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I. Introduction

On December 3, 1985, the United States Supreme Court heard oral argument in *Philadelphia Newspapers, Inc. v. Hepps*.[1] The issue was whether, in a private figure libel case subject to the rules enumerated in *Gertz v. Robert Welch, Inc.*,[2] the United States Constitution requires that the burden of proving falsity of a defamatory communication be placed upon the plaintiff. The defendants' position, that the Constitution imposes such a requirement, was supported by several *amicus curiae* briefs filed on behalf of substantially all major media organizations throughout the nation.[3] It is therefore

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1. No. 84-1491 (Sup. Ct. *argued* Dec. 3, 1985), *on appeal from* 506 Pa. 304, 485 A.2d 374 (1984). On April 21, 1986, before this article went to press, the Supreme Court decided the *Hepps* case. In a five to four decision written by Justice O'Connor (and joined by Justices Blackmun, Brennan, Marshall and Powell) the Court held that the first amendment requires the burden of proof of falsity to placed on the libel plaintiff. This ruling would apply to both private plaintiffs and public, in any action against a media defendant, at least so long as the subject of the allegedly libelous communication involves matter of "public concern."

2. 418 U.S. 323 (1984).

3. These media organizations included Capital Cities Communications, Inc., CBS Inc., National Broadcasting Company, Inc., American Broadcasting Company, Tribune Company, Westinghouse Broadcasting and Cable, Inc., The American Newspaper Publishers Association, Association of American Publishers, Dow Jones & Company, Inc., Gannett Co., Inc., The Society of Professional Journalists, Sigma Delta Chi, Time, Inc., American Society of Newspaper Editors, Associated Press, Cable News Network, Inc., The Hearst Corporation, National Association of Broadcasters, and the Radio-Television News Directors Association. The list of *amici* also included publishers of many large and small daily and weekly newspapers, including several divisions of Knight-Ridder Newspapers, Inc., which is also the parent corporation of Philadelphia Newspapers, Inc. ("PNI"). Philadelphia Newspapers, Inc. publishes both of Philadelphia's daily newspapers, the *Philadelphia Inquirer* and the *Philadelphia Daily News*. Notable for their absence from the list of *amici* were the publishers of *The New York Times* and *The Washington Post*.

relatively safe to say that the arguments espoused in those briefs represent the views of a fair cross section of the electronic and print news media industry.

Throughout these briefs there appears the recurring theme that first amendment rights are so basic and fundamental under the Constitution that the interest of the individual in protecting his reputation must yield whenever it conflicts with those rights. Rather than undertaking a thoughtful analysis of how best to balance and effectively maximize both interests, thereby simultaneously serving both the cause of individual rights and the public's right to know, the media responds by playing its "first amendment trump."[4] As PNI argued in its brief:

> Once the publisher's First Amendment rights are injected into the equation, the common law treatment of the burden of proving truth or falsity cannot stand. The balance tips in favor of the defendant, whose free speech interests are strong and protected by the Constitution, rather than in favor of the plaintiff, whose interest in his own reputation is strong, but does not reach constitutional proportions.[5]

Similarly, in an October, 1982, resolution of the national board of the American Civil Liberties Union ("ACLU"), which filed an *amicus* brief in support of PNI in *Hepps*, the ACLU favored absolute privilege for any statements about a public official on matters related to his office; about public figures on matters related to their public status; and about anyone on a matter of public concern.[6] The ACLU board apparently discussed, but was not overly troubled by, the possibility that reputation was a property interest under the Constitution.[7] In describing the ACLU's position, Professor Marc A. Franklin noted that the ACLU found absolute privilege justifiable "because the plaintiff's interest in relief is weak in the first place."[8] Professor Franklin continued:

> This was a cornerstone of the ACLU's position. Although the Board did not resolve the question of whether the interest was one of property or something that involved a conflict of "rights," it was clear that the majority sufficiently devalued the plaintiff's interest to conclude that it should receive no protection.[9]

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4. Lebel, *Defamation and The First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 782 (1984).

5. Appellant's brief at 28, Philadelphia Newspapers, Inc. v. Hepps, No. 84-1491 (Sup. Ct. *argued* Dec. 3, 1985), *on appeal* from 506 Pa. 304, 485 A.2d 374 (1984).

6. Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F.L. REV. 1, 23 n.105 (1983).

7. *Id.*

8. *Id.*

9. *Id.* at 25 n.118.

It is wrong to undervalue the fundamental nature of the private individual's right to protect his reputation merely because that right is not explicitly mentioned in the Constitution. That approach serves only to obfuscate the very delicate issues which federal and state courts must address and the important rights which they must balance in the developing jurisprudence of constitutional libel law. 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.

II. The Historical Perspective

The right of a private person to protect his reputation must not be considered an historical anomoly. Although freedom of expression, as a fundamental aspect of the concept of self-governance, is a relatively recent phenomenon, the legal right of an individual to protect his reputation against false accusation actually predates the Magna Carta.[10] It was protected both in the secular and non-secular courts in England, in the former by penance and in the latter by an award of money damages.[11] The law's recognition of the fundamental importance of reputation crossed the Atlantic Ocean intact, and has continued unbroken to the present day. The reason that reputational interests have enjoyed such longevity is that:

> In its vital aspect the right to reputation . . . has regard . . . to that repute which is slowly built up by integrity, honorable conduct, and right living. One's good name is therefore as truly the product of one's efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness.[12]

More recently, at a time when the courts were considering appropriate modifications to the law of libel to account for the technology and popularity of radio, this same concept was reiterated in only slightly different terms:

> Within the complex group of individual interests of personality is the claim to honor and reputation which Anglo-American law seeks to protect, in the main, by the civil action for libel or slander. There is no need to quote Shakespeare to emphasize

10. Veeder, *The History and Theory of the Law of Defamation I*, 3 COLUM. L. REV. 546, 548-49 (1903) [hereinafter cited as *Veeder I*].

11. *Id.* at 549-51.

12. Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33 (1904) [hereinafter cited as *Veeder II*].

> the inestimable value of a good name. Consequently, no system of law can fail to take some account of this interest and afford some redress for harm suffered from disparaging or defamatory statements. In fact, it may be asserted that the role assigned to the individual's interest in his reputation, its place in a community's scheme of values, and the type of protective measure taken, are important indications of the community's cultural level and democratic quality. In making an appraisal of any society it is pertinent to ask what individuals are protected against what kinds of statements and by what legal means.[13]

The law of defamation has both civil and criminal origins which were quite independent of each other. Its civil origins focused on the fundamental right of each individual to protect his reputation against false imprecations. Thus, it is noteworthy that, contrary to popular misconception, truth has always been a defense to civil libel except for a relatively short period of time.[14]

By contrast, the law of criminal libel arose from the efforts of the monarch to restrict the printing press' potential for undermining royal power. King James I found the established repressive system of licensing, censorship and prior restraint over the printing press "to be inadequate to suppress the rising tide of public opinion."[15] Thus, in 1606, the Star Chamber created a new criminal law of libel in the case of *De Libellis Famosis*.[16] The law related solely to written defamation and applied to defamation against all categories of persons. Most particularly, however, the doctrine applied to "a magistrate, or other public person," and held that, "it is not material whether the libel be true."[17] It was ostensibly created as a vehicle to keep the peace on the theory that libelous statements tend to incite the one defamed to violence. More accurately, it was created as an instrument of suppression.[18]

The Star Chamber was abolished in 1640 and the last licensing act lapsed in 1695. The doctrine of *De Libellis Famosis*, however, nonetheless survived in the crime of libel[19] and, beginning in 1670, in the civil tort of libel.[20] Its application as a vehicle for censorship and suppression is best remembered in the prosecution of John Peter Zenger in New York in 1735.[21] The first amendment's guarantees of

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13. Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99, 99.
14. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 790 n.9. (1964).
15. *Veeder I*, *supra* note 10, at 562.
16. 5 Co. Rep. 125 (1606).
17. *Donnelly*, *supra* note 13, at 118.
18. *Veeder I*, *supra* note 10, at 567.
19. *Id.*
20. *Veeder I*, *supra* note 10, at 570.
21. 17 How.St.Tr. 678.

freedom of speech and press, and the similar provisions in the constitutions of the several states, represented the broad, philosophical articulation of the sentiments which resulted in Zenger's acquittal by the jury. These guarantees were properly viewed as a complete rejection of the concepts of seditious libel and prior restraint as they then existed. But they were not, and were never intended to be, construed as a rejection of the long-standing fundamental right of the private individual to protect his reputation, a concept with origins entirely separate from and entitled to much greater deference than the tyrannical roots of the doctrine of criminal libel.

