The Over-Constitutionalization of Libel Law: Philadelphia Newspapers Inc. v. Hepps

Evdoxia Beroukas

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol36/iss3/6

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.
NOTES
THE OVER-CONSTITUTIONALIZATION OF LIBEL LAW: PHILADELPHIA NEWSPAPERS, INC. v. HEPPS

INTRODUCTION

In Philadelphia Newspapers, Inc. v. Hepps,¹ the Supreme Court changed the current status of libel law and, in the process, increased the burden of proof for a private figure plaintiff suing for libel when the matter is of public concern. The Court decided that for private figure plaintiffs to succeed in a libel suit against a media defendant, they not only have to prove fault on the media's part, they also have to prove falsity. The Hepps decision, designed to diminish the chilling effect of libel suits on the media,² will discourage many plaintiffs with legitimate claims from filing libel suits and severely encroach upon a state's legitimate interest in protecting its citizens' good names.

This Note will show the practical difference between the two theories of fault and falsity. It will also discuss the effect of this decision on the legitimate state interest in preserving the good name of its citizens and in allowing compensation for injury to their reputations. Finally, this Note will present arguments in favor of a new approach to libel law, acting on the presumption that most private figure libel plaintiffs do not seek monetary damages, but seek instead to clear their reputations in the community in which they live and work.

I. BACKGROUND

The opportunity for free discussion is a fundamental principle of our constitutional system.³ Implicit in this fundamental principle is the dissemination of social, political, and economic information to the citizenry.⁴ A free press⁵ plays a vital role in insuring the flow of ideas and information

2. Id. at 1564.

The United States Supreme Court has defined the "press" broadly. The following are areas which the Court has considered a part of the "press." See, e.g., Greenbelt Coop. Publishing
to the public and provides a way for citizens to make informed decisions in the democratic political process. Libel cases have been decided in light of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 6

To protect this dissemination of ideas, the Court has developed the "marketplace" concept. 7 Under this concept, certain rights have been granted to the press, such as the right to freedom from prior restraints. 8 Freedom of the press, however, often conflicts with other constitutional guarantees or societal interests. 9 One of these interests is a need to preserve the integrity of an individual's reputation.

At common law, libel performed a vindicatory function by enabling the plaintiff to brand the defamatory publication as false. 10 As the law developed, it performed a preventive function in that it permitted a defamed person to expose the defamatory rumor before harm to his reputation had resulted. 11 Libel, as a common law tort, granted the plaintiff the presumption of a good name. 12 The plaintiff had to prove only that a written publication that subjected him to hatred or ridicule was false. 13 Some commentators have suggested that at common law, falsity was not an element of libel at all, but


7. Abrams v. United States, 250 U.S. 616, 630 (1919). Justice Holmes established the marketplace analogy in Abrams and declared that the discovery of truth was the goal best served by the maintenance of the marketplace. But see Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others." Id. at 150.
9. The sixth amendment rights to a fair trial and to confront one's accuser conflict with the freedom of the press. The Supreme Court has recognized that the press's rights give way to the rights of the accused. See, e.g., United States v. Liddy, 354 F. Supp. 208, 215 (D.D.C. 1972) (privilege denied in favor of accused's right to fair trial).
10. RESTATEMENT OF TORTS § 569 comment b (1938).
11. Id.
that libel was a tort related to damage of reputation.\textsuperscript{14} Truth was a defense, but if a defamatory falsehood was circulated, courts presumed a general injury to reputation.\textsuperscript{15} Punitive damages were available if common law malice was shown.\textsuperscript{16} Libel law has been constitutionalized to protect first amendment freedoms, especially the freedom of the press.

An "absolutist" view of the first amendment, which would deny all governmental power to regulate speech, has often been suggested and repeatedly rejected by the Court.\textsuperscript{17} Rather, the Court has applied various tests which recognize some governmental power to inhibit speech in certain contexts. For example, the "redeeming social value" test has frequently been used in obscenity cases.\textsuperscript{18} The "clear and present danger" test has been used to regulate subversive activity and the publication of matter thought to obstruct justice.\textsuperscript{19} Finally, the Court has used a "balancing test" which was not intended to directly condemn the content of the speech but which incidentally limited its exercise.\textsuperscript{20}

The Court, in \textit{New York Times Co. v. Sullivan},\textsuperscript{21} balanced the opposing interests of self-integrity and a free press and held that, under the first amendment, the press will not be liable for printing factual misstatements about public officials unless the press acted with "actual malice."\textsuperscript{22} In that

\begin{footnotesize}
\begin{enumerate}
\item[14.] Therefore, reputation is a protected interest even if not entirely based on truth. W. Prosser, \textit{The Law Of Torts} 797-99 (4th ed. 1971).
\item[15.] 472 U.S. at 765 (White, J., concurring). \textit{See also supra} note 14. Since falsity is not an element of common law libel, truth as a defense does not operate to counteract an element of the tort, but instead represents justification for a defamation. It is for this reason that literal truth need not be demonstrated. \textit{See infra} note 62.
\item[16.] 472 U.S. at 765 (White, J., concurring).
\item[17.] Brennan, \textit{The Supreme Court and the Meiklejohn Interpretation of the First Amendment}, 79 \textit{Harv. L. Rev.} 1, 11 (1965) [hereinafter Brennan]. Meiklejohn believed that freedom of expression in areas of public affairs is an absolute. \textit{Id.} at 12. But, he found no fault with laws which required speakers to conform to the necessities of the community (such as time and place restrictions) as long as the restrictions were not excuses for attempts to suppress speech. \textit{Id.} at 13. Meiklejohn would have allowed distinctions, however, among libel laws by virtue of the principle of "governing importance" that the people should be given that information necessary for self-government. \textit{Id.} at 13-14. The first amendment gives no protection to a defendant in a private defamation case; libel has no relation to the business of governing. \textit{Id.} at 14. \textit{See also} Meiklejohn, \textit{The First Amendment is an Absolute}, 1961 \textit{Sup. Ct. Rev.} 259 (private libel is subject to legislative control; political or seditious libel is not).
\item[18.] Brennan, \textit{ supra} note 17, at 11.
\item[19.] \textit{Id.}
\item[20.] \textit{Id.}
\item[21.] 376 U.S. 254 (1964).
\item[22.] \textit{Id.} at 279-80. \textit{See Note, Constitutional Limitations on the Defenses of Fair Comment and Conditional Privilege}, 30 \textit{Mo. L. Rev.} 467 (1965). The author argues that \textit{New York Times} appears to extend the privilege to all matters of public concern, "a decision \ldots [much] broader than the facts of the case made necessary." \textit{Id.} at 475. The author's concern was that if this interpretation were correct, false, defamatory statements could be made "concerning anyone or anything submitted to the public for its approval without liability unless made maliciously."
case, an elected official in Montgomery, Alabama brought suit in state court alleging that he had been libeled by an advertisement in the New York Times. The advertisement contained statements, some of which were false, about police action allegedly directed against students who participated in a civil rights demonstration. Sullivan claimed the statements referred to him because his duties included supervision of the police department. The Supreme Court held that a state cannot award damages to a public official for defamatory falsehood relating to his official conduct unless he proved "actual malice." Actual malice was defined as a statement made with knowledge of its falsity or with reckless disregard of whether or not it was true or false. Decisions following New York Times enlarged the constitu-

