Constitutional Law - First Amendment - Defamation - Libel

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Constitutional Law—First Amendment—Defamation—Libel

The United States Supreme Court has held that private figure plaintiff alleging defamation has the burden of proving falsity of media defendant's speech on matters of public concern.


Between May 1975 and May 1976, a series of five "investigative" articles appeared in The Philadelphia Inquirer. The general theme of the five articles was that Maurice S. Hepps and his organization had connections with organized crime. The nature of these articles was exemplified by one headline which read: "How Mazzei Used Pull, Kept Beer Chain Intact."

The articles purported to link Maurice Hepps, General Programming, Inc., and a number of independent corporate entities who operated beer and beverage distributorships as franchises of General Programming, Inc. to certain named "underworld" figures and to organized crime generally. The articles referred to Senator Mazzei as a "Pittsburgh Democrat and a convicted felon," whose actions displayed a "clear pattern of interference in state government by the legislator on behalf of Hepps and Thrifty." The articles reported that federal "investigators ha[d] found connections between Thrifty and underworld figures;" that "the Thrifty Beverage beer chain...had connections...with organized crime;" and that Thrifty had "won a series of competitive advantages through rulings by the State Liquor Control Board." On January 16, 1976, the third article in suit reported that a federal grand jury was investigating: (a) the alleged relationship between Hepps' chain and known Mafia figures in eastern Pennsylvania; (b) whether the chain had received special treatment from the [state governor's] administration and the Liquor Control Board; and (c) a possible connection between the chain and small insurance companies con-

1. The Philadelphia Inquirer is owned by Philadelphia Newspapers, Inc. The articles were authored by William Ecenbarger and William Lambert.
4. 106 S.Ct. at 1560. Maurice S. Hepps is the principle stockholder of General Programming, Inc. (GPI), a corporation that franchises a chain of stores—known at the relevant time as "Thrifty" stores—selling beer, soft drinks, and snacks. Id.
5. Id.
6. Id.
trolled by organized crime.  

As a result of these articles Hepps instituted a civil action against Philadelphia Newspapers, Inc. in a Pennsylvania state court. A six week jury trial resulted in a verdict in favor of the Inquirer. The trial court held that Pennsylvania's statute giving defendant the burden of proving the truth of the statements violated the Federal Constitution and thus, the plaintiff bore the burden of proving the falsity of the alleged defamatory publication. In accordance with Pennsylvania statute, 42 Pa. Cons. Stat. §772(7)(1982), Hepps brought an appeal directly to the Pennsylvania Supreme Court, which remanded the case for a new trial. The United States Supreme Court noted probable jurisdiction and reversed, holding that: "[A]t least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without showing that the statements at issue are false."  

Justice O'Connor, writing for the majority of the Court, began the Court's analysis by recognizing the need "to define the proper accommodation between the law of defamation and the freedoms for speech and press protected by the First Amendment." After a careful analysis of some of the Court's recent decisions in this

7. Id.  
9. 106 S.Ct. at 1561.  
10. Id. at 1560, citing 42 Pa.C.S. § 8343(b)(1). The statute reads in pertinent part: "(b) In an action for defamation, the defendant has the burden of proving, when the issue is properly raised: (1) the truth of the defamatory communication."  
11. Id. at 1561. Hepps based his challenge to the judgment rendered below upon the trial court's decision to instruct the jury that the plaintiff bears the burden of proving the falsity of the defamatory publication. He also appealed the trial court's dismissal of his claim for punitive damages. Hepps v. Philadelphia Newspapers, Inc., 506 Pa. 304, 485 A.2d 374 (1984).  
12. 106 S.Ct. at 1561. The Pennsylvania Supreme Court held that: (1) presuming the falsity of the defamatory material for which a private individual brought a civil libel suit for damages and imposing upon the defendant the burden of proving the truth of the defamatory statement is not violative of the first amendment, and (2) evidence was insufficient to establish actual malice so as to raise a triable issue of fact and thus the trial court properly withdrew the question of punitive damages from the jury's consideration. 485 A.2d at 374-75.  
14. 106 S. Ct. at 1559.  
15. Id. Justice O'Connor's majority opinion was joined by Justices Brennan, Marshall, Blackmun, and Powell. Justice Brennan filed a concurring opinion in which Justice Blackmun joined. Justice Stevens filed a dissenting opinion in which Chief Justice Burger, Justice White, and Justice Rehnquist joined.  
16. Id. See U. S. Const. amend. I.
Justice O'Connor identified two primary issues, the resolution of which may alter the common-law interpretation of the first amendment in defamation suits. The first issue involves an inquiry into whether the plaintiff is a public official or figure, or is instead a private figure. The second asks whether the speech at issue is of public concern.

The Court based its analysis of the disputed language on the standard first enunciated in *Gertz v. Robert Welch, Inc.*, which provided that when the plaintiff is a private figure and the newspaper articles are of public concern, the common-law rule must be superceded by a constitutional rule. The Court held that Hepps was a private figure and that the newspaper articles were of public concern; thus, as in *Gertz*, the common law's presumption of falsity—that the defendant bear the burden of proving truth—must yield to a constitutional requirement that the plaintiff bear the burden of proving falsity, as well as fault, before recovering damages.

The Court acknowledged that plaintiffs defamed by false statements which they are unable to prove are false will be unable to recover under this decision. This consideration, however, is outweighed by the need to protect free speech and tempered by the realization that placing the burden on either party will occasionally result in injustice. To make certain that true speech on matters of public concern is not deterred, the Court concluded that the common law presumption that defamatory speech is false cannot prevail when a plaintiff, like Hepps, seeks damages against a media defendant with respect to speech of public concern.

