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NOTES

PRIVATE REPUTATION VS. FREEDOM OF SPEECH

*Philadelphia Newspapers Inc. v. Hepps*¹

In the case of *Philadelphia Newspapers, Inc. v. Hepps*,² the United States Supreme Court was presented with the issue of whether the United States Constitution³ requires a private-figure⁴ plaintiff suing for a defamatory⁵

1. 475 U.S. 767 (1986).

2. *Id.*

3. The first amendment of the United States Constitution has been the vehicle by which former standards of recovery for the defamation plaintiff have been driven to their demise. The freedom of speech and press guaranteed in the first amendment is the most often cited reason for restricting the common law recovery standards. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

4. The United States Supreme Court's decisions center on three categories of plaintiffs. The first category is the "public official." Public official status applies "at the very least" to a government employee who has, or in the eyes of the public has, substantial responsibility in the conduct of public affairs, and in whose qualifications the public has more than a general interest. *Rosenblatt v. Baer*, 383 U.S. 75, 85-86 (1966). The second category is the "public figure." Two types of public figures exist. First, a person may be a public figure because he has achieved such a significant role in the resolution of important issues so as to make his discreditable conduct and characteristics true matters of public interest. Second, a person can become a public figure by injecting himself into issues or controversies of importance to the general public. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1973).

The third category is that of the "private figure." The private figure has not accepted public office or assumed an influential role in ordered society. *Gertz*, 418 U.S. at 345. In short, the private figure is the antithesis of the public figure and public official, failing the test for both.

5. A defamatory statement is one that tends to disparage reputation. W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 111 (4th ed. 1971). A defamatory statement diminishes the "esteem, respect, goodwill or confidence in which the plaintiff is held, or excites adverse, derogatory or unpleasant feelings or opinions against him." *Id.* § 111, at 739.

However, not all statements which disparage reputation are actionable. To be actionable, the statement at issue must be false. Indeed, the truth of a defamatory statement is an absolute defense. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *THE LAW OF TORTS* § 116, at 840 (5th ed. 1984) [hereinafter *THE LAW OF TORTS*]. Furthermore, the statement must be "published"; that is, it must be communicated to one or more people. W. PROSSER, *supra*, § 113, at 766. The defamatory meaning of the statement must be understood by the person to which the statement was published and it must be understood as applying to the plaintiff. *Id.* § 113, at 767. Finally, the plaintiff must not have consented to the statements and the statements must not be privileged.

statement of public concern to prove the falsity of that statement. In a five to four decision authored by Justice O'Connor and joined by Justices Marshall, Brennan, Powell and Blackmun, the Court held that the Constitution does require a private figure plaintiff to prove falsity. The decision overruled the common law of several states, which assumed that a person's reputation was a good one and thus presumed that defamatory statements were false⁶ unless proven true by the publisher.⁷ By forcing the private individual to prove that a challenged statement is false, *Hepps* will accordingly increase the prima facie requirements to recover for defamation in many jurisdictions.

The purpose of this Note is threefold. First, the background and development of defamation law will be presented with a focus on its treatment of the private individual. Second, it will postulate the state of defamation law at the time *Hepps* was argued. The focus of this analysis will be on the balance the Supreme Court had struck, both in the law and in reality, between the private individual's right to vindicate his good name and the media's first amendment rights. Finally, *Hepps* will be analyzed with an eye towards evaluating the propriety of the decision in light of the court's reasoning, policy, and its probable effect on the private figure defamation plaintiff.

The right of the private individual to protect his reputation from harm can be traced to the earliest vestiges of organized society.⁸ In the early 10th century, the Germanic people developed an elaborate compensation schedule for private individuals who had been insulted.⁹ In England, an individual's rep-

As a matter of constitutional law, the public official/public figure must prove that the statement was published with knowledge of its falsity or reckless disregard for its truth. If the statement concerns a private figure, the statement must have been published with lack of reasonable care as to the statement's truth or falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974).

6. See, e.g., *Elliot v. Roach*, 409 N.E.2d 661, 681 (Ind. Ct. App. 1980); *Trahan v. Ritterman*, 368 So. 2d 181, 184 (La. Ct. App. 1979); *Parsons v. Gulf & South Am. Steamship Co.*, 194 So. 2d 456, 460 (La. Ct. App.), cert. denied, 389 U.S. 896 (1967); *Madison v. Yunker*, 180 Mont. 54, 61, 589 P.2d 126, 129-30 (1978), cert. denied sub nom. *Williams v. Pasma*, 461 U.S. 945 (1983); *Rogozinski v. Airstream by Angell*, 152 N.J. Super. 133, 146-47, 377 A.2d 807, 814 (1977), modified, 164 N.J. Super. 465, 397 A.2d 334 (1979); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 87, 94 (Okla. 1976); *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 447-51, 468, 273 A.2d 899, 907-09, 917 (1971); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 420 (Tenn. 1978); *Frank B. Hall & Co. v. Buck*, 678 S.W.2d 612, 623-25 (Tex. Ct. App. 1984), cert. denied, 472 U.S. 1009 (1985); *Denny v. Mertz*, 106 Wis. 2d 636, 654-55, 318 N.W.2d 141, 150, cert. denied, 459 U.S. 883 (1982).

7. Truth is an absolute defense to an action sounding in defamation. The defense that the defamatory statement is true has been given the technical name of justification. THE LAW OF TORTS, *supra* note 5, § 116, at 840.