Id. at 476. Also, the three concurring judges' position in New York Times would be to advocate an absolute privilege. "Their position seems questionable if limited to the public official and candidates for office cases, and intolerable if extended to cases involving other matters of public concern. Id. See also Note, Privilege to Criticize Public Officials: A Constitutional Extension, 38 S. CAL. L. REV. 349 (1965) (New York Times may be seen as extending to individuals who are the subjects of legitimate public interest but these individuals would be at a disadvantage unless they were also extended a right to reply); Note, Delimitation of State's Power to Award Damages in Libel Action Brought by Public Official Against Critic of Official Conduct, 10 N.Y.L. F. 249, 256 (1964) ("[I]t may well be that the Supreme Court's decision today is the harbinger of an absolute privilege for newspapers tomorrow."); Note, Constitutional Law—Defamation—Actual Malice, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), 44 B.U.L. REV. 563, 571 (1964) (Court's rule may lead to excessive abuse, especially when injured party is denied media access); Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 CORNELL L.Q. 581 (1964) (argues for right to reply statutes). But see Note, No Recovery for Libel of Public Official in his Official Conduct in Absence of Actual Malice, 31 BROOKLYN L. REV. 191, 193 (1964) ("Had this decision been otherwise, a precedent would have been set for staggering recoveries against newspapers which would have resulted in their refusal to publish similar criticism of public officials.").


The New York Times Court created the actual malice standard in reaction to a city government and its officials who were abridging the rights of a certain class of people — Black Americans. Yet, in the process of rectifying this wrong, the Court has implicitly created an artificial class of citizens who, . . . are being denied equal protection because of their alleged "special status" . . . . "Separate but equal" has no place in American Constitutionalism.

Id. at 194.

For a similar view, see Note, First and Fourteenth Amendments Require a Conditional Privilege for One Criticizing the Official Conduct of a Public Servant, 25 U. PITT. L. REV. 752 (1964). The Court's decision in New York Times appeared correct in the face of the underlying racial problems, but the decision does limit the states in the exercise of their broad power to apply their own tort laws to defamation cases. Id. at 755. See also Note, Public Official—Recovery for Libel of Public Official Requires Proof of Actual Malice, 9 VILL. L. REV. 534, 539 (1964) (Court gave minority groups protection without specifically stating that as one of the considerations in the decision).

tional privilege to include misstatements involving public figures as well as matters of public concern.28

Prior to 1967, state and lower federal courts were split on the issue of whether or not the New York Times rule should extend to nonpublic officials.29 The Supreme Court resolved this issue in Curtis Publishing Co. v. Butts.30 In Curtis, the Saturday Evening Post published an article which accused Butts, the athletic director at the University of Georgia, of conspiring to “fix” a football game between Georgia and the University of Alabama in 1962.31 Through electronic error, a third party accidentally overheard a phone conversation between Butts and Paul Bryant, head coach at Alabama, one week before the game. The third party allegedly heard Butts outline Georgia’s offensive and defensive plays.32 Butts sued for libel and received a jury verdict in his favor. The Supreme Court affirmed the verdict and

Meaning of the First Amendment,” 1964 Sup. Ct. Rev. 191, 193-94 (views the New York Times decision as one that “may prove to be the best and most important [the Court] has ever produced in the realm of freedom of speech”). The decision has also been seen as “an occasion for dancing in the street.” Id. at 221 n. 125 (quoting Meiklejohn).

Compare Note, Criminal Liability for Criticism of Public Officials, 19 Sw. L.J. 399, 407 (1965) (“[A] rule strictly applicable only to defamation against public officials seems unwise. A more appropriate solution would be to apply the rule when the public interest in the dissemination of truth requires it, whether the individual is a public official or a private citizen.”) with Note, Conditional Privilege Essential to Constitutional Freedom of Expression, 31 Tenn. L. Rev. 504 (1964) (privilege should probably extend to other areas of public interest) and Note, State Law Allowing Libel Suit by Public Official Without Proof of Malice Held Unconstitutional, 42 Tex. L. Rev. 1080 (1964) (standard should apply to matters of public concern) and Note, Defaming a Public Official, 2 Tulsa L.J. 79 (1965) (libelous free speech may shock some, but the truth emerges when all may speak without governmental restrictions). But see Note, Defamation—Constitutional Requirement of Actual Malice, 14 Am. U.L. Rev. 71, 74 (1964) (Constitution should not protect reckless defamers or those who utter defamatory statements relying on uncertain foundations).

28. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (plurality opinion). Id. at 44. See Note, The Scope of First Amendment Protection for Good Faith Defamatory Error, 75 Yale L.J. 642 (1966). “[T]he proper inquiry in any libel case must be directed toward whether the alleged libel concerned a matter legitimately within the public’s concern, not on whether the plaintiff is a public official.” Id. at 651.
29. 388 U.S. at 134 n.1.

The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the relationship between libel law and the freedom of speech and press, lest the New York Times rule become a talisman which gives the press constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes to immunize the press from having to make just reparations for the infliction of needless injury upon honor and reputation through false publication.

