meant to protect because a potential defamation defendant cannot predict what a court will find to be a matter of public or general interest. This unpredictability deters free speech because the speaker may prefer to remain silent rather than speak and risk having a court find the matter not to be of public or general interest.

156. *Id.* at 347.

157. *Id.* at 347-48.

158. *Id.* at 349.

159. *Id.* at 348-49.

160. *Id.* at 349.

161. *See supra* text accompanying notes 115-16.

threat of defamation actions will inhibit first amendment freedoms.¹⁶² Additionally, allowing juries to presume damages invites the punishment of unpopular opinions.¹⁶³ The Court concluded that absent a showing of actual malice, plaintiffs can only be compensated for actual injury.¹⁶⁴ The Court did not, however, limit actual injury to out-of-pocket expenses. Rather it included "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."¹⁶⁵

In proscribing the award of punitive damages absent a showing of actual malice, the Court reasoned that, as with presumed damages, jury discretion to award punitive damages contributed unnecessarily to the danger of media self-censorship. However, unlike presumed damages, punitives were "wholly irrelevant to the state interest that justify[d] a negligence standard for private defamation actions."¹⁶⁶ Therefore, the state interest was outweighed by first amendment concerns and a showing of actual malice as a prerequisite to recovery of punitive damages was justified.

By requiring some fault on the part of the defendant in private defamation actions and limiting the award of presumed and punitive damages to cases where actual malice was shown, the *Gertz* decision cut deeply into state defamation law.¹⁶⁷ The decision also left state courts in disagreement regarding when the *Gertz* limitations on presumed and punitive damages apply. Some state courts concluded the limitations only applied when private figures sued media defendants¹⁶⁸ while others concluded they applied to all private figure suits regardless of the status of the defendant.¹⁶⁹ After ten years of uncertainty, the Court finally addressed the defamation issue again in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*;¹⁷⁰ the results were less than satisfying.

IV. ANALYSIS

The *Greenmoss* plurality held the *Gertz* limitations on recovery of presumed and punitive damages inapplicable to *Greenmoss Builders* because the two cases were distinguishable—one involved a matter of pub-

162. *Gertz*, 418 U.S. at 349.

163. *Id.*

164. *Id.*

165. *Id.* at 349-50.

166. *Id.* at 350.

167. See *supra* notes 112-27 and accompanying text.

168. See *supra* note 26 and accompanying text.

169. *Id.*

170. 105 S. Ct. 2939 (1985).

lic concern and the other did not. The following analysis will demonstrate that the Court failed to distinguish the two cases. In addition, though the plurality did not address the *Gertz* fault requirement, an argument will be made that under the Court's reasoning, after *Greenmoss*, fault on the part of the defendant is not a prerequisite to recovery in defamation actions not involving a matter of public concern.

A. *The Problem with the Plurality's Approach*

The *Greenmoss* plurality argued that its decision not to apply the *Gertz* standard to *Greenmoss Builders* was consistent with *Gertz* because the defamatory statement in *Gertz* involved a matter of public concern while the statement in *Greenmoss* did not.¹⁷¹ Though that factual distinction exists, it should be irrelevant for purposes of first amendment analysis. The rules formulated in *Gertz* respecting defamations against private individuals¹⁷² were not based on the type of speech involved. In fact, the *Gertz* Court rejected the use of a public interest test to determine the applicability of the *New York Times* standard to private individuals.¹⁷³ Instead, it set forth new damage guidelines in the area of defamation of private individuals as an accommodation between the right of the individual to recover for wrongful injury and the need to protect free debate from the chilling effect of state libel law.¹⁷⁴

The *Greenmoss* plurality opinion began, "In *Gertz v. Robert Welch, Inc.*, we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern."¹⁷⁵ That is not what the *Gertz* Court held. What the *Gertz* Court did in fact hold was (1) "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual"¹⁷⁶ and (2) "States may not permit recovery of presumed or punitive damages [in defamations of private individuals], at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."¹⁷⁷ In so hold-

171. See *supra* text accompanying notes 40-53.

172. See *supra* text accompanying notes 156-66.

173. See *supra* text accompanying notes 153-55.

174. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-50 (1974).

175. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2941 (1985) (citation omitted).

176. *Gertz*, 418 U.S. at 347. See *supra* text accompanying notes 156-57 for the *Gertz* Court's reasoning.

177. *Gertz*, 418 U.S. at 349. See *supra* text accompanying notes 156-66 for the *Gertz* Court's reasoning.

ing, the *Gertz* Court gave more protections to plaintiffs without subjecting defendants to strict liability. Whether the defamatory statement involved a matter of public concern was not an issue. Although critical, the *Greenmoss* plurality ignored this portion of the *Gertz* holding.

