

LIBEL

FREE SPEECH AT ALL COSTS: PHILADELPHIA NEWSPAPERS, INC. v. HEPPS - WHAT ABOUT THE PEOPLE?

"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 root of any decent system of ordered liberty."*

INTRODUCTION

It is a truism that each of us values reputation in one way or another. A person's interest in protecting, and the corresponding right to protect, reputation have been historically recognized in the common law.1 This right has become threatened by the United States Supreme Court in Philadelphia Newspapers, Inc. v. Hepps.2 In formulating their decision, the champions of our constitutional rights have taken a "pernicious" step that infringes upon an individual's right to protect that individual's name and upon a state's right to protect its citizens from defamatory falsehoods.3

Prior to the Hepps decision, a private figure plaintiff4 who brought a defamation action based on libel was required to prove that a media defendant5 was at fault6 in publishing a defamatory state-

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1. See Herbert v. Lando, 441 U.S. 153, 158 (1979). The Herbert Court recognized the historical development of liability for defamation, stating: "Civil and criminal liability for defamation was well established in the common law when the First Amendment was adopted, and there is no indication that the Framers intended to abolish such liability." Id. See also Keeton, Defamation and Freedom of the Press, 54 Tex. L. Rev. 1221, 1221-22 (1976) (providing a brief discussion of the history of defamation).
3. Id. at 1566 (Stevens, J., dissenting). See infra notes 191-93 and accompanying text.
4. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). In Gertz, the Court instructed: [Private plaintiffs are not by reason] of the notoriety of their achievements or the vigor and success with which they seek the public's attention... properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.
5. Gertz, 418 U.S. at 348 (discussing a need to protect, more specifically, to shield "the press and broadcast media" from strict liability).
6. See W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts, 20-23 (5th ed. 1984). Tort law has developed from a theory that requires a showing of
ment before recovering damages. The measure of fault was left to the discretion of the individual states. The states were free to choose any fault standard as long as they did not impose liability without fault. Once the plaintiff had proved fault, a presumption arose in favor of the private figure plaintiff that the defamatory statements were false. This presumption, which originated in common law, was later codified by many states. Thus, the burden of proving the truth of the defamatory statements shifted to the defendant.

In Hepps, in a five-to-four decision, the Court created an obstacle for the private figure plaintiff in a defamation action by demanding that the plaintiff meet a greater evidentiary burden than that which was ever before required. The Court has held that before an individual is entitled to recover damages as a result of injuries flowing from a defendant’s publication of a libelous statement, the individual, in addition to proving the publisher’s fault, must bear the burden of proving that the defamatory statement is in fact false. The decision, which the Court stated has added “only marginally” to the plaintiff’s burden, is a substantial blow to some plaintiffs who attempt to defend their names or reputations against defamatory falsehoods. Additionally, the Court’s determination infringes on the state’s interest in protecting its citizens from defamatory falsehoods.

The Court’s move requiring that the private plaintiff

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7. Gertz, 418 U.S. at 347. The Gertz Court held that a plaintiff must at least show fault on the part of the publisher to recover in a defamation action. Id. at 352.
8. Id. at 347-48 n.10.
9. Id. at 347. The Gertz Court left the states to establish the standard of fault. See Philadelphia Newspapers, Inc. v. Hepps, 506 Pa. 304, , 485 A.2d 374, 385 (1984). The trial court in Hepps stated that a plaintiff must show negligence or malice on the part of the defendant in order to recover in a defamation action. Id.
11. See W. PROSSER & W. KEETON, supra note 6, at 795-97.
13. Id. The Court added to the plaintiff’s existing burden that of proving falsity. Id.
14. Id.
15. Id. at 1565. The Court justified its decision by explaining that its holding was a minimal extension of the previously existing standard of fault. Id.
17. Hepps, 106 S. Ct. at 1556. The states are no longer free to set the standards of recovery. Id.
additionally bear the burden of proving falsity is a devastating and unnecessary move. This Note asserts that the Hepps standard is an unnecessary infringement upon the rights of both the private individual and the state to protect a person's reputation.

FACTS AND HOLDING

In Philadelphia Newspapers, Inc. v. Hepps, Maurice S. Hepps, the principal stockholder of a corporation which franchises a chain of "Thrifty" stores, brought an action based on a theory of libel against the Philadelphia Inquirer. Although Hepps lost at the trial court level, he appealed, and the Pennsylvania Supreme Court ruled in his favor.

The defendant, Philadelphia Newspapers, Inc., was the owner of The Philadelphia Inquirer, which printed a series of five articles that linked Hepps to organized crime. The articles charged that Hepps used those criminal links to influence the state's legislative and administrative processes. Accordingly, Hepps commenced an action in a lower Pennsylvania Court. The trial court found that subsection 8343(b)(1) of title 42 of the Pennsylvania Consolidated Statutes, expressly placing the burden of proving the truth of libelous statements on the defendant, violated the federal Constitution. Accordingly, the trial court instructed the jury that Hepps bore the burden of proving the falsity of the statements. Mindful of this instruction, the jury found that Hepps did not prove falsity and returned a verdict in favor of the newspaper.

