

FIRST AMENDMENT—DEFAMATION—PRIVATE INDIVIDUAL MAY RECOVER PRESUMED AND PUNITIVE DAMAGES WITHOUT A SHOWING OF ACTUAL MALICE—*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985).

Until 1964, the cause of action for defamation evolved through the common law into a labyrinth of complex rules and technicalities,¹ often reflecting the ongoing tug-of-war between the free speech rights of defendants and the rights of plaintiffs to their good reputations.² In response to the general confusion in the law of defamation, the United States Supreme Court, con-

¹ A cause of action for defamation can take one of two forms—an action for slander or an action for libel. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) [hereinafter cited as PROSSER & KEETON]; Note, *Survival of Libel Actions—There Is Life After Death in New Jersey*, 15 SETON HALL L. REV. 639, 639 n.2 (1985). The distinction between the two different types of actions lies in the method of publication, which can be either oral or written. See PROSSER & KEETON, *supra*, § 112, at 785. If a defamatory statement is communicated orally, a cause of action for slander exists, while a written defamatory statement will give rise to an action for libel. *Id.* Libel is per se actionable if the statement at issue is defamatory on its face. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1354 (1975). Slander is per se actionable only if the statement falls into one of four narrowly drawn categories: the commission of a crime, the contraction of a loathsome disease, a matter that would adversely affect the plaintiff's business, or an accusation of unchastity if the plaintiff is a woman. *Id.* Libel per quod requires extrinsic proof of the statement's defamatory meaning unless the written statement falls into one of the four categories of slander per se. *Id.* at 1354-55. Furthermore, a per se action presumes damages to the plaintiff's reputation, while a per quod action requires proof of special damages. See *id.* at 1355-56. See generally PROSSER & KEETON, *supra*, § 112, at 785-97 (detailing and explaining the various types of libel and slander).

Many prominent authors have recognized that the common law of defamation has become quite confusing. See *id.* § 111, at 771; Eaton, *supra*, at 1350. William Prosser states: "[T]here is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word. . . ." PROSSER & KEETON, *supra*, § 111, at 771. Another noted author, Joel Eaton, had the following to say about the apparent confusion in the common law of defamation:

[T]he English common law of defamation slowly grew into a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities. It became thicketed with brambled traps for innocent defendants, crisscrossed with circuitous paths and dead ends for seriously wronged plaintiffs, and enshrouded in a "fog of fictions, inferences, and presumptions."

Eaton, *supra*, at 1350 (quoting *Coleman v. MacLennan*, 78 Kan. 711, 740, 98 P. 281, 291 (1908)).

² See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-42 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-73 (1964) (both addressing free speech rights of defendants and reputation rights of plaintiffs in defamation actions).

cerned with the effect that the common law would have on the first amendment rights of defendants, began to define the constitutional parameters of defamation.³ The constitutional standards for defamation formulated by the Court since *New York Times Co. v. Sullivan*⁴ have focused primarily on the status of the plaintiff in a defamation action.⁵ In defining these standards, the Supreme Court often distinguished public figures from private individuals.⁶ During the 1960's and 1970's, the Court established that a public figure must prove that a defamatory statement about him was made with "actual malice" before he could obtain a judgment.⁷ In sharp contrast, the Court required defamed private individuals to establish that a publication about them was malicious only if they were seeking presumed and punitive damages.⁸

Recently, however, the Supreme Court altered this status-oriented approach and declared that the content of the alleged defamation would determine whether the constitutional standard of "actual malice" was applicable.⁹ In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,¹⁰ the Court held that a jury may award a private figure presumed and punitive damages in an action for defamation if the defamatory statement did not involve a "matter of public concern," regardless of whether the plaintiff proves actual malice.¹¹

The defendant in that case, Dun & Bradstreet, a prominent corporation that specializes in compiling and selling data concerning the financial performance of businesses,¹² issued a credit report to five of its subscribers on July 26, 1976.¹³ The report incorrectly stated that Greenmoss Builders, Inc. had voluntarily

³ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁴ 376 U.S. 254 (1964).

⁵ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974). But see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44 (1971) (Brennan, J., plurality opinion) (stating that constitutional standards for defamation apply "to all discussion and communication involving matters of general or public concern").

⁶ See *infra* notes 63-94 and accompanying text.

⁷ See *infra* notes 60-67 and accompanying text.

⁸ See *infra* notes 81-94 and accompanying text.

⁹ See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939, 2946 (1985) (Powell, J., plurality opinion).

¹⁰ 105 S. Ct. 2939 (1985).

¹¹ *Id.* at 2946 (Powell, J., plurality opinion).

¹² *Id.* at 2941 (Powell, J., plurality opinion).

¹³ *Id.* The credit information released by Dun & Bradstreet is compiled from various sources. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 70, 461 A.2d 414, 416 (1983), *aff'd*, 105 S. Ct. 2939 (1985). The sources include the individual company's annual reports, banks, creditors, and trade suppliers. *Id.*

filed a bankruptcy petition.¹⁴ This misstatement occurred because of a mistake made by a seventeen-year-old high school student employed part-time by Dun & Bradstreet to review bankruptcy petitions filed in the Vermont state courts.¹⁵ In the normal course of his duties, the student had inadvertently attributed a personal bankruptcy petition filed by a former employee of Greenmoss Builders to the corporation itself.¹⁶ At the time Dun & Bradstreet released this inaccurate report, its files showed that Greenmoss Builders had a positive net worth.¹⁷ In fact, the company's assets exceeded its secured liabilities by approximately \$30,000.¹⁸

Although Dun & Bradstreet maintained standard procedures to reduce the risk that a filing for bankruptcy would be inaccurately reported, the false report regarding Greenmoss Builders initially escaped management's attention.¹⁹ Normally, as part of their procedures, Dun & Bradstreet would verify the financial status of any allegedly defunct corporation before releasing the potentially damaging information.²⁰ In this instance, however, Dun & Bradstreet released the false report concerning Greenmoss Builders' bankruptcy to five businesses without attempting to verify its validity.²¹

After the report was disseminated, the president of Greenmoss Builders learned of its damaging contents at a meeting with his banker.²² Upon discovering the report's inaccuracies, the president demanded that Dun & Bradstreet inform its subscribers of the true financial condition of Greenmoss Builders.²³ The

¹⁴ *Dun & Bradstreet*, 105 S. Ct. at 2941 (Powell, J., plurality opinion).

¹⁵ *Id.* at 2942 (Powell, J., plurality opinion).

¹⁶ *Id.* Dun & Bradstreet paid the student \$200 each year to review bankruptcy petitions filed in Vermont. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 71, 461 A.2d 414, 416 (1983), *aff'd*, 105 S. Ct. 2939 (1985).

¹⁷ Supplemental Brief of Respondent on Reargument at 3, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 105 S. Ct. 2939 (1985) [hereinafter cited as Respondent's Brief]. In addition, the file showed that Greenmoss Builders enjoyed "a good relationship with its bank" and that the company's financial rating was steadily improving. *Id.*

¹⁸ *Id.*

¹⁹ See *Dun & Bradstreet*, 105 S. Ct. at 2942 (Powell, J., plurality opinion).

²⁰ *Id.*

²¹ See *id.*

²² *Id.* at 2941 (Powell, J., plurality opinion). The Howard Bank, the primary creditor of Greenmoss Builders, informed the company's president of the report's existence during a discussion about future financing. See Respondent's Brief, *supra* note 17, at 1. Shortly after the report's dissemination, the bank severed its relationship with Greenmoss Builders. *Id.* at 1, 4.

