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Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Law

by

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VEGGIE LIBEL MEETS FREE SPEECH: A
CONSTITUTIONAL ANALYSIS OF AGRICULTURAL
DISPARAGEMENT LAWS

Megan W. Semple*

I. INTRODUCTION

In February 1989, the Natural Resources Defense Council (NRDC) issued a report in which the NRDC contended that young children faced increased dangers created by pesticide use. The publication of this report and the resulting publicity caused a firestorm of debate. In part, the NRDC report concerned the effects of the herbicide daminozide, also known as Alar. The CBS news program "60 Minutes" reported on the NRDC publication, highlighting NRDC's warnings about Alar, a chemical which was used by apple growers to stimulate growth and enhance apple appearance. American consumers responded to the program by boycotting apples and apple products.

Washington state apple growers subsequently filed suit against the NRDC, CBS, and CBS affiliates airing the broadcast in Washington. Alleging that the broadcast was inaccurate and disparaging, the apple growers sued to recoup the economic losses from the...
scare. The Ninth Circuit recently affirmed the decision of the Washington federal district court to grant the defendants’ motions for summary judgment, dismissing the apple growers’ suit. Both courts held that the plaintiffs failed to meet their burden of proving that the broadcast was verifiably false.

Since the eruption of the Alar controversy, agriculture and pesticide lobbyists have persuaded eleven state legislatures to enact statutes authorizing damages for “the disparagement of any perishable agricultural product.” Concerned that it would inhibit debate on health issues, Governor Roy Romer of Colorado vetoed one such bill after it passed in the state legislature.

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9 See id. at 930-31.
10 Auvil v. CBS “60 Minutes”, 67 F.3d 816 (9th Cir. 1995) (Auvil IV), affg Auvil v. CBS “60 Minutes”, 836 F. Supp. 741 (E.D. Wash. 1993) (Auvil III) (dismissing suit against CBS and “60 Minutes”). The local affiliates, the NRDC, and Fenton Communications had earlier been dismissed as defendants. See Auvil II, 800 F. Supp at 945; Auvil I, 800 F. Supp at 943.
11 Auvil IV, 67 F.3d at 823; Auvil III, 836 F. Supp. at 742.
12 See infra notes 90-91.
In March 1995, Louisiana Senator Craig Romero introduced a bill which would provide a cause of action to those “person[s] engaging in a business activity who [suffer] damage as a result of another person's environmental disparagement of any such business activity.” La. S.B. 125, Reg. Sess. (1995). Although the bill was later withdrawn from reconsideration, the bill's introduction may signal industry's next step in its effort to silence environmentalists and consumer advocates.
Governor Romer’s concern recalls the First Amendment’s guarantee of free speech and the principles underlying the Supreme Court’s seminal defamation decision, *New York Times Co. v. Sullivan*. Deciding that the First Amendment protected certain statements even if they were defamatory, the Supreme Court imposed additional burdens on defamation plaintiffs. Thus, although these agricultural statutes ostensibly create a right to bring a disparagement suit, the Supreme Court’s defamation decisions cast significant doubt on their ability to withstand First Amendment challenges.

Defamation laws redress false statements that harm an individual’s personal reputation or deter third parties from associating with the defamed individual. Similarly, the tort of injurious falsehood, which includes “product disparagement,” protects plaintiffs who prove they suffered as a result of a false, disparaging statement. Unlike defamation, which remedies injury to one’s reputation, the tort of injurious falsehood compensates for harm to one’s commercial or economic interests.

Under the *New York Times* ruling, defamation plaintiffs must meet the common law requirements; and some plaintiffs must additionally prove that the allegedly defamatory statements were made maliciously. Supreme Court decisions after *New York Times*

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15 376 U.S. 254 (1964). For further discussion, see infra part III.C.
16 376 U.S. at 254.
17 See infra part III.C for a discussion of the Supreme Court’s decisions. See infra part IV for an application of these decisions to agricultural product disparagement statutes.
20 SMOLLA, supra note 18, § 11.02[4].
have more fully defined the plaintiff's burden of proof in a defamation action.\textsuperscript{22} Although its application to product disparagement actions remains uncertain, the injurious falsehood doctrine,\textsuperscript{23} coupled with recently-enacted state laws, may chill potentially beneficial debate regarding health issues. Those concerned about the use of pesticides may censor themselves to avoid potential liability and thus limit the progress of the environmental movement. At present, however, no court has decided a case involving the constitutionality of veggie libel laws.\textsuperscript{24} This Note will evaluate whether these laws can survive a constitutional challenge.\textsuperscript{25}

Although the legal and financial difficulties experienced by growers in the wake of the Alar scare prompted the enactment of several veggie libel statutes,\textsuperscript{26} these statutes may fail to accomplish at least one of their goals — to relax the plaintiff's burden of proof.\textsuperscript{27} These statutes may soon face constitutional challenge because they defy established defamation law by shifting the burden of proving the falsity of the statement and fault of the defendant from the plaintiff to the defendant.\textsuperscript{28} Limiting free speech on important matters such as food safety and public health may also require a higher standard of fault than the negligence standard required plaintiffs suing media defendants to establish the falsity of the statements before recovering for defamation. Both of the decisions dramatically increased the burdens on a defamation plaintiff. See infra part III.B.1 for an explanation of the common law elements of defamation.

\textsuperscript{22} See infra part III.C.2 for a discussion explaining judicial distinctions between plaintiffs and the resulting variances in burdens of proof.

\textsuperscript{23} See infra notes 162-69 and accompanying text for a discussion of the applicability of defamation jurisprudence to product disparagement.

\textsuperscript{24} A 1993 action filed in Georgia by the American Civil Liberties Union on behalf of Action for a Clean Environment and Parents for Pesticides Alternatives sought to have Georgia's agricultural product disparagement statute declared unconstitutional. Action for a Clean Environment v. State, 457 S.E.2d 273 (Ga. Ct. App. 1995). The Georgia Court of Appeals ruled that, in order to be a justiciable controversy, a claim may not be "merely a question as to the abstract meaning or validity of a statute." Id. at 274.

\textsuperscript{25} The narrowness of the laws' purpose may itself be subject to constitutional attack as "unconstitutionally target[ing] the speech of critics of the agricultural and chemical industries." Suits Spur Product Disparagement Statutes, NEWS MEDIA & L., Summer 1994, at 3, 5. A reviewing court may find that the law, like the ordinance contested in R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (concerning an ordinance which prohibited the display of a symbol relating to race, color, creed, religion or gender which one has reason to know will provoke others), "impose[s] special prohibitions on those speakers who express views on disfavored subjects." Id. at 391. However, such an analysis is beyond the scope of this Note.

\textsuperscript{26} Suits Spur Product Disparagement Statutes, supra note 25, at 3.

\textsuperscript{27} See infra part III.A.

\textsuperscript{28} See infra part IV.D.-E (analyzing the constitutionality of these aspects of the veggie libel laws).
specified in the statutes. Moreover, because public debate on food safety is so important, the presumption of falsity in the statutes may render them unconstitutional.

Part I of this Note presents the Alar controversy and outlines the progression of the apple growers' lawsuit. It also introduces the veggie libel laws, describing the main facets of the statutes and the variations enacted by the states. Part II outlines the common law elements of a defamation action and a product disparagement claim, the distinction between the two torts, and the constitutional doctrine surrounding defamation actions. Part III addresses the constitutional shortcomings of veggie libel laws and concludes that the statutes, as enacted, unconstitutionally inhibit protected speech.

II. Veggie Libel Laws: The Alar Controversy and Subsequent Enactments

A. The Alar Controversy and the Resulting Fear

Analysis of the veggie libel laws must begin with their impetus — the Alar controversy. A look at Alar use on agricultural food products, the challenges to its regulatory approval, and its alleged carcinogenic effects provides a context for the veggie libel enactments, the public nature of the issue, and the resulting public debate.

1. The History of Alar Use

In 1963, the agricultural industry first registered the pesticide daminozide, commonly known as Alar, for use as a plant hormone (specifically, a growth regulator). Five years later, the industry registered Alar for use on apples. The chemical demonstrated many benefits, and appeared suitable for various uses. With the use of Alar, apples stayed on trees longer, had longer shelf life, and

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29 See infra part IV.D.2.
30 See infra part IV.E.
31 Marina M. Lolley, Comment, Carcinogen Roulette: The Game Played Under FIFRA, 49 Md. L. Rev. 975, 984 n.82 (1990). Registration of pesticides is governed at the federal level by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Following registration of a pesticide, the EPA sets tolerance levels under the Federal Food, Drug and Cosmetic Act (FFDCA), which establishes the maximum amount of residue that may remain on or in foods on which the registered chemical is used. 21 U.S.C. § 301 (1988 & Supp. V 1993); see also Correia, supra note 3, at 869. These levels are enforced by the Food and Drug Administration. Id.
displayed more uniform color and firmness.33 Consequently, the apple industry and growers throughout the country embraced Alar and applied it to their crops.34

By July 1984, five studies suggested that daminozide caused cancer in laboratory animals.35 Also, daminozide converts into "an even more potent carcinogen,"36 unsymmetrical 1,1 dimethylhydrazine (UMDH), when apples are processed into apple juice or apple sauce.37 Responding to these safety concerns, the Environmental Protection Agency (EPA) announced it would conduct a "special review" to determine whether to publish a notice of intent to cancel Alar's registration.38 Upon such review, the EPA's Scientific Advisory Panel39 concluded that the studies provided information insufficient to assess any risk to human health.40 The EPA retreated: it refused to initiate cancellation proceedings and instead merely required Uniroyal, the manufacturer of Alar, to conduct additional tests.41

In January 1989, reacting to the preliminary results of Uniroyal's toxicology studies, the EPA again announced plans to initiate can-