On appeal, the Pennsylvania Supreme Court held that the standard required the plaintiff to show fault, but did not necessarily require the plaintiff to show falsity. Furthermore, the Pennsylvania

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19. See infra notes 125-69.
21. Id. at 1560.
22. Id. at 1560-61.
23. Id. at 1560.
24. Id. The newspaper printed an article stating that a grand jury was investigating the "alleged relationship between the Thrifty chain and unknown Mafia figures," and "[w]hether the chain received special treatment from the [state governor's] administration and the Liquor Control Board." Id.
25. Id.
26. Id. See 42 PA. CONS. STAT. ANN. § 8343(b)(1) (Purdon 1982). Subsection 8343(b)(1) provides that the defendant has the burden of proving the truth of the defamatory communication when the issue is properly raised. Id.
27. Hepps, 106 S. Ct. at 1560.
28. Id. at 1561.
29. Id.
court held that placing the burden of proving the truth of the allegedly libelous statements on the defendant was not an unconstitutional inhibition of free speech. Thus, the Pennsylvania Supreme Court reversed and remanded the case for a new trial.

Philadelphia Newspapers, Inc. then appealed to the United States Supreme Court. The Court held that when a newspaper publishes speech of public concern, a private figure plaintiff must prove that the newspaper was at fault in publishing the article and must bear the burden of proving that the statements at issue were in fact false. The Court reversed and remanded the case. Thus, the burden of proving the falsity of defamatory statements has become incorporated into Pennsylvania's previous statutory scheme which had required a plaintiff to prove only that the defendant was at fault.

Justice Stevens, dissenting, found that Pennsylvania's preexisting fault standard of proof was a sufficient obstacle for the private figure plaintiff, and that first amendment concerns did not require that the private plaintiff bear the burden of proving falsity.

BACKGROUND

GENERAL PRINCIPALS

Justice O'Connor began the majority Hepps opinion with the realization that the case required the Court once more to "struggle... to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment."

Such a struggle has probably existed since the ratification of the Constitution. In dealing with the conflict between the law of defamation and the first amendment right to free speech, the Court has developed a categorical approach to determine the appropriate standards of proof for different factual situations. The Court has found

30. Id. at 1560-61.
31. Id.
32. Id.
33. Id. at 1563.
34. Id. at 1555.
35. Id. at 1559.
36. Id. at 1560-67 (Stevens, J., dissenting).
38. See supra notes 1, 11 and accompanying text. See also Gertz, The Law of Libel Continues to Develop - An Introduction, 90 DICK. L. REV. 539, 544 (1986) (discussing the long lasting conflicts of views in libel).
39. See supra note 37 and accompanying text. See also B. SANFORD, SYNOPSIS OF
that two major concerns should guide the states' construction of their different standards of proof in defamation actions: the plaintiff's status, and the content of the speech at issue. These concerns are reflected in the categories developed by the Court.

The Court's level of concern for the status of the individual has varied in degree depending on the plaintiff's status as a public or a private figure. The Court has held that public figures must remain open to criticism by the press, thereby reinforcing the theory that open debate is necessary to a democratic form of government. This is especially true, according to the Court, when the speech concerns public officials and criticism of their official conduct. However, the Court has determined that a private figure must be provided a higher degree of protection from public criticism. Private individuals are not involved in the governmental process to the extent that they should be subjected to the same levels of criticism as are elected officials or public figures.

The Court's level of concern for the subject matter of the speech at issue also varies in degree depending on the nature of the speech. Speech criticizing official conduct or matters of purely public concern must be given deference based on the same theory that advocates free and open debate in a democratic society. However, the underpinning of the rule on speech of public concern has no validity when applied to speech of private concern.

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40. See New York Times Co. v. Sullivan, 376 U.S. 254, 269-75 (1964). The New York Times Court discussed the importance of allowing criticism by the media of public officials in a democratic society, especially criticism concerning their official acts. Id. See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 2946 (1985) (holding that a contractor was a private plaintiff and allowed greater protection from the media than public plaintiffs, especially when the speech was of private concern); Gertz v. Robert Welch, Inc., 418 U.S. 323, 344-46 (1964) (recognizing that "private individuals" must be allowed greater protection from the media than public officials or figures); Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (allowing the media the right to criticize "public figures").

41. See infra note 159 and accompanying text.

42. See L. Tribe, American Constitutional Law, § 12-13, at 641-43 (1978) (discussing the categorical developments).

43. See id. § 12-13, at 641.

44. Id.

45. New York Times, 376 U.S. at 269-70 (discussing the necessity of allowing a wide latitude for criticism of public officials).

46. Gertz, 418 U.S. at 344-45.

47. Id.

48. L. Tribe, supra note 6, § 12-13, at 641.


Consequently, the standards of proof applicable to plaintiffs in libel actions vary depending on the Court's characterization of the plaintiff's status and on the nature of the speech.\textsuperscript{51} When the party or speech involved is private, the courts have held that the level of protection afforded to these plaintiffs must be greater than the protection afforded public figures and speech of public concern.\textsuperscript{52} Thus, it has historically been the case that a private individual is given greater protection than a public figure,\textsuperscript{53} and that speech of private concern is treated likewise.\textsuperscript{54} The United States Supreme Court has acknowledged that private individuals are more vulnerable to injury than are public figures,\textsuperscript{55} stating:

The first remedy of any victim of defamation is self-help--using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.\textsuperscript{56}

