Winter 1992

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A Matter of "'Governing' Importance": Providing Business Defamation and Product Disparagement Defendants Full First Amendment Protection

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In my view, "the people need free speech" because they have decided, in adopting, maintaining and interpreting their Constitution, to govern themselves rather than to be governed by others. And, in order to make that self-government a reality rather than an illusion, in order that it may become as wise and efficient as its responsibilities require, the judgment-making of the people must be self-educated in the ways of freedom.1

INTRODUCTION

In 1964, the centuries-old body of defamation law collided with the first amendment.2 This constitutionalization of defamation law, heralded in 1964 as an "'occasion for dancing in the streets,'"3 is today the subject of an active reform movement.4 Although defamation scholars do not agree on the specific changes, most agree that an overhaul is necessary.5 Proposals

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1. Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 263 (quoting Kalven, Metaphysics of the Law of Obscenity, 1960 SUP. CT. REV. 1, 16). Meiklejohn argues that the first amendment's role is to protect speech of "'governing' importance." See id. at 262. This Note argues that under Meiklejohnian theory, criticism of products, businesses, and business figures should receive full first amendment protection because that speech is of "'governing' importance." For a discussion of Meiklejohn's theory of the purpose of the first amendment, see infra notes 115-23 and accompanying text.


Id.; see also Halpern, Values and Value: An Essay on Libel Reform, 47 WASH. & LEE L. REV. 227, 251 (1990) ("There is no real disagreement over either the need to remove the complicating ornamentation from the structure of the law of defamation or the need to provide fairness to the injured plaintiff and protection for the innocently erroneous defendant.")
to inject order into the "chaos" of defamation law include creating a declaratory judgment of truth for plaintiffs, eliminating presumed damages, instituting bifurcated trials and expedited proceedings, and narrowing the category of defamatory speech which receives first amendment protection.

Despite the vigorous reform movement, the plight of one category of defamation litigants remains unaddressed by the wave of proposals: defendants sued for defaming businesses and business figures and for disparaging products. This category of speakers has not only been overlooked by the reformers who seek to inject rationality into defamation law, but in one instance such speakers have been subject to attack by the producers of the products which they criticize. Reform efforts should focus on business

6. Halpern, supra note 5, at 229.
8. See Halpern, supra note 5, at 245 ("[V]irtually all current reform proposals support eliminating presumed damages.").
10. Logan, Tort Law and the Central Meaning of the First Amendment, 51 U. Pitt. L. Rev. 493 (1990). "The current state of affairs is unacceptable. ... A single constitutional standard is needed to unify the various causes of action that allow the recovery of damages for the psychic injury caused by speech ... ." Id. at 496. Logan proposes limiting first amendment protection to political speech: "[T]he Court should confer upon political speech an absolute immunity from any tort action for psychic damages, while committing to the law of the states the remaining claims." Id. at 574.
11. A defamatory statement "tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided." Prosser and Keeton on the Law of Torts § 111, at 773 (5th ed. 1984) [hereinafter Prosser & Keeton]. A broader definition identifies a statement as defamatory if it "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Id. at 774 (quoting Restatement (Second) of Torts § 559 comment e (1977)).
A corporation can recover in defamation for statements which cast aspersions on its "honesty, credit, efficiency or other business character." Id. at 779 (footnotes omitted). For a comparison of business reputation and personal reputation, see infra notes 88-108 and accompanying text.
12. Statements which cast aspersions on a product may also be termed "injurious falsehood," "commercial disparagement," "slander of goods," or "trade libel." Prosser & Keeton, supra note 11, § 128, at 963. "The [injurious falsehood] principle has been applied . . . to statements injurious to the plaintiff's business but casting no reflection upon either his person or property, such as the assertion that he has died or gone out of business, or defamatory words concerning his employees." Id. (footnotes omitted).
13. In March, 1991, the Colorado Senate passed a bill that would provide farmers treble damages for disparagements of their produce. Coates, Colorado Bill Cuts to Core of Produce-Bashing, Chicago Tribune, Mar. 19, 1991, at 1, col. 5. The bill was passed by the Colorado House of Representatives in April, 1991. Colorado 'Veggie' Bill Sent to Governor, Chicago Tribune, Apr. 4, 1991, at 18, col. 1. The bill was introduced in response to the damages apple farmers suffered when environmentalists held a press conference about the dangers of Alar, a preservative used on apples. Coates, supra. The Alar danger was later proved to be overstated, but the losses to the apple industry were reportedly $130-$700 million in 1989. Id.
Ridiculed by consumer groups and the national media, the bill was vetoed by Colorado Governor Roy Romer on April 29, 1991. Colorado's Anti-Libel 'Veggie Bill' Wilts Under Governor's Veto, Chicago Tribune, Apr. 30, 1991, at 3, col. 1. "I am aware of the problems that unsubstantiated rumors can cause in relation to food products," Romer said. But, 'constitutional protection gives individuals, as well as consumer groups and researchers the guaranteed right to raise legitimate questions about food safety and quality.'" Id.
defamation and product disparagement to consider the rationality of the distinction between the torts and their different recovery requirements. Like many parts of defamation law, business defamation and product disparagement are in need of a reorganization.14 Such a restructuring must recognize the value of speech critical of businesses, business figures, and products by reducing uncertainty for litigants through uniform recovery requirements.

Confusion and inconsistency reign in business defamation and product disparagement because false statements critical of a business's products and those critical of its general operations may give rise to separate torts held to protect distinct interests.15 Traditionally, business plaintiffs who attempted to recover for false allegations about their products faced more difficult recovery requirements than business plaintiffs who alleged false statements about their general operations or trade practice.16 The latter received the benefit of the common law of defamation; the former, the more stringent, speech-protective requirements of disparagement. Whether the plaintiff is an individual defamed by statements about activities performed in her business capacity or a corporation defamed by statements about its operations, the courts regard the harm as analogous to the harm which occurs when an individual's personal reputation is defamed about some aspect of her private life.17 In contrast, the courts categorize the harm that occurs when a product is disparaged as an injury to the business's economic interest.


   In the context of personal defamation, the courts have made progress toward resolving the conflict between the protection of the individual's reputation and the first amendment concern with safeguarding free and open debate. However, the laws of corporate defamation and product disparagement have not enjoyed the same judicial attention aimed at the balancing of these competing interests. [omitted].

   Id. (footnotes omitted).


16. See Flotech, Inc. v. E.I. Du Pont de Nemours Co., 627 F. Supp. 358 (D. Mass. 1985), aff'd, 814 F.2d 775 (1st Cir. 1987). A product disparagement suit shares a defamation action's requirements of proof of publication and of the disparaging or defamatory nature of the statements involved. At common law a disparagement cause of action also contains the requirement that the plaintiff prove falsity and special damages. Id. To prove special damages, a plaintiff must show monetary losses caused by the disparaging statement. In contrast, defamation plaintiffs under the common law are not required to prove falsity but are required to prove special damages only in certain instances of slander. PROSSER & KEETON, supra note 11, §§ 112-13.

17. See, e.g., Finnish Temperance Soc'y Sovittaja v. Publishing Co., 238 Mass. 345, 130 N.E. 845 (1921) (A corporation may have a reputation as valuable as a natural person's which may be injured by a libel in the same way.)
Many statements can be classified as either product disparagement or business defamation. False statements about a business's products reflect badly on its general image and community standing when consumers identify the product with the producer. "It might be possible to imply some accusation of personal inefficiency or incompetence ... in nearly every imputation directed against a business or its product."\(^{18}\) Courts and commentators acknowledge an area of overlap between business defamation and product disparagement.\(^{19}\) Before the constitutionalization of defamation law, the gray area between the torts may have chilled speech critical of products because plaintiffs could manipulate some product disparagements into reputational injuries to receive the benefit of common law defamation's less stringent recovery requirements.

The application of the first amendment to defamation law in 1964 reduced some of the inconsistencies in recovery requirements between the torts. In some defamation actions, a plaintiff's prima facie case now closely resembles that of a disparagement plaintiff.\(^{20}\) Defendants sued for defaming business plaintiffs are not guaranteed full first amendment protection, however; the constitutional law of defamation has evolved into a case-by-case balancing analysis which still presents uncertainty for defendants in business defamation cases. The common law of defamation may apply in some defamation actions,\(^{21}\) and if the business official or entity is deemed a private figure and its reputational interest is deemed valuable, then recovery for business defamation may still be significantly easier than for product disparagement.\(^{22}\)

The unpredictability of the Supreme Court's balancing approach and the uncertainty surrounding a business plaintiff's status as a public figure\(^{23}\) create an atmosphere which discourages speech critical of a business's agents and operations. Arguably, a similar atmosphere is created for statements critical of products because such statements may be classified as defamatory,\(^{24}\) subjecting the statements to lower proof requirements than those of disparagement.

\(^{18}\) PROSSER & KEETON, supra note 11, § 128, at 965 (footnote omitted).

\(^{19}\) See Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 516 A.2d 220 (1986); see also PROSSER & KEETON, supra note 11, § 128, at 965 ("The difficulty in the distinction between the personal aspersion and the commercial disparagement lies in the fact that many statements effectuate both harms."). Courts have expressly declined to find statements as both disparaging and defamatory; "yet it is not always easy to find the purported distinction in the actual facts." Id. (footnote omitted).

\(^{20}\) For an analysis of the evolution of the constitutional law of defamation and a discussion of its effect on business defamation, see infra notes 50-74 and accompanying text.


\(^{22}\) Greenmoss, 472 U.S. 749.

\(^{23}\) See id.

\(^{24}\) See United States Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 914 (3d
Libel reformers should direct their efforts toward business defamation and product disparagement because the current atmosphere is likely to deter valuable criticism of products, businesses, and business figures. An atmosphere hostile to the free flow of commercial information hinders effective resource allocation by denying consumers all available information about products and businesses.\textsuperscript{25} Speech about products and businesses is of central importance in today's society. Consumers make countless spending and investing decisions in their lives. Speech about products and businesses should receive full first amendment protection to ensure that these daily decisions are informed. This heightened protection would create an atmosphere which would encourage investigation and exposure of product defects and unethical business practices.