33 Lolley, supra note 31, at 984.
34 Id. (asserting that the apple industry has used Alar extensively); see also Auvil I, 800 F. Supp. at 934 (calling the use of Alar a "common agricultural practice . . . for more than two decades").
35 Lolley, supra note 31, at 984. The five studies revealed a statistically significant relationship between ingestion of Alar and tumor development in lab animals. Nader, 859 F.2d at 749.
36 Lolley, supra note 31, at 984.
37 Id. UMDH is also used as a rocket fuel. Auvil I, 800 F. Supp. at 940 (reprinting a transcript of the "60 Minutes" broadcast).
38 49 Fed. Reg. 29,126 (1984); see Nader, 859 F.2d at 749.
39 FIFRA permits the EPA to cancel a pesticide's registration "[i]f it appears . . . that a pesticide . . . when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." 7 U.S.C. § 136d(b) (1988 & Supp. V 1993). The Act also requires the Administrator to submit a proposed cancellation notice to an advisory panel for comment "as to the impact on health and the environment." Id. § 136w(d). In 1988, FIFRA was amended to require that all pesticides registered before November 1, 1984 be re-registered. Act of Oct. 25, 1988, Pub. L. No. 100-532, 102 Stat. 2688 (codified as amended at 7 U.S.C. § 136a-1 (1994)); see Lolley, supra note 31 at 985.
40 Pesticide Tolerance for Daminozide, 51 Fed. Reg. 12,889 (1986). In support of its decision, the review board pointed to several other "data gaps," including the extrapolation of animal test results to humans. Nader, 859 F.2d at 750. The board concluded that the studies "were 'inadequate to perform a qualitative risk assessment.'" Id. Curiously, the EPA had also considered these same shortcomings before deciding to pursue cancellation proceedings. Lolley, supra note 31, at 985. The Department of Agriculture, responding to the EPA's findings, asked the agency to reconsider by weighing the many benefits of Alar's use against its uncertain risks. Id.
cellation proceedings.\textsuperscript{42} While this announcement was publicized,\textsuperscript{43} the matter did not attract widespread public attention until CBS aired a "60 Minutes" broadcast concerning the NRDC report.\textsuperscript{44} The NRDC report, \textit{Intolerable Risk: Pesticides in Our Children's Food}, contended that, because children consume more food per unit of body weight than adults, as well as more fruits and fruit products, they face greater health risks from pesticides than adults.\textsuperscript{45} Although the NRDC report addressed twenty-three pesticides, the CBS broadcast focused on apples, Alar, and the EPA's inability to initiate cancellation proceedings.\textsuperscript{46} As a result of this attention, American consumers refrained from purchasing apples and apple products such as apple sauce and apple juice.\textsuperscript{47} Not only did sales decline dramatically,\textsuperscript{48} but "[p]ublic school systems in New York, Los Angeles, Atlanta, San Francisco, Chicago[,] and dozens of other cities banned apples from their cafeterias."\textsuperscript{49}

The EPA and the Department of Agriculture tried to stabilize the market and quell public fears by contesting the findings of the NRDC report.\textsuperscript{50} To show support and assist growers, the government purchased fifteen million dollars worth of apples.\textsuperscript{51} The

\begin{footnotesize}
\begin{enumerate}
\item Pesticide Tolerance for Daminozide, 54 Fed. Reg. 6392 (1989); see also Lolley, supra note 31, at 986; Correia, supra note 3, at 877.
\item Philip Shabecoff, \textit{100 Chemicals for Apples Add Up to Enigma on Safety}, N.Y. TIMES, Feb. 5, 1989, at 22.
\item Correia, supra note 3, at 868.
\item The report estimated that 240 in one million children will develop cancer from daminozide before reaching the age of six. Lolley, supra note 31, at 987. The EPA estimated that in an 18 month period, only nine in one million children would suffer from cancer. The estimates varied because of the “different exposure periods, six years versus nine months, and different assumptions about dose-response and exposure levels.” \textit{Id.}; see also Correia, supra note 3, at 875 n.114.
\item See Auvil II, 800 F. Supp. at 934, 937-41.
\item Frank B. Cross, \textit{The Public Role in Risk Control}, 24 ENVTL. L. 888, 943 n.198 (1994) (noting various effects of the "60 Minutes" broadcast).
\item Regulation Governing the Fresh Apple Diversion Program for 1988 Crop Apples, 55 Fed. Reg. 5563 (1990) ("[A]s of May 1, 1989 the national supply of 1988 crop apples was 53\% greater than the previous three year average.").
\item Correia, supra note 3, at 875.
\item Claiming that there was no imminent hazard to children, the EPA, USDA, and FDA issued a joint statement which urged consumers to continue to purchase apple products. \textit{Apple Panic Overblown Reaction to Inadequate Data, Critics Say}, CHEM. MARKETING REP., Mar. 20, 1989, at 9.
\item Government Will Buy Apples Left Over from the Scare on Alar, N.Y. TIMES, July 8, 1989, at A6. The article also cited the USDA as stating that the price of apples per carton had declined about three dollars from their price in 1988. \textit{Id.}; see also Regulation Governing the Fresh Apple Diversion Program for 1988 Crop Apples, 55 Fed. Reg. 5563 (1990).
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November 1959 announcement by Arthur Flemming, Secretary of Health, Education and Welfare, initiated a food scare. Indemnity Payments to Growers of Cranberries and Caponnettes: Hearings on H.R. 12117 Before the Subcomm. of the House Comm. on Appropriations, 86th Cong., 2d Sess. (1960) [hereinafter Cranberry Hearings]. Flemming announced that two batches of cranberries grown in the Pacific Northwest had been contaminated after a weed killer, shown to cause cancer in rats, was improperly used on the berries. Id. at 45 (reprinting as Exhibit 1 Flemming's statement to the press on Nov. 9, 1959). As a result of Flemming's suggestion that consumers refrain from purchasing the berries for Thanksgiving (the busiest time of year for cranberry sales), "grocery stores dumped cranberries from shelves, restaurants stopped serving them, and health officials banned their sale." Bob Secter, Cranberry Panic of '59 Sowed Seeds of Future Crop Scares, Chi. Sun-Times, July 31, 1994, at 6. The payments were granted because the public announcement proved to be "the virtual libeling of an entire industry" based on the improper use of the pesticide by less than one percent of cranberry growers. Cranberry Hearings, supra, at 34.

2. Auvil v. CBS "60 Minutes"

Responding to the "60 Minutes" program, Washington state apple growers filed a civil suit against CBS and the NRDC, alleging defamation and disparagement. Forty-seven hundred growers joined the class action, seeking to recoup their economic losses and arguing that Alar posed minimal risks.

To establish a claim of defamation or disparagement, the statement at issue must be understood to "concern" the plaintiff. The district court found that the NRDC's report neither mentioned a


53 Apple Panic Overblown, supra note 50, at 9 (noting comments by Senators John Warner and Steve Symms calling for executive action to deal with the controversy).


55 See Auvil II, 800 F. Supp. at 931 (explaining that the suit was originally filed in Yakima County Superior Court and subsequently removed to federal court).

56 Id. In addressing the distinctions between the plaintiff's defamation and disparagement claims, the court noted that, though different, the disparagement claim was "subject to the same First Amendment requirements that govern actions for defamation." Id. at 933.

57 Langvardt, supra note 19, at 908 (product disparagement); Smolla, supra note 18, §4.09[1] (defamation).
particular grower nor focused simply on apples, but instead addressed the use of pesticides on twenty-seven fruits and vegetables. Therefore, the court found the NRDC's statements did not "concern" the plaintiffs. Finding that the growers had failed to satisfy this essential element, the court dismissed their claim against the NRDC.

The court also rejected the claims against CBS. To sustain a claim of product disparagement or defamation against a media defendant, a plaintiff must establish not only that the statement at issue "concerns" it, but also that the statement is false. Noting the difficulty of proving that the statements concerning Alar were false, the court found CBS's statements to be protected speech. By dismissing this action, the court buttressed the arguments of agriculture lobbyists advocating agricultural food product disparagement statutes. The resulting enactments reflect not only the concern and frustration of the agriculture industry, but also its success.

### B. Veggie Libel

To prove defamation, a plaintiff must establish that a defamatory statement concerning the plaintiff was published or communicated to a third person. The level of fault, such as negligence or recklessness, may vary depending upon the nature of the plaintiff and the nature of the controversy. To establish product disparagement, a plaintiff must prove that a false disparaging statement was communicated maliciously to a third person, resulting in actual pecuniary losses. The uncertainty and difficulty in satisfying this burden of proof "spurred" enactment of agricultural product disparagement statutes.

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58 Auvil II, 800 F. Supp. at 944.
59 Id.
60 Auvil III, 836 F. Supp. at 743.
61 See infra notes 121-22, 139, 150, 155-57 and accompanying text for a discussion of the falsity requirement for common law defamation and disparagement claims.
63 Suits Spur Product Disparagement Statutes, supra note 25, at 4.
64 A defamatory statement was defined as one that "affected the plaintiff's reputation so as to lower the community's estimation or deter others from dealing with him." Restatement (Second) of Torts § 558 (1977); see infra notes 108-11 and accompanying text.
65 See infra notes 112-20 and accompanying text.
66 See infra part III.C.2.
67 See infra part III.B.2.
68 See infra notes 215-19 and accompanying text.
1. Veggie Libel Defined

In January 1991, Colorado State Representative Steve Acquafresca, an apple grower, introduced a measure to the state assembly. It was the first of a series of state proposals collectively known as “veggie libel laws.” The bill initially attracted jokes and giggles, as well as international attention. However, Acquafresca explained that the bill was designed to protect farmers from food safety scares, arguing that the bankruptcy of farmers or ranchers is “no laughing matter.” Acquafresca called the Alar scare “unfounded,” and the Colorado legislature responded by adopting his proposal. However, Governor Roy Romer vetoed the bill, citing First Amendment concerns. Romer feared that such a law would jeopardize the “constitutional protection [that] gives individuals, as well as consumer groups and researchers[,] the guaranteed right to raise legitimate questions about food safety and quality.” Instead, Louisiana became the first state to adopt a law prohibiting disparagement of any of the state’s agricultural food products.

Although they vary in level of protection, many of the enacted laws and pending bills employ similar language and similar structures. Although the notion of veggie libel at first provoked humor, the passage of the law in Louisiana, and its subsequent adoption in ten other states, has prompted efforts from consumer rights groups, environmentalists, and the media to prevent additional states from enacting similar legislation.

69 See, e.g., John Sanko, Romer Polishes all the Right Apples in Veto of Veggie Bill, ROCKY MOUNTAIN NEWS, May 3, 1991, at 12 [hereinafter Romer Polishes all the Right Apples] (characterizing the bill as “the world-acclaimed and much-guffawed veggie bill ... the one that said Thou Shalt Not Take the Name of a Veggie, Fruit or Other Perishable Product in Vain”).


71 Romer Polishes All the Right Apples, supra note 69.

72 Id.

73 Id.

74 See supra note 14 and accompanying text.


76 LA. REV. STAT. ANN. §§ 3:4501 to :4504 (noting that the chapter was added by 1991 La. Acts 972).

77 The enacted laws in Louisiana, Idaho, Georgia, Florida, South Dakota, Mississippi, and Oklahoma employ similar language and formats in their definitions and proscriptions.

