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Philadelphia Newspapers, Inc. v. Hepps: A Logical Product of the New York Times Revolution

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PHILADELPHIA NEWSPAPERS, INC. V. HEPPS: A LOGICAL PRODUCT OF THE *NEW YORK TIMES* REVOLUTION

I. INTRODUCTION

The common law of defamation evolved in political surroundings entirely different from those that nurtured the constitutional values of free speech and press.[1] Because of their inherent incompatability, reconciling the constitutional interests of freedom of expression with a state's interest in protecting an individual's reputation has proven to be a formidable task for the Supreme Court.

Before the Court drastically altered the law of defamation with its decision in *New York Times Co. v. Sullivan*,[2] libelous statements received no protection from the first amendment guarantees of freedom of speech and of the press.[3] The common law protected an individual's interest in the enjoyment and maintenance of his reputation by affording a civil cause of action under which the publisher of a defamatory statement faced a standard of strict liability.[4] Regardless of his good faith belief in the truth of the defamatory statement, the defendant incurred liability unless he could prove that the statement was either true or privileged.[5]

This "recipient-centered" concept[6] focused on the effect that the speech had on the receiver rather than on the conduct of the sender. General damage was presumed, allowing a private citizen defamed by an unprivileged communication to recover absent proof of special harm to his reputation.[7] In addition, although falsity was an essential element to

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1. Curtis Publishing Co. v. Butts, 388 U.S. 130, 151 (1967). For a general discussion of the historical development of defamation law *see* W. KEETON, B. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS, § 111 at 771-73 (5th ed. 1984); *see also* ROSENBERG, PROTECTING THE BEST MAN (1986) ("An Interpretive History of the Law of Libel").

2. 376 U.S. 254 (1964)(public official cannot recover in a defamation action against a media defendant absent showing of actual malice).

3. *See, e.g.*, Roth v. United States, 354 U.S. 476, 483 (1957) (dictum); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

4. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 113 (4th ed. 1971) (citing Hulton & Co. v. Jones, [1909] 2 K.B. 44, *aff'd* C.A. 20 (1910)). In the beginning of this century, Justice Holmes applied strict liability in Peck v. Tribune, 214 U.S. 185 (1909), where the Chicago Sunday Tribune, instead of placing the picture of a female nurse who regularly drank whiskey, accidentally placed a picture of a nurse who did not drink whiskey in a testimonial advertisement for Duffy's Pure Malt Whiskey. Holmes wrote:

> [I]f the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of majority vote. We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal falsehood in order to constitute a cause of action.

Id. at 190 (quoted in C. LAWTHORNE, THE SUPREME COURT AND LIBEL 10 (1981)).

5. W. PROSSER § 113.

6. *See generally* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 828 (1984) (harm to be redressed is determined by recipient's reaction to speaker's words).

7. Gertz v. Robert Welch, Inc., 418 U.S. 323, 370 (1974) (White, J., dissenting) (pre-

the cause of action, truth was regarded as an absolute defense in civil cases.[8] The plaintiff was, therefore, not required to prove falsity.

The common law approach to defamation maintained a reverence for the value of an individual's reputation.[9] Justice Stewart eloquently described this recognition of an individual's interest in his reputation in *Rosenblatt v. Baer*:[10] "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty."[11]

Beginning with *New York Times*, however, the Supreme Court has recognized that the first amendment raises a barrier to the unqualified protection of an individual's reputation. Chief Justice Holmes captured the essential nature of free expression in his statement that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[12]

In its struggle to accommodate the seemingly irreconcilable values of free speech and protection of an individual's dignity from defamatory statements, the Supreme Court has established an array of standards to be applied in determining the constitutional protection of expressions by organizations and individuals. These standards are based on the type of speech and the nature of the parties.[13] However, in its quest to establish the boundaries of constitutional protection, the Court has remained virtually silent on a crucial aspect of every defamation action — the burden of proving the truth or falsity of a defamatory statement. This critical issue was addressed and resolved in the recent decision of *Philadelphia Newspapers, Inc. v. Hepps*.[14]

II. BACKGROUND

A. *The Onset of the Revolution*

In its 1964 decision, *New York Times v. Sullivan*,[15] the Supreme Court

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sumption of damage was the typical scheme under state defamation law). *See, e.g.*, James v. Fort Worth Telegram Co., 117 S.W. 1028 (Tex. Civ. App. 1909).

8. GATLEY ON LIBEL AND SLANDER § 351, 152 (8th ed. R. McEwen & P. Lewis 1981).

9. *See* B. SANFORD, LIBEL AND PRIVACY 15-21 (1985); *see generally* Lovell, *The "Reception" of Defamation By the Common Law*, 15 VAND. L. REV. 1501 (1962) (outlines history of libel and slander through early England, explaining the reasons for the ultimate division of defamation into two distinct torts).

10. 383 U.S. 75 (1966).

11. *Id.* at 92 (Stewart, J., concurring).

12. Stromberg v. California, 283 U.S. 359, 369 (1931).

13. *See generally* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 7 (1975) (outlining the Court's defamation decisions from *New York Times* to *Gertz*).

