

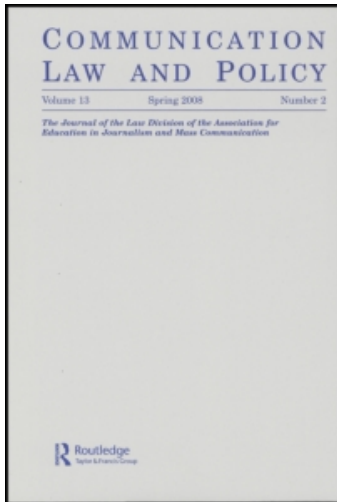
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DECIPHERING *Dun & Bradstreet*: DOES THE FIRST AMENDMENT MATTER IN PRIVATE FIGURE-PRIVATE CONCERN DEFAMATION CASES?

RUTH WALDEN*
DERIGAN SILVER**

In Dun & Bradstreet v. Greenmoss Builders, the Supreme Court of the United States reintroduced a subject matter test into libel law, holding that private figures defamed in the discussion of matters of private concern did not need to prove actual malice to collect punitive or presumed damages. The sweeping language of some of opinions, coupled with the Supreme Court's references to subject matter in subsequent cases, led to confusion over whether and how constitutional protections apply in private plaintiff-private issue cases. This article explores how lower federal and state appellate courts have interpreted Dun & Bradstreet and offers three alternate solutions to appropriately balance the First Amendment rights of defendants with the reputational interests of private plaintiffs in cases arising from the discussion of matters of private concern.

On March 20, 1990, *The Wall Street Journal* published an article focusing on the likelihood of success of the Taj Mahal, an Atlantic City casino owned by Donald Trump. The article included the following quotation:

“When [the Taj Mahal] opens, [Trump] will have had so much free publicity he will break every record in the books in April, June, and July,” says Marvin Roffman, a casino analyst with Janney Montgomery Scott. “But

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once the cold winds blow from October to February, it won't make it. The market just isn't there."¹

Calling Roffman "an unguided missile [sic]" and his assertions an outrage, Trump sent a letter to Janney Montgomery Scott demanding the investment company fire Roffman if he did not issue a public retraction of his assessment of the Taj Mahal's chances for success.² The next day Roffman issued a retraction, which he rescinded the following day. March 23, Janney fired Roffman, but that did not end the battle between Roffman and Trump nor media coverage of it. In the months that followed, Trump referred to Roffman as "a very unprofessional guy," "a man with little talent," and "not a good man" in the *New York Post*, *The Philadelphia Inquirer*, *Barron's*, *Fortune*, *Vanity Fair* and other publications.³ Roffman sued for defamation in federal district court.

Both parties assumed their case would be governed by the decision of the Supreme Court of the United States in *Milkovich v. Lorain Journal Co.*⁴ Trump argued his statements were constitutionally protected because they were opinion that could not be proven true or false.⁵ Roffman countered that most of Trump's statements focused on his ability as an investment analyst, which could be verified "by reviewing his past record and determining whether his investment predictions subsequently proved accurate."⁶

The court agreed with neither party, holding that constitutional protections did not apply to suits brought by private plaintiffs regarding issues of private concern. Citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,⁷ and *Philadelphia Newspapers, Inc. v. Hepps*,⁸ the court asserted that the Supreme Court had "never ruled that the Constitution required any change in the 'features of the common law landscape' as they relate to a defamation action brought by a private plaintiff based on language relating to an issue of private concern."⁹ Instead, the court reasoned that "the actionability of statements of opinion in the private plaintiff/private issue context must be determined by reference to state law."¹⁰

¹Roffman v. Trump, 754 F. Supp. 411, 411 (E.D. Pa. 1990).

²*Id.*

³*Id.*

⁴497 U.S. 1 (1990).

⁵Roffman, 754 F. Supp. at 414.

⁶*Id.*

⁷472 U.S. 749 (1985).

⁸475 U.S. 767 (1986).

⁹Roffman, 754 F. Supp. at 415 (quoting *Hepps*, 475 U.S. at 775).

¹⁰*Id.*

In *Roffman v. Trump*, the federal district court tread a path many lower courts either have had a great deal of trouble navigating or have refused to travel altogether. While a few state and federal courts have held that constitutional protections do not apply at all in private-private cases or have read *Dun & Bradstreet* as affecting nothing but the fault standard for punitive and presumed damages, most lower courts either use cautious language — suggesting, questioning or speculating whether the First Amendment applies in private-private cases — or ignore or reject *Dun & Bradstreet* altogether, relying solely on state law or *Gertz v. Robert Welch, Inc.*,¹¹ which discarded distinctions based on subject matter. Further complicating matters, some courts continue to interpret the Supreme Court's numerous libel decisions as differentiating between media and nonmedia defendants, even though the Supreme Court has seemingly rejected this distinction.

The purpose of this article is to determine how lower federal courts and state appellate courts have interpreted the Supreme Court's various defamation opinions to determine whether and how constitutional protections apply to private plaintiff-private issue defamation cases, which account for a significant proportion of the defamation suits filed each year. The proliferation of Web sites on which individuals share their experiences with and opinions about everything from the reliability of a plumber¹² and quality of a tour guide¹³ to the suitability of miniature ponies as guide animals for the vision-impaired¹⁴ suggests that such lawsuits will do nothing but continue to increase. Although such cases may not involve matters of public concern, they often do involve matters of great concern to the parties involved. Ruling, as some courts have, that the speech at issue in these cases is not entitled to *any* constitutional protection places it lower in the expression hierarchy than cigarette ads¹⁵ and dial-a-porn.¹⁶

The research demonstrates that most lower courts have had considerable trouble deciphering the convoluted reasoning of *Dun & Bradstreet*, perhaps because it is indecipherable. By attempting to convince themselves and others that they were merely interpreting and applying *Gertz* — rather than rewriting it — four justices in *Dun & Bradstreet* muddled libel law, creating confusion and uncertainty among lower courts. The plurality opinion in *Dun & Bradstreet* certainly was not the first Supreme Court opinion claiming to be consistent with a prior

¹¹418 U.S. 323 (1974).

¹²See, e.g., <http://www.angieslist.com/AngiesList/>.

¹³See, e.g., <http://www.tripadvisor.com/>.

¹⁴See, e.g., *Burleson v. Toback*, 391 F. Supp. 2d 401 (M.D.N.C. 2005).

¹⁵See *Lorillard Tobacco Co. v. Reilly*, 507 U.S. 410 (1993).

¹⁶See *Sable Communications v. FCC*, 492 U.S. 115 (1989).

decision when it was not, and previous scholarship has discussed the practice.¹⁷ However, little research has systematically examined the confusion this can cause in lower courts.

This article begins by reviewing the legal and historical background related to constitutional protection for defamatory speech. Next, it examines the Supreme Court's decisions in *Dun & Bradstreet*, *Hepps* and *Milkovich* in greater detail and reviews the relevant scholarship. Third, it analyzes cases decided by the U.S. courts of appeals, U.S. district courts and appellate courts in the states, District of Columbia and Northern Mariana Islands. Finally, it concludes by summarizing the findings of the research, discussing the impact of the Supreme Court's convoluted reasoning and offering three alternative solutions to the problem of deciphering *Dun & Bradstreet* that would both reduce confusion in the lower courts and better protect free speech rights. This article posits that the best solution, but also the most unlikely, would be for the Supreme Court to repudiate *Dun & Bradstreet* and clearly return to *Gertz's* focus on the plaintiff's status and its holding that private figures must prove at least negligence for compensatory damages and actual malice for presumed or punitive damages regardless of subject matter. A second, but almost equally as unlikely solution, would be for the Court to clarify *Dun & Bradstreet's* reach, confirming that the case addressed only presumed and punitive damages and not any other area of libel law. In the absence of Supreme Court action, the article concludes that the next best solution is for states to take the lead and, as one has already expressly done, "decline to follow *Dun & Bradstreet*."¹⁸

CONSTITUTIONAL PROTECTIONS FOR DEFAMATION

As Justice Byron White noted in *Gertz*, the Supreme Court's "consistent view" before *New York Times Co. v. Sullivan*¹⁹ was that defamatory statements "were wholly unprotected by the First Amendment."²⁰ In most jurisdictions, a defendant was held strictly liable absent proof that the statement was either true or privileged.²¹ In *Sullivan*, the Court began the process of constitutionalizing libel law by holding that a public

¹⁷See, e.g., Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2016–17 (2002) (discussing the Supreme Court's attempt to make the test applied in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) seem as if it were consistent with the one in *Dennis v. United States*, 341 U.S. 494 (1951) when in fact the "test used in *Brandenburg* is nothing like the one used in *Dennis*").

¹⁸*Newberry v. Allied Stores, Inc.*, 773 P.2d 1231, 1237 (N.M. 1989).

¹⁹376 U.S. 254 (1964).

²⁰*Gertz*, 418 U.S. 323, 384–85 (1974) (White, J., dissenting).

²¹Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597, 599 (2000).

official could not recover damages for a defamatory falsehood relating to official conduct unless the defendant acted with actual malice,²² that is, with knowledge of the statement's falsity or reckless disregard for the truth.²³ In addition, the Court provided added protection for defamatory speech by requiring the plaintiff prove actual malice with "convincing clarity" rather than the normal preponderance of evidence.²⁴ *Sullivan* was widely hailed as a landmark decision in support of freedom of expression,²⁵ and three years later, the Court continued to expand constitutional limits on defamation suits based on the identity of the plaintiff.

In *Curtis Publishing Co. v. Butts*,²⁶ the Court extended the protection afforded by the actual malice standard to "public figures."²⁷ In a concurring opinion, Chief Justice Earl Warren reasoned that the distinction between public officials and public figures in 1960s America was artificial.²⁸ Warren contended that evenly applying the *New York Times* standard to cases involving all "public men" would help safeguard "the rights of the press and public to inform and be informed on matters of legitimate interest" and would provide the "necessary insulation for the fundamental interests which the First Amendment was designed to protect."²⁹

In 1971, the Court abandoned its focus on the identity of the plaintiff and temporarily shifted its attention to subject matter. In *Rosenbloom v. Metromedia, Inc.*,³⁰ Justice William Brennan's plurality opinion applied the actual malice rule to defamatory falsehoods concerning a private

²²*Sullivan*, 376 U.S. at 279–80.

²³The Court would later define reckless disregard in a variety of ways. See *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) (the purposeful avoidance of the truth); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (serious doubts as to the truth of the publication); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) (a high degree of awareness of probable falsity).

²⁴*Sullivan*, 376 U.S. at 279–80.

²⁵See, e.g., Harry Kalven Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn as calling the decision "an occasion for dancing in the streets").

²⁶388 U.S. 130 (1967). The Court also handed down a companion case, *Associated Press v. Walker*. The opinion of the Court, written by Justice John Marshall Harlan and joined by three other justices, actually put forth a fault standard described as "highly unreasonable conduct" and "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Based on the complicated configuration of opinions in the two cases, lower courts and many commentators tended to interpret *Butts* as requiring public figures to prove actual malice also. For a full discussion of the case, see Harry Kalven Jr., *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 275–78.

²⁷*Id.* at 164 (Warren, C.J., concurring) (writing that, because of the similarities between the two types of plaintiffs, he would "adhere to the New York Times standard in the case of 'public figures' as well as 'public officials.'")

²⁸*Id.* (Warren, C.J., concurring).

²⁹*Id.* at 164–65 (Warren, C.J., concurring).

³⁰403 U.S. 29 (1971).

individual when the statements were about the individual's "involvement in an event of public or general interest."³¹ Brennan wrote that the distinction between speech about a public person and a private person was an artificial creation³² and that focusing on the identity of the plaintiff did not accurately reflect the framers' intention that the First Amendment should protect all information of interest to the public.³³ The Court's focus on subject matter was short-lived, however. Just a few years later, in *Gertz v. Robert Welch, Inc.*,³⁴ the Court restored its focus on the plaintiff's status.