Just as the standards of proof vary according to the Court's characterization of the plaintiff's status and of the speech at issue, so also did the evidentiary presumptions and burdens of proof that have continued to be espoused by several states under the common law vary.\textsuperscript{57} Initially, American courts followed the well-established theory of the English courts, which presumed damages if a plaintiff brought an action to recover for libel per se.\textsuperscript{58} Libel per se was found when publications were defamatory on their face.\textsuperscript{59} The theory was that if a plaintiff could prove that the published statements were defamatory, a legal presumption arose in favor of the plaintiff that the statements were also false.\textsuperscript{60} This presumption was grounded in the belief that a person is presumed to have a good reputation.\textsuperscript{61} The common law has been adequately summarized by the following statement: "Out of a tender regard for reputations, the law presumes in the first in-

\textsuperscript{51} See supra notes 43, 49 and accompanying text.
\textsuperscript{52} See \textit{Gertz}, 418 U.S. at 344.
\textsuperscript{53} \textit{Hepps}, 106 S. Ct. at 1563. See also B. SANFORD, supra note 39, at 11.
\textsuperscript{54} \textit{Hepps}, 106 S. Ct. at 1563.
\textsuperscript{55} See \textit{Gertz}, 418 U.S. at 344.
\textsuperscript{56} \textit{Id}.
\textsuperscript{57} \textit{Hepps}, 106 S. Ct. at 1566.
\textsuperscript{58} W. PROSSER & W. KEETON, supra note 6, at 795-96.
\textsuperscript{59} \textit{Id}.
\textsuperscript{60} \textit{Id}.
\textsuperscript{61} \textit{Id} at 797.
stance that all defamation is false, and the defendant has the burden of pleading and proving its truth."62

The United States Supreme Court has since abolished the presumed damages rule.63 Constitutional requirements have forced the common law presumption to be limited.64 Accordingly, private persons have been required to show that the defendant was at fault and that the libel caused damages before the plaintiff may recover.65 Provided that the plaintiff met the burden of proving fault, the defendant was required to bear the burden of proving the truth of the allegedly defamatory statement.66 The common law rule has been modernly adopted in state statutes to the extent that the Court has allowed the common law doctrines to survive.67

PRECEDENT BY THE SUPREME COURT

One state's general application of the common law presumption came under attack in New York Times Co. v. Sullivan.68 That case involved an elected city commissioner claimed to have been defamed by an advertisement that criticized his official conduct.69 The advertisement was published in the defendant's newspaper.70

The United States Supreme Court held that, in a case involving the defamation of a public official acting in his official capacity, a public official must prove that a media defendant acted with actual malice in publishing a defamatory statement, regardless of whether the statement was true or false.71 Moreover, the Court determined that a defense of truth was inconsistent with the first and fourteenth amendments.72 After considering the standards used by several states, the Court adopted a rule that had become known as the "New York Times standard."73 The Court held:

The constitutional guarantees require, we think, a federal

62. Id. at 841.
63. Id. at 796.
64. D. Dobbs, supra note 10, at 842.
65. Id.
66. See supra notes 10-11 and accompanying text.
67. See Hepps, 106 S. Ct. at 1560.
70. Id. The advertisement accused the plaintiff, L. B. Sullivan, of initiating a "wave of terror" through the use of "truckloads of police armed with shotguns and tear-gas." L. B. Sullivan was the Commissioner of Public Affairs and supervised the Police Department. Id. at 256-57.
71. Id. at 279-80.
72. Id.
73. Id. at 280 n.20. The New York Times Court recognized that numerous state courts had previously adopted "a like rule." Id. (discussing the applicability of the "New York Times standard").
rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.\textsuperscript{74}

This standard, which required a public plaintiff to prove that the media defendant acted with actual malice in publishing the material, had been adopted previously by a number of state courts.\textsuperscript{75} The New York Times Court believed that its standard would allow for the press to criticize a public figure's official conduct, yet the standard would avoid self-censorship by the press.\textsuperscript{76}

The Court reasoned that a rule which permitted a less demanding standard of proof or one that permitted a defense of truth would encourage self-censorship by the press.\textsuperscript{77} The Court stated that the media, acting as a critic of the government, would be deterred from commenting on the government which would ultimately frustrate the idea of open debate.\textsuperscript{78} The Court recognized:

Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. . . . [W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.\textsuperscript{79}

Although the Court found that the public official did not prove actual malice and thus ruled in favor of the newspaper, the Court addressed the limitations on the right to free speech.\textsuperscript{80} The Court stated that "libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment."\textsuperscript{81}

Justice Goldberg, concurring with the New York Times majority opinion, made a statement that later would be challenged. He asserted:

This is not to say that the Constitution protects defamatory statements directed against the private conduct of a public official or private citizen. Freedom of the press and of speech insure that government will respond to the will of

\textsuperscript{74} Id. at 279-80 (emphasis added).
\textsuperscript{75} See supra note 73.
\textsuperscript{76} New York Times, 376 U.S. at 279-80.
\textsuperscript{77} Id. at 279.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} See id. at 269-71.
\textsuperscript{81} Id. at 269.
the people and that changes may be obtained by peaceful means. Purely private defamation has little to do with the political ends of a self-governing society.\textsuperscript{82}

