Defamation Per Se Cases Should Include Guaranteed Minimum Presumed Damage Awards to Private Plaintiffs

STEVEN A. KRIEGER*

TABLE OF CONTENTS

 Steven A. Krieger is the Managing Attorney of Steven Krieger Law, PLLC, a small Arlington, Virginia-based civil litigation law firm that practices mostly in Virginia and D.C. state courts in civil litigation matters, including defamation claims. Mr. Krieger graduated from UCLA School of Law's Public Interest in Law and Policy program in 2011 and the University of Michigan in 2002. This Article would not have been possible without the months of truly excellent and proactive research assistance by Andrew Salinas (J.D. 2020 Washington and Lee University School of Law) and the editors, including but not limited to Erica Skerven, Joseph Vetti, and Katie Barton of the *San Diego Law Review*, who believed this issue was important enough to justify publication and whose comments and tireless editing greatly improved the Article.

ABSTRACT

To combat the reputational harm associated with defamatory comments, forty states allow plaintiffs to recover presumed damages for reputational harm for defamatory statements considered "per se" defamation without having to prove the exact dollar figure associated with their reputational damages. While damages are presumed to a plaintiff's reputation in a successful defamation per se lawsuit, the spectrum of presumed damages is so wide that there is almost no practical way for a plaintiff to reliably know the size of a presumed damages award, especially a lower-income plaintiff. Plaintiffs cannot evaluate the financial merit of a defamation lawsuit, which removes the primary benefit of presumed damages. This is especially problematic for plaintiffs relying on presumed damages to their reputations to justify the costs of litigation for defamation per se cases, which are the most egregious types of defamation, and why reputational damages are presumed. Without some assurance that a defamed plaintiff will be awarded damages to compensate them for the harm to their reputation, presumed damages have insufficient practical value—lower income plaintiffs who are defamed and later struggle to find employment or who live with tarnished reputations will not pursue litigation while their defamers face no repercussions and no fear of repeating that behavior. Instead of abolishing the doctrine of presumed damages, which some states have done because presumed damages are difficult to quantify, a better approach is to set a guaranteed minimum damages floor associated with presumed damages for plaintiffs who are successful in a per se defamation claim.

I. INTRODUCTION

To combat the reputational harm associated with defamatory comments, forty states[1] allow plaintiffs to recover presumed damages for reputational harm for defamatory statements considered "per se" defamation[2] without having to prove the exact dollar figure associated with their reputational damages. The combination of email, social media, and technology has provided us with the ability to communicate thoughts and ideas to masses of people around the world by a commonplace device that fits in our pocket. While this modern miracle of human ingenuity serves as a remarkable mechanism to communicate, defamatory communications may permanently ruin reputations on a global scale. Take, for example, allegations of sexual assault made against pop-star Justin Bieber by two women over Twitter this past year in 2020.[3] Although Bieber was able to provide proof that the allegations were false, his name was nevertheless in headlines associated with the allegations and some people were no doubt persuaded that he was guilty as accused.[4]

Of course, the majority of people are not celebrities, and non-celebrities may be subject to defamatory statements by those with a large social media presence. For example, in 2018 Elon Musk tweeted that Vernon Unsworth was a "pedo guy" when Unsworth made disparaging comments about a Tesla-engineered submarine sent to aid in the rescue of a youth football team trapped underground in Thailand.[5] For context, Musk has nearly 30 million followers on Twitter and his tweet made headline news.[6] Despite suing Musk for his comments in U.S. court for $190 million in

1. *See infra* note 133.
2. *See infra* Section III.A.
3. Jacob Sarkisian, *Justin Bieber Has Filed $20 Million Lawsuit Against Two Women Over "Factually Impossible" Sexual Assault Allegations*, INSIDER (June 26, 2020, 6:47 AM), https://www.insider.com/justin-bieber-denies-sexual-assault-allegation-lawsuit-2020-6 [https://perma.cc/RV7K-6SXX].
4. Kat Tenbarge, *A New #MeToo Movement Is Erupting Online as Allegations of Sexual Misconduct Hit Celebrities, Influencers, and Streamers*, INSIDER (June 23, 2020, 2:43 PM), https://www.insider.com/me-too-allegations-movement-a-list-celebs-streamers-bieber-tiktokers-2020-6 [https://perma.cc/KA8V-ZL2Z]; *Justin Bieber Denies 2014 Sexual Assault Allegation*, BBC NEWS (June 22, 2020), https://www.bbc.com/news/newsbeat-53050621 [https://perma.cc/62TW-5VR3].
5. *Elon Musk Wins Defamation Case Over "Pedo Guy" Tweet About Caver*, BBC NEWS (Dec. 6, 2019), https://www.bbc.com/news/world-us-canada-50695593 [https://perma.cc/2SA4-F82W].
6. *Id.*

damages to his reputation, Unsworth was unsuccessful and now, at sixty-five years old, must now live with the fact that Musk's tweet will be a permanent mark on his legacy.[7]

However, the vast majority of defamation disputes are not publicized nationally but are very impactful to the lives and well-being of the defamed party. For example, in 2019 a bartender in Asbury, New Jersey, was accused in a Facebook group of drugging a co-worker at a party.[8] His name and picture were later added to a Reddit thread with over 100 comments detailing rumors and allegations of rape and sexual assault by other women.[9] Despite numerous statements made by several women online and two fellow co-workers, the bartender has never been convicted or even charged with sexual assault, but as a result of these social media comments, lost his job shortly after they were published.[10] Although the bartender has filed a defamation suit, he has moved to several different states because employers are refusing to hire him based on the allegations.[11]

While this Article does not take a stance on the veracity of the sexual assault allegations, the struggles of the plaintiff in these cases highlight an under-discussed issue faced by plaintiffs seeking presumed reputational damages. Assuming *arguendo* that the allegations are completely false, and the bartender prevails on his defamation suit, there is no guarantee he will be awarded damages to compensate him for the reputational harm. In the United States, juries or judges affix damages after they find that defamatory statements were made.[12] At common law, the notion of presumed damages means that, because assessing reputational damages is so difficult, the trier of fact is free to determine a dollar amount to adequately compensate the plaintiff given the facts presented at trial and their own sensibilities.[13]

---

7. *Id.*; *see also* Erik Wemple, *Trump Supporter's Libel Case Against MSNBC's Joy Reid Lives On*, WASH. POST (July 16, 2020, 9:27 AM), https://www.washingtonpost.com/opinions/2020/07/16/trump-supporters-libel-case-against-msnbcs-joy-reid-lives/ [https://perma.cc/R9QM-HQV5] (discussing a woman's libel suit against media personality Joy Reid for tweeting an out-of-context photo of the woman and comparing the photo to an infamous photo of a segregationist berating one of the Little Rock Nine).

8. Kelly Heyboer, *This N.J. Bartender Was Accused of Rape by Women on Social Media. Now He's Suing Them.*, N.J.COM (Feb. 29, 2020), https://www.nj.com/news/2020/02/this-nj-bartender-was-accused-of-rape-by-women-on-social-media-now-hes-suing-them.html [https://perma.cc/RER7-8BRT].

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 765 (4th ed. 1971)).

13. *See, e.g.*, Bentley v. Bunton, 94 S.W.3d 561, 605 (Tex. 2002) (noting that, at common law, although the jury is given latitude to assess damages, liability may not be found where there is no evidence to support it.).

While this may work in favor of some plaintiffs,[14] the uncertainty of damages awards could mean that a plaintiff like the bartender could spend tens if not hundreds of thousands of dollars in litigation fees and only receive a nominal award for damages to their reputation.[15]

This is especially problematic for plaintiffs relying on presumed damages to their reputations to justify the costs of litigation for defamation per se cases, which are the most egregious types of defamation, and why reputational damages are presumed. Without some assurance that a defamed plaintiff will be awarded damages to compensate them for the harm to their reputation, presumed damages have insufficient practical value—lower income plaintiffs who are defamed and later struggle to find employment, or who live with tarnished reputations, will not pursue litigation while their defamers face no repercussions and no fear of repeating that behavior. Instead of abolishing the doctrine of presumed damages, which some states have done because presumed damages are difficult to quantify,[16] a better approach is to set a guaranteed minimum damages floor associated with presumed damages for plaintiffs who are successful in a per se defamation claim.

II. HISTORY OF DEFAMATION LAW IN THE UNITED STATES FROM 1735 – PRESENT

A. Colonial and New Republic Era – Establishing Truth as a Defense

In the same way that "All roads lead to Rome," the same concept traces U.S. defamation[17] law from the Anglo-Saxon legal tradition.[18] Both royal[19]

14. *See infra* Section III.B.3.a.3.
15. *See infra* Section III.B.1.
16. *See infra* Part IV.
17. *See* 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:10 (2d ed. 2013) ("Defamation is the generic term for the twin torts of libel and slander. While most jurisdictions maintain the traditional distinction between libel and slander, some treat them as one tort, for 'defamation.'"); *id.* § 1:11 ("The short and simple distinction between the terms is that libel is defamation by written or printed words, or by the embodiment of the communication in some tangible or physical form, while slander consists of communication of a defamatory statement by spoken words, or by transitory gestures.").
18. Van Vechten Veeder, *The History and Theory of the Law of Defamation,* 3 COLUM. L. REV. 546, 547–49 (1903) (discussing the British defamation laws' complicated origins drawing from Germanic, Roman, and Norman defamation laws).
19. *Id.* at 549 (discussing King Alfred the Great's Anglo-Saxon courts in the mid to late 800s).

and religious courts[20] used defamation laws for centuries to stifle public and private criticism of the existing regal and ecclesiastical powers.[21] "In the ninth century, public slander was 'to be compensated with no lighter a penalty than the cutting off of the slanderer's tongue.'"[22] As such, defamation laws in the Anglo-Saxon legal tradition were more concerned with preserving social order rather than providing a metaphorical sword for harmed individuals or a shield for public debate and discourse.[23] The American colonists would make a significant break from this mold in the seminal case *Crown v. John Peter Zenger*,[24] which espoused the bedrock principal of all U.S. defamation law: Truth as an absolute defense.[25]

The facts resulting in the *Zenger* case arose in colonial New York in 1733, after New York Chief Judge Lewis Morris publicly circulated a dissenting opinion he wrote in a case involving the recently appointed British Royal Governor of New York, William Cosby.[26] Irate over Morris's decision to circulate the dissenting opinion, Governor Cosby removed Chief Judge Morris from his post, prompting Morris and his allies to create a pro-colonist, anti-Cosby newspaper named the *New-York Weekly Journal*.[27] After several unsuccessful attempts to shut the newspaper down,[28]

---

20. *Id.* at 550–51 (discussing the Church's prosecution of defamation as a sin against God).

21. *Id.* at 566 (discussing royal and ecclesiastical use of defamation laws against publishers who dared to question authority).

22. Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 39 (1992) (quoting Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1053 (1962)).

23. *See* Lovell, *supra* note 22, at 1053.

24. *See* Paul McGrath, People v. Croswell*: Alexander Hamilton and the Transformation of the Common Law of Libel*, 2011 JUD. NOTICE 5, 9, 15–17 (establishing that truth is a justification provided that the matter was published with good motives and for justifiable ends).

