The Art of Insinuation: Defamation by Implication

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THE ART OF INSINUATION: DEFAMATION
BY IMPLICATION

INTRODUCTION

The law of defamation has historically endured periods of systematic constriction.\(^1\) Upon assuming jurisdiction of the action from ecclesiastical courts, sixteenth-century common-law courts circumscribed the tort with restrictions to prevent defamation complaints from proliferating.\(^2\) Succeeding years brought further changes and restrictions, many of which survive.\(^3\) The resulting body of law, fashioned out of historical anomalies and vestigial rules,\(^4\) has recently been the focus of intense constitutional scrutiny.

A burgeoning emphasis on free speech launched the most recent trend toward restricting defamation.\(^5\) In *New York Times Co. v. Sullivan*,\(^6\) the Supreme Court articulated a new standard\(^7\) that was intended to strike a


\(2.\) One such restriction was the requirement that "temporal" damage be proved. If the party was unable to make such a showing, then the action was simply a spiritual matter for the church's consideration. See W. Keeton, supra note 1, § 111, at 772. Where common-law jurisdiction was established by a showing of temporal damage, however, the parties were fettered with other constraints. See generally Lovell, The "Reception" of Defamation by the Common Law, 15 Vand. L. Rev. 1051 (1962) (describing historical development and resulting complexities of defamation).

\(3.\) See W. Keeton, supra note 1, § 111, at 772.

\(4.\) See generally id. at 771-72 (much in the law of defamation makes no sense); F. Pollock, A Treatise on the Law of Torts 288-89 (1894) ("No branch of the law has been more fertile of litigation than this... nor has any been more perplexed with minute and barren distinctions."); Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 63 (1983) ("The law of defamation should be streamlined, simplified, stripped of internal contradictions, and generally made more coherent."). Smolla has proposed a reform that would abolish the distinction between libel and slander and eliminate the special harm requirement. See R. Smolla, Law of Defamation, § 7.08(1)-(2), at 7-16 (1986); see also infra notes 15-18 and accompanying text (discussing distinction between libel and slander).

\(5.\) See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 766-67 (1985) (White, J., concurring); W. Keeton, supra note 1, § 111, at 773; see, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (requiring at least negligence in all defamation actions); St. Amant v. Thompson, 390 U.S. 727, 731 (1968) ("reckless conduct" for purposes of actual malice not measured by whether reasonably prudent person would have investigated before publishing); Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (extending actual malice requirement to public figure plaintiffs); see also infra notes 46-106 and accompanying text (cases disallowing defamation by implication).

\(6.\) 376 U.S. 254 (1964).

\(7.\) See id. at 279-80. The actual malice requirement was the first constitutional element grafted onto the law of defamation. See M. Mayer, The Libel Revolution: A New Look at Defamation and Privacy 1 (1987). It has not enjoyed an entirely friendly reception. One commentator believes that it grants the trier of fact too much discretion, thereby permitting discrimination against unpopular positions and plaintiffs. See Oakes, Proof of Actual Malice in Defamation Actions: An Unsolved Dilemma, 7 Hofstra L. Rev.

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balance between defending reputational interests and securing the first amendment right of free speech. The effect, though not the purpose, of the actual malice requirement has been to limit the number of successful defamation actions by public figures. Many decisions seem to have interpreted this effect as correlative to its aim. The post-Sullivan trend in defamation mirrors the tort's beginnings: defamation law has been read with increasing strictness to limit suits. As a result, courts have been reluctant to find defamatory implications that arise from facially neutral statements actionable.

This Note analyzes recent cases in light of the issues and potential

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655, 710 (1979). Others maintain that the standard places an undue burden on plaintiffs. In Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir.), cert. denied, 479 U.S. 883 (1986), the dissent observed that

This judicially created limitation on libel actions has... no apparent relationship to any change that has occurred in either the Constitution or society since the Bill of Rights was ratified in 1791. Libel is still libel. All that has changed is the prevailing judicial perception of where the balance should be struck between libel plaintiffs and libel defendants...

Id. at 1306-07 (Bowman, J., dissenting) (footnote omitted).

8. See Sullivan, 376 U.S. at 271-73. Sullivan's intent and its result may not coincide, however. In Dun & Bradstreet, Justice White stated that Sullivan struck an "improvident balance" between the public's interest in being fully informed about public affairs and the plaintiffs' interest in vindicating their reputations. 472 U.S. at 767 (White, J., concurring). He argued that the Sullivan standard has resulted in a stream of public misinformation and in the unwarranted destruction of reputations. See id. at 767-69. One commentator, arguing for a refined approach, suggests that the communications industry should bear its share of the libel burden just as other industries pay the costs for the harms they cause. See M. Mayer, supra note 7, at 15-16.


10. See infra notes 44-106 and accompanying text.

11. The constriction of defamation contrasts to the general trend in tort law of expansive interpretation and liberal provision of remedies. See, e.g., Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) (court's decision restricting defamation "is an anomaly in a time when tort analysis increasingly focuses on whether there was an injury"), cert. denied, 110 S. Ct. 757 (1990); M. Mayer, supra note 7, at 8-9 (in defamation, liability has been sharply limited, whereas in other areas of law liability has been expanded).

12. See R. Smolla, supra note 4, § 4.05(3), at 4-16.

13. This Note discusses federal as well as state cases. Defamation is a state law claim that does not command federal jurisdiction as a matter of course. Federal courts hear defamation cases under pendent or diversity jurisdiction. See, e.g., Stevens v. Tillman, 855 F.2d 394, 395 (7th Cir. 1988) (principal claim under 42 U.S.C. § 1985(3) supporting pendent state law defamation claim), cert. denied, 109 S. Ct. 1339 (1989); Woods v. Evansville Press Co., 791 F.2d 480, 481 (7th Cir. 1986) (defamation action predicated on diversity jurisdiction); Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 501 (3d Cir.) (same), cert. denied, 439 U.S. 861 (1978). Analytically, the forum is irrelevant. Practically, however, it may well influence the plaintiff's chance of success: one study showed that defendants won 75% of the cases in federal court, but only 39% in state court. See Goodale, Survey of Recent Media Verdicts, Their Disposition on Appeal and Media Defense Costs, in Media Insurance and Risk Management 69, 73 (1985).

Theoretically, analyzing a defamation claim requires two inquiries. The threshold question is whether the plaintiff's state-protected right to be free from injury to reputation has been violated. If it has, the court must determine whether the first amendment
questions raised by defamation by implication. Part I presents an analytic backdrop, describing historical impulses and conflicting policies in defamation law. Part II draws on common themes that run through the cases. Part III discusses relevant constitutional and policy considerations, establishing that neither the Constitution nor precedent precludes defamation by implication. It advocates that the fact/opinion test, used to determine whether a constitutional privilege immunizes the challenged defamation, be modified in the context of defamation by implication. Finally, it argues that the power of defamatory insinuations and the plaintiff's considerable disadvantage in challenging them compel recognition of defamation by implication. The Note concludes that such an approach strikes the correct balance between protecting first amendment principles and defending reputational interests.

I. BACKGROUND: HISTORICAL IMPULSES AND COLLIDING POLICIES

Defamation consists of twin torts, libel and slander. Nonetheless precludes recovery. Because state tort law generally incorporates constitutional analysis, federal courts cannot dissect their analysis neatly into a state law segment and a first amendment segment. Cf. Pierce, 576 F.2d at 502 & n.19 ("no rigid line of demarcation may be maintained between state law rules and constitutional norms"). Federal courts may also disregard state law in favor of overriding constitutional principles. In Lewis v. Time Inc., 710 F.2d 549 (9th Cir. 1983), for example, the court relied on Restatement section 566, even though California had not adopted it, because the case involved "a privilege that derives from the Constitution, not from state law." Id. at 555.


This Note eschews the term innuendo because it has two possible, and widely differing, meanings in defamation law. The narrow, technical meaning is associated with libel per quod, which involves communications whose defamatory meaning must be established by extrinsic evidence. The explanation of the communication's defamatory meaning in light of these extrinsic circumstances is called an "innuendo." See Restatement (Second) of Torts § 563 comment f (5th ed. 1984). The second, commonly understood meaning of innuendo is the implication arising from a literal statement. This connotation of innuendo is addressed here by the terms "implication" and "impression." Cf. Brief for Appellee at 60-61 n.63, Newton v. NBC, 677 F. Supp. 1066 (D. Nev. 1987) (No. 89-55220) [hereinafter Brief for Appellee] ("impression" is preferable term where audiovisual medium is involved) (on file at the Fordham Law Review).