Justice O'Connor indicated that placing the burden of proving

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18. 106 S. Ct. at 1563.
19. Id.
20. Id.
21. Id. Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974), held that a private figure who brings a suit for defamation cannot recover without some showing that the media defendant was at fault in publishing the statements at issue.
22. 106 S. Ct. at 1563.
23. Id. Justice O'Connor pointed out in footnote 4 of the opinion that the Court had "no occasion to consider the quality of proof of falsity that a private figure plaintiff must present to recover damages." Id. at 1565.
24. Id. at 1563-64.
25. Id. at 1564. The Court stated in pertinent part: "Because in such a case the scales are in an uncertain balance as to whether the statements are true or false, the Constitution requires that the scales be tipped in favor of protecting true speech." 106 S.Ct. at 1564.
truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. Clearly such a "chilling" effect would be contrary to the first amendment's protection of true speech on matters of public concern; thus, the Court concluded that a private-figure plaintiff must carry the burden of showing that the speech in question is false before recovering damages for defamation from a media defendant. Justice O'Connor explained that any other finding could "only result in a deterrence of speech which the Constitution makes free."

The Court acknowledged that requiring the plaintiff to prove falsity will protect from liability some speech that is false. However, Justice O'Connor noted that the Court was not setting a new trend in Hepps by protecting speech of this kind because the Court has affirmed that "the First Amendment requires that we protect some falsehood in order to protect speech that matters." Concluding that the speech at issue in the principle case clearly "matters," in that it concerns the legitimacy of the political process, Justice O'Connor stated that with respect to true speech on matters of public concern, the Court has been willing to shield even demonstrably false speech from liability, and has placed additional requirements of fault upon the plaintiff in a suit for defamation. Justice O'Connor declared that the Court's decision added only slightly to the burdens that the plaintiff must already bear as a result of their prior findings in the law of defamation.

26. Id.
27. Id. Justice O'Connor asserted that: "To ensure that true speech on matters of public concern is not deterred, the common law presumption that defamatory speech is false cannot stand." 106 S. Ct. at 1564.
28. Id.
29. Id. Justice O'Connor pointed out that the Court's previous decisions on the restrictions that the first amendment places upon the common law of defamation firmly support the Court's conclusion here with respect to the allocation of the burden of proof. 106 S. Ct. at 1564.
30. Id. at 1565. See Gertz, 94 S. Ct. at 3007.
31. Id. See Dun & Bradstreet, 105 S. Ct. at ____ (speech of public concern is at the core of the first amendment's protections).
32. 106 S. Ct. at 1565.
33. Id. The Court noted in pertinent part: 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 are false. Also, as a practical matter, evidence offered by the plaintiff on the publisher's fault in adequately investigating the truth of the published statements will generally encompass evidence of falsity of the matters asserted. 106 S. Ct. at 1565.
and held unequivocally that the plaintiff must show fault.\textsuperscript{34} Justice Brennan, with whom Justice Blackmun joined, concurred in the judgment of the Court.\textsuperscript{35} The Justices wrote separately to assert that the Court erroneously limited its holding to media defendants. Arguing that no distinction should be made with respect to the type of defendant involved, the concurrence emphasized that the first amendment protects all speech, and that the inherent worth of an expression does not depend on its source.\textsuperscript{36}

Justice Stevens, joined by Chief Justice Burger, Justice White, and Justice Rehnquist, in a dissenting opinion,\textsuperscript{37} stressed the error of the Court’s majority in allocating the burden of proof to the plaintiff. Justice Stevens asserted that the Court had reached a pernicious result by devaluing the state’s interest in redressing harm to an individual’s reputation.\textsuperscript{38} Because the \textit{Hepps} decision would have a practical effect only where the speaker meets the \textit{Gertz} fault requirement, Justice Stevens stressed that the decision protects speech made negligently or maliciously. Such speech does not deserve protection, the dissent asserted, as it contributes little to the “marketplace of ideas.”\textsuperscript{39} If the plaintiff cannot prove the falsity of statements, the dissenters reasoned that permitting the intentional and malicious publication of libelous material allows a publisher to act as a “character assassin [with a] constitutional license to defame.”\textsuperscript{40} In the opinion of Justice Stevens, malicious

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\item \textsuperscript{34} \textit{Id.} The Court recognized that the plaintiff’s burden in this case is weightier because of Pennsylvania’s “shield” law. Pennsylvania’s “shield” law provides in pertinent part that “no person...employed by any radio or television station, or any magazine of general circulation,...shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.” 42 PA. CONS. STAT. [\textsuperscript{\textcopyright} 5942(a)(1982). However, the Court saw no need to consider the permissible reach of such a law because the decision of the trial judge, in refusing to give any instructions to the jury as to whether it could or could not draw inferences from the defendant’s decision to use the shield law, was not addressed by Pennsylvania’s highest court, nor was it appealed to this Court. 106 S.Ct. at 1565.
\item \textsuperscript{35} \textit{Id.} at 1565 (Brennan, J., concurring, joined by Blackmun, J.).
\item \textsuperscript{36} \textit{Id.} Justice Brennan wrote separately only to note that, while the Court reserves the question whether the rule it announces applies to non-media defendants, he would adhere to his view that such a distinction is “irreconcilable with the fundamental First Amendment principle that the inherent worth of...speech in terms of its capacity for informing the public does not depend upon the identity of the source, whether corporation, association, union, or individual.” \textit{See Dun & Bradstreet}, 105 S. Ct. 2939, 2957 (Brennan, J., dissenting). 106 S. Ct. at 1565.
\item \textsuperscript{37} \textit{Id.} at 1566-71 (Stevens, J., dissenting).
\item \textsuperscript{38} \textit{Id.} at 1566 (Stevens, J., dissenting). According to Justice Stevens the “state interest in preventing and redressing injuries to reputation is obviously important.” \textit{Id.}
\item \textsuperscript{39} \textit{Id.} at 1567.
\item \textsuperscript{40} \textit{Id.} at 1568.
\end{itemize}
character assassination is not protected by the first amendment. Justice Stevens also concluded that in spite of the "license to defame" provided by the decision reached in the principal case, the Court's analytical approach—by devaluing the state's interest in redressing harm to an individual's reputation—provides a wholly unwarranted protection for malicious gossip. Most damaging to the majority's holding, according to Justice Stevens, was the mistaken belief that doubt regarding the truth of a defamatory statement must invariably be resolved in favor of constitutional protection of the statement and against vindication of the reputation of a private individual. Justice Stevens explained that even assuming that attacks on the reputation of a public figure should be presumed to be true, an entirely different stance is necessary when a defamatory statement attacks the reputation of a private individual. The interest in protecting truthful statements must yield to the "legitimate state interest underlying the law of libel"—"the

