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NOTES

CONSTITUTIONAL LAW—A NEW TWIST TO THE LAW OF DEFAMATION—Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.

INTRODUCTION

Slightly more than two decades have passed since the United State Supreme Court in New York Times, Co. v. Sullivan\(^1\) began limiting state defamation laws by redefining the body of common law defamation in terms of first amendment protection. Since New York Times the Supreme Court has continued to limit state defamation law, and to extend the "actual malice standard,"\(^2\) as developed in New York Times, to other defamation cases.\(^3\) However, the degree of first amendment protection afforded defamatory speech is unclear. Balancing the state interest in protecting citizens from defamatory speech, on one side, against the constitutional interest in free speech, on the other, has posed a precarious dilemma for the Supreme Court. The Court has been faced with deciding which

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2. The "actual malice standard" developed in New York Times required clear and convincing proof that a defamatory falsehood, alleged as libel, was uttered with "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 280.
3. In the companion cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker, 388 U.S. 130 (1967), the "actual malice standard" was applied to public figures. In Time, Inc. v. Hill, 385 U.S. 374 (1967), the Court applied the "actual malice standard" to a news report of a matter of public interest, although a private individual was involved. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), suggested that the New York Times rule apply to all communication and discussion involving matters of public or general concern, regardless of whether the person is famous or anonymous. Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974), while not expressly overruling Rosenbloom, limited its scope. Gertz held that where a private individual was involved in a defamation action the statutes could not impose liability without fault. The state of the law after Gertz required that a public figure must prove actual malice to recover in a defamation action, whereas a private plaintiff needed only to prove the degree of fault chosen by the particular state—usually simple negligence. But to recover presumed or punitive damages the private plaintiff needed to show "actual malice."
of these competing interests is greater, and what facts and circumstances justify a shift in their importance.\textsuperscript{4} Given the opportunity to clarify this area of the law, the Supreme Court granted certiorari in 1983 to Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.\textsuperscript{5} The Court in Dun & Bradstreet\textsuperscript{6} held that a private person need not show "actual malice" to recover presumed and punitive damages when the matter involves a private concern.\textsuperscript{7} The Court reasoned that presumed and punitive damages for defamatory statements that do not involve matters of public concern do not violate the first amendment freedom of speech, even absent a showing of "actual malice."

The Court in Dun & Bradstreet deceptively followed prior defamation cases by extending the test to define the parameters of first amendment protection of libelous speech. While having the potential to clarify this area of the law, the decision in Dun & Bradstreet has only added to the already complex matrix of considerations\textsuperscript{8} (see Diagram I) involved in determining the scope of first amendment restrictions on state defamation laws. The case brings increased difficulty in predicting what libels will be subject

\begin{footnotesize}
\begin{enumerate}
\item 143 Vt. 66, 461 A.2d 414, cert. granted, 104 S. Ct. 389 (1983).
\item 105 S. Ct. 2939 (1985).
\item Id. at 2948.
\item Id.
\item Factors which have been considered in prior cases include the distinction between public/private individuals, New York Times, Co. v. Sullivan, 376 U.S. 254 (1964) and media/non-media defendants. Compare Stuempges v. Parke, Davis & Co., 297 N.W.2d 252 (Minn. 1980) with Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976) (see infra note 70). See also Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974). Throughout the opinion for the Court in Gertz, Justice Powell spoke in terms of "publishers and broadcasters", the "press and broadcast media", and "communications media."

The distinction between public and private concerns has also been noted in the case law. Time, Inc. v. Hill, 385 U.S. 374 (1967) and Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). But, after Gertz, the distinction between public/private matters alone was not enough to decide whether one would be held to the "actual malice" standard.

See also Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 4373 (1986), which ruled unconstitutional a Pennsylvania statute giving the defendant in a defamation action the burden of proving the truth of allegedly defamatory statements. The Court noted that where a newspaper publishes speech of public concern about a private person, the private plaintiff cannot recover damages without also showing the statements made by the defendant were false. 106 S.Ct. at 1559.
\end{enumerate}
\end{footnotesize}
to presumed and punitive damages without the proof of "actual malice" as defined in *New York Times v. Sullivan*.  