14. 106 S. Ct. 1558 (1986).

15. 376 U.S. 254 (1964).

adopted a powerful reading of the first amendment that dramatically restructured the law of libel. In *New York Times*, L. B. Sullivan, the police commissioner of Montgomery, Alabama, brought a libel suit against four Alabama clergymen and the New York Times newspaper. The allegedly defamatory publication, a full-page advertisement, solicited contributions for "The Committee to Defend Martin Luther King and the Struggle for Freedom in the South."[16] Consisting largely of editorial commentary about the mistreatment of Dr. King and negro student protesters by the police and the community, the advertisement contained various minor inaccuracies.[17]

The trial court found in favor of Sullivan and awarded him $500,000. The Alabama Supreme Court affirmed the judgment.[18] The trial court's disposition was based in part on Alabama's defamation law that allowed the jury to presume damages once it found the libelous statement was made of and concerning the plaintiff.[19]

The Supreme Court reversed, holding Alabama's strict liability standard constitutionally deficient because it failed to provide sufficient safeguards for free speech and press, at least where a public official brings a libel action against a critic of his official conduct.[20] In such cases, the Court held, the speaker is entitled to a constitutional privilege that is defeasible only upon plaintiff's proof that the defendant acted with "actual malice."[21] Adopting a conditional privilege originally set forth in *Coleman v. MacLennan*,[22] the Court added constitutional armor to the privilege and limited its use to the "good-faith" criticism of public officials.

Emphasizing society's need for vigorous debate on public issues, the *New York Times* Court recognized that certain inaccuracies are inevitable in the free exchange of ideas. Some erroneous statements, therefore, must be constitutionally protected in order to provide the "breathing space" essential to the survival of free expression.[23] Accordingly, the Court rejected Sullivan's argument that the advertisement should be denied first amendment protection because of its factual errors, its defamatory content, or the combination of these two

16. *Id.* at 257.

17. *Id.* The advertisement stated that police had "ringed the Alabama State College Campus" when in fact they had merely been deployed in large numbers nearby. It also asserted that Dr. King had been arrested seven times, when in fact he had been arrested on only four occasions.

18. New York Times v. Sullivan, 273 Ala. 656, 144 So. 2d 25 (1962).

19. *New York Times*, 376 U.S. at 262.

20. *Id.* at 264.

21. *Id.* at 279-80. To prove "actual malice," the plaintiff must show that defendant acted with "knowledge that [the defamatory statement] was false or [made] with reckless disregard of whether it was false or not."

22. 78 Kan. 711, 98 P. 281 (1908). The Kansas Supreme Court determined that privilege carries a good faith requirement and "extends to a great variety of subjects and includes matters of public concern, public men, and candidates for office." *Id.* at 285. The privilege is qualified to the extent that plaintiff must "show actual malice, or go remediless." *Id.*

23. *New York Times*, 376 U.S. at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

elements.[24]

New York Times involved the criticism of a public official in his official capacity. The Court based its decision on the premise that punishing seditious libel was repugnant to the first amendment value that citizens should be allowed to openly criticize their government.[25] A noted commentator, Professor Harry Kalven[26] predicted the expansion of this privilege shortly after the *New York Times* decision. Kalven cautioned, however, that "the invitation to follow a dialectic progression from public official to government policy . . . to matters in the public domain, like art, seems to me to be overwhelming."[27]

B. *The Expansion of New York Times*

The United States Supreme Court did in fact follow this progression. In the same year that *New York Times* was decided, the Court extended the revolutionary "actual malice" standard to a criminal libel case. In *Garrison v. Louisiana*,[28] the Court held that the Constitution limits a state's power to impose criminal sanctions upon critics of a public official's conduct. Again resting its decision on the foundation that punishing seditious libel offends the first amendment,[29] the Court reiterated the need for free debate on public issues. Even where the utterance is false, the Court observed that the constitutional protections of free expression preclude the imposition of civil or criminal liability upon any utterance that is not knowingly or recklessly false.[30]

Garrison also restated from *New York Times* a supporting rationale for extending a privilege to speech critical of a public official's conduct. The Court noted that "federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty, regardless of the existence of malice in the sense of ill will," and that to deny critics of official conduct a corresponding privilege "would give public servants an unjustified preference over the public."[31]

In a concurring opinion, Justices Douglas and Black repeated the view they expressed in the *New York Times'* concurrence, that the Constitution requires that the freedom to criticize official conduct be absolute, and that by allowing the possibility of sanction for seditious libel where the plaintiff can prove "actual malice" the decision violated the first amendment.[32]

The Court continued its expansion of the *New York Times* standard in

24. *Id.* at 273.
25. *See id.* at 276-77.
26. Kalven, a Professor of Law at the University of Chicago, has been described as New York Times, Inc. v. Sullivan's "most prominent interpreter." N. ROSENBERG, *supra* note 1 at 245.
27. Kalven, *The New York Times Case: A Note On "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.
28. 379 U.S. 64 (1964).
29. *Id.* at 67; *see also supra* note 24 and accompanying text.
30. *Id.* at 73.
31. *Id.* at 74.
32. *Id.* at 79 (Black and Douglas, JJ., concurring).