Defamation law's plaintiff-focused balancing approach has no place in the law of business disparagement given the strong public need to obtain information critical of businesses and their products and given the absence in the business setting of the state's traditional interest in protecting an individual's dignity and self-esteem. To eliminate the confusion surrounding the overlap of business defamation and product disparagement, to finally acknowledge that disparagement and business defamation protect the same interest, and to encourage the free flow of information about products and businesses, business defamation should be removed from defamation law and should instead be merged with disparagement. This general category of business disparagement should then receive the highest level of first amendment protection.

To promote the free flow of criticism of products, businesses, and business figures, this Note proposes a major overhaul in the way courts approach tort liability for statements that have been traditionally classified as business defamation and product disparagement. Part I discusses the historical distinctions between the torts, their different elements at common law, and the uncertain effect of the constitutionalization of defamation law on the Cir.), \textit{cert. denied}, 111 S. Ct. 58 (1990). For a discussion of United States Healthcare, see infra notes 79-83 and accompanying text. \textit{But see} Blatty v. New York Times Co., 42 Cal. 3d 1033, 1045, 728 P.2d 1177, 1184, 232 Cal. Rptr. 542, 549 (1986) (stating that defamation actions are more favorable for plaintiffs than disparagement), \textit{cert. denied}, 485 U.S. 934 (1988).

\textsuperscript{25} In the arguably analogous area of political decision making, Alexander Meiklejohn has argued that the first amendment's role is to provide the citizen all information necessary for governing. Restrictions on information lead to ineffective decision making: "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good." A. MEIKLEJOHN, \textit{FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT} 26 (1948).

For a discussion of Meiklejohn's first amendment theory and an argument for extending it to speech about businesses, business figures, and products, see infra notes 115-23 and accompanying text.
business plaintiff’s defamation case. Part II considers the logic in eliminating
the distinction between the torts given the identity of the business plaintiff’s
interest in avoiding defamatory and disparaging speech, the illogic in anal-
ogizing business and personal reputation, and the high value of the free
flow of commercial information to consumers. Given that statements which
defame a business or business figure’s operations should receive the same
treatment, Part III considers the standards of liability and the role of the
litigants in business disparagement.

I. THE GAP BETWEEN THE RECOVERY REQUIREMENTS
OF DISPARAGEMENT AND DEFAMATION

The different treatment of statements critical of a business or business
figure and statements critical of a business’s products is related to the values
placed on the actions throughout their historical development. Business
defamation developed under rules designed to protect an individual’s interest
in reputation, a value which is entrenched in history. Persons who were
slandered about their trade or professional performance could recover
without showing pecuniary loss; at common law defamation recovery was
relatively simple because reputation was valued so highly. Corporations
were beneficiaries of the relaxed recovery requirements since they were
deemed persons under the law. As legal persons, the courts invested busi-
nesses with reputations.

Product disparagement developed apart from defamation and received
less judicial deference than defamation law because throughout its history
its purpose has been to protect a producer’s pecuniary interest in the
salability of its goods, an interest which has been valued lower than an
individual’s interest in reputation. At common law, disparagement plaintiffs

1985) [hereinafter CARTER-RUCK].
28. See Smith, Disparagement of Property (pt. 1), 13 Colum. L. Rev. 13, 32 (1913)
(“Personal reputation is protected against impairment by language more effectually than
interests in property are protected against impairment by such method.”).
were not required to prove special damages in a libel action when the language used was
defamatory in itself and it injuriously and directly affected its credit. Id.; see also Morrison-
Jewell Filtration Co. v. Lingane, 19 R.I. 316, 33 A. 452 (1895) (A private corporation could
maintain a libel action for a publication concerning its trade or occupation in which it is
engaged.).
30. See, e.g., Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 162, 516 A.2d
220, 239 (1986) (Garibaldi, J., concurring) (“A commercial entity’s economic interest in the
reputation of its product is not nearly as significant as an individual’s interest in its or her
reputation.”); see also Zerpol Corp. v. DMP Corp., 561 F. Supp. 404 (E.D. Pa. 1983) (The
cause of action for product disparagement protects economic interests by providing a remedy
to one who suffers a pecuniary loss from slurs affecting the marketability of his goods.).
faced standards of proof which were more difficult than those of their defamation counterparts. Although statements held to be actionable as either disparagement or defamation are often indistinguishable, commentators have resisted a merger of the torts on the grounds that defamation protects "reputation" while disparagement only protects "economic" interests.\footnote{31}

A. The Differences Between Product Disparagement and Defamation

In their common law forms, product disparagement and defamation differ in their requirements for damages, fault, and falsity; in the availability of injunctive relief; and in the survival of a claim at the plaintiff's death. Both torts require proof (1) that the words refer to the plaintiff or her goods (the "of and concerning" requirement), (2) that the statement was communicated to a third person, and (3) that the words are of a defamatory or disparaging nature.\footnote{32} Compared to defamation, product disparagement places a higher burden on the plaintiff in the special damages requirement. In written defamation and certain types of oral defamation at common law,\footnote{33} a plaintiff is not required to prove damages because they are presumed.

The special damages element requires the product disparagement plaintiff to prove actual pecuniary loss flowing from the statement.\footnote{34} To prove this


\footnote{32. See, e.g., Williams v. Burns, 540 F. Supp. 1243 (D. Colo. 1982) (elements of product disparagement are falsity, publication, words derogatory to plaintiff's property or its quality, intent to cause or reasonable likelihood of harm, and special damages); accord Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164 (Colo. App. 1989), cert. denied, 803 P.2d 517 (Colo. 1991).}

\footnote{33. The recovery requirements for slander (oral defamation) vary according to the nature of the statement. The ordinary slander damages requirement of special damages is relaxed for statements falling into one of the four categories labelled "slander per se." Statements which impute criminal activity or loathsome diseases, which affect the plaintiff in her trade or business, and which impute unchastity are slander per se. Plaintiffs suing for such statements are not required to prove special damages; for all other slanderous statements, special damages must be proven. R. SMOLLA, supra note 27, § 7.05.}

\footnote{34. See Angio-Medical Corp. v. Eli Lilly & Co., 720 F. Supp. 269, 274 (S.D.N.Y. 1989). The damage must be a "natural and immediate consequence" of the product disparagement.}
element, plaintiffs often claim that the defendant's statement caused a loss of product sales or customers. In the past, courts strictly required plaintiffs to show more than a general decline in business and allowed recovery only upon proof of lost sales to specific, identified customers. The impracticability of identifying lost customers has caused the relaxation of this identification requirement in some cases. Some courts have approved a plaintiff's allegation of a general business loss when she demonstrates sufficient reasons why she cannot specifically identify the lost transactions. The plaintiff must prove that the communication played "a substantial part in inducing others not to deal with [her]."

In addition to their damage requirements, product disparagement and defamation differ in their requirements for proof of the defendant's fault. Under the common law of defamation, the plaintiff must show that the defendant was at least negligent in publishing the defamatory material; however, no proof of fault in reference to falsity or the harmful nature of the statement is required. In its early history, product disparagement was also a strict liability tort. For "injurious falsehood," which includes the

Id. Legal fees and executive time spent attacking the disparagement do not by themselves constitute special damages. Id.; see also RESTATEMENT (SECOND) OF TORTS, supra note 11, § 623A comment f. Compensatory damages in product disparagement actions have been "limited to harm to interests of the plaintiff having pecuniary value." Id. The pecuniary loss proof requirement is "a stricter rule than the constitutional restriction to 'actual damages' imposed by the Supreme Court for defamation in Gertz." Id.

For a discussion of the effect of the constitutionalization of defamation law on the damages requirement, see infra notes 61-68 and accompanying text.

35. PROSSER & KEETON, supra note 11, § 128, at 972; see also Anglo-Medical, 720 F. Supp. at 274 (plaintiff's claim fails when it does not plead a loss of customers); Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 8 (Minn. 1984) (a claim that but for the disparagement the business would have been more profitable is too speculative to prove special damages); Drug Research Corp. v. Curtis Publishing Co., 7 N.Y.2d 435, 441, 166 N.E.2d 319, 322, 199 N.Y.S.2d 33, 37 (1960) (persons who ceased to be customers or refused to buy product must be named to prove special damages).

36. PROSSER & KEETON, supra note 11, § 128, at 972-73. Such a plaintiff can recover damages when she eliminates other causes of her decline in sales. Teilhaber, 791 P.2d at 1164. In Teilhaber, the court held that to establish special damages a plaintiff in a product disparagement action must identify those persons who refused to purchase her product. If that showing is impossible, the plaintiff may recover by presenting sufficient evidence, using detailed statistics, to exclude the possibility that factors other than the disparagement caused the loss of general business. Id.

37. Hurbut v. Gulf Atlantic Life Ins. Co., 749 S.W.2d 762, 767 (Tex. 1987) (citing PROSSER & KEETON, supra note 11, § 128, at 971); see also Taquino v. Teledyne Monarch Rubber, 893 F.2d 1488, 1502 (5th Cir. 1990) (Although an intentional disparagement was sufficiently proved, plaintiff's failure to present evidence of a "nexis [sic] between [the disparagement] and any loss of business" was fatal to its case.).

38. See, e.g., Hurbut, 749 S.W.2d at 766 (comparing the elements of defamation with the "more stringent requirements" of disparagement).

39. See Wood, Disparagement of Title and Quality (pt. 2), 20 CAN. BAR REV. 430, 431 (1942). Wood cites cases from the nineteenth and early twentieth centuries which indicate that wrongful intent was not a necessary element of the disparagement action. Id. Disparagement
disparagement tort, the Second Restatement of Torts requires fault with respect to the harmfulness of the statement and its falsity; that is, to prove fault the plaintiff must show that the defendant published the statement when she should have recognized that it would cause harm, she did recognize that it would do so, or she intended to harm the plaintiff’s pecuniary interests. The Restatement also imposes an actual malice standard on the plaintiff’s proof of fault about the falsity of the statement.

The final factor contributing to the product disparagement plaintiff’s heavier burden is the falsity requirement. At common law falsity of the defamatory statement is presumed; a defendant may prevail on the grounds of truth only by affirmatively proving the accuracy of the words. In contrast, under product disparagement “the statement complained of is not *prima facie* untrue.” However, this distinction may have disappeared completely with the Supreme Court’s elimination of the presumption of falsity in most defamation cases.

Despite their heavier evidentiary burden, product disparagement plaintiffs, in some cases, possess a tool unavailable to defamation plaintiffs: an

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cases reflected confusion over the role of malice because of judicial sloppiness and the fluidity of the terminology. In disparagement of quality, a plaintiff was only required to prove malice in response to the defendant’s claim of a privilege. *Id.* at 435.