This Note will illustrate how *Dun & Bradstreet* immensely elevates the distinction between public and private concerns when evaluating what speech deserves first amendment protection in defamation cases. The main thrust is on the deficiencies of the *Dun & Bradstreet* opinion, and how the Court, although given this opportunity to clarify this area of the law, created greater confusion instead.

**The Case**

*Dun & Bradstreet*, Inc., a credit reporting agency, erroneously informed five subscribers of its credit reports that Greenmoss Builders, Inc., a construction contractor, had filed a volun-

10. Much of the difficulty in prediction comes with the subjective nature of deciding what is a public concern and what is a private concern.

11. At trial it was established the error in *Dun & Bradstreet*'s credit report was caused when one of its employees, a seventeen year old high school student paid to review Vermont bankruptcy pleadings, mistakenly attributed to Greenmoss Builders, Inc. a bankruptcy petition filed by former employee of Greenmoss.
tary petition for bankruptcy. Greenmoss brought a defamation action against Dun & Bradstreet claiming both compensatory and punitive damages. The jury returned a verdict for Greenmoss and awarded $50,000 compensatory or presumed damages and $300,000 punitive damages. Dun & Bradstreet moved for a new trial arguing that the United States Supreme Court in *Gertz v. Robert Welch, Inc.* had ruled broadly that the states may not permit recovery of presumed or punitive damages in libel actions, at least when liability is not based on a showing of "actual malice." Dun & Bradstreet contended the trial court allowed the jury to award damages to Greenmoss on a lesser showing.

The judge ordered a new trial, and Greenmoss appealed to the Vermont Supreme Court. The Vermont Supreme Court reversed the trial court's order for a new trial. Basing its opinion on the distinction between media and non-media defendants, the court held that the ruling in *Gertz* was inapplicable to non-media defamation actions, and that this was such an action. The United States Supreme Court granted certiorari to consider whether *Gertz* applied to the facts in *Dun & Bradstreet.*

The United States Supreme Court affirmed the Vermont Supreme Court, holding *Gertz* inapplicable to *Dun & Bradstreet,* but the Supreme Court’s decision followed a totally different line of reasoning from the Vermont court. The Supreme Court focused on speech content in the context of public/private concerns. The Court concluded that Greenmoss Builders could recover presumed and punitive damages without showing that Dun & Bradstreet ac-

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12. Greenmoss Builders filed suit after expressing its dissatisfaction with Dun & Bradstreet's refusal to divulge the names of the subscribers who received the false credit reports.
16. The Vermont Supreme Court noted that while there may be some problems in deciding when a defendant is media or non-media, that distinction was not difficult to draw with credit reporting agencies which are in the business of distributing to a limited number of subscribers financial information for a handsome fee. The Court concluded that such firms are not "the type of media worthy of first amendment protection as contemplated by *New York Times.*" 143 Vt. at 73-74, 461 A.2d at 417-18.
ted with "actual malice," and that this did not violate the first amendment because the defamatory statements published by Dun & Bradstreet involved matters of private concern.\footnote{18}

**BACKGROUND**

Prior to the *New York Times*\footnote{19} case in 1964, defamation was considered to be beyond the reach of first amendment protection.\footnote{20} Under the common law, a defendant was held strictly liable for intentional publication of all defamatory statements regardless of fault.\footnote{21} The only available defenses were truth or a successfully asserted privilege.\footnote{22} Behind the notion of strict liability were a number of justifications, including the principle that the flow of information, especially about personalities, should be limited to the truth.\footnote{23} However, by adopting some conditional privileges, the courts on occasion forced individual reputations to yield to other societal needs.

For first amendment purposes the most important of these common law privileges was that of "fair comment" on matters of public concern. In its broadest application this common law privilege protected statements of opinion, but did not protect honest misstatements of fact although they were of public issue.\footnote{24} In a minority of states, the privilege was extended to protect good faith misstatements of fact concerning public officials, political candi-

19. 376 U.S. 254 (1964)
22. Id. at §§ 114-16 at 815-42.
24. The leading case is Post Publishing Co. v. Hallam, 59 F. 530 (6th Cir. 1893). See W. Prosser, supra note 21, § 113 at 813-15. The courts have had difficulty distinguishing between what is fact and what is opinion. See Titus, Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment, 15 Vand. L. Rev. 1203 (1962).}
dates, community leaders, and others who took a public stance on matters of public concern. 25

In 1964, the Court in New York Times broke with the common law rule of strict liability concerning defamation, holding that the first amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" 26 "Actual malice" was defined as making a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." 27

Following New York Times, the broader first amendment scope of the decision was noted. 28 The Court, in reaching its decision in New York Times, stated that "debate on public issues should be uninhibited, robust, and wide-open." 29 This statement left open a wide range of possible applications of the New York Times "actual malice standard."