Defamation is usually defined as a communication that tends to subject the plaintiff to hatred, contempt, ridicule or avoidance. See W. Keeton, supra note 1, § 111, at 773; cf. Kimmerle v. New York Evening Journal, Inc., 262 N.Y. 99, 102, 186 N.E. 217, 218 (1933) ("words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"). Prosser and Keeton reject this definition as too narrow and espouse the Restatement (Second) definition. See W. Kee-
information communicated by written words or other tangible representations, while slander is defamation by spoken words or transitory gestures. Libel can be communicated by such symbolic expressions as pictures, signs, statues and motion pictures. Even symbolic conduct, such as hanging a plaintiff in effigy or signing his name to an egregious piece of writing, may constitute libel. Traditionally, the form of the defamation was not controlling. Thus, common-law courts did not distin-

16. This Note discusses cases involving libel, not slander, but is applicable to both species of defamation. In theory, slander by implication and libel by implication are equally possible. In practice, however, a claim of slander by implication would probably be unsuccessful. Slander, unlike libel, generally requires proof of "special damages" in the form of actual pecuniary loss. See Terwilliger v. Wands, 17 N.Y. 54, 57 (1858); R. Smolla, supra note 4, § 1.04(5), at 1-12 to 1-13, § 7.01-7.02, at 7-2 to 7-4. Proving that a defamatory statement caused such loss is difficult, but proving that a mere insinuation caused pecuniary loss would be formidable.

17. The Restatement (Second) of Torts defines libel broadly as any "form of communication that has the potentially harmful qualities characteristic of written or printed words," Restatement, supra note 14, § 568(1), and enumerates the following factors to be considered in classifying the defamatory speech: 1) its area of dissemination, 2) its "persis-
tence" and 3) the premeditated character of its publication. See id. at § 568(3). Under the prevailing modern view, all broadcasts are treated as libel. See R. Smolla, supra note 4, § 1.04(4), at 1-11 to 1-12; Restatement, supra note 14, § 568A. This approach com-
ports with the policy underlying the libel/slander dichotomy. See infra note 18.

18. The policy underlying the distinction is to treat communications more likely to cause serious harm (libel) separately from those less likely to do so (slander). See Restatement, supra note 14, § 568A comment a. Cardozo described the rationale with characteristic fluency:

Many things that are defamatory may be said with impunity through the me-
dium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing is its permanence of form. The spoken word dissolves, but the written one abides and 'perpetuates the scandal.'


20. See Johnson v. Commonwealth, 14 A. 425, 425-26 (Pa. 1888). This example sug-
gest two important exceptions in defamation law. The first differentiates assertions of fact from statements of opinion. Opinion is generally not treated as defamatory, apparently on the theory that personal convictions will be understood as such and hence will not lower the plaintiff in the community's estimation. See W. Keeton, supra note 1, § 111, at 776; infra notes 41-43 and accompanying text. The second exception renders hyperbole non-actionable. See Greenbelt Coop. Publishing Ass'n v. Bresler, 398 U.S. 6, 14 (1970). Presumably, listeners will not be swayed by mere exaggeration. See id. Hence, imposing liability would unjustifiably impinge on free speech interests.


22. See Marion v. Davis, 217 Ala. 16, 18, 114 So. 357, 359 (1927); W. Keeton, supra note 1, § 111, at 780; cf. Restatement, supra note 14, § 568(1)-(2) (defamation embodied in physical form, spoken words, transitory gestures or any other form of communication).
tistinguish between implications and statements.23 *Sullivan*, however, constitutionalized the law of defamation,24 inaugurating the most recent trend toward constricting the tort.25 In this climate, courts are hesitant to recognize defamation by implication.

Two conflicting but fundamental legal principles collide in the defamation arena. One principle is the moral notion that individuals should be protected from defamatory statements that impugn their reputations.26 State defamation law defends these reputational interests.27 The other principle is freedom of expression, which is enshrined in the first amendment.28

Application of the Bill of Rights to the states and greater emphasis on freedom of speech have prompted vigilant use of the first amendment to limit state defamation law.29 *New York Times Co. v. Sullivan*,30 a

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23. See W. Keeton, supra note 1, § 111, at 780; Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 Wm. & Mary L. Rev. 825, 847-48 (1984); Merrill v. Post Publishing Co., 197 Mass. 185, 193, 83 N.E. 419, 423 (1908); Lewis v. Chapman, 16 N.Y. 369, 371-72 (1857). Possibly the oldest recorded case of defamation by implication is *Cooper v. Greeley*, 1 Denio 347 (N.Y. 1845). Horace Greeley, writing in the New York Tribune, explained that he was not perturbed by a suit James Fenimore Cooper had filed against him because “[Mr. Cooper] . . . will not like to bring [his action] in New York, for we are known here, nor in Otsego for he is known there.” Id. at 348.


25. See Mihalik v. Duprey, 11 Mass. App. Ct. 602, 604, 417 N.E.2d 1238, 1239-40 (1981). *Sullivan*’s insistence that there be a false statement of fact, see 376 U.S. 254, 279-80 (1964), might be read to preclude defamatory implications. Many courts disallowing defamation by implication seem to base their analyses on such an interpretation. See *Mihalik*, 11 Mass. App. Ct. at 605-06, 417 N.E.2d at 1240. A compelling argument can be made, however, that such a reading attaches far too much significance to a word that was chosen merely to reflect the facts of that case.

26. See W. Keeton, supra note 1, § 111, at 771; Rosenblatt v. Baer, 383 U.S. 75, 86 (1966); Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 504 (3d Cir.), cert. denied, 439 U.S. 861 (1978); Restatement, supra note 14, § 559. As Shakespeare expressed the sentiment,

Good name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robes me of that which not enriches him
And makes me poor indeed.


27. The interest in reputation is a “relational” interest, which involves community perception rather than personal humiliation. Defamation occurs only when the defendant communicates or “publishes” to third parties something that may affect their opinion of the plaintiff. See W. Keeton, supra note 1, § 111, at 771. The plaintiff’s own indignation or suffering cannot support a defamation action, but may constitute parasitic damages attached to an independent cause of action. See id.

28. “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I.

landmark defamation decision, gave eloquent voice to the growing sense that free expression about public matters by citizens and the press must be guarded zealously, even at the occasional expense of reputational interests. Sullivan's imposition of the actual malice standard was motivated by a conviction that debate on matters of public interest should be "uninhibited, robust, and wide-open" even when it includes "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Where the plaintiff is not a public figure, the state's interest in protecting the plaintiff's reputational interest is afforded greater weight. Unlike public figures and officials, the private person has "relinquished no part of his interest in the protection of his own good name." Many courts, however, have effectively interpreted Sullivan as asserting the primacy of free expression over reputational interests. Consequently, they err on the side of under-protecting reputational interests in their eagerness to safeguard first amendment principles. This trend is evidenced by decisions discouraging or even disallowing claims of libel by implication.

II. THE COMPETING APPROACHES

Some courts permit and others prohibit a cause of action for defamation by implication. Unfortunately, they articulate their positions infre-
quently. Many courts that disallow defamation by implication do not do so expressly. Instead, they treat the claim as if it involved a facially defamatory statement rather than analyzing it as a defamatory implication arising from a neutral expression.

Treating such claims as if they were identical to libellous statements, however, misperceives their peculiar nature. It also results in improper constitutional analysis. Courts generally examine the alleged defamation to determine whether it constitutes opinion, which is protected under the first amendment, or fact, which is not. Ollman v. Evans, which sets forth the most widely used version of the fact/opinion dichotomy, articulates a four-part test for the court to use in distinguishing fact from opinion: the factors are the statement’s specificity, verifiability, literary context and public context. However, the fact/opinion test is inappropriate in the context of defamation by implication. Its application to defamatory implications effectively precludes this species of defamation.