The *Gertz* Court specifically rejected the public concern test that the *Greenmoss* plurality revived without comment. Having lived with the test since it was announced four years previously in *Rosenbloom v. Metromedia, Inc.*,¹⁷⁸ the *Gertz* Court decided it was too nebulous a formulation on which to determine the applicability of the *New York Times* standard to private individuals, a standard which usually barred recovery:

The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [the] legitimate state interest [in enforcing a legal remedy for defamation of private individuals] to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not—to determine . . . "what information is relevant to self-government." We doubt the wisdom of committing this task to the conscience of judges. . . . The "public or general interest" . . . inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. . . . On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.¹⁷⁹

178. 403 U.S. 29 (1971). See *supra* text accompanying notes 143-45.

179. *Gertz*, 418 U.S. at 346 (citations omitted) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 79 (1971) (Marshall, J., dissenting)). The plurality's inaccurate recitation of the *Gertz* holding did not escape the attention of the dissent:

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. *Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach.

Thus, the *Gertz* Court deemed the matter of public concern test an inadequate basis upon which to extend the harsh *New York Times* requirements to private defamation suits. Instead, defamation actions by private individuals would accommodate the first amendment through the application of special principles.¹⁸⁰

The *Greenmoss* plurality exhumed the matter of public concern test without acknowledging it had ever been buried. It employed the test as a threshold which must be reached before requiring private defamation plaintiffs to prove actual malice to recover presumed and punitive damages. If a particular court decides the defamatory statement did not involve a matter of public concern, the first amendment does not become an issue and the case then turns on state libel law. In effect, *Greenmoss* carved out an exception to the reach of the Constitution based on a nebulous public concern trigger.¹⁸¹

Disregarding the *Gertz* rejection of the public concern test, the *Greenmoss* plurality argued that in private defamation cases, only speech involving a matter of public concern should receive constitutional protection. Ironically, Justice Powell relied on the *Gertz* decision to support his contention by misreading that holding. In his view, the *Gertz* Court held that "the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*."¹⁸² The fact that it was a public issue had to be weighed against the type of plaintiff to determine if the *New York Times* protections were appropriate. When the plaintiff was a public official or public figure, these protections for defendants were appropriate because of the limited state interest involved. When the plaintiff was a private person, the state interest increased, requiring a different set of protections.¹⁸³ "Nothing in our opinion," Justice Powell concluded, "indicated that this same balance would be struck regardless of the type of speech involved."¹⁸⁴

What Justice Powell failed to recognize was that the *Gertz* Court did not consider the type of speech involved as part of the balancing formula for determining the applicability of *New York Times*. Rather, the Court focused only on the type of plaintiff.¹⁸⁵ The interest of the state, and

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

180. See *supra* text accompanying notes 156-66.

181. The *Gertz* fault requirement may still apply to cases like *Greenmoss*. For an argument that it does not, see *infra* text accompanying notes 193-98.

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

183. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343, 348-49 (1974)). See *supra* text accompanying notes 150-52 for the *Gertz* Court's reasoning.

184. *Greenmoss*, 105 S. Ct. at 2944 (footnote omitted).

185. The *Gertz* Court described the balance as follows:

therefore the balance, changed only when the status of the plaintiff changed, not the classification of speech. Justice Powell's injection of the type of speech into the balancing formula was not supported by the holding in *Gertz*.

Nevertheless, reasoning that the balance would be different when speech did not involve a matter of public concern, the *Greenmoss* plurality argued that "speech on matters of purely private concern is of less First Amendment concern. . . . [T]he role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent."¹⁸⁶ The plurality failed to point out, however, that the concerns that activated *New York Times* were different from those that activated *Gertz*. *New York Times* was triggered by a concern that state libel law was having a chilling effect on the debate of public issues.¹⁸⁷ *Gertz* was triggered by a concern that the application of the *New York Times* standard to private individuals failed to adequately take into account their reputational interests.¹⁸⁸ While a matter of public concern was peripherally involved in *Gertz*, the real concern was an imbalance between first amendment protection and reputational interest in defamation of private individuals. Thus, whether an alleged defamation involves a matter of public concern should not be an issue in applying the *Gertz* requirements.