Id. at 135 (emphasis added).
31. Id. at 135.
32. Id. at 136.
created a new class of libel plaintiff, the public figure.\textsuperscript{33} The Court defined a public figure as one who occupies a position of persuasive power or importance, or who has voluntarily thrust himself into the forefront of a particular public controversy in order to influence the resolution of the issues involved.\textsuperscript{34} The Court held that a public figure who is not a public official may recover damages for a defamatory falsehood which substantially damaged his reputation on a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."\textsuperscript{35} The degree of fault necessary to recover damages was not actual malice but gross negligence.\textsuperscript{36} The Court reasoned that the Butts story was not "hot news" and should have been investigated thoroughly and found that the story was published without substantial independent support.\textsuperscript{37}

In 1971, the Court decided the case of \textit{Rosenbloom v. Metromedia, Inc.}\textsuperscript{38} In a plurality opinion, the Court held that where a private figure plaintiff sued for libel in a matter of public interest, the \textit{New York Times} standard of actual malice applied.\textsuperscript{39} In \textit{Rosenbloom}, a radio station broadcast news of Rosenbloom's arrest for possession of obscene literature and the police seizure of obscene books from Rosenbloom's store. The station also broadcast stories concerning Rosenbloom's lawsuit alleging that the magazines he distributed were not obscene. The stories of the pending lawsuit did not use his name, but used the terms "smut literature racket" and "girlie book peddlers."\textsuperscript{40} After Rosenbloom was acquitted of criminal obscenity charges, he filed a libel action and won a jury award of $25,000 in general damages and $725,000 in punitive damages.\textsuperscript{41} The court of appeals reversed,\textsuperscript{42} holding

\textsuperscript{33} \textit{Id.} at 155.  
\textsuperscript{34} \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 345 (1974).  
\textsuperscript{35} 388 U.S. at 155.  
\textsuperscript{36} \textit{Id.}  
\textsuperscript{37} \textit{Id.} at 157. In \textit{New York Times}, public officials were permitted to recover only where the publication was deliberately falsified or published recklessly, despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard. 376 U.S. at 286-88, 292.  
\textsuperscript{38} 403 U.S. 29 (1971).  
\textsuperscript{39} \textit{Id.} at 40-57. In his concurring opinion, Justice Black stated that the first amendment protects the media from libel judgments even where statements are made with knowledge that they are false. \textit{Id.} at 57 (Black, J., concurring). Justice White reasoned that since there was no actual malice, the first amendment gave the media the privilege to report on official actions of public servants (the police) in full detail, without sparing the reputation of an individual involved in or affected by any official action. \textit{Id.} at 59-62 (White, J., concurring). Justice Harlan's dissent emphasized that the legitimate function of libel law to compensate individuals for actual harm did not conflict with the values of the first amendment. \textit{Id.} at 66 (Harlan, J., dissenting). Justices Marshall and Stewart wanted to restrict the award of damages to actually proved injuries, \textit{Id.} at 84, which would make it unnecessary to rely on "elusive concepts of the degree of fault." \textit{Id.} at 86 (Marshall, J., joined by Stewart, J., dissenting).  
\textsuperscript{40} \textit{Id.} at 36.  
\textsuperscript{41} Punitive damages were reduced on remittitur to $250,000. \textit{Id.} at 40.  
\textsuperscript{42} 415 F.2d 892 (3d Cir. 1969).
that the *New York Times* standard applied and the fact that Rosenbloom was not a public figure was not decisive. The Supreme Court affirmed in a plurality opinion which was virtually impossible to use as precedent. The eight justices who participated in the decision announced their views in five separate opinions, "none of which commanded more than three votes." Three approaches were discussed in *Rosenbloom*. One was to extend the *New York Times* test to all libel cases. The second was to vary the level of the constitutional privilege based on the status of the defamed person. The third approach would grant the press absolute immunity from liability for defamation.43

In *Gertz v. Robert Welch, Inc.*,45 private figure plaintiffs were accorded a different standard than public officials/figures or matters of public concern. In *Gertz*, Nuccio, a Chicago policeman, was convicted of murder. The victim's family retained Gertz to represent them in civil litigation against Nuccio.46 Gertz never discussed Nuccio with the press nor played any part in the criminal proceeding.47 A magazine published by Robert Welch, Inc., printed an article alleging that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of a Communist campaign against the police.48 The article portrayed Gertz as the architect of Nuccio's "frame-up" and labeled him a "Communist fronter" who had been an officer of the National Lawyers Guild, described in the article as a Communist organization.49

Gertz filed a libel suit in federal court. Welch asserted that Gertz was a public figure, therefore the *New York Times* rule applied, which would have allowed Welch to escape liability unless Gertz proved actual malice.44 The district court ruled that Gertz was not a public figure,45 and because some statements in the article constituted libel per se, the court submitted the case to the jury with instructions to ascertain only damages.46 The jury awarded Gertz $50,000. The court then entered a judgment notwithstanding the verdict of Welch, accepting its contention that privilege protected the discussion of any public issue without regard to the status of the person defamed.47 The Court of Appeals affirmed, assuming the claim of privilege by the subject matter of the article was dispositive.48 The Supreme Court reversed, holding that as long as states do not impose liability without fault, they

44. Id.
46. Id. at 325.
47. Id. at 326.
48. Id. at 325-26.
49. Id. at 326.
50. Id. at 327-28.
51. Id. at 328.
52. Id. at 328-29.
53. Id.
54. 471 F.2d 801, 805 (7th Cir. 1972).
may define for themselves the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual.55 The standard became whether or not the plaintiff was a private individual, not whether or not the speech was of public concern. The Court also held that the private figure plaintiff could only be compensated for actual injury under these state standards, and that punitive damages still required a showing of actual malice.56

Thus, the Court adopted a standard which went directly against the Rosenbloom decision. Justice Blackmun, in his concurrence in Gertz, stated that he joined in the decision for two reasons. First, he reasoned that by removing punitive damages in the absence of actual malice, the Court eliminated the fear of media self-censorship.57 Second, Justice Blackmun felt it important that the Court have a clearly defined majority position that eliminated the uncertainty inherent in the Rosenbloom plurality opinion.58

Private figure plaintiffs, therefore, no longer had to prove the press acted with “actual malice” to receive damages for libel. In light of the legitimate state interest in compensating individuals for harm inflicted on them by defamatory falsehood,59 and in light of the fact that private figures have limited access to the media to counteract false statements,60 the Court held that the first amendment allowed the states to impose liability on the media “on a less demanding showing than that required by New York Times.”61