8. Veeder, *The History of the Law of Defamation*, 3 COLUM. L. REV. 546, 548-49 (1903).

9. The *Lex Salica*, an early compilation of written law, was very concerned with the use of foul language. If one were to call a man a "wolf" or a "hare" one would have to pay three shillings. If one were to insult the chastity of a woman the penalty was forty-five shillings. *Id.* at 548.

utation was protected in both the secular and the ecclesiastical courts. Injuries to reputation were punishable by the payment of money damages in the former courts and as a sin in the latter.¹⁰ These early rights of an individual to protect his reputation crossed the Atlantic intact and eventually developed into the common law tort of defamation.

At common law, defamation was a strict liability tort.¹¹ An individual could recover for damage to his reputation caused by a defamatory falsehood absent any showing that the publisher knew of the statement's falsity, or that the publisher was careless in investigating the statement's veracity.¹² Indeed, prior to 1964, the United States Supreme Court endorsed this standard of recovery for defamed plaintiffs by holding that state laws proscribing this recovery were consistent with the first amendment's guarantees of freedom of speech and press.¹³

However, the development of the electronic media fashioned an impending clash between the liberal recovery standards in the state common law and the Constitutional guarantees of freedom of speech and press. The first curtailment of the individual's right to recover in strict liability occurred in the United States Supreme Court's decision of *New York Times Co. v. Sullivan*.¹⁴ In *Sullivan*, an elected commissioner of Montgomery, Alabama, brought suit against the New York Times, claiming he had been libeled in a two-page advertisement that had been run by various civil rights leaders. While Sullivan was not actually mentioned by name in the ad, he recovered \$500,000 under an Alabama law which inferred that libelous statements made about a govern-

10. King Alfred, who presided over the secular courts, provided that a slanderer should have his tongue cut out unless he could redeem it for the price of his head. The records of the pleadings in these cases reveal the sensitivity that surrounded the disgrace and dishonor the slandered plaintiff felt. The complaints not only allege damages for the physical injury but also list extra shillings to compensate them for the injury to reputation. *Id.* at 549-51.

In the ecclesiastical courts, injury to another's reputation was punishable as a sin. Insulting language was given the title "di fimmation" and was punished by the penance of acknowledging the baselessness of the imputation in the presence of the clergy man and the clergy wards. Additionally, an apology to the person defamed was required. *Id.*

11. THE LAW OF TORTS, *supra* note 5, § 113, at 804; L. ELDRIDGE, THE LAW OF DEFAMATION § 5, at 14-15 (1978).

12. "[T]he effect of this strict liability is to place the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals." W. PROSSER, *supra* note 5, § 113, at 773.

13. Prior to 1964, The Supreme Court had held that certain classes of speech were undeserving of constitutional protection. In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Court held that the first amendment protections are not absolute. Categories of speech, including defamation, which inflict injury by their very utterance or tend to incite breaches of the peace, could be constitutionally restricted and punished. *Id.* at 571-72; *accord* *Beauharnais v. Illinois*, 343 U.S. 250, 256-57 (1952). Accordingly, the state law of libel that punished the press for its abuses of liberty were not prohibited by either the federal or state constitutions. *Near v. Minnesota*, 283 U.S. 697, 715 (1931).

14. 376 U.S. 254 (1964).

ment agency were attributable to the official in charge of that agency.¹⁵ At the time the advertisements were published, Sullivan was the official in charge of the Montgomery Police Department — an agency targeted by the ads.

In *Sullivan*, the Supreme Court held that the first and fourteenth amendments require that a public official must show that the statement was published with “actual malice” before the official can recover for a defamatory falsehood relating to his official conduct.¹⁶ Further, the Court stated that the proof must be made with “convincing clarity.”¹⁷ The Court found that the *New York Times* action could at best support a finding of negligence, and accordingly reversed the Alabama Supreme Court’s decision in favor of Sullivan.¹⁸ While *Sullivan* created a gap in the previous standard of recovery for defamatory falsehoods, it left the rights of private figures relatively intact.¹⁹ The Court’s decision centered on public officials and the need for public debate regarding their conduct. The need for this debate justified supplanting the favorable recovery doctrines previously enjoyed by public officials with an approach that more equally balanced the needs of the first amendment and the public official.²⁰ The question of determining the appropriate standard of recovery for private individuals was not before the Court. Accordingly, the private figure continued to enjoy recovery in strict liability for defamatory falsehoods.²¹

15. In affirming the judgment of the trial court in favor of Sullivan, the Supreme Court of Alabama found that the statements had been made of and concerning the plaintiff. The court stated, “[We] think it common knowledge that the average person knows that municipal agents . . . are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner.” *New York Times Co. v. Sullivan*, 273 Ala. 656, 674-75, 144 So. 2d 25, 39 (1962).

16. The Court defined “actual malice” as the publishing of a statement with actual knowledge of its falsity or with reckless disregard as to whether it was true or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

17. *Id.* at 285-86.

18. *Id.* at 288, 292.

19. The Court’s holding was specifically narrowed to include the public official who had been criticized about his public conduct. *Id.* at 256.

20. The Court made repeated reference to the national commitment to robust, uninhibited and wide-open debate on matters of official conduct. *Id.* at 270. The Court equated the public man with public property, stating that any discussion of them “cannot be denied and the right, as well as the duty, of criticism must not be stifled.” *Id.* at 268.

21. While the Supreme Court did not expressly regulate private figures, it expanded the *Sullivan* standard to those plaintiffs who were public figures. *See supra* note 4 and accompanying text. These new “public figures” were merely private figures that were either in positions of notoriety or had injected themselves into the public eye for a specific controversy.

In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, both reported at 388 U.S. 130 (1967), the Supreme Court decided two consolidated cases on the “public figure” theory. The two plaintiffs were Wally Butts, former football coach at the University of Georgia, and Major General Edwin H. Walker, a retired army officer and participant in political affairs. The Court found that both men were public figures.