Since it was formulated over twenty years ago, the New York Times standard has been followed in cases that involve public figures and speech of public concern.\textsuperscript{83}

Subsequently, the United States Supreme Court extended the reach of the New York Times decision.\textsuperscript{84} In Curtis Publishing Co. v. Butts\textsuperscript{85} and Associated Press v. Walker,\textsuperscript{86} the Supreme Court applied the New York Times standard to another group of plaintiffs.\textsuperscript{87} Butts involved a Saturday Evening Post article which accused the University of Georgia athletic director of fixing a football game.\textsuperscript{88} In Walker, a retired general claimed that an Associated Press reporter defamed him by stating that he led a violent crowd which opposed desegregation of the University of Mississippi.\textsuperscript{89} The United States Supreme Court extended the New York Times standard to “public figures” in these cases.\textsuperscript{90} The Court stated that “differentiation between ‘public figures’ and ‘public officials’ and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy.”\textsuperscript{91} This was true because “public figures” also play an important role in ordering society.\textsuperscript{92}

Accordingly, the burden of proof which had been established for public officials was extended to apply to public figures.\textsuperscript{83} However, when the United States Supreme Court was faced with a private figure plaintiff in a defamation action, the Court held that a different standard of proof was applicable.

In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,\textsuperscript{94} the Court articulated its support for the state’s interest in protecting its citizens from defamatory harm.\textsuperscript{95} The case involved a private figure plaintiff, a contractor, who claimed that he was libeled by a credit

\begin{enumerate}
\item \textsuperscript{82} Id. at 301. Justice Goldberg continued, stating that such protection did not hold true for public officials or matters of public concern. Id. at 301-02 (citing W. DOUGLAS, THE RIGHT OF THE PEOPLE 41 (1958)).
\item \textsuperscript{83} See L. Tribe, supra note 42, § 12-2, at 633-38.
\item \textsuperscript{84} See Curtis Publishing Co. v. Butts, 388 U.S. 130, 133 (1967).
\item \textsuperscript{85} 388 U.S. 130 (1967).
\item \textsuperscript{86} 388 U.S. 130 (1967). Curtis Publishing Co. and Associated Press were consolidated in the same action. Id.
\item \textsuperscript{87} See infra notes 88-92 and accompanying text.
\item \textsuperscript{88} Curtis Publishing Co., 388 U.S. at 135.
\item \textsuperscript{89} Id. at 140.
\item \textsuperscript{90} Id. at 155.
\item \textsuperscript{91} Id. at 163 (Warren, C.J., concurring).
\item \textsuperscript{92} Id. at 164 (Warren, C.J., concurring).
\item \textsuperscript{93} Id. at 155.
\item \textsuperscript{94} 105 S. Ct. 2939 (1985).
\item \textsuperscript{95} Id. at 2946.
\end{enumerate}
agency that mistakenly had issued a false credit report to five of its subscribers. The United States Supreme Court affirmed the award of damages to the contractor, even though the defendant did not show that the credit agency had acted with "actual malice." The Court recognized not only that the plaintiff was a private figure, but also that the speech at issue was of purely private concern and thus, the applicable standard of proof needed to reflect less of a first amendment interest than if the speech involved matters of public concern. The Court stated that in such a case "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."

Eventually, the United States Supreme Court was confronted with a case that did not involve purely public or purely private plaintiffs and speech. The application of the New York Times standard became somewhat confused when the Court applied the standard to a private individual for the first time in Rosenbloom v. Metromedia, Inc. In Rosenbloom, a private figure plaintiff brought a defamation suit against a radio station seeking damages based upon a broadcast proclaiming that Rosenbloom's home had been raided and that "obscene" books had been confiscated. Although the plaintiff was a private figure, the Court categorized the speech in issue as involving a matter of public concern, applying the New York Times standard to the private figure plaintiff. The plurality opinion stated that the critical issue in deciding these cases should be whether the subject matter of the speech concerns public or private interests, not whether the plaintiff is a public or private figure. The plurality stated: "[W]e honor the commitment to robust debate on public issues . . . [b]y extending constitutional protection to all discussion and communication involving matters of public or general concern without regard to whether the persons involved are famous or anonymous."

96. Id. at 2941.
97. Id. at 2946.
98. Id.
99. Id. (quoting Harley Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 366, 568 P.2d 1359, 1363 (1977)).
100. See infra notes 101-05 and accompanying text.
102. Rosenbloom, at 32-33.
103. Id. at 42-43.
104. Id. at 43-44.
105. Id.
In *Gertz v. Robert Welch, Inc.*, the United States Supreme Court retreated from the *Rosenbloom* decision by refusing to apply the *New York Times* standard to a private figure plaintiff. The plaintiff in *Gertz* was a police officer convicted of murder. Following the conviction of the officer, a magazine published an article alleging that the murder trial was a "frame-up," and that the attorney for the murder victim's family was a "communist-fronter." Consequently, the attorney brought a libel action that eventually was appealed to the United States Supreme Court.

Before the *Gertz* Court began its discussion of the *New York Times* standard, it discussed the authority of *Rosenbloom*. The Court, viewing the *Rosenbloom* decision in retrospect, explained the "divergent traditions of thought":

One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation.