41. Id. Justice Stevens noted in pertinent part:

The First Amendment does require the target of a defamatory statement to prove that his assailant was at fault, and I agree that it provides a constitutional shield for truthful statements. I simply do not understand, however, why a character assassin should be given an absolute license to defame by means of statements that can neither be verified nor disproven. Id. at 1568-69 (Stevens, J., dissenting). Justice Stevens proceeded to make clear that "[t]he danger of deliberate defamation by reference to unprovable facts is not merely speculative or hypothetical concern. . . . [A] host of factors may make it impossible for an honorable person to disprove malicious gossip about his past conduct, his relatives, his friends, or his business associates." Id. at 1569 (Stevens, J., dissenting).

42. Id. at 1569 (Stevens, J., dissenting). Justice Stevens understood the Court's result to be derived from a straightforward syllogism, the major premise being that "the First Amendment's protection of true speech on matters of public concern" is equivalent to a command that no rule of law can stand if it will exclude any true speech from the public domain, and the minor premise being that although "we cannot know how much of the speech affected by the allocation of the burden of proof is true and how much is false, at least some unverifiable gossip is true." Stevens concludes that from these premises, the majority reasons that it necessarily follows that a rule burdening the dissemination of such speech would contravene the first amendment and accordingly the majority concludes that "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." Id. (Stevens, J., dissenting).

43. Id.

44. Id. at 1570 (Stevens, J., dissenting). Justice Stevens cited Gertz, 94 S. Ct. at 3009-10, as providing support for his conclusion that a different calculus is appropriate when a private individual is involved. In Gertz, the Court held that private persons are "more vulnerable to injury" and "more deserving of recovery"—more vulnerable because they lack "access to the channels of effective communication...to counteract false statements"; more deserving because they have "relinquished no part of their good names" by "thrusting themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 106 S. Ct. at 1570 (Stevens, J., dissenting).
compensation of individuals for the harm inflicted on them by defamatory falsehood."45 Justice Stevens concluded by asserting that the first amendment does not mandate that the Court balance the interest in favor of protecting true speech simply because the speech pertains to "matters of public concern."46

Some twenty-three years have now passed since the United States Supreme Court revolutionized the common law of defamation with its decision in New York Times v. Sullivan.47 However, many implications of that revolution have not been appreciated fully. The revolution with respect to the law of defamation was further expanded and consolidated in a second landmark case, Gertz v. Robert Welch, Inc.48 For more than a decade, states have struggled to comply with Gertz, as Gertz granted states substantial discretion in several key areas.49 In the years between New York Times and Gertz, the Court established various criteria for determining liability in defamation cases, but failed to answer a key question pertinent to every defamation case: given that a defamatory statement must be false to be actionable,50 who has the burden of proving its truth or falsity?

The revolution in the law of defamation recently exploded when the United States Supreme Court agreed to decide whether the Pennsylvania rule requiring a libel defendant to prove the truth of allegedly defamatory material was constitutional. In Philadelphia Newspapers v. Hepps,51 the United States Supreme Court settled this key area of libel law by holding that a private person plaintiff has the burden of proof in cases involving issues of "public concern."52

45. Id. (Stevens, J., dissenting).
46. Id. at 1571 (Stevens, J., dissenting). Justice Stevens asserted that as long as publishers are protected by the requirement that the plaintiff had the burden of proving fault, there can be little, if any basis, for a concern that a significant amount of true speech will be deterred unless the private person victimized by a malicious libel can also carry the burden of proving falsity.

Id. (Stevens, J., dissenting).
47. 376 U.S. 254 (1964).
49. Id. The issues which the Supreme Court seemed to have left to the states include: (1) determining the status of the plaintiff, i.e., whether a public official, public figure, or private person; (2) what standard of liability, such as actual malice, negligence or gross negligence would need to be met by a private person plaintiff; and (3) what lack of care or departure from accepted journalistic standards would satisfy the negligence requirement as long as states did not impose liability without fault. 418 U.S. at 323.
51. 106 S. Ct. 1558 (1986).
52. Id. For a definition of "private person" and "public concern," see Gertz, 418 U.S.
Historically, pre-*New York Times* common law, as codified in Pennsylvania, failed to recognize first amendment limitations upon libel actions and placed on the defendant the burden of proving the truth of the allegedly libelous publications. The Pennsylvania statute at issue gives the defendant in a defamation action the "burden of proving, when the issue is properly raised: (1) the truth of the defamatory communication. . . ." This common law advantage to the plaintiff, however, utterly fails to accommodate a defendant’s free speech rights. Originally, common law did not even recognize truth as a defense. Punishment of truthful speech was so incompatible with public policy, however, that truth eventually became a limited defense in criminal libel suits, and in most instances, a complete defense in civil libel suits. The common law presumed that all defamatory words were false; therefore, truth was recognized only as a defense, not as an affirmative element in the plaintiff’s cause of action. But approximately a dozen states, apparently confusing civil with criminal libel, took the position that truth was an absolute defense only if the defendant had made the statement with either “good motives” or “justifiable ends.”