A. Disallowance of Defamation by Implication

1. Explicit Rejection

In Price v. Viking Penguin, Inc., the Eighth Circuit expressly declined to recognize a cause of action for libel by implication. An FBI

39. See infra notes 58-106 and accompanying text.
40. See infra notes 58-89 and accompanying text.
41. While the distinction between opinion and fact is an old one, see W. Keeton, supra note 1, § 111, at 776 n.72, the Supreme Court breathed new life into it in Gertz v. Robert Welch, Inc.: Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. 418 U.S. 323, 339-40 (1974) (footnote omitted). Although these observations were dicta, the distinction they draw between fact and opinion has been accepted as controlling law. See Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431 n.3 (8th Cir. 1989), cert. denied, 110 S. Ct. 757 (1990).
42. See Ollman v. Evans, 750 F.2d 970, 978, 979-84 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985). The test is designed to identify statements that, both intrinsically and contextually, function as unqualified assertions of fact rather than as elements of opinion. See Price, 881 F.2d at 1432. Whether it succeeds is another matter. See Stevens v. Tillman, 855 F.2d 394, 398-400 (7th Cir. 1988) (trying to separate fact from opinion is “snipe hunt” that Constitution may nonetheless require), cert. denied, 109 S. Ct. 1339 (1989). See generally infra Parts IIA, IIB. Other cases have set out similar tests. See, e.g., Mr. Chow v. Ste. Jour Azur S.A., 759 F.2d 219, 226 (2d Cir. 1985) (context, circumstances surrounding statement, precision of language, verifiability); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783-84 (9th Cir. 1980) (context, cautionary words and circumstances, including medium of dissemination and audience).
43. At least one commentator believes that the fact/opinion dichotomy should be applied in order to render defamatory implications non-actionable. See Note, The Fact-Opinion Determination in Defamation, 88 Colum. L. Rev. 809, 831 (1988).
44. 881 F.2d 1426 (8th Cir. 1989), cert. denied, 110 S. Ct. 757 (1990).
agent brought a libel action against the author and publisher of a book about the Wounded Knee occupation and a subsequent shootout on the Pine Ridge Reservation in South Dakota. His claim was not based on any explicitly defamatory statements in the book, but rather on defamatory implications arising from facially neutral observations. The district court granted the defendants' motion for summary judgment and the plaintiff appealed.

Analyzing the claim as if it involved an overtly defamatory statement, the Eighth Circuit applied Olman's version of the fact/opinion test to determine whether the challenged "statements" were non-actionable opinion. Having determined that the challenged assertions failed the test's specificity prong, the court announced: "We do not recognize defamation by implication."

In effect, the court created an additional hurdle for the plaintiff. To establish a cause of action, the plaintiff must demonstrate that the challenged defamation is specific. The defendant, however, need not show


47. Peter Matthiessen's In the Spirit of Crazy Horse, written in a tenor sympathetic to the Indian situation, urged a new trial for Leonard Peltier, the American Indian Movement member convicted of killing two F.B.I. officers in the melee. Toward that end, the author contributed a share of the book's profits to the Leonard Peltier Defense Committee. See Price, 881 F.2d at 1429, 1435.

48. Price also alleged intentional infliction of emotional distress, false light invasion of privacy and prima facie tort. His request for $25,000,000 in compensatory damages, punitive damages, fees and costs led Viking to recall the book from circulation. See Price, 881 F.2d at 1429.

The district court dismissed some of the defamation claims under state law as well as the emotional distress, privacy and prima facie tort claims. See Price v. Viking Press, Inc., 625 F. Supp. 641, 645, 648, 650-51 (D. Minn. 1985), aff'd, 881 F.2d 1426 (8th Cir. 1989), cert. denied, 110 S. Ct. 757 (1990). Twenty challenged statements remained. They suggested that the plaintiff suborned perjury, orchestrated the dismissal of charges against a criminal suspect, withheld information during a homicide investigation and harassed Indians. See Price, 881 F.2d at 1447-51 app. After four years of encyclopedic discovery and exorbitant costs to both parties, the district court dismissed these remaining claims on constitutional grounds. See Price, 676 F. Supp. 1501, 1515 (D. Minn. 1988).


50. See Price, 676 F. Supp. 1501, 1515 (D. Minn. 1988). The court found that the plaintiff had not shown actual malice by clear and convincing evidence. See id. at 1514. The burden of proving actual malice with "convincing clarity" is applicable at the summary judgment and directed verdict stages. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

51. See supra note 41 and accompanying text.


53. The court maintained that it could not reverse the district court's grant of summary judgment unless the plaintiff showed that "precise factual statements were false."
specificity to avoid liability. The practical result of this approach is that a defendant who has defamed by implication, rather than by an explicit statement, is immune from liability.

Moving beyond the plaintiff's particular claims, the court analyzed the case in light of its significance to "our nation's interest." The court explained that the first amendment compelled it to ignore certain injuries to the plaintiff and instead require that he

- do a great deal more than establish his disagreement with the book.
- We have asked him to select what he finds objectionable, to explain why it has a precise core of meaning, [and] to persuade us that it is a factual matter capable of the jury's resolution . . .

This burden effectively precludes defamation by implication.

2. Implicit Rejection

The Eighth Circuit explicitly articulated its position on defamation by implication in Price, but adopted the analysis it had developed in two earlier cases, Janklow v. Newsweek, Inc. and Secrist v. Harkin. Like Price, Janklow arose from the 1973 Wounded Knee occupation. The plaintiff was a former governor and attorney general of South Dakota. He sued Newsweek for publishing an article discussing his relationship

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Price v. Viking Penguin, Inc., 881 F.2d 1426, 1434 (8th Cir. 1989), cert. denied, 110 S. Ct. 757 (1990). By definition, however, an implication lacks the requisite specificity. See id. at 1439. Hence, under the fact/opinion test, a defamatory implication will always be found to constitute non-actionable opinion. Those courts that analyze defamatory implications as if they were defamatory statements, in fact, invariably reach that conclusion. See infra notes 58-89 and accompanying text.  

54. See Price, 881 F.2d at 1432 n.4.  

55. See id. at 1430. Apparently, a host of literati agreed: amicus curiae for the defendants included William Styron, Kurt Vonnegut, John Irving, Alfred Kazin and Susan Sontag. See id. at 1426.  

56. Id. at 1446.  

57. The plaintiff based his appeal to the Supreme Court on the inequity of this burden. He argued that the circuit court had erected an "insurmountable hurdle" for plaintiffs in libel cases. N.Y. Times, Jan. 9, 1990, at A18, col. 6. Under the fact/opinion test, courts almost invariably interpret defamatory implications as opinion. See infra text accompanying notes 148-149. This is not to say that another result is impossible. See infra note 64 and accompanying text.  


with American Indian activist Dennis Banks, whom he had prosecuted as state attorney general on felony charges arising from the occupation.\textsuperscript{61} Janklow claimed that the article libelled him by implying that revenge motivated his prosecution of Banks, who had initiated charges of assault against him in the tribal community.\textsuperscript{62}

The district court granted summary judgment for the magazine, maintaining that any such implication was non-actionable opinion.\textsuperscript{63} On appeal, a divided panel of the Eighth Circuit reversed, holding that the defamatory implication inferable from Newsweek's article was "factual," and therefore actionable.\textsuperscript{64} The court granted the plaintiff's petition for en banc rehearing on whether the article's implication constituted fact or opinion.

Affirming the district court's dismissal of the complaint with prejudice, the Eighth Circuit held that the challenged implication was protected opinion.\textsuperscript{65} Noting that no bright line separates fact from opinion, the court observed that the term "fact" need not have the same meaning in every legal context. Rather, its given meaning "should depend on the purposes of the law being applied."\textsuperscript{66} By sanctioning a protean definition of "fact," the court licensed result-oriented analysis of the challenged expression. Because "fact" will be viewed through the filter of the first amendment, courts will find the challenged expression to be "opinion" in order to further the first amendment's purpose. The Janklow court did just this.

\textsuperscript{61} See Janklow, 788 F.2d at 1301. In a separate libel suit, the plaintiff followed David Price's lead in suing Viking Penguin and Matthiessen for defaming him in \textit{In the Spirit of Crazy Horse}. The Supreme Court of South Dakota is scheduled to hear the case in early 1990. The result in \textit{Price} bodes well for the defendants, who have reportedly spent more than $2,000,000 defending the book. See Edwin McDowell, \textit{Book Notes}, N.Y. Times, Jan. 10, 1990, at C20, col. 3. If Janklow's suit is resolved in their favor, Viking plans to recoup lost profits by publishing a paperback edition with an addendum describing the book's byzantine legal history. See \textit{id}.

\textsuperscript{62} In fact, the prosecution preceded Banks's initiation of assault charges. See Janklow v. Newsweek, Inc., 788 F.2d 1300, 1303 (8th Cir.), \textit{cert. denied}, 479 U.S. 883 (1986). The article's chronology, however, suggested that the plaintiff began prosecuting after Banks charged him with raping an Indian girl. The rape allegation was later acknowledged as false. See \textit{id}. at 1301.

\textsuperscript{63} See \textit{id}. Having found that the article correctly and neutrally reported the material facts of the allegation, the court held that any implication of revenge was opinion protected under the first amendment.