²³ *Dun & Bradstreet*, 105 S. Ct. at 2941 (Powell, J., plurality opinion).

president also requested that Dun & Bradstreet disclose the names of the businesses that had received the inaccurate report so they could be assured personally that his company was solvent.²⁴ Pursuant to established policy, however, Dun & Bradstreet refused to disclose the names of its customers.²⁵ Nevertheless, the corporation admitted its error and promptly issued a retraction²⁶ of its original report on August 3, 1976.²⁷

Despite Dun & Bradstreet's remedial action, Greenmoss Builders remained dissatisfied and instituted an action for defamation in the Superior Court of Vermont.²⁸ After evaluating the evidence, a jury awarded the plaintiff \$50,000 in compensatory damages and \$300,000 in punitive damages.²⁹ Dun & Bradstreet then moved successfully for a new trial.³⁰ Pursuant to an intervening interlocutory order,³¹ however, the Vermont Supreme Court affirmed the original award.³² It reasoned that nonmedia defendants were not entitled to the level of constitutional protection provided to media defendants by prior United States Supreme Court decisions.³³ Therefore, because Dun & Brad-

²⁴ *Id.*

²⁵ *See id.*

²⁶ A retraction exonerates the defaming party if it is made immediately after the defamatory statement and contains no "lurking insinuations, hypothetical or hesitant withdrawals, or new calumnies in disguise." PROSSER & KEETON, *supra* note 1, § 116A, at 846. Dean Prosser notes that even if the retraction does not exonerate the defendant, it should reduce the plaintiff's recovery because it "tend[s] to negative the 'malice' or outrageous conduct which is a basis for punitive damages." *Id.* *But cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971) (Brennan, J., plurality opinion) ("[I]t is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story.").

²⁷ *Dun & Bradstreet*, 105 S. Ct. at 2941 (Powell, J., plurality opinion). The corrective notice issued in this case by Dun & Bradstreet explained "that it was a former employee of [Greenmoss Builders], not [the company] itself, who had filed the petition in bankruptcy, and that [Greenmoss Builders] 'continued in business as usual.'" *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 71, 461 A.2d 414, 416 (1983), *aff'd*, 105 S. Ct. 2939 (1985). Greenmoss Builders objected to the retraction, however, because it felt the notice impliedly blamed the company for the initial mistake. *Id.*

²⁸ *See Dun & Bradstreet*, 105 S. Ct. at 2942 (Powell, J., plurality opinion).

²⁹ *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 69, 461 A.2d 414, 415 (1983), *aff'd*, 105 S. Ct. 2939 (1985).

³⁰ *Id.* at 69-70, 461 A.2d at 415.

³¹ *Id.* at 70, 461 A.2d at 415. The superior court certified several questions of law to the Vermont Supreme Court before the new trial took place. *Id.*

³² *See id.* at 78-79, 461 A.2d at 420-21.

³³ *Id.* at 74, 461 A.2d at 418. *See generally* Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1221-27 (1976) (analyzing distinctions between media and nonmedia defendants).

street was not a media defendant, the court held that Greenmoss Builders was not required to prove that this particular publication was made with malice in order to recover presumed and punitive damages.³⁴ Furthermore, the state supreme court held that Vermont did not recognize a qualified common law privilege for inaccurate credit reporting.³⁵

The United States Supreme Court granted certiorari on November 7, 1983.³⁶ The Court subsequently affirmed the jury's award of presumed and punitive damages, but it did so for different reasons than the Vermont Supreme Court.³⁷ The United States Supreme Court refused to rely on the fact that Dun & Bradstreet was a nonmedia defendant;³⁸ rather, the Court held that a private individual must prove malice in order to recover presumed and punitive damages only if the alleged defamation involved a matter of public concern.³⁹

Prior to the 1960's, the tort of defamation was confined almost exclusively to the realm of the common law.⁴⁰ Not surprisingly, the varied interpretations by state courts caused the law of defamation to develop into an extremely complex tangle of rules and presumptions.⁴¹ Nevertheless, one thing remains clear: the common law almost invariably favors the defamed plaintiff.⁴² For example, the common law raises a rebuttable presumption that every defamatory statement is false.⁴³ In addition, the mere existence of a defamatory statement creates an irrebuttable presumption that the plaintiff's reputation has been harmed.⁴⁴ Fi-

³⁴ *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 73-75, 461 A.2d 414, 417-18 (1983), *aff'd*, 105 S. Ct. 2939 (1985).

³⁵ *Id.* at 76, 461 A.2d at 419. In contrast to the Vermont court's stance on this issue, a majority of jurisdictions have adopted a qualified privilege for credit reporting. See PROSSER & KEETON, *supra* note 1, § 115, at 828-29; Maurer, *Common Law Defamation and the Fair Credit Reporting Act*, 72 GEO. L. J. 95, 99-105 (1983).

³⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 464 U.S. 959 (1983).

³⁷ See *Dun & Bradstreet*, 105 S. Ct. at 2942 (Powell, J., plurality opinion).

³⁸ See *id.* at 2946 (Powell, J., plurality opinion).

³⁹ *Id.* at 2948 (Powell, J., plurality opinion).

⁴⁰ See generally Merin, *Libel and the Supreme Court*, 11 WM. & MARY L. REV. 371, 372-90 (1969) (setting forth history of libel law). Merin notes that all Thirteen Original Colonies adopted a civil cause of action for libel. *Id.* at 376.

⁴¹ See *supra* note 1 (summary of common law of defamation).

⁴² See Eaton, *supra* note 1, at 1353 (outlining factors favoring plaintiff at common law).

⁴³ *Id.*

⁴⁴ *Id.* In his article, Eaton offers the following justification for the presumption that any defamatory statement has damaged the plaintiff's reputation:

Identifying and locating those persons in the community who may think less highly of the plaintiff because of the publication is difficult, espe-

nally, at common law, a defamed plaintiff may recover punitive damages upon a showing of malice, which is defined as spite or ill will.⁴⁵

The United States Supreme Court entered this area of the law for the first time in 1964.⁴⁶ In its landmark decision in *New York Times Co. v. Sullivan*,⁴⁷ the Supreme Court attempted to strike a workable balance between the common law of defamation and the first amendment guarantee of free speech.⁴⁸ In that case, the *New York Times* had published a paid advertisement that solicited funds for the civil rights movement in the South.⁴⁹ The advertisement attributed several examples of brutality and harassment to the Montgomery, Alabama police.⁵⁰ These alleged instances of police brutality contained a number of factual inaccuracies,⁵¹ and the Montgomery County Police Commissioner instituted a suit against the *New York Times* in the Alabama state courts.⁵² A jury assessed \$500,000 in damages against the newspaper, and the Alabama appellate courts subsequently affirmed this award.⁵³

On appeal, the United States Supreme Court unanimously

cially when the defamatory statement has been indiscriminately circulated. And once located, it is the rare witness who will admit to the plaintiff or testify in court that his attitudes toward the plaintiff have changed as a result of the publication, when by doing so he admits that he changed his opinion without determining the truth or falsity of the statement.

Id. at 1357; *see also* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication.").

⁴⁵ *See* *Eaton*, *supra* note 1, at 1353 n.15.

⁴⁶ *See* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The opinion stated, "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct." *Id.* at 256.

⁴⁷ 376 U.S. 254 (1964).

⁴⁸ *See id.* at 270-73.

⁴⁹ *See id.* at 256-57. Approximately 394 copies of the advertisement entered Alabama, and 35 copies were circulated in Montgomery County, the plaintiff's residence. *Id.* at 260 n.3.

⁵⁰ *See id.* at 257-58.

⁵¹ *See id.* at 258-59.

⁵² *Id.* at 256.

⁵³ *Id.* Although the award was founded on well-settled common law principles, Professor Tribe notes that "the inescapable conclusion was that Alabama's 'white establishment' had taken the opportunity to punish The New York Times for its support of civil rights activists." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-12, at 633 (1978).

reversed the determination of the Alabama courts.⁵⁴ The Supreme Court held that the common law of defamation improperly restricted the first amendment rights of free press and free speech in this case.⁵⁵ The Court reasoned that a contrary result would escalate the fear of costly litigation and lead to "self-censorship," thus "dampen[ing] the vigor and limit[ing] the variety of public debate."⁵⁶ Noting the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"⁵⁷ the Court established a new standard for recovery when the plaintiff in a defamation action is a public official.⁵⁸ The new standard, known as the *New York Times* rule,⁵⁹ required the public official⁶⁰ to prove with "convincing clarity"⁶¹ that the defamatory statement was related to his official conduct and that it "was made with 'actual malice.'"⁶²

The Court later extended the *New York Times* rule to "public figures" in *Curtis Publishing Co. v. Butts*.⁶³ The *Curtis Publishing*

⁵⁴ *New York Times Co.*, 376 U.S. at 264-65.

⁵⁵ *See id.*

⁵⁶ *Id.* at 279. *But see* Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 424 (1975) ("[*New York Times* privilege has failed to prevent self-censorship primarily because it does little to reduce the cost of defending against libel claims").