25. *See* RESTATEMENT (SECOND) OF TORTS § 581A cmt. b (AM. L. INST. 1976) ("At common law the majority position has been that although the plaintiff must allege falsity in his complaint, the falsity of a defamatory communication is presumed. It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof."). *But see* W. S. Holdsworth, *Defamation in the Sixteenth and Seventeenth Centuries, III*, 41 L.Q. REV. 13, 28 (1925). There are also some relatively modern cases holding that truth is not a complete defense. *See, e.g.*, Hutchins v. Page, 75 N.H. 689, 689 (1909); Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 802 (1964); RESTATEMENT (FIRST) OF TORTS § 582 cmt. a (AM. L. INST. 1938). A minority of jurisdictions made truth a conditional defense that the plaintiff could overcome by showing malicious motive or publication without justifiable end. RESTATEMENT (FIRST) OF TORTS § 582 cmt. a (AM. L. INST. 1938).

26. *Crown v. John Peter Zenger, 1735*, HIST. SOC'Y N.Y. CTS., https://history.nycourts.gov/case/crown-v-zenger/ [https://perma.cc/4NP2-ZVJE].

27. *Id.*

28. *Id.*

Governor Cosby eventually circumvented judicial procedural safeguards to arrest John Peter Zenger, the newspaper's printer, and charged him with seditious libel.[29] At trial, Zenger admitted to publishing the seditious material as alleged by the New York Attorney General.[30] Addressing the jury in Mr. Zenger's defense, pro-colonist lawyer Andrew Hamilton famously declared:

> The question before the Court and you, Gentlemen of the jury, is not of small or private concern. It is not the cause of one poor printer, nor of New York alone, which you are now trying. No! It may in its consequence affect every free man that lives under a British government on the main of America. It is the best cause. It is the cause of liberty.[31]

Hamilton's argument appealed to the jurors, who returned a verdict of "not guilty" despite Zenger's admissions.[32] Founding Father Gouverneur Morris, the grandchild of Chief Judge Morris, later stated that the *Zenger* case birthed "the germ of American freedom, the morning star of that liberty which subsequently revolutionized America!"[33] The outcome of the *Zenger* case was significant because it helped establish the notion that the truth could be used as an absolute defense against a defamation cause of action.[34]

Despite the *Zenger* case's purported impact on free speech at the time, the concept of truth as a defense was not addressed in the federal Constitution nor was it adopted by any of the state constitutions.[35] The catalyst for the systemic adoption of truth as a defense came from the 1804 case *People v. Croswell*.[36] In the wake of President Thomas Jefferson's election, his Democratic-Republican Party sought to curb political dissent of the new administration through "a few prosecutions" of local newspapers through state common law seditious libel charges.[37] Harry Croswell, the young editor of the Federalist paper *The Wasp*, was targeted for his criticisms and

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. The United Kingdom only recently adopted this defense in 2013. Defamation Act 2013, c. 26, § 2 (UK).
35. *But see* Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801) (providing for truth as a defense against criminal libel charges).
36. *See* McGrath, *supra* note 24, at 5.
37. *Id.*

charged with criminal libel and sedition in New York.[38] Eventually Croswell's case was heard before the entire New York Supreme Court of Judicature.[39] On appeal, Founding Father, and leading federalist, Alexander Hamilton himself took up the case and argued that Croswell's charges should be dismissed, citing the *Zenger* principle of truth as a defense.[40] Ultimately the four justices evenly split their votes on whether to order a new trial,[41] leaving Croswell's conviction standing.[42] Nevertheless, Croswell was never sentenced,[43] and subsequently the New York Legislature incorporated the *Zenger* principle into the 1821 state constitution.[44] Eventually, virtually all states followed suit, cementing the *Zenger* principle and Hamilton's argument in *Croswell* as the "common sense of all American criminal libel law."[45]

---

38. *Id.*; *see also id.* at 11 (describing that, initially, the case was presided over by Chief Justice Morgan Lewis of the New York Supreme Court of Judicature in a jury trial, but after Chief Justice Lewis's jury instructions effectively barred the *Zenger* truth as a defense argument, the jury had no choice but to deliver a verdict of guilty at the trial level).

39. *Id.* at 12; *see also The Supreme Court of Judicature, 1691–1776*, HIST. SOC'Y N.Y. CTS., https://history.nycourts.gov/case/supreme-court-judicature/ [https://perma.cc/9QR3-3Y2M] (effectively a late seventeenth and eighteenth century version of an appeals court, the Supreme Court of Judicature consisted of a Chief Justice, a Second Justice, and three Associate Justices).

40. McGrath, *supra* note 24, at 15–16.

41. *Id.* at 13, 16 (although the Supreme Court of Judicature comprised of five sitting justices, the New York Attorney General prosecuting the *Croswell* case had just been named the fifth justice of the court while preparing the trial, resulting in his recusal from the Bench for the duration of the case).

42. *Id.* at 16.

43. *Id.* at 17.

44. *Id.*; N.Y. CONST. of 1821, art. VII, § 8 ("Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence, to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.").

45. *See* Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 159 n.159 (citing Beauharnais v. Illinois, 343 U.S. 250, 297 (1952) (Jackson, J., dissenting) (stating that the outcome of *Croswell* and New York's 1821 Constitution "basically . . . states the common sense of American criminal libel law" because Arkansas, California, Colorado, Delaware, Florida, Iowa, Kansas, Maine, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Wisconsin, and Wyoming substantially adopted it, Arizona, Georgia, Idaho, Kentucky, Louisiana, Maryland, Michigan, Minnesota, North Carolina, Oregon, Virginia, and Washington provide for free press and speech though speakers are liable for abuse, and Alabama, Illinois, Indiana, Rhode Island, and West Virginia provide substantially the same protections but add that truth may be given in evidence in a libel prosecution)); *cf. Beauharnais*, 343 at 297–98, 297 n.15 (stating that only Connecticut, New Hampshire, South Carolina, Vermont, and Massachusetts, whose Constitutions were framed earlier than New York's, have a more general freedom of the press standards—the Massachusetts model states: "The liberty of the press is

B. Modern Development of the Actual Malice Standard in Defamation Suits

For about the next 140 years, defamation remained largely within the common law of the states[46] because the U.S. Supreme Court viewed defamation as outside the purview of the First Amendment.[47] This jurisprudence changed in the landmark case of *New York Times Co. v. Sullivan*.[48] In 1960, several Civil Rights Movement leaders purchased an advertisement in the New York Times calling for donations to Martin Luther King Jr.'s legal defense against a lawsuit in Alabama.[49] While the advertisement accurately described the struggles faced by civil rights activists at the hands of the Montgomery Police Department, it also contained numerous inaccuracies and false implications.[50] As a result, the Montgomery Public Safety Commissioner sued the Times for libel on the ground that the advertisement's criticisms of the police were defamatory to himself given his advisory role over the police's conduct.[51] The Alabama trial court instructed the jury that the advertisement itself was libelous per se under Alabama law, meaning damage to Sullivan's reputation was presumed,

essential to the security of freedom in a state it ought not, therefore, to be restricted in this commonwealth." (quoting MASS. CONST. of 1780, art. XVI, pt. I)).

46. *See* Smith, *supra* note 22, at 39 ("The separate development of the law in each of the states has been with 'no particular aim or plan' and has exacerbated the inherent inconsistencies in the law of defamation" (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 772 (5th ed. 1984))); *see also* KEETON ET AL., *supra*, at 771 ("[T]here is a great deal of the law of defamation which makes no sense.").

47. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (classifying defamation as a class of utterances that bear "no essential part in the exposition of ideas"); *see also Beauharnais*, 343 U.S. at 266 (holding that libelous utterances are not "within the area of constitutionally protected speech").

48. New York Times Co. v. Sullivan, 376 U.S. 254, 254–55 (1964).

49. *Id.* at 256–57.

50. *Id.* at 258–59 ("It is uncontroverted that some of the statements contained in the two paragraphs were not accurate descriptions of events which occurred in Montgomery. Although Negro students staged a demonstration on the State Capitol steps, they sang the National Anthem and not 'My Country, 'Tis of Thee.' Although nine students were expelled by the State Board of Education, this was not for leading the demonstration at the Capitol, but for demanding service at a lunch counter in the Montgomery County Courthouse on another day. . . . Although the police were deployed near the campus in large numbers on three occasions, they did not at any time 'ring' the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps, as the third paragraph implied.").

51. *Id.* at 258.

and thus left the jury to determine compensatory and punitive damages.[52] Although Alabama law permitted a jury to award punitive damages only if it found that the publisher acted with malice, the trial judge refused to charge the jury with that standard and failed to order the jury to differentiate between general compensatory damages and punitive damages.[53] The jury returned a guilty verdict and awarded Sullivan a whopping $500,000.00 damages award—the highest libel award amount in Alabama history at the time.[54] The Alabama state appellate courts also ruled in favor of Sullivan.[55]

At the U.S. Supreme Court, the justices ruled unanimously in the newspaper's favor.[56] Drawing from the common law of numerous states and the works of legal scholars,[57] the Court held that for a public official like Sullivan to recover damages in a libel suit against the press when the libel relates to their official conduct, the official would need to prove that the publisher acted with "actual malice," meaning that the information was published with "knowledge that it was false or with reckless disregard of whether it was false or not."[58] This legal standard proved critical for the freedom of the press to report on national news and for the Civil Rights Movement as it prevented segregationists from stonewalling unfavorable news coverage via lawsuits.[59]

---

52. *Id.* at 262.

53. *Id.*

54. David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 504 (2001).

55. *New York Times Co.*, 376 U.S. at 263.

56. *Id.* at 264.

57. *Id.* at 279–80 (citing Ponder v. Cobb, 126 S.E.2d 67, 80 (N.C. 1962); Lawrence v. Fox, 97 N.W.2d 719, 725 (Mich. 1959); Stice v. Beacon Newspaper Corp., 340 P.2d 396, 400–01 (Kan. 1959); Bailey v. Charleston Mail Ass'n., 27 S.E.2d 837, 844 (W. Va. 1943); Salinger v. Cowles, 191 N.W. 167, 174 (Iowa 1922); Snively v. Rec. Publ'g Co., 198 P. 1, 5–6 (Cal. 1921); McLean v. Merriman, 175 N.W. 878, 880 (S.D. 1920); Phx. Newspapers v. Choisser, 312 P.2d 150, 154 (Ariz. 1957); Friedell v. Blakely Printing Co., 203 N.W. 974, 975 (Minn. 1925); Chagnon v. Union-Leader Corp., 174 A.2d 825, 833 (N.H. 1961), *cert. denied*, 369 U.S. 830 (1962); 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 5.26, at 449–50 (1956); Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 891–95, 897, 903 (1949); John E. Hallen, *Fair Comment*, 8 TEX. L. REV. 41, 61 (1929); Jeremiah Smith, *Are Charges Against the Moral Character of a Candidate for an Elective Office Conditionally Privileged?*, 18 MICH. L. REV. 1, 115 (1919); George Chase, *Criticism of Public Officers and Candidates for Office*, 23 AM. L. REV. 346, 367–71 (1889); THOMAS M. COOLEY & VICTOR H. LANE, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 616–28 (7th ed. 1903). *But see*, *e.g.*, RESTATEMENT (FIRST) OF TORTS § 598 (AM. L. INST. 1938) (reversing the position taken in RESTATEMENT (FIRST) OF TORTS § 1041(2) (AM. L. INST., Tentative Draft No. 13, 1936)); Van Vechten Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413, 419 (1910).