Prosser and Keeton argue that the imposition of strict liability in product disparagement “was . . . a continuation of the old unsound analogy to personal defamation, when the proper analogy is rather to cases of interference with contract or to fraud, neither of which involves any strict liability at all and both of which have narrowly restricted any liability even for negligence.” PROSSER & KEETON, supra note 11, § 128, at 969 (footnotes omitted).

40. RESTATMENT (SECOND) OF Torts, supra note 11, § 623A. The text of section 623A states the elements for proof of liability for publication of injurious falsehood:

One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if

(a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and

(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

*Id.* In *Dairy Stores*, Judge Garibaldi would have applied the Restatement’s actual malice requirement to product disparagement cases. 104 N.J. at 161, 516 A.2d at 239 (concurring). Other courts have also applied the standard in such cases. *E.g.*, Bose Corp. v. Consumers Union of United States, Inc., 508 F. Supp. 1249, 1271 (D. Mass. 1981) (actual malice standard applies in a product disparagement case when the plaintiff is a public figure), rev’d, 692 F. 2d 189 (1st Cir. 1982), aff’d, 466 U.S. 485 (1984). “[T]he factors underlying the *New York Times* privilege militate perhaps even more strongly in favor of the application of the actual malice standard in product disparagement cases than they do in personal defamation actions.” *Id.*

41. Wood, supra note 39, at 305 (emphasis in original). According to Wood, the falsity requirement in title disparagement actions was first established in 1882, and cases as early as 1895 required falsity in a disparagement of quality action. *Id.* at 306 & n.64.

injunction. Although courts have held that defamation cannot be enjoined because of the free speech implications, injunctive relief may be available in disparagement cases. Before a plaintiff may obtain an injunction against a disparaging communication, she must prove special damages. Whether injunctions are proper in product disparagement actions is unsettled. Courts which have analogized disparagement to unfair competition rather than defamation have allowed injunctions; other courts have applied the defamation rule to prohibit them.

A final distinction between the torts is the survival of the action after the plaintiff's death. A defamation action does not survive when the plaintiff dies because recovery after her death is considered a "windfall." In contrast, a product disparagement action survives because the policy reasons which require a defamation claim to abate at death do not apply in a disparagement action.

Since [a disparagement action] involves redress for actual pecuniary losses rather than simply violations of interest in character or reputation without measurable loss of economic advantage, redress cannot be considered a "windfall." [If] the tort caused pecuniary loss to the deceased plaintiff, then it caused a similar loss to his estate.

B. The Effect of the Constitutional Law of Defamation

The constitutionalization of defamation law, which began in 1964 with New York Times Co. v. Sullivan, has heightened the proof requirements for most defamation plaintiffs and has thus narrowed the differences

43. The rule against injunctions of defamation is firmly entrenched in the common law. See Near v. Minnesota, 283 U.S. 697 (1931). This rule has become firmly entrenched with the constitutionalization of defamation and the balancing of free speech against reputation.

44. PROSSER & KEETON, supra note 11, § 128, at 971.

45. See R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS 453 (1980) (Courts have been willing to enjoin disparagement in certain cases when they have viewed it as unfair competition); see also K. PLEVAN & M. SIROKY, ADVERTISING COMPLIANCE HANDBOOK 392 (1988) (If the defendant's activity constitutes unfair competition, "the speech loses its 'protected' character and may be enjoined since misleading commercial speech is beyond the protected reach of the first amendment.").

46. See Fisher & Huard, Note, Injurious Falsehood—An Expanding Tort, 33 GEO. L.J. 213, 223 (1945) (lamenting the analogy of disparagement to defamation because the focus on free speech restricts the use of injunctions); see also PROSSER & KEETON, supra note 11, § 128, at 928 (The awarding of an injunction depends on whether the court analogizes disparagement to defamation or to another tort.).

47. Menefee v. Columbia Broadcasting Sys., Inc., 458 Pa. 46, 51, 329 A.2d 216, 219 (1974). In Menefee, the court held: "'justice does not require a windfall to the plaintiff's heirs by way of compensation for an injury to him when they have suffered none of their own.'" Id. (quoting W. PROSSER, LAW OF TORTS § 126, at 901 (4th ed. 1971)).


49. Id.

between disparagement and defamation. In *New York Times*, the Supreme Court held that state defamation law is subject to first amendment limits when the defendant is a public official defamed about the performance of her official duties. To protect speech that is critical of public officials from the chilling effects of the common law of defamation, the first amendment requires proof 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."  
Citing the ""profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"" the Court reasoned that the actual malice standard is necessary to provide this important kind of speech the ""breathing space"" it needs.

The Court's cases after *New York Times* considered the reach of the first amendment in cases not involving public officials. In *Curtis Publishing Co. v. Butts*, a majority of the Court agreed that the actual malice standard should apply to criticism of ""public figures"" as well as to criticism of public officials. Following *Butts*, the Court formulated an analysis for determining the characteristics of a ""public figure."" In *Rosenbloom v. Metromedia, Inc.*, a plurality of the Court stated that the public interest in the event constituting the subject of the defamation is the test for whether actual malice is required. The plurality followed this approach because a public issue does not lose its importance merely because private individuals are involved; defendants who defame private individuals receive constitutional protection if the speech involved is a matter of public concern.

The *Rosenbloom* approach was short-lived, however. *Gertz v. Robert Welch, Inc.* rejected its issue-focused analysis in favor of a plaintiff-focused test. In *Gertz*, the Court weighed the state's interest in protecting the reputation of private persons and determined that the *Rosenbloom* plurality's issue-focused test unduly infringed upon the state's legitimate interest in protecting reputation. In addition, the public interest test required judges to perform the difficult task of valuing the subject of the defamation on a case-by-case basis. Striking a balance between the first amendment and state defamation law, the Court held that

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51. Id. at 279-80.
52. Id. at 270.
53. Id. at 271-72.
54. 388 U.S. 130 (1967).
55. 403 U.S. 29 (1971) (plurality).
56. The plurality said: ""We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."" Id. at 43-44.
58. The *Rosenbloom* test occasion[ed] the additional difficulty of forcing state and federal judges to decide
those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures... may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.99

In Gertz, the Court extended first amendment protection for defamation beyond public figure or public official cases; a finding that the plaintiff is a private figure is not the end of the constitutional analysis. In a break with the common law, the Court held that states can define their own liability standards for private figure plaintiffs so long as they do not impose liability without fault.60 In addition, private plaintiffs who show a level of fault lower than actual malice cannot recover presumed or punitive damages and are thus limited to recovery for actual damages.61 According to the Court, such actual damages recoverable without showing actual malice could include impairment of reputation and mental suffering.62

Although Gertz appeared to replace completely the common law of defamation, the Court has since reaffirmed the common law standards for and denied heightened constitutional protection to a category of defamation actions involving private-person plaintiffs and business defendants.63 Where the defamatory speech is of no public concern because it is in the "individual interest of the speaker and its specific business audience,"64 the balance shifts more strongly in favor of reputation and the common law standards given the "reduced"65 first amendment interest. The Court declined to require a showing of actual malice for a recovery of punitive or presumed damages66 because the concerns which motivated New York Times' protec-

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60. Id. at 347. "Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." Id. at 340.
61. Id. at 349.
62. Id. at 350 ("Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering.").
64. Id. at 762.
65. Id. at 760. "We have long recognized that not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection.'" Id. at 758 (footnote omitted) (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940), quoted in First National Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).
tion of defamatory speech do not apply in a narrow business setting. The Court compared the credit report at issue in *Greenmoss* to advertising, which is "hardy" and unlikely to be deterred because it is speech designed to attract a profit.

Beyond the damages and falsity innovations of *Gertz*, in *Philadelphia Newspapers, Inc. v. Hepps* the Court also eliminated the common law presumption of falsity for defamation cases. When the defamation involves a media defendant and a public official or public figure, or a private plaintiff and an issue of public concern, proof of falsity is now part of the plaintiff's prima facie case. The falsity requirement is essential, the Court explained, to ensure that true speech on matters of public concern is not deterred.

The elimination of strict liability, presumed damages, and the presumption of falsity has molded defamation into a more speech-protective tort which is more closely aligned with product disparagement than it was at the height of the common law. With *Greenmoss*, however, the Court declined to overrule completely the common law and left unprotected an entire category of business-related speech. Statements that are critical of business figures, practices, or products are not guaranteed the benefit of the constitutional safeguards because the level of constitutional protection depends on a case-by-case analysis focused on the status of the plaintiff and the subject matter of the defamation. *Greenmoss* indicates that this analysis turns on whether the information is closely related to the consumer's interest. Militating against first amendment protection is the Court's stated belief that information which is not widely circulated and which involves narrow business concerns is of less constitutional value. The Court has not provided any guidance regarding which business communications qualify as public concerns or which business figures and businesses qualify as public figures. It

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67. *Id.* at 762. According to the Court, the actual malice standard for recovery of punitive and presumed damages is unnecessary where

"there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling."

*Id.* at 760 (quoting Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977)).

68. *Greenmoss*, 472 U.S. at 762.

69. 475 U.S. 767.

70. "We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." *Id.* at 776.

71. *Id.* at 777. "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 778 (quoting *Gertz*, 418 U.S. at 341).
has thus created an atmosphere of uncertainty which may deter speech critical of products, businesses, and business figures.