The private figure plaintiff remained unaffected by these new constitutional limitations until the Supreme Court's decision in *Rosenbloom v. Metromedia, Inc.*²² In *Rosenbloom*, the Court held that its previous standards for recovery, based on the private figure/public figure dichotomy, were inadequate. The plurality of Justices found that a "public issue" test would best serve the needs of the first amendment, and would allow an adequate measure of recovery for the private individual whose good name had been injured.²³ The test was relatively simple. If a statement by a media defendant centered on a matter of "public concern," the plaintiff, whether private or public figure, could not recover absent a showing by clear and convincing evidence that the statement was made with knowledge of its falsity or reckless disregard for its truth.²⁴ The private figure was thus denied strict liability protection against defamatory falsehoods in those situations where the statement at issue was one of "public interest."

The *Rosenbloom* decision quickly came under fire for two reasons. First, it required judges to make subjective determinations about which plaintiffs had thrust themselves into the public eye; i.e. was the statement of public concern.²⁵ Second, it seemingly ignored the previous commitments to private figures and their need for protection from defamatory falsehoods.²⁶ These drawbacks led to *Rosenbloom's* downfall just three years after its inception.

In *Gertz v. Robert Welch, Inc.*,²⁷ the Supreme Court repudiated the *Rosenbloom* "public interest" test.²⁸ The plaintiff in *Gertz* was an attorney who

The Court held that Butts was a public figure because of his position in college athletics and Walker because he had thrust himself into the public eye. The Court then held that a public figure could only recover for a defamatory falsehood upon proof of "highly unreasonable conduct constituting an extreme departure" from accepted journalism practices. *Id.* at 155. While the language of *Butts* seems to be a departure from the *Sullivan* standard of liability in that it does not mention actual malice or reckless disregard, it has been interpreted to extend the *Sullivan* standard of culpability to "public figures." *See, e.g.,* *Herbert v. Lando*, 441 U.S. 153, 156 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36 (1974).

22. 403 U.S. 29 (1971).

23. The Court explained that once a matter is of "public concern" it cannot then become less so because a private figure is involved. The public interest is on the event, not the participants' prior notoriety or anonymity. *Id.* at 43.

24. *Id.* at 52.

25. The court in *Gertz* determined that the *Rosenbloom* "public interest" test abridged the legitimate state interest in protecting its citizens' reputations to a degree it found unacceptable. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974).

26. The Court in *Gertz* found that the *Rosenbloom* opinion failed to take into account several distinguishing factors that separate the private and public figure. First, the private figure has relinquished no part of his good name like the public figure or official. Therefore, he is more deserving of recovery. *Id.* at 345. Second, the private figure does not have equal access to media channels. This prevents the private figure from attaining the same potential latitude that the public figure or official has in rebutting the defamatory statements. *Id.* at 344.

27. 418 U.S. 323 (1976).

28. *Id.* at 346.

had been accused of being a Communist by a publication issued by the John Birch Society.²⁹ The Court needed an approach that would strike the proper balance between the strong interest in protecting private individuals' reputations and the need to shield the press from the "chilling effect" of strict liability.³⁰ The Court accomplished this in two ways. First, the Court protected the state interest in the reputations of its citizens by deferring to the state's judgment as to the level of culpability needed for recovery as long as it was not strict liability.³¹ Second, finding that damages in excess of injury serve no state interest, the Court limited the awarding of presumed and punitive damages to situations where liability was based on knowledge of falsity or reckless disregard of the truth.³² By requiring a defamation plaintiff to prove at least negligence and by limiting the award of presumed and punitive damages, the court substantially lessened any "chilling effect" which previously existed.

After *Gertz*, the private individual enjoyed a greater measure of protection against defamatory falsehoods than was afforded the individual under *Rosenbloom*. This was true in most jurisdictions because the plaintiff needed only to establish the publisher's negligence rather than the "knowledge or reckless disregard" standard of *Rosenbloom*.³³ However, it must be remembered that

29. The article in question was published in AMERICAN OPINION, the monthly publication of the John Birch Society. In March, 1960, the defendant published a series of articles about a prominent Chicago lawyer named Elmer Gertz. *Id.* at 325. The articles alleged that Gertz was an official of the "Marxist League for Industrial Democracy . . . which has advocated the violent seizure of our government." Further, the articles labeled Gertz a "Leninist" and a "Communist-frontier." *Id.* at 326. The article, and its charges against Gertz, contained serious inaccuracies as to his membership in organizations and his political beliefs. *Id.*

30. *Id.* at 348.

31. *Id.* at 347.

32. *Id.* at 349.

33. It appears as though the Supreme Court has afforded the private individual greater deference in his quest to vindicate his good name in its decisions following *Gertz*. The Court has accomplished this by manipulating the private/public figure dichotomy to place an increasing number of plaintiffs in the private figure category.

In *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), the Court held that the ex-wife of Russell Firestone was not a public figure despite *Time's* contention that her position in society had made her a "cause célèbre." *Id.* at 454. The Court found that even though she was involved in litigation, it was compulsory litigation in that the litigation was required to obtain a divorce. The Court seems to have held that while litigation may create a "public figure" for the limited purpose of that litigation, other plaintiffs, such as Mrs. Firestone, will remain private figures. *Id.* at 457.