If expanding democratic dialogue by eliminating self-censorship is the goal of granting first amendment protection to potential defamation defendants, a quantum of predictability about when that protection applies is essential. According to the plurality, in cases where speech does not involve a matter of public concern " '[t]here is no threat to the free

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. . . . This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs . . . will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgement of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamatory falsehood concerning public officials and public figures. . . . [W]e believe that the *New York Times* rule states an accommodation between [the interest of the media in immunity from liability] and the limited state interest present in the context of libel actions brought by private persons. . . . [T]he state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Gertz, 418 U.S. at 342-43.

186. *Greenmoss*, 105 S. Ct. at 2946 (footnote omitted) (citing *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)).

187. See *supra* text accompanying notes 136-38.

188. See *supra* text accompanying notes 146-66.

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.'"¹⁸⁹ The problem, of course, is the one recognized by the Court in *Gertz*. If speech involving a matter of public concern strikes the balance in favor of constitutional protection and it is not clear what constitutes a matter of public concern, potential defamation defendants will not know when they will receive the *Gertz* protections. As one commentator has persuasively argued:

[T]he news media ought not to be put to the task of assessing whether a court would ultimately find its [allegedly defamatory statement] to be in the public interest or of private interest. . . . [T]he difficulty of making such a determination would cause the media to steer wide of the unlawful zone, resulting in self-censorship of matters in the public interest. . . . [I]n order to ensure that state law does not suppress information concerning matters of public interest, it is necessary to provide constitutional protection for information containing defamatory falsehoods which are of no public interest at all.¹⁹⁰

The same considerations apply to potential defamation defendants not in the news media.¹⁹¹ For who is to say what is a matter of public concern?

"[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matter—to take a non-exhaustive list of labels—is not entitled to full First Amendment protection." The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth.¹⁹²

189. *Greenmoss*, 105 S. Ct. at 2946 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977)).

190. *Eaton*, *supra* note 112, at 1415 n.264.

191. One question that the *Greenmoss* decision did seem to answer is whether non-media defendants are entitled to the *New York Times* and *Gertz* protections. Five justices (White, Brennan, Marshall, Blackmun and Stevens) said that they are. See *supra* text accompanying notes 69-71 & 89. For a persuasive discussion of why non-media defendants should be protected, see *Watkins & Schwartz, Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. TECH L. REV. 823, 831-63 (1984).

192. *Greenmoss*, 105 S. Ct. at 2960-61 (Brennan, J., dissenting) (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977)). For an extensive list of cases finding "public interest" in a wide variety of human affairs, see *Gertz*, 418 U.S. at 377 n.10 (White, J., dissenting) and Comment, *The Expanding Constitutional Protection for the News Media from Liability for Def-*

Because there will never be agreement on all the various types of speech that merit first amendment protection, this element should be abandoned for purposes of a constitutional analysis. Rather than eliminating this arbitrary element, the *Greenmoss* decision, with its unpredictable matter of public concern test, undermines the goal of eliminating self-censorship. It forces courts to decide on an *ad hoc* basis when to apply the protections of *Gertz*. Ironically, the Court granted certiorari in the *Greenmoss* case because the state courts were in disagreement about when to apply the *Gertz* protections; yet more uncertainty is sure to follow from the Court's decision.

B. The Fault Requirement

Although the plurality did not specifically address the issue, it is arguable¹⁹³ that after *Greenmoss* the *Gertz* fault requirement¹⁹⁴ no longer applies to defamations of private individuals not deemed to involve a matter of public concern.¹⁹⁵ The reasoning the plurality adopts to allow

amation: Predictability and the New Synthesis, 70 MICH. L. REV. 1547, 1560-62 nn.94-96 (1972).

193. In his concurring opinion, Justice White argued: "Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2953 (1985) (White, J., concurring).

194. See *supra* text accompanying notes 156-57.

195. Perhaps the plurality concluded it need not address the fault requirement in the *Greenmoss* case because, regardless of the Court's decision, whether defendant *Dun & Bradstreet* had been at fault would not be an issue. The *Greenmoss* facts strongly indicate that *Dun & Bradstreet's* error in reporting the bankruptcy constituted negligence:

The trial established that the error in [*Dun & Bradstreet's*] report had been caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to [*Greenmoss Builders*] a bankruptcy petition filed by one of [*Greenmoss Builders*] former employees. Although [*Dun & Bradstreet's*] representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about [*Greenmoss Builders*] before reporting it.

Greenmoss, 105 S. Ct. at 2942. If the *Greenmoss* Court had found *Gertz* applicable to the case, *Greenmoss* would have to prove actual malice on the part of *Dun & Bradstreet* to recover presumed and punitive damages. The *Gertz* fault requirement would have already been met. However, if *Gertz* was found inapplicable to the case, *Dun & Bradstreet's* liability would turn on the common law. Thus, it would be held strictly liable; fault would be irrelevant.