In addition to the restricted use of a truth defense, the common law differed from current law in another crucial respect: strict liability was imposed. The liability structure could be characterized as strict liability (or no-fault) in the sense that, if the matter published proved to be false, the defendant nonetheless incurred lia-

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53. 42 PA. CONS. STAT. § 8343(b).
54. The statute at issue reads in full:
(a) Burden of Plaintiff. In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
(1) The defamatory character of the communication.
(2) Its publication by the defendant.
(3) Its application to the plaintiff.
(4) The understanding by the recipient of its defamatory meaning.
(5) The understanding by the recipient of it as intended to be applied to the plaintiff.
(6) Special harm resulting to the plaintiff from its publication.
(7) Abuse of a conditionally privileged occasion.
(b) Burden of Defendant. In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
(1) The truth of the defamatory communication.
(2) The privileged character of the occasion on which it was published.
(3) The character of the subject matter of defamatory comment as of public concern.
57. Eldredge, § 65 at 328.
bility no matter how reasonable his belief in the truth of the matter asserted.\textsuperscript{58} This harsh result was alleviated only by the development of a "complex structure of privileges" for publications, both absolute (based on the speaker's status) and conditional (based on the occasion on which the statement was made) which served in part to protect and advance the larger societal interest in the free flow of ideas.\textsuperscript{59}

The qualified recognition of truth as a defense and the limited use of privileges were the common law's only recognition of the speech interests of the defendant. Libel simply was not viewed as raising any first amendment considerations.\textsuperscript{60} Clearly, libelous utterances, under both the common law and the Supreme Court's pre-1964 rulings, were viewed as "not being within the area of constitutionally protected speech."\textsuperscript{61} That view of libel, however, drastically changed in 1964.

In \textit{New York Times v. Sullivan},\textsuperscript{62} the United States Supreme Court constitutionalized the law of defamation, thereby imposing limitations upon a state's ability to punish speech concerning public officials based on the first and fourteenth amendments. The Court recognized not only that the defense of truth was inadequate to protect the "debate on public issues that should be unlimited, robust, and wide open, even though it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on public officials,"\textsuperscript{63} but that even requiring the plaintiff to prove falsity was

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  \item\textsuperscript{58} Keeton, \textit{Defamation and Freedom of the Press}, 54 \textit{Tex.L.Rev.} 1221, 1222 (1976).
  \item\textsuperscript{59} \textit{Id.} at 1222.
  \item Thus, the historical truism that, in theory, one who intentionally publishes matter known to be defamatory incurs liability regardless of fault unless he correctly assesses the matter as true is a suspect generality until modified by recognition of the many so-called qualified and unqualified privileges to publish false statements that have developed. Therefore, in the vast majority of situations involving private communications to individuals or limited groups, other than the trivial and gossipy kind involving little harm and consequently, only occasional litigation, it is more nearly accurate to say that the defamed person found it necessary to prove some kind of fault concerning truth or falsity in order to recover. \textit{Id.} at 1222-23.
  \item\textsuperscript{60} Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). The Court stated in pertinent part:
    \begin{quote}
        Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.
    \end{quote}
  \item\textsuperscript{61} Beauharis v. Illinois, 343 U.S. 250, 266 (1952).
  \item\textsuperscript{62} 376 U.S. 254 (1964).
  \item\textsuperscript{63} \textit{Id.} at 270.
\end{itemize}
insufficient protection for speech when the speech concerns public officials. The Court stated that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the breathing space that they need. . . to survive." The New York Times Court concluded that the Constitution of the United States guaranteed:

a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

The argument that New York Times shifted the burden of proof on the issue of the statement's truth or falsity from the defendant to the plaintiff is relatively straightforward and derives from the holding of the case. Subsequent cases which expanded the scope of the New York Times rule to encompass, for example, public figures, left no doubt that New York Times had placed on the public figure plaintiff the burden of proving falsity as well as actual malice. Thus, the Supreme Court has repeatedly characterized New York Times as allowing a public official or figure to recover damages in a libel action only if such person establishes that the alleged defamatory statement was false and that it was made with malice.

Certainly, because New York Times explicitly placed the burden of proving actual malice on the plaintiff, it would have been completely incongruous to allow the plaintiff to recover without also establishing falsity. The requirement that the plaintiff prove the statement was made "with knowledge that it was false or with

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64. Id. at 270-71. See also Sweeney v. Patterson, 76 U.S. App. D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678. Judge Edgerton spoke for a unanimous court which affirmed the dismissal of a Congressman's libel suit based upon a newspaper article charging him with anti-Semitism in opposing a judicial appointment. The judge held:

Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. . . . The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Whatever is added to the field of libel is taken from the field of free debate.

65. 376 U.S. at 279-80.

66. 25 WM. & MARY L. REV. at 855.


69. 376 U.S. at 279.
reckless disregard of whether it was false or not." would seem to require the prior or simultaneous determination that the statement in question was false. Fault alone is insufficient; only false statements made with fault are actionable. Ostensibly, the question of fault, or actual malice, is inextricably intertwined with the issue of falsity. A public plaintiff must prove both elements in order to recover damages in a libel action. Thus, when the Supreme Court was forced to deal with the private figure plaintiff, the common law defamation rules already had been fundamentally altered: the burden of proving falsity as well as fault (actual malice), was squarely on all public official/figure plaintiffs.

