Presumed Guilty: How the European Court Handles Criminal Libel Cases in Violation of Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms

This Note challenges the European Court of Human Rights’ (ECtHR) acceptance of its member states’ common practice of allowing the burden to prove truth or good faith to be placed on the defendant in criminal defamation cases. The ECtHR is charged with the duty of protecting European citizens from violations of the Convention for the Protection of Human Rights and Fundamental Freedoms. Among the rights enshrined in the Convention are the rights to free speech and the presumption of innocence. While the court has expressed concern over the presumption of innocence of the person allegedly defamed, it has allowed presumptions of falsity and bad faith to be placed on the defendant. This Note argues that these presumptions both negate the presumption of innocence and fail to comport with the court’s test for acceptable presumptions in a criminal trial. Finally, suggestions are made for the correction of this error that better comport with the presumption of innocence and the belief espoused by the court, that freedom of expression is one of the foundations of a democratic society.

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INTRODUCTION

The international bestseller *The Girl with the Dragon Tattoo*\(^1\) begins with one of the protagonists, Mikael Blomkvist, being convicted of criminal libel. As the editor of a monthly political magazine, he has accused Swedish industrialist Hans-Erik Wennerström of a number of felonies, including gun-running. Prior to his trial, several of his sources had vanished, and he was no longer sure of the truth of what he wrote.

Though the book does not comment on it directly, the disappearance of his sources would have been a very serious problem for Blomkvist at trial. Namely, he would have been unable to prove that his information was correct or that he had had reasonable grounds for his assertions, a required showing by the defendant to escape criminal libel in Sweden.\(^2\) As a result, for nothing more than the words he published, which incited no acts of violence, implicated no national security concerns, were not written out of personal malice, were not proved false and certainly seemed to be on a matter of high public interest, Blomkvist is sentenced to three months in prison and a hefty sum of damages. At the end of the book, thanks to the investigative prowess of Lisbeth Salander, the mysterious, tattooed heroine best known from the *Millennium Series* trilogy, we discover that Blomkvist’s original report actually understated the magnitude of Wennerström’s crimes. Blomkvist had been right all along but still had to serve a prison sentence.

Any debate regarding the placement of the burden of proof in free speech cases will have high stakes because there is a very real

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and serious risk of a “chilling effect” on the free flow of ideas and information. As Judge Learned Hand once said, in an observation that applies to any country that values freedom of speech, “[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”3 To this end, the Supreme Court of the United States has pointed out the concern that “[w]hatever is added to the field of libel is taken from the field of free debate.”4

Unlike in the United States, criminal law largely governs defamation proceedings in continental Europe.5 Additionally, as in the fictional example above, the practice of placing the burden on the defendant to prove the truth of his assertions is followed by many European states, including Sweden.6 While the European Court of Human Rights (ECtHR or the Court) has accepted this, it has also held that both good faith and fair report are valid defenses if proven by the defendant.7 As a result, to escape liability, a defendant in a criminal libel case has the burden to rebut either a presumption of falsity or bad faith, or to show fair report. This is nearly the opposite of the practice in the United States, which requires the plaintiff to show both fault on the part of the defendant and falsity in his statements.8

The placement of the burden of proof in a criminal case implicates the presumption of innocence, a prominent feature of almost all first world democracies.9 This Note argues that by allowing Con-

vention States to place such a heavy burden of proof on the defendant in a criminal case, and a correspondingly low one on the prosecution, the ECtHR has failed to uphold Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) by violating the presumption of innocence of libel defendants. In doing so, the court runs a serious risk of creating a “chilling effect” on journalism in Convention States.

Part One will trace both the creation and role of the ECtHR and the Convention. It will then provide a background for how the court reviews libel cases under Articles 6, 8 and 10 of the Convention. It will follow with an overview of the defenses available to those accused of libel. Finally, it will review the court’s current reasoning regarding the placement of the burden of proof in criminal defamation cases.

Part Two will start by comparing the ECtHR’s reading of the evidentiary requirements of the presumption of innocence with other international views. It will then examine problems in the logic the ECtHR uses to justify its position, particularly in the case of criminal defamation.

Part Three will recommend that the ECtHR take one of two possible paths to correct its violation of the presumption of innocence and thwart the “chilling effect” it poses to the free exchange of ideas in Europe. First, it could adopt a toned down version of the required showing in the United States. In the second, likely more palatable choice, it could adopt the approach taken in Dalban v. Romania, a case discussed in Part Three.

I. HOW THE EUROPEAN COURT OF HUMAN RIGHTS HANDLES CRIMINAL DEFAMATION CASES

A. The European Court of Human Rights

The ECtHR is widely viewed as one of the most important courts of international adjudication. It was created by an international agreement, and it serves to protect the rights enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms from violations by members of the Council of Europe.


11. Kozlowski, supra note 7, at 133 (citing Mark Janis et al., European Human Rights Law 64 (2d ed. 2000)).
The Convention contains an assortment of rights adopted by the Council of Europe. As the only court that interprets those rights, “issuing judgments that are final and binding on the signatory states, the ECtHR is entrusted with an awesome responsibility—to protect human rights and fundamental freedoms throughout Europe.”

To reach the ECtHR, an applicant must have exhausted all of his domestic remedies. In this scheme, the court acts to limit the power of Convention members by providing a place “where individuals can come to claim redress against the state, while standing in the role of a ‘victim’ . . . of official violence.”

After the ratification of the Convention, the ECtHR worked with the European Commission on Human Rights, both of which were created by Article 19 of the Convention. However, in November of 1999, Protocol No. 11 combined the Commission and the court into one entity. Prior to that, the Commission’s role was to conduct a first review of cases, attempt to reach a settlement and, if necessary, refer the cases to the court. If it chose to pass on the case, the Commission would first give a preliminary opinion on the merits.

There are a total of forty-seven judges on the ECtHR, one for each member state of the Council of Europe. The Council of Europe’s Parliamentary Assembly elects judges for renewable six-year terms. However, no judge can serve past the age of seventy. When deciding cases, the usual judicial panel has seven judges; however, for more important cases, such as those affecting the interpretation of the Convention, a chamber can relinquish its jurisdiction to the Grand Chamber. The Grand Chamber consists of seventeen judges including the president, vice presidents, section presidents and a nine-month alternating rotation of other judges.