\textsuperscript{64} See Janklow v. Newsweek, Inc., 759 F.2d 644, 652 (8th Cir. 1985), \textit{rev'd}, 788 F.2d 1300 (8th Cir.) (en banc), \textit{cert. denied}, 479 U.S. 883 (1986). The court based its holding on the following findings: the article's language was generally that of a factual account; the article's implication was not "broad, unfocused or subjective," but specific and factual; the article contained no cautionary language indicating that opinion, not fact, was being presented; the forum, a news magazine, would indicate that the article offered "hard" news. See \textit{id}.

However, the panel upheld the district court's holding that the article accurately and neutrally reported the facts. See \textit{id}. at 647-49.


\textsuperscript{66} \textit{Id}. at 1302.
Although it applied the *Olman* test\(^ {67} \) to determine whether the challenged implication was fact or opinion, the court concentrated on protecting the defendant's speech. This is evidenced by the court's finding that the implication of revenge is not precise because "[i]t does not *say in so many words* that Janklow's motive [in prosecuting] was revenge."\(^ {68} \) Because nothing short of an explicit charge will satisfy this "in-so-many-words" test, a defamatory implication would never support a defamation action under *Janklow*'s analysis. This result is consonant with the court's apparent conclusion that free speech principles transcend any other interests involved.

The dissent criticized the majority for failing to strike a fair balance between Newsweek's media interests and the plaintiff's reputational interests.\(^ {69} \) It also challenged the court's broad definition of opinion:

> ...to the fortress of actual malice, the Court adds a virtually impenetrable outer barrier built upon an extremely broad and elastic definition of opinion. ... I do not see any reason to extend absolute protection under the First Amendment to statements that qualify as opinion rather than fact only by means of judicial semantics ...  

In *Secrist v. Harkin*,\(^ {71} \) the Eighth Circuit refined the *Janklow* approach and paved the way to *Price*'s explicit repudiation of defamation by implication. In *Secrist*, a member of Senator Roger Jepsen's staff sued Jepsen's campaign rival for defamation.\(^ {72} \) The plaintiff asserted that the candidate's press release libelled him by implying that he actively solicited funds for the senator in violation of the Hatch Act.\(^ {73} \) The district court granted the defendants' motion for summary judgment. It held

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67. *See supra* note 41.
68. *Janklow*, 788 F.2d at 1303 (emphasis added).
70. *Janklow*, 788 F.2d at 1307 (citations omitted). The dissent observed that Janklow would probably have been able to make a strong showing of actual malice if the court had allowed the claim. *See id.* at 1308.
71. 874 F.2d 1244 (8th Cir.), *cert. denied*, 110 S. Ct. 324 (1989).
72. *See id.* at 1247. Jepsen had hired the plaintiff, a Marine Corps lieutenant colonel, through the Secretary of the Navy's intercession. The plaintiff's duties included helping Iowa businesses obtain defense contracts. *See id.* at 1246. His appointment generated sufficient controversy to emerge as a campaign issue the following year, when Jepsen's challenger issued a press release questioning the senator's motives in securing the appointment. It implied that the appointment had increased Jepsen's campaign contributions rather than Iowa's share of defense contracts. It listed thirty-one companies, all identified as defense contractors, that had contributed to the campaign. *See id.* at 1247.

The plaintiff alleged that the following statements defamed him by implication:
that the disputed portions of the press release were constitutionally protected opinion and alternatively, that the plaintiff had not proved actual malice by clear and convincing evidence.

The Eighth Circuit affirmed on appeal, finding that the statements' public and literary contexts suggested opinion rather than fact. The court further observed that "the challenged statements concerning fundraising are not so precise, specific, or verifiable that they can be equated . . . [with] an accusation of criminal conduct." The court thus applied the Ollman factors to the statements themselves, not to their implications. Because the statements did not explicitly or precisely charge criminal conduct, the court dismissed the claim. Hence, while a precise charge of criminal conduct may be actionable as a statement of fact, a veiled charge of criminal conduct, not precise or verifiable, is protected as opinion.

In Pierce v. Capital Cities Communications, Inc., the Third Circuit foreclosed the possibility of a public figure recovering for defamation by implication. In Pierce, a former Port Authority chairman sued a television station for broadcasting a program that created the false impression that he had misused his public position by seeking private pecuniary gain. The program implied that the plaintiff had cast his vote on a Port Authority bridge project to profit from reselling land he had acquired near the bridge. It also insinuated that he had used his knowledge of

1) "A [P]entagon Marine Colonel assigned to drum up defense contracts for Iowa has been more successful at raising money for Sen. Roger Jepsen's reelection bid" than helping Iowa businesses obtain defense contracts.

2) The Jepsen campaign committee received 60% of more than $88,000.00 in defense contractors' contributions after the plaintiff joined the staff.

3) The plaintiff is apparently successful "at opening doors to defense campaign money coffers on behalf of the Senator." See id. at 1253-54 (quoting defendant's press release).

74. See id. at 1248.
76. See id. at 1253.
77. Id. at 1251.
78. See id.
80. The program, which aired three years after Pierce stepped down as chairman, explored the Port Authority's activities and its new chairman's performance. Entitled "Public Bridges and Private Riches," the program's thesis is aptly summarized in its own introduction:

When Washington crossed the Delaware River, it was absolutely free. When [our reporter] crossed the Delaware River, it cost him sixty cents. Washington's crossing brought us a nation. [Our] crossing brought us some incredible findings that go right into your pockets. For 90 days now, [our reporter] has traveled the bridges of the Delaware River Port Authority and the high speed road to profit . . . [B]ut hold onto your dollars. After this program you may want to swim across the Delaware River.

Id. at 497 n.4.
Port Authority projects in private real estate acquisitions.81

The district court granted summary judgment for the defendants, citing the plaintiff's failure to demonstrate actual malice.82 The plaintiff appealed, arguing that the court erred in not fully considering the defamatory implications that flowed from the broadcast's language and composition.83

The Third Circuit affirmed the district court's judgment.84 Criticizing the plaintiff's concession that "no specific statement" was incorrect,85 the court accepted the defendants' argument that treating the challenged innuendoes as actionable defamation would undermine the first amendment86 and compromise Sullivan and its progeny.87 Construing these prior decisions broadly, the court demonstrated its unwillingness to broaden the scope of actionable defamation to encompass defamatory implications: "[b]eyond the details relating to the various statements in the broadcast are fundamental principles of First Amendment jurisprudence compelling [our decision]."88 By characterizing the facts of the case as "mere detail," the court signalled its adoption of a policy-motivated analysis similar to that in Janklow.89

In Lewis v. Time Inc.,90 the court was similarly unsolicitous of defamation by implication. In that case, an attorney sued the publishers of Time for defaming him by implication in an article on the legal profession.91 The district court, granting summary judgment for the defendants, held

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81. See id. at 497-99. The plaintiff also challenged the program's title and introduction as defaming him contextually. See id. at 499-500 & n.8.
84. It held that no defamation had occurred and that even if it had, it was protected on constitutional grounds. See id. at 504.
85. Id. at 509 (emphasis added). This focus on the statements themselves rather than the statements' implications is further evidenced by the court's finding that the defendants did not doubt the truth of any "remarks" in the broadcast. Id. (emphasis added).
86. See id. at 501, 510.
88. Id. at 509.
89. See supra notes 60-70 and accompanying text.
90. 710 F.2d 549 (9th Cir. 1983).
91. The article, entitled "Those $#*X$!!! Lawyers," was the cover story on April 10, 1978. The plaintiff challenged a section of the article, titled "Ethics Enforcement," that referred to the profession's "shadier practitioners." See id. at 550. Representing the plaintiff as a beneficiary of "painfully slow bar discipline," the article noted that he was still practicing law despite a $100,000 malpractice judgment against him in 1970 and a $60,000 judgment including punitive damages in 1974 for defrauding clients of money." See id. at 551. The district court, citing two state court judgments against the plaintiff for malpractice and fraud, held that Time's references to the judgments were protected because they were true statements. See id.

The plaintiff's claim that the article defamed him by implication rested on the article's general tone, as exemplified in the phrases "shadier practitioners" and "painfully slow bar discipline." See id.
that the article's general "negative inferences" were constitutionally protected expressions of opinion based on true statements of fact.92

The Ninth Circuit agreed.93 In characterizing the challenged implications as "opinion," the court relied on the test it formulated in an earlier case, *Information Control Corp. v. Genesis One Computer Corp.*94 Like *Olman*, *Information Control* essentially allowed the court to make a visceral determination of whether the challenged expression should be protected.95 Having decided that the challenged implications were "not the kind of factual expression for which the Constitution permits liability to be imposed,"96 the court summarily rejected the plaintiff's contention that the offending phrases of the article must be read cumulatively.97

92. See id.; *infra* notes 105-106 and accompanying text.
93. See Lewis, 710 F.2d at 554-55. The court relied on the Restatement (Second) of Torts section 566, which states that "[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The defendant argued that the implication that the plaintiff was a "shady practitioner" fell within section 566 because it was based on stated, non-defamatory facts in the public record. See *id.* at 555.