A similar result was reached in *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979). In *Wolston*, the Court held that the plaintiff was not a "public figure" simply because he had participated in an investigation of Soviet intelligence agents sixteen years previous to being defamed. *Id.* at 165-69. The Court took the position that where a plaintiff has done nothing to enter a controversy, or does not initiate the press coverage of the event he is involved in, he will not lose his private figure status regardless of the newsworthiness of the event. This position reaffirms the stance the Court took in *Gertz*, in repudiating any test centering on the "public interest" of the matter. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); see also *Firestone*, 424 U.S. at 454.

the individual's right to recover in strict liability was forced to yield to the first amendment rights of the media. One argument advanced to justify the impairment of individual rights in the interest of the first amendment is that the first amendment rights of the media are textual, while the private figure's reputation interest is a creature of the common law. The argument asserts that when textual rights meet common law rights, the common law must yield.³⁴ However, this argument ignores the fact that an individual's reputation has long been afforded constitutional protection.

The fact that personal reputation is an interest which is afforded constitutional protection is evident from the line of cases beginning with *Joint Anti Fascist Refugee Committee v. McGrath*.³⁵ In *McGrath*, the plaintiff sought an action to enjoin the Attorney General of the United States from labelling various organizations as "totalitarian, fascist, communist or subversive," without due process of law required under the fifth and fourteenth amendments of the Constitution. The injuries alleged included loss of contributions, shame and disgrace.³⁶ Although a plurality opinion that never specifically cited the interest that had been violated, *McGrath* can be interpreted as prohibiting government actions which tend to stigmatize or injure absent a showing of adequate due process protection.³⁷

A more precise definition of the constitutional interest in one's reputation was outlined in *Wisconsin v. Constantineau*.³⁸ In *Constantineau*, a Wisconsin statute provided that government officials could prohibit the sale of intoxicating liquors to those who were known to indulge to excess.³⁹ This was accom-

34. This was an argument advanced by Philadelphia Newspapers and several of the amicus curiae briefs filed in support of Philadelphia Newspapers. Surkin, *The Status of the Private Figure's Right to Protect His Reputation Under the United States Constitution*, 90 DICK. L. REV. 667, 668 (1986). The recurring theme of those briefs was that the textual first amendment rights of the media should always prevail over the private figure's right to protect himself from defamatory falsehoods. As Philadelphia Newspapers argued in its brief:

Once the publisher's First Amendment rights are injected into the equation, the common law treatment of the burden of proving truth or falsity cannot stand. The balance tips in favor of the defendant, whose free speech interests are strong and protected by the Constitution, rather than in favor of the Plaintiff, whose interest in his own reputation is strong, but does not reach constitutional proportions.

Id.

35. 341 U.S. 123 (1951).

36. *Id.* at 131.

37. The Court never expressly mentioned that this case involved a "liberty interest" under the due process clause. Instead, the Court decided the issue on whether the Attorney General had exceeded his power granted under an executive order. *Id.* at 140. The Court found the Attorney General had exceeded his power due to the fact that he had blacklisted the organization as communist without any articulable justification. *Id.* at 126.

38. 400 U.S. 433 (1971).

39. *Id.* at 434 n.2 (referring to WIS. STAT. § 176.26 (1967)).

plished by posting notices and names of the persons known to so indulge.⁴⁰ The issue presented to the Supreme Court was whether the posting of those names, and the resulting stigma associated with it, was proper absent adequate notice and an opportunity to be heard. The Court held that “[w]here a person’s good name, reputation, honor, or integrity is at stake, . . . notice and an opportunity to be heard are essential.”⁴¹ Accordingly, since the Court held that a person’s good name deserves procedural protection under the due process clause, it must constitute a liberty or property interest under the fifth and fourteenth amendments.⁴²

The constitutional protection afforded an individual’s reputation was reaffirmed in *Board of Regents of State Colleges v. Roth*.⁴³ In *Roth*, the issue was whether a nontenured professor, dismissed without justification from a state university, had been denied the protection of the due process clause.⁴⁴ The Court’s first inquiry was whether Roth had been deprived of a valid liberty interest. The Court held that he had not, but, by way of example the Court outlined what would constitute such an interest.

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and association in the community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”⁴⁵

Roth can be interpreted as affirming the proposition that an individual’s reputation is a liberty or property interest under the fifth and fourteenth amendments’ due process clauses.

Three years later, the Supreme Court reaffirmed the principle enunciated in *Roth* when it decided *Goss v. Lopez*.⁴⁶ In *Lopez*, several public high school students were expelled from school without a pre-expulsion hearing.⁴⁷ The Supreme Court found that expulsion from school could damage a student’s reputation in the community.⁴⁸ Applying the reasoning outlined in *Roth*, the Court found a liberty interest in the students’ reputations that qualified for protec-

40. *Id.* at 435.

41. *Id.* at 437. The Court cited *McGrath* to support the premise that before a condemned person suffers any loss, the right to be heard is essential in our society. See *McGrath*, 341 U.S. at 168 (Frankfurter, J., concurring). The Court then drew the obvious analogy to an individual’s reputation to justify its decision.

42. As the Court stated, “Where the state attaches ‘a badge of infamy’ to the citizen, due process comes into play.” *Constantineau*, 400 U.S. at 437.

43. 408 U.S. 564 (1972).

44. *Id.* at 569.

45. *Id.* at 573.

46. 419 U.S. 565 (1975).

47. *Id.* at 567.

48. *Id.* at 575.

tion under the due process clause.⁴⁹ Accordingly, the Court held the students could not be dismissed without some measure of due process.⁵⁰

One thing is clear, the private individual's reputation has been a highly valued commodity. In both its interpretation of the common law of defamation and in its recognition of a liberty interest under the fifth and fourteenth amendments, the Supreme Court has recognized and affirmed the legitimate and strong interest an individual has in his reputation. The rise of the media in the 20th century forced the Supreme Court to balance the individual's right to his good name against the media's right to free speech and press. The Court's decisions in *New York Times* and *Gertz* held that an individual could no longer recover for a defamatory falsehood absent some showing of fault on the part of the publisher in investigating the statement's truth. In reaching this result, the Court was striving to achieve a balance between these two strong competing interests. This Note will now turn to the realities of defamation litigation to determine the actual balance that had been struck prior to *Hepps*.