The ECtHR, unlike a common law court, is not bound by stare decisis. It can follow past decisions but is not forced to do so. However, the court tends to follow its past reasoning when deciding cases, a practice that is helpful to member countries, as it aids them in conforming their behavior to a set legal standard and lends greater

12. Kozlowski, supra note 7, at 134.
15. Kozlowski, supra note 7, at 139.
credibility to the court’s decisions.\textsuperscript{16}

\textbf{B. Criminal Libel and the Convention on Human Rights}

Three articles of the Convention have been of primary importance to the court in its jurisprudence regarding criminal libel cases: Articles 6, 8 and 10. Article 6 preserves a criminal defendant’s right to a fair trial, which includes the presumption of innocence under Section 2.\textsuperscript{17} In the context of ongoing criminal investigations or trials covered by the media, the ECtHR has given great respect to the presumption of innocence of the defendant. The court’s consistent approach has been that the presumption of innocence is violated if a state authority gives an opinion that the person charged is guilty before they have been proven so.\textsuperscript{18} In fact, to breach the presumption, the authority need only give a statement that encourages the public to believe the accused is guilty.\textsuperscript{19} However, the court has also held that states may allow presumptions of fact or law in criminal cases as long as they “confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”\textsuperscript{20}

While Article 6(2) binds only public authorities, the ECtHR has begun to apply it “increasingly also to ‘horizontal’ relationships between private parties.”\textsuperscript{21} This has been particularly true of defamation cases. For example, in one case involving a newspaper article suggesting a man was guilty of assassination, but who had not yet been charged by the state, the ECtHR pointed out that the statements “disregarded his right to be presumed innocent until proven guilty

\begin{footnotesize}
\begin{enumerate}
\item[16.] \textit{Id.} at 139 (citing Daniel Krisch, Note, Vogt v. Germany: \textit{The European Court of Human Rights Expands the Scope of Articles 10 and 11 of the European Convention on Human Rights to Include the Political Activities of Civil Servants}, 14 \textit{CONN. J. INT’L L.} 237, 262 (1999)).
\item[17.] European Convention on Human Rights and Fundamental Freedoms art. 6(2), \textit{supra} note 13 (“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.”).
\item[19.] \textit{Id.} at 104–05.
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according to law.” In another case brought as a result of an article accusing seven Norwegian seal hunters of breaking regulations, the court again noted its concern that the seamen had a right to be presumed innocent. Finally, the court has also stated that the presumption of innocence of an as-of-yet uncharged person is a relevant factor in deciding whether or not it is appropriate to curtail freedom of expression under Article 6(2).

Additionally, in all of these cases, the court combined Article 6(2)’s presumption of innocence with Article 8 of the Convention, which preserves a right to privacy in one’s private and family life and which the court seems to view as tied to reputation. Understanding the connection between privacy and reputation in the continental hierarchy of rights is critical to understanding the current placing of the burden of proof in defamation cases. At their base, continental privacy protections are the right to one’s image, name and reputation—the right to have control over the kind of information that is released to the public and to be shielded from embarrassment or humiliation. As a result, the media, whose role it is to broadcast information that can often be embarrassing, are the enemy of privacy as they endanger one’s reputation. In this regard, it is worth noting that privacy is just one area in which continental law protects from shame and humiliation; there is a “much wider class of legal protections for interpersonal respect . . . the value of respect in continental law is most familiar to Americans from one body of law in particular: the continental law of hate speech, which protects minorities against disrespectful epithets.”

This can be a surprising cultural difference to Americans, who do not share the concept of privacy as inherently linked to reputation. Instead, the American view of privacy is more concerned

25. European Convention on Human Rights and Fundamental Freedoms, supra note 13, art. 8(1) (“Everyone has the right to respect for his private and family life, his home and correspondence.”).
27. Id.
28. Id. at 1164.
with liberty from the state, particularly intrusions into one’s home.\textsuperscript{29} Most notably for the purposes of this Note, the First Amendment\textsuperscript{30} has no exceptions in its language for privacy, reputation or even hate speech; it is written as a blanket protection for free speech. This is a far cry from Article 10 of the Convention, which, in addition to giving everyone freedom of expression in Section 1, expressly limits those freedoms in Section 2:

\begin{quote}
Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
\end{quote}

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\textsuperscript{31}

Critically, for criminal libel cases, Section 2 lists the violation of the “reputation or rights of others” as a valid exception to the right of free speech. This exception is in line with the European view of privacy under Article 8, which can also implicate Article 6(2). In fact, in Tromso v. Norway, the Commission brought the language of all three articles together when it expressed its concern that private prosecutors had a right “to be presumed innocent until found guilty according to law and of their right to respect for their private life and

\textsuperscript{29} Id. at 1161.

\textsuperscript{30} U.S. CONST. amend. I. The Amendment reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

\textsuperscript{31} European Convention on Human Rights and Fundamental Freedoms art. 10, supra note 13.
implicitly their right to enjoy a good reputation.” All of these variables are subjected to a “balancing of competing interests” in the ECtHR’s method of deciding cases brought by citizens claiming that their Article 10 rights have been violated.

In deciding an Article 10 case, the court typically first reiterates that freedom of expression is one of the foundations of a democratic society “and one of the basic conditions for its progress and each individual’s self-fulfillment.” It also stresses that the restrictions contained in Article 10(2) are to be interpreted “strictly” and that a state must establish them “convincingly.” Next, the court analyzes whether an interference with speech was allowed under the Convention: first, the state must have taken some action that interfered with the defendant’s right to free speech under Article 10(1); second, the interference must have been prescribed by law, which is accomplished by showing that it came under the state’s own civil or criminal code; third, the state’s rule must pursue a “legitimate aim” under Article 10(2); and fourth, the interference must have been “necessary in a democratic society.” This last inquiry tends to take up the majority of the court’s analysis, as the parties will generally agree that there has been an interference that was legitimate under 10(2).

The “necessary in a democratic society” test has a number of variables, such as “whether the ‘interference’ complained of corresponded to a ‘pressing social need,’ whether it was proportionate to the legitimate aim pursued and [finally] whether the reasons given by the national authorities to justify it were relevant and sufficient.”