58. *New York Times Co.*, 376 U.S. at 279–80.

59. *See id.* at 300–01 ("The opinion of the Court conclusively demonstrates the chilling effect of the Alabama libel laws on First Amendment freedoms in the area of race relations. The American Colonists were not willing, nor should we be, to take the risk that

Nearly a decade later the Court would decide another major case in defamation law that limited another jury award related to private plaintiffs.[60] When the family of a young man who was shot and killed by a Chicago police officer hired attorney Elmer Gertz to sue the officer in a wrongful death civil suit, an anti-communist magazine published a story accusing Gertz of having a criminal record and of being a part of a communist conspiracy to undermine the police.[61] Although the jury returned a verdict for Gertz in his defamation per se claim, the district court and court of appeals ruled that the actual malice standard applied and, because Gertz failed to show that the magazine published the statements with actual malice, the outcome was a judgment notwithstanding the verdict for the magazine.[62] The libel suit eventually made its way to the U.S. Supreme Court, where the magazine argued that they should be afforded the *New York Times* actual malice standard of proof required for defamation cases involving public officials[63] or public figures.[64]

The U.S. Supreme Court disagreed. The Court held in a 5–4 decision that, as long as states did not impose strict liability, the individual states could

---

'men who injure and oppress the people under their administration [and] provoke them to cry out and complain' will also be empowered to 'make that very complaint the foundation for new oppressions and prosecutions.'. . . Our national experience teaches that repressions breed hate and 'that hate menaces stable government.'" (first quoting The Trial of John Peter Zenger, 17 Howell's State Trials 675, 721–22 (1735); then quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring))); *see also* Weekend Edition Sunday, *Revisiting* New York Times Co. v. Sullivan, NPR, at 2:23 (Feb. 24, 2019, 8:02 AM), https://www.npr.org/2019/02/24/697481372/revisiting-new-york-times-co-v-sullivan [https://perma.cc/9RXG-JKWR] ("It went beyond saying that the newspaper was not defamatory and, actually, recognized for the first time that there was a significant First Amendment interest that was at play in these types of cases—this necessity of a robust, public debate about the people and the policies of our government . . . . The [Supreme Court] said the Constitution protects news organizations who are reporting on public officials, even if they make errors, as long as the media aren't being reckless or knowingly spreading falsehoods.").

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

61. *Id.* at 325–27.

62. *See id.* at 328–30 ("Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict. This conclusion anticipated the reasoning of a plurality of this Court in *Rosenbloom v. Metromedia*, *Inc.*, 403 U.S. 29 (1971).").

63. *Id.* at 327–28.

64. *Id.* at 328.

define "the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood" that injures a private individual and whose "substance makes substantial danger to reputation apparent."[65] Crucially, the Court also held that the common law rule permitting recovery of presumed or punitive damages was unconstitutional against a media defendant, related to a matter of public concern, unless the private plaintiff was able to show that the defendant acted with actual malice.[66] This resulted in limiting private plaintiffs' recovery to "actual injury" to their reputation against a media defendant in a matter related to public concern, doing away with the traditional common law rule that permitted recovery without placing the burden of proof on the plaintiff.[67] This holding was a monumental rejection of the common law rule permitting presumed damages in a broad scope of defamation cases. As Justice White lamented in his dissent:

> Lest there be any mistake about it, the changes wrought by the Court's decision cut very deeply . . . . No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable per se. . . . The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.[68]

C. Defamation for Private Plaintiffs Involving Private Speech

While *New York Times* and *Gertz* ushered in unprecedented constitutional limitations on state defamation law on matters of public concern,[69] the Supreme Court's plurality decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders* in 1985 proved that the First Amendment did not completely

---

65. *Id.* at 347–48 (citing Curtis Publ'g Co. v. Butts, 388 U.S. 130, 155 (1967) (extending the *New York Times* standard to public figures)).

66. *Id.* at 349.

67. *See id.* at 349–50 ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions.").

68. *Id.* at 371–76 (White, J., dissenting).

69. Logan, *supra* note 54, at 507.

abrogate state common law.[70] The case arose in 1976 Vermont when a seventeen-year-old high school student working for a credit-reporting agency mistakenly identified a construction contractor's company as having filed for bankruptcy on a report to the agency's subscribers.[71] Although the agency issued a correction, the contractor sued the agency for defamation per se because the false report damaged its reputation.[72] While issuing the jury instructions, the trial court charged the jury to only award presumed or punitive damages if it found that the agency acted with actual malice, but provided various definitions not aligned with the *New York Times* definition.[73] The jury awarded a judgment of $50,000.00 in compensatory or presumed damages and $300,000.00 in punitive damages in favor of the contractor.[74] On appeal, the agency argued that *Gertz* applied to the case and that the award was unconstitutional because the trial court awarded presumed and punitive damages on a lesser showing than actual malice.[75] Thus, the question posed to the Court was whether *Gertz* should apply to non-media defendants when the defamatory material is about private plaintiffs and does not concern a matter of public or general interest.[76]

According to the Court, the answer was no, *Gertz* did not apply.[77] The Court reminded the agency that speech on matters of purely private concern receives less First Amendment protection than speech on matters of public concern.[78] Unlike in *Gertz*, where "the state interest in awarding presumed and punitive damages was not 'substantial' in view of their effect on speech at the core of First Amendment concern," the Court stated that the state interest was substantial in *Dun & Bradstreet, Inc.*, given the purely private nature of the speech and the rationale of the common law rule that "proof

70. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 743, 757–58 (1985).
71. *Id.* at 751–52.
72. *Id.* at 752.
73. *Id.* at 753–55.
74. *Id.* at 752.
75. *Id.*
76. *Id.* at 757.
77. *Id.* at 763.
78. *Id.* at 759 ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'. . . '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." (first quoting Roth v. United States, 354 U.S. 476, 484 (1957); then quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); and then quoting Carey v. Brown, 447 U.S. 455, 467 (1980))).

of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact."[79] Thus, the Court's plurality held that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern."[80] This decision effectively narrowed the *Gertz* ruling and permitted the states to decide the applicable standard in defamation per se cases involving private plaintiffs seeking presumed damages.

III. DEFAMATION PER SE IN THE PRIVATE PARTY CONTEXT

A. Defamation Overview: Per Quod and Per Se

For the purposes of this Article, this essentially brings us to the current landscape of private plaintiff defamation law in the United States.[81] While

79. *Id.* at 760–61 (quoting KEETON ET AL., *supra* note 46, § 112, at 765 (4th ed. 1971)).

80. *Id.* at 763.

81. More recently, corresponding with the advent of the internet, courts began to grapple with whether Internet Service Providers (ISPs) should be held liable for defamatory content posted on their websites. *Cf.* Smith v. California, 361 U.S. 147, 147 (1959) (insulating bookstores from liability for defamatory content published in written materials provided by their business). In 1991, the Southern District of New York held in *Cubby, Inc. v. CompuServe, Inc.*, that service providers were immune from defamation suits for content posted by users. Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 135, 144 (S.D.N.Y. 1991). However, a few years later in 1995, a New York state court held that an ISP of an online bulletin board was liable for defamatory statements made by third party users where that specific ISP had several moderator functions in place. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *3–7 (N.Y. Sup. Ct. May 24, 1995). Recognizing the potential impact differing court decisions would have on the growth of the Internet, Congressman Chris Cox (R-CA) spearheaded a bi-partisan campaign with Congressman Ron Wyden (D-OR) to address this issue. Chris Cox, *Policing the Internet: A Bad Idea in 1996—and Today*, REALCLEAR POLS. (June 25, 2020), https://www.realclearpolitics.com/articles/2020/06/25/policing_the_internet_a_bad_idea_in_1996_—_and_today.html [https://perma.cc/23Y6-V9AC]. Thus, in 1996 Congress passed § 230 of the Communications Decency Act, adopting the *Cubby, Inc.* court's holding shielding ISPs from user-generated content. *See* 47 U.S.C. § 230 (2018). The rise of the Internet also brought an increase in international communication, bringing the American common law and the First Amendment into conflict with the United Kingdom's ancient defamation laws. In 2003, Khalid Bin Mahfouz sued American author Rachel Ehrenfeld in a United Kingdom court for libel for accusing him and his family of funding Islamic terrorist groups. David Pallister, *US Author Mounts 'Libel Tourism' Challenge,* GUARDIAN (Nov. 15, 2007, 8:03 AM), https://www.theguardian.com/world/2007/nov/15/books.usa [https://perma.cc/D2UU-CXA8]. Dr. Ehrenfeld asserted that the libel action violated her U.S. First Amendment right because the statements made in her book would not constitute libel in the United States and accordingly chose not to defend the suit in the United Kingdom. Ehrenfeld v. Mahfouz, No. 04 Civ. 9641, 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006). After the U.K. court ruled in favor of Mahfouz, Dr. Ehrenfeld countersued in New York to block the judgment's enforcement. Ehrenfeld v. Mahfouz, 489 F.3d 542,

most historical focus on defamation law analyzes the battles between the press and public officials, each state's common law maintains civil defamation causes of action for private individuals.[82] Since the early Republic and until *New York Times*, states developed their own case law on defamation claims, resulting in the often-described "intellectual wasteland" facing legal observers today.[83] Nevertheless, the cornerstone of this common law was developed to protect American society's "pervasive and strong interest in preventing and redressing attacks upon reputation."[84]

There are traditionally two types of defamation: per quod and per se. Defamation per quod is a defamatory statement that is not harmful "on its face" and requires a plaintiff to prove actual damages to their reputation and monetary loss to make their claim actionable and to recover any damages.[85] Libel per quod acquires a defamatory meaning only in light of extrinsic facts known by the recipient.[86] "Further, unlike a plaintiff suing on account of libel per se, the victim of libel per quod usually must plead and prove special damages."[87] Defamation per se, on the other hand, is a defamatory statement "so obviously and materially harmful to the plaintiff that injury to the plaintiff's reputation may be presumed."[88] The traditional four[89] categories of statements classified as defamation per se are: 1)

545 (2d Cir. 2007). When the New York courts eventually held that they lacked personal jurisdiction over Bin Mahfouz, *id.* at 542, the New York State Legislature preemptively passed the Libel Terrorism Protection Act—Rachel's Law—in 2008, granting New Yorkers protection against foreign libel judgments. Libel Terrorism Protection Act, 2008 N.Y. Laws 66 (codified at N.Y. C.P.L.R. 302 (McKinney 2008). Soon after, the federal government adopted its own version of Rachel's Law when President Barack Obama signed the Securing and Protecting our Enduring and Established Constitutional Heritage (SPEECH) Act in 2010. 28 U.S.C. §§ 4101–4105 (2018). *See also* Vincent R. Johnson, *Comparative Defamation Law: England and the United States*, 24 U. MIA. INT'L & COMPAR. L. REV. 1, 8–9 (2017) (discussing the U.K.'s adoption of the Defamation Act of 2013, section 9, which limits causes of actions under related to recognition of English defamation judgments).