Further development came in 1967 when the Supreme Court was afforded an opportunity to expand the coverage of the "actual malice standard." The companion cases of Curtis Publishing Co. v. Butts and Associated Press v. Walker, 30 extended the standard to all "public figures" who "by reason of their fame, shape events in areas of concern to society at large." 31

Following the Butts and Walker decisions, the plurality in Rosenbloom v. Metromedia, Inc., 32 in a highly criticized opinion, 33 suggested that the "actual malice standard" should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general concern." 34 However, Gertz v. Robert Welch, Inc. 35 soon made it clear that the scope of constitutionally
protected speech did not extend as far as the Court in *Rosenbloom* suggested.

The *Gertz* case was instituted when Elmer Gertz, a reputable Chicago civil rights attorney, brought a libel suit in federal court against the publishers of the *American Opinion* magazine, which in 1969 described Gertz as a Communist and suggested his involvement in a Communist campaign against the police. After the jury returned a $50,000 verdict in favor of Gertz, the trial judge entered a judgment notwithstanding the verdict in favor of the publisher, concluding that the *New York Times* "actual malice" standard applied. Gertz appealed. The Court of Appeals for the Seventh Circuit affirmed, basing its holding on *Rosenbloom*. The Supreme Court reversed. The Court stated that "so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of [a] defamatory falsehood injurious to a private individual." Public officials and public figures were still re-

36. *Id.* at 325-27.
37. *Id.* at 329.
38. *Id.* at 330.
39. 471 F.2d 801 (7th Cir. 1972).
40. 418 U.S. at 347.
41. *New York Times* and the cases following put heavy reliance on the distinction between public and private individuals to determine when the “actual malice standard” applied.
42. 418 U.S. at 346.
43. *Id.*
quired by *New York Times* to prove "actual malice" to recover damages in defamation actions.⁴⁵

*Gertz* however, went on to hold that in order for a private individual to recover presumed or punitive damages, he had to prove "actual malice," and that a private plaintiff who could not prove "actual malice" could only recover actual damages.⁴⁶ Thus, the public/private person distinction which *Rosenbloom* had rendered virtually meaningless was resurrected in *Gertz*. (See Diagram II.)

**Diagram II: Development of First Amendment Protection of Libelous Speech**

- **New York Times**
  - Public Officials
  - Actual malice must be shown to collect any type of damages.

- **Butts and Walker**
  - Public Figures
  - Actual malice must be shown to collect any type of damages.

- **Rosenbloom**
  - Private Individuals
  - Suggested actual malice must be shown to recover any damages.

- **Gertz**
  - Private Individuals
  - Actual malice must be shown to collect presumed and punitive damages.
  - Some degree of fault must be shown to recover actual damages.
  - Actual malice need not be shown.

The line of cases from *New York Times* to *Gertz* drastically reformed common law defamation by shielding defamation with

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45. 418 U.S. at 342-43.
46. Id. at 350.
first amendment protection, but the extent of that protection was not totally clear. After Gertz it was apparent that a public figure must satisfy the New York Times “actual malice” standard to recover all damages. On the one hand, Gertz held that a private individual need only prove the degree of fault provided by the particular state to recover actual damages. But, Gertz went further and stated that to recover punitive or presumed damages it was necessary for the private plaintiff to present sufficient evidence to meet the New York Times “actual malice” standard. (See Table I.)