Rosenblatt v. Baer,[33] by applying the "public official" designation to relatively low-ranking government employees.[34] With respect to the *New York Times* standard, the Court held that the term "public official" applies to those governmental employees "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[35]

In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*,[36] the Court went even further, extending the *New York Times* standard beyond public officials to encompass "public figures" as well. Although neither plaintiff was a public official, the Court held that they could not recover without a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[37] It reasoned that as public figures involved in matters of "public interest,"[38] the plaintiffs had access to adequate means of counter-argument, and thus the ability to expose the falsity of the speech against them through public discussion.[39] This policy consideration, the ability of the plaintiff to defend his reputation, was an essential part of the Court's prior decisions regarding the standards necessary to protect the plaintiff. Such policy considerations are the natural consequence of the Court's recognition that the first amendment requires that free speech and an individual's interest in his reputation coexist.

Butts and *Walker* marked the Court's departure from the governmental criticism basis for consitutional protection and the inception of a trend toward creating a privilege for speech involving "matters of public or general interest."[40] Significantly, the Court also manifested its intent to shift another aspect of defamation analysis. The Court stated that the proper focus is upon the editorial process that creates the publication and not simply upon the falsity of its content.[41]

Dealing a nearly fatal blow to the protection of private figure plaintiffs defamed by the media, in *Rosenbloom v. Metromedia, Inc.*[42] the Court advanced the *New York Times* standard to the extremes foretold by Professor Kalven.[43] George Rosenbloom, a magazine distributor, sued a radio station which broadcasted news stories characterizing his books as obscene and labeling him as a "smut distributor" and "girlie book ped-

33. 383 U.S. 75 (1966).

34. *Id.* The plaintiff, Frank Baer, supervised a county recreation area and reported to the county commissioners.

35. *Id.* at 85.

36. 388 U.S. 130 (1967)(cases consolidated).

37. *Id.* at 155.

38. Butts was a state university's athletic director. *Id.* at 135-36. Walker was a retired Army general. *Id.* at 140.

39. *Id.* at 155 (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., dissenting)).

40. 388 U.S. at 154-55.

41. *Id.* at 152-53.

42. 403 U.S. 29 (1971).

43. *See supra* notes 25-26 and accompanying text.

dler."[44] The trial court awarded Rosenbloom $250,000,[45] but the court of appeals reversed.[46] Refusing to allow Rosenbloom's non-public figure status to assume controlling significance,[47] the United States Court of Appeals for the Third Circuit cited *Time, Inc. v. Hill*.[48] In *Hill*, the Court embraced the rationale that "[a] broadly defined freedom of the press assures the maintenance of our political system and an open society,"[49] and applied the *New York Times* standard to false reporting of "matters of public interest" in an action for invasion of privacy.[50] Despite the fact that the plaintiff in *Hill* was a private individual, the Court accorded the defendant publisher the same constitutional privilege that the *New York Times* defendants enjoyed in publishing statements concerning a public official.[51]

The Supreme Court affirmed, holding that although the plaintiff was not a public official or a public figure, the *New York Times* privilege applied to protect the publication or broadcast of "matters of public or general interest."[52] By eliminating the distinction between private and public plaintiffs, the Court gave the media virtual "carte blanche" to publish defamatory material,[53] due to its strong propensity to classify an almost unlimited range of matters as "of public interest."[54]

Rosenbloom represented an extreme departure from the basis on which the *New York Times* privilege was originally founded and established the "matter of public interest" standard for constitutional protection which has proven difficult to apply.[55] In its zeal to prevent press self-censorship, the *Rosenbloom* plurality gave short shrift to the protection of individual reputational interests, even to the point of stating that the first amendment protects the mass media from "[t]he very possibility of having to engage in litigation."[56]

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44. *Rosenbloom*, 403 U.S. at 36.

45. The jury originally awarded $25,000 in general damages and $725,000 in punitive damages. The court reduced the punitive damages award to $250,000 on remittitur.

46. 415 F.2d 892 (3d Cir. 1969).

47. *Id.* at 896.

48. 385 U.S. 374 (1967).

49. *Id.* at 389.

50. *Id.* at 387-88.

51. However, in citing the *Hill* Court's refusal to distinguish the plaintiff from Sullivan in *New York Times*, the Third Circuit apparently ignored the dictum in *Hill* acknowledging that "[w]ere this a libel action, the distinction . . . between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane and the additional state interest in the protection of the individual against damage to his reputation would be involved." *Id.* at 391.

52. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

53. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 206 (1976).

54. *See id.* at 206-07.

55. *Id.* In our society, the media decide what is to be a matter of public concern, and courts have shown scant interest in second-guessing that determination. As Justice Marshall noted in his dissent, all human events are arguably within the area of "public or general concern." *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting).

56. *Rosenbloom*, 403 U.S. at 52-53. The quoted observation was made in response to the suggestion of the dissenters, Justices Harlan and Marshall, that a negligence standard and an "actual damages" limitation would strike the proper balance.