Until recently, the Court had not dictated a particular burden of proof required for private figure plaintiffs to succeed, and consequently, the standard varied from jurisdiction to jurisdiction.62 Some jurisdictions extended

55. 418 U.S. at 349. The state interest in compensating injury to the reputations of private individuals requires a different rule because there is a lack of "self-help" or access to the media, id. at 344, and private individuals, unlike public officials or figures, do not voluntarily "thrust themselves into the forefront of particular public controversies." Id. at 345. The state has a legitimate interest in compensating individuals harmed by defamatory falsehoods and "[w]e would not lightly require the State to abandon this purpose . . . ." Id. at 341.
56. Id. at 349.
57. Id. at 354. There may be no such thing as a false idea under the first amendment, id. at 339, but "there is no constitutional value in false statements of fact." Id. at 340. Self-censorship is not the only societal value at issue. "[A]bsolute protection for the . . . media requires a total sacrifice of the competing value served by the law of defamation." Id. at 341. See also Opinion, supra note 24, at 195. ("Opinion, where stated as opinion, is and should be protected to the utmost. False statements of fact, recklessly written, which ruin the reputation of another, cannot and must not be protected by the first amendment.").
58. 418 U.S. at 354. "A definitive ruling . . . is paramount." Id. (Blackmun, J., concurring).
59. Id. at 341.
60. Id. at 344-45.
61. Id. at 348.
62. Only one state other than Pennsylvania has a statute placing the burden of proving truth on the defendant in a libel action. See CAL. CIV. CODE § 45 (West 1981). Generally, all states allow the introduction of truth as a defense by the defendant or in mitigation of damages. See ALA. CODE § 6-5-183 (1975); ARIZ. REV. STAT. ANN. § 12-651 (1955); ARK. STAT.
the burden of proving actual malice to all defamation plaintiffs if the
II. THE HEPPS DECISION

Maurice S. Hepps is the principal stockholder of a corporation that franchises a chain of "Thrifty" stores, which sells beer, soft drinks, and snacks. The *Philadelphia Inquirer* published a series of five articles between May 1975 and May 1976 indicating that Hepps had links to organized crime and used some of those links to influence both the state's legislative and administrative governmental processes.64

Hepps brought suit for defamation in a Pennsylvania state court. Pennsylvania law required a private figure who brings a defamation suit to bear the burden of proving negligence or malice by the defendant in publishing the statements.65 As to falsity, Pennsylvania followed the common law presumption of an individual's good reputation. Defamatory statements were, therefore, presumptively false, although a publisher who successfully bore the burden of proving the truth of the statements had an absolute defense.66 The trial court concluded that Pennsylvania’s statute, allocating the burden of proving the truth of the statements to the defendant, violated the federal Constitution, and instructed the jury that the plaintiffs bore the burden of proving falsity.67

Hepps appealed directly to the Pennsylvania Supreme Court. That court applied the *Gertz* standard and concluded that a showing of fault did not require a showing of falsity. It held that placing the burden of showing truth on the defendant did not unconstitutionally inhibit free debate, and remanded the case for a new trial.68 The court viewed *Gertz* as simply requiring plaintiffs

---

64. 106 S. Ct. at 1560.
65. 42 PA. CONS. STAT. ANN. § 8344 (Purdon 1982).
67. 106 S. Ct. at 1560.
to show fault in actions for defamation. The court also noted that the presumption of falsity and the burden of proof allocation were justified because media defendants have unique means of determining the facts on which their statements are based. The court reasoned that absent a presumption of falsity, the plaintiff would be forced to prove the statement’s falsity, and proving a negative is “a particularly burdensome task when the alleged libel is a general accusation.”

The United States Supreme Court reversed, holding that when the speech is of public concern, a private figure suing for libel must bear the burden of proving the falsity of the speech as well as the defendant’s fault. The private figure is not relieved of this burden merely because the state has a media “shield” law which allows media employees to refuse to divulge their sources, thus making the plaintiff’s burden heavier. The Court struck down the Pennsylvania statute requiring that libel defendants prove the truth of defamatory statements. See joined a minority of jurisdictions that have upheld the burden of proof allocation. See Note, Proving Truth, supra note 62, at 409.

69. Id. at 318, 485 A.2d at 383-84. See Gertz, 418 U.S. at 347-48. The Supreme Court stated in Gertz:

We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher . . . of defamatory falsehood injurious to a private individual. This approach . . . recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press . . . from the rigors of strict liability for defamation.

Id.

70. See Note, Proving Truth, supra note 62, at 411.


72. 106 S. Ct. at 1559.

73. 42 PA. CONST. STAT § 5942(a) (1982). Other states also have media shield laws. See ALA. CODE § 12-21-142 (1975); ALASKA STAT. § 09.25.150 (1962); ARIZ. REV. STAT. ANN. § 12 2237 (1962); DEL. CODE ANN. tit. 10, § 4322 (1974); ILL. REV. STAT. ch. 110, para. 8-901 (1967) (amended 1985) (court may divest media of its protection in light of compelling public interest); IND. CODE ANN. § 34-3-5-1 (Burns 1986); KY. REV. STAT. ANN. § 421.100 (Michie/Bobbs-Merrill 1970); LA. REV. STAT. ANN § 1452 (West 1982) (conditional privilege from compulsory disclosure of source); MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (1984); MICH. COMP. LAWS ANN. § 767.5a (West 1982); MINN. STAT. ANN. § 595.023-025 (West 1983) (amended 1983) (shield exists except in libel cases where needed to show actual malice); MONT. CODE ANN. § 26-1-902 (1985); NEV. REV. STAT. § 20-146 (1983); NEV. REV. STAT. § 49.275 (1985); N.J. STAT. ANN. § 2A:84A-21 (1976) (amended 1977); N.M. STAT. ANN. § 38-6-7 (1978); N.Y. CIV. RIGHTS LAW § 79-h(b) (McKinney 1976) (amended 1981); N.D. CENT. CODE § 31-01-06.2 (1976) (disclosure not required except upon court order); OHIO REV. CODE ANN. § 2739.12 (Anderson 1981); S.D. CODIFIED LAWS ANN. § 20-11-1 (1985 revision); TEX. CRIM. PROC. CODE ANN. § 1.16 (Vernon 1977); VT. STAT. ANN. tit. 12, § 1605 (1974). Some states provide for media shields except in defamation actions wherein the defendant asserts a defense based on the content or source of such information. See OKLA. STAT. ANN. tit. 12, § 2506B (West 1980); OR. REV. STAT. § 44.530(3) (1983); R.I. GEN. LAWS § 9-19.1-3(b)(1) (1985); TENN. CODE ANN. § 24-1-208 (1980). States which do not have media shield laws provide for media protection under their constitution.