94. 611 F.2d 781, 783-84 (9th Cir. 1980). *Information Control'*s inquiry into the fact/opinion morass focuses on three factors: 1) the facts surrounding publication, 2) the context of the statement and 3) the language itself. See *id.* Such contexts as "public debate, heated labor dispute, or other circumstances in which an 'audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole'" are more likely to indicate opinion. Lewis v. Time Inc., 710 F.2d 549, 553 (9th Cir. 1983) (quoting Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 601, 552 P.2d 423, 428, 131 Cal. Rptr. 641, 644 (1976)) (citation omitted). Language that is "'cautiously phrased in terms of apparency' or is of a kind typically generated in a spirited legal dispute" is, similarly, more likely to be opinion. *Id.* Applying the test, the court determined that the facts surrounding the publication suggested that the article was opinion because, even if it was held out as a factual account, it "did not purport to dissect in detail Lewis's qualifications or lack thereof to practice law." *Id.* The court found that the second factor pointed to opinion because the article made "an effort to persuade readers ... that Lewis should be disciplined, and ... that lawyers in general should be faulted for permitting attorneys like Lewis to practice without censure." *Id.* at 554. Finally, the court conceded that "the article was not part of a 'spirited legal dispute' in which the 'parties are reciprocally attacked and defended,'" but asserted that *Information Control* "does not state that expressions of opinion may be found only in an exchange of views ... . Such a doctrine would too often deny constitutional protection for opinions expressed in the news media ...." *Id.* (emphasis in original).

95. As the dissent in *Janklow v. Newsweek* observed, "the result to be obtained through application of the *Olman* factors is in the eye of the judge." 788 F.2d 1300, 1307 (8th Cir. 1986) (Bowman, J., dissenting), cert. denied, 479 U.S. 883 (1986).

Recognizing that these tests spawn inconsistency, the Supreme Court recently agreed to decide how lower courts should distinguish between opinion and fact. See Milkovich v. The News-Herald, 15 Ohio St. 3d 292, 473 N.E.2d 1191, cert. granted sub nom. Milkovich v. Lorain Journal Co., 110 S. Ct. 863 (1990) (defamation suit dismissed by state courts). In *Milkovich*, a former high school wrestling coach sued an Ohio newspaper for publishing a report that he had "lied" at a court hearing on a 1974 post-match fracas. The state courts had concluded that the reporter's statement was constitutionally protected opinion. See *N.Y.* Times, Jan. 23, 1990, at A19, col. 2.

96. Lewis, 710 F.2d at 554.

97. See *id.* at 552. Another court rejected a similar argument. In *Masson v. New Yorker Magazine, Inc.*, a psychoanalyst claimed that a well-known reporter, Janet Mal-
Similarly, in *Mihalik v. Duprey*, a Massachusetts appellate court refused to consider the overall defamatory impression created by a series of true factual statements. The plaintiff, a school committee member, claimed that a "riddle" published in the committee's newsletter defamed him by implying that he misused his position for personal gain. Denying the defendants' motion for a directed verdict, the trial court instructed the jury that the truthful statements could support a defamation action if they conveyed a defamatory impression when taken in context. The jury found that the riddle did convey the defamatory impression that Mihalik had abused his position and that he had sustained his burden of proving actual malice.

Although the appellate court acknowledged that earlier Massachusetts cases had imposed liability on defendants who had defamed through implication, it maintained that *Sullivan* had invalidated this case law. Falsity cannot be established, the court held, by showing merely that...
the cumulative effect of the statements created a defamatory “overtone.”106

B. Allowance of Defamation by Implication

1. Explicit Allowance

Other courts have concluded that defamation by implication is a valid cause of action.107 In Woods v. Evansville Press Co.,108 a television station owner sued a newspaper and its parent corporation109 for libelling him in an article.110 The plaintiff claimed that the column falsely implied that he was dishonest, indebted and religionistic.111 The district court

figure plaintiff cannot recover damages without also showing that the statements at issue are false.” Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 769 (1986). This reverses the common-law presumption that defamatory speech is false. See Corabi v. Curtis Publishing Co., 441 Pa. 432, 449-50, 273 A.2d 899, 908 (1971); Restatement, supra note 14, § 581A comment b. Writing for the majority in Philadelphia Newspapers, Justice O'Connor explained that “two forces” are particularly important: whether the plaintiff is a public figure and whether the speech is of public concern. See Philadelphia Newspapers, 475 U.S. at 775. If the plaintiff is a public figure and raises an issue of public concern, he must prove scienter and falsity under Sullivan. See id. If the plaintiff is a private figure but raises an issue of public concern, then Gertz applies, see id., and the plaintiff must prove at least negligence and falsity to recover actual damages. If the plaintiff is a private figure and raises no issue of public concern, then the Constitution does “not necessarily force any change in at least some of the . . . common-law landscape.” Id.


107. See infra notes 108-130 and accompanying text.

108. 791 F.2d 480 (7th Cir. 1986).

109. The court ultimately dismissed the complaint against the newspaper’s parent company on jurisdictional grounds. See id. at 483.

110. The article’s author, Kenneth Wayne McManus, was the paper’s regular columnist on media issues. Between December 1980 and June 1981, he devoted all or part of twenty-three columns to matters concerning the plaintiff’s station, Channel 7. In June 1981, he interviewed one of the station’s newscasters, William E. FitzGerald III, who was unsatisfied with changes in programming and station policies implemented after the plaintiff’s purchase of Channel 7. The challenged column consisted almost wholly of FitzGerald’s statements regarding the plaintiff’s management of the station and his personal predictions of future changes. See id. at 481-82.

111. See id. at 483. He did not assert that the column contained any facially defamatory statements. See id. at 486.
granted the newspaper's motion for summary judgment because the plaintiff had failed to prove actual malice.\footnote{112}{See Woods v. Evansville Press Co., 791 F.2d 480, 489 (7th Cir. 1986). Although he was deemed a private figure, state law subjected the plaintiff to the actual malice standard because he based his suit on a matter of public interest. See id. at 483; supra notes 32, 34. The district court suggested that the defendants' motion for summary judgment had to be granted if the plaintiff had not shown actual malice with convincing clarity. See Woods, 791 F.2d at 485. On appeal, the plaintiff asserted that the court had misapplied the burden-of-proof standard. The Seventh Circuit noted the court's apparent suggestion that the plaintiff must prove his case at the summary judgment stage, which would amount to a trial on the merits. See id. Nonetheless, the court did not resolve the issue of whether the district court had in fact required the plaintiff to prove actual malice with convincing clarity, or whether it had appropriately required that he establish the existence of a triable issue of fact. Instead, the Seventh Circuit reviewed the record de novo. See id. at 486. Appellate courts have the duty to make an independent examination of the whole record to ensure that "the [lower court's] judgment does not constitute a forbidden intrusion on the field of free expression." New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); see also Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (reaffirming independent appellate review doctrine); Note, Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Person Defamation Cases, 57 Fordham L. Rev. 579 (1989) (discussing constitutionally mandated plenary appellate review of actual malice determinations). Whether the doctrine applies only to factual determinations favoring the defendant, or extends to those favoring the plaintiff, is unclear. See R. Smolla, supra note 4, § 12.09(3), at 12-41 to 12-42.}\footnote{113}{Woods, 791 F.2d at 486.}\footnote{114}{Id. at 487. Extrapolating from Sullivan's refusal to compel a publisher to guarantee the truth of his statements, the court determined that a publisher reporting on matters of public interest cannot be burdened with predicting and then negating all possible defamatory inferences a jury might draw from an article. See id. at 487-88. Because the plaintiff was unable to show that the inferences he drew from the column were the only reasonable ones, or that the author shared his reading, the court found that he had not sustained his burden of proof. See id. at 486-87. Simply because a statement reasonably can be read to contain a defamatory inference does not mean . . . that this inference is the only reasonable one that can be drawn from the article. Nor does it mean that the publisher of the statement either intended [it] to contain such a defamatory implication or even knew that readers could reasonably interpret the statement to contain the defamatory implication. Id. at 487. The court observed that the result in the case may have been different if the column carried only those implications that the plaintiff reasonably ascribed to it or if there was evidence that the author harbored animosity toward the plaintiff. See id. at 488.}\footnote{115}{841 F.2d 1309 (7th Cir. 1988).}