As a result of the *Rosenbloom* Court's division, the *Gertz* Court minimized the precedential value of the decision and developed its own rationale which gave private figure plaintiffs greater protection. The *Gertz* Court began its discussion of free speech by stating that "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." The Court continued by stating that false statements belong to a category of utterances that "are 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."

The Court discussed the legal protection afforded to a person who has been libeled and found a legitimate state interest in compensating individuals whose reputations have been harmed. The

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107. *Id.* at 346.
108. *Id.* at 325.
109. *Id.* at 325-26.
110. *Id.* at 327-30.
111. *Id.* at 332-39.
112. *Id.* at 333.
113. See infra notes 114-23 and accompanying text.
115. *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (stating that the right to free speech is not absolute).
116. *Id.* at 332.
Court stated:

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose . . . .

. . . . [T]he States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.\(^\text{117}\)

While recognizing the states' legitimate interests, the Court acknowledged the need to provide "breathing space" for the rights of free speech and free press.\(^\text{118}\)

Based on these considerations, the Gertz Court held that the New York Times standard exacted too "high [a] price" from private victims of defamation.\(^\text{119}\) The Court recognized that some deserving plaintiffs would not be able to meet the New York Times standard of proving actual malice.\(^\text{120}\) The Gertz Court stated that "[t]he extension of the New York Times test to private plaintiffs proposed by the Rosenbloom plurality would abridge this legitimate state interest to a degree that we find unacceptable."\(^\text{121}\) Although the Gertz Court held that the New York Times standard was too rigorous to be required of a private individual,\(^\text{122}\) the Court did not articulate a new standard.\(^\text{123}\) The Court left the opportunity to define the appropriate standard to the states.\(^\text{124}\) The Court conditioned this grant of authority by stating that the states could not establish a standard that would allow liability without fault.\(^\text{125}\) States may require, however, that a private figure plaintiff need make a "less demanding showing" than is required by the New York Times standard.\(^\text{126}\) Thus, the Gertz Court clearly recognized an individual's interest in protecting that individual's reputation and the states' interest in compensating those private parties harmed by defamatory statements.\(^\text{127}\) Because of the interests of the state and the individual, the Court did not believe it

\(^{117}\) Id. at 341-46.

\(^{118}\) Id. at 342. The Gertz Court discussed the competition between individual and state rights and the first amendment, requiring that "breathing space" be allowed to enable free speech to survive. Id. The term "breathing space" has been used since NAACP v. Button, 371 U.S. 415, 433 (1963).

\(^{119}\) See Gertz, 418 U.S. at 342-343.

\(^{120}\) Id. at 342.

\(^{121}\) Id. at 346.

\(^{122}\) Id.

\(^{123}\) Id. at 347.

\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) Id. at 348.

\(^{127}\) See supra note 117 and accompanying text.
necessary to shift the burden of proving falsity to private plaintiffs.\textsuperscript{128}

The \textit{Gertz} decision was further supported in \textit{Time, Inc. v. Firestone}.\textsuperscript{129} \textit{Firestone} involved a libel action against the publisher of Time magazine.\textsuperscript{130} The Court found that the plaintiff in this case was defamed by an article which stated that the reason for her divorce was based on "grounds of extreme cruelty and adultery."\textsuperscript{131} In holding for the plaintiff, the \textit{Firestone} Court refused to apply the \textit{New York Times} standard to a private plaintiff.\textsuperscript{132} The Court refused to reinstate the plurality opinion of \textit{Rosenbloom} and supported the \textit{Gertz} decision.\textsuperscript{133} The Court pointed out the weakness of the public concern test and focused on the plaintiff's status in accordance with \textit{Gertz}.\textsuperscript{134} Thus, the court again believed that a private figure plaintiff should not be required to bear the burden of proving falsity.\textsuperscript{135}

The United States Supreme Court has developed an approach to defamation actions based on categorizations of the status of the plaintiff as a public or private figure and of the content of the speech as regarding a public or private concern.\textsuperscript{136} Through \textit{New York Times} and \textit{Gertz}, the Court established standards that conform to this categorical approach and that provide special protection to an individual's interest in that individual's reputation and to the states' interests in protecting their citizens.\textsuperscript{137} Thus, where a private figure plaintiff was involved, the burden of proof did not include a requisite showing of falsity. Rather, once the private plaintiff proved fault and actual damage, the burden of proving truth was placed on the defendant.\textsuperscript{138}

The common law has been changed drastically with respect to "public officials" and "public figures," in that these plaintiffs are required to show "actual malice" before recovering for a defamatory statement.\textsuperscript{139} However, the common law presumption of "good reputation" in regard to private plaintiffs has remained in several states.\textsuperscript{140} The common law "good reputation" presumption is qualified to the extent that a plaintiff must prove fault before the presumption of falsity will arise in favor of the private figure plaintiff and shift the burden to the defendant to prove the truth of the state-

\begin{itemize}
  \item \textsuperscript{128} \textit{Gertz}, 418 U.S. at 346.
  \item \textsuperscript{129} 424 U.S. 448, 454-55 (1976).
  \item \textsuperscript{130} \textit{Id.} at 451-52.
  \item \textsuperscript{131} \textit{Id.} at 452.
  \item \textsuperscript{132} \textit{Id.} at 455-57.
  \item \textsuperscript{133} \textit{Id.} at 454-56.
  \item \textsuperscript{134} \textit{Id.} at 456.
  \item \textsuperscript{135} \textit{See id.}
  \item \textsuperscript{136} \textit{Id.} at 453-54.
  \item \textsuperscript{137} \textit{See infra} note 159 and accompanying text.
  \item \textsuperscript{138} \textit{See supra} notes 60-61 and accompanying text.
  \item \textsuperscript{139} \textit{See supra} notes 73-81 and accompanying text.
  \item \textsuperscript{140} \textit{New York Times}, 376 U.S. at 280.
\end{itemize}
Liability for defamation was clearly established prior to the adoption of the first amendment, and as Justice White wrote in *Herbert v. Lando*, there is no indication that the Framers intended to abolish such liability."

