Hard Truths: Libel by Implication Doctrine and the Need for a Uniform Standard

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HARD TRUTHS: LIBEL BY IMPLICATION DOCTRINE AND THE NEED FOR A UNIFORM STANDARD

Carly Ryan

ABSTRACT

Since the inception of the tort of libel, claims against the media have created a tension between the First Amendment’s commitment to a free press and the desire to prevent reputational harm to individuals. Further complicating the issue are cases in which plaintiffs allege that literally true statements are defamatory based on implications created through juxtapositions or omissions of facts. This is known as libel by implication, a tort currently governed by states through a patchwork of varying standards and interpretations. Not only does the lack of uniformity leave journalists without due notice of the law in the jurisdictions they are reporting on, but also it encourages forum shopping by plaintiffs and attacks against the media.

A solution is critical: libel by implication claims have become increasingly popular with politicians seeking to dispel criticism — precisely the speech the First Amendment was intended to protect. To best protect crucial reporting in an era of animus towards the press, this Note argues that states need to adopt a uniform standard for governing libel by implication that requires a showing that (1) the implications of the article are false and (2) the journalist acted with actual malice in publishing them.

“I imagine it’s no surprise by now that many courts and commentators have complained that defamation law is a ‘quagmire,’ lacks ‘clarity and certainty,’ is ‘overly confusing’ and ‘convoluted,’ leaves courts ‘hopelessly and irretrievably confused,’ and ‘has spawned a morass of case law in which consistency and harmony have long ago disappeared.’”

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INTRODUCTION

Defamation has long existed at common law as an intentional tort, but it has developed over time through state law. In most states today, a plaintiff in a defamation case must prove the following elements: (1) the defendant published a false and defamatory statement concerning the plaintiff and (2) the statement was made with the requisite level of fault and resulted in injury to the plaintiff’s reputation.

This Note focuses on the published statement. Traditionally, the mode of the defamatory statement was not controlling, and common-law courts did not distinguish between implications and direct statements. Today, the “statement” factor has become increasingly complicated. For example, an elaborate body of case law has developed where the statement is not one of fact, but of rhetorical hyperbole, subjective assessment, opinion, and the like. Courts have generally held that those sorts of statements are not actionable because they cannot be proven true or false.

In most defamation cases, this element is straightforward: the defendant clearly made a statement of fact about the plaintiff that the plaintiff claims is false and defamatory. Libel by implication complicates this element. While the typical understanding of libel centers around false statements, entirely factual material can be considered libel based on what it implies. This is known as libel by implication.

5. See Jacobus v. Trump, 55 Misc. 3d 470, 476 (N.Y. Sup. Ct. 2017) (“An asserted fact may be distinguished from a nonactionable opinion if the statement: (1) has a precise, readily understood meaning, that is (2) capable of being proved true or false, and (3) where the full context in which it is asserted or its broader social context and surrounding circumstances indicate to readers or listeners that it is likely fact, not opinion.”).
6. KEETON ET AL., supra note 2, at 840.
7. C. Thomas Dienes & Lee Levine, Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan, 78 IOWA L. REV. 237, 237 (1993) (“Even when all the statements in a publication are factually correct and, at least standing alone, are not defamatory, courts have treated the publication as actionable under the rubric of ‘implied libel.’”).
I. BACKGROUND ON LIBEL BY IMPLICATION

Libel by implication occurs where “the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts … even though the particular facts are correct.” The challenge posed by these cases is that readers have different perceptions, leaving the author unsure whether their statement could have defamatory implications to certain readers. For example, in 1971, the Memphis Press-Scimitar published a short article about a recent shooting that included the following:

A 40-year-old woman was held by police in connection with the shooting with a .22 rifle. Police said a shot was also fired at the suspect’s husband. Officers said the incident took place Thursday night after the suspect arrived at the Nichols home and found her husband there with Mrs. Nichols.