The Seventh Circuit affirmed, declaring that "[a]n implied statement, just as a statement made in direct language, can be defamatory."\footnote{113}{Id. at 487.}} Nevertheless, the court found no evidence that the defendants intended the defamatory implications the plaintiff attributed to the article: while the evidence suggested that the column could reasonably be interpreted as defamatory, it was "insufficient to create a triable issue" that the defendants acted with actual malice.\footnote{114}{Id. at 487.}

The plaintiff in \textit{Saenz v. Playboy Enterprises, Inc.}\footnote{115}{841 F.2d 1309 (7th Cir. 1988).} also won a Pyrrhic victory. While the Seventh Circuit reaffirmed its position that defamation by implication is a valid cause of action, it found that the plaintiff
had not sustained the burden of proving actual malice.\textsuperscript{116}

In \textit{Saenz}, a Secretary of New Mexico's Department of Corrections sued \textit{Playboy} magazine for defaming him in "Thirty-Six Hours at Santa Fe," an article discussing a 1980 riot at the New Mexico State Penitentiary. He alleged that the article falsely implied that he had been involved in torturing political dissidents during his tenure as an official in the United States Office of Public Safety.\textsuperscript{117}

Drawing upon \textit{Sullivan} and \textit{Rosenblatt}, the district court determined that a public official premising his defamation claim on statements that critically assess government must show "'an explicit charge' 'specifically directed' at him."\textsuperscript{118} Because the plaintiff based his claim on defamatory implications, not defamatory declarations, the district court deemed his allegations insufficient to disrupt the article's first amendment protection.\textsuperscript{119} The court sweepingly held that a public official may never establish defamation by implication where the inferences are drawn from statements that also critically evaluate governmental conduct.\textsuperscript{120}

The Seventh Circuit affirmed the grant of summary judgment on the ground that a reasonable jury could not find that the plaintiff had demonstrated actual malice with convincing clarity.\textsuperscript{121} Nonetheless, the court criticized the district court for requiring that the defamatory assertions specifically and explicitly libel the plaintiff.\textsuperscript{122} As the \textit{Saenz} court noted, imposing a burden beyond actual malice on public figures who base their suits on defamatory implications is inequitable:

\begin{quote}
[it] denies [them] the opportunity to demonstrate defamatory inferences that are as clear and perhaps more damaging because of their
\end{quote}

\textsuperscript{116} See \textit{id.} at 1314-16, 1318-20.
\textsuperscript{117} See \textit{id.} at 1311. The Office of Public Safety ("OPS"), an offshoot of the State Department, was established after World War II to help under-developed countries establish democratic criminal justice procedures. The plaintiff directed OPS operations in Uruguay from 1965 to 1969 and in Panama from 1970 to 1973. Responding to rampant and documented charges that the agency and its International Police Academy condoned and perhaps facilitated the torture of foreign citizens, Congress disbanded the OPS in 1975. \textit{See id.}


\textsuperscript{119} See \textit{id.} at 561-62.
\textsuperscript{120} See \textit{id.} at 562; \textit{infra} notes 138-147 and accompanying text.
\textsuperscript{121} See \textit{Saenz} v. \textit{Playboy Enterprises}, Inc., 841 F.2d 1309, 1319-20 (7th Cir. 1988).
\textsuperscript{122} See \textit{id.} at 1314. The three-judge panel, noting that the district court gave an overly solicitous reading to \textit{Sullivan} and \textit{Rosenblatt}, observed that those cases protected but did not immunize political speech: "'[l]ike insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, . . . libel can claim no talismatic [sic] immunity from constitutional limitations.'" \textit{Id.} (quoting \textit{New York Times Co. v. Sullivan}, 376 U.S. 254, 269 (1964)).
unlimited nature than even explicitly defamatory charges. . . . Such a rule goes too far; it invokes the spectre of heinous abuse by crafty and mischievous authors whose subtle art of insinuation is honed for destruction.123

The court further observed that disallowing defamation by implication has two undesirable effects: it exposes public figures to inexplicit but clearly discernible slurs and promotes sensationalist journalism that makes no meaningful contribution to public debate.124

2. Implicit Allowance

In *Newton v. National Broadcasting Co.*,125 the court determined that constitutional considerations did not compel dismissal of the plaintiff’s claim of defamation by implication.126 Newton’s claim survived the defendant’s summary judgment motion and reached the jury.

Newton sued NBC for allegedly defaming him in a Nightly News Special Segment called “Wayne Newton and the Law.” He claimed that the broadcast, consisting of facially non-defamatory observations, implied that the Mafia had financed his acquisition of a Las Vegas hotel.127 The

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123. *Id.* Appellants in *Newton v. NBC* quoted this language in their appellate brief, juxtaposing its fervent, expansive rhetoric with the systematic, analytical prose of their brief to make the court’s position on defamation by implication seem immoderate. *See* Brief for Appellants at 38 n.37, *Newton v. NBC*, 677 F. Supp. 1066 (D. Nev. 1987) (Nos. 89-55220, 89-55285) [hereinafter *Brief for Appellants*] (on file at the Fordham Law Review); *see also infra* notes 125-130 and accompanying text (discussing *Newton*).

124. *See* *Saenz*, 841 F.2d at 1317. In dictum, the court concluded that whether the article impliedly defamed the plaintiff was a “constitutionally permissible” question for the jury and observed that nothing in *Sullivan* or *Rosenblatt* suggested the contrary. *See id.* at 1315; *see also infra* note 137 and accompanying text (discussing *Rosenblatt*).

Another court reached a similar result. In *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980), the mayor of Providence, Rhode Island sued a newspaper for publishing a story that implicitly accused him of rape and bribery. The district court dismissed his claim, asserting that the article was not defamatory because it did not make its accusations explicit. *See id.* at 59. Further, the court held that any implication that Cianci had committed rape or bribed the victim was constitutionally protected opinion. *See id.* The Second Circuit disagreed, finding the story’s implications potentially defamatory. *See id.* at 60-61. As Judge Friendly asserted, “[a] statement that Cianci raped [the alleged victim] at gunpoint twelve years ago and then paid her in an effort to obstruct justice falls within the Court’s explication of false statements of fact rather than its illustrations of false ideas where public debate is the best solvent.” *Id.* at 62. The court reversed and remanded for trial. *See id.* at 71. Thereafter, Cianci’s action was reportedly settled. *See M. Mayer, supra* note 7, at 96.


126. *See id.* at 1067. If the court had found that the challenged implications constituted privileged opinion, it could not have submitted the claim to the jury. In the opinion upholding the jury’s verdict, the court made this determination explicit. *See id.*

127. *See id.; Brief for Appellants, supra* note 123, at 34.

The plaintiff also claimed that the broadcast implied that he had close ties to organized crime figures and that he was not revealing the “whole story” about these affiliations to federal authorities. *See id.* The court ultimately found that the defendants knew that these implications were defamatory because assigning hidden interests in gaming casinos and committing perjury are illegal. *See Newton*, 677 F. Supp. at 1067-68.
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The court upheld the verdict and denied the defendant's motion for judgment n.o.v.\textsuperscript{129} Calling the broadcast's implications "clear and inescapable," the court found that the plaintiff had shown actual malice: because the defendant voluntarily edited the program's audiovisual elements to create defamatory impressions, the jury properly found that the defendant had serious subjective doubts about the truth of the broadcast as well as intent to defame the plaintiff.\textsuperscript{130}

\textsuperscript{128} See id. at 1067-68; Brief for Appellants, supra note 123, at 5. The jury returned a special verdict against NBC and the three NBC journalists who created the segment. It found that all three individual defendants intentionally conveyed a false and defamatory factual impression of Newton with actual malice. The jury awarded Newton $22,757,273, including loss of past and future income, damages for reputational injury and for physical and mental suffering, exemplary damages and pre-judgment interest. The appellants claim that this is the largest jury verdict in a libel case against a news organization "in the history of this nation." See Brief for Appellants, supra note 123, at 3. But see infra note 129 (final award cut by three-quarters); cf. Brief for Appellee, supra note 14, at 83 (award not excessive because it equals only one-quarter of one percent of NBC's worth).

\textsuperscript{129} See Newton v. NBC, 677 F. Supp. 1066, 1068 (D. Nev. 1987). The court did, however, give judgment non obstante veredicto on the jury's award of $9,046,750 for the plaintiff's loss of past and future earnings, ruling that Newton had failed to establish by a preponderance of the evidence that the challenged broadcast had caused the loss. See id. at 1069. The court also directed Newton to file a remittitur of all but $50,000 of the $5,000,000 jury award for reputational injury, stating that the original award shocked the court's conscience because the broadcasts "did not tarnish [the plaintiff's] outstanding reputation." See id. at 1068. The resulting award amounted to $5,275,000. See id. at 1069.