32. Tromso v. Norway, 1999-II Eur. Ct. H.R. 289, 345. Though not put as succinctly, the court’s decision following the Commission’s report also mentions the reputation of others, disclosure of confidential information and the presumption of innocence as issues that need to be taken into account when evaluating an Article 10 claim. Id. at 322–24.

33. Id. at 324.

34. See White v. Sweden, App. No. 42435/02, 46 Eur. H.R. Rep. 3, 41 (2008) (“Of relevance for the balancing of competing interests which the Court must carry out, is the fact that, under Art. 6(2) of the Convention, individuals have a right to be presumed innocent of any criminal offence until proven guilty”).


36. Id.

37. Id.

38. Kozlowski, supra note 7, at 140.


40. Id.
Finally, the court leaves the individual states a certain “margin of appreciation” in deciding both whether such a need exists, and what measures would best address it. Inside this test fits the court’s current acceptance of defamation defendants having the burden to rebut a presumption against them in criminal libel cases.

The ECtHR has also consistently accepted states’ choices to use criminal libel statutes as a suitable means of curbing defamation. For example, in *Radio France v. France*, a case involving radio bulletins accusing a French politician of having played a role in deporting Jews to concentration camps during World War II, the court stated that “in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued.”

**C. Defenses to Criminal Libel**

The court has recognized a few valid defenses to criminal libel. A defendant who successfully shows that the statements were based on true facts, were made in good faith or constitute a fair report of public documents can escape liability. The court places the burden to prove each of these defenses on the defendant.

The obligation to prove truth can enter unexpected fields of expression that go beyond the reporting of inaccurate facts. This was the case in *Lindon v. France*, a case involving an author of fiction who had incorporated a real-life politician into his novel. The novel, *Le Procès de Jean-Marie* (“The Trial of Jean-Marie Le Pen”), was published in 1998. It focuses on the fictional Ronald Blistier, a member of *Front National* (a French far-right party) who killed a man of North African descent in a racially motivated crime. The novel asks whether the leader of *Front National*, Le Pen, can be held

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41. *Id.*
44. *Id.* at 153.
47. *Id.* at ¶ 10.
48. *Id.* at ¶ 11.
responsible for the murder. Although expressed through fictional characters, the book makes several accusatory statements regarding Le Pen: he is the chief of a gang of killers; he makes racist statements reminiscent of the “worst abominations of the history of mankind”; he is a vampire who succeeds because of “the bitterness of his electorate” and “the blood of his enemies”; he uses young militants, both in life and in their deaths, for his own political purposes.

*Front National* and Le Pen brought proceedings against the publisher and the author for public defamation in the Paris Criminal Court, which convicted the defendants. Under French law, it is “defamatory to make any statement or allegation of a fact that impugns the honor or reputation of the person or body of whom the fact is alleged.” The French Criminal Court found bad faith as the defendant could not put forward evidence sufficient “to substantiate the defamatory allegations.” The French Court of Appeals found that the defendants failed to show any evidence that they had performed a “serious preliminary investigation” that would have given them the right to so defame Le Pen.

The ECtHR, after reviewing the decision of the French court, upheld the criminal conviction. In particular, it held that making a fiction writer accountable for statements that seem to allege facts, and can thus be proven or disproven, was acceptable. The court considered it crucial that these allegations were not value judgments, which by definition would have been impossible for the defendants to prove. Additionally, it applauded the French Court of Appeals for adopting a measured approach that only required the defendants to

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49. *Id.*
50. *Id.* ¶ 14.
51. *Id.*
52. *Id.* ¶ 28.
53. *Id.* ¶ 14. The French Court of Appeals uses “bad faith” here to stand for a basic factual verification. The ECtHR, in contrast, uses a good faith/bad faith distinction for defamatory statements as a possible defense based on a defendant’s observance of journalistic standards or of the statement in question being a value judgment rather than a provable fact.
54. *Id.* ¶ 19.
55. *Id.* ¶ 60.
56. *Id.* ¶ 55.
57. *Id.*
have made a “basic verification” of the truth of the facts asserted. 58

Proving truth by showing basic verification has much in common with the second defense, good faith, which gives defendants two different ways of escaping liability. The first is the claim that a statement was only a value judgment based on facts. The second is that a journalist observed appropriate standards of reporting and, as a result, should not be held liable.

The value judgment defense was first described clearly in Lingens v. Austria, a case in which the ECtHR overturned a criminal defamation conviction for violating Article 10 of the Convention. 59 The defendant was a publisher of a magazine that had accused the Austrian Chancellor of protecting former Nazi SS and helping them to participate in Austrian politics. 60 The magazine called the Chancellor’s behavior the “basest opportunism” and “immoral.” 61 The court held that Mr. Lingens’ statements were value judgments based on facts. 62 As a result, because proving value judgments “is impossible... and it infringes freedom of opinion itself,” 63 the court concluded that holding him criminally liable for making these statements constituted a breach of the Convention. 64

However, the value judgment in question cannot be excessive. In Prager & Oberschlick v. Austria, the court found that the defendant journalists could be held guilty of libel for criticizing an Austrian criminal judge who the journalists believed to be one of several judges who were particularly draconian in their rulings. 65 The court held that the form of the attacks, which were severe value judgments that

58. Id.; see also Flux v. Moldova (No. 6), App. No. 22824/04, at ¶ 31 (Eur. Ct. H.R. July 29, 2008) (HUDOC database), http://www.echr.coe.int/echr/ (stating that allegations of serious misconduct do not have to be proven first by criminal trial).
60. Id. at 17.
61. Id. at 17–18.
62. Id. at 28.
63. Id.
64. Id. at 18; see also Ukrainian Media Group v. Ukraine, App. No. 72713/01, 43 Eur. H.R. Rep. 499 (2006) (holding that there had been a violation of Article 10 because Ukraine failed to differentiate between value judgments and statements of fact when holding a defendant liable for what had been only political rhetoric and not provable).
extended to the judge’s wider persona and professional integrity, were not adequately substantiated by the author’s research.\(^\text{66}\) Given these restrictions, it could be argued that proving the defense of a value judgment is harder than proving truth. To prove the defense, a defendant must first argue that his statement was a value judgment, then prove the truth of the underlying facts and then prove that his comments were reasonable in relation to them.