Had *Dun & Bradstreet* not been negligent in distributing the report without verification, perhaps the plurality would have addressed the fault requirement because it would have made a difference on retrial. If *Gertz* was found applicable, naturally the fault requirement would have to be met. However, if *Gertz* was found inapplicable, the Court would have had to specifically address whether fault is an element in defamation cases governed by the common law. If it is, *Dun & Bradstreet* would not be held strictly liable and fault would become an issue.

recovery of presumed and punitive damages without a showing of actual malice in such cases is just as applicable to the fault requirement.

In support of its argument for allowing the recovery of presumed and punitive damages in cases not involving a matter of public concern, the plurality employed a balancing test. It argued that in cases involving a matter of public concern, "the state interest in awarding presumed and punitive damages [is] not 'substantial' in view of their effect on speech at the core of First Amendment concern. This interest, however, is 'substantial' relative to the incidental effect these remedies may have on speech of significantly less constitutional interest."¹⁹⁶ Because in defamation cases " 'proof of actual harm will be impossible . . . where, from the character of the defamatory words and circumstances of publication, it is all but certain that serious harm has resulted in fact,' "¹⁹⁷ the plurality concluded that the state interest in compensating defamation plaintiffs in such cases outweighs the limited constitutional interest.

The same reasoning can be applied to eliminate the fault requirement articulated in *Gertz*.¹⁹⁸ Since the plurality argued that in cases not involving a matter of public concern the state interest becomes more substantial relative to the constitutional concerns involved, it is consistent to argue that in such cases, potential defamation defendants need no shield from the rigors of strict liability. If matters not of public concern are worthy of only limited constitutional protection, imposing a strict liability standard should pose no danger to robust democratic dialogue. Therefore, requiring some fault on the part of the defendant as required by *Gertz* would be unnecessary; speech of such limited importance does not need that safeguard.

196. *Greenmoss*, 105 S. Ct. at 2946 (citing *Gertz*, 418 U.S. at 349).

197. *Id.* (quoting W. PROSSER, *LAW OF TORTS* 765 (4th ed. 1971)).

198. The *Gertz* Court held that state courts could no longer hold defamers of private individuals liable because a fault requirement "provides a more equitable boundary between the competing concerns involved It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields [potential defamation defendants] from the rigors of strict liability for defamation." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974). The *Gertz* Court recognized that this new rule allowed the imposition of liability in defamation suits by private individuals on a less demanding standard than *New York Times*. It reached this conclusion, however, "not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and . . . public figures are wholly inapplicable to the context of private individuals," *id.* at 348, but because it recognized a "strong and legitimate interest in compensating private individuals for injury to reputation." *Id.* at 348-49.

V. PROPOSAL

A. *Status of Plaintiffs*

The protections given defamation defendants should not be based on the status of the plaintiff. Such distinctions hinder, rather than aid, democratic dialogue. The first amendment protection of freedom of expression on public issues was created "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹⁹⁹ The Supreme Court thrust the Constitution into defamation law to ensure that "debate on public issues . . . be uninhibited, robust, and wide-open."²⁰⁰ But it is unrealistic to conclude that the only speech that fits into this category is speech about public officials or figures:

Social sciences literature suggests that an individual's attitude toward political issues is formed . . . by communications in family groups, social groups, work groups, and peer groups in general. . . . [A] back-fence discussion among neighbors, a businessman's speech to a group of graduate students, a conversation over lunch, or letters to a state official may well play . . . an important role in contributing to democratic dialogue.²⁰¹

Moreover, the first amendment is concerned with things other than self-government:²⁰²

While purely political speech undoubtedly lies at the core of the first amendment, speech that would not necessarily bear that label carries considerable societal value and is clearly worthy of first amendment protection [I]ndividuals . . . need information about other individuals with whom they interact on a regular basis—the neighbor whose mysterious late-night meetings have attracted unsavory characters to the quiet residential area, the person who applies for a job, or the new babysitter who is to take care of the kids. In short, there are a variety of occasions when one individual needs to examine the reputation of another, yet the clear message of the common law of strict liability to those giving the information is "don't."²⁰³

As the constitutional law of defamation now stands, defamers of public officials²⁰⁴ and public figures²⁰⁵ are given more protection than

199. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

200. *Id.* at 270.

201. *Watkins & Schwartz*, *supra* note 191, at 850 (footnotes omitted).

202. Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891, 901 n.34 (1984).