There is abundant evidence that the Framers did not intend to relegate the individual's right to protect his reputation to second class status by not mentioning it in the Bill of Rights. The first ten amendments were drafted explicitly to limit the power of the new federal government in order to prevent the recurrence of abuses with which its citizens were only too familiar. While governmental limitations on freedom of expression had been viewed as a pervasive evil, there was no similar history of restrictions on the common law right of the individual to vindicate his good reputation. Moreover, despite the absolutist language in the first amendment's protection of freedom of expression, no court has ever held that the first amendment was intended to abolish the cause of action for defamation. To the contrary, for years libel was not even thought to raise first amendment considerations because it was viewed as "not being within the area of constitutionally protected speech."[22]

The Pennsylvania Declaration of Rights, which in its present form dates generally from the Constitution of 1790, well illustrates the interplay of freedom of expression and reputation, and the respect in which both were held. Article 1, Section 7 provides:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write and print on any subject, *being responsible for the abuse of that liberty*. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to deter-

22. Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

mine the law and the facts, under the direction of the court, as in other cases. (emphasis added).

This provision, on its face, is intended to abolish the evils of licensing, prior restraint, censorship, and prosecutions for seditious libel. The phrase, "being responsible for the abuse of that liberty," is just as obviously intended to preserve the concept of liability for defamation. This point appears even more clearly in Article 1, Sections 1 and 11 of the Declaration of Rights:

> Section 1. Inherent Rights of Mankind
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, *of acquiring, possessing and protecting* property and *reputation*, and of pursuing their own happiness. (emphasis added).
>
> Section 11. All courts shall be open; and *every man for an injury done him in his* lands, goods, person or *reputation shall have remedy by due course of law* . . . . (emphasis added).

These constitutional provisions indicate that under the law of Pennsylvania, "[t]he rights of the [publisher] and of the [persons] alleged to have been libeled . . . rest on the same constitutional ground. They demand an exact balance of the scales of justice . . . ."[23]

The preceding overview reveals that there is no historical reason to approach the issues arising in defamation as a battle for supremacy between the supposedly irreconcilable concepts of freedom of expression and the right to protect private reputation. Those who insist on approaching the subject in this manner lack sensitivity to the importance of the concept of individual dignity, for both freedom of expression and reputation are essentially individual and not group rights. These same persons also fail to appreciate the status which the Constitution gives to the right of the private individual to protect his reputation.

III. Private Reputation as a Fundamental Constitutional Right

The right of an individual to his good reputation is closely allied to the fundamental concept of the presumption of innocence. The Supreme Court has stated that "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."[24]

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23. Commonwealth v. Swallow, 8 Pa. Super. 539, 603 (1898); *see also* Meas v. Johnson, 185 Pa. 12, 19, 39 A. 562, 563 (1898).

24. In re Winship, 397 U.S. 358, 363-64 (1978).

In *Hepps v. Philadelphia Newspapers, Inc.*,[25] the Pennsylvania Supreme Court stated:

> The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life . . . . Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good.[26]

Justice Brennan, joined by Justices Marshall and White, has expressed the same sentiments:

> Certainly the enjoyment of one's good name and reputation has been recognized repeatedly as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal "liberty." . . . In the criminal justice system, this interest is given concrete protection through the presumption of innocence . . . .[27]

The fundamental nature of the presumption of innocence cannot be questioned. *Coffin v. United States*,[28] is illustrative of this point. In *Coffin*, the Supreme Court traced the importance of the presumption of innocence through the Roman ecclesiastical and common law courts. The court ultimately described the presumption of innocence as "axiomatic and elementary" and noted that "its enforcement lies at the foundation of the administration of our criminal law."[29]