74. 106 S. Ct. at 1565.

75. Id.
The majority opinion reasoned that the burden of showing fault necessarily involves showing falsity, because a jury would be more likely to accept a plaintiff's contention that the defendant was at fault in publishing the statements if convinced that the relevant statements were false. The Court concluded that, as a practical matter, the evidence offered by the plaintiff on the publisher's fault in not adequately investigating the truth of the published statement necessarily encompassed evidence of the asserted falsity of the statements.

The Court analogized the need for free debate on public issues in the governmental restriction and seditious libel cases with the facts in Hepps. The Court argued 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," and would have a "chilling" effect on the media.

Justice Stevens, in his dissent, argued that by attaching no weight to the state's legitimate interest in protecting the private individual's good name, the Court reached a "pernicious result." The dissent concluded that while deliberate, or even inadvertent, libels often destroy private personages, they contribute little to the "marketplace of ideas" which the majority sought to protect in this decision. Justice Stevens stated that first amendment rights are adequately protected by requiring the plaintiff to show fault, or actual malice, or even negligence, therefore, there is no reason to burden the plaintiff with proving falsity.

The dissent also made the distinction between proving fault and proving

---

76. The majority opinion was written by Justice O'Connor and joined by Justices Brennan, Marshall, Blackmun, and Powell. Id. at 1559.
77. Id. at 1565.
78. Id.
79. Id.
80. The government cannot limit speech protected by the first amendment without bearing the burden of showing that the restriction is justifiable. Id. at 1564. See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n of New York, 447 U.S. 530, 540 (1980) (content based restriction); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (speaker based restriction). Here, however, the publicity is not directed at governmental employees or agencies, therefore it cannot be analogized to seditious libel prosecutions. See Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).
81. 106. S. Ct. at 1564.
82. Id.
83. Id. In his concurring opinion, Justice Brennan, joined by Justice Marshall, adopted the majority view and was willing to extend the holding to nonmedia defendants. Id. at 1566. See also Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period").
84. The dissent was filed by Justice Stevens and joined by Chief Justice Burger and Justices White and Rehnquist. 106 S. Ct. at 1566.
85. Id. (Stevens, J., dissenting).
86. Id. at 1567 (Stevens, J., dissenting).
87. Id. at 1567-68 (Stevens, J., dissenting).
falsity, and concluded that where private figure plaintiffs are concerned, the first amendment does not require tipping the scales in favor of protecting true speech merely because the speech is of public concern.

III. ANALYSIS AND CRITICISM

In establishing this new burden of proving falsity for the private figure libel plaintiff when suing on a matter of public concern, the Court has confused the two theories of fault and falsity. Fault and falsity are two distinct theories, and while some demonstrations of proof of fault involve proof of falsity, many do not. Plaintiffs have traditionally had the burden of proving falsity in invasion of privacy cases. In libel cases, truth has been generally retained as an affirmative defense for the media defendant. This defense never arose unless the plaintiff established the defendant's fault in publishing the statements.

In the past, if the plaintiff failed to establish that the publisher was at fault, defined as actual malice or negligence, the defendant did not have

88. Id. at 1568-69 (Stevens, J., dissenting).
89. Id. at 1571 (Stevens, J., dissenting). See also Goldberg, The Bar and the Press, 53 ILL. B.J. 716 (1965) (on the balance between freedom of the press and privacy); Note, Constitutional Law—Freedom of Press—Misstatement of Fact Held Privileged in Libel Action by Public Official, 14 DePaul L. Rev. 181, 186 (1964) (“The press must be kept by definite law, regulation or judicial decisions within the confines of decency, honesty and justice. This can only be accomplished by balancing various overlapping rights. Should one right categorically outweigh another, both could eventually be lost.”). A review of the Court's own statements concerning the fundamental right of the individual to protect his reputation shows that first amendment interests do not automatically outweigh the individual's interest in his own reputation. Surkin, The Status of the Private Figure's Right to Protect His Reputation Under the United States Constitution, 90 Dick. L. Rev. 667, 680 (1986) [hereinafter Surkin] (Mr. Surkin was trial counsel for the plaintiffs in Hepps and counsel of record in the Pennsylvania Supreme Court and United States Supreme Court litigation.).
90. Fault is defined as: "Negligence; an error or defect of judgment or of conduct; any deviation from prudence, duty or rectitude; any shortcoming or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course or act; bad faith or mismanagement; neglect of duty." BLACK'S LAW DICTIONARY 548 (5th ed. 1979). See also Comment, Proof of Fault in Media Defamation Litigation, 38 Vand. L. Rev. 247 (1985) (some standards for proving fault in libel cases are: inherent improbability, awareness of inconsistent information, no source, unreliable source, failure to contact an obvious source).
92. See Annotation, Waiver or Loss of Right of Privacy, 57 A.L.R.3d 16 (1974) and cases cited therein.
93. See supra note 62 and accompanying text.
94. Gertz, 418 U.S. at 347.
96. Curtis, 388 U.S. at 135.
to present a defense. If the plaintiff did establish fault, the media defendant could use the defense of truth to escape liability. If the defendant could not establish truth after the plaintiff established fault, the defendant was held liable for defamation.

Under the *Hepps* decision, if the plaintiff fails to prove falsity and fault as a part of its case in chief, the defendant may move for a directed verdict. Thus, the issue of truth or falsity of the publication is removed from the trier of fact. Traditionally, the trier of fact has been allowed to hear both sides of the issue and then decide the merits of the case based on the credibility of the witnesses. The *Hepps* decision makes the libel trial rest solely on constitutional issues, and removes the actual merits of the case from deliberation.97 This result is extremely detrimental to private figure plaintiffs whose primary purpose in suing for libel is to receive a judicial decree which clears their reputations.