⁵⁷ *New York Times Co.*, 376 U.S. at 270.

⁵⁸ *See id.* at 279-80, 283.

⁵⁹ *See, e.g.*, Eaton, *supra* note 1, at 1367.

⁶⁰ Subsequent Supreme Court decisions clarified the meaning of the term "public official." *See, e.g.*, *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (" 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs").

⁶¹ *New York Times Co.*, 376 U.S. at 285-86.

⁶² *Id.* at 279-80. The Court defined "actual malice" as "knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not." *Id.* at 280. The common law, on the other hand, defined malice as "spite or ill will." L. TRIBE, *supra* note 53, § 12-12, at 634-35 n.21. Professor Tribe notes that the lower courts often confused these standards. *Id.* § 12-12, at 635 n.21. The Supreme Court eventually resolved this confusion and specifically stated that the common law standard does not satisfy the constitutional requirement of "actual malice." *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 n.18 (1971) (Brennan, J., plurality opinion). In the interim between *New York Times Co.* and *Rosenbloom*, the Court provided a variety of definitions of actual malice. *See, e.g.*, *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6, 10 (1970) (proof of malice mandates more than a showing "of falsehood and general hostility"); *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("recklessness may be found where there are obvious reasons to doubt the veracity of the [statement] or [its] accuracy"); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (malice requires "high degree of awareness of . . . probable falsity").

⁶³ 388 U.S. 130 (1967). The Court decided both *Curtis Publishing* and a compan-

case defined a public figure as an individual who thrusts himself into a public controversy or who receives continuing public scrutiny and possesses the ability to rebut the defamatory statement.⁶⁴ Although the Court could not agree on the exact level of constitutional protection a defendant should enjoy,⁶⁵ this decision ultimately required public figures to prove that a defamatory statement relating to "public issues and events" was made with actual malice.⁶⁶ This standard applied to a much broader group of potential plaintiffs than the rule enunciated in *New York Times Co. v. Sullivan*, which was confined to government officials criticized for the performance of their duties.⁶⁷

After these two cases, it appeared that the status of the plaintiff would determine whether the constitutional standard of actual malice would apply in a defamation action.⁶⁸ In 1971,

ion case, *Associated Press v. Walker*, in a single opinion. See *Curtis Publishing*, 388 U.S. at 135 (Harlan, J., plurality opinion). Justice Harlan, writing for four members of the Court, stated that libel actions by public figures should be tested under standards similar to the *New York Times* rule. See *id.* at 155 (Harlan, J., plurality opinion). In a concurring opinion, however, Chief Justice Warren unequivocally stated that he would apply "the *New York Times* standard in the case of 'public figures' as well as 'public officials.'" *Id.* at 164 (Warren, C.J., concurring).

⁶⁴ See *id.* at 154-55 (Harlan, J., plurality opinion). More specifically, Justice Harlan stated that a public figure

may have attained that status by position alone . . . [or] by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy . . . [or by] command[ing] sufficient continuing public interest and . . . sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.

Id. at 155 (Harlan, J., plurality opinion) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). The Court later refined this test and recognized three types of public figures. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); see also L. TRIBE, *supra* note 53, § 12-13, at 643-44 (summarizing three categories of public figures). A person is "a public figure for all purposes" if he has achieved "general fame or notoriety in the community." *Gertz*, 418 U.S. at 352. An individual may also be deemed a public figure if he "voluntarily inject[s] himself into a public controversy in order to influence the resolution of the issues involved." L. TRIBE, *supra* note 53, § 12-13, at 644 (misquoting *Gertz*, 418 U.S. at 345). Finally, a person may become a public figure involuntarily. *Gertz*, 418 U.S. at 345. For example, a suspect arrested for committing a particular crime is considered a public figure with respect to comments and news reports about the arrest. L. TRIBE, *supra* note 53, § 12-13, at 644.

⁶⁵ See *Eaton*, *supra* note 1, at 1392 (noting this disagreement among the members of the Court).

⁶⁶ See *Curtis Publishing*, 388 U.S. at 164 (Warren, C.J., concurring). *Eaton* notes that the *Curtis Publishing* case extended the *New York Times* rule to public figures. *Eaton*, *supra* note 1, at 1393.

⁶⁷ See *Eaton*, *supra* note 1, at 1393 (comparing *New York Times Co.* and *Curtis Publishing* decisions).

⁶⁸ See, e.g., *Cepeda v. Cowles Magazines & Broadcasting, Inc.*, 392 F.2d 417, 420

however, the Court abruptly switched its emphasis from the status of the plaintiff to the content of the alleged defamatory statement.⁶⁹ In *Rosenbloom v. Metromedia, Inc.*,⁷⁰ Justice Brennan, in a plurality opinion, held that the *New York Times* requirement of actual malice applied not only to statements concerning public figures, but also "to all discussion and communication involving matters of public or general concern."⁷¹ The plurality noted that the primary interest of the community lies in the reported event itself.⁷² The public, Justice Brennan observed, "focus[es] . . . on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."⁷³

The other members of the Court, however, refused to accept Justice Brennan's reasoning.⁷⁴ In a persuasive dissenting opinion, Justice Marshall noted that all human occurrences are arguably in the public's interest.⁷⁵ He argued that Justice Brennan's approach would result in numerous ad hoc determinations of whether a given issue is sufficiently important to a particular community.⁷⁶ Consequently, he maintained that the plurality's approach was unworkable⁷⁷ and that "the appropriate resolution of the clash of societal values [in media defamation cases] is to restrict damages to [the plaintiff's] actual losses."⁷⁸

In 1974, the Supreme Court adopted Justice Marshall's argument that the courts are ill-equipped to determine whether a statement sufficiently involves the public interest.⁷⁹ Thus, the Court re-established the status of the plaintiff as the critical consideration for constitutional protection of defamatory state-

(9th Cir.) (famous baseball player's status as a public figure mandated proof of actual malice before he could recover for alleged libel), *cert. denied*, 393 U.S. 840 (1968). *But see* Branson & Sprague, *The Public Figure — Private Person Dichotomy: A Flight from First Amendment Reality*, 90 DICK. L. REV. 627, 631 (1986) (even in *New York Times Co. v. Sullivan*, the "Court cared more about the public interest involved than the status of the persons discussed").

⁶⁹ See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

⁷⁰ 403 U.S. 29 (1971).

⁷¹ *Id.* at 43-44 (Brennan, J., plurality opinion).

⁷² See *id.* at 43 (Brennan, J., plurality opinion).

⁷³ *Id.* (footnote omitted).

⁷⁴ See *id.* at 59 (White, J., concurring); *id.* at 62 (Harlan, J., dissenting); *id.* at 79-81 (Marshall, J., dissenting).

⁷⁵ *Id.* at 79 (Marshall, J., dissenting).

⁷⁶ *Id.* at 80-81 (Marshall, J., dissenting).

⁷⁷ *Id.* at 81 (Marshall, J., dissenting).

⁷⁸ *Id.* at 86 (Marshall, J., dissenting).

⁷⁹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

ments.⁸⁰ In *Gertz v. Robert Welch, Inc.*,⁸¹ a private individual, Elmer Gertz, sought recovery for injury to his reputation resulting from an article appearing in a national magazine.⁸² The Seventh Circuit applied *Rosenbloom* and required a showing of actual malice by the plaintiff because the content of the article related to a matter of public concern.⁸³ Although Gertz proved that the article's statements were defamatory, he was unable to establish that they were published with the malice necessary to recover in the action.⁸⁴

Subsequently, the United States Supreme Court reversed the Seventh Circuit's decision and held that the *New York Times* standard of actual malice is not wholly applicable when a private individual is defamed by a national magazine.⁸⁵ The *Gertz* Court specifically reaffirmed the view that the level of protection available to a defendant in a defamation action depends upon the status of the plaintiff.⁸⁶ The Court determined that Mr. Gertz, a private individual, should recover even if he could not establish that the statements were made with actual malice.⁸⁷ In so holding, the Court reasoned that a private individual, unlike a public figure, lacks the necessary access to the media for an effective rebuttal.⁸⁸ Furthermore, the Court recognized that private citizens rarely introduce themselves into a public controversy for the purpose of influencing the outcome.⁸⁹

Finally, the Court balanced the state's interest in protecting an individual's reputation against the first amendment rights of

⁸⁰ See *id.* at 344-46.

