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When Is Fiction Just Fiction? Applying Heightened Threshold Tests to Defamation in Fiction

Cover Page Footnote
J.D. Candidate, 2008, Fordham University School of Law; B.S., 2003, Northwestern University. I am grateful to my family and friends for their love, support, and good humor.

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NOTES

WHEN IS FICTION JUST FICTION?
APPLYING HEIGHTENED THRESHOLD TESTS TO
DEFAMATION IN FICTION

Mark Arnot*

Whenever a work of fiction can be reasonably read as stating actual facts about a real person, courts allow juries to decide whether the work actually conveys a defamatory meaning. As a result, current defamation law essentially forces fiction authors to write about unidentifiable people or unbelievable events. This Note examines the jurisprudence surrounding defamation in fiction and, for comparison, defamation by implication. After surveying policy arguments, the Note concludes that current defamation law is inconsistent, inefficient, and burdensome as applied to fiction. Finally, the Note suggests that courts apply a heightened threshold test to defamation in fiction claims, similar to the tests courts sometimes apply to defamation by implication claims or use to assess falsity or actual malice. The adoption of an appropriate heightened threshold test would retain protection for reputations while allowing authors to avoid liability through the use of contextual devices, such as disclaimers, and without altering the content of their work.

INTRODUCTION

In 2006, New Republic columnist Michael Crowley authored a critical profile of author Michael Crichton.1 Shortly thereafter, Crowley noticed a strong resemblance between himself and the character "Mick Crowley" in Crichton's latest novel, Next.2 In addition to having nearly identical names, both Crowleys are graduates of Yale University and political journalists in Washington, D.C.3 In the novel, Mick Crowley's appearance is brief but

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3. See id.

1853
Crichton has apparently resorted to employing the small penis rule, a "sly trick" used in publishing to ward off defamation lawsuits. Assuming no man would come forward claiming to be a character with a small penis (or would invite such an inquiry), the scheming author simply depicts his target as less than fully endowed. The author then defames as he pleases and hopes his subject forgoes legal action due to the possible embarrassment of coming forward. Thus, the small penis rule is not really a rule, merely a tactic for discouraging litigation. In the end, Michael Crowley appears disinclined to file suit. Although "grossed out," Crowley says that he was "strangely flattered" by his "sliver of literary immortality."

The small penis rule illustrates the awkwardness of applying defamation law to works of fiction. Defamation law hardly furthers its purpose of protecting reputations by incentivizing the use of such tricks. Despite its inefficiency, however, the law manages to impose a heavy burden on writers who, unlike Crichton, do not wish to use fiction as a vehicle to defame. Unfortunately, under the vague standards of current defamation law, fiction writers cannot depend on contextual devices, such as disclaimers, to shield them from liability. As a result, they must alter the content of their work, likely dulling its impact and diminishing its artistic value. Reputations are indeed worthy of some protection. The suggestions proposed below, however, recognize the importance of creating clearer standards and of allowing authors and publishers to immunize their works without changing the content itself.

Generally, defamation law makes no special distinctions for works of fiction. As long as a publication can be reasonably read as stating a false and defamatory fact about the plaintiff, it is actionable. The only other significant legal hurdle for a plaintiff is establishing the defendant's requisite level of fault, which varies depending on whether the plaintiff is a

4. Id. (quoting Crichton, supra note 2, at 225).
6. Id.
7. Of course, a plaintiff could claim that the small penis allegation is itself false and defamatory. There are, however, potential problems with such a claim: (1) describing one's anatomy as "small" may not be sufficiently factual, see infra Part I.B.2; (2) the claim would likely trigger additional scrutiny of the plaintiff's anatomy to determine the statement's truth or falsity, see infra note 332; and (3) if the statement does not accurately describe the plaintiff, then the defendant may use this to argue, albeit weakly, that the statement is not about the plaintiff, see infra Part I.B.1.
8. See Crowley, supra note 2; see also Smith, supra note 5 (quoting a libel lawyer as explaining, "Now no male is going to come forward and say, 'That character with a very small penis, 'That's me!'").
9. Crowley, supra note 2.
10. See, e.g., Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 439–40, 442 (10th Cir. 1982).
public or private individual. Public officials and public figures must prove actual malice, while private figures must show only some level of fault.\textsuperscript{11}

Repeatedly, courts have found that works labeled as fiction can be reasonably read as stating false and defamatory facts about plaintiffs.\textsuperscript{12} Thus, current defamation law essentially forces fiction authors to write about unidentifiable people or unbelievable events.\textsuperscript{13} As a result, commentators often note that the law affords fiction inadequate and inconsistent protection.\textsuperscript{14}

This Note suggests that courts apply a heightened threshold test to claims of defamation in fiction, similar to the tests some courts have adopted for claims of defamation by implication. Traditionally, a defendant is liable for any statement his communication reasonably implies.\textsuperscript{15} The U.S. Courts of Appeals for the Fourth Circuit and the D.C. Circuit, however, fashioned a heightened threshold test requiring that "[t]he language . . . not only be reasonably read to impart the false innuendo, but . . . also affirmatively suggest that the author intends or endorses the inference."\textsuperscript{16} Adapted for fiction, this standard would require that the publication not only be reasonably read to convey a false statement of fact about the plaintiff, but also affirmatively suggest that the author intends or endorses the factual meaning. Furthermore, the realistic style or content of a fictional work should be insufficient to provide this affirmative suggestion. Rather, the suggestion should relate to how the work is presented, for example, whether there is a prominent disclaimer stating that the work is fictional. This standard would allow fiction writers to fully express themselves, as long as they clearly indicate that their work is fictional.

This standard is reinforced by consideration of the supportable interpretation rule. This rule protects commentary, such as book reviews, by finding that the commentary is true, provided it is a "supportable interpretation of the source material."\textsuperscript{17} Although the U.S. Supreme Court articulated this rule in cases concerning actual malice, the D.C. Circuit incorporated it into the falsity element.\textsuperscript{18} Incorporating the doctrine into the


\textsuperscript{14} See, e.g., id.; \textit{infra} Part II.B.1–2.


\textsuperscript{16} Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993) (citing White v. Fraternal Order of Police, 909 F.2d 512, 520 (D.C. Cir. 1990)).

\textsuperscript{17} Moldea v. N.Y. Times Co., 22 F.3d 310, 313, 315–17 (D.C. Cir. 1994) ("[W]hen a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation.").

\textsuperscript{18} Id. at 316; see \textit{infra} note 411.
falsity element recognized that the only evidence of the author’s intent is usually the publication itself.

The supportable interpretation rule is not easily adapted for fiction because works of fiction generally do not directly critique specific source material. A rough equivalent, however, might protect any work supporting an interpretation that it does not state actual facts about real people. After all, it would be odd to protect literature reviews without extending similar protection to the literature itself. A better approach may be to incorporate the U.S. Court of Appeals for the Ninth Circuit’s actual malice standard into the falsity element. This would require, in light of the total “presentation of the article,” evidence that the defendant “intended to suggest” the false, i.e., literal, meaning.19

In addition, courts should redefine “negligence” in assessing whether a defendant has taken reasonable measures to ensure that readers do not interpret a work of fiction as stating actual facts. Where the defendant has not acted negligently, the constitutional fault requirement is not met.20 Negligence should not be presumed simply because a defendant has failed to ensure that every possible factual interpretation is unreasonable. Again, instead of looking to the content itself, courts should focus the reasonableness inquiry on how the work is presented, in particular, the clarity and prominence of any disclaimers. Similarly, regardless of a defendant’s state of mind, a finding of actual malice should be precluded where the publication (including disclaimers) indicates that the defendant did not intend a literal, defamatory reading.21

Part I of this Note presents background information and introduces key issues. In particular, Part I.A briefly describes the traditional common law of defamation and provides an overview of the applicable constitutional framework. Part I.B outlines how courts address the two biggest issues in most defamation in fiction claims: (1) whether the work is “of and concerning” the plaintiff, and (2) whether the work conveys a statement of fact about the plaintiff. Part I.C examines the various ways courts analyze defamation by implication claims. Part I.D briefly addresses the application of the fault requirement. Part II discusses arguments advanced by commentators for and against the application of a heightened threshold test to defamation in fiction claims. Part III suggests that courts assessing such claims would benefit by adopting a heightened threshold test focusing on the intent of the author as conveyed by the publication itself. Finally, this Note recommends that courts provide a clear definition of what reasonable measures a defendant can take to preclude fault, and hence liability.

21. See Hoffman, 255 F.3d at 1187 (adopting this standard).
I. THE LAW OF DEFAMATION: BACKGROUND AND CONTEXT

The primary purpose of defamation law is to allow people to protect their reputations "from unjustified invasion and wrongful hurt."22 As Justice Potter Stewart stated, this interest "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."23

In general, claims of defamation in fiction and defamation by implication are treated no differently than other defamation claims.24 The same basic elements and constitutional doctrines apply.25 In essence, the communication at issue must be reasonably capable of stating, explicitly or implicitly, a false fact that harms the plaintiff's reputation.26

When a statement is only implied or presented as fiction, however, there is a heightened risk that the author did not intend the meaning that the plaintiff claims it conveys. Thus, in such situations, courts must determine whether a defendant may be held liable for a reasonable, but perhaps unintended, meaning conveyed by his statement.27

Due to the nature of defamation in fiction, two inquiries are particularly significant: (1) whether the publication is "of and concerning" the plaintiff, and (2) whether the publication contains a statement of fact about the plaintiff.28 The "of and concerning" inquiry is complex because works of fiction usually do not explicitly reference the plaintiff, but instead present a slightly fictionalized version.29 Similarly, the statement of fact inquiry is complicated because, unlike most statements, works of fiction purport not to represent actual persons or events.30

In adjudicating claims of defamation by implication, courts analyze not only the defendant's literal statement, but also assess what the statement

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23. Id.
24. See Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 442 (10th Cir. 1982) ("The test is not whether the story is or is not characterized as 'fiction,' 'humor,' or anything else . . . ").
25. See id.
27. See White v. Fraternal Order of Police, 909 F.2d 512, 519 (D.C. Cir. 1990) ("Application of this general standard becomes even more difficult where the reported facts are materially true and the alleged defamation is not stated explicitly. If the speaker or author has not uttered the alleged defamation explicitly, how is the court to discern whether it would be reasonable to understand the alleged defamatory meaning to have been intended?"); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1194–95 (9th Cir. 1989) ("[I]f a speaker knowingly publishes a literally untrue statement without holding the statement out as true, he may still lack subjective knowledge or recklessness as to the falsification of a statement of fact required by New York Times.").
28. See Pring, 695 F.2d at 439.
29. See, e.g., Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 925–27 (7th Cir. 2003); Bindrim v. Mitchell, 155 Cal. Rptr. 29, 43–44 (Ct. App. 1979) (Files, J., dissenting).
30. See, e.g., Pring, 695 F.2d at 442–43.
reasonably implies.\textsuperscript{31} Because an implication is unstated and thus naturally ambiguous, determining its meaning is often troublesome.\textsuperscript{32} For example, courts are often forced to determine whether a statement of opinion implies an underlying factual assertion that is false and defamatory.\textsuperscript{33}

Finally, the application of the fault requirement to both implication and fiction claims is somewhat complicated. Where actual malice is required, courts generally require that the defendant was aware not only of the statement's falsity, but also of the defamatory meaning attributed to it.\textsuperscript{34} Negligence is often defined as simply neglecting to negate a reasonable defamatory meaning.\textsuperscript{35}

A. Common Law and Constitutional Framework

Traditionally, a statement was considered defamatory if it was communicated to someone other than the plaintiff, was false, and tended to harm the plaintiff’s reputation in the community.\textsuperscript{36} The defamatory nature of a statement, however, may also refer separately to its tendency to harm one's reputation.\textsuperscript{37}

Under the common law, "the fact that [a publication] did not assume to state a fact or an opinion [was] irrelevant."\textsuperscript{38} In \textit{Burton v. Crowell Publishing}, for example, the U.S. Court of Appeals for the Second Circuit held that a photograph capturing the plaintiff in an awkward and seemingly ridiculous pose was capable of a defamatory meaning.\textsuperscript{39}

Furthermore, because the common law generally presumed falsity, it was not necessary for a statement to be factual (i.e., provable as true or false) in order to satisfy the falsity requirement.\textsuperscript{40} Truth was only "an affirmative
defense which must be raised by the defendant and on which he ha[d] the burden of proof. Judge Learned Hand explained the logic of this in Burton: “The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation . . . .”

Under the traditional common law, fault was not an element of a defamation claim. Thus, a defendant could be held strictly liable for harm done to another’s reputation as a result of publishing a defamatory statement. The common law’s presumption of falsity and lack of any fault requirement made authors of nonfactual statements particularly vulnerable to defamation claims. Because one cannot prove that a nonfactual statement is true, defendants authoring works of fiction, opinion, parody, or visual art could not readily capitalize on the defense of truth. Common law doctrines such as fair comment (and, later, neutral reporting) may continue to provide some protection, but only in limited circumstances.

In New York Times Co. v. Sullivan, the Supreme Court recognized that defamation’s common law form required constitutional safeguards to ensure that free speech had adequate “breathing space.” While recognizing the states’ strong interest in protecting reputations, the Court also noted that defamation “must be measured by standards that satisfy the First Amendment.” In addition, the Court recognized the “profound national commitment to the principle that debate on public issues should be

41. Restatement (Second) of Torts § 581A cmt. b.
42. Burton, 82 F.2d at 156.
44. See Kennedy, 3 F.2d at 208.
45. See Milkovich, 497 U.S. at 13–14.
48. Id. at 269.
uninhibited, robust, and wide-open.”

According to the Court, however, the defense of truth was not enough to guarantee such wide-open debate:

[T]he defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

To ensure greater breathing space, the Court articulated a constitutional fault element “prohibit[ing] a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”

In addition, the Court required that actual malice be shown with “convincing clarity.”

Addressing the “of and concerning” requirement, the Court also held that “an otherwise impersonal attack on governmental operations” could not be transmuted into the “libel of an official responsible for those operations.” Thus, “[s]ince . . . there was no other evidence to connect the [New York Times] statements with [Sullivan], the evidence was constitutionally insufficient to support a finding that the statements referred to respondent.”