**Table I: State of the Law After Gertz**

<table>
<thead>
<tr>
<th>DAMAGES</th>
<th>PUBLIC PERSON</th>
<th>PRIVATE PERSON</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actual</td>
<td>Actual Malice</td>
<td>Some degree of fault established by each state</td>
</tr>
<tr>
<td>Presumed</td>
<td>Actual Malice</td>
<td>Actual Malice</td>
</tr>
<tr>
<td>Punitive</td>
<td>Actual Malice</td>
<td>Actual Malice</td>
</tr>
</tbody>
</table>

The Gertz decision still left many questions unanswered. For example, what was the role of a media/non-media defendant? Was the distinction between a private and public interest valid? Was the only crucial factor in awarding actual damages, without proving “actual malice,” whether the plaintiff was a private or public person? Was a person, public or private, ever entitled to presumed or punitive damages in a defamation case absent proof the defend-

47. *Id.* at 342-43. Although no Supreme Court case addresses the situation when a public person/private matter is involved, Gertz noted that the New York Times standard defined the appropriate level of constitutional protection when a public person was defamed. Public persons may only recover for injury to reputation by showing “actual malice.” 418 U.S. at 342. Conceivably, the logic of Dun & Bradstreet could be applied to the situation of public person/private concern. However, since Dun & Bradstreet involved a private person the analogy is somewhat flawed. As Gertz pointed out, “private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.” 418 U.S. at 345.
48. *Id.* at 347-50.
49. *Id.* at 350.
ant acted with "actual malice"? With these questions setting the stage, *Dun & Bradstreet* was granted writ of certiorari to the United States Supreme Court. *Dun & Bradstreet* gave the Court a prime opportunity to clarify the constitutional limits on state defamation laws.

**Analysis**

The Supreme Court in *Dun & Bradstreet* found *Gertz* inapplicable. The Court concluded "that permitting recovery of presumed and punitive damages [by a private person plaintiff] 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." 50 The Vermont Supreme Court had held *Gertz* inapplicable in *Dun & Bradstreet* based on the fact that *Gertz* did not apply to defamation actions concerning non-media defendants. The Supreme Court reached the same result as the state court, but no single rationale dominated the plurality's decision, and no member of the Court followed the state court's analysis regarding media/nonmedia defendants.

Justice Powell, speaking for the plurality, relied on the 1983 public employment law case of *Connick v. Myers*, 51 and held that matters of private concern need not be given as much constitutional protection as matters of public concern. 52 The Court noted that *Gertz* struck a balance between two competing interests: the state interest in protecting its private citizens and the first amendment's interest in free and robust speech. 53 Balancing the state interest against the same first amendment interest at stake in *New York Times*, the *Gertz* Court held that a state could not allow a private individual recovery of presumed or punitive damages absent a showing of "actual malice." 54 In *Dun & Bradstreet* the Court noted that nothing in the *Gertz* opinion "indicated that this same balance would be struck regardless of the type of speech involved." 55 The *Dun & Bradstreet* plurality concluded that where speech does not involve matters of public concern, "the state interest adequately supports awards of presumed and punitive dam-

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50. 105 S. Ct. at 2948.
52. 105 S. Ct. at 2945.
53. Id. at 2944-45.
54. 418 U.S. at 349.
55. 105 S. Ct. at 2944.
ages—even absent a showing of actual malice.”

Chief Justice Burger and Justice White concurred in separate opinions. Both Justices agreed with the plurality’s “private/public concern” rationale. Yet, the concurring opinions went further to say that *New York Times* should be re-examined and that *Gertz* should be overruled. In urging the Court to reject *Gertz*, Justice White based his reasoning on the premise that the public’s interests set forth in *New York Times* did not tilt the scales in favor of first amendment protection when a private individual was involved. White, in his dissent in *Gertz*, had stated that the common law remedies should be retained for private plaintiffs—regardless of the concern involved.

Justice Brennan, writing for the dissent, stated alliance to the principles of *New York Times*. The dissent also expressed support for the *Gertz* holding that denied recovery of presumed and punitive damages without proof of “actual malice.” The dissent strongly disagreed with the plurality’s limits on first amendment speech protection, specifically the plurality’s “private/public concern” distinction. The dissenters said such a standard would only lead to confusion when trying to distinguish between a private matter and a public concern.