Assuming that the Supreme Court's goal was to achieve a balance between the private figure's right to his good name and the media's right to publish freely, it may have fallen short of that goal. While empirical evidence on the realities of defamation litigation is scarce, two recent empirical studies authored by Professor Marc A. Franklin (hereinafter Franklin I & Franklin II) help formulate a conclusion as to the actual balance achieved between these two important interests.⁵¹ The most striking statistic outlined in Franklin II reveals that a defamation plaintiff has approximately a five-percent chance of final victory on his claim.⁵² A breakdown of the study into the various procedural stages of the average defamation claim will highlight the ramifications of this raw statistic. A great majority of the defamation plaintiffs lost before their claim ever reached trial. Of the appellate cases chronicled in the study,

49. *Id.* at 577.

50. The students were suspended as a result of a period of general unrest among the student body. Each student received a ten day suspension. *Id.* at 570. None of the students, however, were given a hearing to determine the operative facts of the suspensions. The Court determined that the students had a liberty interest in their reputations that could be endangered because of the suspensions. *Id.* at 576. While the Court gave the school board wide discretion in its choice of the pre-expulsion due process measures to be put in place, it held that notice and an opportunity to be heard are essential when one's reputation is concerned. *Id.* at 581.

51. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. RES. J. 455 [hereinafter Franklin I]; Franklin, *Suing Media For Libel: A Litigation Study*, 1981 AM. B. RES. J. 797 [hereinafter Franklin II].

52. Franklin II, *supra* note 51, at 803. This was a study that encompassed all types of defamation litigation, and as such the results are a mix of cases tried under the *Gertz* and *Sullivan* standards of liability. It is a certainty that the recovery rates for the *Gertz* private-figure plaintiffs are somewhat higher than the corresponding rates for the *Sullivan* public-figure plaintiffs simply because the *Gertz* plaintiffs usually have a lesser level of culpability to prove as an element of their prima facie case. *Id.* at 825-26.

seventy-five percent involved rulings by the trial court at the pre-trial stage.⁵³ If the trial court ruled in favor of the defamation plaintiff on a pre-trial motion, the ruling stood a fifty-percent chance of reversal on appeal.⁵⁴ However, if the trial court ruled in favor of the defendant's pre-trial motion, it was upheld on appeal seventy-five percent of the time.⁵⁵ This translated into final victory for the media-defendant at the pre-trial stage in 104 of the 190 cases reported.⁵⁶ If the defamation plaintiff reached trial, his chances of success increased. Of the thirty-seven trial verdicts reported, plaintiffs obtained ten verdicts which were ultimately upheld on appeal, as compared to twenty-two for the media-defendants (four cases had yet to be disposed of at the time of the study).⁵⁷ Although plaintiffs fared well in front of juries, their verdicts were upheld less than fifty-percent of the time.⁵⁸ To the contrary, if the defendant received a favorable jury verdict, it was upheld in thirteen of the fifteen reported cases.⁵⁹

A possible explanation for the disparity in the success rates of the two competing interests is that the media-defendants are simply not printing false defamatory statements about individuals, and accordingly, these plaintiffs are correctly denied a verdict in their favor. However, this conclusion is not supported by the data. Of the eighty-three successful defense verdicts in media defendant cases reported in Franklin I, only five successfully raised the defense of "truth."⁶⁰ The remainder of the defenses raised were comprised of various common law defenses (fifty-one percent) and the constitutional defenses outlined in *Gertz* and *New York Times* (thirty-seven percent).⁶¹ Several conclusions may be drawn from the data outlined in Franklin I & II. First, suing for defamation is not likely to be a successful venture.⁶² The plaintiff suing for

53. *Id.* at 829.

54. *Id.*

55. *Id.*

56. *Id.* The statistics break down as follows: The media defendant won 32 out of 50 motions to dismiss, for a 64 percent success rate. The media defendant won 72 of 77 motions for summary judgment, for a total of 94 percent. *Id.* at 803.

57. *Id.* at 829.

58. *Id.*

59. While the plaintiffs that succeeded at trial were rewarded with damage awards, the majority were reversed or remitted. Of the ten successful plaintiff awards, five were upheld and five were altered. *Id.* at 805. The five that were upheld were: (1) \$20,000 general and punitive; (2) \$50,000 general; (3) \$60,000 general; (4) \$10,000 general; (5) \$350,000 general. The five that were altered were: (1) \$75,000 reduced to \$45,000; (2) \$88,000 reduced to \$75,000; (3) \$132,500 reduced to \$32,500; (4) \$17,550 reduced to \$15,000; (5) \$36,000 for four claims. *Id.* at 805 & n.21.