**ANALYSIS**

With the decision of *Philadelphia Newspapers, Inc. v. Hepps*, the Court claims to have extended the scope of the previous standard of proof and the *New York Times* standard "only marginally." In fact, however, the decision substantially changes a plaintiff's approach to proving a cause of action in defamation.

Previously, a private individual was not necessarily required to meet a standard of proof as heavy as proving actual malice, and was not necessarily required to prove the falsity of the statements. However, the *Hepps* Court required not only that the private party plaintiff bear the burden of proving fault on the part of the publisher, but also what could be the insurmountable burden of proving the falsity of the published statements. This standard refutes the common law rule on falsity. Under common law, the defendant in a defamation action was required to bear the burden of proving the truth of the allegedly libelous statements. In regard to that rule, the *Hepps* Court stated:

"[T]he common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."

The Court's purpose in refuting the common law rule was "to ensure that true speech on matters of public concern is not deterred . . . ."

However, such a ruling is not in accord with the historically

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141. See supra notes 73-81 and accompanying text.
143. Id. at 158.
144. 106 S. Ct. 1558 (1986).
145. Id. at 1565.
146. Id. at 1566 (Stevens, J., dissenting).
147. See supra notes 119-21 and accompanying text.
148. See supra notes 13-14 and accompanying text. See generally Case Comment, supra note 16, at 808-20 (discussing the problems which require a private plaintiff to prove falsity).
149. Hepps, 106 S. Ct. at 1563.
150. See supra notes 60-62 and accompanying text.
151. Hepps, 106 S. Ct. at 1563.
152. Id. at 1564.
established rights of the states and individuals.\textsuperscript{153} The \textit{Hepps} Court minimized any interest that an individual has in that individual's reputation and any interest of the state in protecting its citizens by omitting even a mention of these well-established rights.\textsuperscript{154} The Court's absolute disregard for these rights is shocking considering that they were of primary concern to the \textit{Gertz} Court.\textsuperscript{155} The Court's treatment of this case effectively nullifies the rights of the individual and the states,\textsuperscript{156} but reaffirms the rights of the press under the first amendment.\textsuperscript{157} These rights were previously deemed more important than an unconditional immunity of the press.\textsuperscript{158}

The \textit{Hepps} Court acknowledged the traditional categorical approach and its importance to the constitutional considerations, stating:

\begin{quote}
When the speech is of public concern but the plaintiff is a private figure, as in Gertz, the Constitution still supplants the standards of the common law, but the constitutional requirements are, in at least some of their range, less forbidding than when the plaintiff is a public figure and the speech is of public concern. When the speech is of exclusively private concern and the plaintiff is a private figure, as in \textit{Dun \\& Bradstreet}, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.\textsuperscript{159}
\end{quote}

Despite this analysis, it is apparent that the \textit{Hepps} Court failed to consider the protection provided to private individuals that the \textit{New York Times} and \textit{Gertz} Courts had thought so important. While the \textit{Hepps} Court recognized that its holding will leave innocent plaintiffs without recourse in some situations,\textsuperscript{160} the Court nevertheless disposed of the interests of both the states and individuals, using the

\begin{footnotes}
\item[153] See \textit{id}. at 1566 (Stevens, J., dissenting).
\item[154] \textit{id}. at 1566 (Stevens, J., dissenting). The majority in \textit{Hepps} failed to discuss the impact that its decision will have on states rights.
\item[155] See \textit{supra} notes 117, 121-22 and accompanying text.
\item[156] \textit{Hepps}, 106 S. Ct. at 1569 (Stevens, J., dissenting). \textit{See also Case Comment, supra} note 16, at 820 (stating that the states are to decide the burdens).
\item[157] \textit{Hepps}, 106 S. Ct. at 1564.
\item[158] \textit{See supra} notes 102-07 and accompanying text.
\item[159] \textit{Hepps}, 106 S. Ct. at 1563. The Court also stated:
\begin{quote}
One can discern in these decisions two forces that may reshape the common-law landscape to conform to the First Amendment. The first is whether the plaintiff is a public official or figure, or is instead a private figure. The second is whether the speech at issue is of public concern. When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law.
\end{quote}
\item[160] \textit{id}. at 1563-64.
\end{footnotes}
Constitution as its support.\textsuperscript{161}

Justice Stevens, writing for the dissent, recognized a valid state interest in protecting and preventing injuries to citizens' reputations.\textsuperscript{162} He emphasized that the majority decision attached no weight to this state interest.\textsuperscript{163} Justice Stevens stated that the Court grossly undervalued the state's interest in providing redress for injuries to private individual reputations.\textsuperscript{164} Believing the fault requirement to be a sufficient standard for a private plaintiff to satisfy, Justice Stevens stated: "The Court's decision trades on the good names of private individuals with little First Amendment coin to show for it."\textsuperscript{165}

