The Surprising Case Against Punitive Damages in Libel Suits Against Public Figures

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It has become a truism that media defendants in libel cases are being hit by increasing numbers of ever-growing punitive damage awards. More than a decade ago commentators began lamenting that "[t]he libel ‘megaverdict,’... virtually unknown until the 1980s," had "become commonplace." 1 That trend has continued in the intervening years, with reports of substantial libel damages verdicts coming in on a monthly basis. 2 In the face of this development, one would expect the press and its lawyers to respond with what should be (from the media’s perspective) an appealing and powerful argument: that the First Amendment precludes the award of punitive damages in libel cases, at least when the plaintiff is a public figure. Fifteen or twenty years ago, when massive libel awards first became a notable phenomenon, there was some reason to think that such an argument could be successful. Several state courts had held that the First Amendment — or analogous free speech provisions in their state constitutions — barred the award of punitive damages in libel cases. 3 A fair number of commentators (some of them quite prominent) had

† Special Counsel, Mayer, Brown & Platt, Washington, D.C. A.B. 1977, Cornell University; J.D. 1980, University of Chicago Law School. I am indebted to Professors Richard Lazarus, David Strauss, and Nicholas Zeppos, who commented on an earlier draft of this article and did their best to correct my errors.


2. The most comprehensive available listing of libel verdicts indicates that — excluding a $200,000,000 punitive award returned in 1997 — the average punitive award returned during the decade of the 1990s (through 1998) was double that returned during the 1980s. The median award in the 1990s exceeded the median for the 1980s by 26%. LIBEL DEFENSE RESOURCE CENTER BULL. 4 (Jan. 31, 1999).

3. Stone v. Essex County Newspapers, 330 N.E.2d 161 (Mass. 1975) (citing First Amendment, "reject[ing] the allowance of punitive damages in this Commonwealth in any defamation action, whether based on negligence, or reckless or willful conduct"); Tosti v. Ayek, 476 N.E.2d 298, 937 (Mass. 1985) (same); Mass. Ann. Laws c. 231, § 93 (codifying rule); Wheeler v. Oregon, 593 P.2d 777, 788-789 (Ore. 1979) (Oregon constitution "prohibits the award of punitive damages in defamation cases, unless some other constitutional provision requires that they be allowed"); Lewis v. Or. Beauty Supply, 733 P.2d 430 (Ore. 1987) (same); Huffman & Wright Logging Co. v. Wood, 817 P.2d 1334 (Ore. Ct. App. 1991) (same); Taskett v. KING Broadcasting Co., 546 P.2d 81, 86 (Wash. 1976) (citing First Amendment, "juries shall be limited to awarding damages for only the actual damages sustained...[U]nder no circumstances will we allow a jury to award punitive damages [in a defamation case]"); Hauter v. Cowles Publishing Co., 811 P.2d 231, 235 (Wash. App. 1991) (same). See also Sprouse v. Clay Communications, Inc, 211 S.E.2d 674, 692 (W. Va. 1975) ("regardless of the law in this State, it would appear that the penumbra of protection of the First Amendment is such that punitive damages may only be recovered in cases where the award of actual damages is insufficient to dissuade
reached the same conclusion, albeit typically with little analysis.\(^4\) And the Supreme Court had not squarely addressed the issue.

Despite this ammunition, however, the press never seriously pursued the argument that punitive awards for libel are unconstitutional. It appears that the question whether the First Amendment bars such awards in public-figure libel cases has been presented to the Supreme Court only once, in a petition that was filed more than a decade ago.\(^5\) And the contention has largely disappeared from the briefs of media defendants in the lower courts. The reason for this surrender seems plain enough: like the little girl whose parents fed her broccoli every night, media defendants — after years of paying punitive judgments (or of settling cases for amounts that include a premium based on the availability of punitives) — have come to accept the familiar unpleasantness as part of the natural order of things.

Against this background, it is all the more surprising to learn that, some fifteen years ago, five Justices of the Supreme Court essentially concluded that punitive damages are unconstitutional in all libel cases. Four Justices, in an opinion for a plurality of the Court in *Dun & Bradstreet v. Greenmoss Builders, Inc.*,\(^6\) opined that punitive judgments, "by providing damages unrelated to the actual harm caused by false statements,...necessarily deter and penalize truthful statements as well," and therefore do not serve "the state interest in preventing the special hazards posed by [false] speech."\(^7\) The fifth Justice, others in like circumstances from committing similar acts in the future"); McHale v. Lake Charles American Press, 390 So.2d 556, 570 (La. App. 1980) (appearing to follow Sprouse).


\(^5\) CBS, Inc. v. Brown & Williamson Tobacco Corp., No. 87-1354, cert. denied, 485 U.S. 933 (1988). As it happened, from the defendant's perspective that case involved extraordinarily unappealing facts; the defendant had destroyed its files under suspicious circumstances and gave incredible testimony on the stand. Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1125-1126, 1127, 1134-1135 (7th Cir. 1987). In addition, the issue was raised elliptically in PG Publishing Co. v. DiSalle, No. 88-1638, cert. denied, 492 U.S. 906 (1989), which argued briefly that the Court should grant review if it rejected the Eighth Amendment challenge to punitive damages then pending in *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).


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writing for himself, concluded flatly that "a state may not permit recovery of punitive damages in a libel action."8

How is it, then, that libel defendants continue to find themselves subject to massive punitive awards? As readers familiar with Dun & Bradstreet may suspect, the answer is that these defendant-friendly opinions were never published; they were withdrawn and are available only in Justice Thurgood Marshall's files at the Library of Congress. But the discovery that the Supreme Court came very close to holding that the First Amendment bars the award of punitive damages for libel is grounds for rethinking the question — and certainly suggests, at a minimum, that the proposition may have some merit. This essay accordingly follows the path suggested by those vanished opinions. It begins by proposing that the First Amendment principles actually articulated by the Court (in its holdings, as opposed to its unpublished drafts) should preclude the award of punitive damages in libel cases brought by public figures. Looking closely at the evolution of the opinions in Dun & Bradstreet, it then offers reasons for believing that the Court might be more willing to entertain that proposition than is generally believed.

I. THE INCONCLUSIVE HISTORY

To appreciate the relevant principles, it is useful to begin with cases that have the feel of ancient history but continue to shed useful light on the Court's approach to libel. The Court began the constitutionalization of libel law in New York Times Co. v. Sullivan,9 with its famous holding that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not."10 Having reached that conclusion, however, the Court had a much harder time determining the rules to apply when the plaintiff was not a public official or was not a public figure at all, or when the plaintiff sought punitive damages.

The Court made its first stab at these problems in Curtis Publishing Co. v. Butts,11 a case involving a then-notorious episode in which a Saturday Evening Post article accused the University of Georgia's athletic director of fixing a football game against the University of Alabama — fighting words indeed.12 Justice Harlan, writing for a four-Justice plurality that included Justices Clark,
Justice Harlan, writing for a four-Judge plurality that included Justices Clark, Stewart, and Fortas, concluded that the requirements of *New York Times* were too "rigorous" to be applied in that setting. Instead, the *Butts* plurality would have held "that a 'public figure' who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Of particular note here, Justice Harlan went on to opine that "there is...nothing in any of our past cases which suggests that compensatory and punitive damages are subject to different constitutional standards of misconduct," meaning "that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award." *Butts* left the law in confusion, however, because neither aspect of Justice Harlan's opinion attracted a majority of the Court. Chief Justice Warren concluded that the *New York Times* standard should apply in cases brought by "public figures" as well as by "public officials;" Justices Brennan and White agreed in a separate opinion; and Justices Black and Douglas characteristically opined that the First Amendment precludes all libel judgments against the press. None of these Justices specifically addressed the constitutional rules that govern the award of punitive damages.

The Court failed to resolve this confusion in *Rosenbloom v. Metromedia, Inc.*, a case that became the high water mark of Justice Brennan's attempt to ratchet up the burden on libel plaintiffs. The *Rosenbloom* plaintiff, delicately described by Justice Brennan as "a distributor of nudist magazines," was not a public figure, although the defamatory speech — a radio station's report of the plaintiff's arrest and the seizure of his nudist (i.e., allegedly obscene) materials — involved a matter of general interest. Writing for a three-Judge plurality that included Chief Justice Burger and Justice Blackmun, Justice Brennan concluded that, so long as the challenged speech involved a matter of "public or general concern," the plaintiff (whether or not a public figure) had to satisfy the *New York Times* standard. Two Justices concurred in the result, Justice Black on the absolutist theory that the First Amendment precludes libel awards against media defendants even when they knowingly publish false

13. *Id.* at 155 (plurality opinion).
14. *Id.* at 160.
15. *Id.* at 161.
16. *Id.* at 163 (Warren, C.J., concurring).
17. *Id.* at 172-74 (Brennan, J., concurring in part, dissenting in part).
20. *Id.* at 32 (plurality opinion).
21. *Id.* at 52.
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statements, and Justice White on the ground that "the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail." But for present purposes, the views of the dissenters are most significant. Justice Marshall, joined by Justice Stewart — after uncharitably noting that "George Rosenbloom, before the events and reports of the events involved here, was just one of the millions of Americans who live their lives in obscurity" — concluded that the plurality's application of the New York Times standard undervalued "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." Justice Marshall therefore would have left the states largely free in private-figure cases "to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need" so long as they did not impose "absolute or strict liability." But recognizing the threat posed to the press by libel suits, Justice Marshall offered an alternative method of protecting First Amendment values: he would have altogether precluded the award of punitive damages for defamation.