78 See Bill Rogers, Veggie Libel? Censored by the Food Industry, PUBLISHERS’ AUXILIARY, Dec. 19, 1994, at 4 (urging readers to contact the South Carolina Press Association for information and “talking points” to oppose a veggie libel law currently pending in South Carolina); You Still Can’t Say Beans About Georgia Produce, ATLANTA J. & CONST.,
2. Veggie Libel Statutory Language

As many as twenty-seven states have considered, or are currently considering, an agricultural food product disparagement statute.79 Fundamentally, the statutes provide producers of agricultural food products with a cause of action against anyone who disparages their products.80 Under these statutes, the main elements of agricultural food product disparagement are: (1) dissemination to the public in any manner;81 (2) of false information the disseminator knows to be false;82 (3) stating or implying that a perishable food product is not safe for consumption by the consuming public;83 (4) information is presumed false when not based on reasonable and reliable scientific inquiry, facts, or data;84 (5) disparagement provides a cause of action for damages;85 and (6) any action must be filed within one or two years.86

Some states significantly expanded the class of potential parties by defining "producer" to include the "entire chain from grower to consumer."87 Striving to relax the burdens of proving a defamation

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79 See supra note 13.
82 See, e.g., id. Georgia's law, however, reaches only dissemination that is "willful and malicious." Ga. Code Ann. § 2-16-2(1).
84 See, e.g., id.
85 See, e.g., id. § 3:4503.
86 See, e.g., id. § 3:4504 (action must be filed within one year); Ga. Code Ann. § 2-16-4 (action must be filed within two years).

In its recently enacted law, Ohio clarified the identity of potential plaintiffs by specifying that "any person who grows, raises, produces, distributes or sells a perishable agricultural product or any association representing such persons" may sue under its provisions. Ohio Rev. Code Ann § 2307.81(B)(4). Similarly, bills proposed in Pennsylvania and Illinois define "producer" to include "any person engaged in growing or raising a perishable food product or commodity, or marketing or manufacturing such product or commodity for consumer use." H.R. 949, 179th Pa. Gen. Assem., Reg. Sess. § 3 (1995); S. 234, 89th Ill.
action, some state legislatures codified sweeping prohibitions. In so doing, the agriculture lobby may have virtually prohibited discussion of consumer safety issues related to fruits and vegetables.

Other provisions of these statutes also demonstrate the power of the agricultural lobby. South Dakota’s statute permits producers to recover treble damages from “any person who disparages a perishable agricultural food product with intent to harm the producer.” Alabama’s law specifies that “[i]t is no defense . . . that the actor did not intend, or was unaware of, the act charged.” The laws enacted in Arizona and Ohio even grant the court discretion to award “the successful party court costs and reasonable attorney fees.” Despite the questionable constitutionality of

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88 As noted, the Auvil plaintiffs experienced difficulty in establishing that the NRDC’s report specifically concerned the apple growers and their products. See supra notes 57-59 and accompanying text. By expanding the potential class of plaintiffs, the laws seek to relax this common law requirement. See infra part IV.A.

89 See infra part IV.A.

90 The statements generally must state or imply that “the . . . product is not safe for consumption by the consuming public.” ALA. CODE § 6-5-621(1); ARIZ. REV. STAT. ANN. § 3-113(A); FLA. STAT. ch. 865.065(2)(a); GA. CODE ANN. § 2-16-2(1); IDAHO CODE § 6-2002(1)(b); LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); OHIO REV. CODE ANN. § 2307.81(B)(1); S.D. CODIFIED LAWS ANN. § 20-10A-1(2).

The statutes define “perishable agricultural food products” to mean “any food product of agriculture or aquaculture which is sold or distributed in a form that will perish or decay beyond marketability within a period of time.” See, e.g., LA. REV. STAT. ANN. § 3:4502(2).


91 As expected, the pesticide industry is also lobbying state legislatures to enact agricultural product disparagement laws. At a fall conference of the American Crop Protection Association (ACPA), the director of government affairs of Monsanto, a pesticide manufacturer, announced that “agricultural product disparagement" would again be a “significant issue” in 1995, as it was in 1994. Barolo Says Streamlining Office Will Enhance Credibility of Program, 18 Chem. Reg. Rep. (BNA) No. 32, at 995 (Nov. 4, 1994). The Monsanto executive also heads the ACPA’s State Affairs Committee. Id.


Originally, Florida’s statute similarly authorized the recovery of treble damages for intentional disparagement. In May 1995 however, the legislature deleted the provisions which authorized such a recovery. S. 622, Fla. Leg. § 3 (1995).

93 ALA. CODE § 6-5-623.

94 ARIZ. REV. STAT. ANN. § 3-113(C); OHIO REV. CODE ANN. § 2307.81(C).
these provisions, their very existence may be enough to silence consumer activists and environmentalists fearing ruinous liability.95

III. CONSTITUTIONAL CONCERNS SURROUNDING VEGGIE LIBEL

In New York Times Co. v. Sullivan, the Court recognized that “erroneous statement is inevitable in free debate, and . . . [thus] must be protected.”96 In subsequent cases, the Court has tried to clarify the influence of the First Amendment on the long-recognized action for defamation.97 In one case, the Supreme Court applied the First Amendment defamation jurisprudence to a product disparagement claim.98 Because a statement concerning the safety of vegetables may lead to liability for both torts, an analysis of the vegetable libel laws must address the underlying First Amendment principles, distinctions between the two torts, and the evolution of the defamation doctrine.

A. First Amendment Principles Underlying Defamation Claims

Although the First Amendment’s text “unequivocally” prohibits Congress, and the states by incorporation, from making laws which abridge the freedom of speech,99 “it is the decisions of the United States Supreme Court these past two hundred years that have given the amendments life . . . [and provided] the basis for the kind of freedom and justice all Americans are guaranteed and enjoy.”100 Generally, the Supreme Court protects speech “unless shown to likely produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”101 Certain narrowly-defined classes of speech may be restricted without raising constitutional concerns.102 “These

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95 South Dakota’s triple damages provision may exceed the constitutional limitations on damages. That issue is beyond the scope of this Note.
96 376 U.S. at 271-72.
97 See infra part III.C.
98 Bose Corp. v. Consumers Union, Inc., 466 U.S. 485 (1984); see infra notes 167-71 and accompanying text.
99 RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 5 (1992) [hereinafter FREE SPEECH].
102 See generally LEAHY, supra note 100, at 109-40 (outlining permissible state regulations of speech such as reasonable, nondiscriminatory time, place, and manner restrictions; treatment of certain governmental property as closed to the public; zoning laws excluding adult movie theaters from certain areas; and laws prohibiting speech which produces a “clear & present danger . . . of a substantive evil”).
include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . . ."  

103 The Supreme Court recognizes societal interest in “preventing and redressing attacks upon reputation.”  

104 Although some speech may be regulated, the laws, regulations, or ordinances addressing such concerns must be “carefully drafted so that maximum protection is given to the right of free speech.”  

105 While the agricultural product disparagement statutes establish statutory torts, the nature of their prohibitions implicates First Amendment arguments raised by the Supreme Court’s review of defamation or libel cases.  

B. Defamation Versus Product Disparagement

Although conceptually distinct, the tort of defamation and the tort of product disparagement share several common law elements.  

107 Defamation focuses “on the protection of a plaintiff’s reputation” in the sphere of personal dignity.  

108 By contrast, product disparagement, a type of injurious falsehood, reflects an interest in compensating economic injury to business or commercial interests.  

109 Since disparaging published statements about a product might also damage one’s reputation, distinctions between the two causes of action and the scope of their First Amendment protection may be inconsistent and confusing.  

111 This section will outline the common law elements of each tort and analyze their similarities and differences.

104 FREE SPEECH, supra note 99, at 118.
105 LEAHY, supra note 100, at 136.
106 Note that because of the nature of the defendants envisioned by these statutes, i.e. non-competitors, the First Amendment doctrine concerning commercial speech will not be addressed.
108 Langvardt, supra note 19, at 907.
109 SMOLLA, supra note 18, § 11.02[1].
1. The Elements of Defamation

Common law defined defamation\(^{112}\) as an "unprivileged publication of false and defamatory statements concerning a plaintiff."\(^{113}\) A defamatory statement had to affect the plaintiff's reputation so as to lower community esteem or deter others from dealing with him.\(^{114}\) A plaintiff was not required to prove any actual harm to reputation; once the plaintiff proved a prima facie case, the court presumed damages.\(^{115}\)

After proving the statement was defamatory, to establish a prima facie case, a plaintiff had to prove that the statement "concerned" the plaintiff.\(^{116}\) Often referred to as the "of and concerning" element,\(^{117}\) the statement had to be understood to refer specifically to the plaintiff.\(^{118}\) The plaintiff did not need to be mentioned by name, so long as a reasonable person hearing or reading the statement would have concluded that the plaintiff was the party described.\(^{119}\)

Under common law, a plaintiff met the prima facie burden once he proved that a defamatory statement concerned him.\(^{120}\) Although a plaintiff had to argue that the statement was false, common law did not require the plaintiff to prove falsity.\(^{121}\) Instead, the court traditionally presumed the statement was false.\(^{122}\) The common law allowed only truth as a defense.\(^{123}\) Thus, if a defendant proved that the statement was substantially true, a plaintiff could not recover for defamation.\(^{124}\)

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\(^{112}\) Defamation refers to the twin torts of libel and slander. SMOLLA, supra note 18, §1.04(1). Libel applies to a statement that was written, printed, or "communicated in some . . . physical form." Id. If, instead, the statement was made orally or "by transitory gestures," it was treated as slander. Id. Because both the common law and constitutional law treat the two torts similarly, the general term "defamation" will be used in this Note. Langvardt, supra note 19, at 907.

\(^{113}\) Langvardt, supra note 19, at 907 (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

\(^{114}\) See id. at 908, (citing RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

\(^{115}\) SMOLLA, supra note 18, § 1.03[2].

\(^{116}\) Langvardt, supra note 19, at 908 (citing RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

\(^{117}\) Id.

\(^{118}\) SMOLLA, supra note 18, § 4.09[1].

\(^{119}\) Langvardt, supra note 19, at 908. In Rosenblatt v. Baer, the Supreme Court held that "there must be evidence showing that the attack was read as specifically directed at the plaintiff." 383 U.S. 75, 81 (1966).

\(^{120}\) SMOLLA, supra note 18, § 1.03[2].

\(^{121}\) Id.

\(^{122}\) Langvardt, supra note 19, at 909.

\(^{123}\) KEETON ET AL., supra note 110, § 116, at 839.