Previously, as in \textit{Gertz}, it was left to the states to determine the standard of fault that the plaintiff was forced to prove, a standard that was not necessarily as stringent as that of \textit{New York Times}.\textsuperscript{166} The Court now requires that a private plaintiff satisfy a more substantial standard and carry a weightier burden of proof.\textsuperscript{167}

As a result, the common law protection for a defamed private plaintiff is minimized.\textsuperscript{168} The presumption that an individual's name is good has been discarded, and a private plaintiff is instead required to prove that that plaintiff's name is not bad by proving the falsity of the statements.\textsuperscript{169} This is where one must ask: "What about the people?" It is against established principles as well as the states' interest to presume that a private plaintiff's reputation is bad.\textsuperscript{170} A private plaintiff now has the burden of proving that the publisher was at fault in publishing the statements and that the statements themselves were in fact false.\textsuperscript{171} As a result, the states are left helpless in providing redress to private figure plaintiffs, and the defamed persons are confronted with a devastatingly stringent standard and burden of proof.

The Court reasoned that in showing fault, a plaintiff will "generally encompass" evidence of falsity, stating:

A jury is obviously more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements at issue if convinced that the relevant statements

\begin{itemize}
  \item \textsuperscript{161} \textit{id.} at 1564.
  \item \textsuperscript{162} \textit{id.} at 1566.
  \item \textsuperscript{163} \textit{id.}
  \item \textsuperscript{164} \textit{id.} at 1569.
  \item \textsuperscript{165} \textit{id.} at 1571.
  \item \textsuperscript{166} \textit{see} text at \textit{supra} notes 121-24.
  \item \textsuperscript{167} \textit{see} \textit{supra} note 14 and accompanying text.
  \item \textsuperscript{168} \textit{see} \textit{supra} notes 57-58 and accompanying text.
  \item \textsuperscript{169} \textit{Hepps}, 106 S. Ct. at 1559.
  \item \textsuperscript{170} \textit{see} \textit{supra} notes 57-58 and accompanying text.
  \item \textsuperscript{171} \textit{see} \textit{supra} note 14 and accompanying text.
\end{itemize}
were false. As a practical matter, then, evidence offered by plaintiffs on the publisher’s fault in adequately investigating the truth of the published statements will generally encompass evidence of the falsity of the matters asserted.\footnote{Hepps, 106 S. Ct. at 1565.}

While a jury may be “more likely” to accept the plaintiff’s allegations as true,\footnote{Id.} this hardly seems a justifiable reason to abolish the evidentiary presumption that had favored the private figure plaintiff and shifted the burden of proving truth to the defendant. If this new standard was only a “marginal” addition, or the state of the law after \textit{Gertz}, as was suggested, it is surprising that the case’s disposition involved a five-to-four decision.\footnote{Id. at 1559.} The dissent accurately notes the failure of the majority to attach to the decision the requisite importance of the state and individual rights that have been protected for so long.\footnote{Id. at 1566 (Stevens, J., dissenting).}

This burden of showing fault and falsity will be as stringent as the public figure plaintiff’s requirement of showing “actual malice.”\footnote{See id. at 1570-71 (Stevens, J., dissenting).} Considering our constitutional precepts, a private individual should not be forced to bear a burden that may be as heavy as that required of a public official.\footnote{Id. at 1563-65.}

This newly contrived obstacle that requires the plaintiff to prove falsity in addition to fault was rationalized by the Court.\footnote{Id. at 1563.} The Court determined that the common law rule requiring the defendant to bear the burden of proving truth is unconstitutional.\footnote{Id. at 1568-69 (Stevens, J., dissenting).} It does not seem just that the Court’s prohibition of a rule which requires the defendant to prove the truth of that defendant’s statements necessarily must result in an opposite rule that requires the private figure plaintiff to prove the falsity of the statements, especially considering the valuable interests at stake.

It would be ideal if a standard could be found that would not require a defendant to prove his statements to be true, but that would not give the defendant “a constitutional license to defame.”\footnote{Id. at 1568-69 (Stevens, J., dissenting).} Because such a standard cannot be found, and since the burden must re-

\begin{itemize}
\item \footnote{Hepps, 106 S. Ct. at 1565.}
\item \footnote{Id.}
\item \footnote{Id. at 1559.}
\item \footnote{Id. at 1566 (Stevens, J., dissenting).}
\item \footnote{See id. at 1570-71 (Stevens, J., dissenting). If a state’s fault standard was stringent enough to require a private figure plaintiff to prove actual malice on the part of a publisher, the \textit{Hepps} addition requiring proof of falsity would make the burden on a private figure plaintiff at least equivalent to that of a public official.}
\item \footnote{See supra notes 56-57 and accompanying text.}
\item \footnote{Hepps, 106 S. Ct. at 1563-65.}
\item \footnote{Id. at 1563.}
\item \footnote{Id.}
\item \footnote{Id. at 1568-69 (Stevens, J., dissenting).}
\end{itemize}
main on one of the parties, the risk that the statements cannot be proven true or false should fall on the defendant. In *Curtis Publishing Co. v. Butts*, the United States Supreme Court reasoned that the media defendants, being in the business of publishing, risk injury and liability that all must bear simply because they are a business. The majority opinion proclaimed that a business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of other[s]."