Justice Marshall saw "[t]he size of the potential judgment that may be rendered against the press [as] the most significant factor in producing self-censorship." He added that "[t]he manner in which unlimited discretion may be exercised is plainly unpredictable. And fear of the extensive awards that may be given under the doctrine must necessarily produce the impingement on freedom of the press recognized in New York Times." He also observed that [t]his discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such freewheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls.

Justice Marshall therefore concluded that "[t]he threats to society's interest in freedom of the press that are involved in punitive and presumed damages can largely be eliminated by restricting the award of damages to proved, actual injuries." He "believe[d] that the appropriate resolution of the clash of societal values here is to restrict damages to actual losses." This conclusion

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22. Id. at 57 (Black, J., concurring).
23. Id. at 62 (White, J., concurring).
24. Id. at 78 (Marshall, J., dissenting).
25. Id. at 79.
26. Id. at 86.
27. Id. at 82.
28. Id. at 83.
29. Id. at 84.
30. Id.
31. Id. at 86.
represented a dramatic switch in position by Justice Stewart, who just four years earlier had joined Justice Harlan’s conclusion in *Butts* that special rules should not govern the award of punitive damages.

Equally surprising was a similar shift in position by Justice Harlan himself, who also dissented in *Rosenbloom*. Although he was not prepared to eliminate punitive damages altogether, Justice Harlan did declare it "impermissible, given the substantial constitutional values involved, to fail to contain the amount of jury verdicts in [defamation] cases within any ascertainable limits." He explained that "from the standpoint of the individual plaintiff [punitive] awards are windfalls," and concluded

that where these amounts bear no relationship to the actual harm caused, they then serve essentially as springboards to jury assessment, without reference to the primary legitimating compensatory function of the system, of an infinitely wide range of penalties wholly unpredictable in amount at the time of the publication and that this must be a substantial factor in inducing self-censorship. Further, I find it difficult to fathom why it may be necessary, in order to achieve its justifiable deterrence goals, for States to permit punitive damages that bear no discernible relationship to the actual harm caused by the publication at issue. 33

Justice Harlan therefore would have found that "where the compensatory scheme seeks to achieve deterrence as a subsidiary byproduct, the desired deterrence, if not precisely measured by actual damages, should be informed by that touchstone if deterrence of falsehood is not to replace compensation for harm as the paramount goal." 34 As a consequence, he would have held unconstitutional, in a private libel case, jury authority to award punitive damages which is unconfined by the requirement that these awards bear a reasonable and purposeful relationship to the actual harm done. 35

The Court finally obtained a majority in *Gertz v. Robert Welch, Inc.* 36 a case in which the plaintiff was a private figure (and a sympathetic one at that; he was a respected lawyer who was labeled a "Leninist" by a publication of the

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32. *Id.* at 64 (Harlan, J., dissenting).
33. *Id.* at 74-75.
34. *Id.* at 75.
35. *Id.* at 77. Justice Harlan believed that “the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm caused by the conduct of others.” *Id.* at 66. He therefore referred to the “overriding principle that deterrence is not to be made a substitute for compensation,” *Id.* at 76, which presumably flowed from his view that “any system that punishes certain speech is likely to induce self-censorship by those who would otherwise exercise their constitutional freedom.” *Id.* at 64-65. Having said that, however, Justice Harlan also concluded that “the First Amendment interest in avoiding self-censorship” does not “always outweigh the state interest in vindicating” the policy of deterrence: “[i]t seems that a legislative choice is permissible which, for example, seeks to induce, through a reasonable monetary assessment, repression of false material, published with actual malice, that was demonstrably harmful and reasonably thought capable of causing substantial harm, but, in fact, was not so fully injurious to the individual attacked. Similarly, the State surely has a legitimate interest in seeking to assure that its system of compensating victims of negligent behavior also operates upon all as an inducement to avoid such conduct.” *Id.* at 74.
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John Birch Society\textsuperscript{37}). Justice Powell’s majority opinion engaged in a characteristic exercise in balancing. On the one hand, Justice Powell noted that “punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press”;\textsuperscript{38} on the other, he recognized that “[t]he legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.”\textsuperscript{39} He therefore split the baby. Suits by public officials and other public figures would be governed by the demanding \textit{New York Times} standard. But for actions by private individuals, \textit{Gertz} adopted the liability standard proposed by Justice Marshall’s \textit{Rosenbloom} dissent: “[w]e hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.”\textsuperscript{40}

This dichotomy was based on a common sense distinction. The Court opined that “[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”\textsuperscript{41} The Court also saw “a compelling normative consideration underlying the distinction between public and private defamation plaintiffs.” Although public figures generally “have thrust themselves to the forefront” and therefore “invite attention and comment,” “[n]o such assumption is justified with respect to a private individual.”\textsuperscript{42}

Having thus accepted the fault standard proposed by Justices Marshall and Stewart in \textit{Rosenbloom}, the \textit{Gertz} Court was considerably cagier when it came to the question of punitive damages. Like Justice Marshall, the majority in \textit{Gertz} started from the proposition that the state’s only legitimate interest in libel cases involved “compensating injury to the reputation.”\textsuperscript{43} Having said that, the Court found:

no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-

\begin{itemize}
\item \textsuperscript{37} See \textit{id.} at 326.
\item \textsuperscript{38} \textit{Id.} at 340.
\item \textsuperscript{39} \textit{Id.} at 341.
\item \textsuperscript{40} \textit{Id.} at 347.
\item \textsuperscript{41} \textit{Id.} at 344.
\item \textsuperscript{42} \textit{Id.} at 344, 345.
\item \textsuperscript{43} \textit{Id.} at 343. See also \textit{id.} at 349 ("[T]his countervailing state interest extends no further than compensation for actual injury.").
\end{itemize}
censorship, but, unlike the former rule, punitive damages are wholly irrelevant to
the state interest that justifies a negligence standard for private defamation actions.
They are not compensation for injury.

The Court therefore held that “the States may not permit recovery of... punitive damages [in libel cases], at least when liability is not based on a
showing of knowledge of falsity or reckless disregard for the truth.”\textsuperscript{44} The Court then restated the point in the following terms: “the private defamation
plaintiff who establishes liability under a less demanding standard than that
stated by \textit{New York Times} may recover only such damages as are sufficient to
compensate him for actual injury.”\textsuperscript{45}

Lower courts generally have understood this passage to mean that a libel
plaintiff may obtain punitive damages so long as he or she makes a showing of
actual malice; hence the slew of punitive awards against media defendants. But
the Court’s language on the point actually is a model of ambiguity. The
Court’s initial statement of its holding is hedged about with the weaselly tem-
porizer “at least” (states may not award punitive damages, “at least” when ac-
tual malice is not established).\textsuperscript{46} And the Court’s summing up was oddly pas-
sive and incomplete; it stated that a plaintiff who did not satisfy \textit{New York Times}
could obtain only compensatory damages, rather than making the af-
firmative statement that a plaintiff who \textit{did} make the requisite showing \textit{could}
obtain punitive damages.

While this all may seem like so much hair-splitting, there is intriguing evi-
dence in the Marshall papers indicating that the Court’s ambiguity was deliber-
ate. Justice Powell’s initial draft opinion in \textit{Gertz} stated that “the States may
not permit recovery of presumed or punitive damages when liability is based
on a finding of negligence”\textsuperscript{47} and that, “[b]ecause punitive damages perform
much the same functions as criminal penalties, the incidence of their imposi-
tion should be governed by our decision in \textit{Garrison v. Louisiana}”\textsuperscript{48} — that

\begin{itemize}
  \item \textsuperscript{44} \textit{Id.} at 350.
  \item \textsuperscript{45} \textit{Id.} at 349 (emphasis added).
  \item \textsuperscript{46} \textit{Id.} at 350. The Court applied the same standard to awards of presumed damages, complaining:
\textit{The largely uncontrolled discretion of juries to award damages where there is no loss unnec-
essarily compounds the potential of any system of liability for defamatory falsehood to inhibit
the vigorous exercise of First Amendment freedoms” and “invites juries to punish unpopular
opinion rather than to compensate individuals for injury sustained by the publication of a
false fact.} \textit{Id.} at 349.
  \item \textsuperscript{47} The \textit{New York Times}’ Anthony Lewis has called attention to the Court’s ambiguity, noting that
“[i]f \textit{Gertz} did not go all the way with Justice Marshall [in expressly rejecting punitive damages], that
may be because Justice Powell preferred to test the question by further experience. His phrase ‘at least’
in the holding seems to leave open the possibility that punitive damages may in time be found too in-
timidating to free expression to be allowed at all.” \textit{Lewis, supra} note 4, at 617 (citations omitted).
  \item \textsuperscript{48} MP, No. 72-617, \textit{Gertz v. Robert Welch, Inc.}, opinion of Powell, J. (Dec. 28, 1973), at 23 (em-
phasis added).
  \item \textsuperscript{49} \textit{Id.} at 25 (citing 379 U.S. 64 (1964)).
\end{itemize}
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is, punitives should be available on a showing of actual malice.\(^{50}\) This indicates (more or less) clearly that punitive damages were to be available so long as the plaintiff’s proof satisfied \textit{New York Times}. Justice Powell then circulated a redraft that eliminated this language and substituted the “at least” formulation.\(^{51}\) Three days later, Justices Stewart and Marshall (who, it will be recalled, opposed punitive awards in all libel cases) joined the opinion.\(^{52}\) This chronology strongly suggests that the issue was left open to accommodate those two Justices.\(^{53}\)

The \textit{Gertz} ambiguity was not clarified by the Court’s last word on the subject, in \textit{Dun & Bradstreet}. There, the libel plaintiff was not a public figure and the defamatory speech (an inaccurate credit report) involved matters of purely private concern. This time writing for a three-Justice plurality (including Justices Rehnquist and O'Connor), Justice Powell concluded that, “[i]n light of the reduced constitutional value of speech involving matters of no public concern, we hold that the state interest adequately supports awards of presumed and punitive damages — even absent a showing actual malice.”\(^{54}\) In \textit{Dun & Bradstreet} Justice Powell thus split the baby into thirds, adding an additional step to the \textit{Gertz} approach by providing that punitive damages could be awarded even without satisfaction of the \textit{New York Times} test so long as the defamatory speech did not involve a matter of public concern.\(^{55}\)

The plurality explained that \textit{Gertz} “found that the state interest in awarding presumed and punitive damages was not ‘substantial’ in view of their effect on speech at the core of First Amendment concern. This interest, however, is

\(^{50}\) In \textit{Garrison}, the Court held that penalties could be imposed under a criminal defamation statute only if the defendant was shown to have violated the \textit{New York Times} standard. See 379 U.S. at 74-75.