82. *See, e.g.*, Andrew Bossory, *Defamation Per Se: Be Prepared to Plead (and Prove!) Actual Damages*, BUS. TORTS & UNFAIR COMPETITION , Spring 2014 at 11–15 (2014).

83. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 691 (1986); *see also* Smith, *supra* note 22, at 39.

84. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

85. Palm Springs Tennis Club v. Rangel, 86 Cal. Rptr. 2d 73, 76 (Ct. App. 1999).

86. 5 PAUL M. DEUTCH & FREDERICK A. RAFFA, DAMAGES IN TORT ACTIONS § 45.02(c).

87. *Id.*

88. Van Horne v. Muller, 705 N.E.2d 898, 903 (Ill. 1998).

89. *But see* Solaia Tech., L.L.C. v. Specialty Publ'g Co., 852 N.E.2d 825, 839 (Ill. 2006) ("In Illinois, there are five categories of statements that are considered defamatory *per se:* (1) words that impute a person has committed a crime; (2) words that impute a

involvement in criminal activity, 2) contraction of a loathsome, contagious, or infectious disease,[90] 3) involvement in any sexual misconduct, or 4) an inability to comport with character and fitness requirements of their profession.[91] In the vast majority of cases, actual malice is presumed in defamation per se claims involving private plaintiffs and matters of private concern.[92]

---

person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication."); W. T. Farley, Inc. v. Bufkin, 132 So. 86, 87 (Miss. 1931); Goodwin v. Kennedy, 552 S.E.2d 319, 322–23 (S.C. Ct. App. 2001).

90. Although accusing someone of contracting a loathsome disease is still valid in every state that retains the *per se* categories, there "are very few American cases applying this category. The diseases considered loathsome have tended to be limited to venereal diseases such as syphilis or gonorrhea, and leprosy." SMOLLA, *supra* note 17, § 7:17. *But see* Cohen v. Meyers, No. X04HHDCV115038794S, 2015 WL 8487861, at *8–9, *28 (Conn. Super. Ct. Nov. 12, 2015) (awarding a man $100,000.00 in compensatory damages after a disgruntled contractor accused him of cheating on his wife and contracting a "venereal disease").

91. SMOLLA, *supra* note 17, § 7:9.

92. *See* Spencer v. Spencer, 479 N.W.2d 293, 296 (Iowa 1991) ("Libel per se means the statements are actionable in and of themselves without proof of malice, falsity or damage."). *Compare, e.g.*, Maison de France, Ltd. v. Mais Oui!, Inc., 108 P.3d 787, 798 (Wash. Ct. App. 2005) ("We hold that under *Dun & Bradstreet*, where no matters of public concern are involved, presumed damages to a private plaintiff for defamation without proof of actual malice may be available."), Fountain v. First Reliance Bank, 730 S.E.2d 305, 309 (S.C. 2012) ("If the statement is actionable per se, then the defendant 'is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.'" (quoting Erickson v. Jones St. Publishers, L.L.C., 629 S.E.2d 653, 664 (S.C. 2006)), Marston v. Newavom, 629 A.2d 587, 593 (Me. 1993) (stating that in per se claims, malice is implied as a matter of law), *and* Goldsmith v. Unity Indus. Life Ins. & Sick Benefit Ass'n, 128 So. 182, 182 (La. Ct. App. 1930) ("Since such statements as are charged to have been made, if actually made, are slanderous per se, it is not necessary that actual malice be shown."), *with* Samuels v. Tschechtelin, 763 A.2d 209, 245 (Md. Ct. Spec. App. 2000) (stating that if the statement is defamatory per se, damages are presumed when a plaintiff can demonstrate actual malice, by clear and convincing evidence, even in the absence of proof of harm, whereas a statement defamatory per se made with mere negligence requires the plaintiff to prove actual damages).

When the *Gertz* Court held that the private plaintiff has to show actual malice to recover presumed damages, punitive damages, or both, it was understood at the time to broadly invalidate Wisconsin and South Carolina-esque common law. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 328, 334 (1974); *see also* RESTATEMENT (SECOND) OF TORTS § 621(b) (AM. L. INST. 1976) ("Though the action in the *Gertz* case was one of libel and the defendant would be classified within the term, news media, and the defamatory statement involved a matter of public concern, there is little reason to conclude that the constitutional limitation on recoverable damages will be confined to these circumstances. The rationale that a state has no substantial interest in securing for a plaintiff 'gratuitous awards of money damages far in excess of any actual injury' seems fully applicable to a slander action against a private defendant. Even if the application of the *Gertz* holding as a

B. The Patchwork of Defamation Damages

The traditional categories of damages that one may recover from a defamation action are 1) nominal; 2) punitive or exemplary; and 3) compensatory or actual, which can largely be broken down into a) special and b) general damages.[93]

1. Nominal Damages

Nominal damages must be given at least where the published statement is actionable per se and the plaintiff prevails, but can be limited to amounts such as "six cents or one dollar."[94] For example, nominal damages may be awarded when the plaintiff's bad character leads the trier of fact to believe that no substantial harm has been done to their reputation and there is no proof that serious harm has resulted from the defendant's attack upon the plaintiff's character and reputation.[95] Such an award serves as a "judicial declaration that the plaintiff's right has been violated."[96] It vindicates the plaintiff's character through a verdict which establishes the falsity of the defamatory statement.[97]

2. Punitive Damages

Punitive damages are "not aimed at compensation, but at punishment and deterrence"[98] in response to action deemed reprehensible by the trier of fact.[99] The holding in *Dun & Bradstreet, Inc.* distinguished First Amendment protections between private speech and public speech by holding that states may permit the recovery of punitive damages even if actual malice

---

constitutional decision should eventually be limited in some respects, so that it does not apply, for example, to a private slander, it seems unlikely that the common law of the States would apply a different test as to the damages that could be recovered."). But in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the plurality made clear that the traditional common law rule could survive constitutional muster within the private v. private context. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985).

93. KEETON ET AL., *supra* note 46, § 116A, at 842; SMOLLA, *supra* note 17, § 9:52.

94. SMOLLA, *supra* note 17, § 9:5; *see also* Stidham v. Wachtel, 21 A.2d 282, 282 (Del. Super. Ct. 1941).

95. RESTATEMENT (SECOND) OF TORTS § 620(a) (AM. L. INST. 1976).

96. SMOLLA, *supra* note 17, § 9:7 n.1.

97. *Id.* § 9:7.

98. SMOLLA, *supra* note 17, § 9:36.

99. *Id.* (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974)).

is not present.[100] As such, "punitive damages are available as a matter of constitutional law without regard to fault levels" and are now "purely a matter of state law."[101] "Traditionally, state courts permitt[ed] punitive damages in defamation actions only if . . . the defendant [was] guilty of publishing with common law malice, in the sense of spite, ill will, or vengeance."[102]

3. Compensatory or Actual Damages

While nominal and punitive damages enjoy almost universal definitions and court usage, the definition and categorization of compensatory[103] or actual damages,[104] including the various sub-categories, are not consistently applied by courts or legal secondary sources.[105] According to Smolla's *The Law of Defamation*, compensatory damages can generally be broken down between special damages—pecuniary, monetary, and injury—and general damages, including proof of actual reputational damages, emotional damages,

---

100. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

101. SMOLLA, *supra* note 17, § 9:38.

102. *Id.* at § 9:43. *But see* Ciecierski v. Avondale Shipyards, Inc., 572 So. 2d 834, 834 (La. Ct. App. 1990) (holding that punitive damages are not allowed in Louisiana for defamation claims), *writ denied*, 574 So. 2d 1256 (1991).

103. SMOLLA, *supra* note 17, § 9:11 ("In the law of defamation, compensatory damages is not a specific category or term of art as such. The word 'compensatory' in a nontechnical descriptive sense merely refers to all damages designed to compensate for injury, rather than those damages that are 'punitive,' i.e., designed to punish the defendant.").

104. Actual damages are classified as "real losses flowing from the defamatory statement." W.J.A. v. D.A., 43 A.3d 1148, 1154 (2012) (citing KEETON ET AL., *supra* note 46, § 116A, at 843). It "is not limited to out-of-pocket loss," *Gertz*, 418 U.S. at 350, but includes "impairment of reputation and standing in the community," along with personal humiliation, mental anguish, and suffering to the extent that they flow from the reputational injury. SMOLLA, *supra* note 17, § 9:24. Contained within the notion of actual damages is the doctrine of presumed damages—the losses "which are normal and usual and are to be anticipated when a person's reputation is impaired." KEETON ET AL., *supra* note 46, § 116A, at 843 (citing RESTATEMENT (SECOND) OF TORTS § 904 (AM. L. INST. 1977)).

105. *See* SMOLLA, supra note 17, § 9:4 ("The tendency to misuse terms in the damages area, though perhaps not as egregious as in the area of the per se and per quod rules, is nonetheless a recurring problem. The various categories of damages should thus be referred to with reasonable attention and precision. Courts may thus refer to 'compensatory' or 'actual' damages, 'nominal' damages, 'general' damages, 'special' damages, or 'punitive' or 'exemplary' damages."); *see also, e.g.*, Van Poole v. Nippu Jiji Co., 34 Haw. 354, 357 (1937) ("General damages are such as the law implies and presumes to have occurred from the wrong complained of. The term 'general damages' is sometimes synonymous with 'actual damages.'"). "It always connotes 'compensatory damages.'" *Van Poole*, 34 Haw. at 357. "In the law of libel where the defamatory language is libelous *per se* general damages are such as naturally, proximately and necessarily result from the publication complained of (citation omitted) and include those which will compensate the person defamed for 'the injury to his reputation, business, and feelings which the defamatory publication caused.'" *Van Poole*, 34 Haw. at 357 (quoting Palmer v. Mahin, 120 F. 737, 741 (8th Cir. 1903)).

and "presumed" reputational damages that do not require proof of monetary damages.[106] For the purposes of this Article, special damages, actual reputational injury, and actual emotional well-being injury will be referred to as "hard" compensatory damages while presumed damages will be referred to as "soft" compensatory damages.

a. Special Damages

Special damages, or "special harm," consist of injury of a pecuniary or monetary loss.[107] These special damages may include "any injury of financial value to the plaintiff," but a plaintiff's mental distress, even with a physical illness, is insufficient.[108] Examples of special damages include the loss of customers, business, a specific contract, earnings, credit, or employment.[109] However, special damages do not include the loss of social contacts or friends unless these social losses are connected to financial injury.[110] To prove special damages, when damages are not presumed, the plaintiff must connect the reputational injury to specific financial loss.[111]

b. General Damages

As special damages include monetary loss, general damages include compensatory damages other than monetary losses.[112] Types of general damages include damage to reputation[113] and emotional or mental damages.[114] General damages include: (1) "actual damages," with supporting evidence, to a plaintiff's reputation and emotional or mental well-being,[115] and (2)

106. SMOLLA *supra* note 17, § 9:12.
107. *Id.* at § 9:35.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*; *see also* RESTATEMENT OF TORTS § 622 (AM. L. INST. 1938) ("One who is liable either for a libel or for a slander actionable per se is also liable for any special harm of which the defamatory publication is the legal cause.").
112. SMOLLA, *supra* note 17, § 9:13.
113. *Id.* § 9:14; *see also* RESTATEMENT OF TORTS § 621 cmt. a (AM. L. INST. 1938) (In defamation actions general damages "are imposed for the purpose of compensating the plaintiff for the harm which the defamatory publication is proved, or, in the absence of proof, is assumed to have caused to his reputation.").
114. SMOLLA, *supra* note 17, § 9:14; *see also* RESTATEMENT OF TORTS § 621 cmt. a (AM. L. INST. 1938).
115. SMOLLA, *supra* note 17, § 9:22 (consisting of general damages other than pecuniary loss).