*Dun & Bradstreet* substantially reinterpretes *Gertz*. The plurality opinion brings speech content into the spotlight as a means to evaluate whether libelous speech is deserving of first amendment protections. *Dun & Bradstreet* draws a distinction for the allowance of presumed and punitive damages to a private plaintiff without proof of “actual malice” based upon whether the matter involved is public or private. “Actual malice” must be shown for matters of public concern, but is not required for private matters. Although a public matter was involved in *Gertz*, the Court stated without reference to public or private concerns, that private individuals could not recover presumed or punitive damages without showing “actual malice.” *Dun & Bradstreet* puts a twist to *Gertz*,

56. Id. at 2946.
57. Id. at 2948 (White, J., concurring).
58. Id. at 2950 (White, J., concurring).
59. 418 U.S. 373 (White, J., dissenting).
60. Id. at 2954 (Brennan, J., dissenting).
61. Id.
62. Id. at 2959-60.
63. Id. at 2959-60 n.11 (Brennan, J., dissenting).
64. 418 U.S. at 348-49.
by immensely elevating the "public/private concern" distinction. While the division between public concerns and private concerns existed in the Court's rationale in prior libel cases,\textsuperscript{65} \textit{Dun & Bradstreet} catapults speech content into the already existing matrix of factors\textsuperscript{66} to be considered when evaluating whether libelous speech is afforded first amendment protection when a private individual is involved.

Along with holding that the states could not impose liability without fault, \textit{Gertz} ruled that in defamation suits by private individuals the states could not permit recovery of presumed and punitive damages unless "actual malice" was shown.\textsuperscript{67} \textit{Dun & Bradstreet} holds that "actual malice" need not be proven to collect presumed or punitive damages when the defamatory statements about a private person do not involve matters of public concern.\textsuperscript{68} What was thought to be blanket protection against presumed and punitive damages where "actual malice" cannot be shown, actually is only a protection in those situations where a private individual is defamed about a matter of public concern. Fault must be shown, but it does not have to rise to the degree of actual malice for the private individual to collect presumed or punitive damages. This is a substantial reinterpretation of \textit{Gertz}. (See Table II which illustrates how the damage recoveries for presumed and punitive damages are split after \textit{Dun & Bradstreet} and compare it with Table I.)

\textsuperscript{66} See supra note 9.
\textsuperscript{67} 418 U.S. at 346.
\textsuperscript{68} 105 S. Ct. at 2948.
In *Dun & Bradstreet* the Court adopted a two tier process of evaluating cases where a private individual has been defamed. Step one is deciding whether the person is a public individual or a private individual. If a public individual, the plaintiff must show “actual malice” in order to collect any type of damages. If the person is a private individual the court takes the second step and asks: Does this case involve a matter of public or private concern? If a private concern exists then the court allows presumed and punitive damages without proof of “actual malice.” (See Diagram III.)

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69. Any damages: actual, punitive, compensatory or presumed.
The Court in *Dun & Bradstreet* was given an excellent opportunity to explain the scope of first amendment protection of defamatory speech and to clarify this area of the law. However, the Court failed to do so. The opinion is deficient in several ways.

*Dun & Bradstreet*’s most severe shortcoming is that it failed to give the practicing bar an expository precedent by which attorneys can advise both their media and non-media clients about potential libels that may be subject to presumed and punitive damages. While giving a new factor to consider in evaluating private defamation actions, the *Dun & Bradstreet* opinion fails to clarify the area of first amendment protection of libelous speech.

The Court’s failure to treat the media/non-media defendant question ignored an issue which has been a deciding factor in lower court cases,\(^70\) including the *Dun & Bradstreet* decision by the Ver-

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mont Supreme Court. The Vermont Supreme Court noted that in non-media defamation actions the critical elements which brought the United States Supreme Court into the law of defamation were missing. There were no threats to free and robust debate of public issues, no potential interference with meaningful dialogue of ideas concerning self-government, and no threat of liability causing a reaction of self-censorship by the press. The Supreme Court did not even address the media/non-media defendant question, even after the Court specifically limited the arguments in the briefs to media/non-media and commercial speech issues. Had the Court addressed these issues, much of the confusion in applying Gertz could have been resolved. The Court's formulation of a new rationale without the benefit of opposing views will eventually bring up questions and problems that could have been avoided if only the Court had addressed the media/non-media defendant problem in its opinion. The question now is whether the distinction between media and non-media remains a consideration because of the Court's heavy focus on the "private/public concern." The Court should have taken the opportunity to say whether the media/non-media distinction makes any difference.