\(^{124}\) Id.
Until the 1964 decision, *New York Times Co. v. Sullivan*,125 defamation was also a strict liability tort.126 The plaintiff did not need to establish fault of the defendant with respect to the statement's falsity or its "harmful nature."127 Presuming reputational harm upon clear evidence of a false and defamatory statement, courts permitted juries to estimate the amount necessary to compensate the plaintiff.128

2. The Elements of Product Disparagement

Instead of redressing reputational harm, the product disparagement tort reaches derogatory statements about the plaintiff's property or the quality of his products.129 Accordingly, the comments reached by the disparagement tort far surpass the scope of defamation.130 In a product disparagement action, the statements may disparage the plaintiff's business, its "character, . . . its employees, . . . its customers, or its popularity."131 Although the statements must "concern" the plaintiff's business, the plaintiff's burden concentrates primarily on the effects of the statements.132

The effects of the statement must include a realized, pecuniary loss.133 Under this essential element, termed the "special damages" requirement, the plaintiff must present evidence illustrating

126 Langvardt, *supra* note 19, at 909.
127 Arent, *supra* note 107, at 448.
128 Langvardt, *supra* note 19, at 911.
129 Product disparagement is a type of injurious falsehood. Originally addressing such issues as "oral aspersions cast upon the plaintiff's ownership of land" which thus prevented an individual from leasing or selling it, the tort was known as "slander of title." KEETON ET AL., *supra* note 110, § 128, at 962; see also Ruder & Finn, Inc. v. Seaboard Sur. Co., 422 N.E.2d 518, 521-22 (N.Y. 1981). Two hundred years later, in the nineteenth century, the action was expanded to include oral and written statements affecting the quality of one's property, rather than solely one's title. KEETON ET AL., *supra* note 110, § 128, at 963.
130 Langvardt, *supra* note 19, at 914.
132 Commentators suggest that the tort of product disparagement includes an "of and concerning" element. Langvardt, *supra* note 19, at 914, 956 (citing Blatty v. New York Times Co., 728 P.2d 1177, 1182-84 (Cal. 1986)); Arent, *supra* note 107, at 446 ("Both torts [defamation and product disparagement] require proof that the words refer to the plaintiff or her goods.") (citing William v. Burns, 540 F. Supp. 1243 (D. Colo. 1982)); see also Teilhaber Mfg. Co. v. Unarco Materials Storage, 791 P.2d 1164 (Colo. Ct. App. 1989), cert. denied, 803 P.2d 517 (Colo. 1991). However, the Ninth Circuit recently suggested that the requirement may not be conclusively established. Auvil IV, 67 F.3d at 816 n.4 ("Applicability of the 'of and concerning' requirement to product disparagement law is raised on appeal. We need not decide this issue . . . because . . . the growers cannot show falsity."). For a more detailed discussion regarding whether product disparagement should include such a requirement, see Langvardt, *supra* note 19, at 955-58.
loss of particular sales to identified persons. Courts today often relax this burden by permitting plaintiffs to introduce evidence revealing a decline in sales after the publication of the statement. In such cases, courts also require the plaintiff to illustrate the false statement was widely circulated and eliminate all other potential causes for the sales decline.

In addition to special damages, the plaintiff must prove that (1) the statement was communicated or published to a third person; (2) the statement "play[ed] a material and substantial part in inducing others not to deal with the plaintiff;" (3) the statement was false; and (4) the defendant acted with wrongful intent or malice.

The fault requirements vary among jurisdictions. Some courts adopt the Second Restatement of Torts approach, requiring the plaintiff to establish that the defendant recognized or should have recognized that publication would cause harm; that the defendant intended such harm; or that the defendant knew the statement was false yet published the statement in reckless disregard of its truth or falsity. Other courts adopt an approach "substantially identical to the cause of action for product disparagement described by the Restatement." These courts require proof that the defend-

134 Langvardt, supra note 19, at 918.
135 Id. at 918-19. As Prosser and Keeton note, if courts insist on evidence of actual fault before imposing liability, the necessity of such a strict burden on establishing a loss of sales is not necessary to protect an innocent defendant. Keeton et al., supra note 110, § 128, at 973; see also Arent, supra note 107, at 448 n.36.
137 Smolla, supra note 18, § 11.02[2][c].
138 Keeton et al., supra note 110, § 128, at 967.
139 Smolla, supra note 18, § 11.02[2][a].
140 Id. § 11.02[2][e].
141 Keeton et al., supra note 110, § 128, at 968-70; Smolla, supra note 18, § 11.02[2][e]; Langvardt, supra note 19, at 916-18.
142 Arent, supra note 107, at 449 (citing Restatement (Second) of Torts § 623A (1977)); see also Contract Dev. Corp. v. Beck, 627 N.E.2d 760, 764 (Ill. App. Ct. 1994) (holding that more recent cases require plaintiff to prove actual malice to establish prima facie case of slander of title); A&B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council, 651 N.E.2d 1283, 1294-95 (Ohio 1995) (applying actual malice to standard product disparagement claim, since the standard applies to a defamation claim based on same facts).
ant made the false statement maliciously.\textsuperscript{144} Guided by the malice requirement for the "closely-related tort of slander of title,"\textsuperscript{145} common law malice generally involves "hate, spite, or ill-will directed at plaintiff by defendant."\textsuperscript{146} Still other courts have found sufficient fault when the plaintiff proves the defendant "intended to interfere with the plaintiff's economic interests."\textsuperscript{147}

3. \textit{Common Law Defamation and Disparagement Compared}

As noted above, the common law elements of defamation and disparagement were in some ways similar. Both required publication\textsuperscript{148} of statements "of and concerning"\textsuperscript{149} the plaintiff. However, defamation and disparagement differed in their requirements for fault, falsity, damages, and defendant privilege.\textsuperscript{150} The constitutional development of defamation law, beginning with \textit{New York Times v. Sullivan}, altered these traditional requirements and muddied the distinctions between the two torts.\textsuperscript{151}

\textsuperscript{144} \textit{Systems Operation, Inc.}, 555 F.2d at 1140-41.
\textsuperscript{145} \textit{Id.} at 1140.
\textsuperscript{146} Langvardt, \textit{supra} note 19, at 913 n.69 (citing \textit{Turner v. Welliver}, 411 N.W.2d 298 (Neb. 1987), for the definition of malice under common law) (other citations omitted).
\textsuperscript{147} \textit{Id.} at 916-17; see also \textit{Smolla, supra} note 18, \textsection 11.02[2][e] (noting the lack of consensus regarding the "sort of intent, malice, or fault" required for injurious falsehood claims).
\textsuperscript{148} \textit{Smolla, supra} note 18, \textsection 11-02[1] (noting the injurious falsehood requirement that the statement be "public[ized] to a third person").
\textsuperscript{149} \textit{See supra} notes 116-19 and accompanying text regarding the "of and concerning" requirement for defamation claims.
\textsuperscript{150} \textit{See generally} \textit{Arent, supra} note 107, at 447-50 (outlining the differences between product disparagement and defamation); Langvardt, \textit{supra} note 19, at 907-19 (comparing and contrasting defamation and injurious falsehood).

While both absolute and conditional privileges exist, the conditional privilege is more often employed in the business defamation context. Langvardt, \textit{supra} note 19, at 911. One type of conditional privilege protects the statement if deemed "fair comment." \textit{Keeton et al., supra} note 110, \textsection 115. Generally defined as "a statement of opinion about a matter of public concern," courts differ as to the fair comment privilege's coverage. Langvardt, \textit{supra} note 19, at 912 n.62. While a majority of courts require that the statement be purely opinion, other courts extend the privilege to include "false statements of supposed fact." \textit{Id.} at 912 n.62. Courts also recognize a conditional privilege for statements whereby the party "made an accurate report concerning a governmental proceeding that was open to the public." \textit{Id.} at n.60.

The defense of privilege has also been applied to product disparagement suits. In \textit{Dairy Stores, Inc. v. Sentinel Publishing Co.}, the court decided that a conditional privilege "should exist wherever it would exist for a defamation action." 516 A.2d 220, 226 (N.J. 1986).

\textsuperscript{151} \textit{See infra} part III.C.
To sustain a common law claim for product disparagement, the plaintiff must always establish special damages.\textsuperscript{152} This onerous "special damages" burden often led plaintiffs to present their cases as defamation actions,\textsuperscript{153} for which the common law traditionally "presumed damages."\textsuperscript{154} However, the Court's adoption of a fault standard in \textit{New York Times v. Sullivan} now prevents many plaintiffs from enjoying this presumption.

The falsity element provides another example of how \textit{New York Times v. Sullivan} blurred the distinctions between defamation and disparagement. Under common law defamation, harmful statements about the plaintiff were presumed false.\textsuperscript{155} By contrast, in a successful product disparagement claim, the plaintiff must establish that the statement is false.\textsuperscript{156} As one commentator noted, however, "[the falsity] distinction [between defamation and disparagement] may have disappeared completely with the Supreme Court's elimination of the presumption of falsity in most defamation cases."\textsuperscript{157}

Similarly, the strict liability nature of the defamation tort all but disappeared with the Supreme Court's \textit{New York Times v. Sullivan} decision.\textsuperscript{158} Rather than presuming malicious intent, the Supreme Court now requires different levels of fault depending on whether the plaintiff is considered a public or a private person.\textsuperscript{159} Consequently, this distinction between the common law torts of defamation and product disparagement has also faded. Under current standards, both torts now require the plaintiff to prove some level of fault.\textsuperscript{160}


\textsuperscript{154} See supra note 115 and accompanying text.

\textsuperscript{155} See supra notes 121-22 and accompanying text.

\textsuperscript{156} Keeton et al., supra note 110, § 128, at 967. The requirement is reflective of the tort from which it is derived — "injurious falsehood." See \textit{id.} at 962-63.

\textsuperscript{157} Arent, supra note 107, at 449; see also infra notes 204-08 and accompanying text for a discussion of the First Amendment's impact on the falsity presumption.

\textsuperscript{158} See supra notes 125-28 and accompanying text regarding the state of the law prior to \textit{New York Times Co. v. Sullivan}.

\textsuperscript{159} See infra part III.C.2.

\textsuperscript{160} \textit{Id.}
While the two causes of action traditionally involved different conduct, injuries, and remedies, application of First Amendment principles to defamation law blurred these distinctions.161

C. Constitutionalizing Defamation

New York Times Co. v. Sullivan and the "constitutionalization" of defamation law162 heightened the plaintiff's proof requirements.163 The decision also muddied the distinction between defamation and product disparagement. In the decision, the Supreme Court noted that the First Amendment guarantees free speech because the framers "eschewed silence coerced by law."164 The Court's attention to First Amendment implications significantly impacted three of the common law elements in a defamation action: the fault requirement, the recovery of damages, and the presumption of falsity.165

While courts recognize the "overlap" between defamation and disparagement actions,166 the constitutional protection ultimately afforded to each of these actions may differ. In Bose Corp. v. Consumers Union, Inc.,167 the Supreme Court applied principles of First Amendment defamation jurisprudence to a product disparagement action.168 Although the Court did not address whether defamation jurisprudence applies to product disparagement generally, the Court held that the product disparagement issue in Bose "fit[ ] easily within the breathing space that gives life to the First Amendment."169 Because speech regarding the safety of agricul-

161 See Langvardt, supra note 19, at 919.
162 Justice White included this phrase in his concurring opinion in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 766 (1985) (White, J., concurring) ("New York Times Co. v. Sullivan was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander."). The phrase reveals the Supreme Court's determination that the Constitution supplants established common law defamation principles in certain contexts. Since New York Times Co. v. Sullivan, the Court has been articulating those contexts.
163 See infra part III.C.1.
164 376 U.S. at 270 (quoting Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).
165 See Arent, supra note 107, at 453-55.
166 Georgia Soc'y of Plastic Surgeons v. Anderson, 363 S.E.2d 140, 144 (Ga. 1987) (noting that overlap may occur particularly in cases alleging disparagement of plaintiff's business or product since statement may not reflect solely on product but may also suggest plaintiff's personal incompetence or inefficiency).
168 Id. at 513.
169 Id. (qualifying its holding by noting the Court of Appeals' doubts about applying New York Times Co. v. Sullivan protection to a product disparagement claim yet "express[ing] no view on that ruling"); see Unelko Corp. v. Rooney, 912 F.2d 1049, 1058
tural food products is "speech that matters," and because potential errors in that speech may "fit easily within the breathing space that gives life to the First Amendment," the constitutional validity of the veggie libel laws should be assessed according to defamation jurisprudence.