\textsuperscript{130} See id. at 1067. The defendants have appealed to the Ninth Circuit, asserting that the district court erred in denying their motion for a directed verdict on the issue of liability. See Brief for Appellants, supra note 123, at 1 (submitted in August 1989). They contend that precedent bars recovery by public figures for defamation by implication. See id. at 35. The plaintiffs, however, point out that defamation by implication is not a new cause of action, but one that the Ninth Circuit has long recognized. See Brief for Appellee, supra note 14, at 61. In Church of Scientology v. Flynn, 744 F.2d 694 (9th Cir. 1984), the Ninth Circuit reversed the district court's dismissal of the plaintiff's complaint for failure to state a claim upon which relief could be granted. See id. at 698. The decision could not be upheld "if 'by reasonable implication a defamatory meaning may be found in the communication.'" Id. at 696 (quoting Forsher v. Bugliosi, 26 Cal. 3d 792, 806, 608 P.2d 716, 723, 163 Cal. Rptr. 628, 635 (1980)). Because the jury could reasonably have inferred such a defamatory meaning from the defendant's remarks, the court held that the plaintiff's complaint was sufficient to survive a motion to dismiss and remanded to the lower court. See id. at 696-98. In an earlier case, McNair v. Hearst Corp., 494 F.2d 1309 (9th Cir. 1974), the court reached a similar conclusion. It reversed the trial court's grant of summary judgment for the defendant, finding that the allegedly defamatory implications of a newspaper story's headline and first two paragraphs could sustain a cause of action for defamation. See id. at 1311.
III. BALANCING THE EQUITIES: PERMITTING DEFAMATION BY IMPLICATION

A. Constitutional Considerations Do Not Compel Disallowing Defamation by Implication

Courts disallowing defamation by implication construe *Sullivan* and its progeny as having established a general constitutional disapproval of expanding the scope of defamation. While these cases limit defamation in certain respects, they do not suggest that the Constitution immunizes defendants who defame implicitly.\(^1\) Disallowing a cause of action for defamation implications is a draconian response to a supposed proliferation of defamation actions\(^2\) and an unnecessary encroachment on a state-created right.\(^3\)

*Sullivan* and succeeding cases sought to stem this tide of defamation suits by restricting the right to legal redress for reputational injury, an approach that may not accord with the original intent of the first amendment.\(^4\)

Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. . . . [Thus no] restraint [is] hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.\(^5\)

Cases disallowing defamation by implication carry this trend further by subordinating the individual's reputational interests to the defendant's

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Then-judge Scalia's eloquent discussion of unnecessary judicial activism in first amendment jurisprudence bears on the problem at hand:

What is under discussion here is not application of preexisting principles to new phenomena, but rather alteration of preexisting principles . . . on the basis of judicial perception of changed social circumstances. The principle that the first amendment does not protect the deliberate impugning of character or reputation . . . is to be revised . . . because we perceive that libel suits are now too common and too successful.

*Id.* at 1038 n.2 (Scalia, J., dissenting in part) (emphasis in original).


\(^4\) See id. at 1306-07 n.1 (Bowman, J., dissenting).

first amendment rights. Precedent dictates no such expansion of first amendment rights. In fact, the Rosenblatt Court suggested that a public figure could base a claim on implicit defamatory charges, provided he demonstrate that the assertions were made "of and concerning" him.

An argument for disallowing defamation by implication is that Sullivan and succeeding cases precluded defamation claims based on defamatory implications that arise from true statements of fact. This argument confuses defamatory statements and defamatory implications, however, and many courts have correctly rejected it. The apprehension underlying this argument is that plaintiffs will base defamation claims on any remote or unreasonable inferences that they may extricate from facially neutral statements.

This fear is unfounded. It is for the court, not the plaintiff, to determine whether the challenged implication is reasonably susceptible of a defamatory meaning. If a defamatory implication is possible in light of its context, the court should submit to the jury the issue of whether

136. See id. at 1308 (Bowman, J., dissenting); supra notes 44-106 and accompanying text. The asserted interest in protecting defendants' free speech rights also involves protecting the public interest in open debate and free dissemination of ideas. Publication of implicitly defamatory communications, however, does not necessarily further this goal. The Federal Communications Commission has observed that "[r]igging or slanting the news is a most heinous [sic] act against the public interest—indeed, there is no act more harmful to the public's ability to handle its affairs." Galloway v. FCC, 778 F.2d 16, 19-20 (D.C. Cir. 1985) (citation omitted).

137. Compare Rosenblatt v. Baer, 383 U.S. 75, 81-82 (1966) ("Even if a charge and reference were merely implicit ... but a plaintiff could show by extrinsic proofs that the statement referred to him, it would be no defense to a suit by one member of an identifiable group engaged in governmental activity that another was also attacked.") with Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1316 (7th Cir. 1988) ("Although the Rosenblatt Court did not address directly an explicit charge requirement, it clearly contemplated a defamation action premised on something less than an 'explicit charge' specifically leveled against the complaining official. ... Nothing in New York Times or Rosenblatt restricts the use of innuendo.").

138. Presumably, this argument derives from Sullivan's protection of false statements about public figures made in public debate. If such statements merit first amendment protection, the argument goes, then false and defamatory implications arising from true statements should also be protected. Sullivan did reject the possibility that impersonal criticism of a governmental entity be read as casting defamatory aspersions on members of that entity. Neither it nor succeeding cases, however, precludes public figures from demonstrating that the challenged defamation libelled them directly; not merely by association. See Saenz, 841 F.2d at 1315. Hence, directly libelling a public figure by implication stands on the same constitutional footing as directly libelling a public figure by an explicit statement. See supra note 25.


140. See, e.g., Woods v. Evansville Press Co., 791 F.2d 480, 488 (7th Cir. 1986) (no evidence that defendants intended implications at issue); Note, supra note 43, at 830 (plaintiffs might base claims on unreasonable inferences).

141. See Southern Air, 877 F.2d at 1013-14; Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1313 (7th Cir. 1988); Woods, 791 F.2d at 486; W. Keeton, supra note 1, § 111, at 774.

142. The defamatory meaning of words must be determined in reference to their con-
any defamatory implication was actually conveyed to the average audience member. Only if the jury decides that the challenged implication was false, defamatory and clearly apparent will the challenged implication be actionable. Whether the defamatory implication happens to arise from true factual statements is irrelevant because ultimately the audience is left with a false impression that may eclipse the statements' literal truth.

B. Refining the Fact/Opinion Test

Applying the fact/opinion test to defamatory implications is inappropriate. Claims of defamation by implication scrutinized under the test will almost invariably fail because an implication, inherently inexplicit and cryptic, is not precise or verifiable. Indeed, courts applying the test invariably conclude that the alleged defamation is protected opinion. In effect, then, these courts disallow the cause of action.

Under Olman's version of the fact/opinion test, courts must consider four factors. The first two require an analysis of the precision and ver-

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143. The court apparently did just this in Newton v. NBC. See 677 F. Supp. 1066, 1067-69 (D. Nev. 1987); Brief for Appellee, supra note 14, at 69. Accord Woods v. Evansville Press Co., 791 F.2d 480, 486 (7th Cir. 1986) (where statement is reasonably susceptible of both defamatory and non-defamatory meanings, interpretation is matter for jury); McNair v. Hearst Corp., 494 F.2d 1309, 1311 (9th Cir. 1974) (jury may infer defamatory meaning from article).

144. Any concern that the jury will be unable to distinguish between statements and the implications that arise from them is probably unfounded. In Newton, the jury's responses to special verdict questions demonstrated its ability to make the distinction. The jury found that two of the three defendants were liable for making a defamatory statement about the plaintiff, but that all three defendants were liable for conveying a defamatory implication about the plaintiff. Hence, "the jury discerned the separate requirements posed by these questions and did not find that the requirements of one were encompassed within those of the other." Brief for Appellee, supra note 14, at 58-59 & n.60.

145. See, e.g., Brief for Appellee, supra note 14, at 70-71 & n.78 (jury based verdict for plaintiff on three discrete, conspicuous implications).


147. Any argument that defamation by implication cannot seriously harm a plaintiff's reputation is specious. Besides overlooking the potency of insinuation and the fact that much of human communication is inexplicit, see infra notes 161-163 and accompanying text, the argument ignores testimonial data on the lingering effect of defamatory implications. See McNair v. Hearst Corp., 494 F.2d 1309, 1311 n.2 (9th Cir. 1974); Brief for Appellee, supra note 14, at 88 n.105.