In defamation cases involving individuals who are neither public officials nor public figures, the Supreme Court, in Gertz v. Robert Welch, Inc., recognized that where speech involves matters of public concern, such speech is entitled to some measure of first amendment protection. In view of the lessened first amendment interests at stake and the greater state concern for the reputations of private individuals, the Court struck a different balance than in New York Times, requiring some minimal degree of fault to remove the speech from the constitutionally protected zone. As in New York Times, the Court in Gertz recognized that the imposition of liability without fault would deter some truthful speech,
notwithstanding that the defendant would still have the available
defense of truth. Reiterating the rationale of New York Times,
the Court noted that the “First Amendment requires that we pro-
tect some falsehood in order to protect speech that matters.”
Hence, falsity alone is not enough to support a private figure libel
verdict, just as falsity alone is not sufficient in a public official/
figure action. In order to protect “speech that matters,” a pri-

tate person must establish some measure of fault with regard to
the publication: “So long as they do not impose liability without
fault, the states may define for themselves the appropriate stan-
dard of liability for a publisher or broadcaster of defamatory false-

To be sure, Gertz unquestionably puts the responsibility for
proving fault on the plaintiff. The inescapable conclusion is that
Gertz implicitly placed responsibility for proving falsity on the
plaintiff as well. As such, the Supreme Court has recognized that
the decisions in cases from New York Times through Gertz have
“considerably changed” the common law allocation of burdens of
proof. Prior to New York Times, plaintiffs made out a prima facie
case by demonstrating that the publication was damaging in some
respect and the defenses available were truth and privilege. The
plaintiff’s burden is now considerably expanded. In almost every
case, the plaintiff must focus on the editorial process and prove a

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75. Id. at 340-41. “Allowing the media to avoid liability only by proving the truth . . .
with the burden of proving it on the defendant, does not mean that only false speech will be
deterred.” 418 U.S. at 340-41.

76. Id. at 341.

77. “It seems clear that the principal concern of the Gertz decision is the issue of
falsity.” Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert
comment c at 27-29.

78. 418 U.S. at 341.

79. Id. at 347. Mr Justice Powell went on to explain the Court’s holding:
Our accommodation of the competing values at stake in defamation suits by private
individuals allows the states to impose liability on the publisher or broadcaster of
defamatory falsehood on a less demanding showing than that required by New York
Times. This conclusion is not based on a belief that the considerations which
prompted the adoption of the New York Times privilege for defamation of public
officials and its extension to public figures are wholly inapplicable to the context of
private individuals. Rather we endorse this approach in recognition of the strong and
legitimate state interest in compensating private individuals for injury to reputation.
But, this countervailing state interest extends no further than compensation for ac-
tual injury. We hold that the States may not permit recovery of presumed or punitive
damages, at least when liability is not based on a showing of knowledge of falsity or
reckless disregard for the truth.

Id. at 348-49.
false publication attended by some degree of culpability on the part of the publisher.\textsuperscript{80}

The unmistakable implication of the Court's defamation cases, therefore, is that a plaintiff must prove both falsity and fault. In fact, at least fifteen jurisdictions, after \textit{Gertz}, have held or suggested that a private plaintiff must bear the burden of proving falsity.\textsuperscript{81} Apparently, the Supreme Court has already recognized the innate relationship between the truth issue and the element of fault: "Demonstration that an article was true would seem to preclude finding the publisher at fault."\textsuperscript{82} This means that if a publisher is found to have been at fault, the article must have been shown to be false.

The Court's attempts to delineate the parameters of the constitutional privilege of free speech reflect the potential for confusion over the "truth or falsity" burden that existed prior to \textit{Philadelphia Newspapers, Inc. v. Hepps}.\textsuperscript{83} In \textit{Hepps}, the Supreme Court was required 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."\textsuperscript{84} With the \textit{Hepps} decision, the Court has taken a significant step toward eliminating any potential confusion, placing the burden of proving

\textsuperscript{80} Herbert v. Lando, 441 U.S. 153, 175-76 (1979).


\textsuperscript{82} Time, Inc. v. Firestone, 424 U.S. 448, 458 (1976), citing Cox Broadcasting Corp. v. Cohn, 420 U.S. at 498-500 (Powell, J., concurring).
\textsuperscript{83} 106 S.Ct 1558 (1986).
\textsuperscript{84} Id. at 1559.
falsity on the plaintiff in certain types of defamation cases.\textsuperscript{85}

Not persuaded by the Pennsylvania Supreme Court's disposition of the principal case, the Supreme Court held that "where a newspaper publishes speech of public concern, a private figure plaintiff cannot recover damages without also showing that the statements at issue are false."\textsuperscript{86} The requirement that a libel plaintiff prove falsity does not flow only from logic and the Supreme Court's prior decisions in defamation cases. Viewed more broadly, the requirement is the natural and compelled outgrowth of the protection afforded all types of speech.