Disturbed by this extension of the constitutional privilege to all matters of public interest, one commentator argued that *Rosenbloom* effectively destroyed the common law of defamation and concluded: "The line of cases which began with *New York Times v. Sullivan* has come to an end. The courts have no where to go after the decision in *Rosenbloom v. Metromedia*."[57]

C. *The* Gertz *Decision*

Rosenbloom commanded the votes of only three Justices,[58] and lasted only three years. In 1974, the Court decided *Gertz v. Robert Welch, Inc.*[59] and abruptly aborted the evolution of a system in which "the great bulk of material contained in the press—far more than merely matters relevant to self-government—was subject to the *Times* privilege."[60] With *Gertz*, the Court adopted an approach that re-established its recognition of the reputational values without sacrificing first amendment freedoms.

Elmer Gertz, a prominent Chicago lawyer, brought a libel action against the author and publisher of a magazine article describing him as a communist involved in a campaign to discredit the police.[61] The trial court ruled the publication libelous as a matter of law and withdrew from the jury all issues except the measure of damages.[62] Although the jury awarded Gertz $50,000, the trial court determined that the *New York Times* privilege applied and entered judgment for defendants notwithstanding the verdict.[63] The court of appeals affirmed on the basis of *Rosenbloom*, holding that because the case before it involved a matter of public interest, the *New York Times* standard was applicable.[64]

The Supreme Court reversed and remanded, rejecting *Rosenbloom* because of its failure to adequately weigh the reputational interests of private individuals against the freedoms of speech and press.[65] Articulating a three-part formula designed to reach the proper balance of these values, the Court held: (1) the *Times* standard applies to public figures and officials but not to private figures even if those private

57. Note, *The End of the Line:* Rosenbloom v. Metromedia, 31 U. PITT. L. REV. 734 (1970).

58. Only Justices Brennan, Burger, and Blackmun could wholly agree that the *New York Times* standard of knowing or reckless falsity applied in a state civil libel action brought by a private individual for a defamatory falsehood uttered in a radio broadcast about the individual's involvement in an event of public or general interest. *Rosenbloom*, 403 U.S. at 30-32.

59. 418 U.S. 323 (1974).

60. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 447 (1975).

61. *Gertz*, 418 U.S. at 325-26.

62. Gertz v. Robert Welch, Inc., 322 F. Supp. 997, 998 (N.D. Ill. 1970).

63. *Id.* at 1000. The Court found insufficient evidence to show that there was actual malice or reckless disregard for the truth. *Id.*

64. 471 F.2d 801 (7th Cir. 1972) *rev'd*, 418 U.S. 323 (1974). The court of appeals doubted the correctness of the trial court's finding that plaintiff was not a public figure, but reached the same result by applying the public interest test. *Id.* at 805, n.8.

65. *Gertz*, 418 U.S. at 346-47. Instead of balancing the competing interests, especially with respect to the private plaintiff, the plurality adopted a one-sided approach favoring the defendant.

figures are involved in a matter of public interest;[66] (2) the states may define their own standard of liability with respect to private plaintiffs "so long as they do not impose liability without fault;"[67] and (3) no plaintiff may recover punitive damages unless the *Times* standard of knowing or reckless falsity is met.[68]

The *Gertz* decision benefited private plaintiffs by overruling the "matter of public interest" test[69] prescribed by *Rosenbloom*, thereby firmly establishing a distinction between private and public plaintiffs.[70] But the decision also imposed an additional burden on certain classes of private figures. While in the past a private plaintiff not involved in a matter of public interest could recover absent a showing of fault by the publisher, *Gertz* abolished strict liability with respect to all plaintiffs. This abolition was necessary, however, in order to avoid punishing the media for publishing material whose accuracy was reasonably verified and that was written in a conscientious manner.

Thus, *Gertz* marked the Court's return to a balancing approach. The decision protected the media by requiring all plaintiffs to prove fault, yet accommodated the private individual's reputational interests by refusing to apply the *Times* standard to those who were not public officials or public figures. The plaintiff, Elmer Gertz, recently noted that "in the *Gertz* case, [the Court] backtracked and held that private persons had to prove fault, as defined by state law, and actual injuries, as more broadly defined."[71]

D. *The Falsity Issue*

In the years between *New York Times* and *Gertz*, the Court established various criteria for determining liability in defamation cases, but failed to answer a key question pertinent to every defamation case: given that

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66. *Id.* at 343.

67. *Id.* at 347. The Court found this to be true at least where "the substance of the defamatory statement makes substantial danger to reputation apparent." *Id.* at 348 (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967)).

68. *Id.* at 350.

69. *See supra* note 50 and accompanying text.

70. The Court found two major reasons to distinguish private plaintiffs from public officials or figures: first, public officials and public figures have greater access to the media and hence a more realistic opportunity to rebut false statements. Second, public figures and officials have chosen to seek the limelight or to influence government operations and thus have more or less "assumed the risk" of inciting adverse commentary.