"presumed damages," that exist as a matter of law and do not require evidence to support the amount of financial damages.[116]

1. Actual Reputation Injury

Whether a plaintiff is required to prove actual reputational injury depends on the controlling standard. For cases under the *Gertz* negligence standard, which deal with private figure plaintiffs involving matters of public concern but where the plaintiff is unable to prove actual malice, the plaintiff is required to prove actual reputational injury."[117] In contrast, for cases under the *Dun & Bradstreet, Inc.* standard, which deal with private figure plaintiffs and no matters of public concern where the plaintiff was able to prove actual malice, the plaintiff is not required to prove actual reputational injury.[118] "Actual damages are thus damages established by evidentiary proof, but of a nonpecuniary nature."[119] Unlike special damages that often contain discrete dollar amounts, the dollar amounts for actual reputational injury are often subjective based on the testimony about the plaintiff's reputation from witnesses at trial.[120]

2. Actual Emotional Well-Being Injury[121]

In *Gertz* the Supreme Court required only that actual harm be supported by proof.[122] As such, if the plaintiff could prove emotional or mental harm, the plaintiff could recover for this more subjective harm.[123] The more common types of actual harm in defamation cases include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[124] After the *Gertz* decision, which permitted the recovery of emotional or mental harm, the courts developed two ways

---

116. *Id.* § 9:14.

117. *Id.* § 9:23 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974)); *see also* KEETON ET AL., *supra* note 46, § 116A, at 843 ("In *Gertz v. Robert Welch, Inc.*, the Supreme Court held the common law rule that harm to reputation from the publication of a libel was presumed to be incompatible with the First Amendment . . . unless the plaintiff proves that the defamatory publication was made with knowledge of its falsity, or recklessly with regard to the truth or falsity of the statement.").

118. SMOLLA, *supra* note 17, § 9:23.

119. *Id.* § 9:22.

120. *Id.*

121. *See generally id.* § 9:24 (explaining that mental or emotional harm constitutes actual harm).

122. *Gertz*, 418 U.S. at 350 ("[A]ll awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.").

123. SMOLLA, *supra* note 17, § 9:24.

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

to address this harm. Some decisions required emotional or mental harm damages only "parasitically," when the plaintiff was able to prove reputational injury; but other decisions permitted evidence of emotional or mental harm to be sufficient by itself to recover actual damages, even if the plaintiff did not suffer reputational injury.[125] In reviewing an award of damages to compensate a plaintiff for emotional distress, courts may consider such factors as the nature, duration, and severity of the plaintiff's mental anguish, and may consider the magnitude of disruption to the plaintiff's life, but the evidence has to exceed mere or modest "worry, anxiety, vexation, embarrassment, or anger."[126]

3. Presumed Damages Without Proof of Actual Financial Injury

The most unique form of compensatory damages are presumed damages because the plaintiff is not required to provide any evidence of actual financial loss.[127] In other words, "the plaintiff is relieved of the necessity of producing any proof whatsoever that he has been injured."[128] Instead, the trier of fact may "presume" that reputational injury caused financial loss simply due to the defendant's publication of the defamatory content.[129] While the presumption of damages creates an invitation for "arbitrariness," the courts have tried to ensure that these presumed damages "serve the social policy of compensation."[130] Accordingly, "courts for centuries

125. SMOLLA, *supra* note 17, § 9:24.

126. Anderson v. Durant, 550 S.W.3d 605, 618–19 (Tex. 2018) ("A damages award for mental anguish will survive a legal-sufficiency challenge when the record bears 'direct evidence of the nature, duration, and severity of the plaintiff's mental anguish, thereby establishing a substantial disruption in the plaintiff's daily routine,' or when the record demonstrates 'evidence of a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger.'" (quoting Parkway Co. v. Woodruff, 901 S.W.2d 434, 444 (Tex. 1995)).

127. SMOLLA, *supra* note 17, § 9:17.

128. *Id.* (quoting Charles T. McCormick, *The Measure of Damages for Defamation*, 12 N.C. L. REV. 120, 127 (1934)); W.J.A. v. D.A., 43 A.3d 1148, 1154 (N.J. 2012) (citing SMOLLA, *supra* note 17, § 9:17) ("Presumed damages are a procedural device which permits a plaintiff to obtain a damage award without proving actual harm to his reputation."); Freeman Holdings of Ariz., L.L.C. v. Does, No. CV-11-01877, 2013 WL 210810 (D. Ariz. Jan. 18, 2013) (presumed damages must serve social policy of compensation) (quoting SMOLLA, *supra* note 17, § 9:17 ("[C]ourts . . . impos[e] as the guiding principle the notion that presumed damages must serve the social policy of compensation.")).

129. SMOLLA, *supra* note 17, § 9:17.

130. *Id.*

have allowed juries to presume that some damage occurred from many defamatory utterances and publications."[131]

IV. LANDSCAPE OF PRESUMED DAMAGES DOCTRINE POST-*DUN & BRADSTREET, INC.* AND THE WIDE RANGE OF PRESUMED DAMAGE AWARDS FOR PRIVATE PLAINTIFFS

As discussed above, *Dun & Bradstreet, Inc.* permits states to grant presumed damages when defamation involves a private figure and not a matter of public concern.[132] Forty states follow the traditional common law rule that soft compensatory damages are presumed for plaintiffs seeking recovery from defamation per se claims.[133] The forty states that

131. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985) (citing RESTATEMENT (FIRST) OF TORTS, § 568 cmt. b (AM. L. INST. 1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670)).

132. *Id.* at 763.

133. *See* MacDonald v. Riggs, 166 P.3d 12, 18 (Alaska 2007); Tanner v. Ebbole, 88 So. 3d 856, 863 (Ala. Civ. App. 2011); Hirsch v. Cooper, 737 P.2d 1092, 1095–96 (Ariz. Ct. App. 1986); Gilman v. McClatchy, 111 Cal. 606, 613 (1896). In California, "libel per se" is also known as "libel on its face." CAL. CIV. CODE § 45a ("A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo, or other extrinsic fact, is said to be a libel on its face."). *See also* Williams v. Dist. Ct., 866 P.2d 908, 911 (Colo. 1993); Colo. Pattern Jury Instr. Civ. 22:25 (3d ed. 2017); Lyons v. Heid, No. CV 940311175S, 1998 WL 309797, at *15 (Conn. Super. Ct. May 29, 1998); Stidham v. Wachtel, 21 A.2d 282, 282 (Del. Super. Ct. 1941); Harmon v. Liss, 116 A.2d 693, 696 (D.C. Mun. Ct. 1955); Miami Herald Pub. Co. v. Brown, 66 So. 2d 679, 681 (Fla. 1953); John D. Robinson Corp. v. S. Marine & Indus. Supply Co., 396 S.E.2d 837, 841 (Ga. Ct. App. 1990); Van Poole v. Nippu Jiji Co., 34 Haw. 354, 358 (1937); Barlow v. Int'l Harvester Co., 522 P.2d 1102, 1103 (Idaho 1974); Mauvais-Jarvis v. Wong, 987 N.E.2d 864, 881 (Ill. App. Ct. 2013); Stanley v. Kelley, 422 N.E.2d 663, 668–69 (Ind. Ct. App. 1981); Bierman v. Weier, 826 N.W.2d 436, 455 (Iowa 2013); Toler v. Süd-Chemie, Inc., 458 S.W.3d 276, 282 (Ky. 2014); Shapiro v. Massengill, 661 A.2d 202, 217 (Md. Ct. Spec. App. 1995); Simons v. Burnham, 60 N.W. 476, 480 (Mich. 1894); Becker v. Alloy Hardfacing & Eng'g Co., 401 N.W.2d 655, 661 (Minn. 1987); McFadden v. U.S. Fid. & Guar. Co., 766 So. 2d 20, 24 (Miss. Ct. App. 2000); Keller v. Safeway Stores, Inc., 108 P.2d 605, 612 (Mont. 1940); Hutchens v. Kuker, 96 N.W.2d 228, 232 (Neb. 1959); Bongiovi v. Sullivan, 138 P.3d 433, 448 (Nev. 2006); Lassonde v. Stanton, 956 A.2d 332, 341–42 (N.H. 2008); NuWave Inv. Corp. v. Hyman Beck & Co., 75 A.3d 1241, 1252–53 (N.J. 2013); Arnold v. Sharpe, 251 S.E.2d 452, 455 (N.C. 1979); Johnson v. Nielsen, 92 N.W.2d 66, 68–69 (N.D. 1958). According to the North Dakota Central Code Section 14-02-04, North Dakota defines slander as what common law would consider the four defamation per se categories and considers libel a separate cause of action. N.D. Cent. Code § 14-02-04; *see also Johnson*, 92 N.W.2d at 68–69; N.D. Cent. Code § 14-02-03; 35 OHIO JUR. 3d. *Defamation and Privacy* § 5 (2020) (citing Gosden v. Louis, 687 N.E.2d 481, 492 (Ohio Ct. App. 1996)); Mitchell v. Griffin Television, L.L.C., 60 P.3d 1058, 1066 (Okla. Civ. App. 2002); Benassi v. Georgia-Pacific, 662 P.2d. 760, 764 (Or. Ct. App. 1983)); 1 RONALD J. RESMINI, RHODE ISLAND TORT LAW AND PERSONAL INJURY PRACTICE § 434(a) (citing Henry v. Cherry & Webb, 73 A. 97, 102 (R.I. 1909)) (in case of "libel and slander . . . pecuniary damage is presumed"); Kunst v. Loree, 817 S.E.2d

keep the common law rule either allow private plaintiffs to recover soft damages[134] or, where there is no proof of actual reputational harm, entitle plaintiffs to only nominal damages.[135] The Hawaii Supreme Court aptly articulated the rationale in support of presumed damages in 1937:

> The presumption that the victim of defamatory language libelous *per se* has suffered general damages is not a mere fiction to be lightly disregarded. It is the common experience of mankind that injury and resulting damage is the natural, proximate and necessary result of libels which hold a subject "up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of society and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man."[136]

Meanwhile, ten states have extended *Gertz*'s rationale to its most restrictive conclusion and abandoned the common law rule on presumed damages in favor of requiring actual proof of damages for private plaintiffs seeking soft compensatory damages.[137] As explained by the Arkansas Supreme Court:

295, 306–07 (S.C. Ct. App. 2018); Walkon Carpet Corp. v. Klapprodt, 231 N.W.2d 370, 373–74 (S.D. 1975); Venn v. Tennessean Newspapers, Inc., 201 F. Supp. 47, 59 (M.D. Tenn. 1962) (applying Tennessee law); Burbage v. Burbage, 447 S.W.3d 249, 259 (Tex. 2014); Westmont Mirador, L.L.C. v. Miller, 362 P.3d 919, 921 (Utah Ct. App. 2014); Tronfeld v. Nationwide Mut. Ins. Co., 636 S.E.2d 447, 450 (Va. 2006); Maison de France, Ltd. v. Mais Oui!, Inc., 108 P.3d 787, 791 (Wash. Ct. App. 2005); Milan v. Long, 88 S.E. 618, 619 (W. Va. 1916); Williams v. Hicks Printing Co., 150 N.W. 183, 188 (Wis. 1914); McBride v. Peak Wellness Ctr., Inc., 688 F.3d 698, 711 (10th Cir. 2012) (citing Hoblyn v. Johnson, 55 P.3d 1219, 1232–33 (Wyo. 2002)).