The principle defined in the Supreme Court's "speech" decisions is that the first amendment should be used as a guide in securing the dissemination of public information from as diverse a range of sources as possible.\textsuperscript{87} From \textit{New York Times} through \textit{Gertz} and the recent opinion in \textit{Dun & Bradstreet}, the Supreme Court has recognized that speech concerning public affairs is more than self-expression; "it is the essence of self-government."\textsuperscript{88} Because speech on matters of public concern is the basis of the first amendments guarantees,\textsuperscript{89} the Supreme Court has provided full protection for truthful information about public affairs despite its defamatory character.\textsuperscript{90} Even some false speech about public affairs is protected to provide the "breathing space" necessary for publishers and broadcasters to fulfill their historic role as disseminators of information.\textsuperscript{91}

Rules compelling a speaker to guarantee the truth of a publication have been rejected because they invite "self-censorship."\textsuperscript{92} The purpose of the \textit{New York Times} privilege was to minimize the threat to the media of libel judgments, which encourage self-censorship and hinder "uninhibited, robust, and wide-open" debate on public issues.\textsuperscript{93} In \textit{New York Times}, the Court realized that a certain number of inaccuracies are inevitable in the free interchange

\textsuperscript{85} The decision placed the burden of proving falsity on the plaintiff in cases where the subject matter of the defamatory speech is of "public concern" and the defendant is a member of the mass media.

\textsuperscript{86} 106 S.Ct. 1558, 1559 (1986).

\textsuperscript{87} Associated Press v. United States, 326 U.S. 1, 20 (1945).

\textsuperscript{88} Garrison v. Louisiana, 379 U.S. at 74-75.


\textsuperscript{90} See Garrison, 379 U.S. at 74-75.

\textsuperscript{91} New York Times, 376 U.S. at 271-72.

\textsuperscript{92} Id. at 279.

\textsuperscript{93} Id. at 270.
of ideas and developed a principle which planted the seed for the Hepps decision. As the New York Times Court observed: "A rule compelling the critic of official conduct to guarantee that truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to comparable 'self-censorship.'"

Although the protection has since been extended beyond criticism of official conduct, the underlying need to avoid self-censorship still applies. The Pennsylvania statute at issue in Hepps, which placed the burden of proving truth on the defendant, attempted to establish precisely the type of rule proscribed by New York Times and Gertz. By virtually requiring a defendant to guarantee the truth of his assertions, the statute clearly violated the constitutionally-based principles discussed by the Court since New York Times. As such, it is neither surprising nor unwarranted that the Hepps Court concluded that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result." Without eliminating defamation actions altogether, the decisions since New York Times have significantly reduced the likelihood that judges and juries, through the advice of media counsel, will prescribe what the press may or may not publish.

That all defamatory statements do not readily lend themselves to an accurate determination of their truth or falsity is an inescapable fact. In "public concern" speech cases, such as Hepps, the states' interest in preserving private reputation must yield to the extent necessary to ensure that truthful expression is not punished, or worse, suppressed. Any rule such as that approved by the Supreme Court of Pennsylvania, which elevated private reputation over speech on public affairs, especially speech not proven to be false, plainly fails to satisfy the principles of historic first amendment analysis. Indeed, the common law rule enforced by the Pennsylvania Supreme Court permits, and perhaps encourages, punishment of speech that is as consistent with truth as it is with falsity. The protections afforded by the "fault" requirement are of little solace to a publisher who must bear the burden of establishing the truth of the publication. Clearly, a rule which requires the

94. Id. at 279.
plaintiff to establish falsehood and failure to take reasonable precautions to ascertain the truth, properly balances first amendment concerns.  

Justice O'Connor, writing for the majority, acknowledged that there will always be instances when the jury will be unable to determine conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive. Conscious of this country's jurisprudential fallibilities, the Court decided that since occasional errors will occur, the constitution requires courts to risk denying recovery to deserving plaintiffs for unprovable false statements, rather than punishing media defendants for proving unprovable truth. In a case presenting a configuration of speech and plaintiff like the one the court faced in Hepps, and because it is impossible to determine whether speech is true or false in every case, Justice O'Connor held that the Constitution requires protecting true speech. Justice O'Connor further concluded: "To ensure that true speech on matters of public concern is not deterred, we hold that the common law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." Certainly where, as in Hepps, the risk of liability carries with it the potential for large damage awards, self-censorship and dissipation of speech on matters of public concern, the burden should be on the plaintiff to establish in the first instance that the speech is outside the protected zone. Such a rule leaves adequate protection for private reputation.

Balancing the interests of the parties, fairness considerations dictate that the plaintiff bear the burden of establishing the falsity of a challenged publication. The Hepps decision reiterates what the Court's other decisions have held, namely that Gertz mandates a balancing test, under which the state's interest in compensating a defamation plaintiff is balanced against the publisher's free speech

97. Such a rule is consistent with the rules adopted in other actions seeking to impose liability for speech. In "speech" cases other than civil defamation actions, the Supreme Court has recognized that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn." Speiser v. Randall, 357 U.S. 513, 525 (1958). For that reason, statutory schemes which place the burden on the defendant to prove that the speech is protected by the first amendment have been rejected consistently by the Supreme Court.

98. Hepps, 106 S.Ct at 1563.

99. Id. at 1563-64.

100. Id. at 1564.

101. Id.
It seems obvious that 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, to which Justice O'Connor referred, 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 reputation is strong, but does not reach constitutional proportions.

There is a thread of fundamental unfairness in allowing a plaintiff to file suit, sit back and make the defendant prove his case, while the court presumes that the defendant has acted wrongfully by speaking false words. The common-law presumption in the plaintiff's favor runs counter to the usual assumption that a defendant has acted properly unless and until it is proven otherwise. Contrariwise, it is completely fair and equitable to put the burden of proving the essential element of falsity on the plaintiff, who seeks to punish allegedly false speech.