Even if all communications about products, businesses, and business figures were to receive full constitutional protection, compared to product disparagement, defamation law would still provide a less speech-protective environment. The availability of presumed damages on a showing of actual malice and nonpecuniary damages on a showing of some fault may discourage potential defamation defendants from making statements critical of businesses and business figures. In contrast, disparagement’s requirement of proof of economic loss traceable to the statement is more protective of criticism than defamation law’s damage requirements, since the speaker can be held liable only for monetary losses which her statement has caused.72

Beyond the continued availability of presumed damages, some speech falling under the defamation label may also be deterred because the Court has expressly declined to consider whether constitutional protection is available to nonmedia defendants.73 The possibility of less protection for nonmedia defamation defendants creates uncertainty for a large group of potential critics of businesses. In contrast, most courts require the disparagement plaintiff to prove the same elements whether the defendant is a member of the media or not.74

While the constitutionalization of defamation law narrowed the evidentiary gap between product disparagement and business defamation, the Supreme Court’s balancing analysis perpetuates uncertainty for defendants; a potential critic cannot predict the protection she will receive. The different recovery requirements between the torts and the factual similarity between situations giving rise to actions for business defamation and product disparagement create an atmosphere which also encourages plaintiff manipu-

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72. Restatement (Second) of Torts, supra note 11, § 623A comment f. Compensatory damages in disparagement actions have been “limited to harm to interests of the plaintiff having pecuniary value.” Id. The pecuniary loss proof requirement is “a stricter rule than the constitutional restriction to ‘actual damages’ imposed by the Supreme Court in Gertz.” Id.; see also Prosser & Keeton, supra note 11, § 128, at 965 n.36 (Supp. 1988) (“Since, in theory, a corporation may have an action for defamation as well as disparagement, the defamation action may succeed, with, perhaps, presumed damages, even though the disparagement action fails.” (citation omitted)).

73. The Supreme Court has explicitly declined to consider whether nonmedia defendants should receive the same first amendment protections that media defendants currently possess. Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2706 n.6 (1990); Hepps, 475 U.S. at 779 n.4.

74. See Dairy Stores, 104 N.J. at 152-54, 516 A.2d at 234-35. In Dairy Stores, the court held that the New York Times actual malice standard is available to both media and nonmedia defendants. Therefore, the source of a derogatory newspaper article about the plaintiff’s product was entitled to the same protection from liability for defamation provided by the “actual malice” standard as the reporter and newspaper owner. Id. at 153, 516 A.2d at 234-35.
lition. Simply by labelling its claim as defamation, a business plaintiff can increase its chances of recovery for a critical statement.

C. Judicial Treatment of Defamation and Product Disparagement

The atmosphere of uncertainty for potential business critics is intensified because judges are faced with the difficult task of sifting through often identical fact situations to label statements as either defamatory or disparaging. Because of the murky factual distinction between the torts and the seemingly arbitrary line drawing, potential critics cannot determine in advance whether their speech will receive the protection of product disparagement or defamation law's nebulous balancing analysis.

Recognizing that product disparagement and defamation can both encompass statements critical of products, businesses, and business figures, courts acknowledge an area of overlap between the torts, even though they continue to maintain the separation between disparagement and defamation. Statements disparaging a manufacturer's product which also suggest that the manufacturer was dishonest, lacked integrity, or knowingly defrauded the public are actionable as defamation as well.

Courts have doubtless invested time and rhetoric in their struggle to conform the facts of each case to one or the other category. Often disparagements reflect badly on the business's judgment. Similarly, in many cases, statements which are held to be defamatory reflect badly on the plaintiff's products. As a result, a court's reasons for placing statements into one or the other category are usually unsatisfactory from a policy perspective.


76. Prosser & Keeton, supra note 11, § 129, at 965 ("The courts have gone to some lengths . . . in refusing [to find defamation in imputations against a business or its products], particularly where the most that can be made out of the words is a charge of ignorance or negligence." (footnotes omitted)).

77. RESTATEMENT (SECOND) OF TORTS, supra note 11, § 623A comment g. The plaintiff can allege both causes of action in the same lawsuit and, "so long as the damages are not duplicated," may recover damages under both theories. Id.; see also Wham, Disparagement of Property, 21 U. ILL. L. REV. 26, 27 (1926).

The standard is generally stated: "[A] statement is mere disparagement of property and not defamation of the owner or manufacturer where it does not impute dishonesty, fraud, lack of integrity or reprehensible conduct to such owner or manufacturer in connection with the property, goods or product referred to in the objectionable language, but constitutes defamation when it ascribes such conduct to an owner." Hibschman, Defamation or Disparagement?, 24 MINN. L. REV. 625, 631 (1940).

78. See Post, The Social Foundations of Defamation Law: Reputation and the Constitution, 74 CAL. L. REV. 691, 699 (1986). "In many cases, particularly where the plaintiff is a corporation, it is difficult to distinguish between defamation and injurious falsehood, since it is not possible to separate defamation of the plaintiff from disparagement of plaintiff's property or business." Id. (emphasis added) (footnote omitted).
The cases in which the courts apply the reputation-product distinction provide the strongest support for merging business defamation into disparagement. *United States Healthcare v. Blue Cross of Greater Philadelphia*\(^9\) is an example of a judicial attempt to draw the line between the torts. The case involved advertisements published as part of a reciprocal advertising war between a health maintenance organization (HMO) and Blue Cross/Blue Shield. The court held that some of the advertisements contained actionable product disparagement and that others were only actionable as defamation. One advertisement showed a grief-stricken woman who said: "The hospital my HMO sent me to just wasn't enough."\(^0\) The ad's words and visual presentation suggested that the woman suffered some terrible tragedy because of the "HMO's substandard care."\(^1\) The court held that the ad did not constitute product disparagement although the ad clearly implied that the HMO's services were lacking. Instead, the ad's criticism went "beyond the product itself to impute reprehensible conduct to the corporation."\(^2\)

The *United States Healthcare* court provided little guidance as to what characteristics make an advertisement so harmful that it is defamation rather than product disparagement; beyond a few references to scare tactics, it provided no sound policy basis for distinguishing between defamation and disparagement. The alternative grounds of defamation and product disparagement provide a court with tools of manipulation to punish communication which it views as having little value.\(^3\) The court can punish extremely unattractive disparagements with the defamation label. Likewise, it can punish unattractive plaintiffs by categorizing the harmful statements as product disparagements.

The courts are, however, usually not to blame for the irrational line drawing between product disparagement and defamation; they are often mere pawns of plaintiff manipulation. With the constitutionalization of defamation law, business plaintiffs may have looked to avoid the first amendment's heightened requirements by pursuing alternative grounds of recovery. "In recent years plaintiffs suing press defendants have more frequently affixed labels other than defamation to injurious falsehood claims


\(^80\). *Id.* at 926.

\(^81\). *Id.*

\(^82\). *Id.* at 927. The court explained that there was no actionable product disparagement claim "because the statements are directed at the vendor, not his goods." *Id.* The court's reasoning is illogical, since the damages would reach the seller through the charge that its product was ineffective.

\(^83\). The Third Circuit in *United States Healthcare* clearly disapproved of the two ads that it held were defamatory. The court referred to the ads' "scare tactics" several times and appeared to be motivated by the defendants' intentional use of the unsavory marketing technique. See *id.* at 927. Arguably, with this evaluation, the court injected an element of consumer protection into corporate defamation law.
and have increasingly achieved some measure of success in their actions.”

II. CLOSING THE GAP: PROVIDING DISPARAGEMENT DEFENDANTS FULL FIRST AMENDMENT PROTECTION

To eliminate the need for line drawing and thus to create for potential critics of products, businesses, and business figures an atmosphere of certainty which would foster free speech, business defamation and product disparagement should be treated as the same tort.85 The courts should remove business defamation from defamation law because the current analogy between personal and business reputation has no factual or policy basis; rather, business defamation and product disparagement protect analogous economic interests in profits and in product marketability. Under this new tort, defendants should receive full first amendment protection in recognition of the high value of speech critical of products, business figures, and business operations.

In applying uniform recovery requirements for defamation of business and personal reputation, courts have treated the two harms as though they cause similar injuries. Actually, the psychic injury associated with defamation of personal reputation offends different interests than the economic injury arising in business defamation. The reasons for which the Supreme Court values the state's interest in protecting personal reputation over the first amendment interest in the criticism do not apply to business reputation because the latter is not as vulnerable and in need of state protection as the former.86 Statements critical of business reputation do not merit the same state interest as statements critical of personal reputation because a business has no dignity or feelings to be injured.

Since the economic interests protected by business defamation are more properly analogized to the interests protected by product disparagement,

84. Blatty v. New York Times Co., 42 Cal. 3d 1033, 1045, 728 P.2d 1177, 1184, 232 Cal. Rptr. 542, 549 (1986), cert. denied, 485 U.S. 934 (1988) (citation omitted). This observation is cited as support for the application of the first amendment's heightened liability standards for defamation to other communicative torts. “It follows that to prevent creative pleading from rendering the limitations nugatory, they must be broadly applicable whenever the gravamen of the claim is injurious falsehood.” Id. at 1042, 728 P.2d at 1184, 232 Cal. Rptr. at 549.

For an argument that defamation law's current balancing approach actually creates a hostile atmosphere for defendants who criticize products, businesses, or business figures, see supra notes 72-74 and accompanying text.

85. Throughout the remainder of this Note, the tort which is created from this merger will be called “business disparagement.”

86. In Gertz, the Supreme Court declined to apply full first amendment protection to a statement critical of a private figure because the state has a strong interest in protecting the “vulnerable” reputation of private persons. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974). For a discussion of Gertz's analysis of the state's interest in protecting private reputation, see infra notes 101-02 and accompanying text.
the courts should merge defamation of businesses and business figures into product disparagement. Given the weaker state interest in protecting against such economic harms, the courts should then afford business disparagement defendants full first amendment protection. This standard of liability would encourage the free flow of speech critical of businesses, business figures, and products. The fullest amount of such speech is necessary for consumers to make decisions about the most efficient allocation of their resources. Because consumers influence change in business and society through purchase and investment decisions, the courts should deem information about products, businesses, and business figures as a matter of "'governing' importance.'

A. The Different Interests Implied by Business and Personal Reputation

Because personal and business defamation are included within the boundaries of defamation, the "reputation" which the tort protects is composed of two different sorts of interests. A business's interest in its reputation is economic,8 while an individual's interest in her personal reputation involves deeper feelings of self-esteem and dignity. The state's interest in protecting a business or product from false criticism is not as compelling as its interest in protecting personal reputation against false charges because business reputation is not as vulnerable as personal reputation. As a result, the Supreme Court's reasons for deferring to the state's interest in protecting personal reputation do not apply when the speech involves injury to business reputation.

87. Meiklejohn, supra note 1, at 262. According to Meiklejohn, the first amendment protects all information necessary for self-government. In his view, this protection extends beyond political speech to the arts and literature. "[T]he people do need novels and dramas and paintings and poems, 'because they will be called upon to vote.' The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government." Id. at 263 (quoting Kalven, supra note 1, at 16).