Although the presumption of innocence is a rule of criminal law, its underlying policy is also applicable to civil suits. Since the right to protect reputation and the presumption of innocence both spring from the same source — the dignity, worth, and good name of each individual — one can argue that the right of the private person to protection of reputation falls within the "penumbra"[30] of the presumption of innocence. Whether or not the specific guarantees of the Bill of Rights have "penumbras" distinct from the concept of liberty under the fifth and fourteenth amendments, or from the rights retained by and reserved to the people under the ninth and tenth

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25. 506 Pa. 304, 485 A.2d 374 (1984), *argued on appeal*, No. 84-1491 (Sup. Ct. Dec. 3, 1985).

26. *Id.* at 311, 485 A.2d at 378.

27. Paul v. Davis, 424 U.S. 693, 722-24 (1976) (Brennan, J., dissenting). Justice Stevens has since stated his agreement with Justice Brennan's "appraisal of the importance of the constitutional interest at stake." Ingraham v. Wright, 430 U.S. 651, 702 (1977) (Stevens, J., dissenting).

28. 156 U.S. 432 (1895).

29. *Id.* at 453.

30. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

amendments, the right of the private individual to protect his reputation is a right of constitutional proportions.

In *Palko v. Connecticut*,[31] the Supreme Court stated that the rights safeguarded by the first amendment are "fundamental" and "implicit in the concept of ordered liberty." Nearly thirty years later Justice Stewart described the sanctity of individual reputation in language so similar it could not have been a coincidence:

> The legitimate state interest . . . [in] the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being — *a concept at the root of any decent system of ordered liberty*. The protection of the private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a *basic of our constitutional system.* (emphasis added).[32]

This language was quoted with approval and relied upon by Justice Powell in *Gertz v. Robert Welch, Inc.*,[33] and, again, most recently in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[34] an opinion in which he was joined by Justices Rehnquist and O'Connor. Justice Marshall, dissenting in *Rosenbloom v. Metromedia, Inc.*,[35] described "[t]he protection of the reputation of such anonymous persons" and "a free and unfettered press" as "two essential and fundamental values." He also stated that, "A generally applicable resolution is available that promises to provide an adequate balance between the interest in protecting individuals from defamation and the *equally basic interest* in protecting freedom of the press."[36]

As noted earlier, Justice Brennan, in *Paul v. Davis*,[37] joined by Justices White and Marshall, said that, "certainly the enjoyment of one's good name and reputation has been recognized repeatedly in our cases as being among the most cherished of rights enjoyed by a free people, and therefore as falling within the concept of personal 'liberty.' " Justice Stevens, in *Ingraham v. Wright*,[38] agreed. Justice Rehnquist, in *Time, Inc. v. Firestone*,[39] in which Chief Justice Burger and Justice Blackmun joined, described the *Gertz* decision as "a more appropriate accommodation between the public's interest in an

31. 302 U.S. 319, 325 (1937).
32. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).
33. 418 U.S. 323, 341 (1974).
34. 105 S. Ct. 2939, 2945 (1985).
35. 403 U.S. 29, 78 (1971).
36. *Id.* at 81.
37. 424 U.S. 693, 722-23 (1976) (Brennan, J., dissenting).
38. 430 U.S. 651, 702 (1977) (Stevens, J., dissenting).
39. 424 U.S. 448 (1976).

uninhibited press and its *equally compelling need* for judicial redress of libelous utterances."[40] Thus, each of the current justices have either written or joined in opinions expressly stating that the right of a private person to protection of reputation has equal constitutional standing with the right to freedom of the press in private figure defamation cases subject to *Gertz*.