71. Gertz, *The Law of Libel Continues to Develop—An Introduction*, 90 DICK. L. R. 539, 541 (1986). Gertz added that

> at this point, the matter seemed to rest until the plurality opinion in *Dun & Bradstreet v. Greenmoss Builders*, in which the majority held that *Gertz* was confined to matters of public concern. In other words, private individuals not involved in matters of public concern could recover under common law rules, so that neither fault nor malice had to be proved in order to recover compensatory and punitive damages for utterances of no public importance. The Court concluded by stating that all expression is not entitled to the same first amendment protection—that there are degrees of entitlement. If the defamatory utterance concerns matters that are purely private then it is not protected by the *Gertz* rule.

Id. (citing Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939 (1985)).

a defamatory statement must be false to be actionable,[72] who has the burden of proving its truth or falsity? Prior to *New York Times*, truth, together with privilege, was considered an absolute defense to a libel action.[73] Once the Court introduced constitutional analysis to libel law, however, the standards applied to determine which party had the burden of proving truth or falsity became more difficult to determine.

In *New York Times*, the Court recognized that the defense of truth, standing alone, was insufficient to protect free speech,[74] and acknowledged that some falsehoods, even those potentially defamatory, are constitutionally protected.[75] Although nowhere in *New York Times* did the Court expressly shift the burden of proving falsity to the plaintiff,[76] the application and discussion of *New York Times* in subsequent decisions indicates that such a shift was apparently intended.

In *Garrison v. Louisiana*, Justice Brennan interpreted the *New York Times* rule as requiring a public plaintiff to establish falsity as well as "actual malice."[77] Similarly, in *Greenbelt Publishing Association v. Bresler*,[78] Justice Stewart, relying on *New York Times*, emphasized that a public plaintiff must show that the defamatory publication was "not only false but was uttered with actual malice."[79] Interpreting the rule became even more difficult after the Court's dictum in *Cox Broadcasting Corp. v. Cohn*.[80] Having stated that truth is a defense to a libel action, Justice White concluded that the defamed public plaintiff must prove falsity and reckless disregard for truth or falsity.[81]

The Court's attempts to describe the constitutional privilege reflect the confusion over the "truth or falsity" burden that existed prior to *Philadelphia Newspapers, Inc. v. Hepps*.[82] With the *Hepps* decision, the Court has taken a significant step toward eliminating the confusion, placing the burden of proving falsity on the plaintiff in certain types of defamation cases.[83]

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72. Time, Inc. v. Firestone, 424 U.S. 448, 458 (1967).

73. *See supra* note 5.

74. New York Times Co. v. Sullivan, 376 U.S. 254, 278-79 (1964).

75. *Id.* at 273.

76. The possibility of shifting the burden of proof as a means of protecting speech was clear to Justice Brennan. In Speiser v. Randall, 357 U.S. 513 (1958), he wrote that a state may not place on a tax exemption applicant the burden of proving that he has not engaged in criminal advocacy, because such a rule tended to cause self-censorship. *Speiser* was cited liberally by Justice Brennan throughout *New York Times*, but for different purposes. *New York Times*, 376 U.S. at 271, 279, 285.

77. 379 U.S. 64, 74 (1964). Two commentators have observed that this burden of proof requires a public official, at a minimum, to prove falsity. Arkin & Granquist, *The Presumption of General Damages in the Law of Constitutional Libel*, 68 COLUM. L. REV. 1482, 1490 n.58 (1968).

78. 398 U.S. 6 (1970).

79. *Id.* at 8 (citing New York Times v. Sullivan, 376 U.S. 254, 280 (1964)).

80. 420 U.S. 469 (1975).

81. *Id.* at 489-90 (dictum).

82. 106 S. Ct. 1558 (1986).

83. The decision placed the burden of proving falsity on the plaintiff in cases where the subject matter of the defamatory speech is of "public concern" and the defendant is a member of the mass media.

III. *PHILADELPHIA NEWSPAPERS, INC. v. HEPPS*

A. *Facts*

Maurice Hepps was the principal stockholder of General Programming, Inc., which owned the trademark to a chain of "Thrifty Beverage" stores. Boasting an innovative concept in liquor sales and distribution, General Programming licensed and provided management and consultation services to the Thrifty stores.[84] When a bill introduced in the Pennsylvania Legislature threatened to effect adversely the stores' purchasing practices, Hepps engaged the assistance of a lobbyist in order to defeat the measure.[85] The lobbyist, who was reputed to have connections with organized crime, contacted State Senator Frank Mazzei. Mazzei opposed the bill, which never passed.[86] On another occasion, the Pennsylvania Liquor Control Board suspended the Thrifty stores' liquor licenses, alleging that the management agreements violated the liquor code.[87] At Hepps' request, Senator Mazzei arranged a meeting between Hepps and the Liquor Control Board's chief counsel, Alexander Jaffurs. Jaffurs refused to attend this meeting and was discharged shortly thereafter. Jaffurs publicly stated that he believed his prosecution of Thrifty was a factor in his being fired.[88]

The defendant, Philadelphia Newspapers, Inc., publishes the Philadelphia Inquirer which published a series of five articles, authored by defendants William Ecenbarger and William Lambert, stating that Hepps' organization had connections with organized crime. The nature of these articles was exemplified by one headline which read: "How Mazzei Used Pull, Kept Beer Chain Intact."[89] The articles alleged that Mazzei had engaged in a clear pattern of interference with state government on behalf of Hepps and Thrifty, and that Mazzei had several underworld associates including Joseph Scalleat, whom Hepps had engaged as a lobbyist.[90] Based on these articles, Hepps, General Programming, Inc., and several of its franchisees that were engaged in distribution of beer and other beverages filed an action for libel in May 1976.