148. See supra notes 44-106 and accompanying text. But see supra notes 125-130 and accompanying text.

ifiability of the challenged statements. The remaining factors contemplate the statement’s literary and public contexts to determine whether they signal to the audience that opinion is being offered. Because they focus on the specific language of the statement, the precision and verifiability prongs of the test do not consider what is actually being challenged in these cases: the implication arising from that language. Discussing the specificity factor, the court in Price v. Viking Penguin, Inc. explained that statements or phrases susceptible of more than one meaning cannot be deemed specific. Because defamatory implications may be interpreted differently by various people, this approach precludes defamation actions predicated on implications.

In Janklow v. Newsweek, Inc., for example, the court asserted that a series of statements implying that the plaintiff began prosecuting Dennis Banks because Banks filed rape charges against him was not sufficiently precise in its implication. Had the statements indicated that the plaintiff “continued prosecuting” Banks after the charges were lodged, rather than that he “was prosecuting” him after the accusation, the defamatory implication would be almost impossible to draw. Because the statements did not make that suggestion more explicit, the implications were deemed fatally unspecific, even though the article’s chronology clearly suggested that revenge motivated the prosecution.

The court further found that the implication was unverifiable. The plaintiff contended that the implication that he prosecuted Banks in retribution was absolutely verifiable because he began prosecuting before the rape charges were lodged against him. The court agreed, but found that another interpretation of the statements was possible: the plaintiff, as a newly appointed attorney general, may have continued the prosecution he had begun before his promotion in order to obtain revenge, handling the case personally instead of recusing himself. Because different inferences were possible, this implication failed the verifiability prong. Under this sort of analysis, every inference that might be drawn from the challenged statements would have to pass this prong. Such an approach is clearly incorrect: the focus should be on the implication that the jury finds a reasonable audience would understand.

A purely contextual analysis would avoid the inconsistencies of applying the full-blown fact/opinion test to defamatory implications. Omitting the precision and verifiability prongs, this alternative approach would apply only the contextual factors of the traditional test. Analyz-
ing the implication in light of the underlying statement's literary and social contexts might reveal whether the implication more closely resembles opinion than fact.

This approach is not without problems. Determining whether an implication suggests fact or opinion is difficult, and any factors used in the inquiry are necessarily inexact. Rejecting the fact/opinion dichotomy entirely, however, would pose greater problems. Treating all defamatory implications as assertions of fact rather than opinion would not comport with the reality of human communication and would eviscerate the constitutional privilege for statements of opinion.

C. Policy Considerations Require Allowing Defamation by Implication

Disallowing defamation by implication ignores the reality of human discourse. Communication, rarely composed of transparent assertions, is a nexus of suggestions, cues, allusions, presumptions and intimations. What speech leaves unsaid is often more potent than what it makes explicit: "it is the thought conveyed, not the words, that does the harm." An offending word may be evanescent, but a defamatory implication may linger.

Precluding a plaintiff from recovering for defamation that is cleverly couched in implication is inequitable. It rewards a defendant for having the foresight or literary facility to secrete a "classic and coolly-crafted libel" in the overtones of a facially neutral statement. It may provide a loophole through which media defendants can escape liability for "high-profile" defamatory stories by insinuating what they may not state.

159. See infra notes 160-162 and accompanying text.
160. According to the Saenz court, defamatory implications may be as clear and perhaps more damaging than explicitly defamatory statements "because of their unlimited nature." Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1314 (7th Cir. 1988).
162. See supra note 147 and accompanying text.
163. Ollman v. Evans, 750 F.2d 970, 1036 (D.C. Cir. 1984) (Scalia, J., dissenting), cert. denied, 471 U.S. 1127 (1985); see also Saenz, 841 F.2d at 1317 (Court did not believe "that a publisher may, without impediment of law, trammel a public official by 'surreptitious and insidious implication' under the pretense of governmental critique."); Woods v. Evansville Press, 791 F.2d 480, 488 (7th Cir. 1986) ("As a result, the actual malice standard, as now applied, rewards a publisher or reporter for communicating a statement in a surreptitious and invidious manner by implication.") (quoting Cochran v. Indianapolis Newspapers, Inc., 175 Ind. App. 548, 563, 372 N.E.2d 1211, 1222 (1978)); Franklin & Bussel, supra note 23, at 850 ("a rule that encourages evasive communication seems too great a price to pay to achieve judicial economy").
164. This is a valid concern, given pressure within the media to produce what Bob
Disallowing defamation by implication also limits the plaintiff’s recourse. In refuting an inexplicit or implied charge, the victim articulates, and thereby accentuates, the charge against him.  

Allowing defamation by implication will not result in an avalanche of meritless complaints. The actual malice standard is a hurdle that plaintiffs who have been defamed by implication may be unable to vault.  

Summary judgment mechanisms also greatly reduce the possibility that the plaintiff will prevail. Finally, any danger that defendants will be held liable for unwitting implications can be avoided by Woodward has termed “holy shit stories.” Tavoulareas v. Washington Post Co., 817 F.2d 762, 796 n.48 (D.C. Cir.) (en banc), cert. denied, 484 U.S. 870 (1987); see also R. Smolla, supra note 3, § 4.05(3), at 4-17 n.68 (defendant who intentionally inserts defamatory implication “between the lines” must be distinguished from defendant who unintentionally defames by implication). For examples of deliberate attempts to mislead an audience through insinuations that most readers or viewers will uncritically absorb, see Mihalik v. Duprey, 11 Mass. App. Ct. 602, 607-08 n.3, 417 N.E.2d 1238, 1241 n.3 (1981) and Spiegel, supra note 161, at 306.

165. A further problem is that the plaintiff’s rebuttal subverts his own reputational interests. Cf. Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1314 (7th Cir. 1988) (one who is “soiled by the stain of defamatory innuendo is disadvantaged greatly in responding to the varying inferences that may be gleaned from inexact accusations”). As the Gertz Court observed of explicit defamatory statements, “an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie.” Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974).

166. One study showed that plaintiffs suing media defendants prevailed in only five percent of the cases, after all appeals. See Franklin, Suing the Media for Libel: A Litigation Study, 1981 Am. B. Found. Research J. 795, 797 [hereinafter Franklin, Suing the Media]. Plaintiffs ultimately won judgments in 12 percent of non-media cases. See Franklin, Winners and Losers and Why: A Study of Defamation Litigation, 1980 Am. B. Found. Research J. 455, 476. Another study found that plaintiffs confronting the actual malice standard won 47% of their cases in 1984. See Goodale, supra note 13, at 73-74.

167. In cases involving defamation by implication, the actual malice standard probably provides an even greater hurdle than in typical defamation cases. As one court noted, “[l]ogic fails when one defamed by [an implication] is required to show knowledge of or reckless disregard for its falsity, when in fact it can rarely be proven that the author even knew of the implication.” Woods v. Evansville Press Co., 791 F.2d 480, 488 (7th Cir. 1986) (quoting Cochran v. Indianapolis Newspapers, Inc., 175 Ind. App. 548, 563, 372 N.E.2d 1211, 1222 (1978)); see also Note, supra note 43, at 830 (“Plaintiffs bringing libel actions on the basis of allegedly false, defamatory innuendo, rather than on the basis of explicit and specific statements of fact, may be unlikely to present evidence sufficient to create a triable issue of fact that defendants acted with the requisite fault.”).

requiring clear and convincing proof that a defendant intended the implication at issue. 169 Defendants can request additional instructions forbidding the jury to draw an inference of intent solely from the fact of broadcast itself. 170 This would ensure that verdicts are based only on probative circumstantial evidence of intent. 171

CONCLUSION

Courts have interpreted the recent constitutionalization of defamation law as precluding defamation by implication. Sullivan and succeeding cases, however, do not suggest that a defendant who defames implicitly is immune from liability. Neither does the Constitution compel differentiation between implicit and explicit defamation. Dismissing claims based on defamatory implications penalizes plaintiffs for the defendant’s artfulness, undermines state interests in protecting reputation and fails to advance free speech interests. Allowing claims of defamation by implication will accord proper weight to reputational concerns and calibrate the current imbalance that favors defendants.

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169. Amici Curiae in Newton conceded that “[t]he most obvious unintended impressions are excised in the editing process.” See Brief for Appellee, supra note 14, at 63 n.69 (emphasis added). Requiring excision of intended implications, therefore, would hardly be an undue burden. As two well-known commentators observe, “by basing liability on the defendant’s awareness of the statement’s defamatory meaning, a court could spare a defendant who unintentionally defamed another, while at the same time imposing liability on a defendant who intentionally defamed through implication.” Franklin & Bussel, supra note 23, at 850.

170. See Brief for Appellee, supra note 14, at 63.