203. *Watkins & Schwartz*, *supra* note 191, at 854-55 (footnotes omitted).

204. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court defined a public official as follows:

necessary to protect the first amendment concerns involved and defamers of private individuals are not given enough. To begin to resolve this discrepancy, all plaintiffs should be treated alike. The determination of liability and damages should not be based on the status of the plaintiff.

The *Gertz* Court offered two reasons for the disparate treatment of public and private plaintiffs. First, public plaintiffs are supposed to be in a better position to rebut the defamatory statement, thereby minimizing the reputational damage:

Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and

[T]he "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.

. . . Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees . . . the *New York Times* malice standards apply.

Id. at 85-86 (footnotes omitted). As will be discussed, this statement does not provide a clear separation between public officials and those who would only be considered public employees for *New York Times* purposes.

205. The *Gertz* Court defined a public figure as follows:

For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved.

Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The Court has developed two subcategories of this classification—the general public figure and the special public figure. General public figures are those whose fame precedes them; those of whom the jury has probably heard prior to the litigation. *Id.* at 352. Special public figures cannot achieve that status by involvement in public events alone; they must voluntarily enter a public debate "in order to influence the resolution of [public] issues." *Id.* at 345.

There are problems with both categories. Plaintiffs are placed in the general public figure group simply because of their fame. It has been questioned why the constitutional law of libel should treat Michael Jackson, Reggie Jackson and Leonard Bernstein the same as Dan Rather, William F. Buckley, Jr., Jerry Falwell and Lee Iacocca. Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 908, 916 (1984). Though they have all achieved "pervasive fame or notoriety," *Gertz*, 418 U.S. at 351, they do not all "occupy positions of . . . persuasive power and influence." *Id.* at 345. Therefore, they do not lie at the heart of *New York Times*. Ashdown, *Of Public Figures and Public Interest—The Libel Law Conundrum*, 25 WM. & MARY L. REV. 937, 942 (1984).

The difficulty with the special public figure category, where one's status is achieved by voluntary injection into a public debate to influence the outcome, is that first it must be determined what is a public debate. Judges are asked to decide if "a controversy is 'public,' a determination indistinguishable . . . from whether the subject matter is of public or general concern," a decision the *Rosenbloom* plurality was reluctant to leave to judges. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 644 (1978) (footnote omitted).

For a more thorough discussion of the problems involving public figure status, see generally Ashdown, *supra*, and Schauer, *supra*.

hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.²⁰⁶

Even the *Gertz* Court itself recognized the weakness of this argument:

Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.²⁰⁷

In addition, as one commentator has pointed out:

Even if a rebuttal reaches the entire audience which read or heard the defamatory charge, readers and listeners may accept the rebuttal as little more than a self-serving denial and discount it. A rebuttal is thus likely to have no effect at all in mitigating the injury to the defamed individual.²⁰⁸

Thus, the opportunity for rebuttal is an inadequate reason for distinguishing between plaintiffs.

The second reason the *Gertz* Court gave for the distinction between public and private plaintiffs was an assumption of the risk theory:

[P]ublic officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an "influential role in ordering society."²⁰⁹

This assumption is not necessarily correct. Because the Court's definition of public official is unclear,²¹⁰ it is difficult for an individual to assume the risk of public status, not knowing whether such status has been achieved. "While presidents, governors, and most elected officials and candidates for elective office are public officials, just 'how far down into the ranks of government employees the "public official" designation

206. *Gertz*, 418 U.S. at 344 (footnote omitted).

207. *Id.* at n.9. Justice White reiterates this sentiment in his *Greenmoss* concurring opinion: "[I]t is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2950-51 (1985) (White, J., concurring) (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 46 (1971)).

208. Eaton, *supra* note 112, at 1420.

209. *Gertz*, 418 U.S. at 345 (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

210. See *supra* note 204 and accompanying text.

would extend' is unsettled."²¹¹ The lower courts have routinely found "all government employees, no matter how inferior their positions, and some persons and entities not employed by a government at all . . . [to be] public officials within the meaning of *New York Times*."²¹² It would be incredulous to argue that everyone who works for the government has voluntarily assumed the "increased risk of injury from defamatory falsehood concerning them."²¹³

The Court is on slightly stronger ground when it argues that public figures have assumed the risk of defamatory injury. Recent decisions by the Court have stressed the importance that a public figure become one voluntarily.²¹⁴ Therefore, unlike some government employees deemed public officials, the risk assumed by a public figure should be a knowing one. However, rather than encouraging discussion of public issues, this rule hampers it by discouraging those who might otherwise become involved from doing so for fear of uncompensated injury to their reputation.