New York Times v. Sullivan introduced "breathing space" for speech regarding public officials. To that end, the Court dramatically increased the necessary level of fault for defamation actions. Holding that First Amendment restrictions require proof that an allegedly defamatory statement was made with "actual malice," the Court noted that "erroneous statement is inevitable in free debate, and . . . [thus] must be protected." The actual malice standard heightened the fault requirement for defama-

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171 See Bose, 466 U.S. at 513.

172 376 U.S. at 271-72. New York Times Co. v. Sullivan involved the publication of an advertisement by civil rights activists in an effort to raise funds "to Defend Martin Luther King and the Struggle for Freedom in the South." Id. at 257. The ad contended that, in response to Dr. King's peaceful protests, "[t]hey have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times." Id. at 257-58. In fact, Dr. King had been arrested only four times, and one officer involved in an arrest of Dr. King denied that Dr. King had been assaulted. Id. at 259. Louis Sullivan, the Commissioner of Public Affairs (the agency that supervised the police department in Montgomery), demanded a retraction, contending that the advertisement suggested involvement by the police. Id. at 256, 258. The newspaper refused, arguing that the statements did not reflect on Sullivan. Id. at 262. Sullivan sued for libel. Id. at 256. The lower courts held that the statements "concerned" Sullivan and that the Times acted maliciously. Id. at 262-64. The state courts imputed malice to the newspaper's "irresponsibility" in failing to uncover the advertisement's inaccuracies and by the newspaper's refusal to grant Sullivan's request for a retraction. Id. On appeal, the Supreme Court addressed the application of the First Amendment to state rules regarding defamation actions, and reversed the judgment. Id. at 264.

173 See supra notes 125-28 and accompanying text, explaining that defamation was originally a strict liability tort.

174 376 U.S. at 271-72.
mation of public officials, forcing plaintiffs to show the defendant knew that the statements were false or recklessly disregarded the truth.\(^{175}\) The Court initially focused on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."\(^{176}\) Although the Court radically departed from the traditional common law fault requirements of defamation, the Court remained unclear about the extent to which the First Amendment actual malice standard applied.

2. The Public Nature of the Issue or the Notoriety of the Plaintiff?

In *Rosenbloom v. Metromedia, Inc.*, a plurality of four justices decided to apply the actual malice standard in all cases involving matters of public interest.\(^{177}\) In the view of the plurality, First Amendment protection extended to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."\(^{178}\) The remaining four justices deciding the case declined to adopt this issue-based analysis, however, and the focus of the Court thus remained on the notoriety of the plaintiff.\(^{179}\)

Subsequently, in *Gertz v. Robert Welch, Inc.*, a majority of the Court refused to extend the *New York Times* doctrine to statements concerning private plaintiffs.\(^{180}\) Noting the states' interest in protecting individuals from defamatory falsehood, however, the Court espoused a new rule authorizing states to determine their own liability standards for defamation claims involving private individuals, providing the state did not impose liability without fault.\(^{181}\) As a result, "forty-two jurisdictions in the United States [now] hold that negligence is the standard for private plaintiffs to

\(^{175}\) Id. at 280 & n.20 (referring to opinions in ten different states espousing a similar standard). Note that the Court in *New York Times Co. v. Sullivan* applied the heightened definition requirements only to cases concerning public officials. Id. at 283 n.23.

\(^{176}\) Id. at 270.

\(^{177}\) 403 U.S. 29, 43-44 (1971). However, the three-member plurality declined to determine the precise extent of such a rule's application. Id. at 44-45.

\(^{178}\) Id. at 44.

\(^{179}\) See id. at 57-62 (White, J., concurring); 62-78 (Harlan, J., dissenting); 78-87 (Marshall, J., joined by Stewart, J., dissenting).

\(^{180}\) 418 U.S. 323, 345-46 (1974) (plaintiff, an attorney for murder victim's family in wrongful death action, filed suit against a magazine for falsely stating that plaintiff "framed" murderer).

\(^{181}\) Id. at 347. The Court considered both the threat of injury to a private individual and the inherent danger to a media defendant in curtailing the availability of presumed damages. Id. at 346.
recover against a media defendant even when the subject matter of
the speech is of public concern."182 However, four state courts
recently applied the New York Times actual malice requirement to
defamation actions involving issues of public interest and concern,
even when the defamation plaintiff is a private person.183 These
decisions affirm the importance of debate and speech on matters of
public interest such as public health.184

In Gertz, the Court provided several reasons for allowing states
to protect private plaintiffs with lower standards of fault in defama-
tion actions.185 The Court recognized that public figures and offi-
cials have "significantly greater access to the channels of effective
communication" and are better able to engage in self-help by con-
tradicting the lie or correcting the error.186 The Court further
noted that private plaintiffs deserve more protection because,
unlike public plaintiffs, they do not "invite attention and com-
ment."

These Supreme Court decisions obligate courts to make two
determinations before applying the correct fault standard. First,
the court must decide whether a plaintiff is a public figure or pri-

adopting such a standard include 38 states. See id. at 423 n.1.

Thomson Newspapers, Inc., 648 So.2d 866, 869 (La. 1995) ("There is authority for applying
the actual malice standard when an article concerns public issues, even though the plain-
tiff is a private person.") cert. denied, 115 S. Ct. 2556 (1995); Turf Lawnmower Repair Inc.,
655 A.2d at 427, 434-35 (ru11ing that the actual malice requirement applies to businesses
that "intrinsically implicate[] important public interests, [such as] a matter of public
1995) (requiring private figure plaintiff, a physician, to satisfy actual malice standard
because of importance of public issue when proving defamation by innuendo or
implication).

184 See supra note 183

185 See 418 U.S. at 344-52.

186 Id. at 344.

187 Id. at 345.

188 "The practical task of classifying particular plaintiffs as public or private figures has
been left primarily to lower court judges, and the task has proved difficult." SMOLLA,
supra note 18, §§ 2.09[1], 2.29; see Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) ("[I]t is for the
trial judge in the first instance to determine whether the proofs show [plaintiff] to be a
public officer."). For cases deeming defamation plaintiffs to be public figures, see Tracy
A. Bateman, Who is "Public Figure" for Purposes of Defamation Action?, 19 A.L.R. 5th 1,
348 (1994); SMOLLA, supra note 18, § 2.09.

189 SMOLLA, supra note 18, § 2.09[2].
In *Gertz*, the Court distinguished two categories of public figures. The court first recognized those who "achieve such pervasive fame or notoriety [as to be] . . . a public figure for all purposes and in all contexts." The Court also created a category of limited-purpose public figures — individuals who either voluntarily injected themselves or were "drawn into a particular public controversy, [and who] thereby [became] a public figure for a limited range of issues." This second category may prove significant to agricultural product disparagement statutes when an agricultural producer, grower, or retailer is drawn into a controversy concerning the safety of a particular product.

A court must also determine whether the speech involves a matter of public concern. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Supreme Court adopted a rule for cases with private plaintiffs involving statements that do not address matters of public concern. With such statements, private plaintiffs need not prove "actual malice." In these cases, courts must also evaluate the nature of the statements and whether they concern purely private matters or relate to the public interest.

3. Awarding Damages: The Effect of the Fault Requirement

Concerned in part about media self-censorship, the Court in *Gertz* also curtailed damages. Specifically, the Court prohibited states from awarding presumed or punitive damages without proof of actual malice. In *New York Times*, citing past availability of damages without proof of fault, the Court explained its concern

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190 See 418 U.S. at 351.
191 Id.
193 See infrapart IV.D.1 (assessing the public nature of potential veggie libel plaintiffs).
195 Id. at 761 (finding that speech which does not involve matters of public concern are of "reduced constitutional value" and thus states need not require proof of actual malice to allow awards of presumed and punitive damages).
196 Id.
197 See 418 U.S. at 348-50.
198 Id. at 349.
that fear of damage awards might inhibit speech.\textsuperscript{199} Reiterating this concern, in \textit{Gertz} the Court held that a private plaintiff who establishes less than actual malice may only recover compensation for actual injury.\textsuperscript{200}

However, the Court subsequently retreated from this position. In \textit{Dun & Bradstreet},\textsuperscript{201} the Court permitted presumed damages without a showing of actual malice when the action is filed by a private plaintiff and the defendant's statements do not concern a matter of public interest.\textsuperscript{202} Deciding that defamatory speech which "concerns no public issue" does not warrant First Amendment protection, the Court reinforced the importance of speech relating to public matters.\textsuperscript{203}

4. \textit{Adding an Element of Falsity}

Considering the issue of falsity requirements, the Court in \textit{Gertz} emphasized the importance of the First Amendment.\textsuperscript{204} Although the Court opined that an "erroneous statement of fact is not worthy of constitutional protection,"\textsuperscript{205} it recognized that such statements are inevitable in "free debate." The Court held that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters."\textsuperscript{206} Since \textit{Gertz}, the Court has required both private and public plaintiffs to establish the falsity of the contested statements before recovering in a defamation claim against a media defendant.\textsuperscript{207} This also represents a dramatic