\(^{53}\) That conclusion also receives support from another unpublished opinion that is available in the Marshall papers. In an early draft opinion circulated in \textit{Dun & Bradstreet}, Justice Brennan explained that, “[a]lthough [the Court in \textit{Gertz}] had no occasion to consider whether, as Justices MARSHALL and Stewart had urged in \textit{Rosenbloom}, presumed and punitive damages in defamation actions are invariably incompatible with the First Amendment...the Court held that such damages could not be awarded ‘at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.’” MP, \textit{Dun & Bradstreet}, opinion of Brennan, J. (May 29, 1984), at 8 (quoting \textit{Gertz}, 418 U.S. at 349). This indicates that Justice Brennan — and, presumably, the members of the Court to whom this draft was circulated — understood \textit{Gertz} to have left the question open. Indeed, as is noted below, a member of the \textit{Gertz} majority, Justice Blackmun, joined the Brennan opinion in \textit{Dun & Bradstreet} without objecting to Justice Brennan’s characterization of \textit{Gertz}.

\(^{54}\) 472 U.S. at 761 (plurality opinion).

\(^{55}\) The other concurring opinions in \textit{Dun & Bradstreet} did little to dispel the ambiguity of \textit{Gertz}. Justice White would have overruled \textit{Gertz} altogether and cut back on the scope of \textit{New York Times} (see id. at 769-774 (White, J., concurring in the judgment)) — although he made the interesting observation that the Court, in lieu of adding to the plaintiff’s burden of proof in \textit{New York Times}, might have held that punitive damages should be “scrutinized as Justice Harlan suggested in \textit{Rosenbloom},...or perhaps even entirely forbidden.” \textit{Id.} at 749. Chief Justice Burger agreed with the plurality that \textit{Gertz} does not apply to expression involving matters of private concern while also agreeing with Justice White that \textit{Gertz} should be overruled. \textit{Id.} at 764 (Burger, C.J., concurring in the judgment).
‘substantial’ relative to the incidental effect these remedies may have on speech of significantly less constitutional interest."\(^5^6\) And responding to the dissent’s assertion that \textit{Gertz} had held punitive damages “wholly irrelevant” to the furtherance of any state interest in defamation cases,\(^5^7\) the plurality declared that “what the \textit{Gertz} language indicates is that the State’s interest is not substantial relative to the First Amendment interest in public speech.”\(^5^8\) This passage — appearing, in an elliptical sort of way, to endorse the view that punitive damages do not advance any substantial state interest when speech of public concern is at issue — can be taken to support the proposition that punitive damages are inappropriate in cases involving such speech. But the plurality never quite brought itself to say that expressly, leaving the \textit{Gertz} ambiguity intact.\(^5^9\)

With \textit{Dun & Bradstreet}, the Court connected most of the dots on the libel liability picture. In private-figure, private-speech cases, punitive as well as compensatory damages are available without a showing of actual malice (under \textit{Dun & Bradstreet}). In private-figure, public-speech cases, compensatory

\textit{Id.} at 760 (plurality opinion) (emphasis in original).

\textit{Id.} at 761 n.7 (plurality opinion) (emphasis in original). Indeed, in justifying the award of presumed and punitive damages in cases that do not involve speech on matters of public interest, the plurality explained that

\begin{quote}
[the rationale of the common-law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact."...As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utterances and publications....This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective.]
\end{quote}

\textit{Id.} at 760-761. Of course, while this explains why presumed damages further the state’s goal of compensation, it does not offer a rationale for punitive damages that comports with the state interest in compensating libel victims.

\textit{Id.} at 756. Justice Brennan’s dissent, meanwhile, condemned “unconstrained” and “unrestrained” punitive damages in libel actions (\textit{id.} at 778, 794), language that appears to leave open the possibility of “constrained” or “restrained” punitive awards. Adding to the mystery, Justice Brennan concluded by opining that “deterring potential defamation by case-by-case judicial imposition of presumed and punitive damages on less than a showing of actual malice simply exacts too high a toll on First Amendment values.” \textit{Id.} at 796. This can be read to approve of punitive damages so long as the \textit{New York Times} standard is met, although that conclusion runs counter to the longstanding views of Justice Marshall, who, the reader surely recalls, opposed punitives in all libel cases. As the discussion below (in text at notes 99-149, \textit{infra}) suggests, some of this confusion may be explained by the continual rewriting that preceded the publication of the \textit{Dun & Bradstreet} opinion.
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damages may be awarded on a showing of fault less than actual malice, but punitive damages may be awarded (if at all) only on a showing of actual malice (under Gertz). And in public-figure, public-speech cases, even compensatory damages may not be awarded except upon a finding of actual malice (under New York Times). One part of the picture, however, has yet to be drawn: the Court has not addressed whether punitive damages ever are available in public-figure and public-speech cases.60

II. THE CASE AGAINST PUNITIVE DAMAGES

In this setting, the case against punitive damages in public-figure libel cases is surprisingly straightforward — and seemingly compelled by principles already accepted by the Court. Indeed, that case has only gotten stronger in the years since Dun & Bradstreet, drawing support both from research in the social sciences and from doctrinal developments relating to the law governing punitive damages in general.

The Individual Interest

The Court already has established the formula that governs the application of the First Amendment to libel cases: courts must strike a "balance between the needs of the press and the individual's claim to compensation for wrongful injury."61 Looking first to the individual's side of the equation, the Court has stipulated that the state's principal interest in cases involving speech by public figures or concerning public issues is compensation rather than punishment or deterrence. As noted above, the Court in Gertz found that the state interest in imposing liability for defamation "extends no further than compensation for actual injury."62 The Court accordingly concluded that, "[i]ke the doctrine of

60. The Court's more recent, off-hand remarks on punitive damages in libel actions have not helped clarify matters. In Herbert v. Lando, 441 U.S. 153 (1979), the Court observed that Gertz "limited the entitlement to punitive damages, but such damages are still available upon a showing of knowing or reckless falsehood" (id. at 163); but the Court also repeated the ambiguous Gertz formulation, stating that Gertz forbade "the award of punitive damages absent at least reckless disregard of truth or falsity." Id. at 168 (emphasis added). Other decisions seemingly have indicated that punitive damages are available. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 774 (1986) (referring to "the showing of actual malice needed to recover punitive damages under either New York Times or Gertz"); Smith v. Wade, 461 U.S. 30, 49 (1983) (suggesting that Gertz limited punitive awards to "especially egregious cases"). On the other hand, Justices elsewhere (and more recently) have indicated that punitive damages are not available at all in at least some libel suits. See Pacific Mutual Life. Ins. Co. v. Haslip, 499 U.S. 1, 38 (1991) (Kennedy, J., concurring) (citing Gertz, "the First Amendment prohibits awards of punitive damages in certain defamation suits"); id. at 55 (O'Connor, J., dissenting) (citing Gertz, "the Court has forbidden the award of punitive damages in certain defamation suits by private plaintiffs"); Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 87 (1988) (O'Connor, J., joined by Scalia, J., concurring in the judgment) (citing Gertz, "the Court has forbidden the award of punitive damages in defamation suits brought by private plaintiffs"). It seems safe to say that the Court has not thought very deeply about any of these statements.

61. Gertz, 418 U.S. at 343.

62. Id. at 349. The Court has continued to cite Gertz as standing for this proposition. See Masson
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. They are not compensation for injury.”63 Similarly, in *Dun & Bradstreet* the plurality reiterated that “what the *Gertz* language indicates is that the State’s interest [in awarding punitive damages] is not substantial relative to the First Amendment interest in public speech.”64 The dissent would have gone even further, opining “that in a defamation action punitive damages, designed to chill and not to compensate, [a]re ‘wholly irrelevant’ to furtherance of any valid state interest.”65

Of course, notwithstanding the Court’s blithe assertions on this point, there are grounds to question why the state’s only legitimate interest in public speech cases is obtaining compensation for victims of defamation. Outside of the First Amendment context, after all, the state *is* thought to have an interest in deterrence and retribution that supports the availability of punitive damages.66 The plurality in *Dun & Bradstreet* recognized such an interest where speech that involves matters of private concern is at issue. And Justice Harlan, an iconic figure for many of the Court’s conservatives, was of the view that speech has a role to play, albeit a limited one, even where public speech is involved.67

On balance, however, although the *Gertz* and *Dun & Bradstreet* Courts failed to explain themselves very clearly, they were correct in concluding that the state interest in punishing speech that defames public figures is at best weak. First, errors in such speech are often, in effect, self-correcting. The Court has recognized that public figures who voluntarily “invite attention and comment” also typically have substantial “access to the channels of effective communication,”68 which allows them to respond to inaccurate allegations. Indeed, the more prominent the victim of the defamation, the likelier it is that he or she will attract attention when rebutting a charge. And while there is some truth to the observation that the response never attracts as much attention as the allegation,69 the fact remains that a White House aide who is falsely accused of spousal abuse,70 or a presidential candidate who is inaccurately al-

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63. *Id.* at 350.
64. 472 U.S. at 761 n.7 (emphasis in original).
65. *Id.* at 794 (emphasis in original) (citation omitted).
67. See note 35, supra.
69. See, e.g., *Rosenbloom*, 403 U.S. at 46 (plurality opinion) (“Denials, retractions, and corrections are not ‘hot’ news, and rarely receive the prominence of the original story.”).
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alleged to have been arrested for cocaine use, will have relatively little difficulty getting their rebuttals on the front page.