In a number of opinions following Sullivan, the Supreme Court expanded and clarified First Amendment limitations on defamation claims. In Gertz v. Robert Welch, Inc., the Court held that although a private-figure plaintiff is not required to prove that the defendant acted with actual malice, he must prove some level of fault. “[T]he States may define for themselves the appropriate standard of liability for . . . defamatory falsehood injurious to a private individual,” the Court stated, “so long as they do not impose liability without fault.”

49. Id. at 270.
50. Id. at 279 (citations omitted). “Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.” Id. at 271.
51. Id. at 279–80.
52. Id. at 285–86.
53. Id. at 292.
54. Id.
55. In Gertz, the U.S. Supreme Court also announced that plaintiffs must prove actual malice before they may recover presumed or punitive damages. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) (“[W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.”). The requirements outlined in Gertz, however, do not necessarily apply unless the speech at issue involves a matter of public concern. See 1 Rodney A. Smolla, Law of Defamation §§ 2:12, 3:7–8 (2d ed. 2007); see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985) (plurality opinion) (“In light of the reduced constitutional value of speech involving no matters of public
The next year, in *Philadelphia Newspapers, Inc. v. Hepps*, the Court concluded that, in addition to a showing of fault, the First Amendment requires that, "at least where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false."56

In *Milkovich v. Lorain Journal Co.*, the Court reexamined dicta in *Gertz* that lower courts had interpreted as creating a constitutional protection for opinion.57 The Court dispelled the notion that the dicta in *Gertz* "was intended to create a wholesale defamation exemption for anything that might be labeled 'opinion.'"58 Such an exemption, the Court explained, "would . . . ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact."59 The Court provided an illustration:

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "It would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"60

In recognizing that statements of opinion may imply underlying facts, the Court also rejected the use of factors to separate fact from opinion. Although lower court decisions, such as *Ollman v. Evans*, had relied on such factors,61 *Milkovich* dismissed them as creating "an artificial dichotomy between 'opinion' and fact."62 Instead, the Court insisted that free speech was "adequately secured by existing constitutional doctrine."63

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57. See, e.g., Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990); see also Ollman v. Evans, 750 F.2d 970, 974 (D.C. Cir. 1984) ("In *Gertz*, the Supreme Court in *dicta* seemed to provide absolute immunity from defamation actions for all opinions and to discern the basis for this immunity in the First Amendment.").
58. Milkovich, 497 U.S. at 18 ("The 'marketplace of ideas' origin of this passage 'points strongly to the view that the 'opinions' held to be constitutionally protected were the sort of thing that could be corrected by discussion.'" (quoting Cianci v. New Times Publ'g Co., 639 F.2d 54, 62 n.10 (2d Cir. 1980))).
59. Id.
60. Id. at 18-19 (alteration in original) (quoting Cianci, 639 F.2d at 64).
61. Ollman, 750 F.2d at 979.
63. Id.
B. Defamation in Fiction

1. The “Of and Concerning” Requirement

Every defamation plaintiff must demonstrate that the publication at issue is “of and concerning” him—in other words, that it refers to, or is about, him. As explained by the Second Circuit, the plaintiff must prove that the statement “designates [him] in such a way as to let those who knew him understand that he was the person meant.” Notably, courts do not mean “meant in the mind of the writer,” but instead “meant by the words employed.” Courts generally allow the issue to reach a jury as long as the average or reasonable reader could conclude that the publication is “of and concerning” the plaintiff. The jury then decides whether the publication actually refers to the plaintiff.

Without discussion, courts actually articulate the inquiry in two different ways. They alternate between determining whether the work is meant to refer to the plaintiff and whether the work is understood as referring to the plaintiff. Although these standards seem similar, the difference is that one version completely disregards intent, while the other attempts to deduce intent from the publication. In most cases, the distinction will likely be meaningless, because reasonable people naturally read a publication as intending to mean what they understand it to mean. The distinction could be dispositive, however, where more than one meaning is apparent, a meaning is implied but not stated, or the meaning depends on extrinsic facts.

Labeling a publication as fiction does not preclude a finding that it is “of and concerning” the plaintiff, provided a reasonable reader could interpret

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64. See, e.g., Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966) (“In order for a libelous statement to be actionable, the plaintiff must show that it was published ‘of and concerning’ him.” (quoting Julian v. Am. Bus. Consultants, Inc., 137 N.E.2d 1, 11 (N.Y. 1956))).


70. See, e.g., White v. Fraternal Order of Police, 909 F.2d 512 (D.C. Cir. 1990).
the work as referring to the plaintiff.\textsuperscript{71} The "of and concerning" requirement is generally the same whether the publication at issue is fiction or nonfiction. However, perhaps due to the ambiguity and subjectivity of the test, courts sometimes rephrase or elaborate upon it when addressing works of fiction. In \textit{Geisler v. Petrovelli}, for example, the Second Circuit stated that "the reasonable reader must rationally suspect that the protagonist is in fact the plaintiff, notwithstanding the author's and publisher's assurances that the work is fictional."\textsuperscript{72} The court also stated that the similarity between the plaintiff and the fictional character must be "something more than amusing coincidence or even conscious parallelism on a superficial plane."\textsuperscript{73} In addition, in \textit{Wheeler v. Dell}, the U.S. Court of Appeals for the Seventh Circuit noted that "suggestion is not identification."\textsuperscript{74}

Some courts, particularly state and federal courts in New York, appear to go even further and apply a heightened standard to works of fiction, often without recognizing or discussing their departure from the reasonableness standard.\textsuperscript{75} For example, in \textit{Springer v. Viking Press}, after citing the reasonable person standard,\textsuperscript{76} a New York appellate court articulated a significantly more demanding standard. According to this heightened standard, "the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two."\textsuperscript{77} Furthermore, "[s]uperficial similarities are insufficient[,] as is a common first name."\textsuperscript{78} Interestingly, a more recent decision by a New York appellate court adopted \textit{Springer}'s heightened standard without even referring to the reasonable person standard.\textsuperscript{79}

In determining whether a publication is "of and concerning" the plaintiff, courts often follow the same principles of interpretation that they employ when assessing whether a work is capable of an implication\textsuperscript{80} or a defamatory meaning.\textsuperscript{81} In a sense, determining whether a statement is about the plaintiff and determining what a statement says about the plaintiff

\begin{itemize}
  \item \textsuperscript{71} \textit{Geisler}, 616 F.2d at 639.
  \item \textsuperscript{72} Id.
  \item \textsuperscript{73} Id.
  \item \textsuperscript{74} Wheeler v. Dell Publ'g Co., 300 F.2d 372, 376 (7th Cir. 1962).
  \item \textsuperscript{76} Springer, 457 N.Y.S.2d at 248.
  \item \textsuperscript{77} Id. at 249.
  \item \textsuperscript{78} Id.; see also Aguilar v. Universal City Studios, Inc., 219 Cal. Rptr. 891, 892–93 (Ct. App. 1985) ("[A]s a matter of law, mere similarity or even identity of names is insufficient to establish a work of fiction is of and concerning a real person.").
  \item \textsuperscript{79} See Carter-Clark, 793 N.Y.S.2d at 395.
  \item \textsuperscript{80} See Knievel v. ESPN, 393 F.3d 1068, 1074–75 (9th Cir. 2005).
  \item \textsuperscript{81} See Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 440 (10th Cir. 1982) (noting that sometimes courts treat the requirement that the publication be understood as describing actual facts about the plaintiff as part of the "of and concerning" requirement).
\end{itemize}
are really two aspects of deciding its overall meaning. To determine meaning, courts engage in a fact-sensitive analysis of the totality of the circumstances and the context in which the speech was given. To guide this analysis, some courts look to specific factors, such as the medium of communication, "the general tenor of the entire work, the subject of the statements, the setting, and the format of the work." Nonetheless, the overriding consideration remains the same: "the publication as a whole and . . . its effect upon the average reader."

Consistent with this emphasis on the average reader, courts give words their "natural and obvious meaning." Accordingly, where "statements are clear and unambiguous," they "cannot be enlarged upon or changed from the sense in which they were used." Some decisions, however, emphasize that "the publication is to be measured . . . by the natural and probable effect upon the mind of the average reader." The precise differences between these standards are unclear.

Although perhaps a handful of jurisdictions, most notably Illinois, use an innocent construction rule, the rule's applicability to fiction appears to be weak. Under Illinois's innocent construction rule, "even if a statement falls into a recognized category, it will not be actionable per se if [the judge decides that] the statement 'may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff.' Although the story at issue in Bryson v. News America

82. See id.; Springer, 457 N.Y.S.2d at 248 (introducing discussion of the "of and concerning" element by noting that it is "for the court to decide whether a publication is capable of the meaning ascribed to it" (internal quotation marks omitted)).
84. See Stanton v. Metro Corp., 438 F.3d 119, 126 (1st Cir. 2006).
85. Knievel, 393 F.3d at 1075 (quoting Underwager v. Channel 9 Austl., 69 F.3d 361, 366 (9th Cir. 1995)) (discussing whether referring to a celebrity as a "pimp" in a photograph's caption could reasonably be read literally).
89. Kaelin v. Globe Commc'ns Corp., 162 F.3d 1036, 1040 (9th Cir. 1998) (quoting Bates v. Campbell, 2 P.2d 383, 385 (Cal. 1931)) (stressing that California courts apply the "natural and probable" standard); see also Donald M. Zupane, Annotation, Libel by Newspaper Headlines, 95 A.L.R.3d 660 (1979) (collecting cases).
90. See, e.g., Bryson, 672 N.E.2d at 1216–19; see also Sack, supra note 31, § 2.4.14 & n.258.1 (noting that Missouri, Montana, New Mexico, and Ohio might recognize similar innocent construction rules).
91. Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 924 (7th Cir. 2003) (quoting Chapski v. Copley Press, 442 N.E.2d 195, 199 (Ill. 1982)); see also Bryson, 672 N.E.2d at 1214–15 ("If a defamatory statement is actionable per se, the plaintiff need not plead or prove actual damage to her reputation to recover. Rather, statements that fall within [the] actionable per se categories are thought to be so obviously and materially harmful to the plaintiff that injury to her reputation may be presumed. If a defamatory statement does not fall within one of the limited categories of statements that are actionable per se, the plaintiff must plead and prove that she sustained actual damage of a pecuniary nature ('special damages') to recover. . . . [The categories] are: (1) words that impute the
Publications, Inc. was labeled “fiction,” a character shared the plaintiff’s last name. Thus, the Illinois Supreme Court rejected the defendant’s “claim that the story must be innocently construed as referring to someone other than the plaintiff.” By not entertaining the possibility that the story was merely referring to a fictional “Bryson,” the court implicitly indicated that the innocent construction rule does not apply to fictional works, at least where the plaintiff’s last name is used.

The defendant in Muzikowski v. Paramount Pictures Corp. similarly tried to rely on the innocent construction rule. Paramount argued that it was “reasonable to construe the statements in question as referring to someone other than Muzikowski (namely O’Neill, an entirely fictional character).” Interpreting Illinois law, the Seventh Circuit rejected this argument, holding that, “[i]n light of Bryson, the mere fact that Paramount labeled its movie ‘fictitious’ is not enough to shield it from an Illinois defamation action.” The Seventh Circuit went further than Bryson, however, and indicated that Illinois’s innocent construction rule required the plaintiff to show “that no one could [reasonably] think that anyone but him was meant.” The court then stated that this requirement had been met because changes to the character, “far from supporting an innocent construction that O’Neill is a fictional or different person, only serve to defame him.”

Despite general principles of interpretation, application of the “of and concerning” test is notoriously inconsistent. One commentator observed that, “[a]lthough courts are essentially attempting to answer the same inquiry, they do not always ask the same questions and frequently differ as to the significance of various factors.”

When assessing whether a reader could reasonably conclude that a work is “of and concerning” the plaintiff, courts compare and contrast the plaintiff with his fictional counterpart. In doing so, they look to almost every identifiable trait—including name, physical appearance, age, geographic location, occupation, events, experiences, relationships, and commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; or (4) words that prejudice a party, or impute lack of ability, in his or her trade, profession or business.” (citations omitted)); Sack, supra note 31, §§ 2.8.1, 2.8.3, 2.8.6 (explaining the complicated usage of the term “per se”).

92. Bryson, 672 N.E.2d at 1218–19.
93. Id.
94. Muzikowski, 322 F.3d at 925.
95. Id.
96. Id. at 927.
97. Id.
98. See, e.g., Savare, supra note 67, at 141, 155–56.
99. Id.
In addition, courts often give significant weight to whether the publication appears to be fictional. They also consider the overall context, including the general appearance and labeling of the publication, whether it was marketed as fiction, the presence (or absence) of a disclaimer, and the content itself.

The significance of a disclaimer stating that a work, or a name within a work, is fictitious varies from one case to another. In Smith v. Huntington, for example, the court's decision turned explicitly on the presence of a disclaimer informing readers that the names in a newspaper article were fictitious: "[A]s a matter of law, no reasonable person could have reasonably believed that the article pointed to the plaintiff in the light of a clear statement by the author in boldface print that the names were fictitious." On the other hand, sometimes courts afford disclaimers comparatively less weight. In Stanton v. Metro Corp., for example, the U.S. Court of Appeals for the First Circuit reversed a district court ruling that had dismissed a defamation claim based on the presence of a disclaimer. The First Circuit concluded that, "given the placement of the disclaimer in the article and the nature of the publication in general, a reasonable reader could fail to notice it."

In addition to disclaimers, courts often give significant weight to the nature of the content itself. Many courts dismissing claims simply hold that the work in question is clearly or obviously fictional. Thus, when the content is clearly fictional, a disclaimer may not be necessary, regardless of whether the plaintiff is identifiable. On the other hand, a disclaimer may be ineffective when the content seems factual.