\textsuperscript{199} 376 U.S. at 277-78.
\textsuperscript{200} 418 U.S. at 349. Consistent with the Court's reasoning for relaxed burdens in private plaintiff cases, the majority also held that "state remedies . . . [should] reach no farther than is necessary to protect the legitimate interest involved." \textit{Id}. However, the Court explained that actual damages might include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." \textit{Id}. at 350.
\textsuperscript{201} 472 U.S. 749 (1985).
\textsuperscript{202} \textit{Id}. at 761.
\textsuperscript{203} \textit{Id}. at 757-60; \textit{see also} Connick v. Meyers, 461 U.S. 138, 145 (1983) (noting that "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values'" (citations omitted)).
\textsuperscript{204} 418 U.S. at 340.
\textsuperscript{205} \textit{Id}..
\textsuperscript{206} \textit{Id}. at 341. The Court firmly stated that "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." \textit{Id}. at 340.
\textsuperscript{207} Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986). Note that in \textit{Hepps}, which involved a media defendant, the Court had no "need [to] consider what standards would apply if the plaintiff sues a nonmedia defendant." \textit{Id}. at 779 n.4. Justice Brennan, in a concurring opinion, addressed this issue. Stressing his \textit{Dun & Bradstreet} concerns, Brennan noted the First Amendment principle that "the inherent worth of . . . speech in terms of its capacity for informing the public does not depend on the identity of
departure from the common law presumption of falsity in defamation claims. 208

In sum, the First Amendment requires a court to assess whether the complaining party in a defamation action is a public official, public figure, limited public figure, or private figure. 209 Next, a court must determine if the contested issue concerns a matter of public interest or if it is a purely private matter. 210 These determinations often define the level of fault required to prove defamation. 211 The level of fault also impacts the plaintiff's recovery of damages. 212 The First Amendment permits only actual damages for defamation actions unless a plaintiff can also show that the defendant made the statements with actual malice, or that the statements did not involve a matter of public concern. 213 Finally, the First Amendment requires a public or private plaintiff to prove the falsity of a media defendant's statements. 214

Thus, just as the common law requires a product disparagement plaintiff to establish the falsity of the statement, fault or malice by the defendant, and actual damages caused by the statement, the Supreme Court now requires defamation plaintiffs to overcome similar constitutional hurdles. Therefore, to determine whether veggie libel laws may withstand constitutional scrutiny, they must be evaluated under current defamation jurisprudence.

IV. THE CONSTITUTIONAL SHORTCOMINGS OF VEGGIE LIBEL LAWS

Following the Alar controversy, the rigorous requirements resulting from the Supreme Court's constitutional treatment of defamation and the stringent common law burdens remaining for product disparagement actions provided ripe grounds for legislative reform. 215 Several state legislatures established causes of

the source, whether corporation, association, union, or individual." Id. at 780 (Brennan, J. concurring) (citing 472 U.S. at 781 (Brennan, J., dissenting) (quoting First National Bank v. Bellotti, 435 U.S. 765, 777 (1978))).

208 See supra notes 121-22 and accompanying text.
209 See supra notes 188-93 and accompanying text.
210 See supra notes 194-96 and accompanying text.
211 See supra notes 180-87 and accompanying text.
212 See supra notes 197-203 and accompanying text.
213 See supra note 201 and accompanying text.
214 See supra note 207 and accompanying text.
215 See Barolo Says Streamlining Office Will Enhance Credibility of Program, supra note 91, at 995 (announcing continued efforts of pesticide industry to enact agricultural product disparagement statutes); see also Suits Spur Product Disparagement Statutes, supra note 25, at 3.
action similar to product disparagement or defamation actions. Under most of these statutes, plaintiffs must establish five main elements: (1) dissemination to the public in any manner; (2) of false information that the disseminator knows to be false; (3) stating or implying that a perishable food product is not safe for public consumption; (4) information is presumed false when not based on reasonable and reliable scientific inquiry, facts, or data; and (5) the disparagement provides a cause of action for damages. While these elements resemble those of defamation and disparagement under common law, the statutes relax the plaintiff’s heavy burden for many of the elements.

Treatment of the falsity and fault elements in the statutes might generate the most concern. By establishing a negligence standard of fault and presuming falsity, the veggie libel laws seek to circumvent the burden of proof required by the Constitution. As a result, the enactments might not withstand constitutional scrutiny. A constitutional attack would focus on the nature of the plaintiffs, the nature of the defendants, and the nature of the speech.

A. “Of and Concerning” an Agricultural Food Product

Unlike common law product disparagement or defamation actions, veggie libel laws require only that a statement be “of and concerning” an agricultural food product. Under the statutes,

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216 Only one statute specifies that “[t]his statutory cause of action is not intended to abrogate the common law action for product disparagement or any other cause of action otherwise available.” Idaho Code § 6-2003(6); see also Okla. Stat. Ann. tit. 2, § 3012 (noting that the statute should not limit any cause of action otherwise available under “the Oklahoma Deceptive Trade Practices Act or any state or federal slander or libel law”).

217 See, e.g., supra note 80 (citing statutes enacted in Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Mississippi, Ohio, Oklahoma, and South Dakota).

218 See supra notes 64-68 and accompanying text.


220 See Johnson & Lowry, supra note 7, at 22-23 (explaining potential dangers and effects of product disparagement laws).

221 See id.

222 See, Fla. Stat. ch. 865.065; La. Rev. Stat. Ann. § 3:4502(1); Miss. Code Ann. § 69-1-253(a) (“[D]isparagement means dissemination to the public in any manner of any false information . . . that a perishable agricultural . . . food product is not safe for con-
the disparaging statement need not concern the plaintiff, and the statutes articulate to whom a cause of action is available. Generally, "any producer" may seek damages for losses resulting from disparaging statements about the fruits or vegetables they sell.

This expansive provision responds to the legal obstacles faced by the apple growers faced in their suit. The district court decided that the statements were "of and concerning" apples, and that "all apples were as suspect even if Alar-free." Therefore, while the statements did not identify or refer to any of the plaintiffs specifically, "to the extent that identification of growers is relevant at all, every apple grower in the country was identified." The newly-enacted laws also opened the door to non-growers, such as those who produced apple juice and apple sauce, who were injured by the controversy.

The libel laws also require that the statements "concern" the safety of the food products. Requiring that the disparaging statement "state or imply that the product is not safe for consumption by the consuming public" narrows the scope of pro-

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223 See supra note 87; see, e.g., LA. REV. STAT. ANN. § 3:4502(1).
224 All of the statutes require that the statements concern the safety of the food for public consumption. See supra note 90.
225 See supra notes 57-59 and accompanying text.
227 Id.
228 See supra note 47 and accompanying text (describing range of parties injured by the Alar controversy).
229 ALA. CODE § 6-5-621(1) (requiring dissemination of "information that a perishable food product ... is not safe for human consumption"); ARIZ. REV. STAT. ANN. § 3-113(A) (same); FLA. STAT. ch. 865.065(2) (same); GA. CODE ANN. § 2-16-2(1) (same); LA. REV. STAT. ANN. § 3:4502(1) (same); MISS. CODE ANN. § 69-1-253(a) (same); S.D. CODIFIED LAWS ANN. § 20-10A-1(2) (same); see IDAHO CODE § 6-2002(1)(a) ("Statement clearly imputes the safety of the product."); OKLA. STAT. ANN., tit. 2, § 3011 ("[D]isparagement means dissemination of information which casts doubt on the safety of any perishable agricultural food product."); S.D. CODIFIED LAWS ANN. § 20-10A-1(2) ("[D]isposition ... of any information ... that states or implies that an agricultural food product is not safe for consumption."). Contra IDAHO CODE §§ 6-2002(1)(a) to -2003(4) (requiring that the statement clearly concern the specific plaintiff's product rather than merely "a generic group of products"). Some states do not even expressly require that the statement be "of and concerning" an agricultural food product cultivated in its state. See ALA. CODE § 6-5-622; GA. CODE. ANN. § 2-16-2(2); LA. REV. STAT. ANN. § 3:4502(2); MISS. CODE ANN. § 69-1-253(a); S.D. CODIFIED LAWS ANN. § 20-10A-1(2).
230 See, e.g., LA. REV. STAT. ANN. § 3:4502.
tected statements, but this requirement may not narrow the class of potential plaintiffs.

B. Dissemination versus Publication

Many statutes also alter the level of proof required for a statement to qualify as a "publication." Although defamation and common law disparagement both require publication, many of the veggie laws require only that the information be "disseminated to the public." However, since publication already requires a statement communicated to a third person, this change may not prove as significant as other changes achieved with the laws.

A court interpreting the meaning of "disseminate" may require that the plaintiff meet the requirements of its literal definition. A court might insist that the communication or publication be "widespread" or "become general knowledge." However, with the role of the modern media in society and its ability to easily transmit information, this judicial enhancement may have little practical effect.

C. The Availability of Damages

Veggie libel laws often remove the special damages requirements. Under common law, product disparagement requires the plaintiff to show actual customer loss. By contrast, a plaintiff relying on an agricultural food product disparagement statute need only "suffer damage as a result of another person's disparagement" in order to recover. Some state statutes also permit punitive


232 See supra note 137 and accompanying text.


234 For example, within weeks of publication of the NRDC's report concerning carcinogenic effects of pesticides, the report received national attention after a "60 Minutes" broadcast. See supra notes 44-49 and accompanying text.

235 See supra notes 132-36 and accompanying text.

damages. Also, the statutes' treatment of other constitutional burdens, such as fault and falsity requirements, may significantly impact the availability of damages for an agricultural food product disparagement plaintiff.

D. The Fault Requirement

The standard of fault articulated in the statutes may enable a plaintiff to recover damages more easily than under the common law. Although the enactments vary somewhat, the model statute requires only that the "disseminator knew or should have known [the statement] to be false." Assuming that growers or producers do not qualify as public figures, such a provision is not necessarily unconstitutional since Gertz authorized states to permit recovery of damages by private individuals under a standard lower than actual malice. Although food safety is arguably a matter of public concern, the appropriate standard of fault need not be actual malice.

Thus, analysis of the constitutionality of the statutes' standard requires an assessment of the nature of the plaintiff. Under defamation jurisprudence, to determine the appropriate fault standard, a trial court must determine whether a plaintiff is a public figure, limited public figure, or private person.

1. Public or Private Status of "Producer" Plaintiffs

To provide guidance to the lower courts, the Supreme Court in Gertz articulated two types of public figure plaintiffs. Some plaintiffs are so famous that they warrant public figure status "for all purposes and in all contexts." Others may be "limited-purpose public figures" after they "voluntarily inject [themselves] or [become] drawn into a particular public controversy."