Another justification for the public/private distinction was proffered by Justice Brennan in the *Greenmoss* dissent: "Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures."²¹⁵ As Justice Brennan noted, the alternative to deciding what is in the public interest on a case by case basis would be very costly.²¹⁶ However, it is impossible to predict the type of speech that will be involved based on the status of the plaintiff. Admittedly, deciding on an *ad hoc* basis what involves a matter of public concern is an undesirable approach because of the cost and unpredictability.²¹⁷ However, completely eliminating speech directed toward private individuals from receiving the equivalent protection given speech directed toward public plaintiffs simply because of their status is not the answer. There is too great a risk that speech which should be protected will be chilled. If wide-open debate is the goal, it is better to protect some

211. Comment, *The Constitutional Law of Defamation: Are All Speakers Protected Equally?*, 44 OHIO ST. L.J. 149, 157 (1983) (footnotes omitted) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966)).

212. Eaton, *supra* note 112, at 1376-77.

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

214. See Comment, *supra* note 211, at 160. But see Ashdown, *supra* note 205, at 941 n.30 for a sampling of the many lower courts that have not followed this narrow restriction on the definition of public figure.

215. *Greenmoss*, 105 S. Ct. at 2957 n.5 (Brennan, J., dissenting).

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

217. See *supra* text accompanying note 179.

speech that should not be protected than to leave speech that deserves first amendment protection unprotected.

The reasons for distinguishing between public and private plaintiffs are unpersuasive. Moreover, the legitimate goal of predictability argues in favor of treating all defamation plaintiffs alike. The first amendment limits the reach of libel law to prevent a chill on wide-open debate.²¹⁸ While there are many plaintiffs, such as President Reagan or Johnny Carson, whose status is quite clear, there are many others for whom the line between public official/private individual or public figure/private individual is not so easily drawn.²¹⁹ If a plaintiff's status is unpredictable and a potential defamation defendant's liability depends on that status, the speaker will probably avoid making the statement and steer clear of potential liability rather than risk an unfavorable determination by a court.²²⁰

By proposing that all defamation plaintiffs be treated alike, this Note does not suggest that they all be held to the *New York Times* standard. Instead, this Note proposes all plaintiffs be held to the following standard of liability and damages.

B. Liability

To best accommodate the conflicting state and first amendment interests in defamation cases, adherence to a closely linked system of liability and damages is required. As to liability, all defamation defendants should be held to a negligence standard.²²¹ As Justice Harlan has said:

[I]t does no violence . . . to the value of freedom of speech and press to impose a duty of reasonable care upon those who would exercise these freedoms. I do not think it can be gainsaid that the States have a substantial interest in encouraging speakers to carefully seek the truth before they communicate, as well as in compensating persons actually harmed by false descriptions of their personal behavior. Additionally, the burden of acting reasonably in taking action that may produce adverse consequences for others is one generally placed upon all in our society. Thus, history itself belies the argument that a speaker

218. See *supra* text accompanying notes 136-38.

219. See *supra* notes 204-05 and accompanying text.

220. See *supra* text accompanying note 190.

221. As of 1984, nearly half of the states had defined the standard of liability to be applied in libel cases brought by private individuals. Of those, most have adopted a negligence standard. Cohen, *Libel: State Court Approaches in Developing a Post-Gertz Standard of Liability*, ANN. SURV. OF AM. L. 155, 155 (1984).

must somehow be freed of the ordinary constraints of acting with reasonable care in order to contribute to the public good while, for example, doctors, accountants, and architects have constantly performed within such bounds.²²²

By applying a negligence standard, potential defamation defendants would be encouraged to use reasonable care before making their statements. Knowing that they will be held to this standard if sued, they can maintain adequate records to protect themselves. If they do not act reasonably, then they should be held accountable for the injury they cause. Although this standard will be more easily overcome by plaintiffs than the *New York Times* standard and, therefore, defendants will more frequently be found liable, plaintiffs are more deserving of compensation when injured by unreasonable behavior.

Additionally, because under a negligence standard potential defamation plaintiffs will know they will not be subjected to the ominous *New York Times* standard to recover, they will be encouraged to participate in robust debate. Though by doing so they will put themselves at greater risk of becoming targets of defamatory falsehoods, they will have a reasonable expectation of compensation for injury.

Concededly, it is entirely possible under this standard that a defamatory statement that is indeed false will have been made nonnegligently, and the plaintiff will not be able to recover.²²³ In that situation, the plaintiff should be entitled to a judicial judgment that the statement is false so that his or her reputation will at least be vindicated.²²⁴

222. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (Harlan, J., dissenting).