134. *See, e.g., MacDonald,* 166 P.3d at 18–19 ("Under Alaska law, general damages for defamation per se may be awarded without any proof of damages. In *City of Fairbanks v. Rice*, we noted that the superior court was correct in finding that statements that are defamatory per se 'obviat[e] the need for proof of damages.' Similarly, in *Alaska Statebank v. Fairco* this court upheld damages for a defamation case involving slander per se on the basis that '[p]roof of actual damages was . . . not necessary to support the award.' . . . MacDonald's defamation occurred in a very small town and involved serious allegations against Riggs. Viewed in this context, Riggs's testimony could enable a reasonable juror to award damages on the basis that MacDonald's statements harmed Riggs's reputation and standing in the community and caused him emotional distress.").

135. *See, e.g.*, *Burbage*, 447 S.W.3d at 259 ("Texas law presumes that defamatory per se statements cause reputational harm and entitle a plaintiff to general damages such as loss of reputation and mental anguish. But this presumption yields only nominal damages.") (citations omitted).

136. *Van Poole*, 34 Haw. at 358 (1937) (quoting Kahanamoku v. Advertiser Publ'g Co., 25 Haw. 701, 713 (1920)).

137. *See* United Ins. Co. of Am. v. Murphy, 961 S.W.2d 752, 756 (Ark. 1998); Costello v. Hardy, 864 So. 2d 129, 141 (La. 2004); Zoeller v. Am. Fam. Mut. Ins. Co., 834 P.2d 391, 395 (Kan. Ct. App. 1992); Maietta Constr., Inc. v. Wainwright, 847 A.2d 1169, 1174 (Me. 2003); Draghetti v. Chmielewski, 626 N.E.2d 862, 868 (Mass. 1994); Nazeri

> Among the problems inherent in presuming harm are the absence of criteria given to juries to measure the amount the injured party ought to recover, the danger of juries considering impermissible factors such as the defendant's wealth or unpopularity, and the lack of control on the part of trial judges over the size of jury verdicts. [citation omitted]. Moreover, by allowing presumed damages for certain words that fit within the *per se* categories but precluding actual damages for other words without additional proof of damages, the common-law rule 'creates unjustifiable inequities for plaintiffs and defendants alike.' . . . We believe that the better and more consistent rule . . . is to require plaintiffs to prove reputational injury in all cases.[138]

A. Presumed Damages States

Damage awards for defamation per se lawsuits vary widely based on jurisdiction and within the various per se categories. While "no two cases are exactly the same,"[139] a survey of damage awards illuminates the frustrating uncertainty some plaintiffs face when attempting to recover compensation for their damaged reputations. In 2017, a Texas martial arts instructor was awarded $250,000.00 in damages for harm to his reputation and mental anguish when his reputation was destroyed after a woman falsely accused him of sexually abusing and possessing sexually explicit photos of children.[140] But when a man in Iowa was falsely reported to his mother, pastor, and the state protective services for, among other related conduct, molesting a child, an Iowa jury only awarded him $25,000.00 in compensatory damages in 2014.[141] In Arizona, a 2000 court decision upheld a jury's $100,000.00 presumed damages award in a case where a man was falsely accused of molesting a young girl by her parents who reported him to the police and communicated to the neighborhood.[142] In Alaska, a 2007 court upheld an award of $35,000.00 in reputational damages to a man whose ex-girlfriend falsely accused him of holding her at gunpoint during and after she was assaulted by another man.[143]

---

v. Mo. Valley Coll., 860 S.W.2d 303, 313 (Mo. 1993) (abolishing the distinction between defamation per se and per quod and instead requiring proof of actual injury in every defamation case); Smith v. Durden, 276 P.3d 943, 952 (N.M. 2012) (requiring proof of actual injury in every defamation case); Nolan v. State, 69 N.Y.S.3d 277, 283 (App. Div. 2018); Bakare v. Pinnacle Health Hosps., Inc., 469 F. Supp. 2d 272, 298 (M.D. Pa. 2006) (applying Pennsylvania law); Lent v. Huntoon, 470 A.2d 1162, 1169–70 (Vt. 1983).

138. *United Ins*., 961 S.W.2d at 756 (quoting *Nazeri*, 860 S.W.2d at 313).

139. Okraynets v. Metro. Transp. Auth., 555 F. Supp. 2d 420, 438 (S.D.N.Y. 2008).

140. Hawbecker v. Hall, 276 F. Supp. 3d 681, 681 (W.D. Tex. 2017) (applying Texas law, the court included $68,000.00 in lost wages and $100,000.00 in exemplary damages).

141. Burn v. Sinclair, No. 13-1505, 2014 WL 5243368, at *1–2 (Iowa Ct. App. Oct. 15, 2014) (the jury also awarded him a $25,000.00 punitive award).

142. Schmitz v. Aston, 3 P.3d 1184, 1191, 1193 (Ariz. Ct. App. 2000) *depublished by* 18 P.3d 1230 (2001).

143. MacDonald v. Riggs, 166 P.3d 12, 14, 18–19 (Alaska 2007).

Per se reputational damage awards also vary widely within the imputation of professional ability and honesty context. Examples of significant reputational damages awards related to these types of per se claims include a home builder in South Carolina who was awarded $1 million in actual damages after a homeowner's employee falsely made statements to a vendor and subcontractor accusing the builder of stealing client funds, which seriously injured the builder's reputation.[144] In 2019, a Texas attorney was awarded $500,000.00 in compensatory damages for his reputation when opposing clients defamed him online by accusing him of committing fraud and of violating state professionalism rules for attorneys.[145] In Nevada, a plastic surgeon was awarded $250,000.00 in compensatory damages and $250,000.00 in punitive damages after a doctor lied to the surgeon's patient that he had killed someone who received the same surgery as the patient.[146] A South Carolina court upheld a $400,000.00 actual damages and $100,000.00 punitive damages award for a man whose former employer accused him of being a "thief" for stealing a welding machine, resulting in the man not being able to get work as a result of his tarnished reputation.[147] A man in California was awarded $400,001.00 after several people accused him of committing embezzlement and engaging in "shady financial practices."[148] A Texas jury awarded a salesman $211,000.00 in compensatory damages when his former employer made false comments about the salesman's performance and professional integrity.[149] In another Texas case, a female employee was awarded, *inter alia*, $175,000.00 in character and reputation damages after the vice president of her former employer accused her of prostituting herself to get business at a crawfish boil attended by attendees of a conference.[150] The Eighth Circuit Court of Appeals upheld a $90,000.00 Minnesota jury award for the operator of a vacuum cleaner business who was defamed by a vacuum cleaner manufacturer whose attorneys sent

144. Kunst v. Loree, 817 S.E.2d 295, 295, 300 (S.C. Ct. App. 2018).

145. Vodicka v. Tobolowsky, No. 05-17-00727-CV, 2019 WL 1986625, at *8 (Tex. App. May 6, 2019).

146. Bongiovi v. Sullivan, 138 P.3d 433, 439 (Nev. 2006).

147. Constant v. Spartanburg Steel Prods., Inc., 447 S.E.2d 194, 194–97 (S.C. 1994), *cert. denied*, 513 U.S. 1017 (1994).

148. Brisson v. Propane Studio L.L.C., No. CGC 13-531005, 2014 WL 12516224, at *4, *8 (Cal. App. Dep't Super. Ct. Dec. 5, 2014).

149. Frank B. Hall & Co. v. Buck, 678 S.W.2d 612, 617, 630 (Tex. App. 1984).

150. Fontenot Petro-Chem & Marine Servs. v. LaBono, 993 S.W.2d 455, 457, 460 (Tex. App. 1999) (the employee was also awarded her $60,000.00 award in lost income and $30,000.00 for mental anguish).

a letter falsely accusing the operator of selling used vacuum cleaners as new.[151]

While the above-mentioned cases seem like good results for the plaintiffs, not every defamation per se claim related to professional ability and honesty results in a substantial reputational damages award. The following cases are a sampling of the low end of the presumed reputational damages spectrum for professional ability and honesty. A Texas court reduced a doctor's actual reputational damages to $25,000.00 when he was defamed by a fellow doctor who accused him of being an incompetent physician, being a liar, having low moral character, and coming to the hospital intoxicated in front of patients and other doctors.[152] In another Texas case, an inspector received $55,000.00 in past and future damages to his reputation when a disgruntled airplane owner accused him of breaking into his locked airplane.[153] A New Hampshire contractor only received a $10,000.00 award in reputational damages after dissatisfied customers claimed he built them a "sickly" house to friends and neighbors in the state's small business community.[154] The Eastern District of Virginia reduced an attorney's $24,000.00 award in actual damages to a mere $6,000.00 when an author published several false statements online "questioning Plaintiff's ethical conduct as a practicing attorney, accusing him of the criminal act of extortion, and stating that Plaintiff had been discharged from his employment with a law firm as a result of such conduct."[155] A Virginia jury awarded $10,000.00 in compensatory damages to a motorcycle mechanic in 1996 after an acquaintance falsely accused him of being a thief and a liar to his employer and to strangers at a custom motorcycle show and restaurant.[156] In Nevada, a court awarded a woman $50,000.00 in reputational damage after her a man accused her of committing adultery with another HOA member and engaging in polygamy.[157] In Maryland, a woman who was falsely accused of being criminally charged with harassment and owing money to a broadcast station

151. Scott Fetzer Co. v. Williamson, 101 F.3d 549, 553, 557 (8th Cir. 1996) (applying Minnesota law).

152. Bayoud v. Sigler, 555 S.W.2d 913, 914, 916 (Tex. Civ. App. 1977) (using the term actual damages to mean reputational damages).

153. Peshak v. Greer, 13 S.W.3d 421, 423–24, 427 (Tex. App. 2000) (the jury also awarded the inspector $48,500.00 in special damages that encompassed past and future mental anguish and loss of earning capacity).