To confirm this analysis and the ultimate conclusion of this article, it is necessary to examine the cases which discuss reputation as a liberty interest under the due process clauses of the fifth and fourteenth amendments. The line of cases flows from *Joint Anti-Facist Refugee Comm. v. McGrath*.[41] In *McGrath*, the plaintiffs brought an action for declaratory and injunctive relief to prevent the Attorney General of the United States from designating various organizations as "totalitarian, fascist, communist, or subversive," without prior notice or hearing, pursuant to Part III, Section 3, of Executive Order No. 9835 (March 21, 1947). The injuries alleged by the organizations included loss of contributions, exposure of members to vilification, public shame, disgrace, ridicule and obloquy,[42] and loss of employment and income-producing opportunities.[43] On the face of the pleadings the acts complained of were:

> . . . unauthorized publications of admittedly unfounded designations of the complaining organizations as 'Communist'. Their effect is to cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation. The complaints, on that basis, sufficiently charge that such acts violate each complaining organization's common-law right to be free from defamation.[44]

Though the case resulted in only a plurality opinion, the majority concluded that such arbitrary designations by the government could not stand. Because of the fragmented nature of the majority, there was no agreement regarding the nature of the right being vindicated or even whether the rights being vindicated were those of the organizations or their individual members. Still, the decision stands for the proposition that, absent the rudiments of due process, the government cannot engage in gratuitous name-calling which stigmatizes and causes demonstrable harm to its victims.

The next important case is *Wisconsin v. Constantineau*.[45] In

40. *Id.* at 456 (emphasis added).
41. 341 U.S. 123 (1951).
42. *Id.* at 131.
43. *Id.* at 133.
44. *Id.* at 139.
45. 400 U.S. 433 (1971).

Constantineau, a Wisconsin statute[46] provided that certain designated persons, including the local chiefs of police, could forbid the sale of intoxicating liquors to individuals known to indulge to excess, by distributing and posting notices revealing the names of those persons. Pursuant to the statute a local police chief posted a notice in all retail liquor stores in his community forbidding sale of liquor to Constantineau for one year. The issue presented to the Court was "whether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard."[47]

The Court unanimously agreed[48] that where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.[49] *Constantineau* thus appears to acknowledge that one's "good name, reputation, honor or integrity" are interests sufficiently important to invoke the protections of the due process clause, which necessarily means that they constitute "life, liberty or property" under the fifth and fourteenth amendments.

Board of Regents v. Roth[50] raised the issue of whether a teacher at a state university who was not rehired for the next academic year, and was given no reason for the decision nor an opportunity to challenge it, was denied his constitutional rights. The Court noted first that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[51] The Court saw its initial inquiry to be into the *nature* of the interest at stake; whether the interest was within the fourteenth amendment's protection of liberty and property.[52] The Court held that no liberty or property interest was implicated, but by way of example, described what it would have viewed as liberty interests:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for instance, the he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor or integrity is at stake because of what the

46. Wis. Stat. § 176.26 (1967).
47. 400 U.S. at 436.
48. Three justices dissented on procedural grounds only.
49. 400 U.S. at 437.
50. 408 U.S. 564 (1972).
51. *Id.* at 569.
52. *Id.* at 571.

> government is doing to him, notice and an opportunity to be heard are essential.' . . . In such a case, due process would accord an opportunity to refute the charge before University officials . . . . Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.[53]

Thus, *Roth* affirmed the principle enunciated in *Constantineau* that one's interest in his reputation is a liberty interest under the Constitution.

In 1975, the Court decided *Goss v. Lopez*.[54] In *Lopez*, several public high school students had been suspended from school without a hearing. Applying the *Roth* test, the Court found that the students had both liberty and property interests which qualified for protection under the due process clause and, consequently, they could not be deprived of those interests absent some measure of due process. The liberty interest identified by the Court was precisely the same as that in *Constantineau* and *Roth*, the interest in one's "good name, reputation, honor or integrity."[55] In the majority opinion, Justice White noted that, "If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[56] In case there was any doubt, Justice White also stated that, "Neither the property interest in educational benefits temporarily denied nor *the liberty interest in reputation*, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary."[57] The principles of *Roth* and *Lopez* have consistently been reaffirmed.[58]