B. *Decisions Below*

Noting that a Pennsylvania statute placed the burden of proving the truth of defamatory statements on libel defendants,[91] the trial court con-

84. Brief for Appellee at 2, Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986) (No. 84-1491).

85. Brief for Appellant at 5, Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986) (No. 84-1491).

86. *Id.*

87. *Id.*

88. *Id.* at 6.

89. Hepps v. Philadelphia Newspapers, Inc., 3 Pa. D. & C.3d 693, 695 (1977).

90. *Id.*

91. 42 PA. CONS. STAT. § 8343(b)(1) (1982) provides:
"In an action for defamation, the defendant has the burden of proving, when the issue is properly raised: (1) The truth of the defamatory communication."

cluded that the statute violated the federal Constitution and instructed the jury that plaintiffs bore the burden of proving falsity.[92] After a six-week trial, the jury returned a verdict for the defendants.

On appeal, the Pennsylvania Supreme Court reversed and remanded, holding that the statute met the *Gertz* fault requirement and that fault could be proved without proving falsity.[93] The court interpreted *Gertz* and subsequent cases to mean that the only restraint upon the states mandated by the first amendment in private figure defamation actions, was the prohibition against imposing liability without fault. Rejecting the trial court's instruction that plaintiff bore the burden of proving falsity, the court stated that to allow such a requirement would "condone . . . irresponsible conduct by the media."[94]

C. *The United States Supreme Court Holding*

Not persuaded by the Pennsylvania Supreme Court's disposition, the United States Supreme Court held that "where a newspaper publishes speech of public concern, a private figure plaintiff cannot recover damages without also showing that the statements at issue are false."[95] Even where the plaintiff's burden is escalated by a "shield law" such as Pennsylvania's,[96] the Court found no reason to apply a different constitutional standard.[97]

The Court reasoned that because it is impossible to determine whether speech is true or false in every case, the Constitution requires the scales to be tipped in favor of protecting true speech.[98] To ensure that on matters of public concern true speech is not chilled, the defendant cannot be required to guarantee the truth of all of his factual assertions. As a result, the common law presumption that defamatory speech is false must yield to the first amendment policy that encourages free debate on public issues.[99]

The Court acknowledged that plaintiffs defamed by false statements which they are unable to demonstrate are false will be unable to recover under this decision. This consideration, however, is outweighed by the need to protect free speech and tempered by the realization that placing the burden on either party will occasionally result in injustice.[100]

92. Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 485 A.2d 374, 377 (1984).

93. *Id.* at 312, 485 A.2d at 385.

94. *Id.* at 312, 485 A.2d at 386.

95. 106 S. Ct. 1558, 1559 (1986).

96. 42 PA. CONS. STAT. § 5942(a) (1982) provides in pertinent part: "No person . . . employed by any newspaper of general circulation . . . or any radio or television station, or any magazine of general circulation . . . shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial, or investigation before any government unit."

97. *Hepps*, 106 S. Ct. at 1565.

98. *Id.* at 1564.

99. *Id.*

100. *Id.*

D. *The Concurring and Dissenting Opinions*

Justices Brennan and Blackmun wrote a concurring opinion,[101] asserting that the Court erroneously limited its holding to media defendants. Arguing that no distinction should be made with respect to the type of defendant involved, the concurrence emphasized that the first amendment protects all speech, and that the inherent worth of an expression does not depend on its source.[102]

Justices Stevens, Burger, White and Rehnquist joined in a vigorous dissenting opinion,[103] arguing that the majority devalued the state's interest in redressing harm to an individual's reputation. Because the *Hepps* decision would have a practical effect only where the speaker meets the *Gertz* fault requirement, the decision protects speech made negligently or maliciously. Such speech does not deserve protection, the dissent asserted, as it contributes little to the "marketplace of ideas."[104]

The dissenters quoted *Time, Inc. v. Firestone*,[105] in which the Court stated that when the publisher is at fault through malicious or careless publication of defamatory material, the public interest in uninhibited speech is "at its nadir" and society's need to redress such utterances is "at its zenith."[106] If the plaintiff cannot prove the falsity of statements, the dissent reasoned that permitting the intentional and malicious publication of libelous material allows a publisher to act as a "character assassin [with a] constitutional license to defame."[107] Uncomfortable with the deterioration of the distinction between private and public plaintiffs, the dissent protested that *Hepps* was a throwback to the *Rosenbloom* era.[108]

IV. ANALYSIS

A. *The Shift Toward a New Standard of Liability*

The recurrent theme of Supreme Court defamation cases decided since *New York Times* centers on the defendant's culpability. This emphasis on culpability is evidence of the Court's realization that because of its antagonism toward the interests protected by the first amendment, defamation is a special kind of tort. The tension between defamation and the first amendment arises because the constitutional protection of the tortfeasor is a pervasive issue and the sanction for defamation invades a fundamental right.