Under Meiklejohn's first amendment theory, speech about products, businesses, and business figures is not of "'governing importance.'" For a discussion of Meiklejohn's theory and an argument for an extension of it to speech about products, businesses, and business figures, see infra notes 115-23 and accompanying text.

88. The argument that reputation is purely economic does not explain a business figure's interest in her business reputation. A person's identity is likely to be closely tied to her job. Although this Note argues that all statements critical of products, businesses, and business figures should be removed from defamation law and should receive the highest level of constitutional protection, the inclusion of criticism of business figures cannot turn on the business-reputation-as-economic-interest argument. Instead, statements critical of business figures' performance of their duties should be protected because of the importance of such criticism in consumer decision making. For a discussion of the value of this criticism and the justification for providing it the highest level of constitutional protection, see infra notes 110-37 and accompanying text. For a discussion of the disparagement proof requirements as applied to plaintiffs who are business figures, see infra notes 152-55 and accompanying text.
In many instances of business defamation the plaintiff is a corporation or other business entity. In granting corporations many of the same rights as natural persons, courts have included among those rights the ability to sue for defamation. Corporations have thus become beneficiaries of the easy recovery system developed to protect personal reputation. Although corporations have received the same reputational protection as individuals, the courts have never held that a business can feel pain or loss of dignity from defamatory statements. False statements critical of a business or its products inflict injuries only to the business's economic well-being. Because defamation of business entities and of natural persons harm fundamentally different interests, courts encounter difficulty when forced to compare the two wrongs under a tort designed to protect personal reputation. Some have held that a corporation has no personal reputation; others have described corporate reputation as distinct from individual reputation.

Particularly revealing of the purely economic nature of a business's reputation is Electrical Board of Trade of New York v. Sheehan. In Sheehan, the New York Appellate Division held that a membership corporation which could not engage in business under New York corporation law could not maintain an action for slander since it had no credit to be affected and it could not suffer pecuniary loss. The holding suggests that personal and business reputation are distinct and that the latter interest is concerned

89. Golden Palace, Inc. v. National Broadcasting Co., 386 F. Supp. 107, 109 (D.D.C. 1974), aff'd, 530 F.2d 1094 (D.C. Cir. 1976) (A corporation may maintain an action for libel, but it has no personal reputation and may be libeled only by an imputation about its financial soundness or business ethics.).

90. Pullman Standard Car Mfg. Co. v. Local Union No. 2928 of United Steelworkers of Am., 152 F.2d 493, 496 (7th Cir. 1945) (Although a distinction exists between individual and corporate personality, a corporation has a business reputation protected by law.); see also Erick Bowman Remedy Co. v. Jensen Salsbery Laboratories, 17 F.2d 255, 257 (8th Cir. 1926) (Only in its credit, property, or business can a corporation be injured by falsity; it has no reputation like an individual's); Novick v. Hearst Corp., 278 F. Supp. 277, 279 (D. Md. 1968) ("[A] corporation has no reputation in the sense that an individual has[,] it is only with respect to its credit, property or business that a corporation can be injured by a false publication."); Interstate Optical Co. v. Illinois State Soc'y of Optometrists, 244 Ill. App. 158, 162 (1927) (A corporation has a business reputation which can be libeled.).


92. Id. at 127. Under New York corporate law, the Electrical Board of Trade, as a membership corporation, was not permitted to engage in any business for a pecuniary profit. Id. Although the corporation's complaint did not allege special damages arising from the slander, it could still recover if the slander directly affected its credit or caused it pecuniary loss. Id. at 128. Since the Electrical Board of Trade did not engage in business for a pecuniary profit, it therefore could not recover for slander since it had no credit nor pecuniary interest which could have been harmed. Id.

93. But some cases describe injury to corporate reputation as exactly like injury to personal reputation. See, e.g., Hornell Broadcasting Corp. v. A.C. Nielson Co., 8 A.D.2d 60, 63, 185 N.Y.S.2d 945, 949 (1959) (A corporation may maintain an action for libel where a statement alleges mismanagement or bad credit or subjects it to ridicule, contempt, or disgrace.), aff'd, 8 N.Y.2d 767, 168 N.E.2d 115, 201 N.Y.S.2d 781 (1960).
with economic well-being. Actionable injuries to corporate reputation include allegations of insolvency, bad credit, and unethical business practices. A corporation's reputation is protected against these types of charges to protect its continued transaction of business.

In contrast, personal reputation is protected for nonpecuniary reasons. The protection of an individual's good name is firmly grounded in the history of defamation law. In Gertz, the Supreme Court reiterated its recognition of the high value of personal reputation:

[T]he individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

According to the Court, when the plaintiff is a public figure the strong public interest in the speech outweighs the state's interest in protecting reputation; in comparison, when the plaintiff is a private figure the weaker public interest in the speech will not necessarily outweigh the state's interest in protecting reputation. In Gertz, the Court explained that the heightened speech-protective standard of New York Times was grounded in the strong

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97. See Samson United Corp. v. Dover Mfg. Co., 233 A.D. 155, 156, 251 N.Y.S. 466, 468 (A corporation has an action for libel when the statement affects its public image or its credit, or when the statement drives away its customers.), rev'd 139 Misc. 312, 248 N.Y.S. 325 (1931).
98. See CARTER-RUCK, supra note 26, at 1 ("There is no doubt that the high value placed upon good reputation has persisted through the ages . . . .").
99. 418 U.S. 323.
100. Id. at 341 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).
"The rhetorical power of the [preceding] passage is undeniable. It has proved enormously influential, and can fairly be characterized as an authentic contemporary expression of common law understanding of the law of defamation." Post, supra note 76, at 707-08 (footnote omitted).

The Court has even held implicitly that injury to reputation is not a threshold requirement for a successful defamation claim. An action for defamation is sustainable so long as some psychic injury is alleged. In holding that a defamation plaintiff need not allege injury to reputation, the Court alluded to a previous opinion which held that:

States [can] base awards on elements other than injury to reputation[;] . . . "personal humiliation, and mental anguish and suffering" [are] examples of injuries which might be compensated consistently with the Constitution upon a showing of fault. Because respondent has decided to forgo recovery for injury to her reputation, she is not prevented from obtaining compensation for such other damages that a defamatory falsehood may have caused her.

first amendment interest given the weaker state interest in protecting the reputation of public officials.\textsuperscript{101} The Court in \textit{Gertz} imposed a less stringent rule of recovery for private figure plaintiffs because private reputation is more vulnerable and deserving of protection than a public figure’s reputation.\textsuperscript{102}

The reasons for protecting a private plaintiff’s reputation do not apply to businesses or business figures as plaintiffs. Interest in business reputation is an “interest not nearly as significant as an individual’s interest in his personal reputation and hardly ‘at the root of any decent system of ordered liberty.’” Protecting business reputation is a less compelling goal than protecting personal reputation because a corporation “has no personality, no dignity that can be assailed, no feelings that can be touched. Since it cannot suffer physical pain, worry or distress, it cannot lie awake nights brooding about a defamatory article.”\textsuperscript{103} Rather, a corporation’s reputation is merely “a basis for inducing others to engage in market or nonmarket transactions with [it].”\textsuperscript{104} Some courts have agreed that a business’s reputation presents less compelling concerns and is thus less deserving of protection than an individual’s reputation.\textsuperscript{105}

Even if business reputation were regarded as analogous to personal reputation, more stringent recovery requirements should be applied to business defamation plaintiffs because injury to business reputation is easier

\textsuperscript{101} See \textit{Gertz}, 418 U.S. at 342-43. “[W]e believe that the \textit{New York Times} rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons.” \textit{Id.} at 343.

\textsuperscript{102} \textit{Id.} at 344 (“Private individuals are . . . more vulnerable to injury [than public figures], and the state interest in protecting them is correspondingly greater.”). “[W]e conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.” \textit{Id.} at 343.


\textsuperscript{104} R. \textit{ Phelps} & E. \textit{Hamilton}, \textit{Libel} 80 (1966).

\textsuperscript{105} R. \textit{Posner}, \textit{Economic Analysis of Law} 196 (3d ed. 1986). Posner’s definition is not confined to a business’s reputation. Arguably, the difference between personal and business reputation from an economic perspective is that injuries to dignity and psychic well-being are intangible harms which are difficult to quantify. In contrast, because they often result in lost business opportunities and lost customers, injuries to business reputation are more easily quantified. \textit{See also} Lachman, \textit{Reputation and Risktaking}, in \textit{The Cost of Libel[:] Economic and Policy Implications} 2313 (E. Dennis & E. Noam eds. 1989) (Reputation “is something of an enduring nature . . . and therefore a kind of capital asset.”).

\textsuperscript{106} See Dairy Stores, Inc. v. Sentinel Publishing Co., 104 N.J. 125, 162, 516 A.2d 220, 239 (1986) (Garibaldi, J., concurring) (“A commercial entity’s economic interest in the reputation of its product is not nearly as significant as an individual’s interest in his or her reputation.” (citation omitted)). Judge Garibaldi argues that a business’s less compelling reputational interests justify imposing a higher fault requirement for recovery of damages. \textit{See also} Fetzer, \textit{The Corporate Defamation Plaintiff as First Amendment ‘Public Figure’: Nailing the Jellyfish}, 68 Iowa L. Rev. 35 (1983). “[I]njury to corporate reputation is less problematic for society than injury to personal reputation.” \textit{Id.} at 37.
to quantify than the intangible injuries resulting from defamation of personal reputation. The social nature of injury to personal reputation presents difficult quantification problems. In contrast, injuries to business reputation are easier to translate into dollars and cents because they usually result in lost business opportunities, profits, and customers. The nature of business defamation does not justify the low damage requirements of personal defamation.

All defamatory statements do not fall squarely into either the business or personal reputation categories, however. Statements critical of an individual’s performance of her job could conceivably fall into both categories. Such defamation could harm an individual’s dignity as well as her business standing. Just as the state protects an individual against false statements about her private life, the state has an interest in protecting her against false statements about her business life. Yet business figure plaintiffs suing for false statements about job performance do not need the benefit of presumed damages; such plaintiffs usually can recover damages by proving loss of opportunity, employment, or salary. Although a business figure’s interest in her business reputation is important and deserves protection, the value of speech critical of business figures is of central importance to consumer decision making because business figures of all levels exert a great deal of influence over a consumer’s life. The state’s interest in protecting

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107. 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." W. Prosser, supra note 47, § 112.