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102. Middlebrooks v. Curtis Publ’g Co., 413 F.2d 141, 143 (4th Cir. 1969); see also Films of Distinction, Inc. v. Allegro Film Prods., Inc., 12 F. Supp. 2d 1068, 1081 (C.D. Cal. 1998) (dismissing claims where the movie as a whole was "clearly a work of fiction"); Lyons v. New Am. Library, Inc., 432 N.Y.S.2d 536, 538 (App. Div. 1980) ("[T]he statements which form the basis of the complaint cannot be read to refer to plaintiff. The work clearly states that it is fiction and that, combined with plaintiff’s admission that he did not participate in the Son of Sam investigation, requires the conclusion that the passage is not actionable.").
107. Stanton, 438 F.3d at 128.
108. See Middlebrooks v. Curtis Publ’g Co., 413 F.2d 141, 143 (4th Cir. 1969); see also supra note 102.
One case, for example, illustrates that even strong similarities between a plaintiff and a fictional character may not establish identity when the work is clearly fictional. In Middlebrooks v. Curtis Publishing Co., the Fourth Circuit affirmed a summary judgment ruling in favor of the defendant, despite the author's use of a slight variation of the plaintiff's name (substituting "Esco Brooks" for "Esco Middlebrooks").\textsuperscript{111} The court reasoned that the article "was an obvious work of fiction":

It was listed in the fiction section of the Post index, was labeled fiction, and was illustrated by cartoons. The context in which the name appears is important because names of characters portrayed in short stories and other obvious works of fiction are normally understood by all reasonable men as not intended to depict or refer to any actual person. Of course the fictional setting does not insure immunity when a reasonable man would understand that the fictional character was a portrayal of the plaintiff. But the marked dissimilarities between the fictional character and the plaintiff tend to support the District Court's finding against the reasonableness of an identification of the two. Fox's use of actual place names and geographical settings does not militate against the common understanding of fiction as fiction only. Authors of necessity must rely on their own background and experiences in writing fiction.\textsuperscript{112}

In other cases, a work's realistic style and subject matter have led courts to the opposite conclusion.\textsuperscript{113} For example, in Bryson, mentioned above, the main character in a magazine article was alleged to be a depiction of the plaintiff, despite the fact that the article was labeled "fiction."\textsuperscript{114} The character, who shared the plaintiff's last name, was described in the article as a "slut."\textsuperscript{115} Among other similarities, the article took place in the southern Illinois county where both the plaintiff and the author lived.\textsuperscript{116} The Illinois Supreme Court held that, "although the story Bryson is labeled as fiction, the story itself is not so fanciful or ridiculous that no reasonable person would interpret it as describing actual persons or events."\textsuperscript{117} The court noted that the story portrayed "realistic characters responding in a realistic manner to realistic events" and concluded that a "reasonable reader..."

\textsuperscript{111} Middlebrooks, 413 F.2d at 142–43.
\textsuperscript{112} Id. at 143 (last two omissions added) (footnotes and internal quotation marks omitted); see also Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 207, 212 (Ct. App. 1997) ("The difficulty with [the plaintiff's] argument is that this film is manifestly not about [the plaintiff]. It is about a fictional character... ").
\textsuperscript{113} See, e.g., Allied Mktg. Group, Inc. v. Paramount Pictures Corp., 111 S.W.3d 168, 171, 174 (Tex. App. 2003) ("While Paramount intended to use a fictional company name and did depict a 'scam' as opposed to an actual sweepstakes contest, these facts do not make the segment an 'obvious work of fiction.' Paramount considered Hard Copy to be a news show. Hard Copy identified the segment as an 'undercover' report about a 'nationwide scam.'").
\textsuperscript{114} Bryson, 672 N.E.2d at 1213–14, 1219.
\textsuperscript{115} Id. at 1212, 1213.
\textsuperscript{116} Id. at 1212.
\textsuperscript{117} Id. at 1221.
could logically conclude that the author of the story had drawn upon her own experiences as a teenager when writing the story.\textsuperscript{118} In addition, the court reasoned that "[t]he name ‘Bryson’ is not so common that we must find, as a matter of law, that no reasonable person would believe that the article was about the plaintiff."\textsuperscript{119}

Courts also give varying weight to the fact that the reasonable person applying the "of and concerning" standard is someone who knew or knew of the plaintiff.\textsuperscript{120} In Jones v. Hulton, a British case from the turn of the century, plaintiff Artemus Jones complained of an article in the defendant's newspaper that professed to report on an Englishman's adulterous exploits in France.\textsuperscript{121} The paper claimed that it had been unaware of the plaintiff's existence and intended to use a purely fictitious name.\textsuperscript{122} In a decision affirmed by the House of Lords, the Court of Appeal held that, despite notable differences between the plaintiff and the fictional Jones, identification was possible because some readers may have only limited knowledge of the plaintiff:

No doubt any person who knew the plaintiff intimately, and read the whole of the article carefully, would come to the conclusion that it did not refer to him . . . . But this again was for the jury, and it might well be that the article would be read by persons who knew the plaintiff by the name of Artemus Jones and by repute and from his public life and position, and did not know in what part of London he resided or whether he was or was not a churchwarden.\textsuperscript{123}

In Wheeler v. Dell Publishing Co., on the other hand, the court used a more knowledgeable reasonable person, and specifically assumed that he or she would know about the plaintiff's personality.\textsuperscript{124} The plaintiff in Wheeler complained about Anatomy of a Murder, a novel (also adapted into a movie) that was based on an actual murder trial.\textsuperscript{125} Although the court recognized that nearly every fictional character in the novel represented a real counterpart, it nonetheless held that "none who knew Hazel Wheeler [the plaintiff] could reasonably identify her with Janice Quill [the fictional character]."\textsuperscript{126} Despite numerous similarities, the court concluded that "those who knew [the plaintiff] was Chenoweth's widow and mother of

\begin{itemize}
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Id. at 1218.
\item \textsuperscript{120} Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966); see also Davis v. R.K.O. Radio Pictures, Inc., 191 F.2d 901, 904 (8th Cir. 1951) (“The issue [is] whether persons who knew or knew of the plaintiff could reasonably have understood the exhibited picture to refer to him.” (emphasis omitted)).
\item \textsuperscript{121} Jones v. E. Hulton & Co., [1909] 2 K.B. 444, 445 (C.A.), aff’d, [1910] A.C. 20 (H.L.) (appeal taken from Eng.) (U.K.). The article reports, in part, “‘Whist! there is Artemus Jones with a woman who is not his wife, who must be, you know—the other thing!’” Id.
\item \textsuperscript{122} See Hulton, [1910] A.C. at 20.
\item \textsuperscript{123} Hulton, 2 K.B. at 455.
\item \textsuperscript{124} Wheeler v. Dell Publ’g Co., 300 F.2d 372, 375–76 (7th Cir. 1962).
\item \textsuperscript{125} Id. at 375.
\item \textsuperscript{126} Id. at 375–76.
\end{itemize}
Terry Ann could not reasonably identify her with Janice Quill, for Hazel Wheeler denies having any of the "unsavory characteristics" of Janice Quill." Thus, the court held that the allegedly defamatory traits were the same traits that precluded identification. Notably, other courts have reached the opposite conclusion in similar circumstances.

In a case arising out of a book about the singer Madonna, the First Circuit recently demonstrated similarly acute attention to the reasonable person's knowledge of the plaintiff. The book contained a photograph of a gay man that was incorrectly captioned with the plaintiff's name. Although the plaintiff claimed this was tantamount to being called a homosexual, the court dismissed the claim, finding that "[f]ew, if any," readers would be able to recognize the man in the photograph as a gay man, but not know his name or what he looks like. Similarly, in Polydoros v. Twentieth Century Fox Film Corp., a California court found that a reasonable person would not have enough knowledge to connect the forty-year-old plaintiff to a ten-year-old fictional character in a film: "At most, the fictional character physically resembles [the plaintiff] in the 1960's, a fact which would be lost to anyone who was not acquainted with [him] when he was 10 years old." Thus, the court held that "[n]o sensible person could assume or believe from seeing 'The Sandlot' that it purports to depict the life of [the plaintiff]." 

Although an author's intent is often relevant to proving whether a defamatory statement was made with sufficient fault, it is generally not relevant to determining whether a publication is "of and concerning" the plaintiff. Instead, the identification inquiry focuses on the publication's effect on readers: "'The question is not so much who was aimed at as who was hit.'"

In Jones v. Hulton, mentioned above, the defendant claimed that it had "no intention whatsoever" of referring to the plaintiff, despite the fact that

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128. Wheeler, 300 F.2d at 376. Noting that "suggestion is not identification," the Wheeler court instead found that "any reasonable person... would more likely conclude that the author created the latter in an ugly way so that none would identify her with Hazel Wheeler." Id.
129. See, e.g., Muzikowski v. Paramount Pictures Corp., 322 F.3d 918, 927 (7th Cir. 2003) (finding sufficient evidence for the plaintiff to prove that differences between him and a character in a film "only served to defame" the plaintiff, and did not suggest that character was a fictional or different person).
130. Amrak Prods., Inc. v. Morton, 410 F.3d 69, 73 (1st Cir. 2005). Although this case does not involve a work of fiction, its discussion of the "of and concerning" element is wholly applicable.
131. Id. at 71.
132. Id. at 73.
133. Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 207, 212 (Ct. App. 1997).
134. Id.
136. Id. (quoting Corrigan v. Bobbs-Merrill Co., 126 N.E. 260, 262 (N.Y. 1920)).
Jones had “contributed signed articles to the defendants’ newspaper.”137 Although the plaintiff accepted that the article had intended to refer only to “the imaginary Artemus Jones,” the court found that this was irrelevant and upheld a jury verdict in favor of the plaintiff. The author’s intention, one of the lords explained, “is inferred from what he did [i.e., published]. His remedy is to abstain from defamatory words.”139

Courts similarly ignore intent where the reference to the plaintiff seems clearly malicious. In Corrigan v. Bobbs-Merrill Co., the plaintiff’s claim involved a novel that “somewhat realistically” depicted adventures in New York’s underworld.140 In the novel, the character Justice Cornigan (also referred to as Corigan) presides over cases in the Jefferson Market Court. Joseph E. Corrigan, the plaintiff, had a strikingly similar name and had presided over cases in the same court.141 The New York Court of Appeals concluded that the author of the novel had purposefully defamed the plaintiff due to an unpleasant experience he had when appearing before the plaintiff as a criminal defendant.142 Nonetheless, the court emphasized that intent is not relevant to determining whether a work is “of and concerning” the plaintiff:

The [publisher] is chargeable with the publication of the libelous matter if it was spoken “of and concerning” him, even though it was unaware of his existence, or that it was written “of and concerning” any existing person . . .

“If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, ‘Whatever a man publishes, he publishes at his peril.’”

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139. Id. at 24. The court also found no error in the trial court’s jury instructions, which stated, “If you think any reasonable person would think [that the article referred to a mere imaginary person], it is not actionable at all. If, on the other hand, . . . those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable . . . .” Id.
140. Corrigan, 126 N.E. at 262.
141. Id. In its decision, the court noted the egregiousness of the defendant’s demeaning depiction:

The inference from the unsavory details as related to the facts is unmistakably that the author Howard intended by this chapter deliberately and with personal malice to vilify plaintiff, under the barely fictitious name of Cornigan, in his official capacity, and to expose him to hatred, contempt, ridicule, and obloquy as being ignorant, brutal, hypocritical, corrupt, shunned by his fellows, bestial of countenance, unjust, dominated by political influences in making decisions, and grossly unfit for his place. A paragraph in another chapter, entitled “The Gay Life,” of like import, portrays the man Cornigan even more offensively as an associate of low and depraved characters. No attempt was made by defendant to establish the truth of these allegations . . . .

Id.
142. Id. at 264.
The fact that the publisher has no actual intention to defame a particular man or indeed to injure any one does not prevent recovery of compensatory damages by one who connects himself with the publication . . . .

However, despite pronouncements by courts and commentators that intent is irrelevant to whether a work is "of and concerning" the plaintiff, courts have on some occasions expressly considered the author's intent. In Clare v. Farrell, for instance, the main character of the defendant's novel had the same first and last names as the plaintiff. None of the events in the book, however, "even remotely tend[ed] to identify [the plaintiff] as the person about whom the author was writing." In reviewing Minnesota case law, the court concluded that the cases "seem to test the right of recovery, first, on whether the author of the defamatory article intended to write of and concerning the plaintiff, and second, whether it was so understood by those who read the article or by those who knew of its contents." As there was "no doubt that . . . [the] defendant did not intend to write the book of plaintiff or intend to appropriate plaintiff's name to the story," the court granted the defendant's motion for summary judgment.

2. Statement of Fact Requirement

To sustain a defamation claim, a publication must not only refer to the plaintiff, but must also "reasonably be understood as describing actual facts about the plaintiff or her actual conduct." The Supreme Court has repeatedly held that the statement of fact requirement is mandated by the First Amendment. According to the Court, this requirement "provides

143. Id. at 262 (quoting Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (Holmes, J.).
144. See, e.g., Sack, supra note 31, § 2.9.6 ("Intent of the author is generally irrelevant to whether or not a communication is 'of and concerning' an individual.").
145. See, e.g., Landau v. CBS, 128 N.Y.S.2d 254, 257-58 (Sup. Ct. 1954) ("To make such accidental or coincidental use of a name a libel would impose a prohibitive burden upon authors, publishers and those who distribute the fruits of creative fancy, in whatever form presented . . . . The line of demarcation is not obscure. The difference between coincidental use and consciously disguised defamation is one of proof." (citations omitted)); Allen v. Gordon, 446 N.Y.S.2d 48, 49 (App. Div. 1982) (holding that despite the fact that plaintiff was "the only psychiatrist surnamed Allen in Manhattan," "Dr. Allen" was common enough that it could not reasonably refer to the plaintiff, where the author had never been treated by the plaintiff-dentist and had randomly selected the character's name).
147. Id. at 278.
148. Id.
149. Id.
151. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-20 (1990) (holding that without an express or implied statement of fact the plaintiff cannot prove falsity or fault); Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (holding that the First Amendment precludes an emotional distress claim for an ad parody that "could not reasonably have been interpreted as stating actual facts about the public figure involved"). The only potential exception to the
protection for statements that cannot ‘reasonably [be] interpreted as stating actual facts’ about an individual.” 152 In addition, it “ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” 153

As with the “of and concerning” and defamatory meaning elements, courts generally defer to the jury unless the communication could not reasonably be understood as stating actual facts about the plaintiff. 154 Although some courts describe the issue as a “matter of law,” they similarly defer to the jury as long as more than one interpretation is reasonable. 155

In Pring v. Penthouse International, Ltd., the court noted that some decisions treat the requirement of a false statement of fact “as part of the ‘of and concerning’ requirement.” 156 However, it “is really part of the basic ingredient of any defamation action; that is, a false representation of fact.” 157 Pring was one of the first cases (if not the first) to apply the statement of fact requirement to a work of fiction. Many defamation in fiction decisions have subsequently cited Pring for this proposition, making it the de facto standard. 158

The plaintiff in Pring complained of an article appearing in Penthouse magazine. 159 Among other things, the article describes Charlene, who is

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152. Milkovich, 497 U.S. at 20 (alteration in original) (quoting Falwell, 485 U.S. at 50).
153. Id.
155. See, e.g., Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1415 (C.D. Cal. 1987) (“It is for the court to decide this issue in the first instance as a matter of law.”), aff’d, 867 F.2d 1188 (9th Cir. 1989); Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 207, 212 (Ct. App. 1997) (“Whether a published statement is actionable fact or nonactionable opinion is to be decided by the court as a matter of law.”).
156. Pring v. Penthouse Int’l, Ltd., 695 F.2d 438, 440 (10th Cir. 1982).
157. Id.
159. Pring, 695 F.2d at 439.
Miss Wyoming and has the unique ability to perform oral sex such that the recipient suddenly levitates off the ground. The article ends with Charlene at the pageant, in front of a live audience and television cameras, performing the act on her coach and causing him to levitate in the air. Since the article “described something physically impossible in an impossible setting,” the court concluded that it was clearly pure fiction:

[I]t is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else. It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. . . .