223. *Gertz*, 418 U.S. at 392 (White, J., dissenting).

224. *Greenmoss*, 105 S. Ct. at 2952 (White, J., concurring). *Accord* Freund, *Political Libel and Obscenity*, 42 F.R.D. 491, 497 (1966) (Address delivered to the Judicial Conference of the Third Circuit). *See also* Eaton, *supra* note 112, at 1431-32. This could be accomplished through the requirement of a special verdict such as that used in Ariel Sharon's suit against *Time* magazine. *Sharon v. Time, Inc.*, No. 85-7029 (2d Cir. Jan. 15, 1985) (LEXIS, Genfed library, Courts file). Sharon, a public official held to the *New York Times* standard, lost the suit because he was unable to show actual malice on the part of *Time*. However, the jury also found that the statement made by *Time* was false. Although Sharon was awarded nothing, he still claimed victory stating, "I came here to prove that *Time* lied; we were able to prove that *Time* did lie." McGrath & Stadtman, *Absence of Malice*, NEWSWEEK, Feb. 4, 1985, at 52.

The idea of vindication in libel suits has not escaped the attention of Rep. Charles Schumer, D-N.Y., at least in the context of public officials suing news organizations. His bill, H.R. 2846, now before the House Judiciary Committee, would allow public officials to seek a declaratory judgment that they were portrayed in a false and defamatory light. The officials would have to prove the statement was false but would not be required to prove malice. Because of the reduced burden, there would be no award of damages. The winning plaintiff would, however, collect attorneys' fees. In this way, public officials who felt wronged by the media could have the satisfaction of clearing their names. H.R. 2846, 99th Cong., 1st Sess. (1985). *See* Wolf, *Libel Suits*, 72 A.B.A. J. May 1, 1986, at 32.

C. Damages

Since it will be easier for plaintiffs to recover under a negligence standard, it is important that damages be limited to protect first amendment concerns. As Justice White noted in *Greenmoss*, “[i]n *New York Times*, instead of escalating the plaintiff’s burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press.”²²⁵

1. Compensatory damages

Damages have traditionally been presumed in defamation law because of the difficulty in proving injury to reputation.²²⁶ However, they were still intended to be an approximate compensation for actual injury.²²⁷ Unfortunately, “jury estimates of that injury are often based more on the wealth of the defendant and unpopularity of the speech at issue than on any perception of the actual harm done to the plaintiff often resulting in ‘gratuitous awards of money damages far in excess of any actual injury.’”²²⁸ For that reason, the *Gertz* Court limited the recovery of compensatory damages to actual injury when a private plaintiff failed to prove actual malice.²²⁹

A modified version of the *Gertz* compensation for actual injury standard should be retained for all plaintiffs upon proving the defendant’s negligence. As discussed above, the *Gertz* Court held that actual injury “is not limited to out-of-pocket loss”²³⁰ but can “include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.”²³¹ Since injury to reputation is the essence of a defamation action,²³² a defamation plaintiff should first be required to prove impairment of reputation before being allowed to recover actual damages.²³³ Then, actual damages should be limited to impairment of reputation and standing in the community, the injury defama-

225. *Greenmoss*, 105 S. Ct. at 2952 (White, J., concurring).

226. See *supra* text accompanying notes 114-16.

227. R. SACK, *supra* note 115, at 346.

228. Eaton, *supra* note 112, at 1433 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974)).

229. *Gertz*, 418 U.S. at 349-50. See *supra* text accompanying notes 158-65.

230. *Gertz*, 418 U.S. at 350.

231. *Id.*

232. F. POLLOCK, *THE LAW OF TORTS* 181 (15th ed. 1951).

233. As has always been the case, a defendant should be allowed to introduce evidence of the plaintiff’s bad reputation to mitigate damages. W. KEETON, *supra* note 108, at 847-48.

tion law is meant to redress.²³⁴

Without question, these types of injuries will often be difficult to prove and some plaintiffs will not be fully compensated for their reputational injuries. Moreover, defamation plaintiffs will not be compensated for their non-reputational injuries. But some meaningful limitation must be put on the recovery of damages to accommodate the first amendment. If recovery is allowed for personal humiliation and mental suffering, there is too great a risk of high damage awards bearing no relation to actual harm. The possibility of these high awards is what chills free speech. It is also essential that jury awards for actual injury be reviewable by appellate courts to ensure the amount is not excessive for the injury or punishment disguised as compensation.