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239 418 U.S. at 347-48.
240 See infra part IV.D.2.
241 See supra notes 188-93 and accompanying text.
242 See id.
243 418 U.S. at 351.
244 Id.
Thus, one rationale articulated in *Gertz* to justify a reduced burden for private defamation plaintiffs may not apply to growers. Although the growers may not “invite attention”245 in their individual capacity, like public figures, they enjoy significant access to the “channels of effective communication.”246 The Court has clarified that such access requires “regular and continu[ed] access to the media.”247 The frequent and widespread statements by spokespeople for agricultural trade groups (such as those made by the International Apple Institute in the days following the “60 Minutes” broadcast) demonstrate that growers can gain significant access to the media.248 Because of this access, courts may conclude that growers possess the ability to vigorously and successfully seek the public’s attention and should thus qualify as public figures.249

One New York federal district court, for example, deemed the National Nutritional Foods Association (a health food industry trade association of retailers, manufacturers and distributors) a public figure.250 In dismissing the libel suit, the court pointed to efforts by the group to promote and publicize its products to members of the industry and the consuming public.251 The court also

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245 Id. at 345.
246 Id. at 344.
247 Steaks Unlimited Inc. v. Deaner, 623 F.2d 264, 273 (3d Cir. 1980) (citing Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979)). Requiring access to the media is consistent with the principles espoused in *New York Times*. The Court noted in that case that “the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies” and recognized the “national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” 376 U.S. at 270 (citations omitted).
248 See, e.g., *A Dose of Food Product Damage Control*, 22 NAT’L J. 2236 (1990) (noting that after the “60 Minutes” broadcast on Alar, the International Apple Institute “began what would become two weeks of filing a press release every day to challenge the substance of the show”); Peter Carlson, *The Image-Makers: A Mind-Bending Tour Through the World of Washington Public Relations*, WASH. POST MAG., Feb. 11, 1990, at W31 (outlining the efforts of the apple industry’s public relations team to combat the negative publicity surrounding Alar); *Industry Claims Report Overstates Risk to Kids; Produce Industry’s Reaction to the Natural Resources Defense Council’s Report on Pesticide Residues in Fruits and Vegetables*, SUPERMARKET NEWS, Mar. 6, 1989, at 1 (challenging the conclusions of the NRDC’s report in a press statement released by the Center for Produce Quality, “the produce industry’s nonprofit public relations foundation”).
249 418 U.S. at 342 (“Those who, by reason of . . . the vigor and success with which they seek the public’s attention are properly classed as public figures.”).
250 National Nutritional Foods Ass’n v. Whelan, 492 F. Supp. 374, 382 (S.D.N.Y. 1980) (holding that the National Nutritional Foods Association was a public figure because it “thrust itself into the forefront of public attention on a controversial matter of great public importance”); see also Bateman, supra note 188, at 280-84, 348-49 (outlining cases where “farmers, ranchers and the like” as well as “trade associations and cooperatives” have and have not been held to be public figures).
251 See *Whelan*, 492 F. Supp. at 381 (noting another court’s refusal to permit the same plaintiff as “an entire industry . . . [to] sue on grounds of defamation”).
referred to the plaintiff's status as one of the largest representatives of health food products.252

Another judge opined that "[b]y placing its products on the market [a seller] invites examination and criticism, and has access to advertising further to explain and defend them."253 The agricultural food industry, a "$40 billion industry," spends significant capital on advertising.254 For instance, the Florida Citrus Commission recently spent one million dollars to advertise on Rush Limbaugh's radio show alone.255

Another court assessed one plaintiff's intensive advertising campaign and the attendant costs and deemed a corporation selling steaks to be a "limited-purpose" public figure plaintiff.256 Reluctant to find that the plaintiff had "effectively . . . assumed the risk of potentially unfair criticism by entering into the public arena and engaging the public's attention,"257 and thereby qualifying the corporation as a public figure, the court limited its privilege solely to the controversy giving rise to the litigation.258

While courts have occasionally designated corporations as public figures,259 individual growers may be able to avoid this designation. Even though many growers organize into cooperatives,260 a court

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252 Id.
253 Dairy Stores, Inc. v. Sentinel Publishing Co., 510 A.2d 220, 239 (N.J. 1986) (Garibaldi, J. concurring). But see Turf Lawmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417 (N.J. 1995), cert denied, 64 U.S.L.W. 3467 (U.S. Jan. 8, 1996) (No. 95-424). In the majority opinion, Justice Garibaldi limited application of the actual malice requirement to cases involving businesses whose "activities . . . intrinsically implicate[ ] an important public interest." Id. at 427. The New Jersey Supreme Court further clarified that the actual malice standard is inapplicable to small individually-owned shops whose products and services do not involve those of legitimate public interest. Id.
255 Id.
257 Id.
258 Id. at 274 n.47.
260 Standard and Poor's lists several cooperatives of agricultural growers: Farsouth Growers Cooperative; Fiesta Farms Cooperative; Roper Growers Cooperative; Growers Cooperative Juice Co.; South Bay Farmers Cooperative; Strathmore Cooperative Association; Manson Growers Cooperative; Dora Mount Growers Cooperative; Snokist Growers.
may find it difficult to deem an individual grower to be a public figure because the statutes authorize individual growers to file suit. The statutes also entitle growers' cooperatives to sue as "manufacturers or producers of agricultural food products." In such a suit, designating the plaintiff as a limited-purpose public figure would impact the fault requirement noted in the statutes. Under *New York Times* and its progeny, negligence alone would not suffice in a suit concerning a public matter and a public figure plaintiff. The First Amendment requires that the public figure plaintiff prove the defendant made the statement with actual malice. Consequently, statutes under which the plaintiff must establish that the defendant "knew or should have known the statement to be false" would not satisfy this constitutional requirement. The Court reiterated in *Bose Corp. v. Consumers Union, Inc.* that to prove actual malice, a public figure plaintiff must prove the

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261 See Bateman, supra note 188, at 282-84 (citing cases in which "plaintiff farmers, ranchers and the like were not public figures for purposes of their defamation actions"). In *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir. 1981), cert. denied, 454 U.S. 1130 (1981), the court held that a broadcast concerning the deaths of cows at plaintiff's ranch, after rancher had publicized a cattle drive seven years earlier, did not make the rancher a "public figure." 642 F.2d at 374. The court also noted the plaintiff's lack of access to effective methods of communication. *Id.*

262 See supra note 80 and accompanying text.

263 ALA. CODE § 6-5-622 (authorizing a suit by "any person who produces, markets, or sells a perishable food product"); ARIZ. REV. STAT. ANN. § 3-113(A) (granting any producer or any association representing producers the right to sue); FLA. STAT. ch. 865.065(3)(a) (same). In contrast, Idaho, Louisiana, Mississippi, Oklahoma and South Dakota limit plaintiffs to "producers." IDAHO CODE § 6-2003(1); LA. REV. STAT. ANN. § 3:4503; MISS. CODE ANN. § 3:4502-9-8; OKLA. STAT. ANN. tit. 2, § 3010; S.D. CODIFIED LAWS ANN. § 20-10A-2. Ohio's law includes notice requirements for association plaintiffs. The statute requires that the association of producers notify its members of the suit and distribute any award among those members participating in the suit. OHIO REV. CODE ANN. § 2307.81(D).

264 See 418 U.S. at 351-52 (holding that some plaintiffs may be treated as public figures for a limited range of issues and thus subject to heightened fault requirements pertaining to public figure plaintiffs).

265 376 U.S. at 280 (deciding that public official plaintiff must prove that defendant acted with actual malice, "with knowledge that it was false or with reckless disregard of whether it was false or not"); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) (applying *New York Times* standard to public figure plaintiffs); *Dun & Bradstreet*, 472 U.S. at 761 (creating new rule that private plaintiffs may receive punitive damages even without showing "actual malice," when relevant statements do not focus on matters of public concern).

266 376 U.S. at 280; *Curtis Publishing*, 388 U.S. at 160.

267 See, e.g., L A. REV. STAT. ANN. § 3:4502(1).
defendant realized the statement's falsity or "subjectively entertained serious doubt" regarding its truth.268 Agricultural food product disparagement statutes, except those of Arizona, Idaho, and Texas, lack such a standard.269

2. Matters of Public Concern

While a court may or may not accept an argument that growers or producers qualify as public figures, courts will almost certainly rule that food disparagement laws implicate an issue of public concern.270 After constitutionalizing defamation law, the Supreme Court stopped focusing so much on whether the allegedly defamatory statement involved a matter of public concern.271 Nevertheless, in Dun & Bradstreet, the Court commented that "every . . . case in which this Court has found constitutional limits to state defamation laws . . . involved expression on a matter of undoubted public concern."272 Such speech is "at the heart of the First Amendment's protection."273

To resolve this issue in an agricultural food product disparagement suit, a court would probably address the statement's "content, form[,] and context . . . as revealed by the whole record."274 Accordingly, courts have recognized the value of publishing information affecting the public's role as consumers.275 A federal district court specifically noted the importance of information


269 Arizona's remedy is available only to plaintiffs who suffer "damages as a result of malicious public dissemination." ARIZ. REV. STAT. ANN. § 3-113(A). Idaho's statute requires that "the defendant made the statement with actual malice . . . he knew the statement was false or acted in reckless disregard of its truth or falsity." IDAHO CODE § 6-02002(1)(d). Texas further heightened its fault requirement, by forcing plaintiffs to prove that the defendant "knows the information is false." TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a)(2). Such a requirement of actual knowledge satisfies the actual malice standard.

270 See infra notes 272-78, 283 and accompanying text.

271 See Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 45 (1971) (holding in a plurality opinion that actual malice standard applies to statements concerning events of public or general interest); 418 U.S. at 343 (rejecting the Rosenbloom approach because it could lead to "unpredictable results and uncertain expectations"). Ironically, in Dun & Bradstreet, 472 U.S. at 749, the Court articulated yet another distinction between cases brought by private individuals concerning a "purely private matter" and those concerning matters of public interest, leading the Court to embark on a public interest inquiry. See id. at 761-63.

272 472 U.S. at 756.

273 Id. at 758-59 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978) (citation omitted)).

274 Id. at 761 (citing Connick v. Meyers, 461 U.S. 138, 147-48 (1983)).

regarding "health and safety problems in consumer products." The court further expressed concern that "[i]t would be unfortunate indeed if the threat of product disparagement stifled the free flow of such information." After all, the consuming public relies heavily on the media to broadcast and report on these matters.

Not surprisingly, the federal government expressly recognizes the value of public debate on such issues, affords access to the regulatory process, and provides information on these products. Much of the development and enforcement of environmental law has depended on public participation. However, public partici-

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277 508 F. Supp. at 1271.

278 See James L. Huffman, Truth, Purpose, and Public Policy: Science and Democracy in the Search for Safety, 21 ENVTL. LAW. 1091, 1094-95 (1991) (book review) ("[P]rudent consumers pursue their values on the basis of the information they have, often with a confidence not justified by their knowledge. . . . Without better information, they will not accept that a better choice exists."); see also William Rogers, Executive Director, South Carolina Press Association, Remarks in Opposition to South Carolina S. 160 Before the Subcommittee of the South Carolina Senate Agriculture and Natural Resources Committee (Mar. 15, 1995) (transcript on file with the Virginia Environmental Law Journal).