. . . [A]s was said in Greenbelt, “even the most careless reader must have perceived that.” The descriptions were “no more than rhetorical hyperbole.”

As with other types of defamation claims, a plaintiff bringing a defamation in fiction claim bears the burden of proving falsity. Once the “of and concerning” requirement has been satisfied, proving falsity is usually straightforward (after all, to the extent a work of fiction is taken literally, it essentially admits to being false). Any difference between the plaintiff and his fictional counterpart is considered “false.” Minor inaccuracies, however “do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.”

C. Defamation by Implication

As Judge Robert D. Sack stated in his defamation treatise, a “publisher is, in general, liable for the implications of what he or she has said or written, not merely the specific, literal statements made.” The constitutional

160. Id. at 440–41.
161. Id.
162. Id. at 443 (quoting Greenbelt Coop. Pub. Ass’n v. Bresler, 398 U.S. 6, 14 (1970)).
163. See, e.g., id. at 440 (requiring a “false representation of fact”); Savare, supra note 67, at 135–36.
165. Id.
167. Sack, supra note 31, § 2.4.5, at 2-33 & n.107 (footnotes omitted). Defamation law distinguishes between implication, insinuation, and innuendo. Implication and insinuation refer to the inference or “understanding that the average reader may . . . draw from the face of the communication.” Innuendo, on the other hand, “refers specifically to the defamatory meaning a reader may be expected to draw from the communication because of extraneous facts known to the reader but not contained in the communication.” Id. § 2.4.5, at 2-38. Occasionally, however, courts use “innuendo” in its natural, general sense, referring to any implication or insinuation. Id. § 2.4.5, at 2-39; see also Ladany v. William Morrow & Co., Inc., 465 F. Supp. 870, 875 n.9 (S.D.N.Y. 1978).
requirement that a communication convey a statement of fact in order to be actionable applies equally to fiction and implication claims. 168

As with fiction claims, courts assessing implication claims predominantly use a reasonableness standard. 169 Under this standard, courts focus on whether a reasonable person could conclude that the defendant’s statement implied the factual meaning alleged by the plaintiff. 170 If so, the issue goes to the jury to determine what a reasonable person would actually conclude. 171 Judge Sack noted, however, that an unrestrained approach that allows juries to “draw whatever inferences [they] wished,” could swallow other defamation principles that insulate statements from liability, such as opinion, substantial truth, and actual malice. 172

Recognizing the danger, many federal and state courts have adopted a variety of approaches that attempt to distinguish between inferences for which the author is liable and those for which he is not, even though both might be reasonable. For example, in White v. Fraternal Order of Police, the D.C. Circuit articulated a heightened threshold test that augments—or arguably clarifies—the traditional reasonableness test. 173 Oregon’s high court has similarly concluded that “the link between the communication and the defamatory inference must not be too tenuous.” 174 Other states, such as Montana and Ohio, have categorically rejected all claims “based on innuendo or inference.” 175 In Louisiana, “a defamatory implication [is actionable only] if the statements regard a private individual and private affairs.” 176 Even then, the private individual would need to prove that the implication is “ascertainable by a reasonable person with some degree of certainty,” 177 and must perhaps also show that it is the “principal inference a reasonable reader or viewer will draw.” 178

Similar doctrines of interpretation apply to both fiction and implication claims. In general, courts give words their natural meanings and look to the

169. See, e.g., id. at 21.
170. See id.
171. See, e.g., id.; Stanton v. Metro Corp., 438 F.3d 119, 124–25 (1st Cir. 2006).
173. See White v. Fraternal Order of Police, 909 F.2d 512, 520 (D.C. Cir. 1990); infra note 203 and accompanying text.
174. Brown v. Gatti, 145 P.3d 130, 133 (Or. 2006) (internal quotation marks omitted). The practical meaning of this is somewhat ambiguous, however, since the court then explained, “[W]hen a claim for defamation requires the drawing of a defamatory inference, the inference that the plaintiff seeks to draw from the facially nondefamatory communication must be reasonable.” Id. (internal quotation marks omitted).
175. McConkey v. Flathead Elec. Coop., 125 P.3d 1121, 1130 (Mont. 2005); see also Krems v. Univ. Hosp. of Cleveland, 726 N.E.2d 1016, 1021 (Ohio Ct. App. 1999) (“Ohio does not recognize libel through implied statements.”). The Montana court, however, went on to state that, “if the stated opinion does not disclose the facts upon which it is based, and as a result creates the reasonable inference that it is based on defamatory facts, there is no protection for the statement.” McConkey, 125 P.3d at 1131.
177. Id. (quoting Bussie v. Lowenthal, 535 So. 2d 378, 382–83 (La. 1988)).
178. Id. at 717 n.8.
“over-all context” or totality of the circumstances. Thus, the implication must be present in the “plain and natural meaning” of the words used. In addition to these guidelines, some courts use specific factors or prongs to guide their analysis. Similar to New York’s factors, the Ninth Circuit uses a three-pronged test to guide its examination of the “totality of the circumstances”:

“First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.”

Regardless of the specific factors, however, the dispositive inquiry remains the same: whether, in light of “the over-all context in which the assertions were made, ... the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.” Courts also apply the following rule:

The meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common acceptation. The province of the innuendo is to show how the words used are defamatory, and how they relate to the plaintiff, but it cannot introduce new matter, nor extend the meaning of the words used, or make that certain which is in fact uncertain.

As a statement of opinion is not literally a statement of fact, defamation by implication claims often involve statements that purport to be opinions. In such cases, determination of whether the statement is actionable depends upon whether the statement implies undisclosed, false facts.


179. See, e.g., Flamm v. Am. Ass’n of Univ. Women, 201 F.3d 144, 153 (2d Cir. 2000).
182. See, e.g., Flamm, 201 F.3d at 153 (noting the three factors considered by New York courts).
183. Knievel v. ESPN, 393 F.3d 1068, 1075 (9th Cir. 2005) (quoting Underwager v. Channel 9 Austl., 69 F.3d 361, 366 (9th Cir. 1995)).
184. Flamm, 201 F.3d at 153 (quoting Brian v. Richardson, 660 N.E.2d 1126, 1130 (N.Y. 1995)).
185. Hatfill, 416 F.3d at 331 (internal quotation marks omitted).
187. See id.
188. Hatfill, 416 F.3d at 330–31, 333.
189. Id. at 333–34.
presented evidence linking the plaintiff to the anthrax mailings of 2001 and urged officials to more rigorously investigate him, but they also cautioned readers to presume his innocence.\textsuperscript{190} Applying Virginia law, the Fourth Circuit noted that a "defamatory charge may be made expressly or by inference, implication or insinuation. In short, it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory."\textsuperscript{191}

The court concluded that, "[b]ased on [the articles'] assertions, a reasonable reader of Kristof's columns likely would conclude that Hatfill was responsible for the anthrax mailings in 2001."\textsuperscript{192} Although the articles did not make a direct accusation, the defendants thus could be liable for imputing to the plaintiff the commission of a crime involving moral turpitude because the stated facts "g[ave] rise to [this] inference."\textsuperscript{193} Accordingly, the Fourth Circuit reversed the district court's order granting the defendant's motion to dismiss.\textsuperscript{194}

Although applying slightly different reasoning, the U.S. Court of Appeals for the Eighth Circuit similarly concluded that "Minnesota law would allow for implied defamation claims." The court stated that because the common law requires a statement "to be construed in light of a document as a whole," the artificial juxtaposition of two statements "can give rise to an actionable implication."\textsuperscript{195}

The plaintiff in \textit{White v. Fraternal Order of Police} complained of letters the Fraternal Order of Police (FOP) sent to the local U.S. attorney's office. The letters reported on irregularities in the drug testing of the plaintiff, who was then a nominee for the rank of captain in the Washington, D.C., Metropolitan Police Department (MPD).\textsuperscript{196} The letters stated,

\begin{quote}
[I]t appears that drug testing procedures have been subverted to protect one and possibly more MPD officials from the results of positive urinalysis tests. ... If records have been falsified, false statements made, or testing procedures subverted for gain (such as promotion), it is likely that criminal as well as ethical violations have been committed.\textsuperscript{197}
\end{quote}

Robert C. White also complained of two related media stories.\textsuperscript{198} Although he conceded that "much" of the information in the letters and news reports was true, he asserted that the "letters were defamatory by implication and
that the respective news reports effected defamation by the omission of certain crucial facts."\textsuperscript{199}

The court acknowledged that the usual standard was that "‘[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.’"\textsuperscript{200} The court, however, expressed the need for added guidance in cases "where the reported facts are materially true and the alleged defamation is not stated explicitly."\textsuperscript{201} Specifically, the court asked, "If the speaker or author has not uttered the alleged defamation explicitly, how is the court to discern whether it would be reasonable to understand the alleged defamatory meaning to have been intended?"\textsuperscript{202}

After reviewing the case law, the court determined that prior decisions had implicitly followed a common rule:

In sum, the court must first examine what defamatory inferences might reasonably be drawn from a materially true communication, and then evaluate whether the author or broadcaster has done something beyond the mere reporting of true facts to suggest that the author or broadcaster intends or endorses the inference. We emphasize that the tortious element is provided by the affirmative conduct of the author or broadcaster, although it is immaterial for purposes of finding defamatory meaning whether the author or broadcaster actually intends or endorses the defamatory inference.\textsuperscript{203}

Furthermore, the court explained that "it is the defamatory implication—not the underlying assertions giving rise to the implication—which must be examined to discern whether the statements are entitled to full constitutional protection."\textsuperscript{204}

The court found that the letters met this heightened standard because "[b]y raising the specter of criminal violations, . . . the FOP provided a clear signal from which a reader could conclude, rightly or wrongly, that the defamatory inference was intended or endorsed."\textsuperscript{205} The articles were not actionable, however, because they "merely reported true facts from which a reader might infer that White used drugs."\textsuperscript{206} There was "no evidence in the text of the articles to suggest that it would be reasonable for a reader to conclude that [The Washington Post Company] intended the defamatory inference. Beyond unpleasant but true facts, the articles are devoid of any

\textsuperscript{199} Id. at 518–19.
\textsuperscript{200} Id. at 519 (quoting Restatement (Second) of Torts § 563 (1977)).
\textsuperscript{201} Id.
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 520.
\textsuperscript{204} Id. at 523. Quoting a treatise, the court went on to state, "[I]f the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication . . . he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct." Id. (alterations in original) (internal quotation marks omitted).
\textsuperscript{205} Id. at 521.
\textsuperscript{206} Id. at 526.
suggestive juxtapositions, turns of phrase, or incendiary headlines."\textsuperscript{207} Turning to the NBC broadcast, the court found that the reporter's "dramatic intonation, standing alone or in combination with other factors, was not sufficiently distinctive to convey a clear implication to the viewers."\textsuperscript{208} Therefore, the court concluded that "the broadcast [was] not capable of conveying a defamatory meaning."\textsuperscript{209}

In \textit{Chapin v. Knight-Ridder, Inc.}, the Fourth Circuit echoed the heightened standard articulated by the D.C. Circuit three years earlier in \textit{White}.\textsuperscript{210} Citing \textit{White}, the court reasoned that

because the constitution provides a sanctuary for truth, a libel-by-implication plaintiff must make an especially rigorous showing where the expressed facts are literally true. The language must not only be reasonably read to impart the false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.\textsuperscript{211}

Notably, in \textit{Hatfill}, discussed above, the Fourth Circuit refused to dismiss the plaintiff's claim regarding defamatory implications, even though the articles did not affirmatively suggest that the author intended or endorsed the implications.\textsuperscript{212} Because the court was reviewing a motion to dismiss and had to accept the plaintiff's allegation that the expressed facts were also false, the court held that \textit{Chapin} was "inapposite."\textsuperscript{213} On remand, the district court granted the defendant's motion for summary judgment. The district court found that the plaintiff could not establish actual malice as to the implication that he was the anthrax mailer, and that the specific facts in the columns were not materially false.\textsuperscript{214}

Although sometimes courts state that the omission of a material fact can create a defamatory implication,\textsuperscript{215} other cases contend that omissions are more properly considered within the context of falsity.\textsuperscript{216} Essentially, courts rely on the omitted fact to determine whether the implication was

\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
\textsuperscript{210} Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1092–93 (4th Cir. 1993).
\textsuperscript{211} Id. (citing \textit{White}, 909 F.2d at 520) (footnote omitted).
\textsuperscript{212} Hatfill v. N.Y. Times Co., 416 F.3d 320, 334 n.7 (2005); see also supra notes 188–94 and accompanying text.
\textsuperscript{213} Hatfill, 416 F.3d at 334 n.7.
\textsuperscript{215} See, e.g., Memphis Publ'g Co. v. Nichols, 569 S.W.2d 412, 420 (Tenn. 1978) ("In our opinion, the defendant's reliance on the truth of the facts stated in the article in question is misplaced. The proper question is whether the [m]eaning reasonably conveyed by the published words is defamatory, whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." (internal quotation marks omitted)).
\textsuperscript{216} See Sack, supra note 31, § 2.4.5, at 2-35 ("Several other courts have concluded that, at least where there is a public-figure or public-official plaintiff, there cannot be libel by implication unless there is a specific fact omitted from the statement in question and that omission renders the statement false.").
false—not to determine what the statement implied.\textsuperscript{217} The author’s knowledge of the omitted fact may be relevant to fault but, because the fact was omitted, it should not affect the reasonable meaning of the statement.\textsuperscript{218}