An alternative to the Hepps standard would be to elevate the private plaintiff's standard of proof to a uniform fault standard, such as actual malice, but retain the pre-Hepps evidentiary presumption of falsity in favor of the plaintiff. The Court's decision that requires the plaintiff to show fault and falsity will work a great hardship on the private figure plaintiffs; such a hardship does not appear to be warranted.

The Hepps majority acknowledged the pitfalls of adopting its extreme position when it stated:

"Under a rule forcing the plaintiff to bear the burden of showing falsity, there will be some cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false. The plaintiff's suit will fail despite the fact that, in some abstract sense, the suit is meritorious. Similarly, under an alternative rule placing the burden of showing truth on defendants, there would be some cases in which defendants could not bear their burden despite the fact that the speech is in fact true."

The Court acknowledged that the effect of the new standard is

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182. 388 U.S. 130 (1967).

Other professional activity of great social value is carried on under a duty of reasonable care and there is no reason to suspect the press would be less hardy than medical practitioners or attorneys for example. The "freedom of the press" guaranteed by the First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted.

Id.

186. Hepps, 106 S. Ct. at 1563-64.
“weightier” because Pennsylvania has a shield law that allows media defendants the right not to divulge their sources. Yet, the Court opts to protect the defendants in the name of free speech and avoidance of self-censorship, and, as a result, the state’s interests in protecting its citizens have been lost.

Following the Hepps decision, a publisher can deliberately print and publish untrue statements and escape liability unless the plaintiff can satisfy the burden of proving that the publisher was at fault in publishing the statements and that the statements were false. This result is noted in Justice Steven’s dissent, in which he stated:

The issue the Court resolves today will make a difference in only one category of cases--those in which a private individual can prove that he was libeled by a defendant who was at least negligent. For unless such a plaintiff can overcome the burden imposed by [Gertz], he cannot recover regardless of how the burden of proof on the issue of truth or falsity is allocated. By definition, therefore, the only litigants—and the only publishers—who will benefit from today’s decision are those who act negligently or maliciously.

While recognizing the burden of proof problem, Justice Stevens believed that meeting the fault standard was a sufficiently stringent burden.

Thus, disregarding the common law and shifting the burden of falsity to the plaintiff will only serve to protect those who have already been shown to have been at fault in publishing the statements at issue. Considering the established rights of the states to protect their citizens and of private figure plaintiffs to maintain a good reputation, the shifting of the burden of proving falsity in private figure plaintiff cases leads to a pernicious result. The Hepps Court disregarded the states’ and private individuals’ interests and required what the Gertz Court deemed to be an unwarranted burden of proof for a private plaintiff.

CONCLUSION

In effect, the Court has stripped private individuals of some

187. Id. at 1565. See generally Case Comment, New Jersey Shield Law Provides Newspapers an Absolute Privilege Protecting Editorial Processes and Confidential Sources From Discovery in a Defamation Action: Moressa v. New Jersey Monthly, 28 Vill. L. Rev. 225, 251-52 (1982-83) (discussing shield laws).
188. Hepps, 106 S. Ct. at 1564.
189. See supra notes 160-64 and accompanying text.
190. See supra note 14 and accompanying text.
191. 106 S. Ct. at 1566 (Stevens, J., dissenting) (citation omitted).
192. Id. at 1568-69 (Stevens, J., dissenting).
193. Id. at 1566 (Stevens, J., dissenting).
rights to recover for defamatory statements, and it has deprived the states of their rights to protect their citizens. The Court justified this result by allowing for the first amendment protection of free speech and free press. However, the Hepps majority failed to consider the value in an individual's name and to consider the states' interests in protecting their citizens. The Gertz test was deemed to be the correct solution to balancing the competing interests. Even a more stringent, uniform fault standard may not be wholly unacceptable as a burden for a private plaintiff, but the standard now laid down by the Court is unwarranted, considering the rights that it abridges.

Assuming that evidence of falsity will nevertheless come out at trial, the Hepps majority unhesitatingly requires falsity to be proven by the private plaintiff. A jury's willingness to accept a plaintiff's evidence is not a satisfactory reason for forcing a private party plaintiff to prove fault and falsity. A standard requiring proof of fault and proof of falsity is too great a burden for a private individual to bear. Such a standard would insulate the media from liability for negligent and malicious actions. Ultimately, a defamed individual may suffer unredressable harm.

What if a publisher were to publish an article stating that "John Doe attended meetings of a communist organization, on a certain day, twenty years ago"? Now, John must prove to a jury of his peers that this statement is false. Will John remember where he was on that day twenty years ago? Will he know that every meeting or party that he has attended did not involve some function of communism? Will he be able to prove it if he does know? Such a statement could certainly be harmful to John's reputation. Proving that the publisher is at fault in publishing this statement may be simple. However, additionally proving that the publisher has published a falsity is a great burden indeed. If John cannot surmount this burden, his reputation suffers without redress.

Jeff Harvey — '88

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194. See supra note 137 and accompanying text.
195. See supra note 130 and accompanying text.
196. See supra note 160 and accompanying text.