Proof of fault does not necessarily depend on, or encompass, proof of falsity as the majority in *Hepps* concludes.98 The media defendant may have been at fault in negligently gathering its information, in basing its accusations on unreliable sources, in not confirming its information with independent sources, in relying on outdated information stored in the defendant's files, or in not being a responsible member of the media community.99 By insisting

97. The *Curtis* Court stated:

[N]either the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must primarily focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be neutral with respect to the content of the speech involved, . . . and can be adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the defamatory falsehood.

*Id.* at 153.


99. *But see Dun & Bradstreet*, 472 U.S. at 749. If the press is faced with punitive damages for any mistaken publication which injures someone's reputation, the result would be unacceptable self-censorship. *Id.* at 770 (White, J., concurring). Justice White further stated however:

[I]f protecting the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases . . . . In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press . . . . Presumed damages to reputation might have been prohibited, or limited, as in *Gertz*. Had that course been taken and the common law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated . . . . At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name.

*Id.* at 771 (White, J., concurring). *See also Note, The Evolution of a Public Issue: New York Times Through Greenmoss*, 57 U. CoLo. L. Rev. 773, 790-91 (1986) (suggestion that *New York Times* should be overturned is not surprising but it would be a constitutional tragedy);
on proof of falsity in addition to proof of fault, the Hepps Court effectively sanctioned these unprofessional news and information gathering devices.

The Court argued that the "First Amendment's protection of true speech on matters of public concern" justified the imposition of a rule of law which will protect all true speech from exclusion from the public domain, because any other rule would have a chilling effect on the media. The Court then admitted that the allocation of the burden of proof of falsity to the plaintiff may or may not affect how much of the speech is true. As the dissent points out, the Court then concluded that a rule burdening the dissemination of such speech would "contravene the First Amendment." Accordingly, the majority imposed the burden of proof of falsity on the private figure plaintiff before allowing the recovery of damages from a media defendant. Thus, a plaintiff who could prove the highest form of fault, actual malice, would still be precluded from recovering any damages unless he could also prove falsity.

The Court's decision in Hepps is internally consistent because, as the dissent points out, the Court "grossly undervalues" the state interest in redressing injuries to private reputations. The Court's major premise is that when there is doubt regarding the truthfulness of a defamatory state-

Keeton v. Hustler Magazine, 104 S. Ct. 1473, 1479 (1984) ("False statements of fact harm both the subject of the falsehood and the readers of the statement. [A state] may rightly employ its libel laws to discourage the deception of its citizens.") (emphasis in original). But see McNulty, The Gertz Fault Standard and the Common Law of Defamation: An Argument for Predictability of Result and Certainty of Expectation, 35 DRAKE L. REV. 51, 100 (1985) (The author wanted to see an extension of Gertz to matters of public concern; he proposed that fault [awareness of the falsity] and actual damages [proof of actual injury] be the criteria for all libel cases. This would eliminate the shifting burdens of proof and the need to find definitions for actual malice and public concern which the courts and juries could work with.).

100. Hepps, 106 S. Ct. at 1564. See also Curtis, 388 U.S. 130. "Truth as an absolute defense and media privileges are designed to foster free communication." 388 U.S. at 151-52. The Curtis Court also felt that the constitutional guarantees of free speech and press are adequately served by judicial control over excessive jury verdicts. Id. at 160. Compare Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 CORNELL L. REV. 581, 592 (1964) (the new privilege should be extended to all matters of public concern) with Note, New York Times Co. v. Sullivan—The Scope of a Privilege, 51 VA. L. REV. 106, 119 (1965) (irresponsible press with broad privileges not likely to produce informed public opinion—criticizing the government is to be encouraged, but "granting a further privilege to those who misstate the facts in defaming outspoken private citizens will only restrain that free debate which is desired"). See also Burt v. Advertiser Newspaper Co., 154 Mass. 238, 243, 28 N.E. 1, 4 (1891) ("[W]hat the interest of private citizens in public matters requires is freedom of discussion rather than of statement") (Mr. Justice Holmes).


102. Unverifiable gossip, some of which is true. Id.

103. Id. at 1569.

104. Id. at 1564.

105. Id. at 1568 (Stevens, J., dissenting).

106. Id. at 1569 (Stevens, J., dissenting).
ment, the balance must tip toward protection of the statement and against vindication of the private individual's reputation. 107

The Court's decision does help to unify the law in the area, which was split in the state courts that have considered this issue since Gertz. Some courts have held that the defendant must bear the burden of showing truth; 108 others have held that the plaintiff must bear the burden of showing falsity. 109 In providing for a uniform law, however, the Court has limited states in the exercise of their broad powers to apply their own tort law to certain defamation cases.

Private figure libel cases serve important state interests. 110 "The Constitution has not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars." 111 Careless and unchecked lies, whether printed or not, do nothing to enhance the free marketplace of ideas, and libel suits are the only hope for vindication that the law gives to a citizen whose self-integrity has been attacked. 112

In Hepps, the Court overruled the Pennsylvania statute which allocated the burden of proving the truth of a defamatory statement to the defendant. 113 In so doing, the Court has removed from the states the power to define for themselves the appropriate standard of liability for a publisher of a defamatory falsehood injurious to a private individual. The right to protect one's reputation should not be undervalued because it is not explicitly mentioned in the Constitution. 114

Instead of combining the issues of fault and falsity, the Court could have made falsity an alternative to fault for the plaintiff. 115 The stakes are high

107. Id. at 1563-65. But see Gertz, 418 U.S at 343-48. The state's interest in redressing injuries to private reputations requires a less stringent burden. Id. "Private individuals are . . . more vulnerable to injury, and the state interest in protecting them is correspondingly greater." Id. at 344. See also Bezanson, Plato's Cave Revisited: The Epistemology of Perception in Contemporary Defamation Law, 90 DICK. L. REV. 585, 606 (1986) (in libel law, a "clear eye" should be kept on the reputational foundation of the tort).

108. See 106 S. Ct. at 1561. See also supra note 62 and accompanying text.

109. See supra note 62 and accompanying text.


111. Id.

112. Id. at 93. "Surely, if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." Id. at 94.

113. See supra notes 72-75 and accompanying text.

114. See Surkin, supra note 89, at 669.

All parties to the current debate over the future structure of libel law should recognize that the rights of free speech and press, and the right of the private individual to protect his reputation are not adversarial but instead symbiotic. We should direct our efforts toward maximizing both rights rather than favoring one over the other.

Id.