In *Gertz*, Justice Lewis Powell's majority opinion acknowledged that for nearly a decade the Court had been struggling to balance the law of defamation with the First Amendment.³⁵ Powell famously noted that while there was "no constitutional value in false statements of fact,"³⁶ the First Amendment required that "we protect some falsehoods in order to protect speech that matters."³⁷ However, Powell also reasoned that the First Amendment interest in protecting speech must be balanced with the "legitimate state interest" in compensating individuals for the harm inflicted upon them by defamatory falsehoods.³⁸ In order to strike a balance between the two interests and prevent the "unpredictable results and uncertain expectations" that would result from an ad hoc balancing approach, the Court found it necessary to "lay down broad rules of general application."³⁹

First, the Court ruled that under the First Amendment only public officials and public figures must prove actual malice to win their libel lawsuits while private figure plaintiffs only had to prove some degree of fault.⁴⁰ The opinion reasoned that these standards recognized the strength of the state's interest in protecting private individuals' reputations yet shielded "the press and broadcast media from the rigors of strict liability for defamation."⁴¹ Second, the Court made a distinction between winning a defamation suit and the recovery of presumed and

³¹*Id.* at 31–32. Brennan cited Samuel D. Warren & Louis D. Brandeis, *The Rights to Privacy*, 4 HARV. L. REV. 193, 214 (1890), as the source of the term "public or general interest." 418 U.S. at 31 n.2.

³²*Id.* at 41.

³³*Id.* at 42–43.

³⁴418 U.S. 323 (1974).

³⁵*Id.* at 325.

³⁶*Id.* at 340.

³⁷*Id.* at 341.

³⁸*Id.*

³⁹*Id.* at 343–44.

⁴⁰*Id.* at 347–48 ("We hold, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

⁴¹*Id.* at 348.

punitive damages, ruling that the states could not permit recovery of presumed or punitive damages without a showing of actual malice by all plaintiffs, regardless of their status.⁴² Powell wrote that juries' largely uncontrolled ability to award large damages under the common law in situations where there was no actual loss was likely to inhibit the "vigorous exercise of First Amendment freedoms."⁴³ Powell reasoned that the doctrine of presumed damages "invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."⁴⁴ It is also important to note that Powell's opinion consistently referred to the need to protect "publishers," "broadcasters" and "the media" from juries,⁴⁵ words that suggested to many courts and commentators a different standard for media and nonmedia defendants.

In sum, from the Court's landmark decision in *New York Times v. Sullivan* to its ruling in *Gertz v. Welch*, the justices' opinions in defamation cases were marked by repeated attempts to define the scope of constitutional protections for defamatory speech. First, in *Sullivan* and *Butts*, the Court focused on the status of the plaintiff in the case. Next, in *Rosenbloom*, a plurality of the Court extended the actual malice privilege to all defamatory speech relating to matters of public or general concern. Finally, in *Gertz*, the Court rejected *Rosenbloom's* focus on subject matter and held that a private figure may constitutionally recover actual damages upon proof of the defendant's negligence without regard to subject matter. However, despite the *Gertz* Court's decision to move away from subject matter tests, such tests were soon resurrected in a series of decisions—decisions that evoked criticism and caused confusion.

Resurrecting Subject Matter Distinctions: Dun & Bradstreet, Hepps and Milkovich

In 1976, Dun & Bradstreet, a credit reporting agency, issued a false report to five subscribers indicating that Greenmoss Builders, Inc., a construction contractor, had filed for bankruptcy.⁴⁶ Greenmoss's president learned of the mistake, asked Dun & Bradstreet to issue a correction, and requested the names of all the firms that had received the false

⁴²*Id.* at 349.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*See, e.g., id.* at 350 ("Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of *media* self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions" (emphasis added)).

⁴⁶*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 749–50 (1985).

report. After investigating the issue, Dun & Bradstreet notified the five subscribers that its report was false and Greenmoss “continued in business as usual.”⁴⁷ Greenmoss, unsatisfied with the notice, again asked for a list of subscribers who had seen the original notice. When Dun & Bradstreet again refused to divulge the information, Greenmoss filed suit for defamation in Vermont state court. The jury awarded Greenmoss \$50,000 in compensatory or presumed damages and \$300,000 in punitive damages.⁴⁸

Dun & Bradstreet moved for a new trial on the ground that the trial judge’s instructions had allowed the jury to award presumed and punitive damages without proof of actual malice. Although the trial court indicated it doubted *Gertz* applied in nonmedia cases, it nonetheless granted a new trial. The Vermont Supreme Court, holding that *Gertz*’s First Amendment requirements applied only to media defendants, reversed, thereby allowing the jury verdict to stand.⁴⁹ “Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,” the Supreme Court granted certiorari.⁵⁰ While the Court affirmed the state court’s decision, it rejected the distinction between media and nonmedia defendants.

Writing for a three-member plurality,⁵¹ Justice Powell ignored the media-nonmedia distinction and instead concluded that the limitation on the recovery of presumed and punitive damages established in *Gertz* did not apply “when the defamatory statements do not involve matters of public concern.”⁵² Powell’s opinion characterized the Court’s defamation decisions as attempts to balance the state’s interest in compensating individuals for injury to their reputations with First Amendment interests in protecting speech.⁵³ Discussing *Gertz*, Powell asserted that because private individuals did not voluntarily expose themselves to increased risk of injury and lacked effective opportunities for rebutting

⁴⁷*Id.* at 752. The error occurred when a 17-year-old employee of Dun & Bradstreet inadvertently attributed a bankruptcy petition filed by one of Greenmoss’s former employees to the firm. Although it was Dun & Bradstreet’s practice to check the accuracy of its reports with the businesses themselves, it did not verify the information about Greenmoss before it issued the report. *Id.*

⁴⁸*Id.*

⁴⁹*Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 461 A.2d 414, 417–18 (Vt. 1983) (“There is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience. We therefore reject, as have the majority of circuit courts, the assertion that credit agencies such as defendant are the type of media worthy of First Amendment protection as contemplated by *New York Times* and its progeny.”).

⁵⁰*Dun & Bradstreet*, 472 U.S. at 753.

⁵¹Justices William Rehnquist and Sandra Day O’Connor joined Justice Powell. Chief Justice Warren Burger and Justice Byron White each filed a separate concurrence.

⁵²*Dun & Bradstreet*, 472 U.S. at 763.

⁵³*Id.* at 756–57.

defamatory statements, the state had a stronger interest in protecting their reputations.⁵⁴ He concluded that *Gertz*'s ban on recovery of presumed and punitive damages absent a showing of actual malice appropriately struck a balance between this strong state interest and a strong First Amendment interest — the interest in protecting speech on matters of public concern.⁵⁵ However, according to Powell, there was nothing in *Gertz* that “indicated that the same balance would be struck regardless of the type of speech involved,”⁵⁶ and the Court had never considered whether *Gertz*'s balance applied to statements that involved no issue of public concern.⁵⁷ Comparing *Dun & Bradstreet* to *Gertz*, Powell reasoned that while the state's interest in protecting reputation in the two cases was identical, the First Amendment interest present in *Dun & Bradstreet* was “less important than the one weighed in *Gertz*.”⁵⁸ Powell's opinion concluded that speech on private matters was generally of “reduced constitutional value.”⁵⁹

Chief Justice Warren Burger and Justice White wrote concurring opinions, and Justice Brennan, joined by Justices Harry Blackmun, Thurgood Marshall and John Paul Stevens, issued a dissent. In his short concurring opinion, Burger put his own spin on Powell's opinion, asserting the plurality held that *Gertz* — in its entirety — did not apply to private-private cases:

The single question before the Court today is whether *Gertz* applies to this case. The plurality opinion holds that *Gertz* does not apply because, unlike the challenged expression in *Gertz*, the alleged defamatory expression in this case does not relate to a matter of public concern. I agree that *Gertz* is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance.⁶⁰

Nothing in Burger's opinion indicated that the plurality's opinion was confined to presumed and punitive damages, even though Justice Powell was careful to emphasize so in the opening paragraph of his opinion.⁶¹

Justice White also saw the plurality opinion as reaching beyond presumed and punitive damages but used more cautious language than the Chief Justice: “Although Justice Powell speaks only of the inapplicability of the *Gertz* rule with respect to presumed and punitive damages, it

⁵⁴*Id.* at 756.

⁵⁵*Id.*

⁵⁶*Id.* at 756–57.

⁵⁷*Id.* at 757.

⁵⁸*Id.* at 758.

⁵⁹*Id.* at 761.

⁶⁰*Id.* at 764 (Burger, C.J., concurring).

⁶¹*Id.* at 751.

must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.”⁶² Although the plurality opinion was written as if it flowed naturally from *Gertz*, White concluded that Powell’s opinion “declined to follow” that case.⁶³ “I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether it implicates a matter of public importance,” he wrote.⁶⁴ White’s opinion also was highly critical of the path the Court had followed since *Sullivan*.⁶⁵ Contending the Court had undervalued the state’s interest in protecting reputation, White argued that common-law rules should apply in all cases involving private individuals.⁶⁶

Brennan’s dissent found fault with both the plurality opinion and White’s concurrence on many levels. First, like White, Brennan questioned Powell’s claim that his opinion flowed from *Gertz*: “In professing allegiance to *Gertz*, the plurality opinion protests too much. As Justice White correctly observes, Justice Powell departs completely from the analytic framework and results of that case.”⁶⁷ Brennan attacked the idea that *Gertz* could be reconciled with any distinction between speech on matters of public concern and speech involving purely private matters: “One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involves matters of public concern.”⁶⁸ Second, Brennan noted that even if a distinction should be drawn between matters of public concern and matters of private concern, neither Powell nor White successfully justified their classification of the speech in question as relating only to matters of private concern.⁶⁹ Third, Brennan criticized

⁶²*Id.* at 773–74.

⁶³*Id.* at 773 (White, J., concurring).

⁶⁴*Id.* (White, J., concurring).

⁶⁵*Id.* at 767–72 (White, J., concurring). Although Justice White joined the judgment and opinion in *Sullivan*, as well as later decisions that extended the actual malice standard, in *Dun & Bradstreet* he wrote that he had come “to have increasing doubts about the soundness of the Court’s approach and about the assumptions underlying it.” *Id.* at 768.

⁶⁶*Id.* at 772 (White, J., concurring).

⁶⁷*Id.* at 785 (Brennan, J., dissenting).

⁶⁸*Id.* at 786 n.11 (Brennan, J., dissenting) (“*Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach. . . . At several points the Court in *Gertz* makes perfectly clear the restrictions of presumed and punitive damages were to apply in all cases.”).

⁶⁹*Id.* at 786 (Brennan, J., dissenting) (“The credit reporting at issue here surely involves a subject matter of sufficient public concern to require the comprehensive protections of *Gertz*.”). See *id.* at 787–90 for Brennan’s full argument as to why the speech at question in *Dun & Bradstreet* was a matter of public concern.

the plurality opinion for not giving any appropriate guidance to lower courts on what would constitute a matter of public concern.⁷⁰ Finally, Brennan's opinion argued that even if the subject matter of a credit report were classified as a matter of private concern, it would "fall well within the range of valuable expression for which the First Amendment demands protection."⁷¹

In addition to criticizing the plurality's reasoning, Brennan attempted to counter Burger's and White's broad readings of the plurality opinion:

Neither the parties nor the courts below have suggested that respondent Greenmoss Builders should be required to show actual malice to obtain a judgment and actual compensatory damages. Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than a showing of actual malice is constitutionally permissible.⁷²

Thus, Brennan's dissent was both a critique of the majority's decision to resurrect subject matter distinctions and an attempt to make sure lower courts did not expand the decision to include other areas of constitutional protection for defamatory speech. However, just ten months later, the Court again focused on subject matter distinctions.