Placing the burden of proving falsity on a plaintiff, such as Hepps, does no more than require him to prove the key element of his case. Moreover, even those members of the Supreme Court who have expressed dissatisfaction with the protection of false speech afforded by the Gertz requirement of proof of fault recognize that a plaintiff should be able to vindicate his reputation only upon proving falsity. Plaintiff Hepps, when asked why he instituted

This conclusion makes sense. In much the same way that our system's repulsion for punishing the innocent tips the balance in favor of criminal defendants, our system's infatuation with free speech tips the balance in favor of defamation defendants. Undeniably, "the First Amendment requires that we protect some falsehood in order to protect speech that matters." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974).
104. R. Sack, at 136.
105. 25 Wm. & Mary L. Rev. at 859. The determination of who should bear the burden of proof is merely a question of policy and fairness based on experience in different situations. In determining what would be fair in a given situation, the courts consider such factors as who is making the allegation, who is more capable of proving that particular fact is false, and what choice experience tends to favor.

The first of these factors obviously would not favor placing the burden of proof on the defendant because the courts have long required the plaintiff to plead that the statement is false. The second factor likewise would not favor placing the burden of proof on the defendant because the plaintiff should be in a better position than the defendant to test the truth of the statement made about himself, at least when the charge is specific as to time or place. The only factor that arguably favors a general requirement that the defendant prove the truth of the statement, therefore, is tradition. Id. at 859-60.
the action, answered: "To finally get the truth of what happened in Harrisburg, to fight to get my name back, to show that the thrust of these articles was totally false. . . ." Thus, there simply is no reason to relieve this libel plaintiff of proving falsity, the essential ingredient of a defamation action. The jury charge given in Hepps instructed that, in order to prevail, Hepps was required to prove falsity by a preponderance of the evidence, just as he was required to prove all the other elements of his case. If the jury was in doubt because the evidence on the falsity issue was equally balanced, then the defendant would prevail. Such a result seems just and appropriate. In a close case, such as Hepps, where it was not shown to the jury's satisfaction that the publication was false, there should be no recovery for defamation. As Justice O'Connor plainly conveyed, fairness considerations, as well as first amendment principles, do not permit recovery for speech where the evidence is equally consistent with truth as with falsity. To hold otherwise would permit a plaintiff to recover money damages for speech which has never been found false—a result diametrically opposed to the Supreme Court's mandate that truth may not be the subject of sanctions where discussion of public affairs is involved.

Furthermore, the reasons for presuming that defamatory speech is false do not withstand analysis in the Hepps case. The Supreme Court of Pennsylvania offered three arguments in support of the

108. This necessarily follows from the finding that plaintiffs are not relieved of proof of the key elements in other types of actions. In Pennsylvania, there is no presumption of falsity in product disparagement cases. See Menefee v. Columbia Broadcasting System, Inc., 458 Pa. 46, 53, 329 A.2d 216, 220 (1974); and Young v. Geiske, 209 Pa. 515, 58 A. 887 (1904). Also, the Supreme Court's exploration of the ramifications of the placement of the burdens of persuasion and production is particularly illuminating in decisions under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, where plaintiffs made arguments, similar to those made by Hepps, regarding the fairness of leaving the burden of persuasion on plaintiffs. Despite the strong societal concerns and the personal interests of the Title VII plaintiff, the Supreme Court consistently has concluded that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981)(citations omitted). As in discrimination cases, the burden of persuasion should remain with the libel plaintiff, who seeks to punish speech through an award of monetary damages. Because defamation plaintiffs, no less than discrimination plaintiffs, have a full and fair opportunity to carry their burden of persuasion, there simply is no reason to relieve the libel plaintiff of the burden of proving the key element of falsity.

109. Hepps, 106 S.Ct. at 1563-64.
common-law rule giving the defendant the burden of proving truth: (a) plaintiff enjoys a presumption of good character; (b) plaintiff should not be required to prove a negative; and (c) the publisher has “peculiar knowledge” of the facts. These arguments, alone or in combination, fail to justify an absurd rule which would lead to the imposition of money damages for speech which may be true.

First, in reference to “presuming good reputation” some commentators, as well as the Pennsylvania Supreme Court, attempt to explain this deviation from standard civil procedure by drawing an analogy to the criminal law’s presumption of the defendant’s innocence. The underlying premise of the rule giving the defendant the burden of proof is the presumption that any person accused of wrong-doing is innocent until proven guilty. Proponents of that view contend that the plaintiff is entitled to the presumption that his reputation is good and that the disparaging remarks, therefore, are false. As commentators have noted, however, “they . . . fail to explain . . . why a concept meant to benefit a criminal defendant should be available to a civil plaintiff.”

When applied in defamation cases, the presumption of plaintiff’s good character and the presumption of the falsity of the publication lacks rationality. The Supreme Court has held, in both civil and criminal cases, that in order for a legislature to presume one fact from evidence of another, there must be a “rational connection” between the fact proved and the fact presumed. To otherwise violates the Constitution by denying due process or equal protection. Undeniably, in Hepps, a presumption of falsity based upon the defamatory nature of the publication fails to meet these constitutional standards. The presumption of Hepps’ good character and civil “innocence,” which in turn leads to a presumption of falsity, simply fails the rationality test required of any presumption.