2. Punitive damages

Historically, punitive damages in defamation law have made courts and commentators uneasy because they represent punishment of expression. Punitive damages are intended to punish the defendant and deter similar behavior in the future. Consequently, "they constitute a device peculiarly suited to use by courts or juries to avenge or attempt to silence unpopular speakers or communications."²³⁵ On the other hand, because of the difficulty of proving actual injury in this area, punitive damages are sometimes the only method of dealing with the willful character assassin.²³⁶

Currently, if a defamation plaintiff must overcome a defendant's constitutional privilege, either under the *New York Times* or *Gertz* "actual malice" standard, knowledge of falsity or reckless disregard for the truth must be shown to recover punitive damages.²³⁷ This is to be distinguished from the circumstances under which punitive damages are normally awarded—when the defendant is found guilty of common-law malice in the sense of "reckless or careless indifference to the plaintiff's rights and feelings, or bad faith, ill will, spite, vengeance or bad motives."²³⁸

The two malice standards are easily confused by courts.²³⁹ How-

234. See Eaton, *supra* note 112, at 1438-39 for a variation of this proposal.

235. R. SACK, *supra* note 115, at 349 (footnote omitted).

236. *Id.* at 350.

237. See *supra* text accompanying note 166.

238. R. SACK, *supra* note 115, at 350 (footnote omitted).

239. The jury instruction given in the *Greenmoss* case itself is a good example:

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

ever, the standard chosen is very important in determining whether the plaintiff recovers. The award of punitive damages under the common-law malice standard is commonplace.²⁴⁰ Conversely, because the plaintiff must prove actual malice by clear and convincing evidence,²⁴¹ recovery has been foreclosed in nearly all defamation cases in which the constitutional standard has been applied.²⁴²

It would be desirable to eliminate this confusion in terms yet continue to make it difficult for plaintiffs to recover punitive damages in defamation cases except under the most egregious circumstances. Otherwise, the risk of punishing and deterring unpopular speakers is too great.²⁴³ To accomplish this, defamation plaintiffs should only be able to recover punitive damages when they can prove by clear and convincing evidence that the defendant's sole motivation in publishing the defamatory statement was to maliciously injure the plaintiff. Even if the statement was published for malicious reasons, if the defendant can show any other reason for the publication, the plaintiff will not meet its burden. While this will make it very difficult for the plaintiff to recover punitive damages, it will also make it more likely that a speaker will only be punished for intentionally hurting the plaintiff rather than expressing an unpopular view.

Using this standard for recovery of punitive damages in defamation cases will eliminate the confusion between actual malice and common-law malice. Additionally, this limitation would make recovery for punitive damages both less likely and more predictable. As a result, the threat of punitive damages will be far less likely to unnecessarily inhibit democratic dialogue.

VI. CONCLUSION

Rather than resolving the questions left open in *Gertz v. Robert Welch, Inc.*,²⁴⁴ the decision in *Dun & Bradstreet, Inc. v. Greenmoss*

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.

Greenmoss, 105 S. Ct. at 2943 n.3 (citation omitted) (emphasis added by the Supreme Court). See also Eaton, *supra* note 112, at 1370.

240. R. SACK, *supra* note 115, at 350.

241. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964). See also Eaton, *supra* note 112, at 1374.

242. Eaton, *supra* note 112, at 1375.

243. See *supra* text accompanying note 235.

244. 418 U.S. 323 (1974). The *Gertz* decision left the state courts in disagreement about when to apply its protections. See *supra* text accompanying notes 168-69.

Builders, Inc.,²⁴⁵ created new ones. The *Greenmoss* decision resurrected the nebulous matter of public concern test for determining the applicability of the *Gertz* requirements to defamations against private individuals. It also left unclear whether the *Gertz* fault requirement would apply when a court determined the speech did not involve a matter of public concern. Lower courts are sure to resolve these problems differently, further confusing an area of the law that is desperately in need of simplification.

This Note proposes a comprehensive simplification of the first amendment standards applied to defamation. First, the type of speech involved in the defamation would be irrelevant in determining the standard to be applied because what involves a matter of public concern, and thus deserves first amendment protection, is unpredictable. Second, a negligence standard of liability should be applied coupled with limitations on recoverable damages. With liability limited to actual damages and punitive damages awarded only in egregious cases, there will be an adequate balance between free speech concerns and reputation. Potential defamers will be encouraged to be careful and the damages will be kept in line with the actual harm, thus minimizing the chilling effect of potential defamation liability.

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245. 105 S. Ct. 2939 (1985).