In *Philadelphia Newspapers, Inc. v. Hepps* the Court reversed the Pennsylvania Supreme Court's ruling that the First Amendment did not require the private figure plaintiff in that case to prove the falsity of the defamatory allegations.⁷³ Writing for a five-member majority, Justice Sandra Day O'Connor said *Sullivan* and its progeny reflected "two forces" that had reshaped the common law: the plaintiff's status and "whether the speech at issue is of public concern."⁷⁴ Reinforcing the spin that Justice Powell had put on *Gertz* in his *Dun & Bradstreet* opinion, Justice O'Connor wrote:

When the speech is of public concern but the plaintiff is a private figure, as in *Gertz*, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional

⁷⁰*Id.* at 786–87 (Brennan, J., dissenting).

⁷¹*Id.* at 790 (Brennan, J., dissenting).

⁷²*Id.* at 781 (Brennan, J., dissenting).

⁷³475 U.S. 767, 771 (1986).

⁷⁴*Id.* at 775.

requirements do not necessarily force any change in at least some of the features of the common-law landscape.⁷⁵

The Court ruled that when a plaintiff was a private figure but the speech was of public concern, as in *Hepps*, the Constitution required that the plaintiff bear the burden of proving falsity as well as fault.⁷⁶

Adding to the confusion over a media-nonmedia distinction once again, O'Connor's opinion specifically stated that the Court was not considering what standards would apply in a case involving a "nonmedia defendant."⁷⁷ Thus, while the Court mentioned the idea of applying the First Amendment differently to media and nonmedia defendants, in the end it focused on a subject matter test, as it had in *Dun & Bradstreet*. However, the Court's reliance on subject matter to determine when constitutional protections apply was again commingled with references to a possible media-nonmedia distinction in 1990, when it considered constitutional protection for statements of opinion.

Writing for a seven-member majority in *Milkovich v. Lorain Journal Co.*, Chief Justice William Rehnquist declined to recognize a broad constitutional protection for opinion, contending that "existing constitutional doctrine" provided adequate protection.⁷⁸ *Hepps*, Rehnquist wrote, already ensured "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."⁷⁹ Invoking a subject matter test but continuing to muddy the waters with an allusion to a possible media-nonmedia distinction, Rehnquist said that a statement on a matter of public concern "must be provable as false before there can be liability under state defamation law, at least in situations . . . where a media defendant is involved."⁸⁰ That statement, however, was immediately followed by a footnote in which Rehnquist

⁷⁵*Id.*

⁷⁶*Id.* at 776.

⁷⁷*Id.* at 779 n.4 ("Nor need we consider what standards apply if the plaintiff sues a nonmedia defendant.")

⁷⁸497 U.S. 1, 19 (1990). Chief Justice Rehnquist wrote that although the respondents were relying on a passage from *Gertz* to argue for constitutional protection for opinion, the statement in question was not intended to create "a wholesale defamation exemption for anything that might be labeled 'opinion.'" *Id.* at 18. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact" (footnote omitted)).

⁷⁹*Id.* at 20.

⁸⁰*Id.* at 19–20.

said the *Hepps* Court “reserved judgment on cases involving nonmedia defendants . . . and accordingly we do the same.”⁸¹

Thus, in *Dun & Bradstreet*, *Hepps* and *Milkovich* the Court relied on a subject matter test to determine when constitutional protections apply to defamatory statements while leaving unsettled and unclear an array of other issues, especially whether constitutional protections apply at all in private plaintiff-private issue defamation cases and whether different constitutional standards apply to media and nonmedia defendants. Over the next twenty years, the Court’s decision to resurrect subject matter distinctions would receive a great deal of criticism.

Scholarly Reaction to Subject Matter Distinctions

Scholars who have criticized the Court’s use of a subject matter test have generally focused on three issues. First, a number of writers have echoed Brennan’s and White’s criticisms of Powell’s attempt to reconcile *Dun & Bradstreet* with *Gertz*. Gerald R. Smith wrote that Powell’s plurality opinion in *Dun & Bradstreet* was based on a disingenuous reading of his own opinion in *Gertz*,⁸² while Michael Greene referred to it as a “strained and artificial” interpretation.⁸³ Other scholars have simply noted that the case reversed the Court’s focus without criticizing Powell’s effort to make the two cases appear seamless. Robert Drechsel wrote that the *Dun & Bradstreet* Court “injected into defamation litigation an element that it had seemingly rejected forcefully eleven years earlier in *Gertz v. Robert Welch, Inc.*”⁸⁴ Don Lewis concluded that together *Dun & Bradstreet* and *Hepps* “returned to first amendment defamation law a consideration seemingly discarded in *Gertz*.”⁸⁵

Second, a number of writers have been critical of the use of subject matter tests, echoing *Gertz*’s argument that courts are ill-equipped to make content-based distinctions. For example, Lewis concluded that in *Dun & Bradstreet* Powell appeared to have disregarded both the difficulty in determining what constitutes a matter of public concern and the wisdom of committing this task to the courts.⁸⁶ Smith wrote:

⁸¹*Id.* at 20 n.6.

⁸²Gerald R. Smith, *Of Malice and Men: The Law of Defamation*, 27 VAL. U. L. REV. 39, 54 (1992).

⁸³Michael Greene, Comment, *Dun and Bradstreet v. Greenmoss: Cutting Away the Protective Mantle of Gertz*, 37 HASTINGS L. J. 1171, 1182 (1986).

⁸⁴Robert Drechsel, *Defining “Public Concern” in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders*, 43 FED. COMM. L.J. 1, 1 (1990) (citations omitted).

⁸⁵Don Lewis, *Dun and Bradstreet, Inc. v. Greenmoss Builders, Inc.*, Philadelphia Newspapers, Inc. v. *Hepps*, and *Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 768 (1987).

⁸⁶*Id.* at 772.

“The *Gertz* opinion resolutely counseled against an ad hoc, case-by-case consideration of subject matter of statements involved because that approach ‘would lead to unpredictable results . . . and render our duty to supervise the lower courts unmanageable. . . . We doubt the wisdom of committing this task to judges.’”⁸⁷

Finally, as Nat Stern noted, *Dun & Bradstreet* has “evoked considerable criticism as well as questions about the reach of its rationale.”⁸⁸ Lewis wrote that *Dun & Bradstreet* could be interpreted as signaling the Court’s intention to return to strict liability in future cases involving private individuals and public figures so long as the subject matter was of private concern⁸⁹ while Seth Goodchild noted that the fractured nature of the decision made the Court’s intention unclear.⁹⁰ Marin Roger Scordato concluded that *Dun & Bradstreet* “raised the serious possibility that the entire structure of federal constitutional law limitations on the defamation tort that had been developed since *Sullivan* . . . applied only to actions in which the complained of speech addressed a matter of public concern.”⁹¹ Smith noted that *Milkovich* only served to “muddy the waters” because the Court held that in cases involving defamatory opinion, public individuals must prove actual malice and private figures must show some fault if the subject matter is of public concern but was silent on private-private cases, leaving open the possibility that strict liability might apply.⁹²

In 1988, Rodney A. Smolla wrote a detailed analysis of *Dun & Bradstreet* that would later be cited by a number of courts. Smolla noted that the case’s complex configuration of opinions left it unclear “whether all the *Gertz* rules, including the no liability without fault rule, are completely outside of first amendment restrictions when the speech is not of ‘public concern,’ or whether the case is limited to the presumed and

⁸⁷Smith, *supra* note 82, at 54 (quoting *Gertz*, 418 U.S. 323, 343–46 (1974)).

⁸⁸Stern, *supra* note 21, at 604.

⁸⁹Lewis, *supra* note 85, at 774–75.

⁹⁰Seth Goodchild, Note, *Media Counteractions: Restoring the Balance of Modern Libel Law*, 75 GEO. L. J. 315, 320 n.35 (1986) (“Private individuals, in matters of private concern, may no longer have to prove fault after the Court’s decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* A plurality, although noting that such speech is not ‘totally unprotected’ by the Constitution, expressly stripped it of some protections, but declined to address the issue of fault. Chief Justice Burger and Justice White, in separate concurring opinions, both asserted that fault was no longer an element of the private plaintiff’s case where the speech involved private concern. But the four dissenting justices asserted that the plurality’s decision did not change the *Gertz* fault requirement” (citations omitted).).

⁹¹Marin Roger Scordato, *The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law*, 40 CONN. L. REV. 165, 192 (2007).

⁹²Smith, *supra* note 82, at 57.

punitive damages issue.”⁹³ Smolla wrote that even though only *Gertz’s* presumed and punitive damages rule was before the Court, it was clear that in private-private cases both White and Burger would return to the common law, and “[a] careful reading of the plurality opinion supplies a number of clues indicating that the plurality would probably endorse a return to strict liability in private figure cases not involving speech of public concern.”⁹⁴ Smolla summarized the decision by noting, “The precise scope of *Dun & Bradstreet* remains unclear; it will take years for its implications to evolve fully.”⁹⁵

Despite the three lines of criticism outlined above, most of the empirical research on private-private defamation cases in lower courts has analyzed how courts have determined what constitutes a matter of public concern.⁹⁶ Little research has been conducted on lower courts’ application of constitutional protections in the wake of *Dun & Bradstreet*, *Hepps* and *Milkovich*. For example, although Smith found lower courts “have failed to achieve certainty and predictability in defamation law”⁹⁷ and blamed at least some of this confusion on *Dun & Bradstreet*,⁹⁸ he focused on the plaintiff’s status and cases involving media defendants.

PRIVATE PLAINTIFF-PRIVATE CONCERN DEFAMATION CASES IN THE LOWER COURTS

Eight U.S. courts of appeals, fourteen U.S. district courts, and appellate courts in twenty-two states, the District of Columbia and the Northern Mariana Islands have addressed, to varying degrees, the impact of *Dun & Bradstreet* on the law of libel and/or whether and how the First Amendment applies in private plaintiff-private issue defamation cases.⁹⁹ The opinions run the gamut from assertions that *Dun &*

⁹³RODNEY A. SMOLLA, LAW OF DEFAMATION §1.05[4].

⁹⁴*Id.* at §3.02[3]. First, Smolla cited Powell’s tendency to “slip” from the narrow formulation of the issue before the Court to a broader phrasing that implicated all of *Gertz’s* holdings. Second, he noted Powell’s approving citation of two state supreme court decisions that applied strict liability to private plaintiff-nonmedia defendant situations. Finally, he concluded that “if one applies the analytic structure adopted by Justice Powell,” it was hard to conclude anything other than that Powell would permit strict liability in such cases. *Id.*

⁹⁵*Id.* at §1.05[4].

⁹⁶*See, e.g.,* Drechsel, *supra* note 84; Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 241 VAL. U. L. REV. 241 (1987); Smith, *supra* note 82; Stern *supra* note 21.

⁹⁷Smith, *supra* note 82, at 40.

⁹⁸*Id.* at 57.

⁹⁹Cases for analysis were identified using the Westlaw search function. First, all state and federal cases in the Westlaw database decided after 1985 were searched using the term “libel or defamation or slander and ‘private figure’ or ‘private person’ or ‘private

Bradstreet swept away all First Amendment requirements in private-private suits to unequivocal declarations that the case affected nothing but the fault requirement for presumed and punitive damages. In between are courts that suggest *Dun & Bradstreet* may reach beyond presumed and punitive damages but don't decide the issue, some that acknowledge uncertainty but duck the issue or rule solely on the basis of state law, and others that completely ignore *Dun & Bradstreet*, citing only *Gertz* or state decisions.