Even after choosing to focus on the private versus public concern, the Court failed to provide sufficient guidelines to distinguish the "private" from the "public" concern. Quoting from Connick


72. Id. at 74, 461 A.2d at 418.

73. Not only was the briefing limited to media/non-media and commercial speech issues, but the Vermont Supreme Court, in holding Gertz inapplicable, had based its decision on the media/non-media distinction. From all indications the media/non-media issue should have at least been addressed.

74. Since the Court did not address the media/non-media issue, the importance of the distinction is questionable. But see Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1565 n.4 (1986) (where the Court, in requiring a private plaintiff to bear the burden of proving the falsity of allegedly defamatory statements concerning a public matter, refused to consider what standards would apply if a plaintiff sued a non-media defendant). Did the Court in Dun & Bradstreet choose not to reach the issue because the Court thought it unimportant? Or is the distinction still valid?

75. 105 S. Ct. at 2959-60 (Brennan, J., dissenting).
v. Myers," the Court said only that "whether [the] speech addresses a matter of public concern must be determined by the expression's content, form, and context as revealed by the whole record." The Court neglected to expand upon this criteria on which it relied.

Applying this ostensibly vague criteria to the case at bar, the Court simply took the false credit report and reasoned that such a report was "speech solely in the individual interest of the speaker and its specific business audience," without fully considering what factors may be evaluated in determining which matters may be classified as a public concern. Further, the decision provides no guidance as to when a private news story becomes a public concern, or as to whether a public concern becomes "public" just because the public is interested in the matter.

As the dissent pointed out, the Dun & Bradstreet plurality opinion resembled the plurality opinion in Rosenbloom v. Metromedia, Inc. Rosenbloom's plurality suggested that first amendment protection of defamatory speech expand to all cases involving the communication or discussion of "public issues," regardless of whether the plaintiff was a public or private individual. Gertz rejected Rosenbloom's rationale, finding that the Rosenbloom standard would unacceptably impinge upon the states' legitimate interest in protecting its private citizens. Gertz was also critical of Rosenbloom's "public or general interest" test because of its subjective nature and because it would occasion judges to decide on an ad hoc basis which publications address issues of public concern. Dun & Bradstreet will undoubtedly resurrect the same deficiencies the Gertz opinion found in Rosenbloom.

Dun & Bradstreet also creates the same potential for inconsistency as Rosenbloom. The subjective nature of deciding what is a public or private concern will undoubtedly lead to ad hoc decision making. The discretion given to judges to decide what is a public or private concern will inevitably spawn inconsistent decision making in the lower courts as lawyers and judges attempt to explore

77. 105 S. Ct. at 2947.
78. Id. at 2947.
79. Id. at 2959-60 n.11 (Brennan, J., dissenting).
80. 403 U.S. 29 (1971).
81. 418 U.S. at 346.
82. Id.
83. Id.
the parameters of the *Dun & Bradstreet* decision. However, *Dun & Bradstreet* is not a return to *Rosenbloom*. *Dun & Bradstreet* advances both a distinction between public/private individuals and a distinction between public/private concerns. *Rosenbloom* advocated only a distinction between the latter.

The result reached in *Dun & Bradstreet* is correct when considering the reasoning of precedent cases. The state interest in compensating private individuals for injury to their reputations supports awarding presumed and punitive damages even absent a showing of "actual malice" when the defamatory speech is of a purely private nature. As opposed to speech dealing with public concerns, the value of speech on matters of a purely private concern receives reduced constitutional value. Constitutional protection of speech on a private matter does not further first amendment concerns for free and open debate of public issues and the free exchange of ideas. Restating the *Dun & Bradstreet* holding to give it deference to the prior case law: A private person or company should be allowed to recover presumed and punitive damages from a non-media defendant for libelous speech containing matters of private concern without having to prove "actual malice."