280 See, e.g., Environmental Defense Fund, Inc. v. Ruckelhaus, 439 F.2d 584 (D.C. Cir. 1971) (holding that the Secretary of Agriculture improperly refused to suspend registration of a pesticide upon the Environmental Defense Fund's petition for review); Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (holding that environmental organizations had standing to challenge the Secretary of Agriculture's decision after alleging the injury of biological harm to man and other living things resulting from the Secretary's failure to take action following the group's petition to restrict the use of DDT).
pation depends on the availability of information.\textsuperscript{281} Recognizing this, the Supreme Court noted that "the free flow of commercial information is indispensable . . . to the formation of intelligent opinions as to how that system ought to be regulated or altered."\textsuperscript{282}

In an agricultural food product disparagement statute, the contested statement necessarily concerns food safety or, impliedly, the environmental effects of agrichemicals.\textsuperscript{283} Whether the purpose of the speech is to inform the public of potential dangers or to alert them of a proposed regulation or legislation, such speech merits First Amendment protection.\textsuperscript{284} Nonetheless, even if courts deem the speech covered by agricultural disparagement statutes to concern matters of public interest, the statutes' negligence standard may be constitutionally sufficient as long as the plaintiff does not qualify as a public figure.\textsuperscript{285} In all cases, the fear of resulting liability may cause those concerned with these issues to censor themselves and remain silent.

E. Presuming Falsity

Traditionally, states can restrict the exercise of free speech constituting defamation and, derivatively, product disparagement. The Court has maintained this traditional exception to the general right of free speech, reasoning that states have a "legitimate state interest . . . [in] compensat[ing] . . . individuals for the harm inflicted on them by defamatory falsehood."\textsuperscript{286} The Court not only "narrowed the scope" of this exempted protection since \textit{New York Times} and

\textsuperscript{281} 376 U.S. at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (1942) ("The protection of the public requires not merely discussion but information."). \textit{cert. denied}, 317 U.S. 678 (1942).
\textsuperscript{282} \textit{Virginia Bd. of Pharmacy}, 425 U.S. at 765.
\textsuperscript{283} See Barolo Says Streamlining Office Will Enhance Credibility of Program, supra note 91, at 995. Note also that the precipitating events, the Alar controversy and the failed \textit{Auvil} suit, concerned the pesticide Alar. \textit{See supra} part II.A.1.
\textsuperscript{284} In the "60 Minutes" report, NRDC highlighted the dangers of Alar to the consuming public to pressure the EPA and FDA to reconsider their methodology for calculating risk. \textit{Auvil II}, 800 F. Supp. at 943; \textit{see also supra} note 276 (outlining cases designating food product safety as a matter of public concern).
\textsuperscript{285} In \textit{Gertz}, the Court rejected the approach preferred by the \textit{Rosenbloom} majority, and authorized states to determine their own liability standards, so long as the state does not impose liability without fault when the action involves a private figure. 418 U.S. at 347; \textit{see also supra} part III.C.1-2.

In Alabama, by providing that "[i]t is no defense . . . that the actor did not intend, or was unaware of, the act charged," the legislature may have tried to make those who "disparage" strictly liable for the effects of their statements. A court may thus find this provision unconstitutional under \textit{Gertz}. \textit{See Ala. Code} § 6-5-623.
\textsuperscript{286} 418 U.S. at 341 (emphasis added).
its progeny,287 but also imposed on plaintiffs the burden of proving a statement’s falsity.288 Seven of the eleven states with agricultural food product disparagement laws, however, ignored this require­ment, authorizing state courts to presume falsity if the information “is not based upon reasonable and reliable scientific inquiry.”289

In so doing, these states effectively shifted the burden of proof to all defendants to establish the accuracy or veracity of their state­ments.290 This conflicts with the Supreme Court’s decisions on the matter.291 In Philadelphia Newspapers, Inc. v. Hepps,292 the Court held that common law presumptions of falsity are unconstitutional when a plaintiff seeks damages against a media defendant and speech of public concern is at issue.293 Explaining its holding, the Court focused on the potential “chilling effect” of an alternative ruling.294 Furthermore, weighing the potential impact against the minimal increase in the plaintiff’s burden of proof, the majority opined that evidence regarding fault would “generally encompass evidence of the falsity of the matters asserted.”295

Hepps followed developing defamation jurisprudence. The applicable state law in New York Times afforded a defense of truth.296 However, reasoning that such a defense would compel critics to guarantee the truth of all factual assertions, potentially

288 See supra notes 204-08 and accompanying text.
289 ALA. CoDE § 6-5-621(1); GA. CODE ANN. § 2-16-2(1); LA. REV. STAT. ANN. § 3:4502(1); MISS. CODE ANN. § 69-1-253(a); see also ARIZ. REV. STAT. ANN. § 3-113(E)(1) (defining false information as information that is not based on reliable science and which the disseminator knows or should have known to be false); FLA. STAT. ch. 865.065(2)(a) (same); OHIO REV. CODE ANN. § 2307.81(B)(2) (same). In contrast, Colorado requires that the statement be “materially false.” COLO. REV. STAT. § 35-31-101. While South Dakota requires that the speaker knew that the statements were false, S.D. CODIFIED LAWS ANN. § 20-10A-1(2), Idaho obligates a plaintiff to satisfy an actual malice standard. IDAHO CODE § 6-2002(d).
290 See Johnson & Lowry, supra note 7, at 23.
291 See, e.g., 418 U.S. at 340 (“Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.”).
293 Id. at 776-77.
294 Id. at 777 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)). In New York Times, the Court also noted the “consistent[ ] refus[al] to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker.” 376 U.S. at 271. The Court reasoned that such a burden would lead to media “self-censorship.” Id. at 279.
295 Hepps, 475 U.S. at 778.
296 376 U.S. at 267 (citing Parsons v. Age-Herald Publishing Co., 61 So. 345, 350 (Ala. 1913) (“A defendant's privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based.”)).
leading to self-censorship, the Court decided the defense was unconstitutional.297 Thus, the Supreme Court demonstrated its belief that doubt about the provability of truth, even when believed to be true, "or fear about the expense of having to do so" in a court of law, may deter speech.298

The seven veggie libel statutes presuming falsity raise similar concerns. While a speaker may have confidence in the truth of a statement, concerns regarding the ability to prove the statement’s veracity may prompt self-censorship, thus inhibiting the exercise of free speech.299 The discovery conducted in the Auvil case illustrates the difficulty of satisfying the falsity standards enacted in Alabama, Arizona, Louisiana, Florida, Georgia, Mississippi, and Ohio.300 To establish the truth or falsity of the statements made in the "60 Minutes" broadcast, the parties argued about the causes of cancer, the validity of animal tests as predictors of human risk, the appropriate mathematical models to use to extrapolate from animal studies to human risks, and the appropriate cancer risks for consumers.301 After thirteen months of litigation,302 the federal district court ruled that the plaintiffs could not prove the defendant’s statements concerning these issues to be false.303

Ironically, one of the grower’s experts testified in the Auvil litigation that “there is no such thing as scientific certainty because there is always tomorrow and always new evidence and you never know what the next day will bring.”304 While the statutes do not call for scientific certainty, the reasonableness or reliability of “scientific inquiry, facts, or data”305 involves the same uncertainty.306 More importantly, uncertainty about whether a study or method is “reasonable” or “reliable” may have the chilling effect long feared by the Supreme Court of “deter[ring] journalists from pursuing stories about products that endanger public safety.”307

297 376 U.S. at 278-79.
298 Id. at 279.
299 376 U.S. at 271-72; Hepps, 475 U.S. at 777.
300 See Johnson & Lowry, supra note 7, at 21-23.
301 Id. at 21.
302 Id. at 22.
304 Johnson & Lowry, supra note 7, at 22.
305 GA. CODE ANN. § 2-16-2(1); MISS. CODE ANN. § 69-1-253(a).
306 See Johnson & Lowry, supra note 7, at 23.
307 Suits Spur Product Disparagement Statutes, supra note 25, at 5. Similarly, the costs of attempting to ensure the veracity of statements may deter reports on the safety of pesticides and their use on crops. See Johnson & Lowry, supra note 7, at 21-22 (outlining the discovery “odyssey” which included “exchang[es] of thousands of pages of documents[.]
The agriculture and pesticide industries might argue that, by requiring that the defendants base their statements on reasonable and reliable scientific data, these statutes do not seek to discourage debate, but instead serve to prevent exaggerated or mischaracterized reports of nonexistent dangers. However, the Court expressly addressed the issue of exaggeration in *Cantwell v. Connecticut*, finding that "in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of citizens of a democracy." Acknowledging instances where "speech is unknowably true or false," the Court in *Hepps* reaffirmed the First Amendment principle that "some falsehood [be protected] in order to protect speech that matters."

V. Conclusion

Information and reports on the safety of agricultural food products is clearly "speech that matters." Judicial interpretation and treatment of the agricultural food product disparagement laws will define the extent to which the First Amendment protects speech concerning pesticides and food safety. Since this speech "fits easily within the breathing space that gives life to the First Amendment," courts should assess the constitutionality of the agricultural food product disparagement laws under defamation jurisprudence. Such an analysis will focus on the fault and falsity requirements outlined in the statutes.

To analyze the articulated fault standards, a court must determine whether the dispute concerns a matter of public interest. Because of the significant public interest in food safety, a court will probably find that a dispute covered by the agricultural product disparagement laws involves a matter of public concern. However, assessing the appropriate fault standard requires a court to decide whether the plaintiff is a "public figure." A court may find that...
an individual plaintiff has significant access to the media or is sufficiently well-known to warrant public figure status. While a producer or cooperative, such as Ocean Spray, may qualify as a public figure, an individual farmer could easily qualify as a private figure. If so, the laws requiring only that the defendant "knew or should have known" would meet constitutional standards.\(^{316}\)

By contrast, those statutes defining false information as information that "is not based upon reasonable and reliable scientific inquiry"\(^{317}\) may not survive constitutional challenge. In assessing this presumption of falsity, a court must consider the importance of the speech affected and the possible chilling effect of the statute on the media and public.\(^{318}\) Affirming these principles, the Supreme Court made clear that a defamation plaintiff must prove the falsity of a media defendant's statement.\(^{319}\) Because the prohibited statements may be unknowably true or false, they too must be afforded First Amendment protection.\(^{320}\) Courts in Alabama, Arizona, Florida, Georgia, Louisiana, Mississippi, Ohio, and South Dakota confronted with claims of agricultural disparagement should recognize these principles and provide this important speech with the constitutional protection it deserves.\(^{321}\)

\(^{316}\) Louisiana, for example, is one state employing this standard. See La. Rev. Stat. Ann. § 3-4502(1).


\(^{318}\) See supra note 307 and accompanying text.

\(^{319}\) See supra notes 292-93 and accompanying text.

\(^{320}\) See supra notes 300-311 and accompanying text.

\(^{321}\) Neither Colorado nor the Idaho statute contain the presumption of falsity. See supra note 289.