Second, any state interest in deterrence is likely to be amply served by the award of compensatory damages. That is particularly so because compensatory damages in the libel setting are available for injury to reputation and for pain and suffering, a standard that is flexible enough to allow for substantial judgments that will have a considerable deterrent effect. In the public figure setting, moreover, there is little danger that wrongdoing will go undiscovered and unremedied, which is the usual justification for awarding punitives as a deterrent; the subject of a defamatory remark can be counted on to hear of it.

Third, the very idea of state-imposed punishment seems out of place when the challenged conduct is speech that is critical of a public figure and involves an issue of public importance. To be sure, as a matter of theory false and defamatory statements are valueless and constitutionally unprotected, which is why defamation actions are permissible in the first place. But critical remarks about public figures are an essential element of political discourse and a desirable aspect of serious journalism. It thus seems reasonable in this context to read the First Amendment as casting substantial doubt on the state's right to punish participants in this sort of commentary. After all, it is the modern theory of the First Amendment that, rather than punishment, "the fitting remedy for evil counsels is good ones." And as Justice Harlan observed in a slightly different context, "[a]ny nation which counts the Scopes trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding of falsity." At a minimum, this all serves to diminish the state-interest side of the equation.

71. See, e.g., H. Kurtz, Bush Accuser is Said to Be Ex-Convict; Publisher Halts Release of Biography of GOP Candidate, WASH. POST (Oct. 22, 1999), at C1; L. Weeks, Editor Quits in Bush Bio Imbroglio; Incident Raises Questions About Publishers' Safeguards, WASH. POST (Oct. 27, 1999), at A1. Of course, it helps when the accuser has served time in prison for trying to kill his former employer.


73. "Medical expense and economic loss do have some objective reality but the warrant to add pain and suffering gives the jury immediate freedom to price the injury subjectively." Kalven, The Jury, the Law, and the Personal Injury Damage Award, 19 OHIO ST. L.J. 158, 161 (1958). See Smolla, supra, 132 U. PA. L. REV. at 92; Sacks & Tofel, supra, 90 DICK. L. REV. at 612. In one notorious libel case, for example, the Philadelphia Inquirer was held liable for $2.5 million for injury to reputation even though the plaintiff introduced no evidence that he had suffered any actual economic harm. Sprague v. Walter, 656 A.2d 890, 925 (Pa. Super. 1995).


The Danger of Overdeterrence

On the other side of the balance, the danger that punitive damages will in fact lead to overdeterrence — and consequently chill freedom of expression — is particularly acute in public-figure cases. Indeed, the availability of punitive damages in such cases poses unique and obvious dangers to protected speech, dangers that derive from the nature of jury decision-making regarding punitives, from the impact of punitive judgments on speakers, and from the nature of the affected speech.

As an initial matter, the character of the decision-making process where punitives are concerned makes it inevitable that there often will be erroneous and excessive awards in public-figure libel cases. In fact, all public-figure cases, which require application of the New York Times standard, present a substantial prospect of jury confusion. The Court has recognized that “[t]he phrase ‘actual malice’ is unfortunately confusing in that it has nothing to do with bad motive or ill will.”

And Justice Ginsburg, while still on the D.C. Circuit, explained that “[e]xperience supports the intuition that juries have considerable trouble ‘distinguishing actual malice from mere negligence.’ . . . [a]s Judge Bork has observed, ‘[t]he evidence is mounting that juries do not give adequate attention to limits imposed by the first amendment and are much more likely to find for the plaintiffs in a defamation case.’”

The problem is greatly compounded when punitive damages are added to the mix; because the jury in a public-figure suit is instructed that both liability and entitlement to punitive damages turn on a finding of recklessness, jurors are likely to believe that punitive damages may be awarded whenever a verdict is returned for the plaintiff in a public-figure libel case. That such awards are not in fact invariably returned simply points up the hit-or-miss aspect of punitives, a phenomenon that has a powerful in terrorem effect on potential defendants.

More generally, one need not share Mark Twain’s politically incorrect view — that the jury “would prove the most ingenious and infallible agency
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for defeating justice that human wisdom could contrive⁸⁰ — to recognize that juries are capable of making serious errors. As the leading scholars of the subject have observed,

A jury is composed of untrained citizens, drawn randomly from the eligible population, convened briefly for a particular trial, entrusted with great official powers, permitted to deliberate in secret, to render a verdict without explanation, and, without any accountability then or ever, to return to private life.⁸¹

While a whole constellation of considerations leads judges to arrive (in theory) at well-reasoned and objectively "correct" decisions, individual members of a jury have no such incentives. Students of the jury thus have found that juries sometimes "consider[] extralegal factors in determining liability and punitive awards."⁸² Moreover, it seems clear from the work of social scientists that juries may be biased against corporate defendants, a category that includes newspapers and broadcasters.⁸³ Yet in libel suits, by definition every error in the award of punitive damages means that speech is being wrongfully (or excessively) punished.

This danger of error that is inherent in all jury decisionmaking is made considerably worse by the nature of the question posed to the jury when punitive damages are at issue. While juries presumably are most effective in making factual determinations that are within the common experience of lay men and women, determining the amount of punitive damages to award calls for the exercise of the kind of sentencing discretion that generally is the province of a judge.⁸⁴ Justice Breyer thus has observed, correctly, that jurors who are asked to consider the award of punitive damages are expected "to act, at least a little, like legislators or judges, for [ awarding punitive damages] permits them, to a certain extent, to create public policy and to apply that policy, not to compen-

⁸⁰. M. Twain, ROUGHING IT 256 (Signet ed. 1980) (emphasis in original). Twain added that "[t]he jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago." Id at 257 (emphasis in original). Or to paraphrase Judge Jerome Frank, "the jury applies law it doesn't understand to facts it can't get straight." Vidmar, Foreward: Empirical Research and the Issue of Jury Competence, 52 LAW & CONTEMP. PROBS. 1, 1 (1989) (footnote omitted) (citing J. Frank, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1945)).


⁸⁴. Ellis, Punitive Damages, Due Process, and the Jury, 40 ALA. L. REV. 975, 1004-1006 (1989). Indeed, as the Court has noted, "highly discretionary calculations that take into account multiple factors are necessary in order to set civil penalties.... These are the kinds of calculations traditionally performed by judges." Tull v. United States, 481 U.S. 412, 427 (1987).
sate a victim, but to achieve a policy-related objective outside the confines of the particular case. 85

Jurors judging a punitive damages case thus labor under a significant handicap that derives both from the nature of the institution and from the character of the punitive damages decision. A jury considers its case in isolation; it lacks the information and experience needed to place the particular defendant’s actions in context, and typically has no knowledge of the range of punishments to which comparable wrongdoers have been subjected. A jury is therefore far less able than a judge to devise a sanction that is appropriately proportioned to the relative wrongfulness of the defendant’s conduct. 86

Of course, juries are expected to follow the judge’s instructions. But “[j]ury instructions [regarding punitive damages] typically leave the jury with wide discretion in choosing amounts.” 87 And even apart from that problem, the Supreme Court has recognized in the punitive damages context “the possibility that a jury will not follow those instructions and may return a lawless, biased, or arbitrary verdict.” 88 There would be nothing surprising in that: “jury researchers are nearly unanimous in giving the jury poor marks for its understanding of legal instructions.” 89

Punitive damages thus present a set of related dangers for free speech in public-figure cases. The complexity of the actual malice standard ensures that

85. BMW, 517 U.S. at 596 (Breyer, J., concurring).
86. Moreover, the difficulty that a jury will have in reaching a correct decision is compounded by a feature of punitive damages regimes that almost seems calculated to induce an incorrect decision: in many states, juries are informed of the defendant’s wealth, and plaintiff’s counsel may urge the jury to transfer some of that wealth to the plaintiff. It has long been a commonplace that juries bedazzled by evidence of the size and financial condition of a wrongdoer and feeling “antipathy to a wealthy, out-of-state corporate defendant” may surrender to “redistributionist impulses.” TXO, 509 U.S. at 468-469 (Kennedy, J., concurring in part and concurring in the judgment). This unsurprising temptation means that evidence of wealth “may do more harm than good; jurymen may be more interested in divesting vested interests than in attempting to fix penalties which will make for effective working of the admonitory function.” Morris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173, 1191 (1931). See Abraham & Jeffries, Punitive Damages and the Rule of Law: The Role of Defendant’s Wealth, 18 J. LEGAL STUD. 415, 424 (1989); Ellis, supra, 40 ALA. L. REV. at 996.
87. Honda, 512 U.S. at 432. As the Court has noted, most states “require[e] only that the damages awarded be reasonably necessary to vindicate the State’s legitimate interests in punishment and deterrence.” BMW, 517 U.S. at 568.
88. Honda, 512 U.S. at 433.
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many verdicts will be returned in error. And the virtually unconstrained elasticity of the punitive damages determination gives jurors what the Court has described as a largely unreviewable license to “use their discretion selectively to punish expressions of unpopular views.”90 This is not a hypothetical danger. The Court has warned that juries are “unlikely to be neutral with respect to the content of speech” and may seek to suppress “those vehement, caustic, and sometimes unpleasantly sharp attacks...which must be protected if the guarantees of the First Amendment are to prevail.”91 Allowing the award of punitive damages when the jury is sufficiently outraged by the defendant’s conduct thus invites the imposition of punishment “on the basis of the jurors’ taste or views, or perhaps on the basis of the dislike of a particular expression.”92 This is a danger, of course, that is greatest in cases that involve public speech about public figures, where statements are most likely to be controversial and the jury is most likely to have a viscerally negative reaction; selective punishment of unpopular views is not much of a threat when the challenged speech involves Dun & Bradstreet’s credit reports. Judicial review, meanwhile, is an inadequate safeguard against the suppression of unpopular speech: judges — who may themselves have been the subject of the defendant’s “caustic” and “unpleasantly sharp attacks” — may lack both the will and the institutional ability to look behind the jury’s return of a punitive award.93