115. See supra notes 84-89 and accompanying text.
when an individual's reputation is at issue,\textsuperscript{116} and the law should allow that individual to prove his case in as many ways as possible, rather than combining two already difficult burdens into one onerous burden.

In the \textit{Hepps} decision, the majority's comparison to the government libel cases is misplaced.\textsuperscript{117} When the government places restrictions on the media to prevent discussion or dissemination of information regarding governmental acts or policies, the government has acted in direct opposition to the fundamental purpose of the first amendment. When a private individual's reputation is at stake, however, especially when the individual is not a public figure and has done nothing to place himself in the public eye, there should be less first amendment freedom guaranteed to the press. Each of the justices in the \textit{Hepps} decision has either written or joined in opinions expressly stating that the right of a private individual to protect his reputation has equal constitutional standing with the right to freedom of the press.\textsuperscript{118}

Access to information is a valid public interest. However, the Court's ruling in \textit{Hepps} does little to further this interest. If the reason for access to this information is to provide the citizenry with the information necessary to make informed decisions about society and the government, false information arguably has little to offer this decision making process.\textsuperscript{119}

\section*{IV. Impact}

The Court made its decision to protect the free flow of ideas and information to the public so that the public may make informed decisions. That the rationale behind the ruling is justifiable, in fact, basic to our ordered system, is not the issue. For our society to function, there must be free access to information which the press is capable of disseminating.\textsuperscript{120} This access, however, should not be interpreted to mean that the press is free to print lies about an individual or to engage in sloppy investigative techniques, and justify such publications under the guise of the first amendment.\textsuperscript{121}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{116} 383 U.S. at 94.
\item \textsuperscript{117} See supra note 80 and accompanying text.
\item \textsuperscript{118} See Surkin, supra note 89, at 673-77 nn.31-40. "The review of historical antecedents and the Supreme Court's own statements concerning the fundamental nature of the right of the private individual to protect his reputation makes apparent the error of the contention that first amendment interests, ipso facto, outweigh the individual's interest in his own reputation." \textit{Id.} at 680.
\item \textsuperscript{119} See supra notes 3-8, 84-89 and accompanying text. "The core purpose of the first amendment relates to self-governance and the \textit{New York Times} privilege should too." Bran-son, The Public Figure-Private Person Dichotomy: A Flight from First Amendment Reality, \textit{90 Dick. L. Rev.} 627, 637 (1986) (The author's proposed solution is to apply the first amendment only when necessary and return all remaining cases to the common law approach.).
\item \textsuperscript{120} "It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate . . . [to steer away] from public cognizance." 403 U.S. at 53.
\item \textsuperscript{121} See \textit{Dun & Bradstreet}: "[I]t makes little sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication
\end{itemize}
\end{footnotesize}
In shifting the burden of proof to the plaintiff to show the falsity of the speech, Hepps allows the media to print whatever it wishes, with little or no fear that its statements will be challenged. This decision will probably result in fewer libel suits brought by private figure plaintiffs.\textsuperscript{122}

The Court considered the idea that individuals with legitimate complaints may refrain from using the courts to redress the wrongs against their reputations.\textsuperscript{123} The Court engaged in a circular argument that some falsehood must be protected to provide the public with information which it needs, and to diminish the chilling effect of libel cases on the media.\textsuperscript{124} Yet, to date, the empirical evidence does not show that libel cases weigh heavily on the media. In fact, a recent study shows that of 700 libel cases examined between 1974 and 1984, the media won 90\% of the time.\textsuperscript{125} It does not appear that the media has been adversely affected by libel suits. If anything, libel suits may tend to promote more careful investigation by the media of its stories, which will ultimately benefit society as a whole.\textsuperscript{126} The argument that the common law presumption of falsity will lead to faultless liability in the close cases in which juries cannot decide on the truth of the publication\textsuperscript{127} with the most misinformation and do the most damage to private reputation." 472 U.S. at 773. See also Whitten v. Commercial Dispatch Pub. Co., Inc., 487 So. 2d 843 (Miss. 1986).

"While a newspaper is granted some leeway in its reporting, it may not misstate the facts or otherwise misconstrue the truth." Id. at 846.

122. See supra note 120. The same analysis should also apply to libel plaintiffs.

123. 106 S. Ct. at 1563-64.

124. Id.

125. See Soloski, The Study and the Libel Plaintiff: Who Sues for Libel?, 71 IOWA L. REV. 215 (1985) [hereinafter Soloski]. Professor Soloski researched 700 libel cases from 1974 to mid-1984. His study shows that seven out of ten libel cases involved media defendants. Over one-half of these cases are the result of stories that deal with the plaintiff's business or professional activities. Forty percent of the cases brought against the media are by private individuals. The media wins 90\% of all cases pressed to judicial resolution. Id. at 218. A study by the Libel Defense Center conducted from 1981-1984 found that while news organizations eventually prevail in over 90\% of the cases, they lost 83\% of the initial jury trials. Of Reputations and Reporters, TIME, Mar. 19, 1984, at 64.

126. 106 S. Ct. at 1571 (Stevens, J., dissenting). See also Soloski, supra note 125. Daily newspapers are the media most sued for libel, representing over two-thirds of the reported cases. Most libel suits do not result from "hard-hitting, investigative news stories that are run on front pages under banner headlines." Soloski, supra note 125, at 219. These front-page stories represent only 45\% of libel suits and tend to be brought by elected and nonelected public officials or professionals. Business owners, managers, or white collar employees bring libel suits concerning stories on the inside pages. Id. As one newspaper editor said, "Investigative stories are done with great care . . . . It's the routine [inside page] stories that rise up and bite you in the ass." Id. (emphasis added). This suggests sloppy or incomplete investigative techniques are used in the stories which affect most private figure libel plaintiffs. When the aggrieved party is a private individual, the allegedly libelous story tends to focus on his criminal or public acts and the study further found that the lower an individual's community visibility, the greater the likelihood that the story dealt with his business or professional acts. Id. "The press does not live up to its great first amendment mandate with reportage that is shallow or sloppy," Smolla, "Where Have You Gone, Walter Cronkite?" The First Amendment and the End of Innocence, 39 ARK. L. REV. 311, 333 (1985).

leads to a possible solution: each state may pass statutes which provide that in libel cases, excessive damages will not be allowed.