While jury discretion [in calculating damages] may be justified where the plaintiff is a natural person, this discretion should not be permitted where the plaintiff is a corporate entity. A corporation has no soul. Its feelings are never wounded. If it has been injured, the injury must be an economic loss which must in turn be reflected in the corporate balance sheet.

Id. Because damages are easier to prove for defamation of business entities, the commentator argues for the elimination of presumed damages in corporate libel cases. Id.

Some commentators advocate stiffening the defamation damage requirements in all cases. Most suggested defamation reform proposals advocate eliminating presumed damages. See Halpern, supra note 5, at 245.

109. Chief Justice Warren recognized the blurring of lines between public and business officials:

While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions
reputation is thus outweighed by the importance of the criticism. Although business figure plaintiffs may still seek recovery under business disparagement, the courts should heighten the recovery requirements to protect the speech.

B. The High Value of Speech Critical of Products, Businesses, and Business Figures

Courts should provide full first amendment protection to business disparagement defendants because speech critical of businesses and products is so valuable to society. With today's marketplace confronting consumers with an overabundance of different types and brands of products, individuals are faced with countless purchase decisions throughout their lives. For informed spending decisions, speech critical of products, businesses, and business figures plays an important role. Few decisions are more dominant in a person's life than what products to buy or in which company to invest.\(^{110}\) Because information about products and the operations of their manufacturers is so crucial for an average American's day-to-day decision making, defendants sued for defamation of products, businesses, and business figures should receive the highest level of constitutional protection of \textit{New York Times}. Full first amendment protection through application of the actual malice standard would thus create an atmosphere which encourages persons to investigate and discover defects and to announce criticism of products, businesses, and business figures; the criticism would in turn improve consumer decision making and encourage businesses to avoid future criticism by improving their products and remedying defects.

Under the constitutional law of defamation, speech critical of public officials and public figures is protected because it is central to the purposes of the first amendment. Speech critical of businesses, business figures, and products is similarly related to the first amendment's purposes. The citizenry

\(^{110}\) Americans' personal consumption expenditures, totaling \$3.2\ billion, made up 66\% of the gross national product in 1988. \textsc{Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States 1990}, at 425 (Table No. 690). This percentage remained constant from 1983 to 1988. In comparison, in 1988 Americans spent 15\% of the gross national product on private domestic investments. \textit{Id.}
can exert tremendous power over national policy by buying or refusing to buy the products of certain manufacturers. In modern society the citizen’s power to purchase is a vehicle for voicing her opinions on issues of public concern. Product boycotts have become commonplace in American life, “largely because they are so successful.”

This power in the marketplace is akin to the power as self-governor Alexander Meiklejohn envisioned for American citizens. According to Meiklejohn, the central purpose of the first amendment is to assist citizens in obtaining information necessary to fulfill their roles as governors in the democracy. The Supreme Court apparently adopted Meiklejohn’s vision of the central role of the first amendment with New York Times Co. v. Sullivan’s guarantee of actual malice protection to those who criticize public officials and Butts’s extension of that protection to criticism of public figures. The first amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

111. See Smith, Consumer Boycotts and Consumer Sovereignty, 21 EUR. J. MARKETING 7 (1987). “The consumer boycott is, as a moral act, an expression by the individual of his or her preferences on the issue, a sanction by the individual as the state is not prepared to act. It also adds to the aggregate of pressure for change.” Id. at 13.

112. Id.

113. Boycotting Corporate America, supra note 112, at 69. In 1990, consumers exercised their purchasing power to stop canners from selling tuna caught in nets prone to trap and kill dolphins, to pressure a cosmetic company to cease testing products on animals, and to protest a large oil company’s investments in South Africa. Id. Also, animal rights groups who protested the use of animal fur for coats exerted pressure on fellow consumers, leading to a drop in fur company profits. Id. at 70.

114. Id. at 69.

115. Meiklejohn, supra note 1, at 253-54.

116. Kalven, supra note 3, at 209 (“[T]he [New York Times] opinion almost literally incorporated Alexander Meiklejohn’s thesis that in a democracy the citizen as ruler is our most important public official.” (citation omitted)).


118. “It is as much [the citizen’s] duty to criticize as it is the official’s duty to administer.” Id. at 282 (citation omitted). Free speech is essential “to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.” Id. at 301 (Goldberg, J., concurring) (quoting DeJonge v. Oregon, 299 U.S. 353, 365 (1937)).


120. New York Times, 376 U.S. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
guaranteed by the first amendment is crucial to a citizen's role in self-government.

Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.\[2\]

The first amendment's purpose is to provide citizens all the information necessary to "understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."\[12\] Purchasing decisions dominate many citizens' lives. With countless choices available, the free flow of commercial information is vital for the best allocation of consumer resources.\[12\] Concerning "the question of freedom of information in the

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121. Meiklejohn, supra note 1, at 257. Although he included art and literature as issues of governing concern deserving an uninhibited flow, Meiklejohn excluded the role of a "merchant advertising his wares" because it is "utterly different from that of a citizen who is planning for the general welfare." A. MEIKLEJOHN, supra note 25, at 39.

Meiklejohn, writing in 1948, may not have envisioned the role of consumption in modern society. In some instances the power to purchase is an effective tool to effect change. For example, without the vocalization of public concern for the environment, it is doubtful that manufacturers would have been motivated to produce environmentally safe, less wasteful products and packaging. See Marketing Greener?: Friendly to Whom?, ECONOMIST, Apr. 7, 1990, at 83; see also M. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS (1984).

[The appropriate scope of the first amendment protection is much broader than . . . Meiklejohn would have it. Free speech aids all life-affecting decision making, no matter how personally limited, in much the same manner in which it aids the political process. Just as individuals need an open flow of information and opinion to aid them in making their electoral and governmental decisions, they similarly need a free flow of information and opinion to guide them in making other life-affecting decisions.

Id. at 22; see also Gerety, The Submarine, The Handbill, and The First Amendment, 56 U. CIN. L. REV. 1167, 1169 (1988) ("A persuasive argument can also be made for the importance— even the political importance—of commercial information.") (emphasis in original). But see C. BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989). Baker argues that "profit-motivated commercial speech should be denied [constitutional] protection . . . . It lacks the crucial connections with individual liberty and self-realization that are central to justifications for the constitutional protection of speech, justifications that in turn define the proper scope of protection under the first amendment." Id. at 196 (footnote omitted).

122. A. MEIKLEJOHN, supra note 25, at 88-89.

123. Meiklejohn's argument that the citizens themselves must judge the wisdom of speech applies in the context of commercial information. "Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good." Id. at 26.

The Supreme Court has recognized the significance of consumer information:

So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial
market place,” “a free society cannot look to government as a protector of freedom of information for its own people.” 124 Informed consumption can promote efficient decision making and can help preserve natural resources.

The Supreme Court in *Greenmoss* rejected implicitly the view that speech about businesses is a matter essential to self-government in holding that a credit report need not receive protection because the free flow of such information is not central to the first amendment. The concerns of *New York Times* are not present, the Court held, when the speech is of a narrow business interest and, like advertising, is hardy and unlikely to be deterred. The Court concluded that with less protection for a credit report “‘[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press.’” 125 The Court noted that the states are free to provide credit report publishers with a privilege shielding them from liability. 126

The Court’s denial of first amendment protection for the credit report turned on the state’s interest in protecting reputation through defamation law and the narrowly commercial nature of the communication. *Greenmoss* did not recognize, however, the fundamental policy distinction between personal and business reputation 127 and the diminished need for state protection of the latter. In the credit report situation, proving injury to business reputation is not inherently difficult; thus, the state does not have a

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[126] *Greenmoss*, 472 U.S. at 763 n.9. Most states do apply a privilege to credit reports. *Id.*

[127] See *Post*, supra note 78, at 740. According to *Post*, the problem with *Greenmoss* is the identification of the issue as a fundamental conflict between free speech and “reputation.” This formulation is deeply misleading. Reputation is not a single idea, but is instead a melange of several different concepts. Each concept demands its own constitutional analysis . . . . For example, although Justice Powell justifies defamation law in terms of the protection of human dignity, the plaintiff in [*Greenmoss*] was a corporation that could advance no conceivable claim to such dignity.

*Id.*
compelling interest which sufficiently counterbalances the first amendment interest in the free flow of information.

The "hardiness" of commercial information such as credit reports and advertising was another factor on which the Court based its decision to deny the credit report first amendment protection in Greenmoss. While advertising of one's own products is absolutely vital for business existence, criticism of a competitor's product may not be: Thus, lower protection for speech about businesses, business figures, and products could deter such marginally vital but socially valuable criticism. Courts should deem such statements as issues of governing importance under the first amendment because information about a business's policies and products aids a consumer's purchase decisions.128 Through this protection, individual manufacturers would remain free to formulate their own cost-benefit analyses of the efficacy of negative advertising. In Hustler Magazine, Inc. v. Falwell,129 Chief Justice Rehnquist, writing for the majority, found first amendment value in a caricature of a minister which appeared in Hustler magazine:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." 130

Analogously,

> just as our system of government is based on faith in the individual citizen's ability to determine matters for himself, so does the success of our free economy rest on the ability of the consumer to choose intelligently in the market place—based on a free flow of information in a free, unregimented economy.131

In addition to the explicit guarantee of the freedom of speech, the Supreme Court has recognized the implicit first amendment guarantee of the freedom to receive information.132 The Court has acknowledged the strong interest in the free flow of information about products.133 A restraint on the free

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128. Justice Brennan, dissenting in Greenmoss, described speech about business matters as "an important part of our public discourse," 472 U.S. at 787, even if it does not directly implicate "the central meaning of the First Amendment."" Id. (quoting New York Times, 376 U.S. at 273).
130. Id. at 50-51 (quoting Bose v. Consumers Union of United States, 466 U.S. 485, 503-04 (1984)).
131. May, supra note 124, at 65.
132. See Virginia State Bd. of Pharmacy, 425 U.S. at 756 (The freedom of speech "afforded is to the communication, to its source and to its recipients both."); see also Dairy Stores, 104 N.J. at 162, 516 A.2d at 239 (Garibaldi, J., concurring) ("[T]he public has a substantial interest in gaining information about the quality and character of products.").
133. Virginia State Bd. of Pharmacy, 425 U.S. at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").
flow of product information hurts those who need inexpensive information the most; only those citizens with the financial ability may spend extra resources to obtain the information.