154. Lassonde v. Stanton, 956 A.2d 332, 337 (N.H. 2008).

155. Cretella v. Kuzminski, 640 F. Supp. 2d 741, 746–47 (E.D. Va. 2009) (applying Virginia law).

156. Poulston v. Rock, 467 S.E.2d 479, 481 (Va. 1996) (also awarded $25,000.00 in punitive damages).

157. Barraco v. Robinson, No. 72566-COA, 2019 WL 1932068, at *1 (Nev. Ct. App. Apr. 26, 2019).

by her ex-boyfriend's jealous girlfriend only received $10,000.00.[158] Lastly, in a 2011 Texas case, an attorney was awarded only $20,000.00 in damages to his past and future reputation after he was falsely accused over a radio-talk show of making sexually suggestive comments and exposing a co-worker to pornography in the workplace.[159]

B. Actual Damages States

This wide range of damage awards demonstrates the gamble many plaintiffs face when they are deciding whether to pursue a defamation per se claim in presumed damages states. Nonetheless, plaintiffs in states that require actual proof of damages face their own hurdle in achieving monetary justice. Compare an Arkansas plaintiff in 1998 who was awarded $600,000.00 in compensatory damages and $2 million in punitive damages against her former supervisor who falsely told clients that she was stealing their insurance premiums[160] with a Missouri man who was only awarded $30,000.00 in reputational damages and a mere $25.00 in punitive damages after he was accused of molesting a child through posters plastered throughout his neighborhood.[161] Similarly, in Louisiana, a court awarded a couple $35,000.00 each in general damages after another neighborhood couple accused them of molesting the couple's four-year-old daughter during an overnight stay in their home.[162] In Maine, a solar home contractor only received $20,000.00 in compensatory damages when a former customer falsely told another homeowner/potential customer that the contractor was a "drunk" and that his crew drank on job, left earlier each day, and eventually failed to show up.[163] And yet, the reputational damage awards in the above mentioned cases are many times that which was awarded to Theresa Smith in 1993.[164] Smith was a law student at the Southern University Law School in Baton Rouge, Louisiana, who was taught by a first-year law

158. Harvey-Jones v. Coronel, 196 A.3d 36, 40–41 (Md. Ct. Spec. App. 2018) (the court also awarded her $200,000.00 in punitive damages).
159. Olson v. Westergren, No. 13-10-00054-CV, 2011 WL 3631963, at *1 (Tex. App. Aug. 18, 2011).
160. United Ins. Co. of Am. v. Murphy, 961 S.W.2d 752, 754 (Ark. 1998).
161. Kennedy v. Jasper, 928 S.W.2d 395, 397–98 (Mo. Ct. App. 1996).
162. Connor v. Scroggs, 821 So. 2d 542, 546–47 (La. Ct. App. 2002).
163. Haworth v Feigon, 623 A.2d 150, 155–56 (Me. 1993).
164. Smith v. Atkins, 622 So. 2d 795, 796, 800 (La. Ct. App. 1993).

professor.[165] One day, in front of Smith's class, the professor recounted an incident where he witnessed Smith drunk at a nightclub and described how she accidentally fell on the ground as she went to sit down.[166] When Smith asked why the professor did not help her up, he either responded "'I ain't pickin' no Slut up off the floo' [sic] or an elaborate mock stage-whisper 'Slut.'"[167] According to the record, the news that the professor called Smith a "slut" spread around the law school like "wildfire" and resulted in Smith being the butt of many jokes by her peers.[168] When Smith sued the professor for libel, the trial court only awarded her $1,500.00 in general damages to her reputation.[169] The Fourth Circuit Court of Appeal in Louisiana thought the award was far too small and bumped the damages up to a measly $5,000.00.[170] For context, the Southern University Law School is a small, local law school of close to 500 full-time students where graduates mostly go on to work for the State of Louisiana.[171] In the legal field reputation is everything, so to be ridiculed and extremely embarrassed by a law professor before even taking the bar exam could have been a debilitating start to her career.[172]

Similar to the forty states that permit presumed damages, per se reputational damage awards in actual damage states, especially for per se claims in the category of professional ability and honesty, can be quite high. For example,

---

165. *Id.* at 796; *Contact Us*, S. UNIV. L. CTR., https://www.sulc.edu/page/prospective-students-contact-us-2 [https://perma.cc/53CE-SBN8].

166. *Smith*, 622 So. 2d at 796–97.

167. *Id.* at 797.

168. *Id.*

169. *Id.* at 799.

170. *Id.* at 800.

171. S. UNIV., STANDARD 509 INFORMATION REPORT (Nov. 26, 2019), https://www.sulc.edu/assets/sulc/ABADisclosures/ABA-509-Report-January-4-2019.pdf [https://perma.cc/N9EQ-WP6E]; S. UNIV., EMPLOYMENT SUMMARY FOR 2019 GRADUATES (Apr. 25, 2020, 3:23 PM), https://www.sulc.edu/assets/sulc/CareerServices/2019-SULC-Employment-outcomes.pdf [https://perma.cc/4AWN-KPUV].

172. *See Smith*, 622 So. 2d at 797–98 ("Numerous students testified that after the name-calling incident, they stopped associating with Theresa Smith. One student stated that while she did not believe Professor Atkin's allegation, the gossip became so bad that if you associated with Theresa, other students would then target you as the butt of their jokes and gossip. A student testified that she was head of the Moot Court Board and a serious student who anticipated a serious and successful career in law and that she could not afford to be associated with someone of low moral character, that it had the potential of impacting negatively on her career. Another student testified that although he had never thought that Theresa Smith was a slut, when the Professor called her that openly and in class, he thought that there might be some basis to it—'after all he was a Professor'—and he began to wonder about Theresa. Another student testified that the incident would cause him not to offer Theresa a partnership or a job if he were in a position to do so, because he could not afford to have someone of questionable character affiliated with him professionally. Other students thought that actively associating with Theresa would cause Professor Atkins to retaliate with bad grades.").

take the New York case of *Cantu v. Flanigan*.[173] *Cantu* involved a Mexican businessman who had earned an international reputation of being a man of integrity within the petroleum industry.[174] Flanigan was also a businessman and served as the president of a Bahamian corporation that, over two decades, had filed multiple lawsuits against Mexican petroleum workers unions.[175] Believing that Cantu was connected with the Mexican government, and somehow had the ability to assist with the settlement of judgments from those lawsuits, Flanigan made several accusations against Cantu to a reporter.[176] Namely, he accused Cantu of managing a racketeering enterprise, money laundering, bribery of government officials, being involved with Mexican criminal cartels, being the head of a crime family, oil smuggling, committing mail and wire fraud, "tampering, obstruction of commerce, unlawful travel, theft by conversion and extortion," and, most outrageously, conspiring with Iraqi President Saddam Hussein to circumvent sanctions against Iraq and being personally responsible for causing gasoline prices to rise.[177]

When the allegations were published in a globally circulated magazine, Cantu lost business contracts, reported that he could no longer enter into multi-million dollar contracts because of the damage to his reputation, and even became subject to a criminal investigation by the Mexican government.[178] After Cantu filed a defamation suit in New York, the jury awarded him $150 million in compensatory damages for the harm to his reputation, humiliation, and mental anguish.[179] Although Flanigan appealed the award amount, the Eastern District of New York sustained the award because (1) Cantu "had a positive reputation throughout the petroleum industry and . . . his reputation for honesty and fair business practice was recognized throughout the world by his peers," and "[t]he evidence . . . indicated that [plaintiff's] reputation enabled him to secure large, multi-million dollar contracts"; (2) "the defendant's statements were . . . inflammatory"; (3) "the statements at issue . . . were circulated throughout the world"; (4) the statements "addressed [plaintiff's] professional reputation within the petroleum industry . . . and were made such that they would appear to be coming from a credible

173. Cantu v. Flanigan, 705 F. Supp. 2d 220 (E.D.N.Y. 2010).
174. *Id.* at 222.
175. *Id.* at 222–23.
176. *Id.* at 223.
177. *Id.*
178. *Id.* at 224.
179. *Id.* at 225.

source"; and (5) the defendant "engaged in a deliberate course of conduct that can only be described as attempted criminal extortion."[180] This made the award the largest approved defamation award in New York State history.[181]

A second example is Hanna Bouveng's lawsuit against her former employer NYG Capital, LLC–NYG–in 2016.[182] Bouveng was a Swedish national who was studying at Berkeley College in New York City when she accepted a job at NYG, a Wall Street investment firm in Manhattan.[183] After over a year of unwanted sexual advances and intimidation, Bouveng was fired for refusing to pursue a sexual relationship with her employer Benjamin Wey, a major Wall Street figure.[184] Soon afterwards, Wey sent emails to Bouveng's family and friends that he found her "naked, dirty, [and] totally drunk" with a "homeless black man" in Bouveng's bed, and that she "par[ties] like crazy, is not hanging out with the right people, and leads a double life."[185] Wey then published a series of articles in an online publication accusing her of, *inter alia*, being a prostitute, attempting to blackmail him, committing perjury, having drug and gun possession convictions, committing bank fraud, and being in the United States illegally.[186] Bouveng testified that the top Google searches concerning her name were images and headlines from the Wey articles.[187] Because of Wey's actions, Bouveng lost friends and feared that she would be unable to get another job, prompting her to move back to Sweden and work at a coffee shop.[188]

When Bouveng sued over Wey's statements for defamation per se, the jury awarded her $1.5 million in compensatory damages for her reputation and emotional distress.[189] On appeal to the Southern District of New York, Wey and NYG argued in part that the compensatory damages award should be reduced because, unlike in other high damages awards cases, Bouveng was only at the outset of a professional career, so any reputational harm would not be comparable to plaintiffs like Cantu.[190] While the court acknowledged that Bouveng was at the mere beginning of a career where she was being groomed to take on the role of a marketing director for a

180. *Id.* at 228–29.
181. *Id.* at 230.
182. Bouveng v. NYG Capital L.L.C.,175 F. Supp. 3d 280, 280 (S.D.N.Y. 2016) (applying New York law).
183. *Id.* at 289–90.
184. *Id.* at 289, 291–301.
185. *Id.* at 301.
186. *Id.* at 303–07.
187. *Id.* at 307.
188. *Id.* at 308.
189. *Id.* at 335.
190. *Id.* at 342.

Swedish life insurance company, it flatly rejected Wey and NYG's argument.[191] The Court described the defendants' actions as "carefully and maliciously" designed to do "maximum damage to Plaintiff's burgeoning professional career," and noted the disturbing precedent that could arise if individuals or organizations with substantial resources could "destroy careers before they can become well established" and were only liable to pre-career reputational damages.[192] Accordingly, the court upheld the compensatory damages award.[193]

However, other defamation claims about a plaintiff's alleged dishonesty have resulted in far smaller awards. A bingo hall owner in Louisiana received $50,000.00 in general reputational damages when a police officer falsely accused him of "bilking" thousands of dollars from charities over the years.[194] Likewise, in Maine, a former vice president of sales and marketing was also awarded $50,000.00 in compensatory damages after her employer accused her of charging personal items to the company credit card.[195] A former employee at a Vermont distribution center was awarded $19,000.00 in compensatory reputational damages after his employer called him a thief at a staff meeting when the former employee kept rejected merchandise.[196] In Louisiana, a woman only received $15,000.00 in general damages after her former employer accused her of embezzlement in a fax to the principals of her new employer.[197] A Louisiana plaintiff was only awarded $500.00 in reputational damages when he was evicted after his landlord's relative spread false rumors that he was being investigated for use and sale of illegal drugs and that he hosted parties involving nudity, sex, and drug use.[198] And a New York man received a paltry $500.00 in reputational damage after a video rental store displayed his name on the counter along