Proving that one has followed appropriate journalistic practices can fulfill the second defense under the umbrella of good faith. The ECtHR’s interpretation of good journalism has much in common with negligence cases in the United States.\(^\text{67}\) For example, in \textit{Flux v. Moldova},\(^\text{68}\) the court upheld a judgment against the defendants because they had failed to uphold journalistic standards\(^\text{69}\) when publishing an article that accused a high school principal of inappropriate use of funds and receiving bribes.\(^\text{70}\) The article was based on an anonymous letter they had allegedly received from students’ parents.\(^\text{71}\) The court’s finding, which was based on the information put forward by the defendants to prove truth, concluded that a breach existed because the journalists had failed to investigate beyond the letter, had not given the principal the opportunity to reply and had written a reply letter to an article written by the principal that took the form of a reprisal.\(^\text{72}\) In defining its analysis of journalistic good faith, the court stated that the factors to consider are: “the nature and degree of the defamation at hand, the manner in which the impugned article was written, and the extent to which the applicant newspaper could reasonably regard its sources as reliable with respect to the allegations in question.”\(^\text{73}\) At present, this is the only real defense available to a journalist who cannot prove truth.

Finally, the last possible defense is that of fair report. To


\(^{67}\) Kozlowski, \textit{supra} note 7, at 172.

\(^{68}\) Flux v. Moldova (No. 6), App. No. 22824/04, at ¶ 35 (Eur. Ct. H.R. July 29, 2008) (HUDOC database), http://www.echr.coe.int/echr/. This was a civil case; however, as the court has shown no tendency to subject criminal cases to a different standard of review than civil cases, the same outcome would almost surely have been reached had it been criminal.

\(^{69}\) \textit{Id}.

\(^{70}\) \textit{Id}. ¶ 5.

\(^{71}\) \textit{Id}.

\(^{72}\) \textit{Id}. ¶¶ 29–30.

\(^{73}\) \textit{Id}. ¶ 26.
prove fair report, a defendant must show that he relied on official reports for the information in his statements. However, it is worth noting that the Commission’s opinion required that the press not “distort” or “interpret” the official statements in an unwarranted way. Similarly, the court has indicated that if the press’s aim is to hurt the subjects of the article rather than to contribute to an ongoing debate, it might not find a violation of Article 10, despite the fact that the press had relied on official statements. Thus, it could be argued that fair report, like value judgments, is a more difficult defense to prove than it may appear at first glance. Additionally, it too seems to touch ultimately on proving truth, as official reports are simply treated as sources of truth that can be trusted.

Although the ECtHR does not use the same terminology, the defendant in these cases could be considered as having the burden to prove one of a variety of available affirmative defenses. An affirmative defense is made when the defendant proves facts outside of the prosecution’s complaint that allow the defendant to escape or minimize his liability. A defense attempting to show that the prosecution has not met its own burden is not an affirmative defense. Thus, in the same way that we might assume a person charged with a crime was not under duress until they prove otherwise, the court is willing to assume that a defamatory statement is untrue or made in bad faith until the defendant can present evidence to the contrary. However, an important point in the European defamation context is that the defendant puts forward these affirmative defenses to refute a bad act, when showing that the statements are true, or mental state, when showing good faith, which has not been proven by the prosecution.

D. Placing the Burden of Proof and the Presumption of Innocence in Criminal Libel

The court has addressed and carefully analyzed the placement of the burden to prove truth, good faith or fair report as a defense in
criminal libel cases surprisingly few times. In fact, the now defunct Commission on Human Rights did the most thorough analysis in the case of *Lingens v. Austria*\(^7\) (an earlier decision by the same name as the previously cited *Lingens*); the reasoning used in the case has not been overturned. In *Lingens*, two magazine journalists, one of whom was also the chief editor,\(^8\) appealed their conviction for criminal libel confirmed by the Austrian Court of Appeal.\(^8\) The two had published an article accusing an Austrian member of parliament of having lied several times about the existence of an employer who had fired fifty workers even though it had had more than enough orders to keep them all.\(^8\)2 After the publication, the politician instituted a private criminal prosecution of the pair for defamation in the press.\(^8\)3

According to the court, under the Austrian Penal Code it is “a criminal offence to state before others that a person has contemptible features or attitudes, or to accuse him of dishonest behavior or of behavior contrary to good morals which is liable to scorn, or to degrade him in the public opinion.”\(^8\)4 Additionally, the offense becomes aggravated if the material is available to the general public.\(^8\)5 Finally, if the allegation is true, the defendant will not be punished; however, the defendant has the burden of proof.\(^8\)6

The defendants argued that Austria had violated their rights under Articles 6(2) and 10 of the Convention.\(^8\)7 In particular, they attempted to show that choosing not to punish a defendant only if he proves truth violates the presumption of innocence.\(^8\)8 Curiously, in denying the existence of an Article 6(2) violation, the Commission described the criminal proceeding as a special one, where “normal principles of criminal procedure are to a certain extent modified by the necessity to respect... the procedural rights of the private prosecutor who is thereby given the means for asserting his civil right to


\(^{80}\) *Id.* at 173.

\(^{81}\) *Id.* at 176.

\(^{82}\) *Id.* at 172–73.

\(^{83}\) *Id.* at 173.

\(^{84}\) *Id.*

\(^{85}\) *Id.*

\(^{86}\) *Id.*

\(^{87}\) *Id.* at 176.

\(^{88}\) *Id.*
the protection of his reputation." Thus, the fact that the Austrian legislature chose to lay the burden to prove truth on the defense was allowalbe.

The Commission stated that the key requirement is that the prosecution must prove the existence of the defamatory statement and its "dissemination" because a defendant commits the offense described by the Penal Code only by making a defamatory statement. To make this argument, the Commission relied on the observation that the offense can even be committed by a true statement that is nonetheless impossible to prove. Thus, "[w]hat exculpates is not the objective truth of a defamatory statement, but [the] ability to prove its truth." In a later case, the court more explicitly placed this reading in its Article 6(2) jurisprudence by holding that assuming the defendant's inability to prove truth is acceptable as a presumption of fact or law, as it is within reasonable limits. The Commission approved of this method as ensuring that journalists take the necessary precautions that what they print is true when it is likely to defame another.