This likelihood of unpredictable, erroneous, and sometimes effectively unreviewable punitive judgments is sure to have a significant impact on the willingness of speakers to engage in controversial speech. After all, it is the fundamental assumption of New York Times that the prospect even of compensatory damages will curtail expression. But punitive awards, for which availability is not constrained by meaningful jury instructions and which may be limitless in amount, compound this danger exponentially. In an era when

90. Gertz, 418 U.S. at 350.
93. Courts in Pennsylvania provide a suggestive illustration of the problem. In the libel suit against the Philadelphia Inquirer mentioned above (at note 73), the jury returned a punitive award in the astonishing amount of $31.5 million, reduced on appeal to a still remarkable $21.5 million. Sprague, 656 A.2d at 929-30. It is not surprising that the Pennsylvania courts were unsympathetic to the defense; the Inquirer historically has engaged in vigorous reporting about corruption and other failures of the Pennsylvania judiciary. Indeed, it had published several articles and editorials that were critical of the trial judge hearing the case against it in Sprague, including one revealing that he had eight relatives on the common pleas court payroll. See Ditzen & Biddle, Review board official provides for family, in Above the Law, THE PHILADELPHIA INQUIRER 16 (May 15-17, 1993) (The judge explained: “Do we only want orphans working for the courts? People who don’t have families?”). Indeed, three justices of the Pennsylvania Supreme Court initiated libel actions against the Inquirer or its sister publication, The Philadelphia Daily News, during the pendency of the Sprague suit. See Lounsberry, Judge Orders Removal of Larsen; Justice is Spared a Term in Prison, THE PHILADELPHIA INQUIRER A1 (June 14, 1994). The plaintiff in one of those cases, however, was removed from the court after his conviction on felony charges.
eight- and even nine-figure punitive judgments are not surprising, every critical article potentially becomes a bet-the-company proposition for the publisher. And that is particularly true of controversial speech that is likely to offend a jury’s sensibilities. The inevitable result is the limitation of speech. That outcome should be unacceptable in cases where the First Amendment requires the highest level of protection because “the speech is of public concern and the plaintiff is a public figure,”94 and where, as a result, First Amendment principles demand “precision of regulation.”95

In sum, weighed against the significant danger to free expression, the state’s interest in awarding punitive damages in public-figure libel cases is insubstantial. There is no doubt that “speech on public affairs occupies the highest rung of the hierarchy of First Amendment values[] and is entitled to special protection.”96 Under the Court’s doctrine, the state’s principal concern is with compensation, a consideration that applies with special force when the plaintiff is a public figure who may readily get his or her rebuttal before the public. And the uncertainty that attends both the imposition of punitive liability and the selection of a particular punishment “can only dissuade protected speech.”97 The constitutional balance accordingly requires the preclusion of punitive damages in public-figure cases. In this area, only the elimination of punitive damages suffices to “carve out an area of ‘breathing space’ so that protected speech is not discouraged.”98

Considerations of logic and symmetry support this conclusion. As noted above, under Dun & Bradstreet, punitive as well as compensatory damages are available in private-speech cases without a showing of actual malice; in public-speech, private-figure cases, Gertz provides that compensatory damages may be awarded upon a showing of fault less than actual malice, but punitive damages may be imposed (if at all) only upon a showing of actual malice; and where the victim of the defamation is a public figure, even compensatory damages may not be assessed except upon a finding of actual malice. This hierarchy suggests that punitive damages should not be available at all in public-figure cases, where the strictest rules must apply.

97. Id. at 686.
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III. THE PRACTICALITIES OF THE ARGUMENT AGAINST PUNITIVE DAMAGES: THE CURIOUS CASE OF DUN & BRADSTREET

All of this goes to show that there is a strong theoretical and academic case to be made for the elimination of punitive damages in public-figure libel cases. But that conclusion begs the practical question: is there any real possibility, at this late date, that a relatively conservative Supreme Court would be willing to find substantial new content to the First Amendment? On the face of it, the prospect appears farfetched. But closer examination suggests several reasons to believe that the Justices might be open to the possibility — not the least of them the fact that the Court already has come surprisingly close to applying the First Amendment in precisely that way. Indeed, the evolution of the Court’s opinion in Dun & Bradstreet reveals that the Justices saw nothing at all outlandish in the suggestion that punitive damages should have no role to play in any libel cases.

The Court’s Silent Majority To Eliminate Punitive Damages

Dun & Bradstreet was a defamation action brought by a private figure; the challenged speech involved matters of purely private concern.99 The jury found for the plaintiff, awarding $50,000 in compensatory and $300,000 in punitive damages. The Vermont Supreme Court upheld the verdict, concluding that the New York Times protections are not available to non-media defendants.100

The case was first argued to the Supreme Court on March 21, 1984.101 Although the Marshall papers do not indicate the Court’s initial vote, they do show that the Justices had a difficult time coming to rest in the case.102

99. See 472 U.S. at 751-752 (plurality opinion). In particular, the defendant, a credit reporting agency, falsely reported to certain of its subscribers that the plaintiff had filed for bankruptcy.
100. Id. at 753.
101. It appears that the Court initially voted to deny certiorari, but granted review in the case after Justice White circulated a dissent from the denial arguing that the lower courts were split on the question whether the holding of Gertz applied in suits by private plaintiffs against non-media defendants. See MP, dissent of White, J. (Oct. 13, 1983); MP, memorandum to the Conference of Burger, C.J. (Oct. 21, 1983) (conflict in lower courts noted by White “leads me to give a reluctant ‘grant’”).
102. Ordinarily, the Justices would vote at the first conference after argument and the case then would be assigned to one of the Justices in the majority, without any written exchange between the Justices. In Dun & Bradstreet, however, Justice Stevens circulated a post-conference note stating that, “[a]fter further reflection, I have decided to vote to reverse.” MP, letter of Stevens, J. (March 26, 1983). Justice O’Connor followed with a note stating that, “[o]n further reflection about this case, I am not inclined to dismiss it as improvidently granted,” although she indicated that her view on that point “may be in the minority.” On the merits, she opined that the “commercial transfer of facts by a non-media defendant” deserves “only the most modest First Amendment protection.” She therefore indicated that she would vote to affirm. MP, letter of O’Connor, J. (March 28, 1984). Justice Powell then circulated a letter indicating that he agreed with O’Connor and that, “[s]ince this case will be decided,” he would vote to affirm by “treating D&B as belonging to a specialized category of disseminators of information.” MP, Letter of Powell, J. (March 28, 1984). Finally, on that same date, the Chief Justice circu-
event, it appears that a majority eventually voted in favor of the defendant; on May 29, 1984, Justice Brennan circulated a draft majority opinion that would have reversed the lower court's decision. That he did so almost certainly means that at least five Justices had tentatively voted to reverse and that Justice Brennan, as the senior Justice in the majority, had assigned himself responsibility for writing the opinion. This draft focused on and rejected the lower court's analysis, concluding that there should be no "distinction between 'media' and 'nonmedia' defendants for purposes of First Amendment principles applicable to defamation suits." Because the jury had awarded presumed and punitive damages without the finding of actual malice required (at a minimum) by Gertz, Justice Brennan would have reversed.

Justice Brennan's opinion was quickly joined by Justices Marshall, Blackmun, and Stevens. But Justice Brennan was unable to obtain the decisive fifth vote. On June 15, 1984, Justice Powell circulated a dissent opinion that private speech of the sort peddled by Dun & Bradstreet — challenged in "a purely private defamation action against a commercial credit reporting agency" — does not raise "the concerns that activated New York Times and Gertz." Justices Rehnquist and O'Connor joined the dissent. Chief Justice Burger, meanwhile, declined to take a position on the merits, asking Justice Brennan to "show [that] I would [dismiss the certiorari petition as improvidently granted]."

This left Justice White, who presumably had been the fifth vote at conference to reverse. On June 25, 1984, however, he circulated a note stating that, "[a]t this moment, I am up in the air on this case." Although he expressed sympathy for Justice Powell's views, Justice White also believed that the Powell dissent narrowed Gertz and he was "unprepared to take that step without a

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103. It seems improbable that Chief Justice Burger voted with the majority because it would be most uncharacteristic of him to assign a First Amendment libel case to Justice Brennan.

104. MP, opinion of Brennan, J. (May 29, 1984), at 3.

105. Id. at 11-20. As is noted above, in the course of his analysis Justice Brennan acknowledged that Gertz left open the question whether punitive damages ever were available in libel cases. See note 53, supra. Without explicitly answering the question, Justice Brennan expressed considerable skepticism about the propriety of punitive awards in this context, noting that many of the Court's decisions in other settings "reflect a recognition that 'the alleged deterrence achieved by punitive damage awards is likely to be outweighed by the costs.'" Id. at 9 (citation omitted).