D. The Fault Requirement

\textit{New York Times Co. v. Sullivan} described actual malice as requiring that a defendant published a statement “with knowledge that it was false or with reckless disregard of whether it was false or not.”\textsuperscript{219} Subsequent opinions have explained that reckless disregard is a subjective standard and requires clear and convincing evidence “that the defendant in fact entertained serious doubts as to the truth of his publication”\textsuperscript{220} or “actually had a high degree of awareness of . . . [its] probable falsity.”\textsuperscript{221}

Suits involving defamation in fiction or by implication complicate the fault issue because the defendant may not have intended or been aware of the defamatory meaning alleged by the plaintiff.\textsuperscript{222} Recognizing the subjective awareness required by actual malice, courts have overwhelmingly adopted an expanded actual malice requirement that requires awareness of the allegedly defamatory meaning.\textsuperscript{223} In a passage lower courts have apparently overlooked, the Supreme Court appears specifically to require such a test. \textit{Milkovich} stated that actual malice requires awareness of the false implications—not merely awareness of the falsity of those implications:

[W]here a statement of “opinion” on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth. Similarly, where such a statement involves a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault as required by \textit{Gertz}.\textsuperscript{224}

\begin{itemize}
\item \textsuperscript{217} See \textit{Nichols}, 569 S.W.2d at 420.
\item \textsuperscript{218} See \textit{Sack}, supra note 31, § 3.8 (“There is substantial danger . . . in permitting a fact finder to base a finding of liability on something not explicitly contained in an allegedly defamatory statement.”).
\item \textsuperscript{220} \textit{St. Amant v. Thompson}, 390 U.S. 727, 731 (1968).
\item \textsuperscript{221} \textit{Harte-Hanks Commc’ns, Inc. v. Connaughton}, 491 U.S. 657, 688 (1989) (internal quotation marks omitted).
\item \textsuperscript{222} See, \textit{e.g.}, \textit{Dworkin v. Hustler Magazine, Inc.}, 867 F.2d 1188, 1194–95 (9th Cir. 1989).
\item \textsuperscript{223} See, \textit{e.g.}, \textit{Hoffman v. Capital Cities/ABC, Inc.}, 255 F.3d 1180, 1187 (9th Cir. 2001); \textit{Sack}, supra note 31, § 5.5.1.2 & nn.380–84 (collecting cases); \textit{Thomas B. Kelley & Steven D. Zansberg, Libel by Implication}, Comm. Law., Spring 2002, at 3, 11 (“There is an emerging consensus, primarily in the federal courts, that in implication cases a plaintiff must prove by clear and convincing evidence that the defendant knew of the defamatory implication conveyed by the publication, or deliberately omitted facts that it knew would negate the defamation.”).
\item \textsuperscript{224} \textit{Milkovich v. Lorain Journal Co.}, 497 U.S. 1, 20–21 (1990).
\end{itemize}
Based on the subjective awareness that actual malice requires, *Dworkin v. Hustler Magazine, Inc.* similarly noted that, "if a speaker knowingly publishes a literally untrue statement without holding the statement out as true, he may still lack subjective knowledge or recklessness as to the falsification of a statement of fact required by *New York Times*."  

Building on this, in *New Times, Inc. v. Isaacks*, the Texas Supreme Court fashioned a modified fault standard in a case arising out of a satirical newspaper article.  

Acknowledging the similarity between fiction and implication claims, the court only slightly modified its fault test for implications, which required knowledge or strong suspicion "that the article was misleading or presented a substantially false impression." Thus, the court held that actual malice exists where "the publisher either kn[ed][w] or ha[d] reckless disregard for whether the article could reasonably be interpreted as stating actual facts." The *New Times* court noted that "[a]pplying the actual malice standard to a satirical work may 'become[] confused because the author is usually well aware of any "falsity" contained in the comment and indeed intends no "truth." That sounds like "actual malice.""  

Hardly any decisions have adopted this "automatic actual malice" standard. However, in one such decision, *Bindrim v. Mitchell*, the court reasoned that because the defendant-author attended therapy sessions resembling those described in her book, she could not argue that "she did not know the true facts."  

Since "actual malice" concentrates solely on defendants' attitude toward the truth or falsity of the material published and not on malicious motives, certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.

The dissent pointed out that the majority's opinion essentially inferred actual malice "from the fact that the book was 'false.'" Although "'[t]hat inference is permissible against a defendant who has purported to state the

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227. *Id.*

228. *Id.* (citing *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982); *Bentley v. Bunton*, 94 S.W.3d 561, 603 (Tex. 2002)).

229. *Id.* at 162 (quoting *Sack*, *supra* note 31, § 5.5.2.7.1, at 5-111).


231. *Bindrim*, 155 Cal. Rptr. at 35.

232. *Id.* at 35–36 (citations and footnote omitted).

233. *Id.* at 44 (Files, J., dissenting).
truth[,] . . . when the publication purports to be fiction, it is absurd to infer
malice because the fiction is false.''

The expanded actual malice standard, as noted by Judge Sack, takes into
account this possible gap between the meaning the defendant intended and
the one the plaintiff alleges:

[W]hether the speaker means to say something true and it is understood to
mean something false, or to say something benign and it is understood to
mean something defamatory, innocent or negligent misstatement is fully
protected by the "actual malice" standard. It is for this reason that
implications perceived in a statement but not intended by the speaker
cannot be actionable in public official or public figure cases.\textsuperscript{235}

Perhaps realizing that the logic of \textit{Bindrim} could also eviscerate \textit{Gertz}'s
minimum fault requirement,\textsuperscript{236} some courts have compounded a negligence
element into the "of and concerning" test.\textsuperscript{237} For example, in \textit{Stanton v. Metro Corp.},
the court articulated this test: "A plaintiff may establish that
the defendant's words were of and concerning the plaintiff by proving at
least that the defendant was negligent in publishing words which reasonably
could be interpreted to refer to the plaintiff."\textsuperscript{238} Interpreting \textit{Gertz}, Judge
Sack expanded on this reasoning in his treatise:

If an author takes reasonable precautions to disguise the identity of a
character modeled or believed by readers to be modeled from real life,
assuming the fictional work can be said to be about a matter of legitimate
public concern, the author is not guilty of "fault" and, as a matter of
constitutional law, should not be liable.\textsuperscript{239}

Courts, however, have not clearly defined "reasonable precautions."\textsuperscript{240}
Instead, courts essentially presume negligence whenever the defendant
publishes a defamatory statement.\textsuperscript{241} For example, in \textit{Stanton} the court
provided this rather circular definition:

[I]t may be inferred that the defamer was negligent in failing to realize
that the communication would be [understood as referring to the plaintiff],
provided the plaintiff can prove that a reasonable understanding on the

\textsuperscript{234} \textit{Id.} at 44–45.
\textsuperscript{235} \textit{Sack, supra} note 31, § 5.5.1.2, at 5–75 to -76.
\textsuperscript{236} \textit{See, e.g., \textit{Restatement (Second) of Torts} § 564 cmt. f (1977).}
\textsuperscript{237} \textit{See \textit{Stanton v. Metro Corp.}, 438 F.3d 119, 128 (1st Cir. 2006).}
\textsuperscript{239} \textit{Sack, supra} note 31, § 2.9.6, at 2-150. Note that this assumes "the \textit{Gertz}
requirement of 'fault' extends to matters other than falsity." \textit{Id.} § 2.9.6 n.549.
\textsuperscript{240} Cf. \textit{Eric Scott Fulcher, Note, Rhetorical Hyperbole and the Reasonable Person
Standard: Drawing the Line Between Figurative Expression and Factual
Defamation}, 38 Ga. L. Rev. 717, 723 (2004) (concluding that because the Supreme Court "has given lower
courts little guidance on how the reasonable person standard should be applied . . . courts
have addressed rhetorical hyperbole in a variety of ways").
\textsuperscript{241} \textit{See, e.g., \textit{Stanton}, 438 F.3d at 131–32. One exception arises where the statement's
defamatory meaning is created by extrinsic facts unknown to the plaintiff. \textit{See \textit{Restatement (Second) of Torts} § 580B.}
part of the recipient that the communication referred to the plaintiff was one that the defamer was negligent in failing to anticipate.242

Although unusual, at least a few courts have recognized that an author may act reasonably despite referring to the plaintiff. In *Clare v. Farrell*, the court held that, “even if . . . Minnesota law permits recovery if the writer negligently wrote of and concerning the plaintiff in a defamatory manner,” the defendant had not been negligent.243 The court specifically noted that the reasonableness standard should provide fiction authors with “some latitude”:

It would be an astonishing doctrine if every writer of fiction were required to make a search among all the records available in this Nation which might tabulate the names and activities of millions of people in order to determine whether perchance one of the characters in the contemplated book designated as a novel may have the same name and occupation as a real person. At least some latitude must be given authors in their selection of names for characters so that the production of fictional literature may continue, and the mean, the base, and the good of the characters therein fearlessly portrayed.244

Similarly, in *Polydoros v. Twentieth Century Fox Film Corp.*, the court noted that “[t]he industry custom of obtaining ‘clearance’ establishes nothing, other than the unfortunate reality that many filmmakers may deem it wise to pay a small sum up front for a written consent to avoid later having to spend a small fortune to defend unmeritorious lawsuits such as this one.”245 As the court was addressing a “negligence” claim and determined the work was not defamatory, however, this statement may not fully apply to the *Gertz* fault standard.246

II. APPLYING A HEIGHTENED THRESHOLD TEST TO DEFAMATION IN FICTION CLAIMS

As explained above, jurisdictions have developed a variety of tests to address defamation by implication claims.247 While some courts give such claims no special treatment and simply apply the ordinary defamation framework, others have developed heightened threshold tests.248

242. *Stanton*, 438 F.3d at 131–32 (internal quotation marks omitted); see also *New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 480 N.E.2d 1005, 1009 (Mass. 1985) (“While the plaintiff need not prove that the defendant ‘aimed’ at the plaintiff, he or she must prove that the defendant was negligent in writing or saying words which reasonably could be understood to ‘hit’ the plaintiff.”).
244. *Id.* at 279.
246. *Id.*
247. See *supra* Part I.C.
248. See *supra* Part I.C.
Aside from a few exceptions, courts and commentators have thus far addressed defamation by implication apart from defamation in fiction. However, considering the rise of heightened threshold tests for defamation by implication—and the expansion of the supportable interpretation rule into the falsity element—it seems appropriate to query whether disparate treatment is justified. Drawing on the arguments of legal scholars and commentators, this part discusses the appropriateness of adopting a heightened threshold test to address comparable free speech concerns raised by defamation in fiction claims.

A. Arguments Against Applying a Heightened Threshold Test to Defamation in Fiction Claims

1. Appropriate Protection Already Exists

Many courts and commentators acknowledge that protection for works of fiction is "bought only at a price." As Frederick Schauer stated, "[S]omeone who has become the recognizable centerpiece of an unflattering portrayal has good reason to feel aggrieved. . . . Maybe [such victims] should be denied recovery, but that is not the same thing as saying that they have not been harmed." Commentators who support the current legal framework (or advocate only slight adjustments) often argue that a statement likely has the same ultimate effect upon the reader regardless of whether it purports to be fiction or nonfiction. Thus, according to Schauer, providing increased protection for fiction would ignore the reality that fiction can damage reputations just as easily as nonfiction:

[A] reader's picture of reality is quite likely to be influenced by works of fiction, even if that reader knows full well that he or she is reading a work of fiction. If my perception of small-town America is permanently changed because of having read Main Street, Babbitt, and Dodsworth, and if I still have trouble eating sausages because of having read The Jungle some years ago, then it seems not at all surprising that someone's view of, say, Dr. Bindrim would be changed as a result of having read Gwen Mitchell's book, assuming that the identity between Bindrim and the fictional character was known. Consequently, the effect of a false and

249. But see New Times, Inc. v. Isaacks, 146 S.W.3d 144, 162–63 (Tex. 2004) (modifying the actual malice test used in defamation by implication cases and applying it in a case arising from a fictionalized and satirical article).
251. Schauer, supra note 250, at 246.
252. See, e.g., id. at 262.
unflattering portrayal in a novel is likely to be exactly the same as that of a work of nonfiction.253

Thus, as the book in Bindrim was harmful to the plaintiff’s reputation despite its clear fiction label, Schauer did not find the result in that case troubling.254

Another commentator, Daniel Smirlock, has similarly argued that, “[i]f readers can both acknowledge that a work is ‘fictional’ and still believe that it refers to a real person, then the label attached to the work should be no more dispositive than is the routine disclaimer.”255 Furthermore, although “[a]uthors occasionally express their exasperation at readers’ assumptions that their novels are ‘really’ reportage or biography... the contradiction seems to be one that the law must live with.”256

Courts and commentators often worry that giving too much weight to disclaimers would allow writers to immunize “thinly disguised character assassination[s].”257 In such a situation, “the disclaimer might be understood by the reader as a mere wink, [not] indicating the absence... of factual truth.”258 Similarly, in Milkovich v. Lorain Journal Co., the Court quoted Judge Henry Friendly’s observation that “[i]t would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words ‘I think.’”259

In Schauer’s view, authors are innocent only where their “characters bear such a remote resemblance to anyone in real life that any defamatory imputation would be absurd or [their] imputations are so [removed] from reality as not even to suggest a hint of truth behind the fiction.”260 Writing in 1985, Schauer noted that only a few cases imposed liability “upon the totally innocent.”261 Thus, he concluded that defamation law struck an appropriate balance between protecting fiction and reputation, and that only

253. Id. at 261–62 (footnotes omitted); see also Daniel Smirlock, Note, “Clear and Convincing” Libel: Fiction and the Law of Defamation, 92 Yale L.J. 520, 532 (1983) (“[M]any readers seem nonetheless inclined to take fiction, or aspects of fiction, as the literal truth.”).

254. Schauer, supra note 250, at 260 (“[T]he dispute engendered by Bindrim concerns the extent to which a person in Dr. Bindrim’s position should have a cause of action when a work clearly identified as fiction also clearly draws on that real person and makes unflattering modifications in the character modeled after that person. As should be apparent by now, I am not troubled by imposing liability under such circumstances.”). Compare this with Smirlock, supra note 253, at 525.