Finally, the Commission also pointed out that many other states party to the Convention place the burden the same way.

There are a few different ways to interpret the Commission’s reasoning. First, though it does not say so clearly, the Commission seems to view the protection of reputation under Article 10(2) as requiring a democratic society to place the burden on the defendant to show truth or good faith. Furthermore, the Commission’s acknowledgment that several other Convention States have similar methods brings together the margin of appreciation element of its Article 10 analysis with its views on Article 6(2). In other words, the Commission seems to say that if the majority of Convention States believe this is a correct placing of the burden, then that idea is due some re-

89. Id. at 178.
90. Id.
91. Id.
92. Id.
93. Id.
94. Radio France v. France, 2004-II Eur. Ct. H.R. 119, 143–44. In this case, the defendants could only prove good faith as, under French law, proving truth was not a defense for events occurring more than ten years earlier. It is worth noting that the court does not seem to have been troubled by this lack of a defense.
96. Id.
Outside of Lingens, there is only one relatively new strain of jurisprudence from the court that could give any indication that it is willing to reevaluate its stance. However, this line of reasoning only applies to a very particular circumstance when the court detects an “inequality of arms” between the plaintiff and the defendant that it feels makes it inappropriate for the defendant to have to prove truth. However, the court locates the Convention right they are defending as the right to a fair trial under Article 6(1) rather than the presumption of innocence under Article 6(2).

The most well-known example for this proposition is a civil case, Steel & Morris v. The United Kingdom. In Steel, the defendants were two Greenpeace members who had distributed a leaflet containing a multitude of allegations about McDonald’s that, true or not, could easily be considered defamatory. The ensuing civil libel trial, which the defendants lost, became the longest in the history of English law. Additionally, although the defendants had received pro bono assistance, they had been unable to afford the balance of their legal representation. In finding a violation of Article 6(1), the court pointed out that “[i]t is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side.”

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97. Id.
98. European Convention on Human Rights and Fundamental Freedoms art. 6(1):
   In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
99. See generally Steel & Morris v. United Kingdom, 2005-II Eur. Ct. H.R. 7; see also McVicar v. United Kingdom, 2002-III Eur. Ct. H.R. 261, 277–78 (finding that the defendant had not been deprived of a fair trial because he was represented by a specialist defamation lawyer and the law in question was complex enough to require legal assistance).
101. Id. at 25.
102. Id. at 30–31.
103. Id. at 28 (citations omitted) (emphasis added).
It is certainly possible to read into this holding that the court was uncomfortable with allowing these defendants to shoulder the burden of proof when facing a monolithic plaintiff like McDonald’s. While the court does not comment on the presumption of innocence, it is not difficult to imagine that the subject may have come up had this been a criminal trial. If the situation presents itself in the future, as it certainly could in a jurisdiction that allows for criminal defamation suits, it will be interesting to see how the court handles the relationship between “inequality of arms” and the presumption of innocence.

II. COMPARATIVE PRINCIPLES OF THE PRESUMPTION OF INNOCENCE AND THE COURT’S FAULTY REASONING

A. Adopting a Less Flexible Approach

In Western legal thought there is a surprising lack of consensus on what constitutes the presumption of innocence. As this section will endeavor to show, the ECtHR has adopted a reading that is too flexible.

In the international realm, the presumption has roots that extend to the common law and is an important feature of most liberal democracies. The reason behind its prevalence, as identified by Blackstone, is that “it is better that ten guilty persons escape than one innocent suffer.” In the United States, the Supreme Court has carried this doctrine forward with unwavering support. In In re Winship, Justice Brennan suggested one of the many reasons for this feature of U.S. law: “The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.”

The Court has even gone so far as to say that the presumption of innocence is “axiomatic and elementary” to American criminal law. As a result, the Court has held that a jury must be told that the defendant is presumed innocent in a criminal trial. Additionally, the

104. Kofele-Kale, supra note 9, at 919.
Court has held that the prosecution must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which he is charged."\(^{108}\)

One scholar found the right to the presumption of innocence in five different international instruments, which included the statutes of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.\(^{109}\) Also, at least sixty-seven national constitutions contain provisions guaranteeing the presumption of innocence.\(^{110}\) According to another international criminal law scholar, the presumption has three main implications:

(i) the person charged with a crime must be treated . . . as being innocent until proved guilty; (ii) the burden of proof, that the accused is guilty of the crime with which he is charged, is on the prosecutor; the defendant may limit himself to rebutting the evidence produced by the Prosecutor, but does not have to prove his innocence; (iii) in order to find the accused guilty of the crimes charged, the court must be convinced of his guilt according to a certain standard of proof, which in civil law countries is normally [the judge's innermost conviction] whereas in common law countries it is "finding the accused guilty beyond a reasonable doubt."\(^{111}\)

The ECtHR was one of the first courts to argue that reverse-burden clauses are acceptable when they force the defense to prove an element that would be hard for the prosecution to establish because the information is more readily available to the defendant.\(^{112}\)

To keep this within acceptable bounds, the court imposes a test on

\(^{108}\) *In re Winship*, 397 U.S. at 364.


\(^{111}\) ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 390 (2003); see also SALVATORE ZAPPALA, *HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS* 85 (2003).

\(^{112}\) Kofele-Kale, *supra* note 9, at 931.
the shifting of the burden, confining it to “reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.” In *Radio France*, the court uses the “reasonable limits” test to explain that their acceptance of the presumption of bad faith does not conflict with the presumption of innocence because it forces journalists to conduct serious investigations and directors to exercise supervision with the goal of “preventing defamatory or insulting allegations and imputations being disseminated through the media.”

Interestingly, it is possible to use the “reasonable limits” test to make sense of the result reached in *Steel and Morris*, discussed in Part I. Perhaps in that situation, which involved a tremendous “inequality of arms,” the court felt that the rights of the defense had been violated and thus resulted in an unfair trial. However, using this as the primary test of Article 6(2) leaves out what many consider to be the most important part of the presumption of innocence: that the prosecution must prove that the alleged bad act was committed by the defendant.