⁸¹ 418 U.S. 323 (1974).

⁸² See *id.* at 325-27. The article about Gertz appeared in the monthly magazine of the John Birch Society, *American Opinion*, which was published by the defendant. *Id.* at 325. Gertz claimed that the article had defamed him by implying that he had a criminal record, alleging that he had helped plan the 1968 Democratic Convention demonstrations in Chicago, and accusing him of involvement in the "Marxist League for Industrial Democracy." *Id.* at 326.

⁸³ See *id.* at 330-31.

⁸⁴ *Id.* at 331-32.

⁸⁵ See *id.* at 348-49. Although the Court recognized that the *New York Times* rationale was not "wholly inapplicable to the context of private individuals," it reasoned that "the strong and legitimate state interest in compensating private individuals for injury to reputation" outweighed the competing first amendment values in this situation. *Id.*

⁸⁶ See *id.* at 342-44. The Court defined three categories of public figures to whom the *New York Times* rule would apply. See *id.* at 345; see also *supra* note 64 (setting forth Court's definitions).

⁸⁷ See *Gertz*, 418 U.S. at 345-46.

⁸⁸ *Id.* at 344.

⁸⁹ *Id.* at 345.

the defendant.⁹⁰ In this instance, the Court determined that the strong and legitimate state interest in protecting Mr. Gertz's reputation outweighed the first amendment interests of the defendant.⁹¹ As a result, the *Gertz* Court held that the stringent malice requirements of the *New York Times* decision were inapplicable when the plaintiff was a private figure.⁹² The Court then empowered the states to establish their own standards for recovery by private persons in defamation actions, provided that they refrain from imposing liability without a finding of fault.⁹³ The Court also declared that an award of either presumed damages or punitive damages would still require proof of actual malice.⁹⁴

Although *Gertz* clarified many of the constitutional parameters of defamation actions,⁹⁵ it remained unclear whether the holding applied only to media defendants or whether it applied to private, nonmedia defendants as well.⁹⁶ Several lower courts and commentators suggested that the opinion was limited to media defendants because the Court continually referred to "the media"⁹⁷ when enunciating the constitutional standards for defamation.⁹⁸ Furthermore, at least one author noted that the law of

⁹⁰ See *id.* at 348-49.

⁹¹ See *id.*

⁹² See *id.* at 348, 351.

⁹³ *Id.* at 347. Professor Tribe notes that the publisher of a defamatory statement about a private individual will generally be held to a negligence standard. See L. TRIBE, *supra* note 53, § 12-13, at 639 n.7. The states, however, are free to establish a more stringent standard. See, e.g., *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 98-99, 538 P.2d 450, 457 (1975) (actual malice standard imposed when alleged libel involves matter of public interest).

⁹⁴ *Gertz*, 418 U.S. at 349-50. The Court noted that the states lack a legitimate interest in securing awards for plaintiffs who suffer no actual injury. *Id.* at 349. Furthermore, because the competing interest of the defendant was grounded in the first amendment, the Court ruled that the state remedies for defamation should "reach no farther than is necessary to protect the legitimate [reputational] interest involved." *Id.* at 349.

⁹⁵ See L. TRIBE, *supra* note 53, § 12-13, at 641 (noting that "*Gertz* narrowed the range of situations in which constitutional constraints left the common law tort wholly untouched").

⁹⁶ See Eaton, *supra* note 1, at 1416-17.

⁹⁷ See, e.g., *Gertz*, 418 U.S. at 350 (referring to media); *id.* at 353 (Blackmun, J., concurring) (same); *id.* at 355 (Burger, C.J., dissenting) (same).

⁹⁸ See, e.g., Eaton, *supra* note 1, at 1416-17. Professor Tribe notes that "[t]he majority opinion may imply by its repeated references to the 'media' that the application of the *Gertz* rules is not required in defamation actions against non-media defendants." L. TRIBE, *supra* note 53, § 12-13, at 639 n.6. In addition, Joel Eaton concludes that "[t]he rules fashioned in *Gertz* clearly were meant to apply only in defamation suits against the press. For the present at least, private individuals defamed by non-media defendants may journey into the common law forest in search of recompense and vindication without encountering the constitutional army." Ea-

defamation lacked a constitutional standard for recovery when a private individual was defamed by a nonmedia defendant.⁹⁹ The Supreme Court squarely faced such a situation in *Dun & Bradstreet*.¹⁰⁰ In deciding the case, however, the Court rejuvenated its prior emphasis on the content of the allegedly defamatory statement.¹⁰¹ The Court held, contrary to *Gertz*, that presumed and punitive damages could be awarded to a private individual without a showing of malice when the alleged defamation involved a matter outside the public interest.¹⁰²

The *Dun & Bradstreet* case created a sharp division among the members of the Supreme Court.¹⁰³ In fact, the Justices failed to

ton, *supra* note 1, at 1417; see also Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 635 (1975) (Court is concerned with the press's ability "to insure bold and vigorous prosecution of the public's business"). But cf. First Nat'l Bank v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."); Branzburg v. Hayes, 408 U.S. 665, 690-91 (1972) (news reporter required to appear before grand jury has no greater first amendment rights than ordinary citizen).

The fact that defamation actions involving nonmedia defendants rarely reach the Supreme Court provides one reason for the lack of a clear constitutional standard in this area. See Eaton, *supra* note 1, at 1404 & n.228. In his article, Eaton explains why cases reaching the United States Supreme Court almost exclusively involve the media:

[Media defendants] publish vast amounts of information which inevitably contain a vast number of errors; their wide dissemination of an error is more likely to aggravate the defamed than would neighborhood gossip; and their sizeable financial resources make them more attractive targets for suit. In addition, judgments against media defendants are generally much larger than those against individuals, making the economic gamble of an appeal acceptable. Finally, media defendants possess greater resources to pursue several appeals, and are more apt to press their constitutional claims on principle than are non-media defendants.

Id. at 1405 n.228.

⁹⁹ See Eaton, *supra* note 1, at 1417.

¹⁰⁰ See *Court Strengthens Libel Plaintiff's Hand*, N.Y. Times, June 27, 1985, at B8, col. 1. The article noted that "[i]t had been expected that the Court would decide, for the first time, whether the news media and all other speakers enjoy the same protections under the First Amendment's guarantees of freedom of speech and freedom of the press." *Id.* at col. 2. The *American Bar Association Journal* also commented that "[t]he long-awaited decision was expected to resolve whether the First Amendment limits on libel suits against news media were also available to nonmedia defendants like *Dun & Bradstreet*." Gora, *Supreme Court Report*, 71 A.B.A.J., Nov. 1985, at 116, 123; see also *Bose Corp. v. Consumers Union*, 466 U.S. 485, 492-93 n.8 (1984) (Court impliedly acknowledged it would consider libel rules for nonmedia defendants in *Dun & Bradstreet*).

¹⁰¹ See *Dun & Bradstreet*, 105 S. Ct. at 2944-46 (Powell, J., plurality opinion).

¹⁰² See *id.* at 2946 (Powell, J., plurality opinion).

¹⁰³ See *id.* at 2954 (Brennan, J., dissenting) (noting "diversity of considered opinions").

agree on a majority pronouncement and issued a total of four separate opinions.¹⁰⁴ Justice Powell announced the decision of the Court and authored an opinion in which Justices Rehnquist and O'Connor joined.¹⁰⁵ In addition, both Justice White and Chief Justice Burger filed separate concurrences,¹⁰⁶ and Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented.¹⁰⁷

In his plurality opinion, Justice Powell observed that the Court had previously imposed constitutional limitations on the development of the common law only in cases dealing with public matters.¹⁰⁸ For example, he pointed out that the defamation involved in *New York Times Co. v. Sullivan* concerned one of the major issues of that time—the civil rights movement in the South—which was clearly a matter of public interest.¹⁰⁹ In addition, Justice Powell observed that the *Gertz* Court had dealt with a matter of “undoubted public concern” when it had established the constitutional standards for defamation actions brought by private figures against media defendants.¹¹⁰ He therefore posited that the issue for determination in *Dun & Bradstreet* was whether *Gertz* barred the recovery of presumed and punitive damages when a defamatory statement involving a matter of purely private concern was made without malice.¹¹¹

Justice Powell interpreted *Gertz* as an accommodation between the “‘strong and legitimate . . . interest’” in compensating a private plaintiff for harm to his reputation and the competing interest in protecting the first amendment rights of the defendant.¹¹² He maintained that *Gertz* had resolved the tension between these interests in favor of the plaintiff by permitting compensation for actual injury to a private individual's reputation even in the absence of a showing of malice.¹¹³ Justice Powell also observed, however, that *Gertz* involved the dissemination of

¹⁰⁴ See *id.* at 2941-48 (Powell, J., plurality opinion); *id.* at 2948 (Burger, C.J., concurring); *id.* at 2948-54 (White, J., concurring); *id.* at 2954-65 (Brennan, J., dissenting).