Broad Interpretations: A Return to the Common Law

The only U.S. court of appeals to declare explicitly that *Dun & Bradstreet* returned private-private defamation cases to the purview of the common law is the U.S. Court of Appeals for the Fifth Circuit. In *Snead v. Redland Aggregates* in 1993, the Fifth Circuit, in an oft-cited and quoted opinion, concluded: “[W]e believe that five Justices of the *Dun & Bradstreet* Court supported common law standards for private/private cases. We therefore conclude that the Constitution imposes no minimum standard of fault in private/private libel cases.”¹⁰⁰

In the unanimous opinion, Judge Jerry E. Smith termed “what standard of care, if any, is required by the First Amendment in a private/private case” a “*res nova* question.”¹⁰¹ He then went on to analyze the several *Dun & Bradstreet* opinions, concluding Chief Justice Burger’s and Justice White’s separate concurrences “stated that they would hold that the Constitution imposed no minimum standard of fault where the case involves a private figure.”¹⁰² Demonstrating less certainty about the plurality’s intent, he wrote that Justice Powell’s opinion “contains strong hints” that *Dun & Bradstreet* freed states to

individual.” A secondary search of the cases identified using the primary search term was then conducted using the term “‘matter of private concern’ or ‘not matter of public concern’ or ‘private interest’ or ‘not public interest’ or ‘private issue’ or ‘not public issue’ or ‘matters not of public concern’ or ‘does not involve matters of public concern’ or ‘a matter not of public concern’ or ‘a matter of public concern’ or ‘matters of private concern’ or ‘not matters of public concern.’” The cases identified by the secondary search were then manually searched to identify opinions addressing the standards to be applied in defamation cases involving private individual and matters of private concern. Westlaw is an online database of legal documents maintained by the West Publishing Company. The initial database searches for private figure-private issue cases turned up hundreds of such cases over the twenty-three-year time period under study. However, most of the opinions did not directly address the issue under consideration here, that is, the applicability of constitutional standards in such cases and, thus, were not included in the analysis.

¹⁰⁰998 F.2d 1325, 1334 (5th Cir. 1993).

¹⁰¹*Id.* at 1332. *Black’s Law Dictionary* defines *res nova* as “[a]n undecided question of law.” BLACK’S LAW DICTIONARY 1337 (8th ed. 2004).

¹⁰²*Snead*, 998 F.2d at 1333–34.

set their own rules in private plaintiff-private issue defamation cases.¹⁰³ The first hint was what Judge Smith characterized as the plurality's "distaste for constitutionalizing the entire common law of law," based on a footnote in which Justice Powell was responding to the dissenters.¹⁰⁴ The second was Justice Powell's citing "with approval the leading state court decision that held that the *Gertz* constitutional standards do not apply in cases of purely private defamation."¹⁰⁵

With no constitutional limitations applicable, the Fifth Circuit turned to Texas law, concluding that "presumed damages are available in cases of libel *per se* without any showing of fault on the part of the defendant," but punitive damages required a showing of common law malice.¹⁰⁶ In a footnote, the court noted that because the plaintiffs had not proven any actual damages, it need not address whether the First Amendment imposed any fault requirement on the recovery of actual damages in a private-private case.¹⁰⁷ That footnote, of course, is quite puzzling since it would make no sense to require a private plaintiff to prove some degree of fault to be compensated for actual, provable harm but impose no fault burden on a private plaintiff who was unable to prove any real harm. Such an approach would stand the *Gertz* holding — that actual malice is required for presumed damages while only negligence is required for actual damages — on its head.

Three federal district courts also have interpreted *Dun & Bradstreet* as permitting a return to the common law in private plaintiff-private issue defamation actions. The U.S. District Court for the Eastern District of Pennsylvania held that in a private-private case only state law determined the protection available for statements of opinion. As noted in the introduction, *Roffman v. Trump* resulted from statements Donald

¹⁰³*Id.* at 1334.

¹⁰⁴The *Dun & Bradstreet* footnote reads in part:

The dissent, purporting to apply the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of *Gertz*. . . . The dissent's 'balance,' moreover, would lead to the protection of all libels—no matter how attenuated their constitutional interest. . . . The dissent would, in effect, constitutionalize the entire common law of libel.

472 U.S. 749, 761 n.7 (1985).

¹⁰⁵998 F.2d at 1334. In the case the Supreme Court cited, *Harley-Davidson Motorsports v. Markley*, 568 P.2d 1359 (Ore. 1977), the Oregon Supreme Court's decision that the First Amendment did not apply was based on the fact that the defendant was not a media entity rather than that the subject of the report was not a matter of public concern. Framing the question in terms of whether the Speech Clause provided the same protection as the Press Clause, the Oregon court concluded, "We are not impressed with the argument . . . that because the news media is [sic] given a constitutional privilege, non-media defendants should be placed in no less a position." *Id.* at 1365.

¹⁰⁶*Id.* at 1334–35.

¹⁰⁷*Id.* at 1331 n.8.

Trump made to a variety of media regarding investment analyst Marvin Roffman.¹⁰⁸ Notwithstanding Trump's arguments to the contrary, the court ruled Roffman was a private figure and the statements regarding his professional competence related to "issues of private concern."¹⁰⁹

Despite the fact that both the plaintiff and defendant "assumed that the standards set forth in *Milkovich* control the disposition of the case at hand," the court ruled constitutional doctrine was inapplicable.¹¹⁰ In a detailed discussion of Supreme Court libel cases, Chief Judge Louis C. Bechtle cited *Dun & Bradstreet* for the proposition that "[w]hile it can be said that the Supreme Court has 'federalized' defamation law as it relates to public figures or issues of public concern, the Court has created few restrictions on state defamation law with respect to suits brought by private plaintiffs based on speech relating to issues of private concern."¹¹¹ The court then bolstered its conclusion by quoting *Hepps*:

The Supreme Court has stated that "[w]hen the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun and Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape" (emphasis added). While this statement does imply that the Constitution creates some limitation on a state's right to fashion its own defamation remedy in the private plaintiff/private issue context, the Court has never ruled that the Constitution requires any change in the "features of the common law landscape" as they relate to whether statements of opinion can form the basis of a defamation action brought by a private plaintiff based on language relating to an issue of private concern.¹¹²

Judge Bechtle pointed to the Supreme Court's declaration in *Milkovich* that a separate constitutional privilege for opinion was not needed because "'existing constitutional doctrine' adequately protected the relevant First Amendment interests," and concluded that the cases that established existing constitutional doctrine "all involve either public plaintiffs or public issues."¹¹³ Having determined the First Amendment inapplicable, the court then applied the common law opinion

¹⁰⁸754 F. Supp 411, 413–14 (E.D. Pa. 1990).

¹⁰⁹*Id.* at 418. Trump argued that the likelihood of success of the Taj Mahal was a public issue and that Roffman became a limited purpose public figure when he voluntarily offered his assessment of the casino's chances for success to the public. *Id.* at 417

¹¹⁰*Id.* at 414.

¹¹¹*Id.* at 415.

¹¹²*Id.* (quoting *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1996)) (citation omitted).

¹¹³*Id.* at 416 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990)).

defense as articulated in the *Restatement (Second) of Torts*,¹¹⁴ which the federal court said had been adopted by Pennsylvania state courts.¹¹⁵ Interestingly, the court, in a footnote, hinted that the outcome — denial of Trump’s motion for summary judgment — would have been the same under *Milkovich*.¹¹⁶

In contrast to the lengthy analysis provided by the Eastern District of Pennsylvania, the Minnesota federal district court, in an unreported opinion, needed only one sentence and a citation to decide that “[b]ecause the speech at issue involved a private plaintiff and a private issue, principles of Minnesota common law” applied to the slander suit at bar.¹¹⁷ The citation was to state court of appeals case, *Weissman v. Sri Lanka Curry House*,¹¹⁸ which will be discussed below.

In *Sleem v. Yale University*, the U.S. District Court for the Middle District of North Carolina in a private plaintiff-private issue case started its discussion of the impact of *Dun & Bradstreet* cautiously, saying, “[T]he implication” of the case was that the plaintiff was “no longer constitutionally required to prove fault.”¹¹⁹ By the end of the paragraph, though, the court asserted unconditionally, “*Dun & Bradstreet* allows the states to choose whether to allow presumed damages and impose liability without fault in cases involving private person plaintiffs and non-public issues.”¹²⁰

In addition to these federal court cases, four states’ appellate courts have broadly interpreted *Dun & Bradstreet* as eliminating First Amendment restrictions in private-private libel suits. Just a year after *Dun & Bradstreet* and three months after *Hepps*, the Arizona Supreme Court cited those two cases to support its categorical conclusion that “when a plaintiff is a private figure and the speech is of private concern, the states are free to retain common law principles.”¹²¹ That statement was just dictum, however, because the plaintiff was a public figure and the subject of the news story was a matter of public concern. In a 2004 private-private case, the Kentucky Supreme Court also declared without qualification that lawsuits involving “allegedly defamatory statements of a purely private concern about private persons do not

¹¹⁴RESTATEMENT (SECOND) OF TORTS § 566 (1977).

¹¹⁵*Roffman*, 754 F. Supp. at 418–19.

¹¹⁶*Id.* at 417 n.5. (“The court has no occasion to decide whether the final result reached today would be any different under application of the principles stated in *Milkovich*. Indeed, the court does not reach the issue of whether there is, in fact, any difference between the state standard it applies today and the standards set forth in *Milkovich*.”).

¹¹⁷*Kirkof v. Brown*, No. Civ. 01-476, 2002 WL 31718394 *5 (D. Minn. Nov. 27, 2002).

¹¹⁸469 N.W.2d 471 (Minn. Ct. App. 1991).

¹¹⁹843 F. Supp. 57, 61 (M.D.N.C. 1993).

¹²⁰*Id.* at 62.

¹²¹*Dombey v. Phoenix Newspapers, Inc.*, 724 P.2d 562, 567 (Ariz. 1986).

implicate . . . constitutional protections.”¹²² Unlike its Arizona counterpart, however, the Kentucky court failed to support its one-sentence assertion with any citations, quotations or even discussion.¹²³

In a rare criminal libel case, *People v. Ryan*, the Colorado Supreme Court, after reviewing U.S. Supreme Court cases, referred to private-private defamation as “constitutionally unprotected conduct.”¹²⁴ In response to the plaintiff’s claim that the Colorado statute was facially unconstitutional because it did not contain an actual malice requirement, the court declared, “In a purely private context, a less restrictive culpability standard may be used to meet the state’s legitimate interest in controlling constitutionally unprotected conduct injurious to its citizens.”¹²⁵ The statute, the court concluded, was invalid “insofar as it reaches constitutionally protected statements about public officials or public figures on matters of public concern” but could be applied when “one private person has disparaged the reputation of another private individual.”¹²⁶

In the Minnesota Court of Appeals, a dissenter’s opinion that “in the absence of . . . a public context, a defamation action is not constitutionally significant, but rather is governed by state common law”¹²⁷ became the rule of the court within weeks. In *Lund v. Chicago & Northwestern Transportation Co.*, Judge Gary Crippen disagreed with his two colleagues who ruled that a memo placed on a workplace bulletin board stating, “FAVORITISM, DICK LUND, SICK, MOVE-UPS, BROWN NOSE, SHIT HEADS,” was constitutionally protected opinion.¹²⁸ Quoting *Dun & Bradstreet* and *Hepps* and citing *Roffman v. Trump*, Judge Crippen asserted: “The internal business communication at issue in this appeal is of purely private concern. The plaintiff is a private figure. Thus, we should determine the dispute according to state common law principles rather than constitutional law.”¹²⁹

Just six weeks later, in *Weissmann v. Sri Lanka Curry House*,¹³⁰ Judge Crippen and two different colleagues declared, “Because the Supreme

¹²²*Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004).

¹²³In fact, in both the majority and dissenting opinions in the case, there is only one citation to any Supreme Court decision, and that appears as a parenthetical when the majority quotes an earlier Kentucky Supreme Court opinion that was quoting *Sullivan’s* definition of actual malice. *Id.* at 799 n.66.

¹²⁴806 P.2d 935, 939 (Colo. 1991) (en banc).

¹²⁵*Id.*

¹²⁶*Id.* at 940–41.

¹²⁷*Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 370 (Minn. Ct. App. 1991) (Crippen, J., dissenting).