107. MP, opinion of Powell, J. (June 15, 1984), at 5.

108. Id. at 6.


110. MP, letter of Burger, C.J. (June 19, 1984) ("As of now, please show I would DIG.")
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reargument.” On the other hand, Justice White also was unwilling to join Justice Brennan’s opinion, “with its reaffirmation of Gertz.” Justice White accordingly proposed that the case be reargued, adding that if it were not he would “join the Court’s judgment of reversal, which I think is more consistent with existing precedent than an affirmance would be.” This proposal to have the case reargued quickly attracted support, and the case was set for reargument the following term.

The case was argued for the second time on October 3, 1984. Although the Marshall papers again do not indicate the vote at the Court’s conference, it appears that the Justices divided as they had after the first argument, with five supporting reversal. Thus, Justice Brennan circulated a draft majority opinion on October 30, 1984.

This opinion was similar to the one he had written the previous spring, rejecting the contention that either the private nature of the speech or the nonmedia status of the defendant made Gertz inapplicable. As for punitive damages, Justice Brennan did not, in so many words, conclude that they were unconstitutional in all libel cases. But his opinion left little doubt that he took that view. He noted that, after the decision in Gertz, the Court had “followed [Gertz’s] reasoning with respect to damages in excess of actual harm in analogous areas of the law,” citing several decisions in which the Court had flatly precluded the award of punitives. He opined that “[t]hese cases, like Gertz, reflect a recognition that ‘the alleged deterrence achieved by punitive damage awards is likely outweighed by the costs — such as the encouragement of unnecessary litigation and the chilling of desirable conduct....’” He stated that, “when the threat of unpredictable and disproportionate damages induces potential speakers to refrain from speaking, both the speaker and society as a whole are losers.” He cited with apparent approval the holdings of several state courts “that the First Amendment, or comparable state constitutional provisions, bars [punitive] damages in cases where the party injured by defamation recovers adequate compensatory damages.” And he concluded that

the state interest in redressing the harm caused by false statements in the defamation context is fully served by damages that compensate for actual injury. Unconstrained awards of presumed and punitive damages, in contrast, do more than require speakers to bear the costs of their false and harmful statements; by providing damages unrelated to the actual harm caused by false statements, such awards nec-
essarily deter and penalize truthful statements as well.¹¹⁷

Justices Marshall, Blackmun, and Stevens again quickly joined the Brennan opinion.¹¹⁸

Justice Powell circulated his dissent on November 23, 1984.¹¹⁹ As he had the previous spring, Justice Powell opined that the speech in Dun & Bradstreet deserved less protection than that in Gertz because it was “purely private” and did “not appear in a newspaper or magazine of general or regular circulation.”¹²⁰ He accordingly was of the view that the Court had “to strike a new balance between the interests of the speaker here and the state interest in providing a legal remedy for defamatory falsehood.”¹²¹

In striking that balance, however, Justice Powell staked out dramatic new ground where punitive damages were concerned. He took Gertz to stand for the proposition that the state interest in remedying defamation “does not aim to reward victims of falsehood with damages in excess of the harm they have suffered, for the legitimate ‘state interest extends no further than compensation for actual injury.’”¹²² But punitive damages, he emphasized, “unlike presumed damages, are not intended to compensate the tort victim.”¹²³ As a consequence, “[i]n view of the serious constitutional concerns that punitive damages pose and the absence of any state interest in providing windfalls to libel plaintiffs,” Justice Powell would have held “that a State may not permit recovery of punitive damages in a libel action.”¹²⁴ He would have taken a different tack as

¹¹７.  Id. at 20.
¹¹９.  This opinion actually was both a dissent in part and a partial concurrence because, as is noted below, Justice Powell would have set aside the punitive award.
¹²⁰.  MP, opinion of Powell, J. (Nov. 23, 1984), at 8.
¹²¹.  Id. at 9-10.
¹²².  Id. at 10 (quoting Gertz, 418 U.S. at 349).
¹²³.  Id.
¹²⁴.  Id. at 13-14. In reaching his conclusion on punitive damages, Justice Powell borrowed heavily from due process concepts, observing that, “[i]n levying fines under the name of punitive damages, neither courts nor juries are required to observe the procedural safeguards that the Fifth, Sixth, and Fourteenth Amendments require in criminal proceedings”; that “the courts must afford the defendant some of these protections whenever the purpose is punishment”; and that “[b]ecause it guards against wrongful and arbitrary punishments, the Due Process Clause is a constitutional protection no less necessary and vital to our civil liberties than is the First Amendment.”  Id. at 11. See id. at 12-13 (noting that many jurisdictions had modified the common law rules governing punitive damages, that entitlement to such damages in England was severely limited, and that “[i]t is time we follow these overdue developments”). Indeed, Justice Brennan’s response characterized the Powell opinion as “hold[ing] that an award of punitive damages would be unconstitutional as a denial of due process.” MP, opinion of Brennan, J. (Jan. 17, 1985), at 15 n.5. But however much he was influenced by notions of due process, Justice Powell’s conclusion necessarily had a substantial First Amendment component. It is difficult to believe that Justice Powell meant to suggest that all punitive damage awards are unconstitutional, a conclusion that would mark a truly revolutionary change in the law. To the contrary, it was “the absence of any legitimate state interest in providing windfalls to libel plaintiffs”—an absence that was derived from Gertz’s First Amendment-based conclusions about the primacy of the state interest in compensation—that pushed Justice Powell to the conclusion that punitive damages should not be recoverable “in a libel action.” MP, opinion of Powell, J. (Nov. 23, 1984), at 14.
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to presumed damages, however; because “their purpose is to compensate, not
to punish or deter.”\textsuperscript{125} Justice Powell would have held them available “even
without proof of actual malice.”\textsuperscript{126}

On December 14, Justice Brennan responded to the Powell dissent. He
again did not expressly declare that punitive damages either should or should
not be unconstitutional in libel cases. But he also did not explicitly disagree
with Justice Powell on that point. To the contrary, he asserted only that Justice
Powell was wrong in distinguishing between punitive and presumed damages,
declaring that the dissent’s “rationale for prohibiting punitive damages in libel
cases is the same as that relied upon by the Court in \textit{Gertz} for prohibiting pre-
sumed damages in the absence of a showing of actual malice.”\textsuperscript{127}

But this was as far as Justice Brennan was able to go in reformulating libel
law because he again was unable to attract a fifth vote for reversal. On De-
cember 20, 1984, Chief Justice Burger directed a note to Justice Powell indi-
cating that he and Justice Rehnquist were “not ready to drop punitive dam-
ages,” that he had “trouble with the media, non-media” distinction, and that he
would “await further writing.”\textsuperscript{128} He followed this with another note on De-
cember 27, 1984, reiterating that he could not “accept either the media-
nonmedia dichotomy or the abolition of punitive damages in libel cases, espe-
cially the latter. So, very likely I will agree with no one except myself.”\textsuperscript{129}
And more troubling from Justice Brennan’s perspective, Justice White — the
putative fifth vote for reversal — sent a note of his own on December 26,
1984, stating that “[i]t will be some time before I am ready in this case.”\textsuperscript{130} A
month later, on January 25, 1985, Justice White dropped his other shoe,
circulating a cranky dissent that took issue with the entire enterprise begun in
\textit{New York Times}, maintained that \textit{Gertz} should be overruled, and concluded
that the \textit{Gertz} rule should in any event be inapplicable when the speech at issue
does not involve a matter of public importance.\textsuperscript{131}

\textsuperscript{125} \textit{Id.} at 14. Curiously, Justice Powell did not read Justice Brennan’s opinion altogether to pre-
clude the award of punitive damages; Justice Powell took the majority to task because, “by allowing
punitive damages in some libel cases, the Court neglects important constitutional interests that can be
protected without harming the State’s legitimate interest in compensation.” \textit{Id.} at 16.

\textsuperscript{126} \textit{Id.} at 16.

\textsuperscript{127} MP, opinion of Brennan, J. (Dec. 14, 1984), at 15 n.5. Justice Powell in turn responded, justi-
fying his distinction between presumed and punitive damages. He acknowledged that his opinion for
the Court in \textit{Gertz} “did not distinguish between presumed and punitive damages in libel suits involving
public expression.” But he explained that he had changed his view “[u]pon the more mature reflection
required by the Court’s constitutionalization of the entire law of libel.” MP, opinion of Powell, J. (Dec.
21, 1984), at 15 n. 15. In his view, “[t]he purpose of presumed damages is essentially compensatory”
and “[t]his compensatory rationale for allowing presumed damages is wholly different from allowing a
private litigant to punish a defendant by awarding punitive damages without due process of any kind.”
\textit{Id.} at 15-16 n.15.

\textsuperscript{128} MP, letter of Burger, C.J. (Dec. 20, 1984). As the Marshall papers do not include any docu-
mentation stating Justice Rehnquist’s views, it is not clear how the Chief Justice became aware of his
position on punitive damages.

\textsuperscript{129} MP, letter of Burger, C.J. (Dec. 27, 1984).

\textsuperscript{130} MP, letter of White, J. (Dec. 26, 1984). Justice White went on, perhaps with some irony, to
end his note to Justice Brennan with a cheerful “Happy New Year.” \textit{Id.}
olve a matter of public importance.  

At this point, with only Chief Justice Burger’s vote still in play (Justices Rehnquist and O’Connor were presumptive votes to reverse, given the position they had taken the previous spring), Justice Powell seemingly saw his opportunity to take the majority away from Justice Brennan. On February 22, 1985, Justice Powell circulated a redraft of his dissent that directly addressed the Chief Justice’s two stated concerns: his hostility to drawing a distinction between media and non-media defendants, and his opposition to eliminating punitive damages. This new draft eliminated both any reference to the “non-media” status of the defendant and all suggestions that the two categories of defendant should receive different treatment.