¹⁰⁵ *Id.* at 2941.

¹⁰⁶ See *id.* at 2948 (Burger, C.J., concurring); *id.* (White, J., concurring).

¹⁰⁷ See *id.* at 2954 (Brennan, J., dissenting).

¹⁰⁸ See *id.* at 2943-44 (Powell, J., plurality opinion).

¹⁰⁹ *Id.* at 2943 (Powell, J., plurality opinion).

¹¹⁰ *Id.* at 2944 (Powell, J., plurality opinion).

¹¹¹ See *id.* at 2941, 2944 (Powell, J., plurality opinion).

¹¹² *Id.* at 2944 (Powell, J., plurality opinion) (quoting *Gertz*, 418 U.S. at 348).

¹¹³ See *id.* Justice Powell stated that the *Gertz* Court had weighted the scale in favor of private plaintiffs because “they generally lack effective opportunities for rebutting [defamatory] statements [made by the media].” *Id.*

information important to the public.¹¹⁴ Thus, he concluded that what was relevant in *Gertz* was not automatically relevant with respect to purely private speech.¹¹⁵

Justice Powell emphasized that all speech does not necessarily receive equal constitutional protection.¹¹⁶ He reasoned that speech on matters of public interest "is 'at the heart of the First Amendment's protection' " and is thus entitled to "special concern."¹¹⁷ Purely private speech, Justice Powell determined, "is of less First Amendment concern."¹¹⁸ Accordingly, he stated that the Court should refrain from restricting the common law of defamation if the "concerns" of free public debate addressed in *New York Times Co. v. Sullivan* and *Gertz* are not present.¹¹⁹

Justice Powell then attempted to strike a workable balance between the competing interests at stake in all defamation cases involving statements of purely private concern.¹²⁰ Emphasizing that the state interest in protecting an individual's reputation was "strong and legitimate,"¹²¹ he observed that a citizen's right to this protection " 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.' " ¹²² Justice Powell then reasoned that the state's interest in shielding individual reputations outweighed the first amendment interest in protecting purely private speech.¹²³ He therefore concluded that presumed and punitive damages could be awarded without a

¹¹⁴ See *id.*

¹¹⁵ See *id.* at 2944 & n.4 (Powell, J., plurality opinion). Justice Powell stated that *Gertz*'s disapproval of presumed and punitive damages except in cases involving actual malice was consistent with the result in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* He maintained that the key factor in *Gertz*—a matter of public concern—was absent in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* See *id.*

¹¹⁶ *Id.* at 2945 & n.5 (Powell, J., plurality opinion). The plurality noted that obscene speech and fighting words have received no constitutional protection. *Id.* at 2945 n.5 (Powell, J., plurality opinion) (citations omitted). Justice Powell also observed that commercial speech merits only reduced constitutional protection. *Id.*

¹¹⁷ *Id.* at 2945 (Powell, J., plurality opinion) (citations omitted).

¹¹⁸ *Id.* at 2946 (Powell, J., plurality opinion) (citing *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)).

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ *Id.* at 2945 (Powell, J., plurality opinion) (quoting *Gertz*, 418 U.S. at 348).

¹²² *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

¹²³ See *id.* at 2945, 2946 (Powell, J., plurality opinion). Justice Powell found the state interest " 'substantial' relative to the incidental effect [presumed and punitive damages] may have on speech of significantly less constitutional interest." *Id.* at 2946 (Powell, J., plurality opinion).

showing of actual malice when a private person was defamed by a statement that did not concern the public interest.¹²⁴

Justice Powell next addressed whether the credit report issued by Dun & Bradstreet was actually a matter of purely private concern.¹²⁵ Employing a method of analysis set forth in *Connick v. Myers*,¹²⁶ Justice Powell considered the “content, form, and context”¹²⁷ of Dun & Bradstreet’s credit report and noted the report’s similarity to commercial speech.¹²⁸ He reasoned that a reduced level of protection was appropriate in this case because the speech at issue was solely in the financial interest of Dun & Bradstreet and its customers.¹²⁹ Furthermore, he observed that the credit report was circulated among only five subscribers, who were contractually bound not to disseminate its contents.¹³⁰ Therefore, Justice Powell concluded that there was “simply no credible argument that credit reporting requires special protection to ensure that ‘debate on public issues [will] be uninhibited, robust, and wide-open’ ”;¹³¹ he thus held that the report did not involve a matter of public concern.¹³²

Chief Justice Burger filed an opinion concurring in the judgment of the Court.¹³³ In the Chief Justice’s opinion, the *Gertz* decision was not controlling because it was limited to situations in which “the alleged defamatory expression concerns a matter of general public importance.”¹³⁴ In contrast, the Chief Justice reasoned, “the expression in question here relate[d] to a matter

¹²⁴ *Id.*

¹²⁵ *See id.* at 2947 (Powell, J., plurality opinion).

¹²⁶ 461 U.S. 138 (1983).

¹²⁷ *Dun & Bradstreet*, 105 S. Ct. at 2947 (Powell, J., plurality opinion) (quoting *Connick*, 461 U.S. at 147-48).

¹²⁸ *See id.* at 2947 & n.8 (Powell, J., plurality opinion). Although Justice Powell refused to hold that the credit report constituted commercial speech, he stated that “many of the same concerns that argue in favor of reduced constitutional protection in [the] areas [of advertising and commercial speech] apply [to credit reports] as well.” *Id.* at 2947 n.8 (Powell, J., plurality opinion).

¹²⁹ *Id.* at 2947 (Powell, J., plurality opinion).

¹³⁰ *Id.* Because the report was issued to only five subscribers, the plurality reasoned that it did not involve a “‘strong interest in the free flow of commercial information.’ ” *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 764 (1976)). Justice Powell also noted that credit reporting was “hardy and unlikely to be deterred by incidental state regulation” because “it [was] solely motivated by the desire for profit.” *Id.*

¹³¹ *Id.* (citing *New York Times Co.*, 376 U.S. at 270).

¹³² *Id.*

¹³³ *See id.* at 2948 (Burger, C.J., concurring).

¹³⁴ *Id.*

of essentially private concern."¹³⁵ Therefore, he agreed that Greenmoss Builders could collect punitive damages absent a showing of malice.¹³⁶ Nevertheless, the Chief Justice exhibited considerable dissatisfaction with the Court's decision; he asserted that *Gertz* should be overruled, thus allowing defamed private citizens to seek redress under the common law rules.¹³⁷

Chief Justice Burger also questioned the wisdom of *New York Times Co. v. Sullivan*.¹³⁸ The Chief Justice maintained that the decision had equated actual malice with "reckless disregard of the truth."¹³⁹ Thus, he argued that the requirement of actual malice should be deemed satisfied if "the exercise of reasonable care" would have disclosed the falsity of a defamatory statement.¹⁴⁰ Because the Court had not taken this approach, however, the Chief Justice concluded that the *New York Times* decision should be re-examined.¹⁴¹

Justice White also wrote a separate opinion concurring in the Court's judgment.¹⁴² Like Chief Justice Burger, he believed that *Gertz* should be overruled and the common law retained when a private individual sues for defamation.¹⁴³ Moreover, throughout his opinion, Justice White criticized the Supreme Court's involvement in the area of defamation.¹⁴⁴ He asserted that the Court had been "engag[ing] in severe overkill" in attempting to achieve its goal of "protecting the press from intimidating damages liability that might lead to excessive timidity."¹⁴⁵

In addition, Justice White opined that the Court's excursions into the law of defamation had resulted in "two evils."¹⁴⁶ First, he noted that a false statement about a public official will remain unchallenged unless the official is able to prove actual malice—an extremely difficult and expensive burden for most plaintiffs to

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *See id.* Chief Justice Burger agreed with Justice White's conclusion that *Gertz* should be overruled. *Id.* Justice White stated that a rejection of *Gertz* would result in the application of the common law rules to private plaintiffs. *Id.* at 2950 (White, J., concurring).