¹²⁸*Id.* at 369 n.1.

¹²⁹*Id.* at 371 (Crippen, J., dissenting).

¹³⁰469 N.W.2d 471 (Minn. Ct. App. 1991).

Court has not extended constitutional protections for public speech to speech of purely private concern, . . . private plaintiff/private issue defamation actions must be analyzed under state common law principles.”¹³¹ Like *Lund, Weissmann* involved the question of protection for opinion. Having dismissed the applicability of the First Amendment, the court declared: “Minnesota common law makes no distinction between ‘fact’ and ‘opinion.’ A communication is defamatory if it causes enough harm to a person’s reputation to lower the community’s estimation of the individual or to deter others from associating or dealing with the individual.”¹³² In 2000 and again in 2003, the Minnesota Court of Appeals — which has addressed the issue more than any other court — reaffirmed its holding that the First Amendment does not apply in private-private cases.¹³³

Uncertain Interpretations: Suggestions, Implications and Questions

Some courts that have addressed what, if any, constitutional limits apply in private-private cases have either couched their discussions in cautious language or admitted they didn’t know the full impact of *Dun & Bradstreet*. Two U.S. courts of appeals fall into this category.

In *Sunward Corp. v. Dun & Bradstreet*, another credit reporting case, the Tenth Circuit in 1987 speculated, “*Greenmoss* may have removed the application of the *Gertz* fault requirement to private plaintiff/private matter cases.”¹³⁴ Subsequently, the court made a similar but unconditional declaration: “In the recent case of *Greenmoss*, the Supreme Court confirmed that *Gertz* applies only where matters of public concern or interest are involved.”¹³⁵ The context of that statement, though, makes it unclear whether the Tenth Circuit was saying the *Gertz* negligence requirement for actual damages was inapplicable or just the actual malice requirement for presumed and punitive damages.¹³⁶ Regardless of the court’s meaning, the issue remained unsettled because it was irrelevant

¹³¹*Id.* at 473. In the excluded portion of the quotation, the majority also interpreted *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1991), as “reject[ing] a separate constitutional privilege for opinion,” but that was the only portion of the majority opinion with which Judge Crippen disagreed. *Id.* (Crippen, J., concurring specially).

¹³²*Id.*

¹³³See *Dedefo v. Wake*, No. C2-02-1692, 2003 WL 21219830 (Minn. App. May 27, 2003); *Harman v. Heartland Food Co.*, 614 N.W.2d 236 (Minn. App. 2000).

¹³⁴811 F.2d 511, 525 n.12 (10th Cir. 1987) (emphasis added).

¹³⁵*Id.* at 527 n.14.

¹³⁶The sentence preceding the quotation refers to the actual malice requirement for presumed and punitive damages while the one before that discusses negligence as the minimum standard for actual damages. *Id.*

to the outcome of *Sunward Corp.*, which hinged on matters of Colorado common law and the availability of presumed damages.

Sixteen years later, in another private-private case governed by Colorado law, the Tenth Circuit ignored *Sunward Corp.*, as well as *Dun & Bradstreet* and *People v. Ryan*, the Colorado Supreme Court's criminal libel decision discussed above. Instead, in a footnote the court simply said negligence was required in a private plaintiff-private issue suit based on a footnote in a Colorado Supreme Court decision that listed "fault amounting to at least negligence" as one of four elements required in a defamation action.¹³⁷

The other U.S. court of appeals to discuss whether *Dun & Bradstreet* eliminated the constitutional fault requirement in private-private cases was at least consistent in the two opinions it issued. In 1997, the First Circuit said it was "unclear whether the First Amendment prohibits a state from imposing strict liability in a defamation case brought by a private plaintiff concerning statements that implicate a matter of private concern,"¹³⁸ and in 2003, the court deemed the issue "still formally unsettled."¹³⁹ In neither case did it matter, however, because in both cases the court concluded that state common law — Maine in the former, Massachusetts in the latter — required negligence.¹⁴⁰

Additionally, three U.S. district courts have used cautious or ambiguous language when discussing the reach of *Dun & Bradstreet*. Significantly, all three discussions were dicta. In 1987, the D.C. District Court said *Dun & Bradstreet* "indicates that only in private-figure plaintiff cases *not* involving matters of public concern will a strict liability fault requirement be constitutionally permissible."¹⁴¹ It followed that up with a footnote stating: "The Court in *Dun & Bradstreet* admittedly did not decide whether strict liability could be imposed in a defamation action. Technically, only the presumed and punitive damages rules of *Gertz v. Robert Welch, Inc.* were before the Court."¹⁴² However, because the court had already found the subject of the report to be a matter of public concern, the standard to be applied in private-private cases was irrelevant.¹⁴³

¹³⁷*Quigley v. Rosenthal*, 327 F.3d 1044, 1058 n.4 (10th Cir. 2003) (citing *Williams v. Dist. Court*, 866 P.2d 908, 912 n.4 (Colo. 1993)).

¹³⁸*Lewinsky's v. Wal-Mart*, 127 F.3d 122, 128 n.4 (1st Cir. 1997).

¹³⁹*Andresen v. Diorio* 349 F.3d 8, 17 n.4 (1st Cir. 2003).

¹⁴⁰*Id.* at 17; 127 F.3d at 128 n.4.

¹⁴¹*Pearce v. The E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1505 (D.D.C. 1987) (emphasis added).

¹⁴²*Id.* at 1506 n.21 (citation omitted).

¹⁴³*Id.* at 1506.

The U.S. District Court for the Virgin Islands, sitting as an appellate court to review a slander decision of the territorial court, admitted that “neither party has raised the issue and it is not essential to our decision” but, nonetheless, went on to discuss the impact of *Dun & Bradstreet* on private-private cases in some detail.¹⁴⁴ It concluded, “In effect, the Supreme Court in *Dun & Bradstreet* left it to each state and territory to choose whether to adopt strict liability or negligence in cases involving a private figure and speech not a matter of public concern.”¹⁴⁵ Despite the apparent certainty of that statement, within a couple of paragraphs, the court backed down: “Until the Supreme Court clarifies whether strict liability is a permissible standard in defamation cases and the Restatement provides further guidance on this issue, courts in this jurisdiction should continue to follow the *Gertz* rule allowing the application of a negligence standard to all private figure defamation cases.”¹⁴⁶

Finally, an Illinois federal district court, citing *Dun & Bradstreet*, said, “Only where the speech is exclusively of private concern and the plaintiff a private figure is the Constitution largely silent.”¹⁴⁷ However, there was no hint of whether the court meant the Constitution did not apply at all or that it simply placed no restrictions on the awarding of punitive and presumed damages and allowed a presumption of falsity. In addition, because the plaintiff was the former prime minister of India, clearly a public figure, it really didn’t matter.

Four state courts have also indicated uncertainty in their discussions of *Dun & Bradstreet* or used vague, conditional terms to describe its reach. The Alabama Supreme Court did so twice. In the first case, in 1987, the court wrote:

[After *Dun & Bradstreet*] the constitutional constraints that we had previously found in the First Amendment as a result of *Gertz* do not in fact exist in cases of defamation of private figure plaintiffs on matters not of public concern. Consequently, the question arises as to whether the common law rule of defamation per se (requiring no proof of injury) ought to be revitalized in those cases within the fact patterns contemplated by *Dun & Bradstreet*.¹⁴⁸

¹⁴⁴Ross v. Bricker, 770 F. Supp. 1038, 1043 (D.V.I. 1991). This was a private plaintiff-private issue slander suit, but the trial court had found negligence in ruling for the plaintiff, which is why the appeals court said the issue was not essential.

¹⁴⁵*Id.*

¹⁴⁶*Id.* at 1044.

¹⁴⁷Desai v. Hersh, 719 F. Supp. 670, 673 (N.D. Ill. 1989).

¹⁴⁸Cousins v. T.G.&Y. Stores Co., 514 So. 2d 904, 907 n.3 (Ala. 1987).

That question, however, was not necessary to the case at hand, so the court left it unanswered. A year later, the Alabama high court said, “[I]n view of the *Dun & Bradstreet* holding . . . , which was premised on the reduced constitutional value of speech involving no matters of public concern, it is questionable whether the fault requirement mandated by *Gertz* survives.”¹⁴⁹ Despite that statement, the court, citing pre-*Dun & Bradstreet* state precedents, said that a private plaintiff in a private issue suit had to prove negligence and, for punitive damages, common law malice.¹⁵⁰

In 1991, the Michigan Supreme Court wrote, “[T]he logic of *Dun & Bradstreet* . . . suggests that the private-figure/private-interest subject matter configuration does not trigger heightened First Amendment scrutiny.”¹⁵¹ The Michigan case, however, involved a private plaintiff and matter of public concern, so the suggestion regarding the reach of *Dun & Bradstreet* was, once again, merely dictum. Similarly, the Maryland Court of Appeals cautiously stated that in a private plaintiff-private issue opinion case, “[M]any of the protections afforded defendants in regard to speech concerning matters of public concern and public figures or public officials *may not* be applicable unless afforded by Maryland law.”¹⁵² The court then launched into a seven-page comparison of constitutional protection for opinion and the common law fair comment defense, concluding the two were essentially the same. Unlike the Minnesota Court of Appeals, the Maryland court never said that constitutional opinion protection would not apply in private-private cases. Instead it declared the offending statement was not defamatory because it was pure opinion as defined by the *Restatement (Second) of Torts*.¹⁵³

In reversing a trial court’s dismissal of a private-private defamation case, the New Jersey Supreme Court said that “the question of whether plaintiffs must allege damage and fault” was unsettled.¹⁵⁴ Noting the

¹⁴⁹*Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1092 n.2 (Ala. 1988).

¹⁵⁰*Id.* at 1092, 1096. Almost twenty years later, in an extremely complicated case, the Alabama Supreme Court did not discuss whether *Dun & Bradstreet*’s impact reached beyond presumed and punitive damages. Instead, the court cited *Nelson v. Lapeyrouse Grain Corp.* for the proposition that Alabama law requires a private plaintiff defamed in the discussion of a matter of public concern to prove actual malice to simply win his lawsuit. *Cottrell v. National Collegiate Athletic Ass’n*, 2007 WL 1696564, at *29 (Ala. June 1, 2007). That, however, is not what *Nelson* held. In *Nelson* the court said, “*To recover punitive damages* in defamation cases,” the plaintiff in a private person-public issue libel suit must prove actual malice. *Nelson*, 534 So. 2d at 1095 (emphasis added).

¹⁵¹*Loccicchio v. Evening News Ass’n*, 476 N.W.2d 112, 131 (Mich. 1991) (emphasis added).

¹⁵²*Peroutka v. Streng*, 695 A.2d 1287, 1292 (Md. App. 1997) (emphasis added).

¹⁵³*Id.* at 1300.

¹⁵⁴*Printing Mart-Morristown v. Sharp Elec. Corp.* 563 A.2d 31, 47 (N.J. 1989).

answer to that question hinged on its interpretation of *Gertz*, *Dun & Bradstreet* and *Hepps*, the court then listed a string of opinions from other states “[h]olding that in cases involving private persons and matters not of public concern there need not be an allegation of either damage or fault” and another string of cases holding “that there is such a requirement,” several of which pre-dated *Hepps*.¹⁵⁵ The state supreme court then ducked the issue, saying it “should await the development of a record or, at the very least, the research efforts and arguments of counsel, with reasoned consideration by the courts below.”¹⁵⁶ Whether the record, research and arguments ever were developed is unknown since no further opinions in the case could be located.