A second reason relied upon for placing the burden of proof on the defendant is equally unsatisfactory. The Pennsylvania Supreme Court reasoned that it is more fair to require a publisher to

111. 25 Wm. & Mary L. Rev. at 860.
113. 25 Wm. & Mary L. Rev. at 860.
115. 25 Wm. & Mary L. Rev. at 860-61.
prove his assertion than to require a plaintiff to establish the absence of factual support for the assertion. In other words, it is too burdensome to require a libel plaintiff to prove a negative.\textsuperscript{116} Placing the burden on the party who has made an affirmative allegation, however, is not an invariable test, nor always a significant circumstance; the burden is often on the party who has a negative assertion to prove. Courts often require the plaintiff to prove a negative.\textsuperscript{117} Moreover, modern discovery practices have obviated much of the earlier concern about proving a negative.\textsuperscript{118} The Restatement (Second) of Torts also recognizes the ability to prove a negative assertion, including falsity.\textsuperscript{119} Even the common law recognized a libel plaintiff's ability to prove the very negative assertion at issue in \textit{Hepps}, \textit{i.e.}, that a challenged defamatory statement was not true.\textsuperscript{120} Since even common law recognized plaintiff's ability to prove falsity, there is no basis for generally protecting a plaintiff from proving such a negative assertion once a publisher's first amendment rights are recognized.

Finally, the third reason cited for removing the burden of proof from the plaintiff is seriously inadequate. The Pennsylvania Supreme Court relied upon the general principle that the burden of proof should be placed upon the party with "peculiar means of knowledge of the particular facts in issue."\textsuperscript{121} While libel defendants undoubtedly know upon what facts they have based their assertions, plaintiffs obviously have best access to information regarding the truth or falsity of any assertions about themselves.\textsuperscript{122} A

\textsuperscript{116} Id. at 860. "Not all negatives are difficult to prove." A plaintiff is in the best position to know the facts about his own life and activities that will establish falsity. A plaintiff's simple denial would perhaps be sufficient in the abnormal situation of a defendant who publishes statements that conclusively defame without providing some information that would indicate truth. If the defendant included information tending to indicate truth, however, the plaintiff, who has access to the facts of his life, can be expected to discharge the burden of overcoming the suspicious circumstances. Id. at 860-61.

\textsuperscript{117} Id. at 861. Courts routinely required parties to prove a negative in tort cases, Prentice v. Crane, 234 Ill. 302, 84 N.E. 916, 918 (1908), as well as in criminal law, Mullaney v. Wilbur, 421 U.S. 684, 701 (1975), tax law, Rand v. Helvering, 77 F.2d 450, 451 (8th Cir. 1935), discrimination cases, Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978), as well as other substantive areas. 25 WM. & MARY L. REV. at 861.

\textsuperscript{118} Id.

\textsuperscript{119} RESTATEMENT (SECOND) OF TORTS § 651 (1977). The comments note that the "plaintiff unequivocally has the burden of proving the falsity of the injurious statement." Id. comment b.

\textsuperscript{120} R. Sack, at 134.

\textsuperscript{121} See Corabi v. Curtis Publishing Co., 441 Pa. at 450, 273 A.2d at 908.

\textsuperscript{122} 54 Tex. L. Rev. at 1236. "A plaintiff is in the best position to know the facts about his own life and activities that will establish falsity." Id.
defendant may not, obviously, sit back and require the plaintiff to challenge his assertions in a vacuum. The facts upon which defendant relied in making the accusations against a plaintiff are, under modern discovery rules, divulged prior to trial.\textsuperscript{128} It necessarily follows that once the factual basis for the publication has been discovered, the plaintiff, with his "unique knowledge" about his own behavior, has the best access to information that would refute, or support, the accusations made.\textsuperscript{124}

Even where the plaintiff's burden is escalated by a "shield law" such as Pennsylvania's,\textsuperscript{126} the Supreme Court found no reason to apply a different constitutional standard.\textsuperscript{126} Pursuant to this statutory privilege, which permits reporters to refuse to divulge their sources of information, the reporters refused to identify the "federal sources" who initially told them about Thrifty's connections to organized crime. Reliance upon the "shield law," however, had no effect whatsoever on plaintiff's ability to meet the burden of proving falsity. The reporters testified fully and candidly as to the information they relied upon in publishing the alleged defamatory articles. It is that information, not the names of the \textit{Inquirer}'s confidential federal sources, that Hepps needed to know in order to attempt to prove the articles false. While the plaintiff may be hindered from attacking the credibility of the defendant's source, such plaintiff fully retains his ability to dispute the actual substance of the statement.

To be sure, the decision reached in \textit{New York Times} brought the concept of culpability into the law of defamation, freeing the media defendant from its compulsion to avoid statements unflattering to public officials. Upon this basis, the \textit{Gertz} Court extended the fault requirement to private plaintiffs, yet protected their reputational interest by refusing to require that they meet the \textit{Times} standard. The Hepps decision—based on the premise that the first

\begin{footnotesize}
123. \textit{See Herbert v. Lando}, 441 U.S. at 176-77. Prior to the adoption of modern discovery rules, a plaintiff had little ability to obtain information from a defendant prior to trial, which may explain in part why the common-law presumption of falsity remained in effect. But the availability of liberalized discovery makes it possible for a libel plaintiff to meet his burden of proving "a false publication attended by some degree of culpability on part of publisher." \textit{Id.} at 176.
124. 54 Tex. L. Rev. at 1236.
125. 42 Pa. Cons. Stat. § 5942(a) (1982) provides in pertinent part: "No person. . .employed by any newspaper of general circulation. . .or any radio or television station, or any magazine of general circulation. . .shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial, or investigation before any government unit."
\end{footnotesize}
amendment mandates that a libel plaintiff prove that the speech he complains of is false—has served to further clarify this revolutionary process. Consistent with the constitutionally mandated shift of the Court’s focus, Hepps is a logical and enlightening product of the New York Times revolution. As such, Hepps has made it clear that vigorous debate on public issues should not be stifled by requiring a publisher to bear the burden of proving to a legal certainty each word which is written. Such a rule would intrude drastically on the field of free debate and cast a net of timidity over those who would comment on matters of public concern.

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