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53. *Id.* at 573.
54. 419 U.S. 565 (1975).
55. *Id.* at 574.
56. *Id.* at 575.
57. *Id.* at 576 (emphasis added).
58. *See, e.g.*, Codd v. Velger, 429 U.S. 624 (1977); Carey v. Piphus, 435 U.S. 247 (1978); Ownen v. City of Independence, Mo., 445 U.S. 622, 633 n.13 (1980). *Codd* also raised an issue relevant to PNI's position in *Philadelphia Newspapers, Inc. v. Hepps*, *see supra* text accompanying notes 1-9, but not relied upon by the newspaper in its briefs or oral argument. Although it reaffirmed *Roth*, the decision was adverse to the plaintiff employee because he had failed to allege or prove that the stigmatizing charges in his personnel file were false. That holding could easily have been analogized to libel law to support PNI's argument that Hepps had to be required to prove falsity. Justices Brennan, Marshall and Stevens, dissenting in *Codd*, were concerned about this, and expressed their view that truth ought to be a defense, to be alleged and proved by the defendant. This dissent apparently carried the day in *Carey v. Piphus*, which held that a cause of action for denial of procedural due process "does not depend upon the merits of the claimant's substantive assertions." 435 U.S. at 266 (Brennan, J., dissenting).

In contrast to all of these cases stands *Paul v. Davis*.[59] In *Davis*, local law enforcement officials, acting without statutory authority, posted notices and photographs of "known shoplifters" in their community.[60] Davis brought suit alleging a denial of due process under the Civil Rights Act.[61] The Court, desiring to avoid creation of a federal common law of defamation, held that defamation of an individual by a government entity, absent allegations of resulting loss of liberty or property, did not state a claim under the Civil Rights Act.[62]

The holding appears to be directly at odds with the rationale of *Constantineau*, *Roth*, *Lopez*, and their progeny. Each case recognizes that reputation itself is a liberty interest entitled to protection under the due process clause. Justice Brennan, in his dissent in *Davis*, explicitly pointed this out.[63] The *Davis* holding also appears inconsistent with the Court's high respect for the reputational interests of private individuals expressed in the Court's private-figure libel decisions from *Gertz v. Robert Welch, Inc.*,[64] through *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[65]

The *Davis* holding must be placed in context to be understood. The Court was faced with a traditional state law defamation claim and was searching for some method to avoid creation of a federal common law of defamation under the Civil Rights Act.[66] It was even more concerned that "such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[67] Since it seemed apparent that there had been a "deprivation" without "due process," the Court felt that the only way to escape this morass was to conclude that the interest being protected was not a liberty or property interest under the fourteenth amendment, despite substantial authority to the contrary. Since *Davis*, the Court has continued its struggle to avoid having the fourteenth amendment create "a font of tort law" for every negligent act of a state employee that causes injury.

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59. 424 U.S. 693 (1976).

60. The posting differed from that in *Constantineau* because the notice carried with it no penalty, whereas in *Constantineau* the posting also denied the affected individual the right to purchase liquor. However, Justice Brennan, the author of *Constantineau*, noted, that fact played no part in the *Constantineau* decision. 424 U.S. at 729-30.

61. 42 U.S.C. § 1983 (1982).

62. The appellants in *Philadelphia Newspapers, Inc. v. Hepps*, *supra* note 1, relied upon *Paul v. Davis* to support their contention that the right of the private individual to protect his reputation does not rise to constitutional dimensions.

63. 424 U.S. at 723 (Brennan, J., dissenting).

64. 418 U.S. 323 (1974).

65. 105 S. Ct. 2939 (1985).

66. 42 U.S.C. § 1983 (1982).

67. *Davis*, 424 U.S. at 701.

In *Ingraham v. Wright*,[68] and *Parratt v. Taylor*,[69] the Court dealt with essentially the same problem in cases where it could not avoid finding that there had been a "deprivation" of "property." In each case, the Court resolved its dilemma by concluding that the "post-deprivation" hearing afforded by the states' tort laws constituted "due process" under the fourteenth amendment. In his dissenting opinion in *Ingraham*, Justice Stevens commented that based upon the majority's logic, it was possible that *Davis* was rightly decided for the wrong reasons.[70] Justice Stevens stated that even though a clear liberty interest — reputation — had been infringed, the state tort law remedy for defamation might satisfy the individual's due process rights.[71]

The Court remains uncertain in this area. Recently, in *Daniels v. Williams*,[72] the Court overruled *Parratt v. Taylor*[73] and held that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property."[74] It is unlikely, however, that *Williams* will be the last word since three justices concurred only in the result.