Most notably for present purposes, Justice Powell also wholly eliminated his lengthy attack on punitive damages. He replaced it with the following equivocal statement:

[T]he merit of imposing punitive and presumed damages reasonably may be doubted in some circumstances. In Gertz, we found that the state interest in awarding these particular remedies was not “substantial” in view of their effect on speech at the core of First Amendment concerns. But this case concerns speech of significantly less constitutional interest. The state interest in these remedies need not be compelling to support the incidental effect they may have on this kind of protected speech.

Justice Powell added that

[there is language in Gertz that can be read broadly to the effect that presumed and punitive damages have no place in the law of defamation. It is necessary, however, to view this language in the context of the only issue before the Court in that case. The suit was brought by a private person for a publicly circulated libel on an issue of general concern. It was the public nature of the libel and its circulation that primarily led the Court to limit recovery to “actual injury.” Presumed and punitive damages were deemed — for the reasons first articulated in New York Times — to threaten public expression on matters of general concern. Id., at 349-350. No such threat is present when one party privately libels another by stating that it has filed for bankruptcy.]

Justice Powell therefore concluded that common law rules should not be

131. MP, opinion of White, J. (Jan. 25, 1985), at 3-10. Justice White indicated that he had “become convinced that the Court struck an improvident balance in the New York Times case between the public’s interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.” Id. at 3. He did suggest, however, that, “[i]n New York Times, instead of escalating the plaintiff’s burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might be scrutinized as Justice Harlan suggested in Rosenbloom, 403 U.S., at 77, or entirely forbidden as JUSTICE POWELL would have it in this case.” Id. at 7. This observation, shorn of its reference to Justice Powell, survived in his published opinion. See note 55, supra.

132. MP, opinion of Powell, J. (Feb. 22, 1985), at 1, 3-4, 6-11.

133. Id. at 10-11 (footnote omitted).

134. Id. at 10-11 n.12.
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disturbed in the factual setting of Dun & Bradstreet. These changes in his opinion had the desired effect, at least in part; Justice O'Connor joined the re-draft on the day that it was circulated and Justice Rehnquist did the same on March 18.

In a final attempt to preserve his majority — presumably, by attracting the vote of Chief Justice Burger, the only member of the Court who was not yet committed — Justice Brennan circulated a new and substantially rewritten draft majority opinion on March 20, 1985. In addition to adding a vigorous defense of New York Times that was aimed at Justice White and a forceful rejection of the media/non-media distinction that troubled Chief Justice Burger, the revision deleted the opinion’s sharpest jabs at punitive damages, substituting language that appeared to allow punitives on a showing of actual malice. But this effort failed. On April 10 Chief Justice Burger circulated a note indicating (somewhat inconsistently) that he would join both the Powell and the White opinions. Shortly thereafter the Chief Justice wrote to Powell, “hereby reassign[ing] the...case to you with all the ‘pluses’ and ‘minuses’ that go with it!”

On May 10, 1985, Justice Powell circulated a revised opinion that now represented the views of a plurality of the Court. Although the draft was substantially modified in form to reflect its new status as the Court’s principal opinion, in most respects its substance reflected the earlier Powell dissent, turning on the reduced value of speech that did not involve matters of public concern. In one significant area, however, the new opinion did mark a change in course: it again weakened its critique of punitive damages. It thus eliminated both the observation that “the merit of imposing punitive and presumed damages may reasonably be doubted in some circumstances” and the lengthy argument that Gertz, read in context, stands for the proposition that “presumed and punitive damages have no place in the law of defamation” when public speech is at is-

135. Id. at 1.
139. Id. at 22-26.
140. Id. at 18 (“we have held that the Constitution requires actual malice as a prerequisite to presumed and punitive damages because even where the central concerns of New York Times v. Sullivan are not present the First Amendment demands protection for a vast range of expression”). See id. at 16 (quoting Justice Harlan’s opinion in Rosenbloom that “the First Amendment should be construed to limit the imposition of punitive damages to those situations in which actual malice is proved”).
Instead, the redraft added the affirmative and emphatic declaration that the state interest in awarding presumed and punitive damages "is substantial relative to the incidental effect these remedies may have on speech of significantly less constitutional interest." The reason for this change is unclear and is not addressed in the Marshall papers; perhaps it was done to attract the Chief Justice, who wanted to preserve punitive damages and who still had not formally joined the opinion.

There was one more round of changes. Justice Brennan converted his last draft majority opinion into a dissent. Chief Justice Burger decided not to join either the Powell or the White opinions after all, circulating a brief concurrence in the judgment that would have confined Gertz to cases involving speech on matters of public concern. And Justice Powell modified his opinion to respond to Justice Brennan. He maintained that Gertz's restrictions on punitive damages applied only "in cases involving public speech." And addressing Justice Brennan's statement that Gertz had labeled the award of punitive damages "irrelevant" to the legitimate state interest in compensation, Justice Powell declared that the state interest in awarding punitives "is not substantial relative to the First Amendment interest in public speech." With minor stylistic changes, the opinions were published in this form.

These documents are more than a revealing backstage look at the Court's decision-making process; they also show that the prospect of eliminating punitive damages in libel cases was a very real one. Four Justices (Brennan, Marshall, Blackmun, and Stevens) - writing in a case involving nonpublic speech about a private party, the least favorable setting for libel defendants — expressed the greatest degree of doubt about the legitimacy of punitive awards. A fifth Justice (Powell) explicitly advocated elimination of punitive damages in all libel cases. And two more Justices (Rehnquist and O'Connor) signed on to an opinion (Powell's draft dissent of February 22, 1985) indicating that punitive damages "have no place in the law of defamation" when the speech at issue involves matters of public concern. Indeed, it appears that the various opinions' criticisms of punitive damages were dropped largely as a matter of

144. Compare id. at 10 with MP, opinion of Powell, J. (Feb. 22, 1985), at 10-11 & n.12.
145. MP, opinion of Powell, J. (May 10, 1985), at 10 (emphasis in original).
146. MP, opinion of Brennan, J. (May 23, 1985). Although the two opinions are very similar in substance, the dissent made one interesting linguistic change. Justice Brennan's draft majority opinion stated affirmatively that "we have held that the Constitution requires actual malice as a prerequisite to presumed and punitive damages." MP, opinion of Brennan, J. (March 20, 1985), at 18. The dissent eliminated that language and returned to the negative formulation of Gertz, stating that the Constitution "proscribes the award of presumed and punitive damages on less than a showing of actual malice." MP, opinion of Brennan, J. (May 23, 1985), at 7. This change eliminated the suggestion that the Court had expressly permitted punitive awards.
148. MP, opinion of Powell, J. (June 19, 1985), at 7 n.4 (emphasis in original).
149. Id. at 11 n.7 (emphasis in original).
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happenstance, as Justices Brennan and Powell vied for the vote of Chief Justice Burger. By the time the opinions took their final form in the Court’s end-of-term crunch, the majority’s hostility to punitive damages had been obscured.

Of course, none of this proves that the current Justices would be as receptive to a challenge to punitive damages as was a silent majority of the Burger Court. But the curious history of Dun & Bradstreet offers a sort of empirical proof that, at a minimum, the argument would not be rejected as absurd.

A More Favorable Climate

That is particularly so because the environment for such a challenge is in several respects more favorable now than it was at the time of the Dun & Bradstreet decision. First, in the intervening years the Court has been exposed repeatedly to examples of enormous and irrational punitive awards outside of the libel context, a development that eventually led the Court to constitutionalize the entire field of punitive damages. It did so first in Honda Motor Co. v. Oberg, in which it recognized a procedural due process right to judicial review of the size of punitive judgments, and then in BMW of North America, Inc. v. Gore, where it imposed substantive due process-based limits on the permissible size of punitive awards. In light of this history, the Court has surely come to have a greater appreciation for the ways in which, as it explained in Honda, “[p]unitive damages pose an acute danger of arbitrary deprivation of property.” Indeed, precluding the award of punitive damages in public-figure libel cases — which would involve a fairly limited step in an area that already is comprehensively governed by constitutional rules — would be far less dramatic than the decision in BMW, which imposed a constitutional overlay on an entirely new area of state activity.

Second, the nature of punitive awards in libel cases has changed since Gertz, and even since Dun & Bradstreet: judgments against the press have become substantially larger. Writing contemporaneously with Dun & Bradstreet, then-Judge Bork — even in his pre-Slouching Towards Gomorrah days, no patsy for the recognition of new constitutional rights — observed that Sullivan seems not to have provided in full measure the protection for the marketplace of ideas that it was designed to do. Instead, in the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damage awards, has threatened to impose self-censorship on the press which can as easily inhibit debate and criticism as would overt governmental regula-

153. 512 U.S. at 432.
tion that the first amendment most certainly would not permit.\textsuperscript{154}

Commentators have confirmed this conclusion with more recent empirical findings, concluding that punitive judgments “continue to escalate alarmingly.”\textsuperscript{155}

Indeed, while the Court has noted its “concern about punitive damages that ‘run wild’” outside the First Amendment setting,\textsuperscript{156} defamation verdicts have outpaced increases in damages awards returned in areas of nonconstitutional tort litigation.\textsuperscript{157} Libel verdicts in the early 1980s, for example, were three times greater than awards in medical malpractice and product liability actions.\textsuperscript{158} The most recent data indicate that during the 1990-1998 period the average punitive libel award was $3,378,926 and the median was $300,000\textsuperscript{159} — amounts that are, respectively, double and 25% larger than the corresponding figures ($1,647,958 and $250,000) for the 1980-1989 period.\textsuperscript{160} For smaller publications, these are substantial sums.