Comparatively, the ECtHR sets a poor example by allowing the type of reverse-burden clauses found in criminal libel statutes. It has been rightly said that the court is one of the premier courts for international adjudication. As such, developing countries, attempting to decide on their own rights regimes, can be expected to look to the court for guidance. Clauses that force a defendant to prove that he did not commit a bad act or have bad faith have little place in the modern world and conflict with one of the most basic principles of criminal prosecution in Western tradition: *in dubio pro reo* (“when in doubt, for the accused”).

Recently, the United States Congress has taken note of the differences between the two schemes and passed the SPEECH Act.

which prohibits American courts from enforcing foreign libel judgments that are inconsistent with the First Amendment. While it was written as a result of a British libel case against an American that had not reached the ECtHR, it is certainly possible that, under the law, libel decisions affirmed by the ECtHR will not be enforceable in the United States. That the United States felt free speech was so threatened as to compel legislative action was rightly called “a humiliation” by a British House of Commons Report.

B. Critique of ECtHR Reasoning

The court’s reasoning of how allowing the burden to prove truth or good faith to be placed on the defense comports with its understanding of the presumption of innocence is logically flawed. To see why, it is useful to start by examining one of the cases in which the court most clearly expressed its reading of the presumption.

In Salabiaku v. France, Salabiaku went to Roissy Airport in Paris, allegedly expecting a parcel to arrive from Africa containing food via an Air Zaire flight. After picking up a trunk without a name that he assumed was for him, the trunk was confiscated and found to contain ten kilograms of cannabis, which resulted in his immediate arrest. Two days later, Air Zaire called Salabiaku’s Parisian landlord to tell him that a package containing food with Salabiaku’s name and address had mistakenly been shipped to Brussels. The relevant French law stated:

\[
\text{[A]ny person in possession (détention) of goods which he or she has brought into France without declaring them to customs is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him; such force majeure may arise only as a result of an event beyond human con-}
\]

123. Id. at 9.
124. Id.
trol which could be neither foreseen nor averted...\textsuperscript{125}

Since he was unable to prove the occurrence of an event beyond his control or foreseeability, Salabiaku was convicted. He appealed, claiming that the law as written violated his Article 6(2) right to be presumed innocent because it had placed upon him a presumption of guilt.\textsuperscript{126} The ECtHR found that there had been no such violation.\textsuperscript{127}

Much like the vast majority of criminal defamation statutes that come before the court, the statute in this case places a burden on the defendant to show that he has not acted wrongfully. Also, as in its defamation jurisprudence, the ECtHR pointed out that the crime here is committed regardless of fault, the nonexistence of which the defense must prove to exculpate itself.\textsuperscript{128} However, the court in \textit{Salabiaku} took pains to point out that a Convention right was not implicated and that “[c]ontracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence.”\textsuperscript{129} It is interesting to note that, unlike in \textit{Salabiaku}, in defamation cases a right protected under the Convention is directly implicated. As a result, “the importance of what is at stake” would seem to be high in the court’s “reasonable limits” test. Unfortunately, as the reasoning used in this case is almost identical to that used in \textit{Lingens},\textsuperscript{130} the court does not seem to accord criminal statutes dealing with a Convention right any greater protection from presumptions of fact.

Additionally, the court’s reasoning regarding how the law was applied to the defendant in \textit{Salabiaku} expresses a concern that is notably absent from its defamation cases. The court attached great significance to the French government’s argument that, while the wording of the statute would suggest an irrefutable presumption, in reality French courts “do enjoy a genuine freedom of assessment in this area and ‘the accused may . . . be accorded the benefit of the

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} at 10.
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 19.
\item \textsuperscript{128} \textit{Id.} at 16–17.
\item \textsuperscript{129} \textit{Id.} at 15.
\end{itemize}
doubt, even where the offence is one of strict liability.” The court identified this as “scrupulous respect” for the presumption of innocence. Moreover, the French court made its decision based on the evidence presented by both parties and even added an intent element not present in the statute.

This reasoning is remarkably different from that applied in defamation cases. There, it is impossible to find instances of the court signaling its concern that defendants be given the benefit of the doubt in a crime that also lacks a culpability requirement. One could easily ask why the court here is grateful that the element of intent was added by the French courts and inferred from evidence given by the prosecution, but not in defamation cases. As this discussion takes up the majority of the court’s analysis, it is very possible that, had the French not adopted these practices, the case could have come out the other way; why then does the court avoid similar analysis of defamation statutes?

Finally, the ECtHR’s reasoning, particularly in Lingens, for why it is acceptable to place a burden to prove truth or good faith on the defendant in defamation cases suffers from multiple failures of common sense. The first is the Commission’s assertion that criminal defamation proceedings should be thought of as a “special type of criminal proceedings” because they involve giving the private prosecutor the procedural right to assert his civil right to reputation. This is patently not true. The prosecutor does have a civil right to reputation for which he can sue, but he has chosen to bring a criminal prosecution. As a result, when the defendant in Lingens was found guilty, he not only had to pay the prosecutor damages, he also had to pay a fine to the state and could face prison time if he defaulted. Additionally, it bears repeating that the defendant was convicted of a criminal offense under Austria’s Penal Code; there are larger factors than money at stake here. Unlike in a civil proceeding, for the rest of his life the defendant in Lingens will have the stain of a criminal conviction on his record. The ECtHR utterly fails to consider this aspect of the criminal case.

132. Id.
133. Id. at 18.
135. Id. at 174.
136. Id.
Along the same lines, the court’s focus on protecting the reputation of the prosecutor comes only at the expense of causing harm to the reputation of the defendant. In many of the cases surveyed in this Note, the court comments on the need to protect the reputation of the person who has been defamed as justifying the inference of bad faith. This, however, begs the question of why the defamed person’s reputation is worth more than the journalist’s. By assuming bad faith, have not the state laws in question assumed that the journalist either lied or failed to live up to the standards of his profession? As a result, before he even opens his mouth, has he not been defamed by the state in a way that would lower him in the eyes of his community? Especially in a criminal proceeding, it is fantasy to suggest that in this situation the prosecutor is the only individual who has been defamed. Thus, without even reaching the heightened review discussed in Salabiaku, it is hard to see how a public authority has not given the opinion that the accused is guilty when bad faith is assumed. The mere fact that he can rebut the assumption does little to alleviate the fact that the state court hearing the case begins with this belief; after all, are not all accusatory opinions rebuttable?