¹³⁸ *See id.* at 2948 (Burger, C.J., concurring).

¹³⁹ *Id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.*

¹⁴² *See id.* at 2948-54 (White, J., concurring).

¹⁴³ *See id.* at 2950, 2952 (White, J., concurring).

¹⁴⁴ *See id.* at 2949, 2952 (White, J., concurring).

¹⁴⁵ *Id.* at 2952 (White, J., concurring).

¹⁴⁶ *Id.* at 2951 (White, J., concurring).

satisfy.¹⁴⁷ Thus, Justice White reasoned, as a result of the *New York Times Co. v. Sullivan* holding, the public would continue to be misled as "the stream of information about public officials and public affairs is polluted."¹⁴⁸ Second, Justice White criticized the fact that the actual malice standard must be met before the public official can recover for any resulting damage to his reputation.¹⁴⁹ He argued that this requirement permits the "destruction" of a public official's reputation and professional life even when a reasonable investigation might have disclosed the actual facts.¹⁵⁰

Justice White then addressed the Supreme Court's decision in *Gertz*.¹⁵¹ He noted that under *Gertz*, a private plaintiff defamed by the most outrageous lie would be without a remedy and the false statement would remain uncorrected unless the plaintiff was able to prove fault on the part of the defendant.¹⁵² Assuming that this burden was met, Justice White noted, the private plaintiff would still have to prove actual damage to his reputation.¹⁵³ He observed that the common law had viewed this latter requirement as "difficult, if not impossible, to discharge."¹⁵⁴ Justice White maintained that the standards set forth in *Gertz* were unfair to private plaintiffs; thus, he reaffirmed his dissenting position in that case and advocated the retention of the common law rules in all cases in which a private individual is defamed.¹⁵⁵

Justice White next pointed out that although *Gertz* had established two constitutional requirements for recovery in defamation actions by private figures,¹⁵⁶ the plurality had rejected only one of these: the requirement of a showing of actual malice before a plaintiff can recover presumed and punitive damages.¹⁵⁷

¹⁴⁷ *Id.* at 2950 (White, J., concurring). Justice White maintained that the plaintiff has very little chance to offset the damage done by a false statement. *Id.* He stated that "[d]enials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Id.* at 2951 (White, J., concurring) (quoting *Rosenbloom*, 403 U.S. at 46 (Brennan, J., plurality opinion)). Thus, Justice White concluded that a public official's access to the media was "a decidedly weak reed to depend on for the vindication of First Amendment interests." *Id.* at 2950 (White, J., concurring).

¹⁴⁸ *Id.* at 2951 (White, J., concurring).

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* Justice White maintained that the *New York Times* requirements often lead to "grossly perverse results." *Id.*

¹⁵¹ *See id.* at 2951-52 (White, J., concurring).

¹⁵² *See id.* at 2951 (White, J., concurring).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* at 2952 (White, J., concurring).

¹⁵⁶ *See id.* at 2953 (White, J., concurring).

¹⁵⁷ *See id.*

Justice White noted that the plurality had failed to consider whether the additional *Gertz* requirement of fault on the part of the defendant was also necessary before the plaintiff could recover.¹⁵⁸ Consequently, Justice White reasoned, Justice Powell's opinion necessarily implied that *all* the standards enunciated in *Gertz* are inapplicable when the alleged defamation does not involve a matter of public concern.¹⁵⁹

In his dissenting opinion, Justice Brennan first observed that none of the various opinions filed expressed the views of a majority of the Court with respect to the important question presented.¹⁶⁰ He then analyzed Justice Powell's treatment of *Gertz*.¹⁶¹ Justice Brennan disputed Justice Powell's contention that the *Gertz* decision was premised on speech that involved public matters.¹⁶² To the contrary, Justice Brennan stated, *Gertz* specifically sought to avoid a judicial determination of whether a matter was sufficiently in the public's interest to warrant protection.¹⁶³ He posited that the *Gertz* Court had believed that the relative importance of a public issue should not be left to judicial interpretation.¹⁶⁴ Therefore, he declared, *Gertz* had reinstated the view that the constitutional protection granted to an alleged defamatory statement would turn on the status of the plaintiff.¹⁶⁵ Justice Brennan maintained that it would be "incongruous" for the Court to eliminate "the protection against presumed and punitive damages by reference to a judicial judgment as to whether the speech at issue involved matters of public concern."¹⁶⁶

Justice Brennan then stated that none of the opinions of the other Justices offered any guidelines for determining whether a subject is sufficiently in the interest of the public to warrant con-

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ *Id.* at 2954 (Brennan, J., dissenting). In contrast to Chief Justice Burger and Justice White, Justice Brennan declared that the Court's "solid allegiance" to the principles enunciated in *New York Times Co. v. Sullivan* was not undermined by its fragmented approach to the "idiosyncratic facts" of the *Dun & Bradstreet* case. *Id.*

¹⁶¹ See *id.* at 2959-60 (Brennan, J., dissenting).

¹⁶² See *id.* at 2959-60 & n.11 (Brennan, J., dissenting).

¹⁶³ See *id.* at 2959 n.11 (Brennan, J., dissenting).

¹⁶⁴ See *id.* at 2957 n.5, 2959 n.11 (Brennan, J., dissenting).

¹⁶⁵ See *id.* at 2957 n.5 (Brennan, J., dissenting).

¹⁶⁶ *Id.* at 2959 n.11 (Brennan, J., dissenting). Justice Brennan noted that the concurring opinion of Justice White reached a similar conclusion. *Id.* at 2959 (Brennan, J., dissenting). Justice Brennan agreed with Justice White's contention that "*Gertz* was intended to reach any false statements . . . whether or not [they] implicate[] a matter of public importance.'" *Id.* (quoting *id.* at 2952-53 (White, J., concurring)).

stitutional protection.¹⁶⁷ Justice Brennan criticized the plurality's holding as containing merely a "garnish of substantive analysis" and as offering only "a smorgasbord of reasons why the speech" at issue was not in the public's interest.¹⁶⁸ He similarly criticized Justice White for deciding without analysis or explanation that Dun & Bradstreet's credit report merited no constitutional protection.¹⁶⁹ Furthermore, Justice Brennan believed that the plurality's reliance on *Connick v. Myers* was misplaced because that decision's distinction between public and private matters was expressly limited to the context of governmental employment situations.¹⁷⁰

Justice Brennan further argued that even if the Court were to assume that *Gertz* applies only to matters of public interest, the credit report at issue in *Dun & Bradstreet* was sufficiently important to require first amendment protection.¹⁷¹ He maintained that the dissemination of financial data comports with the principle that the availability of economic information from diverse and competing sources is necessary for the financial well-being of the public.¹⁷² In addition, Justice Brennan reasoned that the public possesses a valid interest in bankruptcy filings because they are effectuated through judicial mechanisms and become part of the public record.¹⁷³ Moreover, he noted that an announcement of a local company's bankruptcy may be of great concern to residents of that community.¹⁷⁴ Thus, he believed *Gertz* should apply to the instant facts even under Justice Powell's interpretation of that case.¹⁷⁵

In support of his conclusion, Justice Brennan disposed of Justice Powell's reasons for according the credit report reduced

¹⁶⁷ See *id.* at 2959, 2960 (Brennan, J., dissenting).

¹⁶⁸ See *id.* at 2959 (Brennan, J., dissenting).

¹⁶⁹ *Id.*

¹⁷⁰ See *id.* at 2962 n.14 (Brennan, J., dissenting).

¹⁷¹ See *id.* at 2961, 2962 (Brennan, J., dissenting).

¹⁷² *Id.* at 2962 (Brennan, J., dissenting). Justice Brennan observed, "Our economic system is predicated on the assumption that human welfare will be improved through informed decisionmaking." *Id.* In addition, he stated that "[t]he . . . information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to [the] private discourse essential to our well-being." *Id.*

¹⁷³ *Id.* (citation omitted).