Neither of the concurring opinions were correct in their attempt to justify the disposition. Both Chief Justice Burger's and Justice White's opinions sought a re-examination of *Gertz* and *New York Times*—suggesting specifically that *Gertz* be overruled. Based on a long line of case law which affords a broad range of speech protected by the first amendment, the Court would find it hard to justify overturning these precedents. The dissent gives the plurality valid criticisms, but the dissent would expand first amendment protection too far. By strictly adhering to *New York Times* and *Gertz*, the dissent's approach would blindly apply pr-

84. The *New York Times* rationale was grounded on "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 376 U.S. at 270. *Gertz* went further on this notion of "open debate on public issues" and reasoned that defamatory statements made about a private person concerning a public issue were deserving of some first amendment protections. However, *Gertz* did involve a public matter, and the Court was not faced with the situation of a private plaintiff bringing a defamation action when a private matter is involved.

85. Since the Court did not consider the media/non-media defendant issue the question may still be posed: "What result if *Dun & Bradstreet* clearly involved a media defendant?"

cedent to defamation cases which involve other facts and considerations.\textsuperscript{87}

**CONCLUSION**

*Dun & Bradstreet* allows a private individual to recover presumed and punitive damages without showing "actual malice" when the matter involves a private concern. The plurality opinion focuses on speech content as a means to evaluate whether libelous speech is deserving of first amendment protection. *Dun & Bradstreet* immensely elevates the "public/private concern" distinction. While that concern has existed in the Court's rationale in prior libel cases, *Dun & Bradstreet* catapults speech content into the already existing matrix of factors considered when evaluating whether libelous speech is afforded first amendment protection when a private individual is defamed.

*Dun & Bradstreet* is not a return to *Rosenbloom*, the case merely gives *Gertz* a new twist. *Gertz* held there could be no presumed or punitive damages without showing "actual malice." *Dun & Bradstreet* agrees with this holding, but allows private individuals presumed or punitive damages where the defamatory publication involves a matter of private concern without showing "actual malice." (See Diagram IV.) The *Gertz* requirement that a private person must show some fault to recover in a defamation action still applies.

\textsuperscript{87} Strict application of *New York Times* and *Gertz* would eliminate the consideration of the state interest in protecting its private citizens from defamatory statements. As the majority stated in *Gertz*, the Court would not lightly require the states to abandon this interest. 418 U.S. at 342. Quoting Justice Stewart, the majority noted that the individual's right to the protection of his own good name "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." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (as quoted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 324, 342 (1974)).
NEW TWIST TO DEFAEMATION

DIAGRAM IV
THE EFFECT OF DUN & BRADSTREET ON GERTZ

DUN & BRADSTREET

PUBLIC CONCERN
No presumed or punitive damages without showing actual malice

PRIVATE CONCERN
Presumed and punitive damages without showing actual malice

GERTZ
No presumed or punitive damages without showing actual malice

_Dun & Bradstreet_ appears to be a retreat in the Court’s movement to protect defamatory speech under the first amendment. From all indications in the _Gertz_ opinion, a private person, just like the public person, would be required to prove “actual malice” to recover presumed and punitive damages. _Dun & Bradstreet_ expressly holds that a private person need not prove this higher degree of culpable conduct to recover presumed and punitive damages. As long as liability is not imposed without showing fault, the state common law remains intact when a private person is defamed about a matter of private concern.

_Dun & Bradstreet_ makes it easier for private plaintiffs to recover presumed and punitive damages in defamation actions when the matter is a private concern. However, the subjective nature of what is a private and what is a public concern will undoubtedly be the most troublesome aspect in application of the _Dun & Bradstreet_ decision. Judges will often be required to use hindsight to evaluate what is public and what is private. This will inevitably lead to ad hoc decisions at the appellate as well as the trial level.

_Dun & Bradstreet_ leaves several questions unanswered: What is the effect of having a media defendant? What facts need be con-

88. *But see* Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986), where the Court decided a private person is required to bear the burden of proving the falsity of allegedly defamatory statements concerning a public matter before recovery of damages will be allowed.
sidered in deciding what is a public concern? When does a private news story become a public concern? Is a private/public concern now the only factor to consider in determining when the first amendment will protect defamatory statements when a private individual is defamed? Does the decision have any effect on defamation actions involving public officials or public figures?

When *Dun & Bradstreet* was granted certiorari in 1983, it was projected that at least some of these unanswered questions would be addressed and resolved. Given this golden opportunity to define the scope of first amendment limits on state defamation laws, the Supreme Court skirted several central issues and raised issues and questions that did not even exist prior to the decision.

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