The Commission’s second error involves the assertion that placing the burden of proof on the defendant “in no way means that the accused has to prove his innocence because he can only be considered as innocent if he has not committed the offense.” Another case, Radio France, suggests that this concept is important because were this not the case, it would not be within the “reasonable limits” window that allows states to presume fact in a criminal case. To support its reasoning, the Commission points to the fact that the prosecution still has to prove that the defendant disseminated a defamatory statement in the press; otherwise, the truth or untruth of the statement at issue would be irrelevant. In essence, upon the prosecution’s showing of certain elements, the burden shifts to the defense to show the non-existence of an element that is assumed. However, the court never considers the relative weight of the two burdens and whether the difference between the two is within the “reasonable limi-
"its" available to states to presume fact without violating the presumption of innocence.

In reality, the two burdens are wildly out of balance. The incredible ease with which a private prosecutor can establish a defamatory statement made by the press is obvious. As truth and good faith are not at issue, a private prosecutor could prove the existence of a defamatory statement even if it relayed information about him that was universally known to be true. All negative articles that focus on an individual are almost by nature defamatory in that they will damage his reputation and lower him in the eyes of the community. All will employ facts or opinions that are damaging. That is the entire point of any defamatory article: to put forth information on a person that is newsworthy precisely because it is damaging. Furthermore, authors almost always sign their articles, though it is unlikely that discovering the author of an unnamed piece would be too difficult. As it is almost impossible to imagine anyone spending the necessary time and money to bring a criminal libel charge that could not meet this burden at the outset, nearly the entire burden of proof rests on the defendant who must prove his own innocence.\footnote{For an example of what must be proven by the prosecution, see Radio France, 2004-II Eur. Ct. H.R. at 142. The court observes that the Prosecutor had to prove that the defendant was a publishing director, that the statement was disseminated and defamatory and that it was fixed before broadcast. It concludes that this burden, versus the defendant’s burden of showing good faith, is acceptable and within the reasonable limits of presumptions of fact. While it is possible to read the passage as admitting that the defendant’s burden is much higher, the court never explicitly states this. In reality, it is hard to imagine that the private prosecutor in this case would have brought the case if he was unsure about any of these elements. \textit{id.}}

Moreover, the court has even held that a defendant who can show he had sources for his information can still fail because he has not lived up to journalistic standards. In the case of Flux v. Moldova, the defendants showed that they had relied on a source for their information but still lost because they had failed to investigate further or provide the accused with a right to reply.\footnote{Flux v. Moldova (No. 6), App. No. 22824/04, at ¶ 29 (Eur. Ct. H.R. July 29, 2008) (HUDOC database), http://www.echr.coe.int/echr/} This case shows just how difficult it can be for a defendant to combat the presumption against him.

The last error is the view that it is acceptable to place the burden of proof on defendant journalists because this establishes a proper standard of care when reporting statements that may be defamatory
to an individual. However, why would placing the burden to prove falsity on the prosecution remove such a standard of care? Would the journalist not still have to prove truth if the prosecutor was able to show evidence that the defamatory statements in question were indeed false? Also, is not the private prosecutor in the best possible position to prove falsity? After all, he knows with one hundred percent certainty whether the statements are true or not. While the court might respond that the defendant, unlike the prosecutor, knows which sources he relied upon, is that not information that could easily be turned over in discovery? What is more, if the defendant cannot turn that information over, could not the prosecution argue that that lends itself to an inference of precisely the type of bad faith the court likes to discourage?

Many of these criticisms of the ECtHR’s logic spring from one key observation: the presumption of falsity and bad faith negates the presumption of innocence in a criminal defamation case. In the prototypical case, a journalist publishes an article alleging an unsavory action or viewpoint held by another person, often a public figure. Next, the subject of the article brings a criminal suit against the journalist claiming that the article defamed him. The prosecution will then have to prove the defamatory nature of the article and connect it to the defendant. Finally, the defendant will attempt to escape a conviction by showing truth, good faith or fair report.

Given the evidentiary burdens discussed above, which side has the advantage in trial? The obvious answer to that question is very concerning. How can the prosecution be the more attractive evidentiary side if the presumption of innocence is being observed? The common sense conclusion is that, at least in criminal defamation, the presumption of falsity and bad faith makes the presumption of innocence impossible to fulfill. They cannot coexist.

It could be argued that ECtHR criminal defamation jurisprudence should be thought of the same way as strict liability crimes in the United States, and thus their concern with the burden of proof should not be as great. There are two problems with this comparison. The first is that such strict liability crimes tend to result in only minor penalties that do not seriously harm the reputation of the offender.

144. See 21 AM. JUR. 2d Common Law § 132 (2012) (“A legislature may elect to regulate conduct under a state’s police power to promote the social good without requiring mens rea.”).
145. See id. § 133.
One of the key reasons for this is that their primary purpose is to protect society rather than punish an offender. A paradigmatic example of a strict liability crime is a speeding ticket. However, criminal defamation statutes in Europe often carry significant penalties, including the possibility of prison time. While the ECtHR is very hesitant to uphold prison sentences based on defamation, the court will still allow them in “exceptional circumstances.” In addition, the monetary penalties in many cases are high enough to do significant damage to the financial wellbeing of the offender. For example, in *Prager & Oberschilck v. Austria*, Mr. Oberschlick was forced to pay 20,000 Austrian schillings. Such a penalty, not to mention the frequently public nature of defamation cases, clearly leads to reputational harm. Furthermore, as argued previously, a presumption of falsity and bad faith at trial seems likely to cause additional harm to the defendant’s reputation. These types of penalties warrant greater concern with the burden of proof than strict liability cases in the United States.

Furthermore, unlike strict liability cases where the absence of negligence is typically not a defense, the ECtHR has been willing to find that a showing of no-fault will exculpate a defendant. As previously discussed in Section 3 of Part I, the ECtHR has recognized a good faith defense, which allows defendants to escape liability by showing that appropriate standards of reporting were followed or that the statement in question was a value judgment based on facts. Though this is an “ill-defined fault standard,” it has similarities to the U.S. negligence standard in private libel cases. The fact that the court is willing to use this analysis suggests that criminal defamation is not the type of low-level, strict liability criminal violation that would warrant a lower concern with the burden of proof.