Narrow Interpretations: Presumed and Punitive Damages Only

No federal courts have explicitly restricted *Dun & Bradstreet*'s applicability to the fault level required for presumed and punitive damages, but two state high courts have done so. Just a few weeks after *Dun & Bradstreet* was announced, the Massachusetts Supreme Judicial Court discussed the plurality and concurring opinions in that case before writing:

Justice White's concurrence, in which he indicates his preference that *Gertz* be overruled, states that the *Gertz* requirement that private parties prove “some kind of fault on the part of the defendant” also is inapplicable to private parties suing on matters of private concern. Justice White alone states this proposition, however, and we do not interpret the plurality opinion, with its two concurrences in the judgment, to so alter the *Gertz* holding. . . . We view the fault requirement of *Gertz* to be intact regardless whether the private parties are suing on matters of public or private concern.¹⁵⁷

¹⁵⁵*Id.* Interestingly the New Jersey high court's citations did not include a three-year-old private-private case decided by the New Jersey Court of Appeals in which the intermediate appellate court, without citing *Dun & Bradstreet*, said that strict liability had been eliminated completely by *Gertz*. *Bainhauer v. Manoukian*, 520 A.2d 1154, 1168 (N.J. Super. Ct. App. Div. 1987). The only citation to *Dun & Bradstreet* in that case was in support of the proposition that the same constitutional standards applied regardless of whether the defendant was media or nonmedia. *Id.* at 1167 n.7.

¹⁵⁶*Printing Mart-Morristown*, 563 A.2d at 47.

¹⁵⁷*New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 480 N.E.2d 1005, 1009 n.4 (Mass. 1985) (citation omitted).

The court went on to say that the constitutional issue was irrelevant, though, because state common law required the plaintiff to prove negligence on the part of the defendant.¹⁵⁸

The only other state high court to restrict *Dun & Bradstreet* to its holding was the California Supreme Court. In *Brown v. Kelly Broadcasting Co.*, the California court, in no uncertain terms, held: “*Dun & Bradstreet* affects only the showing required for presumed and punitive damages, and *Philadelphia Newspapers* affects only the burden of proof as to falsity. Neither opinion affects the standard of fault required to recover proven compensatory damages.”¹⁵⁹ The statement was used to reject the defendants’ contention that a public interest privilege under California’s statutory protection for privileged publications and broadcasts¹⁶⁰ was warranted based on the two U.S. Supreme Court cases.¹⁶¹ While the court acknowledged that the private figure plaintiff was defamed during the discussion of a matter of public interest, it held that he need prove only negligence, not malice as required to overcome the statutory privilege.¹⁶²

Four years later, the California Court of Appeals seemed to contradict the state supreme court when it cited *Dun & Bradstreet* for the proposition that “[s]ince the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue.”¹⁶³ What exactly the court of appeals meant by that declaration, however, is unclear since the court subsequently cited *Gertz* and *Brown* to require negligence in that private person-private issue defamation suit.¹⁶⁴ Further muddying the California waters was another court of appeals case in 2003 in which the court, citing *Dun & Bradstreet*, said, “While private communications about private matters are not totally unprotected by the First Amendment, they warrant no special protection against liability for defamation when they are false and damaging to the subject’s reputation.”¹⁶⁵ That statement was used to support the court’s decision not to apply the California anti-SLAPP statute¹⁶⁶ after one private individual sued another for accusing him of theft.¹⁶⁷

¹⁵⁸*Id.*

¹⁵⁹771 P.2d 406, 433 n.37 (Cal. 1989) (citations omitted).

¹⁶⁰CAL. CIV. CODE § 47(3) (2005).

¹⁶¹*Brown*, 771 P.2d at 433 n.37.

¹⁶²*Id.* at 425.

¹⁶³*Savage v. Pacific Gas & Elec. Co.*, 26 Cal. Rptr. 2d 305, 311–12 (Cal. App. 1993).

¹⁶⁴*Id.* at 313.

¹⁶⁵*Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 392 (Cal. App. 2003).

¹⁶⁶CAL. CODE CIV. PROC. § 425.16 (2005).

¹⁶⁷*Weinberg*, 2 Cal. Rptr. 3d at 395.

While only two state appellate courts identified by this research expressly declared that *Dun & Bradstreet's* only effect was on the fault level required for presumed and punitive damages, several courts applied or discussed the case in only that context without addressing whether it had broader applicability or implications. For example, in *Yesner v. Spinner*,¹⁶⁸ the U.S. District Court for the Eastern District of New York was concerned solely with the availability of presumed damages:

This action clearly falls within the *Dun & Bradstreet* category of cases, in that it involves a private-figure plaintiff concerning matters not of public concern. The question now becomes whether in light of *Dun & Bradstreet* the New York courts nonetheless permit the recovery of presumed damages under such circumstances as they did pre-*Gertz*.¹⁶⁹

Citing state cases, the federal court decided New York now required common law malice for presumed damages.¹⁷⁰ Because there was no need to discuss what fault requirement might have applied were the plaintiff seeking actual damages, the court did not.¹⁷¹

Ignoring or Rejecting Dun & Bradstreet

Several federal and states courts have chosen to ignore the uncertainty generated by *Dun & Bradstreet* when discussing the appropriate fault level in private plaintiff-private issue defamation suits and either just cited *Gertz* or focused solely on state law. In dicta, the U.S. Courts of Appeals for both the Third and Ninth Circuits took the former approach. In a footnote in a 1988 case in which “[e]ven plaintiffs concede[d] that the article raise[d] issues of public concern,” the Third Circuit, citing only

¹⁶⁸765 F. Supp. 48 (E.D.N.Y. 1991).

¹⁶⁹*Id.* at. 52.

¹⁷⁰*Id.* at 53.

¹⁷¹*See also* Tan v. Younis Art Studio, Inc., No. CV-04-0004-GA, 2007 WL 1598179, at *7 n.21 (N. Mar. I. May 31, 2007)(citing *Dun & Bradstreet* only when stating negligence would be required for presumed and punitive damages private-private cases); Gilbert v. WNIR, 756 N.E.2d 1263, 1269 (Ohio Ct. App. 2001) (citing *Dun & Bradstreet* solely for its presumed and punitive damages holding); Geyer v. Steinbronn, 506 A.2d 901, 913–14 (Pa. Super. 1986) (citing and discussing *Dun & Bradstreet* in the context of the standard for presumed and punitive damages); Holtzscheiter v. Thomson Newspapers, Inc., 506 S.E.2d 497, 509 (S.C. 1998) (Toal, J., concurring) (discussing *Dun & Bradstreet* in arguing that South Carolina should always require actual malice for punitive damages); Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914 (Tex. Ct. App. 1991) (citing *Dun & Bradstreet* solely for the proposition that actual malice is not needed for damages in private-private suits).

Gertz, wrote that states may not impose liability without fault even if the plaintiff is a private person and the case involved a private issue.¹⁷² Likewise, a decade later the Ninth Circuit, also in a footnote, cited *Gertz* and wrote, “A private person who is allegedly defamed concerning a matter that is not of public concern need only prove, in addition to the requirements set out by the local jurisdiction, that the defamation was due to the negligence of the defendant.”¹⁷³ In an interesting twist on this approach, the New Jersey Court of Appeals cited *Dun & Bradstreet* in its discussion of whether *Gertz* applied to nonmedia cases¹⁷⁴ but then relied on *New York Times v. Sullivan* and *Gertz* only when ruling that the trial judge had erred by applying a strict liability standard in a private-private slander case.¹⁷⁵

More commonly, courts that ignored *Dun & Bradstreet* in their fault discussions did so because they relied solely on state precedents, even though at times they cited *Dun & Bradstreet* for other purposes. Such was the case in an opinion by the Second U.S. Circuit Court of Appeals in a diversity of citizenship slander action brought by a fired hospital employee against his former supervisor.¹⁷⁶ In its discussion of what constitutes a matter of public concern, the Second Circuit cited state cases,¹⁷⁷ which in turn cited *Dun & Bradstreet*, but when it came to determining the appropriate fault standard in a private-private case, the federal appeals court cited only New York state cases.¹⁷⁸ Noting that New York’s high court had never addressed the issue, the Second Circuit ducked the question, sending the case back to the trial court to determine “whether negligence or some other level of fault is applicable.”¹⁷⁹ Likewise the U.S. District Court for the Western District of Tennessee cited both *Gertz* and *Dun & Bradstreet* in declaring actual malice was not required for either actual or punitive damages in a private-private suit¹⁸⁰ but then went on to cite only a pre-*Dun & Bradstreet* state precedent in deciding that the plaintiff had to prove negligence.¹⁸¹

¹⁷²*Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069, 1077 n.5 (3rd Cir. 1988).

¹⁷³*Newcombe v. Adolf Coors, Inc.*, 157 F.3d 686, 694 n.4 (9th Cir. 1998).

¹⁷⁴*Bainhauer v. Manoukian*, 520 A.2d 1154, 1167 n.7 (N.J. Ct. App.1987).

¹⁷⁵*Id.* at 1168.

¹⁷⁶*Albert v. Loksen*, 239 F.3d 256 (2d Cir. 2001).

¹⁷⁷*See id.* at 269–70 for the court’s complete discussion of what constitutes a matter of public concern.

¹⁷⁸*Id.* at 269–70.

¹⁷⁹*Id.* at 270–71.

¹⁸⁰*Wolfe v. MBNA Am. Bank*, 485 F. Supp. 2d 874, 888 n.5 (W.D. Tenn. 2007).

¹⁸¹*Id.* at 889. The case cited was *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978). *See also* *Lewis v. NewsChannel 5 Network*, 238 S.W.3d 270, 297 (Tenn. App. 2007) (citing only the *Restatement (2d) of Torts* to support the dictum that all private plaintiffs must prove negligence).

As discussed above, sixteen years after it speculated in dictum that *Dun & Bradstreet* may have completely eliminated a First Amendment-based fault requirement in private-private cases, the Tenth Circuit ignored *Dun & Bradstreet* and cited only a state precedent to hold that negligence was required in a private plaintiff-private issue defamation action.¹⁸² In a 2007 diversity action involving the application of New Jersey law, the U.S. District Court for the Southern District of New York simply cited a New Jersey Appellate Division case for the proposition that “[w]here a plaintiff is a private figure and the speech is about an exclusively private concern, a traditional negligence standard of fault is applicable.”¹⁸³ Similarly, the U.S. District Court for the District of New Jersey relied solely on a New Jersey precedent to declare, in dictum, “A plaintiff in a private concern defamation case can prevail upon showing negligence on the part of the defendants.”¹⁸⁴ In a libel suit brought by television celebrity Joan Lunden’s ex-husband as a result of a “a lurid story in a supermarket tabloid,”¹⁸⁵ the New York Appellate Division deemed both the plaintiff and the issue private and then cited only a state precedent to support applying a negligence standard.¹⁸⁶

In some cases, the state precedents relied upon to support applying a particular fault standard in private-private cases did not really provide a great deal of support. For example, the U.S. District Court for the Northern District of Indiana relied on a footnote in a concurring opinion in an Indiana Court of Appeals case and a decision of the Southern District of Indiana federal court to unconditionally state, “In the case of a private individual bringing a defamation action over a matter of private concern, only negligence with regard to the truth or falsity of the statement is required.”¹⁸⁷ However, neither of the two opinions cited actually held that negligence was the appropriate standard in private-private cases. In the cited state court concurring opinion, Judge John G. Baker was simply analyzing the various opinions in an earlier Indiana Supreme Court decision when he summarized: “[I]t appears at least three members of our supreme court would apply a negligence

¹⁸² *Quigley v. Rosenthal*, 327 F.3d 1044, 1058 n.4 (10th Cir. 2003) (citing *Williams v. Dist. Court*, 866 P.2d 908, 912 n.4 (Colo. 1993)).

¹⁸³ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Savino*, No. 06 Civ. 868, 2007 WL 895767, at *8 (S.D.N.Y. Mar. 23, 2007).

¹⁸⁴ *Costello v. City of Brigantine*, No. Civ. A. 99-4072, 2001 WL 732402, at *15 (D.N.J. June 28, 2001). The court found the plaintiff to be a public figure.

¹⁸⁵ *Krauss v. Globe Intern., Inc.*, 251 A.D.2d 191, 191 (N.Y. App. Div. 1998).