255. Smirlock, supra note 253, at 533.

256. Id. at 532–33.

257. Blumstein, supra note 13, at 31.

258. Id.

259. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990) (quoting Cianci v. New Times Publ’g Co., 639 F.2d 54, 64 (2d Cir. 1980)); see also Corrigan v. Bobbs-Merrill Co., 126 N.E. 260, 262–63 (N.Y. 1920) (“Reputations may not be traduced with impunity, whether under the literary forms of a work of fiction, or in jest, or by inadvertence, or by the use of words with a double meaning.” (citations omitted)).

260. Schauer, supra note 250, at 243–44.

261. Id. at 243.
slight modifications were warranted—namely, requiring that a plaintiff prove the “of and concerning” element with clear and convincing evidence. 262

Two years earlier, Daniel Smirlock took a similar position: “There is no good reason why such motives, when they result in a novel genuinely damaging to reputation, should receive any greater protection than they would have received had they led to the production of a similar work of nonfiction.” 263 Like Schauer, however, Smirlock advocated making the “of and concerning” requirement more rigorous. To do so, he proposed three elements: unmistakability, individuality, and conviction. 264

Another commentator, William E. Carlson, took aim at Pring v. Penthouse International, Ltd. 265 which immunizes works that are too outrageous to state actual facts. 266 Although Carlson agreed with the result, he believed the holding was too broad and would “enable a mischievous fictionist to escape liability for defamation by merely presenting impossible feats in bizarre settings.” 267 He noted that “the reasonable reader nonetheless may cut through the superfluous verbiage and discover a defamatory statement of fact.” 268 Addressing the same concern, Smirlock proposed limiting Pring by requiring courts to consider whether each specific element reasonably states actual facts, as opposed to considering only the believability of the entire work as a whole. 269

Many critics of defamation law have focused their attention on the actual malice test adopted in Bindrim. In addition to noting the weak basis for establishing identification, they often claim that the decision provided inadequate protection to works of fiction because it assumed knowledge of falsity. 270 However, with the widespread adoption of the expanded actual malice test, authors of fiction are arguably now adequately protected from liability. 271

262. Id. at 258–59.
263. Smirlock, supra note 253, at 533.
264. See id. at 538–42.
265. 695 F.2d 438, 440 (10th Cir. 1982).
267. Id.
268. Id. at 426.
269. See Smirlock, supra note 253, at 541 & n.86; see also Schauer, supra note 250, at 261–62 (expressing a similar concern).
271. See supra notes 219–35 and accompanying text. Interestingly, commentators writing on defamation in fiction have largely ignored the widespread adoption of the expanded actual malice test. See, e.g., Savare, supra note 67, at 136–40. But see Sack, supra note 31, § 5.5.1.2 & nn.380–84 (“There may be no substitute in fiction for actual people as characters. A totally invented President or F.B.I. chief cannot convey to the reader the complex of meanings and associations that the names Nixon or Hoover, complete with mythological connotations, evoke. A rule that would ban or burden such communications on the theory that they are known to be false would be at odds with the prized American privilege to speak one’s mind, although not always with perfect good taste, on all public
According to Professors C. Thomas Dienes and Lee Levine, for example, an expanded application of the actual malice standard (coupled with a meaningful inquiry into whether the material bears a defamatory meaning) would provide sufficient protection from liability for unanticipated but reasonable interpretations of publications.272 (Similarly, Dean Rodney A. Smolla proposed that “[p]erhaps the best approach is to ask whether the defendant at least acted with ‘reckless disregard’ for the likelihood that some reasonable readers would fail to see that the material was parody.”273)

2. A Heightened Threshold Test Is Inappropriate for Any Defamation Claim

Somewhat separate from the question of whether defamation law sufficiently protects works of fiction from liability is the question of whether heightened threshold tests are a good idea at all. Some courts and commentators have resisted the use of special threshold inquiries even for defamation by implication claims. For example, in Hatfill v. New York Times Co. and Stanton v. Metro Corp., courts declined to depart from the usual test of whether the publication reasonably implies the defamatory meaning attributed to it.274

Dienes and Levine agree with this approach and argue that declining to apply a heightened test is consistent with the Supreme Court’s defamation jurisprudence.275 They note that the Court has decided multiple cases arising out of implied statements, but has never acknowledged a special rule for them.276 In Hatfill, the court adopted the standard in Milkovich, which held that an implication is actionable as long as it can be reasonably inferred from the defendant’s statement.277 Similarly, Judge Carlos Bea, in dissent, recently criticized a decision by the Ninth Circuit for infringing on the jury’s role of determining the meaning of a statement: “[The] court

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272. See Dienes & Levine, supra note 32, at 244 (rejecting both blanket immunity for implied libel as well as “the imposition of liability on a publisher simply because some recipients of the communication could reasonably interpret the publication to have a defamatory meaning”).
274. See Hatfill v. N.Y. Times Co., 416 F.3d 320, 331 (4th Cir. 2005); see also Stanton v. Metro Corp., 438 F.3d 119, 124–25 (1st Cir. 2006).
275. See Dienes & Levine, supra note 32, at 272.
276. See id. ("The plaintiffs in all of the Court’s recent cases alleged libel by implication, although none of its decisions purport to come to grips with the issue directly.").
277. See Hatfill, 416 F.3d at 333–34 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 18–19 (1990)).
may not... interfere with the jury’s role by treating as nondefamatory a statement that a reasonable juror may fairly read in context as defamatory.”278

In Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan, Dienes and Levine argue that the creation of special threshold tests for implied libel has “created a body of law that is inconsistent, often contradictory, and ultimately unhelpful.”279 Instead, the authors contend that the threshold inquiry should be limited to the court’s traditional, common law role of “determining whether the publication at issue is reasonably capable of bearing a false and defamatory meaning.”280

Interestingly, however, Dienes and Levine’s conception of this general test includes aspects of the heightened threshold test articulated in White v. Fraternal Order of Police.281 They characterize White as “correctly distinguish[ing] between what inferences ‘can reasonably be drawn’ from a publication and the quite distinct inquiry concerning what meaning that publication can reasonably be said to bear.”282 Furthermore, they note that “the Post article did not accuse the plaintiff of... wrongdoing and could not reasonably be read to mean that the Post was itself asserting that allegedly false and obviously defamatory fact.”283 A publication’s “constitutional immunity,” they conclude, should not be jeopardized “if its only reasonable meaning is that the defendants are raising questions to which they do not purport to know the answers.”284

Ultimately, Dienes and Levine reject White only to the extent it specifically requires “an overt purpose to convey the defamatory meaning.”285 In their view, although an overt purpose is relevant, the reporting of accurate facts can communicate a defamatory meaning even without an affirmative endorsement of that meaning.286 As an example, they cite Memphis Publishing Co. v. Nichols.287 Thus, they suggest that courts should conscientiously employ the common law approach of “view[ing] the article as a whole, including its form and context, to

279. Dienes & Levine, supra note 32, at 243; cf. Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980) (noting that the “seeming contradiction” of applying the “of and concerning” test to fiction “is best resolved by the trier of fact since adjudication of the issue as a matter of law will seldom satisfy the expectation that legal holdings be consistent and logical”).
281. 909 F.2d 512 (D.C. Cir. 1990).
283. Id.
284. Id. at 289.
285. Id. at 290.
286. Id. at 290–91.
287. 569 S.W.2d 412, 414 (Tenn. 1978).
determine whether it is reasonably capable of bearing a false, defamatory meaning.”

3. Fiction Is Different from Implication

Even if heightened threshold standards are appropriate for assessing implications, the justifications for providing this enhanced scrutiny are not necessarily applicable to defamation in fiction. By definition, implied meanings are not literally apparent. Thus, because the "danger to reputation" is not apparent from the face of the publication, . . . the publisher [might be] unaware of any need to avoid such harm." Commentators have explained that the "challenge" presented by "implied libel" can be traced to the ambiguity of meaning and the differing perceptions of readers, viewers, and listeners.

Also, courts sometimes root the threshold requirements for implied defamation in an expanded application of the defense of substantial truth. Thus, in White v. Fraternal Order of Police, the court phrased its holding as applicable to implications arising out of "the mere reporting of true facts."

These underlying concerns are perhaps not applicable to defamation in fiction. At least where a work is labeled as fiction, it arguably does not literally state actual facts—because it explicitly says it is only fiction. In this sense, fiction may only imply facts. Nonetheless, once fiction is reasonably read literally, assessing the defamatory meaning is usually straightforward. Once the "of and concerning" and statement of fact requirements have been satisfied, any offensive distinction between the plaintiff and the character is essentially defamatory—and these distinctions are often readily apparent.

Also, as fiction does not purport to state any literal facts, the desire to protect "the mere reporting of true facts" is not applicable to defamation in fiction claims. In fact, limiting liability for works of fiction would arguably encourage the dissemination of false facts by barring defamation.
DEFAMATION IN FICTION

claims even where fiction is reasonably read as stating false facts. Although fiction may present a "higher truth," Schauer has argued that it is more useful to protect the flow of factual information, which is of greater practical use. Also, while authors can alter fiction to avoid defamatory implications, objective facts are not as malleable.

Schauer has also suggested that "creative writers may be less sensitive" than newspapers to potential defamation litigation. Thus, he reasons,

The problem seems to be more one of deterring publishers from accepting novels for publication than of deterring novelists from writing them. Insurance in the context of fiction seems especially attractive... because actions based on fiction are comparatively rare and because the costs seem comparatively easy to spread out or pass on to book purchasers.

According to this line of reasoning, it seems, defamation liability is an appropriate means of encouraging authors and publishers to utilize fiction's malleability so as not to wrongly injure another's reputation.

B. Arguments in Favor of Applying a Heightened Threshold Test to Defamation in Fiction Claims

1. Inconsistent and Unpredictable Standards Chill Speech and Waste Resources

The Supreme Court has warned that clarity "in the area of free speech [is particularly essential] for precisely the same reason that the actual malice standard is itself necessary. Uncertainty as to the scope of the constitutional protection can only dissuade protected speech—the more elusive the standard, the less protection it affords." Commentators, however, regularly note that defamation law is woefully inconsistent and unclear in its treatment of fiction. In particular, commentators are critical of the "of and concerning" test, noting that, although it is "imprecise and inconsistent," the Supreme Court "has done nothing to clarify [it]."

298. Id. at 255 ("For all its importance,... fiction is for most people a comparative luxury. An incremental loss of some fiction seems, as a working hypothesis, less harmful than the incremental loss of some political information. Society would suffer had we been deprived of the novels of Edith Wharton, for instance, but not nearly as much as we would suffer had we been deprived of the exposure of Watergate and its associated crimes.").
299. Id. at 244 n.56.
300. Id.
303. Smirlock, supra note 253, at 526; see also Welch v. Penguin Books USA, Inc., No. 21756/90, 1991 N.Y. Misc. LEXIS 225, at *5 (N.Y. Sup. Ct. Apr. 3, 1991) ("Courts have failed to carve out a clear standard as to how similar or how different the two must be."); Savare, supra note 67, at 140 (explaining that "there is no clear test").
Commentators contend that lack of agreement as to "what is sufficient evidence of identification" and "what constitutes actual malice or negligence" results in "a serious chilling effect on the publication of realistic novels." It makes publishers more "hesitant to publish fiction," and particularly hesitant to publish "historical novels and works by unknown writers." Of course, this chilling not only affects authors and publishers; the public is "deprived of... work, which may have important entertainment, social, or political value."  

Furthermore, commentators report that the uncertainty forces publishers and distributors to spend extra time and resources subjecting creators of fictional works to comprehensive clearance procedures, including "elaborate inquisition[s]" as to their sources. The looming possibility of litigation also increases premiums for libel and errors and omission insurance, pricing some content producers out of the market. Notably, it is the consumers who indirectly pay for these inefficient prophylactic measures, as well as for litigation expenses and payouts. Although a clearer standard would not eliminate the need to conduct clearances or procure insurance, it would make these processes more efficient.  

Of course, simply providing fiction with greater protection from liability would also lower the cost of precautionary measures, especially insurance. Every verdict in favor of a plaintiff potentially raises premiums, which may price smaller companies out of the market. For example, one judgment of $9.2 million forced a small newspaper into bankruptcy proceedings. Although the availability of insurance may enable some publishers to spread risk and slightly blunt the chilling effect of defamation liability, it is largely, arguably completely, irrelevant to deciding when a publication's infliction of reputational harm should be compensable.

304. Smirlock, supra note 253, at 525.  
305. Stam, supra note 302, at 585.  
306. Id. at 582; see also Blumstein, supra note 13, at 29 (describing the test as "inevitably chilling"); Smirlock, supra note 253, at 529 ("The shortcomings of the current 'of and concerning' standard can lead to the same kind of 'chilling effect' on writers and publishers that the Sullivan holding sought to prevent.").  
307. Carlson, supra note 266, at 387.  
308. Savare, supra note 67, at 156–57.  
309. Id. at 157–58 (internal quotation marks omitted); see also Stam, supra note 302, at 586 nn.96–97 (describing publishers' clearance procedures in detail, as well as their subsequent ineffectiveness).  
310. Savare, supra note 67, at 158–59; see also Carlson, supra note 266, at 387 ("The cost of libel insurance... has skyrocketed...")  
312. Id.
2. The "Reasonable Person" Test Is Too Vague

One commentator has argued that the inconsistency in the case law is not the result of faulty application by the courts, but due to an "of and concerning" test that is "badly in need of... elaboration." According to Smirlock, the test's "unelaborated reasonable-person standard" lacks "both content and consistency when applied to works of fiction." Notably, the tests articulated in *Pring* and *Milkovich* also rely on the "unelaborated reasonable-person standard," and are arguably in need of similar elaboration.

Although common law doctrines of interpretation provide some supplementary guidance, inconsistencies in the case law indicate they are largely ineffective in overcoming the vagueness of the reasonable person test. As one commentator states, "Although courts are essentially attempting to answer the same inquiry, they do not always ask the same questions and frequently differ as to the significance of various factors." Thus, as noted above, courts differ in the weight they give to the disclaimers, the content, the reasonable reader's knowledge of the plaintiff, and the author's intent. Similarly, courts disagree as to whether the believability requirement applies to the work as a whole or its separate elements.

*Stanton* and *New Times* further illustrate some of the specific differences. Despite both courts purporting to follow the doctrine that the publication be considered as a whole, they reached contradictory conclusions as to the care exercised by the reasonable reader. In *Stanton*, the court held that, although the disclaimer was on the first page of the article, "some percentage of readers who see the article, particularly casual readers who only glance at it or skim it, will ignore the disclaimer." Thus, the disclaimer would not preclude liability.