Sloppy journalism never produces the truth, yet the courts continue to bar libel cases on constitutional grounds because libel plaintiffs fail to meet their initial burdens. After the Hepps decision, the Court denied certiorari in the case of Coughlin v. Westinghouse Broadcasting & Cable. The Chief Justice, joined by Justice Rehnquist, dissented from the denial of certiorari and called for a re-examination of the New York Times standard.

In Coughlin, the cable company conducted an investigation into the alleged failure of the Philadelphia police to enforce state liquor laws against an “after hours” bar. The company hid a camera across from the bar, filmed Coughlin entering and leaving, and then broadcast the tape. The announcer on the tape stated that “the only paperwork we saw [Coughlin] doing was carrying this envelope out of the club less than a minute after he walked in." The broadcast implied that Coughlin had accepted a bribe.

The company made no attempt to obtain Coughlin’s version of the story. Four months after the evening in question and prior to the broadcast, a reporter for the company approached Coughlin and, with the cameras filming the event, thrust a microphone into Coughlin’s face and asked him what he had been doing four months earlier. Coughlin refused to answer.

Coughlin filed a libel suit alleging that even a “minimal investigation” of the facts would have revealed that he was ordered to investigate a vandalism complaint at the bar and, having done so, returned to his patrol car to fill out the incident report. The “envelope,” Coughlin alleged, was his incident report book.

The district court concluded that Coughlin had raised a genuine issue of material fact concerning the truth of the allegedly defamatory statement since the broadcast was certainly capable of defamatory interpretation. The court nevertheless granted the company’s motion for summary judgment because Coughlin had not introduced sufficient evidence of “actual malice” to withstand such motion.

The court of appeals affirmed. One judge, while concurring in the affirmation, observed that “the New York Times standard makes it hard enough for a public figure to win a libel suit, even when faced, as here, with what any fair observer must agree is egregious conduct on the part of the media.”

129. Id.
130. Id. (emphasis in original).
131. Id.
132. Id. at 2927-28.
134. 106 S. Ct. at 2928.
135. Id. Coughlin had to satisfy the “actual malice” New York Times standard because he was a public official acting in his official capacity at the time the statement was made.
Coughlin appealed and the Supreme Court denied certiorari. Chief Justice Burger, not pleased with the denial, pointed out that Coughlin had been accused of accepting a bribe "on the basis of a cursory investigation, yet his libel suit to clear his name had been found to be constitutionally barred." Coughlin could not publicly clear his name in a court of law because he failed to prove fault on the company's part, even though falsity was deemed to be a material issue. The actual merits of the case, the truth or falsity of the statement, will never be heard by a jury unless Coughlin discovers new evidence. Meanwhile, Coughlin may be subject to disciplinary action or even termination by the police department because his case could not be heard.

Coughlin, however, at least has the opportunity to clear his name with his superiors and coworkers once the internal investigation is complete. Unlike Coughlin, the private figure plaintiff has no other way to clear his name and reputation in the community in which he lives and works. Like Coughlin, however, the private figure plaintiff will be denied the opportunity to clear his name in court if he cannot supply enough evidence to satisfy his burden as to the publisher's fault and the falsity of the statement.

At worst, the Hepps decision will preclude those private figure libel plaintiffs with legitimate claims, who cannot meet the new burden placed upon them, from filing libel suits. The decision changes nothing for those responsible members of the media because they will be able to continue pursuing their goals in disseminating vital information. It is those irresponsible media publishers and reporters who have the most to gain from this decision. These members of the media will be afforded the opportunity to publish with impunity, secure in the knowledge that those with valid complaints will hesitate to pursue litigation because they are unable to meet the burden imposed on them in Hepps.

**Conclusion**

A rule which imposes such an onerous burden of proof on a private figure plaintiff serves no purpose in furthering first amendment rights. As Justice Stevens states in his dissent in Hepps: "The Court's decision trades on the good names of private individuals with little First Amendment coin to show

137. 106 S. Ct. at 2928 (Burger, C.J., dissenting from denial of certiorari). See also Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562 (Ariz. 1986) (dealing with a limited public figure who had to establish actual malice). The Dombey court stated, "Assuming this is bad journalism, it still would not establish reckless disregard of truth. Actual malice is subjective and not based on journalistic standards or their breach." Id. at 575. The Dombey court held that failure to investigate, sloppy investigation, poor reporting practices and the like are not per se actual malice. Id. at 574. The court reached this conclusion after Dombey requested a retraction (the first of which was published but contained further false statements about him) not once but twice and included a three-inch-thick file detailing each error in the articles. Id. at 575. The newspaper continued to publish articles, even after notice that the statements were false and the supporting documents had been delivered to the editor. One wonders how much evidence a libel plaintiff must produce before actual malice can be established per se.
for it." In a true marketplace of ideas, both sides must be heard, and the burden imposed by the Court in *Hepps* is almost a guarantee that only those with the resources to do so may voice their opinions.

The Court should not have placed the additional burden of proving falsity on the private figure libel plaintiff. Libel plaintiffs want to clear their names in the community in which they work and live. In its effort to preserve the freedom of the press, the Court has made it impossible for the libel plaintiff to vindicate his reputation.

---

138. 106 S. Ct. at 1571 (Stevens, J., dissenting).
139. See Soloski *supra* note 125. The vast majority of libel plaintiffs are upset with the alleged falsity and most said that the publication caused them emotional, not financial harm. Half of these plaintiffs go to the media and attempt to get a retraction printed before they see an attorney about bringing suit. *Id.* at 219. See also *Dun & Bradstreet*: "Since libel plaintiffs are very likely more interested in clearing their names than in damages, I doubt that limiting recoveries would deter or be unfair to them." 472 U.S. at 774. Justice White reasoned that the press would be no worse off if the common law rules applied and the judiciary insisted on reasonable damages or the legislature placed a ceiling on such damages. *Id.* at 771.

I still believe that the common law rules should have been retained where plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I doubt the easy assumption that the common law rules would muzzle the press. I cannot assume the press will be intimidated into withholding news that by decent journalistic standards it believes to be true. *Id.* at 772 (White, J., concurring).


The problem is an everyday problem, has existed for a very long time. Our two professions [press and bar] need to examine the record exhaustively, do some soul searching, some house cleaning, and, then, consider if new rules and regulations should be formulated and enforced. It may be there are already enough rules and regulations, and all we need is some guts and vision. *Id.* at 1042.

---

*Evdoxia Beroukas*