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101. *Id.* at 1565.
102. *Id.* (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985) (Brennan, J., dissenting)).
103. *Id.*
104. *Id.* at 1567.
105. 424 U.S. 448 (1976).
106. *Id.* at 456.
107. *Hepps*, 106 S. Ct. at 1568 n.6.
108. *Id.* at 1571 (criticizing the reinstitution of the "matter of public interest" standard).

The *New York Times* decision planted the seed for *Hepps*, both in its realization that some falsehoods must enjoy constitutional protection[109] and in its recognition that requiring a speaker to guarantee the truth of factual assertions leads to "self-censorship"[110] that inhibits free speech. Because of *New York Times*, the defamatory falsehood began to lose its inherent actionability, and the conduct or intent of the speaker assumed a paramount role in determining liability. The *Hepps* decision fits consistently into this theme of culpability, squarely placing the burden of proving falsity, an essential element of fault, on the plaintiff.[111]

The Court's analysis of defamation liability since *NewYork Times* has shifted in focus from the effect of the defamatory speech—strict liability—to the cause of the speech—fault requirement. Mandated by the Constitution's zealous protection of free expression, this shift proceeded without addressing the burden of proving falsity until the Court's decision in *Hepps*.

With the advent of the *Hepps* decision, the Court has removed a significant obfuscation from a complex and confusing area of law. The decision flows logically from the rationale behind the Court's recent defamation decisions,[112] particularly the *Gertz* abolition of strict liability in such actions. After *Gertz*, the *Hepps* conclusion was inevitable: even a private figure plaintiff must prove falsity in order to prevail in a defamation action against the mass media.

B. *The Relationship Between Fault and Falsity*

Gertz established that although a private figure plaintiff need not meet the demanding *New York Times* standard, he must at least show fault on the part of the publisher of the defamatory communication.[113] The Court has also acknowledged that "demonstration that an article was true would seem to preclude finding the publisher at fault."[114] It would appear to follow that if fault involves the elements of carelessness and falsity,[115] the publisher of a true statement cannot fully meet the criteria to support a finding that he was "at fault."

This conclusion is similar to that reached by commentators Franklin and Bussel: "Because fault with respect to falsity is the constitutional rule, a showing of falsity in *Gertz* cases is the logical predicate to satisfying the constitutional test."[116] Even if one argues that such a conclusion does not require that the plaintiff prove falsity as part of his prima facie case, it is undeniable that the converse, requiring the defendant to prove truth, offends the principle set forth in *Gertz*.

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109. New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).
110. *Id.* at 279.
111. Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 375 (6th Cir. 1981) (fault consists of two elements, carelessness and falsity).
112. *See supra* note 12 and accompanying text.
113. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974).
114. Time, Inc. v. Firestone, 424 U.S. 448, 458 (1976).
115. Wilson v. Scripps-Howard Broadcasting, Co., 642 F.2d 371, 375 (6th Cir. 1981).
116. Franklin and Bussell, *supra* note 6, at 857.

The practical effect of shifting the burden of proof is most evident when a jury is undecided. In a close case, a presumption of falsity forces the undecided jury to find for the plaintiff. Even if the media defendant published a true statement, it could possibly be held liable if it were unable to prove the statement true. Thus, the very evil *Gertz* sought to extinguish, liability without fault, may ensue if the plaintiff is not required to prove falsity.[117]

Arguing that the *Gertz* fault requirement already provided an adequate safeguard, the *Hepps* dissent asserted that the decision would prevent plaintiffs from recovering where they could prove fault, such as carelessness or common law malice, but not falsity.[118] However, because true statements are not actionable, one must prove falsity to prove fault. Even a carelessly or maliciously printed article enjoys constitutional protection if it is true.[119] Furthermore, the dissent's scenario of a vindictive publisher knowingly printing an unprovably false story to purposely injure a plaintiff,[120] at the risk of career destruction and financial ruin, seems highly speculative.

C. *The Problem With Presuming Falsity*

In addition to permitting liability without fault in close cases, the presumption of falsity was rightly abolished by *Hepps* as an ancient relic which has outlived its underlying justification. The presumption originated at common law, with an approach to the concept of truth that has been characterized as "nothing short of schizophrenic."[121] While most authorities agreed that falsity was a required element in a defamation action,[122] the bulk of common law decisions assert that truth is merely an affirmative defense, implying that falsity is not a prerequisite to liability.[123] As Philadelphia Newspapers argued in its brief, there is no particular rational connection between the presumption's proved fact, that a defamatory statement was made, and the presumed fact that the statement was false.[124]

The plaintiffs in *Hepps* argued that where a man's reputation is concerned, he should be "presumed innocent until proven guilty." This

117. *Scripps-Howard Broadcasting Co.*, 642 F.2d at 375; *see also* Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 277 (1978) (incorrect determination may improperly deny first amendment protection).