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314. *Id.* at 529.
315. *Pring v. Penthouse International, Ltd.* articulated the requirement that the publication reasonably be read as stating an actual fact about the plaintiff. 695 F.2d 438, 440 (10th Cir. 1982). *Milkovich v. Lorain Journal Co.* held that opinion was only protected where it did not reasonably imply a statement of fact. 497 U.S. 1, 17–20 (1990).
316. See infra notes 318–33 and accompanying text.
318. See *supra* notes 98–149 and accompanying text.
319. See infra notes 331–33 and accompanying text.
320. Compare *Stanton v. Metro Corp.*, 438 F.3d 119, 125 (1st Cir. 2006) ("[W]e must examine the article in its totality in the context in which it was uttered or published and consider all the words used, not merely a particular phrase or sentence." (internal quotation marks omitted)), with *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 154 (Tex. 2004) ("[T]he publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it." (internal quotations marks omitted)).
321. *Stanton*, 438 F.3d at 126 (internal quotation marks omitted).
322. *Id.*
In addition, Stanton did not consider that the hypothetical reasonable reader is someone who knew or knew of the plaintiff. Since the plaintiff in that case was a private figure, readers recognizing her photograph would most likely have become especially interested in the piece and exercised extra care in reading the article—at least more care than “casual readers who only glance at it or skim it.”

Adopting similar logic, courts have recognized that sometimes the reasonable reader may exercise extra care, or be especially knowledgeable about the plaintiff, and have dismissed claims as a result.

In *New Times*, on the other hand, the court recognized that, although “[i]ntelligent, well-read people act unreasonably from time to time... the hypothetical reasonable reader... does not.” Furthermore, despite the fact that “[p]eople every single day think *The Onion* stories are real,” courts “must analyze the words at issue with detachment and dispassion, considering them in context and as a whole.” The court could not “impose civil liability based on the subjective interpretation of a reader who has formed an opinion about the article’s veracity after reading a sentence or two out of context; that person is not an objectively reasonable reader.” Accordingly, the court rejected the defamation claim, finding that “a careful reader” would recognize clues in the article signaling that it was satire.

The *New Times* court also stated that “[t]he reasonable reader would not consider each of these clues in isolation, but would synthesize each signal as part of the larger determination of whether [the article] can reasonably be interpreted as stating actual facts.” Similarly, in *Pring*, the court rejected the plaintiff’s argument that even if the story was literally unbelievable, it conveyed a “subliminal meaning of sexual permissiveness.” In *Mitchell v. Globe International Publishing, Inc.*, however, the court found that “even

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323. See id. at 127.
324. Id. at 126.
325. See, e.g., Amrak Prods., Inc. v. Morton, 410 F.3d 69, 73 (1st Cir. 2005); Wheeler v. Dell Publ’g Co., 300 F.2d 372, 375–76 (7th Cir. 1962); supra notes 120–34 and accompanying text.
328. *New Times*, 146 S.W.3d at 158.
329. Id. at 159.
330. Id. at 158.
331. Id. at 158–59.
332. *Pring v. Penthouse Int’l, Ltd.*, 695 F.2d 438, 442–43 (10th Cir. 1982) (refusing to consider “subliminal meaning” because it “does not represent an applicable standard”). Notably, plaintiff Kimerli Jayne Pring amended her complaint, thereby limiting “her cause to the three [sexual] incidents... with no general implications.” Id. at 441. According to the court, she did so to “avoid answering interrogatories.” Id. As a result, “the trial court limited defendants as to what they could question plaintiff about—no sex history.” Id.; cf. supra note 7.
if the headline and certain facts contained in the article could not be reasonably believed[,] other facts[,] e.g., the implication of sexual promiscuity, could reasonably be believed.**333**

3. The Expanded Fault Requirement Provides Inadequate Protection

Although the expanded actual malice standard provides added protection to authors of fiction, commentators note that it is not a cure-all. Actual malice is “bad news for the First Amendment,” according to Donald Gillmor, author of *Power, Publicity, and the Abuse of Libel Law.***334** Gillmor notes that exploring a defendant’s “state of mind” for evidence of actual malice often involves a tremendous amount of discovery and requires “opening up the editorial process to public scrutiny.”**335** This has led to “[p]rolonged discovery periods [that] greatly increased the costs of libel suits.”**336** Overall, he says, defamation lawsuits have become more “expensive, time-consuming, and incursive for defendants.”**337** For instance, in 2006, a case was dismissed “a full 23 years after it began.”**338**

Thus, Gillmor concludes, “If the ‘actual malice’ test was intended to discourage public officials and celebrities from suing except under extreme provocation, it failed. There are proportionately more libel suits now than ever before, a sizable segment of them brought by public officials.”**339** Although actual malice imposes a high burden on defamation plaintiffs,**340** media defendants are often not vindicated until appeal, after accruing substantial legal costs.**341**

Perhaps even more troubling, Gillmor says, “There is evidence to suggest that many plaintiffs sue with no expectation of winning money damages, but they sue anyway.”**342** According to a study, half of losing plaintiffs were “satisfied either that the media, in lieu of money damages, had been suitably punished by a long and expensive suit or that they had managed to deflect additional bad publicity or had gained good publicity.”**343** Compared to award amounts, litigation expenses are particularly

**335.** *Id.* at 14–15.
**336.** *Id.* at 15; see also Seelye, *supra* note 311.
**338.** Seelye, *supra* note 311.
**340.** *Id.* at 7. In a study, “[a]ctual malice . . . was found in only nine percent of the 340 cases in which the question was addressed.” *Id.* After appeals, only sixteen public figures prevailed. *Id.*
**341.** Seelye, *supra* note 311 (quoting a media insurance company executive as saying that “[t]he media tend to win, but it can be expensive to litigate because you aren’t vindicated until appeal”).
**343.** *Id.*
significant. At one media insurance company, "60 percent to 80 percent of the dollars . . . paid out went to defense expenses, not awards."344

According to Gillmor, the current process is "out of control" and benefits neither side: "Plaintiffs . . . have very little to gain, defendants much to lose . . . ."345 In the end, he says, "Only attorneys, it would appear, benefit from the process."346 As an alternative to actual malice, Gillmor argues that public figures should "have no remedy in libel law"—at least where the media defendant provides space for alleged victims to reply.347

Furthermore, it is not exactly clear how much protection even the expanded fault standard provides against liability. The precise degree of awareness may be different across jurisdictions. For example, according to New Times, actual malice requires knowledge or reckless disregard "for whether the article could reasonably be interpreted as stating actual facts."348 The Ninth Circuit, however, requires that the defendant "knew (or purposefully avoided knowing) that the [publication] would mislead [ordinary] readers."349 Despite an awareness requirement, Dienes and Levine "remain skeptical that the promise of New York Times will be fully realized."350 For example, a publisher's "‘awareness’ that some readers would understand [a] . . . report to be defamatory should not be sufficient to ground liability" where the report contains only true facts with no endorsement and allows readers to "draw [their] own conclusion."351

Also, as direct evidence of the defendant's state of mind is almost never available, actual malice is ordinarily inferred from the defendant’s conduct.352 In fact, the Ninth Circuit noted that it had "yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published."353 The court recognized that its inquiry "must be guided by circumstantial evidence. By examining the editors’ actions we try to understand their motives."354 Thus, a court could possibly find actual malice where the defendant simply publishes a book

344. Seelye, supra note 311.
346. Id.
347. Id. at 7–8.
351. Id.
352. Eastwood v. Nat'l Enquirer, Inc., 123 F.3d 1249, 1253, 1256 & n.20 (9th Cir. 1997); cf. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517–18 (1991) (concluding "that a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement"); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512–13 (1984) (conducting an independent review of the record and finding insufficient evidence that the writer was aware of an error when the article was published); Time, Inc. v. Pape, 401 U.S. 279, 290–92 (1971) (finding insufficient evidence of reckless disregard for the truth where the magazine's 'omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities").
353. Eastwood, 123 F.3d at 1253.
354. Id.
DEFAMATION IN FICTION

that is so realistic the court concludes that the defendant "had a high degree of awareness" that the book "could reasonably be interpreted as stating actual facts." This may not be all that different from the holding in *Bindrim.*

In a case arising from a misleading tabloid headline, the Ninth Circuit described the use of circumstantial evidence:

[W]e're not merely finding that the *Enquirer* editors "should have foreseen" a defamatory interpretation. We are finding, based on the evidence presented at trial, that they did foresee it. The fact that we can't look inside the editors' minds doesn't stop us from reaching conclusions about their thoughts; subjective standards are nearly always satisfied by circumstantial proof... 

Due to this reliance on circumstantial proof, the actual malice inquiry often closely resembles the initial assessment of what the publication reasonably means, or whether the meaning is false. When the publication itself is the only evidence of actual malice, the court must determine whether the publication evidences, by clear and convincing proof, an intent to convey the defamatory meaning.

In *Hoffman v. Capital Cities/ABC, Inc.*, for example, actor Dustin Hoffman complained of magazine photographs containing manipulated images that combined celebrities' heads with models' bodies. The court's assessment of actual malice considered the following:

All but one of the references to the article in the magazine make it clear that digital techniques were used to substitute current fashions for the clothes worn in the original stills. Although nowhere does the magazine state that models' bodies were digitally substituted for the actors' bodies, this would be abundantly clear given that the vast majority of the featured actors were deceased. While [Los Angeles Magazine (LAM)] never explicitly told its readers that the living actors did not pose for the altered photographs in the article, there is certainly no clear and convincing

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357. Compare *Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 35-36 (Ct. App. 1979) ("Since she attended sessions. . . . certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity."). *with Eastwood*, 123 F.3d at 1256 ("[W]e find, from the totality of their choices, that the editors intended to convey the impression—known by them to be false—that Eastwood willfully submitted to an interview by the *Enquirer*. This intentional conduct satisfies the 'actual malice' standard.").

358. *Eastwood*, 123 F.3d 1249, 1256 n.20 (quoting and distinguishing *Newton v. NBC*, Inc., 930 F.2d 662, 680 (9th Cir. 1990)).

359. *See Moldea v. N.Y. Times Co.*, 22 F.3d 310, 316 (D.C. Cir. 1994) ("Although *Masson*, *Bose* and *Pape* all concerned the evidence necessary to establish 'actual malice,' those decisions are rooted in the question of a plaintiff's ability to prove falsity so as to show that a defendant presented information he or she knew to be false.").


361. *Id.* at 1182–83, 1187–88.
evidence in the magazine itself that LAM intended to suggest the opposite. 362

The court thus concluded, “We do not believe that the totality of LAM’s presentation of the article and the ‘Tootsie’ photograph provides clear and convincing evidence that the editors intended to suggest falsely to the ordinary reader that he or she was seeing Hoffman’s body in the altered ‘Tootsie’ photograph.” 363

Addressing defamation by implication, Thomas B. Kelley and Steven D. Zansberg note that, despite the “emerging consensus” applying the expanded fault test, actual malice provides insufficient protection to defendants. 364 They conclude that, “unless it is successfully urged that the claimed implication does not convey a provably false factual connotation, the question of implied meaning frequently embroils the defendant in protracted and costly discovery.” 365 To correct the situation, they propose that, before the “inquiry into the defendant’s state of mind is undertaken, courts should require, as a threshold matter, that the claimed inference or implication is the principal one posited by the article, or the one that is apparently endorsed by the author.” 366

4. Protections for Opinion and Innocent Construction Offer Little or No Protection for Fiction

As noted above, statements of opinion are not actionable unless they imply the existence of undisclosed facts that are false and defamatory. 367 Although courts occasionally reference nonactionable opinion when analyzing whether a work contains or implies a statement of fact, 368 it appears that courts almost never hold that a work of fiction is nonactionable opinion because it relies on disclosed facts. Thus, Smolla concluded, once a plaintiff establishes that a fictional character refers to him, “barriers that would normally impede recovery for a nonfiction work—standards of intent, or the nonactionability of opinion—... quickly come tumbling down.” 369

According to Professor Isidore Silver, this lack of protection may be reasonable, since “faction”—a subgenre of fiction that “adheres fairly

362. Id. at 1188.
363. Id.
365. Id. at 6.
366. Id. at 11.
367. See, e.g., Partington v. Bugliosi, 56 F.3d 1147, 1156–57 (9th Cir. 1995); supra note 187 and accompanying text.
368. See, e.g., Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1193 (9th Cir. 1989) (parody); Polydoros v. Twentieth Century Fox Film Corp., 79 Cal. Rptr. 2d 207, 212 (Ct. App. 1997) (fictional movie).
369. Smolla, supra note 55, § 4:48, at 4-74; see also New Times, Inc. v. Isaacks, 146 S.W.3d 144, 162–63 (Tex. 2004) (discussing satire and parody and concluding that “[i]t may be difficult... to persuade a judge that statements of fact are, under certain circumstances, not statements of fact at all, but of opinion” (internal quotation marks omitted)).
closely to historical fact as a foundation for physiological speculation”—"derives its thrust from the liberal [mixture] of fact and fantasy. The reader cannot readily distinguish between the two, and even clearly symbolic events may be threaded with historical fact."370 However, despite this mixture, he says, "[I]t is error to assume that, because a work of faction impresses one as somewhat ‘historical’ or ‘realistic,’ it is any less fictional than the purest fantasy or romance."371

Silver contends that "[t]he invented action of a novel is nothing more than the author’s opinion of what a character would do under certain circumstances."372 Thus, "[s]o long as the reader is warned that the matter is one of opinion, traditional defenses such as ‘fair comment’ should be available regardless of the particular genre."373

Similarly, Smolla contends that "[t]he objective in devising a coherent approach to handling libel claims in fiction should be to create a standard that would give fiction the same rough quantum of constitutional and common law protection enjoyed by nonfiction."374 To accomplish this, he proposes both applying the expanded actual malice requirement as well as providing immunity "[a]s long as the ordinary reasonable reader is not led into believing that what is packaged as fiction is meant to be taken as fact."375 By incorporating intent, as determined from the work itself, this standard would mimic the requirement that the work can be reasonably read as intending to refer to the plaintiff, as opposed to being simply understood as referring to the plaintiff.376 According to Smolla, this would not provide excessive protection because "as long as the author does not attempt to identify his or her fantasy as reality," there "is usually no real harm in an author’s drawing characters and events from real life, even if those characters are readily identifiable as actual people."377

As Smolla retains a level of deference to the jury, however, his test would insulate works only when the court determines that a reader could not reasonably find that the work was intended to be understood as fact.378 But, if used as a heightened threshold test and applied directly by the court without deference to the full range of reasonableness, this standard would

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371. Id. at 1086.
372. Id. at 1069 ("In essence, psychological character probing is an educated guess about human motivation—an opinion. While such speculation is commonplace in the scholarly literature of psycho-history and psycho-biography, it also exists in the novel of faction.").
373. Id.
375. Id. § 4:48, at 4-76.
376. See supra note 69 and accompanying text.
377. Smolla, supra note 55, § 4:48, at 4-76.
378. Id. § 4:48, at 4-76 & n.11 (citing Pring v. Penthouse Int’l, Ltd., 695 F.2d 438 (10th Cir. 1982)) ("The communication . . . cannot be defamatory as a matter of law if the ordinary reasonable reader would not treat the actions of the character as real, even if the reality of the character is conceded.").
mimic White’s requirement (as articulated in Chapin) that the words “affirmatively suggest that the author intends or endorses the inference.”