Some courts have suggested that information about products presents a more compelling argument for first amendment protection than statements about personal reputation. "Information obtained from product commentators often relates to health or safety problems in consumer products. It would be unfortunate indeed if the threat of product disparagement actions stifled the free flow of such information." Courts have granted first amendment protection to information about products because the information's significance outweighs the manufacturer's interest in its business reputation, "an interest not nearly as significant as an individual's interest in his personal reputation and hardly 'at the root of any decent system of ordered liberty.'"

C. Doctrines Opposing Full First Amendment Protection

Some commentators have argued that the commercial speech doctrine prevents disparagements from receiving full first amendment protection because they often arise from advertisements. Greenmoss cited the commercial nature of a credit report as a factor weighing against providing it first amendment protection; such commercial speech was said to be "hardy" because the profit motive eliminates the chilling effect of regulation.

134. Id. The Court noted that information about prescription drugs is particularly important to consumers. The lack of information caused by a state regulation against advertising hit the elderly, the sick, and the poor the hardest.

135. Dairy Stores, 104 N.J. at 163, 516 A.2d at 239 (Garibaldi, J., concurring) (quoting with approval Bose, 508 F. Supp. at 1271). In Bose, the district court argued that disparaging statements are strong candidates for the actual malice protection: "The public's interest in obtaining information of this type is perhaps even greater than the corresponding interest in personal defamation actions, the interest in obtaining information about other people." 508 F. Supp. at 1271.


137. Id. at 1270 (quoting Rosenblatt, 383 U.S. at 92 (Stewart, J., concurring)).

138. See Langvardt, supra note 31, at 938. Another commentator argued that the commercial speech analysis provides a "rational and compelling dividing line within the tort of disparagement. Speech... characterized as commercial lacks the attributes that constitutional privilege seeks to protect...." Reinhard, Note, The Tort of Disparagement and the Developing First Amendment, 1987 Duke L.J. 727, 758.

See also Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 6 (1979) ("Although disallowing state interference with commercial advertising serves [the] values... [of] aggregate economic efficiency and consumer opportunity to maximize utility in a free market—these values are not appropriate for judicial vindication under the first amendment."); Shauer, Commercial Speech and the Architecture of the First Amendment, 56 U. Chi. L. Rev. 1181, 1182 (1988) ("[T]here is widespread (although certainly not unanimous) agreement that commercial advertising is not itself as central to the first amendment as are various other forms of communication....").

139. Greenmoss, 472 U.S. at 762; see also Virginia State Bd. of Pharmacy, 425 U.S. at 772 n.24 ("[C]ommercial speech may be more durable than other kinds.").
commentators disagree with the validity of the hardiness and nondeterability justifications for providing commercial speech less protection than noncommercial speech.140

Although the Court has recognized that all speech is not of "equal First Amendment importance,"141 statements which qualify as business defamation and product disparagement perform a societal function which is larger than the business's "narrow" economic interest in product sales: they communicate a business or product's defects. This is the kind of information consumers need most. Allowing states to deter false speech through a lower standard of protection for business defamation defendants would also deter speech critical of products. Potential discoveries of product defects would be discouraged.

Positing that it is of no intrinsic value to consumers, the Court's commercial speech doctrine denies first amendment protection to all false and misleading speech.142 Placing restrictions on criticism of products, businesses, and business figures because of its falsity inevitably would deter some true speech, however. The Court has held that even some false speech

is tolerated only to insure that would-be commentators on events of public or general interest are not "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court or fear of the expense of having to do so."143

Government regulation of false speech through lower recovery requirements for plaintiffs would lead to inefficient allocation of resources;144 consumers would benefit most from a free flow of commercial information.145 Such

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140. See Schmidt & Burns, Proof or Consequences: False Advertising and the Doctrine of Commercial Speech, 56 U. Cin. L. Rev. 1273, 1292 (1988). The authors note that noncommercial speech is often motivated by the profit incentive as well. Less protection for commercial speech will not provide more protection for consumers. "A more careful analysis of the profit motive leads to the conclusion that the profit motive guarantees that a certain quantum of speech will occur but leads to no conclusion about the quality of information conveyed by that speech.” Id. at 1293 (emphasis added).

141. Greenmoss, 472 U.S. at 758.


143. Gertz, 418 U.S. at 365 (quoting New York Times, 376 U.S. at 279); see also Harte-Hanks, 491 U.S. 657. “Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged.” Id. at 686 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963), quoted in Gertz, 418 U.S. at 342).

144. “[E]ven untrue remarks may have positive effects upon the quality of our re-examination process.” Grove, 404 U.S. at 903 (Douglas, J., dissenting from the denial of certiorari); accord New York Times, 376 U.S. at 279. “Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'” Id. at 279 n.19 (quoting J.S. Mill, On Liberty 15 (1947)).

an environment would encourage investigation of products and producers and would limit a speaker's fear of liability from announcing possible product defects.

Business defamation and product disparagement need not double as consumer protection mechanisms. The marketplace should be the ultimate arbiter of truth of commercial information.\textsuperscript{146}

"[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."\textsuperscript{147}

Knowledgeable consumers can use their experience to determine the truth of speech about businesses and products.\textsuperscript{148} For example, in recent years manufacturers have sought to capitalize on widespread consumer concern for the environment by labeling goods environmentally safe. Wary of exaggerated labeling, consumers are now "cynical" of the claims.\textsuperscript{149} "[T]he commercial information is not desirable because it would force people to receive unwanted product messages. \textit{Id.} at 1244. He would describe this Note's argument as anti-paternalistic, "stem[ming] from a view that informed self-determination is either the highest good or a prerequisite to attaining the highest good." \textit{See id.}\textsuperscript{146} Lowenstein criticizes the libertarian view that consumers are best protected by an unrestrained, unregulated flow of commercial information. \textit{Id.} at 1244-45.

146. \textit{See New York Times,} 376 U.S. at 270. "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" \textit{Id.} (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)). "The primary purpose for protecting speech is not to attain a universal truth but to protect each citizen's quest for personal development and attainment of his own truths." Burnett, \textit{Protecting and Regulating Commercial Speech: Consumers Confront the First Amendment,} 5 COMM/ENT 637, 657 (1983).

147. \textit{Falwell,} 485 U.S. at 51 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

148. \textit{See May, supra} note 124, at 65 ("I do not say that all food industry advertising is informative, but I do insist that the American consumer has sense enough to distinguish the promotional chaff from the informational wheat."); \textit{cf.} Skolnick, \textit{Foreword: The Sociological Tort of Defamation,} 74 CAL. L. REV. 677, 681 (1986) (Under the marketplace theory of free speech, society "may best be served if the citizens do not rely on the truth of defamatory statements appearing in print, but rather consider these statements skeptically." (emphasis in original)).

149. \textit{Marketing Greener[.] Friendly to Whom?}, \textit{supra} note 121, at 83. "As shoppers learn more about environmental issues, they are becoming cleverer at spotting companies making bogus claims of greenery. A survey of 1,400 British shoppers . . . indicates that 56% of those surveyed are now suspicious of claims that products are environmentally friendly." \textit{Id., see also Forbes, Clutter Kills: The Junk Bonding of America, ADWEEK'S MARKETING WEEK,} June 18, 1990, at 24 ("The public is increasingly cynical about everything it sees, hears and reads."); \textit{Wary Consumers Want More Health Ad Info, Advertising Age,} Dec. 4, 1989, at 12, col. 1 ("Consumers say they want more health messages in food product ads, but they're looking at those messages with a skeptical eye.").
public in the market place has all the power in its hands. That it somehow needs greater protection, I seriously doubt."150

III. APPLYING HEIGHTENED DISPARAGEMENT LIABILITY STANDARDS TO ALL CRITICISM OF PRODUCTS, BUSINESSES, AND BUSINESS FIGURES

Given the Supreme Court’s view that an issue of narrow business concern does not merit first amendment protection under defamation law, the recovery requirements of product disparagement provide a level of protection for speech which is higher than that of defamation law.151 Disparagement’s stringent damages and fault requirements create an atmosphere of certainty supportive of speech critical of products, businesses, and business figures. Disparagement standards should replace the traditional defamation standards for all criticism of businesses and business figures, and such speech should receive the actual malice protection of New York Times.

This Part considers the issues relevant to the plaintiff’s and the defendant’s status and the subject matter of the criticism which will arise with the application of the actual malice standard to business disparagements. First, the status of a business figure plaintiff within its company should not affect the application of the heightened standard. Section A considers and dismisses differing standards based on the business figure plaintiff’s level. Second, Section B considers the defendant’s status as competitor-noncompetitor or as media-nonmedia and concludes that those factors should also be irrelevant to the application of full first amendment protection. Finally, Section C considers the subject matter of the criticism and concludes that it should not affect the application of full first amendment protection.

A. The Role of the Business Plaintiff

Whether a business plaintiff interacts with the public—either as a corporation or a business figure—should have no effect on the level of first amendment protection provided to a business disparagement defendant’s speech. In business disparagement actions, where “economic interests” are at issue, “[t]he existence and strength of the plaintiff’s economic interests and of the defendant’s first amendment interests do not depend upon the public or private character of the plaintiff.”152 Under the analysis of this

150. Cone, Advertising and the Market Place, in Freedom of Information in the Market Place, supra note 124, at 113.
151. See supra notes 72-74 and accompanying text.
152. Langvardt, supra note 31, at 960. Langvardt would maintain the distinction between defamation law and disparagement. He states, however, that “the rules concerning how one acquires public-figure status are not well-suited to business-related injurious falsehood cases.” Id. at 961. Instead, for product disparagement he advocates a focus both on the public interest in the plaintiff’s product and on the defendant’s status. Id. at 962-63. For a discussion of the merits of affording constitutional protection based on the subject matter of the business criticism, see infra notes 164-66 and accompanying text; for a discussion of adjusting protection according to the type of defendant, see infra notes 157-63 and accompanying text.
Note, a business figure plaintiff is a plaintiff employed by a business entity that sells goods or services to the public. The public would include other business figures because relations between business figures affect consumer products and affect consumer investment decisions regarding the company or industry. For example, speech in a corporate credit report is important for the functioning of the economy.