This change may well move the Court, as it did Judge Bork. Justice Harlan, for one, several times suggested that the punitive damages question might have to be revisited if the rules applied by the Court failed to provide adequate protection for free expression because “when matters are in flux...it is more important to rethink past conclusions than to adhere to them without question.”\textsuperscript{161} Indeed, the Court’s decisions in this area, from \textit{Butts} to \textit{Dun & Bradstreet}, have witnessed a remarkable series of vote switches by the Justices.\textsuperscript{162} And as one knowledgeable commentator suggested even before \textit{Dun & Bradstreet}, “[b]y now the evidence is surely in. Experience in the [years] since \textit{Gertz} has made dramatically clear the threat of punitive damages awarded at a jury’s whim.”\textsuperscript{163}

Third, changes in the composition of the Court since the decision in \textit{Dun &
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*Bradstreet* have produced a group of Justices who are, generally speaking, open to First Amendment claims. Of the three Justices who remain from *Dun & Bradstreet*, Justice Stevens joined Justice Brennan’s opinion, while Justices Rehnquist and O’Connor were (at least at one point) prepared to sign an opinion that seemingly disapproved the award of punitive damages in public speech cases. In addition, in the Court’s one post-*Dun & Bradstreet* decision addressing the substance of a libel plaintiff’s burden, Justice O’Connor sided with the defendant: writing for the Court in *Philadelphia Newspapers, Inc. v. Hepps*, she concluded that a plaintiff alleging defamation must prove the falsity of speech about matters of public concern and may not rely on the common-law presumption that defamatory statements are false. She explained that a contrary rule would lead to fear of unjustified liability and produce a “‘chilling’ effect [that] would be antithetical to the First Amendment’s protection of true speech on matters of public concern,” resulting “‘in a deterrence of speech which the Constitution makes free.’” These are the very considerations that would be advanced in a challenge to the constitutionality of punitive damages in public-figure libel cases.

Of course, Justices Brennan, Marshall, Blackmun, and Powell — the principal advocates of the notion that punitive damages are insupportable in libel cases — are gone from the Court. But most of the Court’s newer Justices have displayed a degree of sympathy for First Amendment claims. Most suggestive are the views expressed by Justice Ginsburg. As noted above, while on the D.C. Circuit she joined then-Judge Bork’s observations that juries do not pay proper attention to First Amendment limits and that *New York Times* is not providing adequate protection to libel defendants. But Judges Bork and Ginsburg went further. They observed (with some prescience where Judge Bork himself was concerned) that “[t]hose who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, even wounding assessments.” They accordingly concluded that, “in order to protect a vigorous marketplace in political ideas and contentions, we ought to accept the proposition that those who place themselves in a political arena must accept a degree of derogation that others do not.” And Judges Bork and Ginsburg expressed concern that “the area in which legal doctrine is currently least adequate to preserve press freedom is the area of defamation law....Thus, we have a judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment.”

Judge Ginsburg expanded on these views in a subsequent D.C. Circuit libel cases:

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165. Id. at 777 (citation omitted).
166. Olman, 750 F.2d at 993.
167. Id. at 1002.
168. Id. at 995.
case. Noting that jury confusion and hostility to libel defendants could lead to unwarranted liability, she opined that trial judges must take special care in giving instructions regarding libel. She explained:

*New York Times v. Sullivan* presents a standard that may slip from the grasp of lay triers unfamiliar with legal concepts and perhaps unsympathetic to publishers who print statements shown to be false. Careful effort by judges to make the legal rules genuinely accessible to juries may reduce some of the turbulence in this unsettling area of the law. 169

While this does not speak directly to the punitive damages question discussed here, it does demonstrate sensitivity to the considerations that would underlie an assault on punitive awards.

The other Justices have not yet had occasion to address the First Amendment issues posed by libel awards. 170 But without embarking on a comprehensive review of the Court’s First Amendment jurisprudence that goes well beyond the scope of this essay, it may be noted that Justices Kennedy, Souter, and Breyer have displayed a willingness to endorse expansive readings of the First Amendment in a wide variety of contexts. Indeed, even

169. *Tavoulareas*, 817 F.2d at 807 (Ginsburg, J., concurring).

170. Except for Justice Scalia, who demonstrated an unsurprising hostility to claims for expansive libel protections while on the D.C. Circuit. See *Olman*, 750 F.2d at 1036 (Scalia, J., dissenting) (contending that “[e]xisting doctrine provides ample protection against the entire list of horribles supposedly confronting the defenseless modern publicist” and rejecting Judge Bork’s reference to “constitutional ‘evolution’” in this context).


172. Like Justice Kennedy, Justice Souter has been a generally reliable vote in favor of First Amendment claims in cases where the Court is divided. He joined the same opinions as Justice Kennedy in *Board of County Commissioners v. Umbehr*, *O’Hare Truck Service, Inc. v. City of Northlake*, *McIntyre v. Ohio Election Comm’n*, *United States v. National Treasury Employees Union*, *Ibanez v. Florida Dept. of Business & Professional Regulation*, *Edenfield v. Fane*, *Alexander v. United States*, *R.A.V. v. City of St. Paul*, and *Forsyth County v. Nationalist Movement*. In addition, Justice Souter endorsed expansive approaches to the First Amendment in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521
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of the First Amendment in a wide variety of contexts. Indeed, even Justices Scalia and Thomas, surely the members of the Court who are least likely to find that a settled common-law practice violates the Constitution, have offered some surprisingly broad readings of the First Amendment. Needless to say, all of these decisions are so far afield from the issue discussed here that it is impossible to predict how this group of Justices would resolve the constitutionality of punitive awards in public-figure libel actions. But the votes in these cases do offer some reason to believe that, at the least, a substantial majority of Justices would not reflexively reject a challenge to such awards.

IV. CONCLUSION

The salient characteristics of punitive damages litigation in public-figure libel cases are beyond reasonable dispute. There can be no doubt that jurors who misunderstand or ignore their instructions will, with some frequency, return punitive awards that are either excessive or wholly unwarranted. There is no denying that the elasticity of punitive damages permits juries to award enormous judgments that are not rationally tied either to objective elements of the defendant's conduct or to the size of the plaintiff's injury. It is apparent that some juries will use this power to punish distasteful views and unpopular speakers, a danger that is most acute in cases involving public speech about (often popular) public figures. And human nature being what it is, it is inevitable that this prospect will make speakers more cautious about what they are willing to say lest they face unpredictable and potentially ruinous liability — a prospect that is not entirely vitiated by the availability of limited judicial re-

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173. Although Justice Breyer does not have a long track record on the Court, he is shaping up as a generally reliable vote for expansive First Amendment positions. He voted with Justice Kennedy in Reno v. ACLU, Board of County Commissioners v. Umbehr, O'Hare Truck Service, Inc. v. City of Northlake, McIntyre v. Ohio Board of Elections, and United States v. National Treasury Employees Union. Then-Judge Breyer joined two unexceptional opinions finding for a defamation or libel plaintiff while on the First Circuit, but neither sheds much light on his approach to the First Amendment. See Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir. 1992); Geiger v. Dell Publishing Co., 719 F.2d 515 (1st Cir. 1983).

174. Both joined the Court's opinion in Reno v. ACLU and Justice Souter's dissent in Glickman v. Wileman Bros. & Elliott, Inc. Both also joined the dissenting opinion in Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997), which argued that deference to Congress did not require rejection of a First Amendment challenge to cable regulation. In addition, Justice Scalia joined the Court's (or plurality) opinions in Ibanez v. Florida Dept. of Business & Professional Regulation, Edenfield v. Fane, and Simon & Schuster, Inc. v. New York State Crime Victims Board, wrote the Court's opinion in R.A.V. v. City of St. Paul, and dissented in Austin v. Michigan Secretary of State. Justice Thomas, meanwhile, has taken an absolutist approach that would subject many regulations of commercial speech to strict scrutiny. See, e.g., 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (opinion of Thomas, J.). But having said all of this, the prospect that either of these Justices actually would vote to invalidate punitive damages in a category of libel cases might charitably be characterized as remote.
view.

When the issue is stated in these (admittedly loaded) terms, the question whether punitive awards in public-figure libel cases are constitutionally problematic answers itself. Since New York Times, the Court's First Amendment libel doctrine has been premised on the notion that an area of "breathing space" for speakers must be maintained. As a consequence, the zeal with which false statements are challenged must be tempered by rules that prevent fear of liability from discouraging valuable public debate, a consideration that is most powerful when the speech is on a matter of public interest and concerns a public figure. Against this background, the award of punitive damages — which constitute a windfall for the plaintiff and avowedly are intended to discourage future speech — should be insupportable.

Despite the importance of the issue, it has been fifteen years since the Supreme Court last addressed the rules governing damages in libel actions (in Dun & Bradstreet), more than twenty-five years since it considered libel liability rules in a case involving speech on matters of public concern (in Gertz), and more than thirty years since it faced the issue in a case involving a public figure (in the since-discredited Butts). But while the Court's doctrine has not changed since Dun & Bradstreet, the world certainly has: the dangers of punitive damages have become more apparent as a general matter, and the press in particular has been buffeted by escalating punitive awards. How the Court would react to these changes were it presented with the issue is no sure thing. Libel defendants, however, may find some hope in a noted jurist's rhetorical question, which asked "if, over time, the libel action becomes a threat to the central meaning of the first amendment, why should judges not adjust their doctrines?"175 It is noteworthy that the speaker posing that question was not Justice Brennan, Marshall, or Blackmun; it was Judge Bork. This essay suggests that, so far as punitive awards in public-figure libel cases are concerned, it is time for the Supreme Court to answer Judge Bork's question.

175. Ollman, 750 F.2d at 995 (Bork, J., concurring).