118. 106 S. Ct. at 1566 (Stevens, J., dissenting).

119. *Cf.* Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221, 1236 (1976) (admitting that in an exceptional case, fault requirement would fail to fix liability on a defendant who published what he believed to be false and defamatory matter that actually proved to be true).

120. *Hepps*, 106 S. Ct. at 1568 (Stevens, J., dissenting).

121. B. SANFORD *supra* note 9 at § 6.2.1. (conflicting requirements provide that a defamatory statement must be false for plaintiff to recover yet maintain that truth is an affirmative defense thereby implying that falsity is not a prerequisite to liability).

122. *See* W. PROSSER, *supra* note 4 § 116.

123. B. SANFORD, *supra* note 9 at § 6.2.1.

124. Brief for Appellant at 33, Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1588 (1986) (No. 84-1491) (citing Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371 (6th Cir. 1981)).

rationale supported the presumption of falsity shared by the Pennsylvania Supreme Court in *Corabi v. Curtis Publishing Co.*[125] This view, however, was established in the criminal context. The underlying justification, preventing an innocent defendant from being punished if his guilt is uncertain, hardly justifies awarding a libel plaintiff possibly staggering damages if he is unable to fully convince a jury of falsity.

Shifting from the presumption of falsity, therefore, was a logical step for the *Hepps* Court, and was consistent with the *Gertz* shift away from presumed damages. Both changes reflect the Court's recognition of the vital need to continue the trend away from strict liability in defamation actions.

D. *The Threat of Self-Censorship*

The purpose of the *New York Times* privilege was to minimize the threat to the media of libel judgments,[126] which encourage self-censorship and hinder "uninhibited, robust, and wide-open" debate on public issues.[127] In *NewYork Times*, the Court realized that a certain number of inaccuracies are inevitable in the free interchange of ideas and developed a principle which planted the seed for the *Hepps* decision. As the *New York Times* Court observed: "A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to comparable 'self-censorship.' "[128]

Although the protection has since been extended beyond criticism of official conduct, the underlying need to avoid self-censorship still applies. The Pennsylvania statute at issue in *Hepps*, which placed the burden of proving truth on the defendant, attempted to establish precisely the type of rule proscribed by *New York Times* and its progeny. By virtually requiring a defendant to guarantee the truth of his assertions, the statute clearly violated the constitutionally-based principles discussed by the Court since *New York Times*. Without eliminating defamation actions altogether, these decisions have significantly reduced the likelihood that judges and juries, through the advice of media counsel, will prescribe what the press may or may not publish.

E. *The Uncertain Balance as to Truth or Falsity*

That all defamatory statements do not readily lend themselves to an accurate determination of their truth or falsity is an inescapable fact. Because no "litmus paper" test for truth exists, some speech will inevitably be unprovable. Conscious of our system's fallibility, the Court decided that since occasional errors will occur, the Constitution requires courts to risk denying recovery to deserving plaintiffs for unprovably

125. 441 Pa. 432, 447, 273 A.2d 899, 910 (1971) (the defense of privilege, which negates the malice requirement is not affected by the underlying presumption of falsity).

126. Anderson, *supra* note 60, at 425.

127. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

128. *Id.* at 279.

false statements, rather than punishing media defendants for publishing unprovable truth.[129] This conclusion makes sense. In much the same way that our system's revulsion for punishing the innocent tips the balance in favor of criminal defendants, our system's infatuation with free speech tips the balance in favor of defamation defendants. Undeniably, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."[130]

Furthermore, the plaintiff in a defamation action should be in a better position than the defendant to test the truth of a statement made about himself.[131] While the defendant derives his information from second-hand sources, the plaintiff necessarily knows whether a statement made about him is true or false. Thus, it would appear that the plaintiff has an advantage in gathering evidence to support his case. Even in jurisdictions with a shield law in effect, this advantage is not significantly impaired. While the plaintiff may be hindered from attacking the credibility of the defendant's source, he fully retains his ability to dispute the actual substance of the statement.[132]

V. CONCLUSION

New York Times brought the concept of culpability into the law of defamation, freeing the media defendant from its compulsion to avoid statements unflattering to public officials. Upon this foundation, the *Gertz* Court extended the fault requirement to private plaintiffs, yet protected their reputational interests by refusing to require that they meet the *Times* standard. The *Hepps* decision—constructed on the premise that the first amendment forbids the punishment of speech, either civilly or criminally, unless the speaker is culpable in some way—has served to further solidify this framework. Consistent with the constitutionally mandated shift of the Court's focus, *Hepps* is a logical and illuminating product of the *New York Times* revolution.

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129. *Hepps*, 106 S. Ct. at 1563-64.

130. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).

131. Keeton, *supra* note 119, at 1236.

132. While it may be argued that it is difficult to prove a negative, not all negatives are difficult to prove. A detailed defamatory statement should be readily discredited. Franklin and Bussell, *supra* note 6, at 860-61.