5. Disclaimers Present Audiences with Additional Information

Some commentators have argued that courts should give greater weight to disclaimers. As discussed above, disclaimers stating that a work is fiction are sometimes given great weight and other times essentially ignored. Megan Moshayedi complains that placing the burden of proving falsity on plaintiffs immunizes defendants who pass off rumors as facts (for example, by making a speculative docudrama) because the truth is often unknowable and thus unprovable. She notes that a disclaimer would “preclude[] any undue reputational harm” by “informing the audience that the speaker is not certain of what she has said.” She further notes that since a disclaimer “does not censor the substance of the speech,” it allows the audience to know “not only what a speaker has to say, but also her level of certainty.”

Glenn J. Blumstein, another commentator, has also urged courts to give disclaimers greater weight, at least partially because they instill a degree of doubt in readers:

The label “fiction” still proclaims that the author eschews any obligation to descriptive truth. An ineluctable degree of doubt must therefore accompany the reading of even the most “believable” details. “Facts” inferred from fiction are, thereby, qualitatively attenuated compared to facts explicitly asserted in non-fiction.

Blumstein contends that without the use of disclaimers, the current protection for fiction “offers so little guidance to lower courts that they continue, unsurprisingly, to arrive at wildly inconsistent results.”

Noting that Hustler, Pring, and Dworkin all involved patently unrealistic content, Blumstein questions whether “the ‘general tenor’ of a work” must be equally unbelievable “in order to qualify for constitutional

380. See, e.g., Blumstein, supra note 13, at 31; Megan Moshayedi, Comment, Defamation by Docudrama: Protecting Reputations from Derogatory Speculation, 1993 U. Chi. Legal F. 331, 341-42.
381. See supra notes 105-07 and accompanying text. Compare Middlebrooks v. Curtis Publ’g Co., 413 F.2d 141, 143 (4th Cir. 1969), and Smith v. Huntington Publ’g Co., 410 F. Supp. 1270, 1274 (S.D. Ohio 1975), with Stanton v. Metro Corp., 438 F.3d 119, 125-26 (1st Cir. 2006), and Bryson v. News Am. Publ’ns, Inc., 672 N.E.2d 1207, 1219 (Ill. 1996) (“The fact that the author used the plaintiff’s actual name makes it reasonable that third persons would interpret the story as referring to the plaintiff, despite the fictional label.”).
382. Moshayedi, supra note 380, at 335.
383. Id. at 342.
384. Id.
385. Blumstein, supra note 13, at 32.
386. Id. at 29.
DEFAMATION IN FICTION

III. A THRESHOLD TEST FOR DEFAMATION IN FICTION

A. Defamatory Meaning

A heightened threshold assessment of whether a publication bears the meaning claimed by the plaintiffs would filter out unmeritorious claims earlier in the litigation process and avoid the lengthy and expensive actual malice discovery process. It would also bring renewed focus on the meaning of the publication itself, which is more related to reputational harm than the defendant’s unpublished state of mind.

More troubling than the unpredictability of the reasonableness standard is that it is applied in a manner that limits the ability of authors to control the meanings of their statements. Fiction’s unique ability to look beyond facts is dramatically hampered because courts fail to fully appreciate that fiction purports not to state actual facts. Authors would not be forced to censor their content if courts recognized sufficient contextual or extrinsic means to shield works from liability, such as disclaimers.

Similarly, authors must be allowed to negate defamatory implications arising from their statements without being forced to alter the statements themselves. Society suffers when literature must bend to comply with defamation law. For example, an article stating true facts indicating that

387. Id. at 28–29.
388. Id. at 28.
389. Id. at 29.
390. Id. at 33–34.
391. Id. at 32–33; see also Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 512–13 (1991) (“Writers often use quotations... and a reader will not reasonably understand the quotations to indicate reproduction of a conversation that took place. In other instances, an acknowledgment that the work is so-called docudrama or historical fiction, or that it recreates conversations from memory, not from recordings, might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.”).
392. See supra notes 334–47 and accompanying text.
394. See, e.g., supra notes 271, 371–72 and accompanying text.
395. See, e.g., supra Part II.B.5.
396. See, e.g., Stam, supra note 302, at 576 (“The first amendment seeks a ‘higher truth’ than does the law of defamation; it is more realistic in theory and more practical in application. This is the concept of truth that is advanced by authors of fiction who see their
a person may be responsible for a crime and urging further investigation should be carefully distinguished from an outright accusation (express or implied) that the person in fact committed the crime—especially where the author specifically admonishes readers that the person’s guilt is not yet known.397

A significant part of the problem is the vagueness of the reasonableness test for determining meaning. Especially in the context of fiction or implication, reasonableness provides insufficient guidance. People will often differ as to when a novel reasonably states facts about a real person, or when a statement reasonably implies a defamatory fact. As noted by Dienes and Levine, paying renewed attention to common law doctrines of interpretation would help,398 but it is not enough.

In the context of implications, decisions such as *White* have recognized the problem and begun to articulate helpful supplemental rules of interpretation. *White*, as articulated in *Chapin*, required that “[t]he language . . . not only be reasonably read to impart the false innuendo, but . . . also affirmatively suggest that the author intends or endorses the inference.”399

As the same problems are also present in the context of fiction,400 courts should apply a similar rule in such cases. Thus, this Note proposes that, to be actionable, a work of fiction must “not only be reasonably read” as stating actual facts about the plaintiff, but must “also affirmatively suggest that the author intends or endorses” the literal reading.401

This test adopts the common law’s emphasis on the author’s intent, as inferred from the publication.402 Smolla incorporated this emphasis into his proposal, stating that a work is not actionable unless “the ordinary reasonable reader” believes “that what is packaged as fiction is meant to be taken as fact.”403 Unlike Smolla’s test, however, the proposed rule is a threshold test that would be applied directly by the court (as in *White*) and without deference to the entire range of reasonable interpretations.

To qualify for this heightened test, a work should be clearly labeled as fiction. If the publisher uses a clear disclaimer, a literal reading of the work is not factual—in this sense, a reader can only infer actual facts from a publication claiming to be fiction. Just like a statement containing literally true facts, a work of fiction is not literally false. If a publisher forgoes a disclaimer, however, no such inference is required—the reader need only take the author at his word to find a factual meaning.

398. See Dienes & Levine, supra note 32, at 291; supra text accompanying note 288.
400. See supra Part II.B.1–2.
401. Chapin, 993 F.2d at 1093 (citing White, 909 F.2d at 520).
402. See supra notes 65–66 and accompanying text.
403. Smolla, supra note 55, § 4:48, at 4-76; supra notes 375–76 and accompanying text.
While a publication's realistic tone or factual references may imply that it states actual facts, these qualities should not provide sufficient evidence of intent to overcome a disclaimer and to be read as fact. Examples of sufficient extrinsic affirmative suggestions may include a statement that a film was based on a nonfiction book or a press release claiming that a film's character portrays an actual person. By focusing this inquiry on the context and manner in which the work is presented, as opposed to the content itself, the unpredictable, fact-sensitive analysis required by the "of and concerning" and statement of fact elements would be rendered largely irrelevant.

Thus, a clear disclaimer should create a presumption that a work does not reasonably state actual facts. Furthermore, this presumption should only be rebuttable when something other than the content itself indicates that the author intends a literal meaning.

B. Actual Malice and Falsity

The proposed threshold test is also supported by consideration of the actual malice and falsity elements. The Supreme Court, in Time, Inc. v. Pape and Bose Corp. v. Consumers Union of U.S., Inc., concluded that where reporters have interpreted ambiguous sources, actual malice may not be inferred merely from the falsity of their reports as long as the reports represent rational interpretations of the sources. In Moldea v. N.Y. Times Co., the D.C. Circuit expanded this rational interpretation doctrine. The allegedly libelous statements at issue appeared in a book review and "were evaluations quintessentially of a type readers expect to find in that genre." Because "reasonable minds can and do differ as to how to
interpret a literary work,” the court stated, “we must allow a degree of  
‘interpretive license.’”\footnote{\textsuperscript{410}}

Noting that the Supreme Court had discussed the rational interpretation  
standard in the context of actual malice, \textit{Moldea} nonetheless expanded its  
application to falsity.\footnote{\textsuperscript{411}} This created a broad threshold requirement  
applicable regardless of whether actual malice was required. The court held  
that “when a reviewer offers commentary that is tied to the work being  
reviewed, and that is a supportable interpretation of the author’s work, that  
interpretation does not present a verifiable issue of fact that can be  
actionable in defamation.”\footnote{\textsuperscript{412}} Expanding the actual malice inquiry into a  
threshold requirement recognizes that the publication is often ultimately the  
only evidence of actual malice.\footnote{\textsuperscript{413}} Thus, although “the ‘supportable  
interpretation’ rule may permit some malicious reviews to go unchecked . . .  
‘[b]ecause an ad hoc resolution of the competing interests at stake in each  
particular case is not feasible, we must lay down broad rules of general  
application.’”\footnote{\textsuperscript{414}}

Similarly, expanding the Ninth Circuit’s actual malice test into a falsity  
test would yield a threshold test similar to the test in \textit{White}. In \textit{Hoffman}, the  
Ninth Circuit held that, in light of the total “presentation of the article,”  
there was no “clear and convincing evidence that the editors intended to  
suggest” the false meaning to the reader.\footnote{\textsuperscript{415}} With the exception of the clear  
and convincing evidence requirement, this test is essentially identical to the  
\textit{White} test. In the context of a fiction claim, this test would require  
evidence that the defendant intended to suggest a literal reading. Where the  
work includes a disclaimer, it would be very hard to conclude that the  
defendant intended to suggest a literal reading, especially where the focus  
of the inquiry remains on the context, and not the content itself. Applying  
this requirement as a threshold test would go a long way toward fixing the  
problems of the expanded actual malice inquiry.

C. “Reasonable” Precautions

In addition, a more simplified version of the above proposals would  
require that judges dismiss defamation in fiction claims whenever the  
author has made a reasonable effort to present his work as fiction. This  
approach acknowledges that some readers may “reasonably” understand the

\footnote{\textsuperscript{410}} Id. at 316 (quoting Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 518  
(1991)).

\footnote{\textsuperscript{411}} Id. ("Although Masson, Bose and Pape all concerned the evidence necessary to  
establish 'actual malice,' those decisions are rooted in the question of a plaintiff's ability to  
prove \textit{falsity} so as to show that a defendant presented information he or she knew to be  
false." (citing \textit{Masson}, 501 U.S. 496; Bose, 466 U.S. 485; Pape, 401 U.S. 279)).

\footnote{\textsuperscript{412}} Id. at 313.

\footnote{\textsuperscript{413}} See supra notes 352–63 and accompanying text.

\footnote{\textsuperscript{414}} \textit{Moldea}, 22 F.3d at 320 (quoting \textit{Gertz} v. Robert Welch, Inc., 418 U.S. 323, 343–44  
(1974)).

\footnote{\textsuperscript{415}} \textit{Hoffman} v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1188 (9th Cir. 2001).
work to state actual facts, but nonetheless recognizes that a defendant who has exercised reasonable care has not been negligent. As Gertz requires some degree of fault as to the truth or falsity of the publication, a defendant who made reasonable efforts to ensure that his work will not be read as stating actual facts has not acted with any degree of fault. After all, a publication that is not taken as stating facts cannot be false. Furthermore, since the fault requirement applies to both public and private figures, this standard could be uniformly applied in both types of cases.

In the context of most tort actions alleging negligent conduct, the plaintiff usually must show that the defendant did not exercise a reasonable standard of care. Defamation law twists this slightly, often assuming the defendant failed to exercise reasonable care if any defamatory meaning remains reasonable. Since the reasonable meaning test is particularly unpredictable when applied to fiction, this assumption places an extraordinary burden on publishers. Essentially, a publisher is negligent whenever someone "reasonably" ignores a disclaimer, which may occur whenever the content of the work is sufficiently believable. This proposal would simply redefine the reasonable measures publishers could take to ensure that works of fiction are not reasonably read as stating actual facts.

CONCLUSION

Courts have demonstrated a willingness to depart from the unelaborated reasonable person standard and create different defamation standards for speech made in different contexts. Reviews and critiques, for example, are held to a standard of rational interpretation, which is below substantial truth. Similarly, where the underlying facts are disclosed, a statement of opinion is presumed not to be actionable. Also, in the area of implied defamation, courts have felt compelled to impose heightened threshold tests or categorical restrictions. These elaborations on the reasonable person standard add invaluable clarity to an area of the law where vagueness has a particularly potent chilling effect. Courts should not feel overly reluctant to lay down such clear guidelines, especially since they arguably define reasonableness more than they impose upon it.

In particular, the trend toward favoring context over content is a move in the right direction. But this will not be enough until a mechanism is created for allowing fiction authors to write whatever they please. A writer who

416. Gertz, 418 U.S. at 347 ("[S]o long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").
417. See Pring v. Penthouse Int'l, Ltd., 695 F.2d 438, 440 (10th Cir. 1982); see also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 283-84 (1974) ("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact.").
418. See supra notes 238-42.
claims not to speak of facts arguably has a better claim to immunity than a speaker who opines about disclosed underlying facts. Similarly, it is quite ironic to provide the literary critique with special deference for supportable interpretations, and yet not provide any special deference for the literature itself.