A case-by-case analysis for determining the level of protection for the disparaging speech based on the business figure plaintiff’s level of influence over products, services offered to the public, or transactions affecting the public would not eliminate the uncertainty currently pervading business defamation and disparagement in their current forms and would not promote the free flow of information about products, businesses, and business figures. A public interest-focused approach to analyzing the plaintiff’s role “would lead to unpredictable results and uncertain expectations.”

The public significance of speech about a business figure does not depend upon the person’s power within a business. Low-level employees can have substantial influence over different aspects of corporate policies and thus over the consumer. The need for information about operations on the lowest level is of no less value than the need for information about a chief executive officer’s activities.

To recover for damaging statements concerning the performance of their duties or concerning a characteristic which has a direct bearing on their fitness for the job, all business plaintiffs should prove: (1) that the statement was false; (2) that the statement was published and was made with knowledge of or reckless disregard for the truth; (3) that the defendant intended to cause pecuniary harm or either recognized or should have recognized that the statement would do so; and (4) that the pecuniary loss is directly traceable to the defendant’s statement.

When the injury follows from a statement made about a plaintiff’s operations or job performance, recovery should be limited to special damages as defined in product disparagement law. The kinds of injuries a business figure might prove and recover would include lost employment, a lost wage increase, a lost promotion, or failed business negotiations. Beyond the basic elements, business disparagements

154. These elements follow the RESTATEMENT (SECOND) OF TORTS, supra note 11, § 623A, liability requirements for injurious falsehood.

Any speech relevant to the plaintiff’s job which contributes to decision making and allocation of consumer resources must meet these requirements for recovery. Thus, a fact about a business person’s private life which has no relation to job performance would not receive heightened protection.

A business figure criticized about an aspect of her life which bears no relation to her duties could recover pecuniary loss from the damage to her nonbusiness life if she proves that the defendant intended to cause harm or reasonably should have recognized that her speech would cause harm to the plaintiff’s nonbusiness life.
should survive the plaintiff's death because the actions compensate for economic loss.\textsuperscript{155} Also, injunctive relief should not be available for business disparagements because a free and robust discussion of products, businesses, and business figures is so important in a consumer's daily life.

All business entities, whether huge multinational corporations or small closely held corporations, must meet the disparagement requirements to recover damages for speech which lowers them in the business community and causes them pecuniary loss. As a corporation's size and geographic scope increase, so will the number of potential critics of its operations. This greater risk of disparagement is justified given the invisibly pervasive influence of large corporations.\textsuperscript{156}

When a product is disparaged that is closely identified with a high-level official of a corporation, the officer's recovery should be combined with that of the corporation, and it should be limited to harm to business—not personal—reputation. Since a president or other high-level official has great influence over corporate policy, speech about the officer's conduct is especially important to consumers and investors. The value of speech critical of the corporation's products and business practices outweighs the individual's interest in business reputation. A statement about an aspect of the officer's nonbusiness life may be actionable under the requirements for personal defamation if the statement does not involve something of importance in the free flow of commercial information—that is, if it does not bear on the official's duties or on corporate policy which directly or indirectly influences consumer spending or investing or other public affairs such as the environment.

A more difficult situation arises when a product which is disparaged carries the endorsement of a famous person and the celebrity has no relationship with the endorsed company beyond licensing her name. A similar situation involves a celebrity famous for her accomplishments in an unrelated field who creates a consumer product and is closely associated with it. The strong association with a famous person as creator or endorser does not alter the public interest in the flow of product information. The endorser should not recover for personal defamation when the product is disparaged; by imposing such stiff recovery requirements, the endorser is

\textsuperscript{155} For a comparison of the defamation and disparagement policies on survival, see supra notes 47-49 and accompanying text.

\textsuperscript{156} Whether it involves price formulation, investment decisions, or interaction with the environment, big business plays a significant role in a consumer's life. "[I]t seems that criticism of the activities of a managerial class whose decisions may be closely intertwined [sic] with national policy should be given greater protection than common law standards traditionally provide." Note, supra note 108, at 1507. "Large corporations, in particular, have considerable involvement in American life, and public discussion of their activities should be subject to few limitations." Stevens, Private Enterprise and Public Reputation: Defamation and the Corporate Plaintiff, 12 Am. Bus. L.J. 281, 286 (1974).
encouraged to assume a high level of responsibility to ensure that the products are safe and effective.

B. The Role of the Defendant

To ensure the free flow of a variety of information about products, businesses, and business figures, the disparagement defendant's status should be irrelevant to the business disparagement analysis. Some commentators have argued that competitors should not receive actual malice protection in disparagement suits. Speech critical of a competitor's product is more likely to be self-serving than speech by a noncompetitor. Some competitor criticism may be useful for consumers, however. A case-by-case analysis determining protection based on the defendant's status would create uncertainty which might chill some true speech. "Competitor" is a term of potentially limitless bounds. Many companies make products which compete on one level or another; negative statements about one brand of an item might cause a consumer to buy a wholly different item. Many items could thus be classified as competitors of each other. In addition to a broad array of competing items, this standard could create countless competitors within each manufacturer. Speech by stockholders, employees, and former officers of the competitor would be left vulnerable and subject to the chill of potential liability.

Subjecting competitor-defendants to a lower fault standard for disparagement liability would chill some valuable speech and diminish the effect of competition between firms. Direct criticism by competitors inspires companies to improve their product to avoid future criticism. Such criticism would be of interest to consumers as well; providing all defendants actual malice protection would diversify the flow of commercial information.

Similarly, the application of disparagement standards of liability for statements critical of products, businesses, or business figures should not

157. Langvardt, supra note 31, at 968-69. "[T]his factor takes into account the influences of the policies underlying unfair competition law. . . . The concern with promoting good faith in the marketplace is strong enough to justify treating competitor defendant cases and noncompetitor defendant cases differently." Id. at 968 (footnote omitted). The distinction also reflects the commercial speech doctrine. Id. at 968-69.

Justice Garibaldi, concurring in Dairy Stores, Inc. v. Sentinel Publishing Co., declined to decide whether heightened first amendment protection would also apply to a suit against a competitor. 104 N.J. 125, 162 n.4, 516 A.2d 220, 239 n.4 (1986). Another court held that the first amendment does not require actual malice in a suit over an advertising war because the ads merely proposed commercial transactions. United States Healthcare v. Blue Cross of Greater Philadelphia, 898 F.2d 914, 937 (3d Cir. 1990).

turn on the media or nonmedia status of the speaker. Although at least six members of the Court in *Greenmoss* agreed that constitutional protection of defamation should not depend on whether the defendant is a member of the media,\(^5\) the Court on two recent occasions has expressly left the issue open.\(^6\) Several cases applying the actual malice standard to product disparagement have alluded to the value of consumer reporting and product investigation.\(^6\) One commentator who favors the competitor-noncompetitor distinction would provide nonmedia noncompetitors such as consumers full protection.\(^6\) Nonmedia criticism is just as valuable for consumer decision making as media criticism. """"[T]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.""""\(^163\)

C. The Subject Matter of the Communication

Some commentators advocate an analysis focused on subject matter for determining which statements should receive actual malice protection in disparagement law.\(^164\) A case-by-case analysis would again create uncertainty,

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Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice Brennan [dissenting] that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.


161. See, e.g., Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 280 (3d Cir. 1980). """"Consumer reporting enables citizens to make better informed purchasing decisions. Regardless whether particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation in order to foster . . . First Amendment goals . . . ."""" Id.

162. See Langvardt, *supra* note 31, at 971.


164. In *Dairy Stores*, the court advocated a subject-matter test in holding the corporate plaintiff to be a public figure because of the strong public interest in bottled water, the target of the disparagement. 104 N.J. at 144-46, 516 A.2d at 230-31. """"[M]atters of public interest include such essentials of life as food and water. Widespread effects of a product are yet another indicator that statements about the product are in the public interest. . . . [A]nother criterion is substantial government regulation of business activities and products."""" Id. at 144-45, 516 A.2d at 230 (citations omitted).

See also Langvardt, *supra* note 31, at 963-69. Langvardt offers seven considerations to guide courts in determining whether the speech is of private or public concern:

1. Whether the statement involves an allegation of criminal behavior.
2. Whether the statement pertains to an essential of life. [Such as] food [or] water . . . .
however, and might chill criticism about very narrow but very important business issues. To ensure the full flow of information about products, businesses, and business figures, the subject matter of the statement must be irrelevant to the analysis. Arguably, most statements concerning businesses or products affect the public in some respect; to attempt to draw a public interest line requires the judge to perform the ad hoc classifying the Court sought to avoid in *Gertz*.\(^6\) The free flow of information which is valuable only to a small segment of the community would have a positive effect on the economy and thus on consumers; ""‘the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.’""\(^6\)

**CONCLUSION**

Removing all defamation actions involving businesses and business figures from defamation and merging them with product disparagement would maintain the distinction between personal reputation and economic interest while realigning business defamation to represent the economic interests of plaintiffs. The reorganization would remove the uncertainty surrounding the area of overlap between business defamation and product disparagement. Affording all business disparagement defendants the actual malice standard would create a predictability which would encourage uninhibited criticism of products, businesses, and business figures. Protection of criticism would promote the free flow of commercial information and more efficient resource allocation.

In the market place, more information for the consumer can mean more—not less—freedom for private enterprise. For if we presume a rational consumer as the keystone of our economy, as I believe we must,

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3. Whether the statement pertains to a matter of public safety or public health. . . .
4. The extent and frequency of the public’s use of the product or service referred to in the statement. . . .
5. Whether the product, other property, or service referred to in the statement is heavily regulated by the government. . . .
6. Whether the statement is part of a report about a government proceeding. . . .
7. The extent of circulation of the statement. . . .

*Id.* at 966-67 (emphasis omitted).

165. See *Gertz*, 418 U.S. at 346; *supra* note 58. *But see Greenmoss*, 472 U.S. at 762. When the communication was deemed to involve a narrow business interest and was not published widely, the Court combined the public interest and plaintiff analyses to hold that the actual malice standard for presumed and punitive damages was unnecessary to protect speech. "‘There is simply no credible argument that this type of credit reporting requires special protection to ensure that ‘debate on public issues [will] be uninhibited, robust, and wide-open.”’ *Id.* at 762 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

then whatever gives the consumer better grounds for more rational choice contributes to a greater responsiveness and greater success in the overall economy. For this reason, government and business must cooperate closely and carry on a continuing dialogue to widen the channel of consumer information.167