¹⁸⁶ *Id.* at 194. The following year, in another case involving gossip-column coverage of a celebrity divorce, the appellate division cited both *Gertz* and *Krauss* to support applying a negligence standard. *Huggins v. Moore*, 253 A.D.2d 297, 313 (N.Y. App. Div. 1999).

¹⁸⁷ *Med. Informatics Eng’g, Inc. v. Orthopaedics Ne. P.C.*, 458 F. Supp. 2d 716, 721 n.3 (N.D. Ind. 2006).

standard of fault — if not strict liability — rather than actual malice” in a case in which a “private-figure plaintiff sues a nonmedia defendant for defamation involving matters of nonpublic concern.”¹⁸⁸ The issue, however, was irrelevant to the state court of appeals decision Judge Baker was writing about because the plaintiff had chosen to argue an actual malice standard.¹⁸⁹ The cited U.S. district court case said nothing whatsoever about the appropriate standard of fault to be applied in private person-private issue cases but merely, in dictum, addressed the definition of the term “negligence” within a defamation context.¹⁹⁰

Likewise, in a 2007 private-private case in which the plaintiffs admitted they had suffered no actual harm to reputation, the U.S. District Court for Maryland never even mentioned *Dun & Bradstreet* in holding that plaintiffs would have to prove actual malice to collect punitive damages. Instead, the federal district court cited three Maryland Court of Appeals decisions, none of which was a defamation case.¹⁹¹

While some state courts acknowledged *Dun & Bradstreet* but chose to rule on state grounds and others just ignored the case, at least two have acknowledged the case, only to reject it. Taking this approach was the New Mexico Supreme Court, which in 1989 simply announced:

The United States Supreme Court recently distinguished *Gertz* and declared that states may award punitive damages to private plaintiffs who are the subject of defamation on a matter not of public concern, even in the absence of malice as defined in *Gertz*. We decline to follow *Dun & Bradstreet* on that issue.¹⁹²

The court cited state precedents to hold that strict liability no longer applied in New Mexico and, therefore, even in a private issue case, a private figure plaintiff must prove negligence.¹⁹³ In a much narrower context, the Missouri Supreme Court said that despite *Dun & Bradstreet*, state law required proof of actual malice for both compensatory

¹⁸⁸ *Poyser v. Peerless*, 775 N.E.2d 1101, 1110 n.3 (Ind. App. 2001) (Baker, J., concurring).

¹⁸⁹ *Id.*

¹⁹⁰ *Thompson v. Huntington*, 69 F. Supp. 2d 1071, 1077–78 (S.D. Ind. 1999).

¹⁹¹ *Bouie v. Rugged Warehouse*, Civ. No. AMD 05-2272, 2007 WL 430752, at *2 (D. Md. Jan. 31, 2007). The cases cited were *Shabazz v. Bob Evans Farms, Inc.*, 881 A.2d 1212, *cert. denied*, 887 A.2d 656 (Md. 2005), a racial discrimination case brought by an employee against her employer; *Shell Oil v. Parker*, 291 A.2d 64 (Md. 1972), a tortious interference case; and *Tierco Maryland, Inc. v. Williams*, 849 A.2d 504 (Md. 2004), an assault, battery, false imprisonment and negligent supervision case.

¹⁹² *Newberry v. Allied Stores, Inc.*, 773 P.2d 1231, 1237 (N.M. 1989) (citation omitted).

¹⁹³ *Id.* at 1236.

and punitive damages in credit reporting cases.¹⁹⁴ After discussing the U.S. Supreme Court case in some detail, the state court concluded, “The *Greenmoss* decision does not mandate that we abrogate the qualified privilege for credit reporting agencies.”¹⁹⁵

Finally, a Pennsylvania case provides an interesting example of a ruling based on a state court precedent that later is overturned or modified. The Pennsylvania Superior Court decided *Banas v. Matthews International Corp.*,¹⁹⁶ a private plaintiff-private issue case, in 1985, a few months after *Dun & Bradstreet* but in between the Pennsylvania and U.S. Supreme Courts’ rulings in *Philadelphia Newspapers, Inc. v. Hepps*.¹⁹⁷ The Pennsylvania Superior Court acknowledged that *Dun & Bradstreet* allowed states to award punitive damages in private-private cases without proof of actual malice but said that in Pennsylvania actual malice was required because the state supreme court had so ruled in *Hepps*. The state supreme court decision in *Hepps* had come in 1984, a year before the Supreme Court reintroduced subject matter consideration into libel law in *Dun & Bradstreet*. Furthermore, as noted above, the U.S. Supreme Court ultimately reversed *Hepps* because the state courts had presumed falsity, something the Court said could not be done under the First Amendment when the subject of the report was a matter of public concern.¹⁹⁸ *Banas* has been not been overruled, but, of course, it is impossible to know what the law in Pennsylvania might be had the timing of the case been different vis-à-vis the Supreme Court rulings.

Identity of the Defendant and Other Approaches

Adding to the confusion over the application and reach of *Dun & Bradstreet* has been uncertainty about whether the identity of the defendant — media or nonmedia — makes any difference in the application of constitutional standards in defamation cases. As noted, the Supreme Court itself invited this uncertainty by its frequent references to the press, media, broadcasters and publishers in its libel decisions. In 1994, the U.S. Court of Appeals for the Seventh Circuit dealt with the uncertainty by resorting to state law: “There is still doubt whether the Constitution applies the same standards to media and private defendants. How the Supreme Court understands the first amendment is, however, neither here nor there. We have been exploring how Wisconsin

¹⁹⁴McDowell v. Credit Bureaus of Southeast, Missouri, Inc., 747 S.W.2d 630, 632–33 (Mo. 1988).

¹⁹⁵*Id.* at 633.

¹⁹⁶503 A.2d 637 (Pa. Super. 1985).

¹⁹⁷485 A.2d 374 (Pa. 1984), *rev'd*, 475 U.S. 767 (1986).

¹⁹⁸*Hepps*, 475 U.S. 767 (1986).

understands its own law.”¹⁹⁹ Relying on a pre-*Dun & Bradstreet* Wisconsin Supreme Court case,²⁰⁰ the Seventh Circuit concluded that under state law “one private person’s defamation of another private person should be adjudicated according to the common law, without any special burden on the plaintiff.”²⁰¹ The public figure plaintiffs in the Seventh Circuit case argued that the media-nonmedia distinction should be extended to them, eliminating the need for them to prove actual malice in their defamation action against a psychologist and prosecutor. Saying it “could not find cases either way on this subject,” the Seventh Circuit refused to accept plaintiffs’ argument and held that public figures had to prove actual malice regardless of the identity of the defendant.²⁰²

In 1986, the Washington Supreme Court took a different approach. It did not acknowledge any uncertainty over the First Amendment’s application to nonmedia defendants but simply commingled its discussion of the status of defendant and the nature of the defamatory statement to reach the conclusion that a private figure plaintiff suing a nonmedia defendant would not have to meet the “convincing clarity” standard to survive a summary judgment motion. The court held:

The strict [convincing clarity] standard . . . should not protect a nonmedia defendant sued for a statement about private affairs. Instead, the usual rules governing summary judgment should control. Under these rules, the trial court properly dismissed [plaintiff’s] case if no genuine issue of material fact exists when the evidence and all reasonable inferences from the evidence are considered in the light most favorable to [plaintiff].²⁰³

To support that conclusion, the court mentioned the potential chilling effect of defamation law on the press and quoted *Dun & Bradstreet*’s statement that “speech on matters of purely private concern is of less First Amendment concern.”²⁰⁴ In addition, the court speculated, “[T]he Washington Constitution may provide heightened protection to media defendants.”²⁰⁵

In contrast, a year later in a case involving a defamation suit brought by an anesthesiologist against a surgeon, the New Jersey Appellate Division used *Dun & Bradstreet* to support the opposite conclusion — that the identity of the defendant makes no difference in the application of

¹⁹⁹Underwager v. Salter, 22 F.3d 730, 733 (7th Cir. 1994).

²⁰⁰Denny v. Mertz, 318 N.W.2d 141 (Wis. 1982).

²⁰¹*Underwager*, 22 F.3d at 733.

²⁰²*Id.* at 734.

²⁰³Dunlap v. Wayne, 716 P.2d 842, 846 (Wash. 1986).

²⁰⁴*Id.* (quoting *Dun & Bradstreet*, 472 U.S. 749, 759 (1985)).

²⁰⁵*Id.* at 846 n.1.

constitutional standards in defamation cases.²⁰⁶ The court noted that the Supreme Court's decision in *Gertz* "[spoke] in terms of the press and broadcast media," but it then cited *Dun & Bradstreet* for the proposition *Gertz* actually focused "on the nature of the alleged defamatory communication and the person defamed rather than on the person publishing the defamation."²⁰⁷

Dun & Bradstreet has also spawned some random interpretations. In a lawsuit brought by a University of Kansas journalism graduate student against a utility company over derogatory statements about his ethics and abilities, the Kansas Supreme Court said *Dun & Bradstreet* had "*expanded* protection for speech claimed to be defamatory by making a distinction between speech on matters of public concern and speech on matters of private concern in relationship to a private individual."²⁰⁸ Although the statement was only dictum since the plaintiff was deemed a limited-purpose public figure,²⁰⁹ the court seemed to think that *Dun & Bradstreet* established the actual malice requirement for punitive damages rather than cutting back on its applicability.

The Mississippi Supreme Court, even more surprisingly, read *Dun & Bradstreet* as requiring "private individuals" to prove actual malice to win their lawsuits "if the offending speech involved a matter of public concern or general public interest."²¹⁰ As in the Kansas case, though, the interpretation of *Dun & Bradstreet* was merely dictum since the court found the plaintiff, a university professor protesting his denial of tenure, to be a private figure and the issue to be one of private concern.²¹¹

In an action brought by a vice president of the University of Louisiana at Monroe to compel a Web site to identify the authors of allegedly defamatory postings, the U.S. District Court for the Western District of Louisiana used *Dun & Bradstreet* to support its decision that in a case brought by a public official "regarding statements which are not of public concern, . . . there is no requirement of a showing of actual malice."²¹²

The D.C. Court of Appeals seemed to interpret *Dun & Bradstreet* as requiring — or at least not eliminating — a negligence requirement for

²⁰⁶Bainhauer v. Manoukian, 520 A.2d 1154 (N.J. Super. Ct. App. Div. 1987).

²⁰⁷*Id.* at 1167 n.7. See also Ayala v. Washington, 679 A.2d 1057, 1063 n.2 (D.C. 1996) (recognizing no difference between media and nonmedia defendants in terms of constitutional standards).

²⁰⁸Knudsen v. Kansas Gas & Elec. Co., 807 P.2d 71, 79 (Kan. 1991) (emphasis added).

²⁰⁹*Id.* at 78.

²¹⁰Staheli v. Smith, 548 So.2d 1299, 1304 (Miss. 1989). Remarkably, the only citation to *Gertz* came in connection with the definitions of public figures. *Id.*

²¹¹*Id.* at 1304–05.

²¹²*In re Baxter*, No. 01-00026-M., 2001 WL 34806203, at *15 (W.D. La. Dec. 20, 2001).

punitive damages in private-private cases. In *Ayala v. Washington*,²¹³ a case involving a private plaintiff and statements of both private and public concern, the court presented a lengthy and detailed discussion of what it called the “four factors to be determined in the universe of First Amendment defamation law: the kind of speech, the facts that must be proven, the certainty of proof required, and the type of damages.”²¹⁴ In that analysis, the court cited *Dun & Bradstreet* as “holding that presumed and punitive damages could be awarded to private figure plaintiff on the basis of a negligently-made, false, defamatory statement on a matter of only private concern.”²¹⁵ Finally, a few courts have simply cited *Dun & Bradstreet* to support statements that private plaintiffs need prove only negligence without specific reference to punitive and presumed damages.²¹⁶

DISCUSSION AND CONCLUSION: OH, WHAT A TANGLED WEB WE WEAVE

The most obvious conclusion of this research is that there is considerable confusion and disagreement among lower courts as a result of *Dun & Bradstreet v. Greenmoss Builders, Inc.* While the holding was narrow — private plaintiffs defamed in the discussion of nonpublic matters need not prove actual malice to collect punitive and presumed damages — the reasoning on which that holding was based could support — and has been used to support — much more sweeping decisions. The expansive language of the plurality opinion, coupled with concurrences by Justice White and Chief Justice Burger, and language in *Hepps* and *Milkovich*, has led some judges to question whether the First Amendment applies at all in private plaintiff-private issue defamation cases.