146. See id.


151. Kozlowski, *supra* note 7, at 149.
III. A BETTER WAY FORWARD

At no point does this Note suggest, as it very well could, that the court should simply disallow criminal defamation. Additionally, it never suggests that reputation is not worthy of protection by means of curbing the right of free expression. Nor are there any recommendations or criticisms for the burden of proof in civil defamation cases, a subject beyond the narrow limits of this Note. Rather, only in the context of criminal defamation, and only in the balance of the burden of proof laid on the parties, does this Note suggest that the court change paths and follow one of two methods as soon as the opportunity presents itself. The first method is a version of the United States Supreme Court rules and the second method is that hinted at by the ECtHR in Dalban v. Romania.

The United States has adopted a libel standard that places the entire burden of proof on the allegedly defamed person. In the landmark case, New York Times v. Sullivan, the Court held that a public official can recover damages only when the defendant makes a false, defamatory statement with knowledge or recklessness in regards to its falsity. The Court also noted that to force a critic of a public official to guarantee the truth of everything he says would lead to self-censorship. Building on Sullivan, the Court next held that the defendant must have been at least negligent for private individuals to recover and that plaintiffs could only recover punitive damages on

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152. See, e.g., Gregory Lisby, No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence, 9 COMM. L. & POL’Y 433, 435 (2004) (stating that the purpose of criminal libel “is not to promote or provide ‘breathing space’ for free expression. Its purpose is to chill speech. It does not promote the equality of persons or of ideas. It has no place in a democratic society.”); see also Richard Winfield, The Wasting Disease and a Cure: Freedom of the Press in Emerging Democracies, 20 COMM. LAW. 22, 24 (2002) (“The libel suit should become exclusively a civil remedy to reconcile two competing values: an individual person’s right to reputation and the right of a free press to publish. The criminal justice system has no place in resolving these personal disputes.”).


154. Id. In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), this rule was extended to include public figures in addition to public officials.

155. Sullivan, 376 U.S. at 279.

156. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). The Court states in footnote 10 that any “standard save strict liability” will do for private individuals to recover. As a result, a state must require the plaintiff to at least show negligence. Id. n.10.
a showing of knowledge or recklessness. Finally, the Court in *Philadelphia Newspapers, Inc. v. Hepps* held that the plaintiff must “bear the burden of showing falsity, as well as fault, before recovering damages.”

While the stance taken by the United States Supreme Court is preferable to the position of the ECtHR, there may be too much ground between the two. The fault element is almost completely left out of the Member States’ laws. Only in the context of journalistic standards does one get the sense that the court considers negligence. Furthermore, many of the Member States’ defamation laws mentioned in this Note do not even include the defense of proving truth, which the ECtHR reads in. As was noted in Part I, this may come down to a difference of cultural priorities. The fact that reputation is absent from the U.S. Constitution but is enshrined in Article 8 of the Convention as privacy and verbatim in Article 10(2) certainly suggests such a difference.

Another option comes from *Dalban v. Romania*, in which the ECtHR used language that seems to depart from its previous cases to find a violation of Article 10. In the case, the convicted journalist had accused a state-owned company’s chief executive of fraud and a Senator of receiving improper sums in his position as a member of the company’s board. At the time, the public prosecutor had decided that he lacked sufficient evidence to charge the executive. The journalist also admitted that he had made errors regarding the Senator’s salary. However, the court held that the case violated Article 10 because there was no proof that the “description of events given in the articles was totally untrue and was designed to fuel a defamation campaign....”

While it is important that the defendant provided the evidence related to proving truth in the case, this language is a departure from the court’s usual requirement that every statement must be proven true. A “totally untrue” standard would be a very significant reduction in the burden of proof. In fact, it would seem so easy that

157. *Id.* at 349.
160. *Id.* at 230.
161. *Id.* at 231.
162. *Id.* at 237–38.
163. *Id.* at 231.
the burden in reality would likely quickly shift back to the prosecution to prove the falsity of the evidence submitted by the defense. While this does not relieve the defense of shouldering the initial burden, it is a large enough reduction to give some meaning to the presumption of innocence of the criminal defendant.

**CONCLUSION**

In the early 1970s, President Richard Nixon’s men were busy infiltrating the Democratic Party. On June 17, 1972, five men were caught breaking into the Watergate complex. Bob Woodward and Carl Bernstein, two reporters from *The Washington Post*, relied on anonymous sources, most famously a man they called “Deep Throat,” to report that the authorization for the break-in came from high levels of the government. Eventually, the investigation would lead to the President’s resignation.

If this were to take place in a Convention State, it is at least conceivable that Woodward and Bernstein would have been found guilty of criminal libel, and it is certainly possible that the ECtHR would have upheld the sentences. While working their way up the executive ladder to the President, Woodward and Bernstein published information that was clearly defamatory to certain individuals. However, despite the fact that their allegations proved to be true, would they have been able to prove that in court at the time they made the statements? Unlikely. The sources for their information included many confidential and simply verbal interactions with officials. These officials would have refused to testify given that they likely wished to remain confidential for the protection of their careers.

This brief and admittedly simplified example illustrates the possible costs of placing heavy presumptions on a defendant, thereby violating his right to a presumption of innocence. Unfortunately, these costs are likely hidden, immeasurable and high. How does one calculate the damage to society of articles that will never be written? How does one compute the harm of safeguarding the reputations of those who may not deserve it over the ones of those who bring reputational flaws to light? It is a striking wrong to put such a heavy burden on those seeking to make wrongful deeds public, particularly bad acts by those in positions of power.

As pointed out by the former American Supreme Court Justice Sandra Day O’Connor, it is true that any shift of the burden of proof away from the defendant in defamation cases will result in more published statements that will escape liability even though they
are not based in truth. However, that is a small price to pay to protect the presumption of innocence in criminal cases. It is also a small price to promote the ideal that individuals should be able to speak freely, an ideal the ECtHR has called “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment.” The ECtHR would do well to realize more fully these principles in its decisions and send the right message to both its own Convention States and to the developing world.

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