¹⁷⁴ *Id.* at 2961 (Brennan, J., dissenting).

¹⁷⁵ See *id.* at 2964 (Brennan, J., dissenting). Justice Brennan concluded that a credit report "certainly falls within the range of speech that *Gertz* sought to protect from the chill of unrestrained presumed and punitive damage awards." *Id.* (footnote omitted).

constitutional protection.¹⁷⁶ He attacked Justice Powell's belief that the parallels between the credit report at issue and commercial speech justified a limited level of constitutional protection.¹⁷⁷ Justice Brennan noted that the Court had consistently held that speech on economic matters or in the economic interest of the speaker should receive substantial first amendment protection.¹⁷⁸ He further maintained that the Court had permitted greater regulation of commercial speech only when the speech at issue constituted pure advertising.¹⁷⁹ Justice Brennan defined pure advertising as "an offer to buy or sell goods and services or encouraging such buying and selling."¹⁸⁰ Stating that the credit report in this case was clearly not pure advertising, Justice Brennan reasoned that it should not lose any of its constitutional protection simply because it was conveyed for a price.¹⁸¹

Justice Brennan viewed Justice Powell's reliance on the confidentiality and limited circulation of the credit report as the "linchpin" of the plurality's analysis.¹⁸² He flatly rejected this idea and reasoned that confidential circulation by itself does not render the subject matter outside of the public interest.¹⁸³ In support of his position, Justice Brennan suggested that credit reporting should be analyzed in the aggregate.¹⁸⁴ He noted that Dun & Bradstreet undoubtedly issues thousands of credit reports to similar limited groups of investors and financial institutions.¹⁸⁵ Hence, Justice Brennan feared that if Dun & Bradstreet remained unprotected from presumed and punitive damages, its efforts to supply credit information to its subscribers would be chilled.¹⁸⁶

Justice Brennan also noted the blunt effect that presumed and punitive damages would have on protected expression.¹⁸⁷ He argued that well-settled principles of first amendment juris-

¹⁷⁶ See *id.* at 2960-64 (Brennan, J., dissenting).

¹⁷⁷ See *id.* at 2960 (Brennan, J., dissenting).

¹⁷⁸ See *id.* at 2962 (Brennan, J., dissenting). Justice Brennan stated that "[s]peech about commercial or economic matters . . . is an important part of our public discourse." *Id.* at 2961 (Brennan, J., dissenting). As a result, he observed, "commercial speech . . . receives substantial First Amendment protection." *Id.* at 2962 (Brennan, J., dissenting) (citations omitted).

¹⁷⁹ *Id.* at 2962, 2963 (Brennan, J., dissenting).

¹⁸⁰ *Id.* at 2963 (Brennan, J., dissenting) (footnote omitted).

¹⁸¹ *Id.* at 2961 (Brennan, J., dissenting) (citations omitted).

¹⁸² *Id.* at 2964-65 n.18 (Brennan, J., dissenting).

¹⁸³ *Id.* at 2965 n.18 (Brennan, J., dissenting) (citation omitted).

¹⁸⁴ See *id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* at 2956 (Brennan, J., dissenting).

prudence dictate that "fine instruments" and narrowly drawn standards be employed when regulating speech.¹⁸⁸ Justice Brennan further observed that the cornerstone of *Gertz* was that state remedies for defamatory falsehoods should reach no further than necessary to protect the state's legitimate interest in preserving the reputations of its citizens.¹⁸⁹ He maintained that the first amendment must be given a large measure of deference even in cases that do not involve speech concerning public issues or public figures.¹⁹⁰ In any event, regardless of whether *Dun & Bradstreet's* credit report was "sufficiently central to First Amendment values to require actual malice as a standard of liability," Justice Brennan concluded that it deserved protection from unregulated awards of presumed and punitive damages.¹⁹¹

The various opinions in the *Dun & Bradstreet* decision provide clear evidence of the division among the current Supreme Court Justices regarding the sensitive issue of defamation. Justice Powell's holding that *Gertz* applies only to defamations involving matters of public concern clearly ignores the Court's prior treatment of this area of the law.¹⁹² In addition, Justice Powell has apparently rejected the principle set forth in *Gertz* that judges should not decide on an ad hoc basis whether a publication addresses issues of public interest.¹⁹³ Thus, the *Dun & Bradstreet* opinion mandates a case-by-case determination of whether the controversy has invoked the public interest sufficiently to warrant constitutional protection.¹⁹⁴ Unfortunately, judges will once again become the final arbiters of what issues are matters of public concern and are thus worthy of constitutional protection.¹⁹⁵ In addi-

¹⁸⁸ See *id.* (citations omitted).

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ *Id.* at 2964 (Brennan, J., dissenting). Justice Brennan stated that Greenmoss Builders should be allowed to recover compensatory damages without a showing of actual malice, but he maintained that the malice requirement should apply to the claim for presumed and punitive damages. *Id.* at 2965 (Brennan, J., dissenting).

¹⁹² See *id.* at 2959 (Brennan, J., dissenting). Justice Brennan accused Justice Powell of "depart[ing] completely from the analytic framework and result of [*Gertz*]." *Id.*

¹⁹³ See *Gertz*, 418 U.S. at 346; see also *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). In *Firestone*, the Court stated, "It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for one focusing upon the character of the defamation plaintiff." *Id.* at 456.

¹⁹⁴ See *Dun & Bradstreet*, 105 S. Ct. at 2945-46 (Powell, J., plurality opinion).

¹⁹⁵ See *id.* at 2959-60 & n.11 (Brennan, J., dissenting). Justice Brennan questioned whether "a distinction can and should be drawn between matters of public concern and matters of purely private concern." *Id.* at 2959-60 (Brennan, J., dissenting). In addition, he noted that "[d]istrust of placing in the courts the power to decide what

tion to being largely subjective, these judicial determinations will place unnecessary pressure on an already overworked court system.

It is also distressing that the plurality and concurring opinions in *Dun & Bradstreet* offer so little guidance for determining whether speech is sufficiently in the public's interest to merit protection from the chilling effect of presumed and punitive damages.¹⁹⁶ This lack of guidance is particularly unsettling because the credit reports issued by Dun & Bradstreet about American businesses are arguably matters of public concern.¹⁹⁷ As Justice Brennan noted, a single bankruptcy can have a devastating effect on many lives and on the economic well-being of an entire region.¹⁹⁸ Indeed, one commentator has suggested that if what is good for a major corporation is good for America, then " 'what may be wrong at [that corporation]' must be a legitimate area of public concern.' "¹⁹⁹ The fact that the credit report at issue in *Dun & Bradstreet* defamed a relatively small corporation does not undermine this principle. A credit reporting company is in no position to predict which of its reports will be deemed by the courts to be of public concern. Hence, the fact that credit reporting companies will be unable to predict defamation liability accurately may lead to self-censorship as many companies try to " 'steer far wider of the unlawful zone.' " ²⁰⁰

Additionally, in *Dun & Bradstreet*, Justice Powell balanced the state's strong and legitimate interest in the reputations of its citizens against the defendant's first amendment interest.²⁰¹ He determined that the credit report did not merit constitutional protection from punitive and presumed damages because Dun &

speech was of public concern" led the *Gertz* Court to reject the *Rosenbloom* approach in the first place. *Id.* at 2959 n.11 (Brennan, J., dissenting).

¹⁹⁶ See *id.* at 2960 (Brennan, J., dissenting). Justice Brennan observed that both the plurality opinion and Justice White's concurrence "propose[d] an impoverished definition of 'matters of public concern.' " *Id.*

¹⁹⁷ See *id.* at 2961-62 (Brennan, J., dissenting).

¹⁹⁸ See *id.*

¹⁹⁹ Note, *Libel and the Corporate Plaintiff*, 69 COLUM. L. REV. 1496, 1507-08 (1969).

²⁰⁰ *New York Times Co.*, 376 U.S. at 279 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); see also L. TRIBE, *supra* note 53, § 12-12, at 634 ("a great danger of self-censorship arises from the fear of guessing wrong"). The common law recognized this chilling potential and established a conditional privilege for inaccurate credit reporting. See *supra* note 35 (noting that a majority of jurisdictions have adopted this privilege).