191. *Id.* at 342–43.
192. *Id.*
193. *Id.* at 344.
194. Trentecosta v. Beck, 714 So. 2d 721, 723–26 (La. Ct. App. 1998) (the court also awarded him $94,357.50 in loss profits).
195. Marston v. Newavom, 629 A.2d 587, 589–93 (Me. 1993).
196. Crump v. P & C Food Mkts., Inc., 576 A.2d 441, 443–45, 448 (Vt. 1990) (the jury also awarded him $25,000.00 in punitive damages and $19,000.00 in intentional infliction of emotional distress damages).
197. Blades v. Olivier, 740 So. 2d 755, 756–57 (La. Ct. App. 1999).
198. *See* Lege v. White, 619 So. 2d 190, 190–91 (La. Ct. App 1993) (the court also awarded him $5,000.00 in damages for mental anguish).

with a sign indicating a $1,000.00 "reward" suggesting the plaintiff was a thief.[199]

V. PRIVATE PLAINTIFFS NEED A GUARANTEED MINIMUM DAMAGE AWARD TO ENSURE THAT THE PRESUMED DAMAGES DOCTRINE HAS SUFFICIENT PRACTICAL VALUE

The wide range of awards demonstrates that while some plaintiffs will be adequately compensated for the defamatory statements made about their reputations, others will not.[200] Indeed, even in cases where the plaintiff receives a substantial jury award, higher courts can drastically reduce reputational damage awards.[201] While public plaintiffs, or wealthier private plaintiffs, may be willing to take the litigation gamble, private plaintiffs of more modest means do not have that luxury and are prohibited from benefiting from the presumed damages associated with per se defamation claims. As Justice White observed in his *Dun & Bradstreet, Inc.,* concurrence, "[g]eneral damages for injury to reputation were presumed and awarded because the judgment of history was that 'in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed.'"[202] Even if the plaintiff was awarded only nominal damages, the presumed damages rule performed "a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false," which allowed defamed persons to "expose the groundless character of a defamatory rumor before harm to the reputation . . . resulted therefrom."[203] The plurality further explained that presuming damages in defamation per se cases "furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective."[204]

---

199. Gallo v. Montauk Video, Inc., 684 N.Y.S.2d 817, 818 (App. Term 1998).

200. Indeed, even in cases where the plaintiff receives a substantial jury award, higher courts can drastically reduce reputational damage awards. *See* Cretella v. Kuzminski, 640 F. Supp. 2d 741, 741 (E.D. Va. 2009). *See generally* Jay M. Zitter, Annotation, *Excessiveness or Inadequacy of Compensatory Damages for Defamation*, 49 A.L.R. 4th (2020).

201. *See, e.g.*, *Cretella*, 640 F. Supp. 2d at 741 (applying Virginia law, the court reduced plaintiff attorney's jury award of $24,000.00 in actual damages in defamation action to $6,000.00 where the plaintiff was defamed per se to the state legal ethics board). *See also* Zitter, *supra* note 200.

202. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 765 (White, J., concurring) (quoting RESTATEMENT (FIRST) OF TORTS § 621 cmt. a (AM. L. INST. 1938)).

203. *Id.* (quoting RESTATEMENT (FIRST) OF TORTS § 569 cmt. b (AM. L. INST. 1938)).

204. *Id.* at 761; *see also* Hancock v. Variyam, 400 S.W.3d 59, 64 (Tex. 2013) (affirming this explanation).

This proposition has been well supported by courts throughout the United States. Decades before *Dun & Bradstreet, Inc.*, the Hawaii Supreme Court explained the reputational harm associated with defamatory statements:

> The presumption that the victim of defamatory language libelous *per se* has suffered general damages is not a mere fiction to be lightly disregarded. It is the common experience of mankind that injury and resulting damage is the natural, proximate and necessary result of libels which hold a subject "up to scorn and ridicule and to feelings of contempt or execration, impair him in the enjoyment of society and injure those imperfect rights of friendly intercourse and mutual benevolence which man has with respect to man."[205]

Decades after *Dun & Bradstreet, Inc.*, the New Jersey Supreme Court highlighted the importance of presumed damages in the modern day:

> In today's world, one's good name can too easily be harmed through publication of false and defaming statements on the Internet. Indeed, for a private person defamed through the modern means of the Internet, proof of compensatory damages respecting loss of reputation can be difficult if not well-nigh insurmountable. . . . In sum, private persons face the real risk of harm through the modern ease of defamatory publications now possible through use of the Internet. Presumed damages vindicate the dignitary and peace-of-mind interest in one's reputation that may be impaired through the misuse of the Internet. Permitting reputational damages to be presumed in a defamation action arising in that setting serves a legitimate interest, one that ought not be jettisoned from our common law.[206]

The Iowa Supreme Court agreed that reputational harm was the result of defamatory statements and observed that:

---

205. Van Poole v. Nippu Jiji Co., 34 Haw. 354, 358 (1937) (quoting Kahanamoku v. Advertiser Publ'g Co., 25 Haw. 701, 713 (1920)).

206. W.J.A. v. D.A., 43 A.3d 1148, 1159–60 (N.J. 2012); *see also id.* at 1159 ("Justice O'Hern, in dissent, squarely addressed [the importance of the Presumed Damages doctrine], declaring the plain and simple truth that out-of-pocket losses are not the only damages a private plaintiff in a defamation action suffers. Other damages include the loss of one's good name inflicted by the defamatory publication to third parties, and the anguish and humiliation that flows from a communication that, history and experience teach, will diminish one's good name.") (citation omitted); Bouveng v. NYG Capital L.L.C., 175 F. Supp. 3d 280, 343 (S.D.N.Y. 2016) ("In the internet age in which we live, an individual's online presence is as important–perhaps more important early on–than her physical presence."); Bierman v. Weier, 826 N.W.2d 436, 455 (Iowa 2013) ("In our present-day world, accusations can be spread quickly and inexpensively, through self-publishing of a book or otherwise. A generation or two ago, it is entirely plausible that if [defendant] had decided to write a memoir about his life, it would have stayed by his typewriter and never been copied or distributed. Now, however, for a relatively modest price, it is possible to print 250 copies of a professional-looking book alleging that one's ex-wife is a victim of child abuse from her father. We think libel per se plays a useful role in helping to keep our social interactions from becoming ever more coarse and personally destructive.").

> The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff. Thus some presumptions are necessary if the plaintiff is to be adequately compensated.[207]

Presumed damages in general are only allowed by the law when there is a great likelihood of injury coupled with great difficulty in proving damages.[208] "In allowing the jury to presume damages where none have been proven by concrete evidence, the law permits the jury to prevent an injustice by awarding damages for injuries that are real but not quantifiable."[209]

Although there is some scholarly work opposed to the idea of presumed reputational damages, in part because there is no uniform way for a trier of fact to value presumed damages,[210] forty states still maintain presumed reputational damages for plaintiffs.[211] Therefore, instead of abolishing this critical remedy, especially for modest means plaintiffs, as was done for all plaintiffs in ten states,[212] a solution that is more consistent with the intent of presumed damages would be for states to impose a minimum recovery for presumed reputational damages for private plaintiffs related to matters not of public concern. This solution also addresses the lack of uniform valuation of presumed reputational damages.[213]

In *Dun & Bradstreet, Inc.*, the U.S. Supreme Court rightly acknowledged that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact."[214] If providing actual proof is already "impossible" and courts already presume that "serious harm has resulted," then the next logical step is

---

207. *Bierman*, 826 N.W.2d at 454 (quoting Erwin N. Griswold, *Developments in the Law: Defamation*, 69 HARV. L. REV. 875, 891–92 (1956)).

208. *See* Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 310–11 (1986) (stating that presumed damages compensate for harms that are impossible to measure).

209. Blaine Larsen Processing, Inc. v. Hapco Farms, Inc., No. 97-0212-E-BLW, 2000 WL 35539979, at *12 (D. Idaho Aug. 9, 2000).

210. *See generally* David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 749 (1984).

211. *See supra* note 133.

212. *See supra* note 137.

213. Admittedly, determining a minimum recovery, or "damages floor," is not a perfect solution and the process to determine the minimum dollar amount will contain a level of subjectivity that will make some uncomfortable. However, once the floor is set, all parties will have a more useful mechanism to evaluate the merits of plaintiff's defamation claim and the corresponding presumed damages.

214. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760 (1985) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 112, at 765 (4th ed. 1971)).

to provide plaintiffs with the reliable remedy of a guaranteed minimum dollar amount.

Suppose a minimum wage employee is defamed per se by their manager such that the employee has a valid per se claim in a matter not related to public concern. Assuming this minimum wage employee even realizes that a potential legal remedy exists and has the resources to retain counsel, how is the employee or counsel supposed to adequately weigh the merits of the litigation associated with the presumed damages? The employee could easily spend $20,000.00 on litigation and obtain a presumed damages award of $5,000.00. Without some type of minimum award, presumed damages effectively operate as a legal fiction for many potential plaintiffs.

Opponents may argue that defamation per se is less damaging to a minimum wage employee than a public official or a wealthy private plaintiff, but defamation law provides recovery for hard damages[215] and providing a minimum damage award for presumed damages allows all plaintiffs, regardless of their financial circumstances, to adequately evaluate their legal claim and decide whether to seek legal remedies. As stated by an Iowa Supreme Court Justice:

> I believe the only way a defamed person can definitely vindicate his or her reputation is to bring an action against the defamer. When a defamatory act gives rise to a per se claim, we should not require the defamed person to prove damages in order to vindicate his or her name.[216]

Further, if presumed damages are supposed to "vindicate the dignitary and peace-of-mind interest in one's reputation,"[217] and defamation law remains the only tort in American law where a plaintiff can recover damages without proof of actual injury,[218] then the state legislatures must provide an equally unique remedy—a minimum financial damages award for plaintiffs who successfully litigate a per se defamation claim.

VI. CONCLUSION

A right without a remedy is no right at all.[219] The types of damages and standards of proof in defamation cases vary greatly depending on the

215. *See supra* Section III.B.3. (discussing "hard" compensatory damages).
216. Bierman v. Weier, 826 N.W.2d 436, 467 (Iowa 2013) (Wiggins, J., concurring).
217. W.J.A. v. D.A., 43 A.3d 1148, 1160 (N.J. 2012).
218. Anderson, *supra* note 210, at 748.
219. *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 130 (William Carey Jones ed., Bancroft-Whitney Co. 1916) (1765–1770) ("For it is a settled

plaintiff, the defendant, the intent, and even the type of statements.[220] The doctrine of presumed damages provides a much needed remedy for plaintiffs that addresses an almost universal belief in our justice system—reputational damages are real and very difficult, if not impossible, to fully prove.[221] As such, forty states have maintained the benefits of presumed damages for plaintiffs.[222] However, due to the wide spectrum of presumed damage awards in case law,[223] it is extremely difficult for plaintiffs to adequately evaluate the merits of their defamation claim, which is especially problematic for modest means plaintiffs who have been defamed by a private defendant. A minimum financial damages award for private plaintiffs who successfully litigate a defamation per se claim would provide much needed clarity for litigants and ensure that the presumed damages doctrine has sufficient practical value. While a minimum financial damages award floor will not provide a perfect solution in every case, it is certainly better than abolishing the presumed damages doctrine or perpetuating the current state of uncertainty related to presumed damages awards. Ultimately, perfection should not be the enemy of the very good.

---

and invariable principle in laws of England, that every right when withheld must have a remedy, and every injury its proper redress."); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63 (1803) ("If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

220. *See supra* Part III.

221. *See supra* Parts III–IV.

222. *Supra* note 133.

223. *See supra* Part IV.