60. Franklin I, *supra* note 51, at 493.

61. *Id.*

62. See Bezanson, *Libel Law and the Realities of Defamation Litigation: Setting the Record Straight*, 71 IOWA L. REV. 226 (1985). Bezanson feels that the libel plaintiff sues for the correction of the falsehood and that ultimate judicial victory is not essential. *Id.* at 228. Defamation plaintiffs feel that the act of initiating the suit is effectively showing their disagreement with the statements that defamed them. *Id.* Furthermore, Bezanson submits that the media's disdain for the plaintiff often leads to

defamation stands a five percent chance of ultimate victory.⁶³ Second, these victories are determined by whether the plaintiff can overcome the culpability standards of *Gertz* and *New York Times*, not because the statements at issue are true or nondefamatory in nature.⁶⁴ Indeed, it can be argued that *Gertz* and *New York Times* have provided the media with a substantial shield from liability in publishing defamatory statements, even though this shield must often be erected in the context of costly litigation. In any event, in light of the current state of defamation litigation, any further burdening of the defamation plaintiff and his desire to protect his good name from defamatory falsehoods should be permitted only for compelling reasons.

It is against this background that *Philadelphia Newspapers, Inc. v. Hepps*⁶⁵ can best be evaluated. The litigation in *Hepps* centered on articles written about Maurice S. Hepps in the *Philadelphia Enquirer*.⁶⁶ Maurice S. Hepps was the principal stockholder of General Programming, Inc. (GPI), a corporation that franchised a chain of stores known as "Thrifty" stores.⁶⁷ Between May 1975, and May 1976, the *Philadelphia Enquirer* published a series of articles alleging that Hepps had links to organized crime, and that he had used those links to influence the State Liquor Control Board in its rulings regarding liquor sales to the Thrifty stores.⁶⁸ Furthermore, the articles told of a Grand Jury investigation into Hepps' alleged links to organized crime and his attempts to influence the Liquor Control Board.⁶⁹

Hepps brought suit against the *Enquirer* in Pennsylvania state court, alleging that the articles had defamed him.⁷⁰ In Pennsylvania, as was true in many states, there existed a common law presumption that a person's reputation was a good one.⁷¹ Accordingly, a defamatory statement was presumed

animosity and causes emotion to play a role in the lawsuit. This results in the plaintiff pursuing a suit where logic and reason might instruct the plaintiff to drop the suit. *Id.* at 229.

63. See Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 5 (1983). The study cited by Franklin shows a general recovery rate for tort plaintiffs of 52 to 59 percent, as compared to the 10 percent rate for the defamation plaintiffs. *Id.* at 4 n.18.

64. See Franklin I, *supra* note 51, at 494.

65. 475 U.S. 767 (1986).

66. *Id.* at 769.

67. *Id.*

68. *Id.*

69. *Id.* "The articles discussed a state legislator, described as 'a Pittsburgh Democrat and convicted felon' whose actions displayed a clear pattern of interference in state government by [the legislator] on behalf of Hepps and Thrifty." *Id.* The articles went on to report that "investigators have found connections between Thrifty and underworld figures" and that "the Thrifty beverage beer chain . . . had connections . . . with organized crime." *Id.*

70. *Hepps v. Philadelphia Newspapers, Inc.*, 506 Pa. 304, 485 A.2d 374 (1984), *rev'd*, 475 U.S. 767 (1986), *cert. denied*, 475 U.S. 1134 (1986).

71. *Id.* at 312, 485 A.2d at 378.

false.⁷² If the plaintiff could sustain the burden of proof as to the other prima facie elements of defamation, the burden shifted to the defendant to prove the truth of the statement.⁷³ If the defendant proved the truth of the statement, it was an absolute defense to the claim of defamation.⁷⁴ It was this presumption of falsity that formed the gravamen of the *Hepps* decision.

At the close of the evidence, the trial court concluded that the presumption of falsity was in contravention of the first amendment.⁷⁵ Accordingly, the trial court instructed the jury that *Hepps*, in addition to the other elements of his defamation claim, also had to sustain the burden of proving that the defamatory statements were false.⁷⁶ The jury found for the *Enquirer*, and pursuant to Pennsylvania statute,⁷⁷ *Hepps* appealed directly to the Pennsylvania Supreme Court.

The Pennsylvania Supreme Court found that *Gertz* simply required *Hepps* to prove the fault of the *Enquirer* in publishing the challenged articles.⁷⁸ As to the falsity of the articles, the court found that the presumption of falsity did not unconstitutionally inhibit free speech.⁷⁹ Accordingly, the Pennsylvania Supreme Court remanded the case for a new trial with instructions that the presumption of falsity would stand.⁸⁰ The United States Supreme Court noted probable jurisdiction and reversed the Pennsylvania Supreme Court.⁸¹

The United States Supreme Court found that the Constitution requires that a private figure plaintiff defamed by a media defendant's statements on a matter of public concern must prove both the falsity of the statement and the fault of the publisher.⁸² The Court's primary concern in *Hepps* centered on the "chilling effect" that the burden of proving the truth of a statement would have on the media's decision whether to publish statements.⁸³ The Court was concerned that a publisher would not publish certain articles due to the publishers's fear of unjustified litigation.⁸⁴ The Court reasoned that this situation becomes particularly intolerable in situations where the statements at issue are

72. *Id.* at 313, 485 A.2d at 379.

73. *Id.* at 313-14, 485 A.2d at 378-79.

74. *See id.* at 313-14, 485 A.2d at 379; *see also* 42 PA. CONS. STAT. § 8343(b)(1) (1982) (defendant has the burden of proving the truth of a defamatory statement); *cf.* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (common-law presumes injury to reputation from publication of a defamatory statement).

75. *Hepps*, 506 Pa. at 311, 485 A.2d at 377.

76. *Id.*

77. 42 PA. CONS. STAT. § 722(7) (1982).

78. *Hepps*, 506 Pa. at 319, 485 A.2d at 384.

79. *Id.* at 327, 485 A.2d at 387.

80. *Id.* at 318, 329, 485 A.2d at 382-87.

81. *Philadelphia Newspapers, Inc. v. Hepps*, 472 U.S. 1025 (1985).

82. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777-78 (1986).

83. *Id.*

84. *Id.*

of public concern, a situation analogous to the *Hepps* factual setting.⁸⁵ Accordingly, because the first amendment was designed to protect such speech from interference, the Court struck down the presumption of falsity of a defamatory statement.⁸⁶

The Court justified its decision to place the burden of proof as to falsity on *Hepps* by relying on its decisions concerning state sponsored censorship of speech.⁸⁷ In these decisions, the Court held that before the state can restrict speech protected by the first amendment it must "bear the burden" of showing the restriction is justified.⁸⁸ The basic proposition underlying these decisions was the need to encourage free debate and the dissemination of information to the public.⁸⁹ Only by requiring the government to show justification for its restrictions could the Court be satisfied that these goals were obtained.⁹⁰

In *Hepps*, the Court analogized the government's attempts to restrict speech to the private figure's attempt to redress the injury to his reputation through a suit in defamation.⁹¹ The Court found that the underlying need to encourage debate on public issues, found to be compelling in the governmental restriction cases, was also present in a private suit for defamation.⁹² Accord-

85. The Court stated:

"Allowance of the defense of truth, with the burden of proving it on the defendant," was found wanting because it did not "mean that only false speech [would] be deterred" — doubts regarding whether truth "can be proved in court or fear of the expense of having to do so" would force good faith critics of official conduct to "steer far wider of the unlawful zone."

Hepps, 475 U.S. at 788 (Stevens, J., dissenting) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))).

86. *Hepps*, 475 U.S. at 776-77.

87. *Id.* The four cases cited dealt basically with unjustified governmental restriction of free speech. In *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980), the Court invalidated a state public utility commission order which prohibited a utility from inserting in monthly bills various pamphlets advocating nuclear power. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court held that states cannot prohibit corporations from spending money to express their views on referendum issues, even if they do not deal directly with their business. In *Speiser v. Randall*, 357 U.S. 513 (1958), the Court held that a state cannot require the signing of a loyalty oath before a taxpayer can receive a benefit. The basic theme of these cases is that when speech protected by the first amendment is at issue, the government cannot limit that speech without justification.

88. *Consolidated Edison Co.*, 447 U.S. at 535; *Bellotti*, 435 U.S. at 786; *Speiser*, 357 U.S. at 525-26.

89. See *Consolidated Edison Co.*, 447 U.S. at 534; *Bellotti*, 435 U.S. at 776-77.

90. See *Consolidated Edison Co.*, 447 U.S. at 540-43; *Bellotti*, 435 U.S. at 787-88; *Speiser*, 357 U.S. at 528-29.

91. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

92. "[T]he need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case . . ." *Id.* Furthermore, "the first amendment requires that we protect some falsehood in order to protect speech that matters. Here the speech concerns the legitimacy of the political process, and therefore clearly 'matters.'" *Id.* at 778 (quoting *New York*

ingly, the private figure defamation plaintiff must now "bear the burden" of showing his restriction on the media's right to speak is justified - he must prove that the defamatory statement at issue is false.

However, several elements of the *Hepps* Court's argument appear inconsistent with its previous cases concerning defamation. The Court is undoubtedly correct in its assessment of the burden that the government must shoulder before it can restrict speech entitled to first amendment protection. However, the problem arises in the Court's analogy between the burden applicable to the government and the similar burden it places on the private figure plaintiff. This analogy is appropriate only if the private figure's peculiar characteristics are ignored, i.e. equating the private individual with the public official or the public figure. This position appears inconsistent with the Court's previous decisions holding that the private figure's burden must be calculated with an eye to his peculiar characteristics.⁹³ The Court in *Gertz*, after reaffirming the *New York Times* test for public figures and public officials stated, "the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them. No such assumption is justified with respect to a private individual."⁹⁴ Furthermore, the Court stated that the individual has "not accepted public office or assumed an 'influential role in ordering society'"⁹⁵ and "has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."⁹⁶ By equating the private figure to the government the Court has ignored the unique position the private figure occupies in society.

The *Hepps* majority's effort to justify this inconsistency by focusing on the type of speech involved also appears inconsistent with *Gertz* and its progeny. While the Court does not expressly rely on the "general or public interest" test of *Rosenbloom*,⁹⁷ much of the Court's justification for the shift in the burden of proof is centered on the nature of speech involved.⁹⁸ This line of

Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).

93. The differences between the private figure and the public figure, and the reasons for differing culpability standards were enunciated in *Gertz*. Basically, private figures are more deserving of recovery, and hence are required to bear a lesser burden of proof in their defamation claims, because they do not have the access to media channels that the public figures do. Furthermore, the private figure has relinquished no part of his good name by thrusting himself into the public eye. *Gertz*, 418 U.S. 323, 344-45 (1974); see *supra* note 26. Accordingly, these differences, as well as the strong state interest in redressing injury to its private citizens, require that different rules should exist for the private figure. *Gertz*, 418 U.S. at 343.

94. *Gertz*, 418 U.S. at 345.

95. *Id.* (quoting *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring in result)).

96. *Id.*

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

98. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-77 (1986).

reasoning (one which centers on the type of speech involved and not the type of plaintiff involved) was found unacceptable in *Gertz*.⁹⁹ In *Gertz*, the majority found that a decision based on the "public or general interest in a statement does injustice to the two competing interests at stake."¹⁰⁰ On the one hand, the Court reasoned that a private figure that is defamed on a matter of public concern has no recourse unless he can meet the rigorous culpability standards of *New York Times*.¹⁰¹ This would be true despite the characteristics that distinguish the private and public plaintiffs. On the other hand, the Court reasoned that the publisher who defames a person on a matter of private concern may be held liable even after they took every reasonable precaution to insure reliability.¹⁰² Thus, it would appear that the *Hepps* majority's reliance on the type of speech involved to justify the increased burden to the plaintiff is also misplaced if its opinion is to remain consistent with *Gertz*.