Exacerbating the problem is the spin that Justice Powell and especially Chief Justice Burger put on *Gertz*, implying the holding in *Gertz* had to do with both the status of the plaintiff *and* the subject matter of the report.²¹⁷ As Justice White noted in his *Dun & Bradstreet*

²¹³679 A.2d 1057 (D.C. 1996).

²¹⁴*Id.* at 1062.

²¹⁵*Id.* at 1063 n.3.

²¹⁶*See, e.g.*, *Taylor Building Corp. of America v. Benfield*, 507 F. Supp. 2d 832, 841 (S.D. Ohio 2007); *Schneider v. Pay 'N Save Corp.*, 723 P.2d 619, 625 (Alaska 1986).

²¹⁷*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757 n.4 (1985) (“[P]roperly understood” all of *Gertz* holdings were only “within the context of public speech.”); *id.* at 764 (Burger, C.J., concurring) (“I agree that *Gertz* is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance.”).

concurrence, that simply was not true.²¹⁸ As noted above, while Powell was certainly not the first justice to make an opinion seem consistent with precedent when it was not, in *Dun & Bradstreet* it was especially problematic because *Gertz* rested solely on the plaintiff's status, and in the decade before *Dun & Bradstreet*, many lower courts had relied on *Gertz* to apply First Amendment limitations in all private plaintiff cases without regard to subject matter. The attempt to rewrite *Gertz* into a private plaintiff-public issue case pulled the constitutional rug out from under these lower court cases.

In addition, even if *Dun & Bradstreet* is interpreted narrowly as solely eliminating the actual malice requirement for presumed and punitive damages in private-private cases, it still creates problems for lower courts. Justice Powell's plurality opinion never says what, if any, fault level is required for punitive and presumed damages in private-private suits. Is negligence, the minimum fault level established in *Gertz* for private figure plaintiffs to collect compensatory damages, sufficient? Or is common law malice also required? Justice Powell's plurality opinion does not address the issue while both Burger's and White's concurrences indicate a preference for restoring common law rules to the entire area of private-private libel, which would mean no fault requirement for compensatory or presumed damages and common law malice for punitive damages.

Interestingly, it was the Vermont trial court's use of a common law malice standard, as well as constitutional malice, for punitive damages in the jury instructions that brought the case to the Supreme Court to begin with. The instructions referred to "bad faith," "inten[t] to injure" and "willful, wanton or reckless disregard of the rights and interests of the Plaintiff," or "knowledge that [the report] was false *or* with reckless disregard of its truth or falsity."²¹⁹ When the jury returned its verdict of \$300,000 in punitive damages, there was no way of knowing on which

²¹⁸*Id.* at 772–73 (White, J., concurring). Of course, Justice White used more diplomatic language:

It is interesting that Justice Powell declines to follow the *Gertz* approach in this case. I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance. Justice Powell, however, distinguishes *Gertz* as a case that involved a matter of public concern, an element absent here.

Id.

²¹⁹*Id.* at 755 n.3. The court's instructions on malice read:

If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequences, *or* if it was made

of the various definitions the jury based its decision. However, it is important to note that the trial court's wide-reaching definition of the malice required for punitive damages was in line with the pre-*Sullivan* common law treatment of punitive damages. The *Restatement (First) of Torts*, published in 1938, declared that the standard to be used by a jury in deciding on punitive damages was "whether the defamatory matter was published with knowledge of its falsity, with reckless indifference thereto, or solely for the purpose of causing harm to the plaintiff."²²⁰ In other words, long before *Sullivan* or *Gertz*, courts were considering whether the defendants published with knowledge of falsity or reckless indifference to truth or falsity in awarding punitive damages in *all* defamation cases — not just those involving certain plaintiffs, certain subjects or certain types of defendants.

Adding to the confusion and uncertainty over how and when the "two forces"²²¹ — plaintiff's status and subject matter — affect application of the Constitution to defamation is the possibility of a third force — the identity of the defendant — playing a role. Although Justice Powell in *Dun & Bradstreet* specifically said the Court's ruling was based on "reasons different from those relied upon by the Vermont Supreme Court,"²²² which had reached its decision on the basis of the nonmedia status of the defendant, the plurality opinion never explicitly rejected the idea that the defendant's status might affect application of the First Amendment.²²³ Additionally, as noted above, the majority opinions in both *Hepps* and *Milkovich* mentioned the possibility of different standards applying to media and nonmedia defendants.²²⁴ With this confusion, it is little wonder that some courts have ignored or even declined to follow *Dun & Bradstreet* and have instead relied solely on state case law and/or *Gertz*.

The stock solution to eliminating the confusion created by the Supreme Court's convoluted and conflicting reasoning in *Dun & Bradstreet*, *Hepps* and *Milkovich* is for the Court to revisit and clarify its rulings. Clearly the best solution would be for the Court to admit it made

with knowledge that it was false *or* with reckless disregard of its truth or falsity, it was made with malice.

Id.

²²⁰RESTATEMENT (FIRST) TORTS § 616 cmt. b (1938).

²²¹Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986).

²²²*Dun & Bradstreet*, 472 U.S. at 753.

²²³While Powell's plurality opinion is silent on the matter, both White's concurrence and Brennan's dissent specifically address the issue of providing more protection to media than non-media defendants. *See id.* at 773 (White, J., concurring); *id.* at 781–84 (Brennan, J., dissenting). In addition, Brennan specifically drew attention to the fact that Powell's opinion did not reject the distinction. *Id.* at 784 n.10.

²²⁴See *supra* notes 77–81 and accompanying text.

a mistake in *Dun & Bradstreet* when it added a subject matter layer on top of consideration of plaintiff's status and to return to its *Gertz* holding — private figures must prove at least negligence for compensatory damages and actual malice for presumed and/or punitive damages.²²⁵ This would realign the Court's approach to libel law with *Sullivan* and *Gertz* and provide clear direction to lower courts. It would also ameliorate the injustice of permitting damage awards without proof of injury, which is what the Court sought to do in *Gertz*. As Justice Powell wrote:

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under traditional rules . . . the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred.²²⁶

This, Powell continued, “unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms.”²²⁷ However, given the current makeup of the Court and the traditional reluctance to overturn precedent, this solution is highly unlikely to come to pass.

The next best solution would be for the Court to make it clear that *Dun & Bradstreet* affected only the constitutional fault level required for punitive and presumed damages in private figure-private issue cases. The *Gertz* standard of at least negligence for compensatory damages, and, by extension, presumed and punitive damages, still stands for all private plaintiffs. Such a ruling would reinforce the plurality's statement that *Dun & Bradstreet* addressed only the awarding of presumed and punitive damages.²²⁸ It also makes good sense, given that courts and commentators have long recognized that defamation, as a strict

²²⁵ Although the focus of this research is not the application of *Hepps*, it is the authors' opinion that subject matter should not have been the focus in that case either. The Court should have ruled that all libel plaintiffs must prove the falsity of the allegations. Why should defamation plaintiffs not bear the same burden as plaintiffs in other types of tort actions, that is, proving all the elements of the offense they assert?

²²⁶ *Gertz v. Welch*, 418 U.S. 323, 349 (1974). See also *United Insurance Co. of America v. Murphy*, 961 S.W.2d 752, 756 (Ark. 1998) (discussing problems associated with the presumed damages rule).

²²⁷ *Gertz*, 418 U.S. at 349 (1974).

²²⁸ As noted, the first paragraph of Powell's plurality opinion makes it abundantly clear that the issue before the Court was only the awarding of presumed and punitive damages. *Dun & Bradstreet*, 472 U.S. at 751 (“In [*Gertz*] . . . we held . . . the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows ‘actual malice’ The question presented in this case is whether *this* rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.”) (emphasis added).

liability tort, was an anomaly under the common law. Furthermore, since the common law standard for the awarding of punitive damages — as recognized by the *Restatement of Torts*²²⁹ as well as the Vermont Supreme Court in *Dun & Bradstreet*²³⁰ — was knowledge of falsity, reckless disregard for the truth or intent to injure, it is likely most states would require more than negligence for punitive damages.

Additionally, this approach would be entirely consistent with Justice Powell's statement in *Dun & Bradstreet* that private-private speech is "of reduced constitutional value,"²³¹ but *not* "no constitutional value." Although the statements giving rise to the lawsuits in private-private cases may not be of public concern, they are not necessarily trivial or inconsequential, especially for the people involved. Whether a British company stole a Texas man's design for a railroad car and thus engaged in "industrial espionage" and "international piracy" is a very serious matter for the parties involved,²³² as is the question of whether an anesthesiologist was responsible for a patient's death.²³³ Surely the individual who speaks up, even intemperately, to protest a personal injustice or to protect his patients is entitled to some First Amendment protection. Stripping the speech at issue in private figure-private issue defamation cases of all constitutional protection places it in the category of wholly unprotected speech, on the same constitutional footing with obscenity,²³⁴ false advertising,²³⁵ incitement to imminent violence²³⁶ and true threats.²³⁷ While this approach would still leave courts to decipher not only the status of plaintiffs but also the subject matter of their speech — a task for which they are admittedly poorly suited — it would at least reduce confusion and uncertainty and, once again, guarantee that all speech is provided with at least some constitutional protection.

Either of these solutions, however, requires that an appropriate case be appealed to the Supreme Court and that four justices vote to grant certiorari. While this might not happen anytime soon, the good news is that lower federal courts and state courts don't have to wait for the Supreme Court to fix the problem. Because defamation law is state

²²⁹RESTATEMENT (FIRST) TORTS §616 cmt. b (1938).

²³⁰*Dun & Bradstreet*, 472 U.S. at 753.

²³¹*Id.* at 761.

²³²*Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1328 (5th Cir. 1993).

²³³*Bainhauer v. Manoukian*, 520 A.2d 1154 (N.J. Super. Ct. App. Div. 1987).

²³⁴*See Miller v. California*, 413 U.S. 15 (1973).

²³⁵*See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

²³⁶*See Brandenburg v. Ohio*, 395 U.S. 444 (1969)(per curiam).

²³⁷*See Virginia v. Black*, 538 U.S. 343 (2003).

law, they can do it themselves by following the lead of the New Mexico Supreme Court in “declin[ing] to follow *Dun & Bradstreet*”²³⁸ and continuing to require actual malice for presumed and punitive damages under state law or at least requiring common law malice in addition to negligence. The U.S. Constitution sets the minimum protection for expression; states are free to recognize greater protection under their own constitutions, statutes or common law.

By attempting to make *Dun & Bradstreet* seem as if it flowed from *Gertz*—when clearly it did not—and by reintroducing subject matter distinctions into libel law—after convincing lower courts it was abandoning the concept in *Gertz*—the Supreme Court caused havoc in the lower courts. Today, more than twenty years after *Dun & Bradstreet*, few courts have been able to decipher the opinion or agree on how constitutional protections apply in private-private defamation cases. As the Internet continues to grow as a medium of communication, allowing private individuals to comment on private matters with greater frequency and reach, this confusion is only likely to grow and fester. The best hope right now for reducing this confusion and ensuring that an appropriate balance is struck between protection of individual reputation and freedom of expression may be for the states to do it themselves.

²³⁸Newberry v. Allied Stores, Inc., 773 P.2d 1231, 1237 (N.M. 1989).