²⁰¹ See *Dun & Bradstreet*, 105 S. Ct. at 2944-46 (Powell, J., plurality opinion).

Bradstreet's first amendment interest was "less important."²⁰² This analysis contains several flaws, however, because both the state's interest and the defendant's interest in the controversy were erroneously derived.

In determining the magnitude of the state's interest, Justice Powell relied heavily on Justice Stewart's concurring opinion in *Rosenblatt v. Baer*.²⁰³ In *Rosenblatt*, Justice Stewart reasoned that "[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every *human being*—a concept at the root of any decent system of ordered liberty."²⁰⁴ Greenmoss Builders is a corporation, however, and it lacks the type of reputational interest that the common law protects by allowing presumed damages. A corporation has no emotions or feelings and cannot suffer the kind of "psychic injury"²⁰⁵ that the law of defamation attempts to prevent.²⁰⁶ Therefore, the language relied on by Justice Powell—"the essential dignity and worth of every human being"²⁰⁷—is simply inapplicable when the defamed plaintiff is a corporation.²⁰⁸ Furthermore, as Justice

²⁰² *Id.* at 2945 (Powell, J., plurality opinion); see also *supra* notes 120-124 and accompanying text (setting forth Justice Powell's reasoning).

²⁰³ 383 U.S. 75 (1966). Justice Powell relied upon Justice Stewart's opinion to support his conclusion that the state's interest in protecting private reputations is "strong and legitimate." See *Dun & Bradstreet*, 105 S. Ct. at 2945 (Powell, J., plurality opinion).

²⁰⁴ *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring) (emphasis added).

²⁰⁵ Note, *Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation*, 75 COLUM. L. REV. 963, 992 (1975); see *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) ("Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."); PROSSER & KEETON, *supra* note 1, § 111, at 779 ("A corporation is regarded as having no reputation in any personal sense. . . ."); Fetzer, *The Corporate Defamation Plaintiff as First Amendment "Public Figure": Nailing the Jellyfish*, 68 IOWA L. REV. 35, 52 (1982) ("The business corporation has no personality, no dignity that can be assailed, no feelings that can be touched.") (citation omitted). Dean Prosser also notes, however, that a corporation "has prestige and standing in the business in which it is engaged, and language which casts an aspersion upon its honesty, *credit*, efficiency or other business character may be actionable." PROSSER & KEETON, *supra* note 1, § 111, at 779 (emphasis added).

²⁰⁶ See Fetzer, *supra* note 205, at 51-52.

²⁰⁷ See *supra* note 122 and accompanying text.

²⁰⁸ Note, *supra* note 205, at 992. The author notes that *Gertz* was premised on protecting the individual's interest in his reputation. *Id.* He maintains that if the value of a corporation's good name is substituted for an individual's reputational interest, the constitutional balance "shifts dramatically." *Id.* The author concludes that "the value of uninhibited speech and press should far outweigh the purely pecuniary value" associated with a corporation's good name. *Id.*

Brennan observed, any damage suffered by Greenmoss Builders can readily be measured in financial terms.²⁰⁹ Therefore, an award of presumptive damages in place of actual damages may overcompensate a plaintiff such as Greenmoss Builders and thus violate the clear policy that free speech should be chilled only when absolutely necessary.²¹⁰

In addition, Justice Powell's determination that Dun & Bradstreet's first amendment interest was "less important" than the state's interest in protecting reputations minimizes the increasingly pervasive role that big business plays in everyday life.²¹¹ Like the Federal and state governments, major businesses have an important effect on the political, economic, and social lives of all Americans.²¹² Because American businesses "are not amenable to the restraints of the political process,"²¹³ however, public opinion and criticism may be the only method of influencing the conduct of this country's corporate giants.²¹⁴ Therefore, because government and business both have pervasive effects on the lives of Americans,²¹⁵ any critical examination of either should be granted substantial protection. Moreover, legislative involvement in the act of incorporation and in the subsequent operations of companies has led many courts and commentators to reason that American corporations have assumed the risk of public scrutiny.²¹⁶ Thus, a compelling argument may be made that

²⁰⁹ See *Dun & Bradstreet*, 105 S. Ct. at 2964 n.16 (Brennan, J., dissenting).

²¹⁰ See *id.* at 2956 (Brennan, J., dissenting).

²¹¹ See *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 163-64 (1967) (Warren, C.J., concurring).

²¹² See *id.* at 163 (Warren, C.J., concurring).

²¹³ See *id.* at 164 (Warren, C.J., concurring).

²¹⁴ See *id.* If ownership of a corporation is spread among a large number of stockholders, the company may be even less responsive to the wishes of a majority of its owners. See Note, *supra* note 199, at 1507.

²¹⁵ See Note, *supra* note 199, at 1506-07.

²¹⁶ See, e.g., *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1342 (S.D.N.Y. 1977) (large corporation deemed a public figure because of extensive regulation of its activities by state departments of insurance and SEC); *Trans World Accounts, Inc. v. Associated Press*, 425 F. Supp. 814, 820 (N.D. Cal. 1977) (corporation considered a public figure with respect to a matter under investigation by the Federal Trade Commission); *Martin Marietta Corp. v. Evening Star Newspaper*, 417 F. Supp. 947, 955-56 (D.D.C. 1976) (all corporations are public figures because they lack any privacy interest); see also Fetzer, *supra* note 205, at 60-65 (noting extensive regulation of corporations); cf. *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (corporation deemed a public figure because of extensive advertising and "regular and continuing access to the channels of communication"). But see *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980) (noting that corporations generally have no greater access to the media than private individuals). See generally Note, *In Search of the Corporate Private Figure: Defamation of*

Dun & Bradstreet's reports deserve heightened first amendment safeguards.

Perhaps the most unsettling element of the *Dun & Bradstreet* decision, however, is the lack of clear guidelines regarding the level of constitutional protection that will be accorded future defendants in defamation actions. As a result of *Dun & Bradstreet's* emphasis on content, the distinction between media and nonmedia defendants relied on by the lower court may no longer have constitutional significance.²¹⁷ Furthermore, Justice Powell failed to clarify whether fault must still be shown—as prescribed by *Gertz*²¹⁸—before actual damages may be awarded for defamatory statements regarding matters of private concern. Indeed, he expressly rejected the idea that malice must be proven before punitive damages may be awarded in cases such as *Dun & Bradstreet*.²¹⁹ Accordingly, his broad distinction of *Gertz* might also imply that actual damages may be awarded absent proof of fault in defamation cases involving wholly private matters. In any event, the willingness of the Court to create additional doctrinal distinctions at the expense of clarity indicates that the Court is

the Corporation, 6 HOFSTRA L. REV. 339 (1978) (discussing application of *Gertz* standard to corporations).

²¹⁷ See *Dun & Bradstreet*, 105 S. Ct. at 2959 (Brennan, J., dissenting). Justice Brennan stated that the plurality opinion had "eschew[ed] the media/nonmedia distinction." *Id.* In addition, he argued that such a distinction would be "irreconcilable with the fundamental First Amendment principle that '[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend on the identity of its source.'" *Id.* at 2957 (Brennan, J., dissenting) (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978)). Furthermore, Justice Brennan maintained that a media/nonmedia "distinction would likely be born an anachronism." *Id.* at 2957-58 (Brennan, J., dissenting). He reasoned that "transformations in the technological and economic structure of the communications industry" have blurred the distinctions between media and nonmedia entities. *Id.* at 2958 n.7 (Brennan, J., dissenting). But see *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986). In *Hepps*, the Court held that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without . . . showing that the statements at issue are false." *Id.* at 1559. Justice O'Connor, writing for the majority, hinted at a distinction between media and nonmedia defendants, stating that the Court need not "consider what standards would apply if the plaintiff sues a nonmedia defendant." *Id.* at 1565 n.4.

²¹⁸ See *supra* note 93 and accompanying text (noting *Gertz's* requirement of some sort of fault); cf. *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558, 1559 (1986) (recognizing the vitality of the fault requirement when a private figure sues a media defendant).

²¹⁹ See *Dun & Bradstreet*, 105 S. Ct. at 2948 (Powell, J., plurality opinion).

insensitive to the need to offer clear, workable guidelines and is unwilling “to come to rest in the defamation area.”²²⁰

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²²⁰ *Gertz*, 418 U.S. at 354 (Blackmun, J., concurring).