Even if the majority's decision was correct in its reasoning, several additional factors which the majority opinion failed to mention seem to make the decision unjustified and unnecessary. *Hepps* brings speech that has been previously discredited under the guise of first amendment protection without showing adequate justification. As *Hepps* centers on a presumption of law, the decision will only affect that category of defamatory speech which is not provable as either true or false. Indeed, if the statements at issue were provable as either true or false, evidence would be available to either rebut the presumption or render it unnecessary. It is inevitable that some instances of such speech will be false, and thus, *Hepps* will now protect some defamatory falsehoods. Therefore, a plaintiff who can show that the defendant published a defamatory statement with negligence or reckless disregard as to its truth but cannot prove the falsity of the statement will lose even though he was the subject of a defamatory falsehood. This result is questionable in light of the fact that the defamatory utterance has rarely been afforded constitutional protection under the first amendment.¹⁰³

99. The Court in *Gertz* laid waste to the idea that simply because speech is of public concern the plaintiff's status is irrelevant. "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest [in the reputations of the state's citizens] to a degree we find unacceptable." *Gertz*, 418 U.S. at 346; see also *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (refusing to reinstate the *Rosenbloom* "public interest" test).

100. *Gertz*, 418 U.S. at 346.

101. *Id.*

102. *Id.*

103. The court outlined its distaste for the defamatory falsehood in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1973), stating: "But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Id.* at 340.

The Court has placed the defamatory falsehood in that category of speech which "[a]re no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323,

The Court justifies protecting defamatory falsehoods because it now protects the true statement that was also unprovable. The problem is that the majority's decision adds little, if anything, to the previous protection of *Gertz* and *New York Times*. Because the plaintiff must prove that the defendant's action at least constituted negligence before he can recover, the careful and prudent publisher in theory cannot be liable. The previous presumption of falsity only hurt the negligent or malicious publisher who could not prove the defamatory statement true. Extending this reasoning, the Court's decision will only help negligent and malicious publishers, a holding of dubious credibility. As the minority in *Hepps* stated, "While the public's interest in an uninhibited press is at its nadir when the publisher is at fault or worse, society's 'equally compelling' need for judicial redress of libellous utterances is at its zenith."¹⁰⁴

Furthermore, the Court has ignored the important policy considerations behind the presumption of falsity. A private individual who has been defamed deserves the presumption of falsity for several reasons. First, the common law presumption of falsity is consistent with the strong interest society recognizes in a person's reputation, an interest that has been recognized from the inception of our nation as legitimate and deserving of protection.¹⁰⁵

Second, of the two parties to the litigation, the private individual is the least able to present proof of a statement's veracity.¹⁰⁶ The media defendant has access to sources, names and information that was gathered in the preparation of the story.¹⁰⁷ Furthermore, many jurisdictions have enacted "shield law legislation" which could be invoked to prevent the plaintiff from gaining access to information altogether.¹⁰⁸ The presumption of falsity helped bring to light the relevant facts surrounding the defamatory statements because the defendant would have to divulge such facts to overcome the presumption.¹⁰⁹

Third, when the media publishes a statement, it is in effect vouching for its substance. The plaintiff, in a defamation action, is challenging the truth of the statement. Requiring the plaintiff to prove the falsity of the statement is in contravention to the general rule that the party making an accusation must provide proof of that accusation.¹¹⁰ The presumption of falsity merely forced the party making the statements to support them.

Finally, the presumption of the truth of a statement forces a plaintiff to

340 (1973) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

104. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 784-85 (1986) (Stevens, J., dissenting).

105. *Constitutional Law — Freedom of Speech — Freedom of The Press — Libel and Slander — Burden of Proof — As A Matter of Federal First Amendment Law, A Private Plaintiff Has The Burden of Proving the Falsity of An Alleged Defamatory Statement*, 50 CINC. L. REV. 807, 818 n.70 (1981) [hereinafter *Constitutional Law*].

106. *Id.* at 818.

107. *Id.*

108. *See Hepps*, 475 U.S. at 779.

109. *Constitutional Law*, *supra* note 105, at 818.

110. *Constitutional Law*, *supra* note 105, at 819.

prove a negative.¹¹¹ For example, assume a publication accuses an individual of sexual misconduct. To recover in defamation, the plaintiff is forced to prove that he *did not* commit the misconduct. Contrary to the presumption of innocence that governs in a criminal trial, a presumption of bad character will govern in a trial for defamation.¹¹²

The United States Supreme Court's decision in *Philadelphia Newspapers, Inc. v. Hepps*¹¹³ is incorrect for several reasons. First, studies show that the Court's prior decisions provided more than adequate protection for the media defendant. Second, the Court has ignored the strong, legitimate interest private figures have in their reputations by equating them with the public official in justifying the shift of the burden of proof. Further, the Court has shielded some defamatory falsehoods from prosecution in exchange for a marginal increase in the protection of an already adequately protected media defendant. Finally, the Court has ignored the strong public policy issues surrounding the presumption of falsity. In short, "[t]he Court's decision trades on the good names of private individuals with little First Amendment coin to show for it."¹¹⁴

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111. *Constitutional Law*, *supra* note 105, at 818.

112. *Constitutional Law*, *supra* note 105, at 818.

113. 475 U.S. 767 (1986).

114. *Id.* at 790 (Stevens, J., dissenting).