Davis, therefore, should not be viewed as a repudiation by the Court of the importance of individual reputation as a liberty interest under the Constitution. Notably, as recently as June, 1985, in *Dun & Bradstreet*,[75] three justices joined in one opinion and two in another, both of which described the right of the individual to protect his reputation as "a concept at the root of any decent system of ordered liberty."[76] Moreover, three of the remaining four justices are on record as vehemently disagreeing with the holding of *Davis*.[77] Some effort should, therefore, be made to construe that holding in a way that returns it to the decisional mainstream.

In fact, *Davis* can be squared with these other holdings. The complaint in *Davis* apparently presented a classic cause of action for libel *per se* without any claim of actual injury. The plaintiff did not lose his job, was not stripped of any rights he would otherwise have had, and, in general, did not sustain any actual loss. *Davis'* holding, that there is no liberty interest in reputation alone cognizable under the Civil Rights Act,[78] absent some actual injury caused by the gov-

68. 430 U.S. 651 (1977).
69. 451 U.S. 527 (1981).
70. 430 U.S. at 701-02 (Stevens, J., dissenting).
71. *Id.*
72. 54 U.S.L.W. 4090 (U.S. Jan. 21, 1986) (No. 84-5872).
73. 451 U.S. 527 (1981).
74. 54 U.S.L.W. at 4866 (emphasis in original).
75. 105 S. Ct. 2939 (1985).
76. *Id.* at 2945, 2951.
77. Justices Brennan, Marshall and Stevens.
78. 42 U.S.C. § 1983 (1982).

ernmental action, can be read as consistent with the then-recent decision in *Gertz v. Robert Welch, Inc.*,[79] which precluded an award of presumed damages and required instead proof of actual damages.

The due process cases thus constitute ample authority for the proposition that reputation is an interest of constitutional dimension. To the extent that *Davis* suggests the contrary, it is likely to be "a short-lived aberration,"[80] arising from unique circumstances, and without broad applicability.

IV. Conclusion

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. Both interests are strong and equally deserving of protection. Both interests have come to be identified as important goals of democracy and freedom. Moreover, experience has shown that suppression of either right inevitably results in injury to the other as well. The media especially should be particularly sensitive to this relationship given its own experience of the 1950's, when public defamation in the name of national security resulted in serious jeopardy to the right of free expression. As Justice Stewart said: "The rights and values of private personality far transcend mere personal interests. 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."[81]

To favor freedom of the press over an individual's private reputation by constitutional fiat is not in anyone's best interest. However, as evidenced by the briefs of PNI and its *amici* in *Philadelphia Newspapers, Inc. v. Hepps*,[82] this remains one of the principal approaches of the organized media in its efforts to structure libel law.[83] Instead of treating the development of constitutional libel law as a conflict between irreconcilable interests, the approach in each case should be to determine how best to maximize these two important

79. 418 U.S. 323 (1974).

80. 424 U.S. at 736 (Brennan, J., dissenting).

81. Rosenblatt v. Baer, 383 U.S. 75, 93-94 (1966) (Stewart, J., concurring).

82. No. 84-1491 (Sup. Ct. *argued* Dec. 3, 1985), *on appeal from* 506 Pa. 304, 485 A.2d 374 (1984).

83. There is no doubt that the media is highly organized. For example, the Libel Defense Resource Center ("LDRC") describes itself as "an information clearinghouse organized by leading media groups to monitor and study developments in libel and privacy litigation. Supporting organizations include leading publishers and broadcasters, media and professional trade associations representing newspaper, magazine and book publishers, broadcasters, journalists, authors, news directors, newspaper editors, and libel insurance carriers." LDRC Bull. No. 11, 37 (Summer-Fall, 1984).

rights. It would be a refreshing change.

To suggest that each individual has a fundamental constitutional right to protect his reputation is not to suggest that the right is inviolate. As with any other individual right it must constantly be accommodated with the interests of society as a whole, and with the rights of other individuals. The proper accommodations, however, are not likely to be made by those who operate under the misconception that, as rights go, freedom of expression is immune from this process or that reputation is somehow a second-class citizen.