Many read the word “found” to mean that the shooter found her husband in a compromising and promiscuous situation with Mrs. Nichols. As it turns out, the two were simply sitting in the living room talking. Nonetheless, Mrs. Nichols claimed that she had been labeled as an adulterer in her community and brought suit. But, as the newspaper wrote in its brief, all of the information it published was in fact true: “A [forty]-year old woman was in fact held by police in connection with the shooting. A shot was in fact fired at the suspect’s husband. The suspect did in fact find her husband at the Nichols’ home with Mrs. Nichols.”

Still, the Supreme Court of Tennessee found for the plaintiff: “The publication of the complete facts could not conceivably have led the reader to conclude that Mrs. Nichols and Mr. Newton had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory.” The court made this ruling on an ordinary negligence standard—conducting no further inquiry into the author’s motives or beliefs was done, despite the Memphis Press-Scimitar having no intention to damage the reputation of Mrs. Nichols.

10. Id.
11. Id. at 415.
12. Id. at 415.
13. Id. at 420 (emphasis added).
14. Id. (emphasis added).
15. Id. at 418.
As illustrated, libel by implication thus creates a problem regarding intent: innumerable implications are possible from a single set of facts, so how do we decide which implication the author intended? Often, the author is completely unaware of the meaning the plaintiff attributes to the publication. In that case, should it matter that the defendant had an innocent motive?

Because reader-meaning can encompass a myriad of implications, journalists may find it safer to tailor their speech around the threat of libel. This risk-consciousness would likely result in less speech, whether that be from the author choosing to omit risky details, or by choosing not to write certain articles altogether. This disincentive to “speak” then creates a tension with the goals of the First Amendment, “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”

Courts have typically responded to these concerns by weighing defamation cases with a thumb on the scale for protecting First Amendment rights. This interest in free speech favors unconstrained political debate. This tenant is so settled that some degree of abuse of the right is expected—the speech need not even be in “good taste.” The Court explained in New York Times v. Sullivan, “we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

The other side of the scale involves the state’s interest in preventing reputational harm. While damages can be awarded for emotional or economic losses associated with libel, reputational harm is considered the chief loss of tort. Unlike justifications for the First Amendment, legal protection against reputational harm is most often conceptualized around the interest of the plaintiff, rather than that of society. Scholars have evaluated the harm as stemming from a property interest, an

16. See id.
20. See id. at 271.
21. Bridges v. California, 314 U.S. 252, 270 (1941) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions”).
22. N.Y. Times Co. v. Sullivan, supra note 19, at 270.
interest in maintaining hierarchy, and as a means for preserving inherent dignity.\textsuperscript{24} Still, states have an interest in preventing dignitary harms for societal reasons as well, such as “creating incentives for the press to exercise considered judgment before publishing material that compromises personal integrity.”\textsuperscript{25}

A. The States’ Ability to Regulate Libel

Until Sullivan, libel was considered one of the narrow classes of speech excluded from First Amendment protections.\textsuperscript{26} The law of defamation was purely a state-level issue and was thought to be outside the scope of Constitutional protection. This notion allowed states to impose strict liability where “malice” could be presumed.\textsuperscript{27} The decision in Sullivan was a landmark change to First Amendment law, holding that states don’t have unbridled power to regulate defamation; rather, regulations must pass Constitutional muster.\textsuperscript{28} Thus, while libel law was historically a strict liability tort excluded from First Amendment protection, modern-day statutes must comply with a growing number of First Amendment “requirements” defined by the Supreme Court. While this Note argues that states should adopt a uniform state law, the holding of Sullivan shows that the Court has precedent for carving out more protection for libel.

\textsuperscript{26} Chandok v. Klessig, 632 F.3d 803, 813 (2d Cir. 2011) (“Historically, a defendant was held strictly liable for defamation”); Chaplinsky v. State of New Hampshire, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”).
\textsuperscript{27} Cousins v. Goodier, 283 A.3d 1140 (Del. 2022) (“Before 1964, the United States Supreme Court considered defamation to be a matter of state tort law and criminal law without First Amendment implications. In New York Times Co. v. Sullivan, however, the Court recognized that defamation actions can have a chilling effect on the discussion of important public issues and held, among other things, that libel—written defamation—can claim no talismanic immunity from constitutional limitations. ... [and] must be measured by standards that satisfy the First Amendment.”) (internal citations omitted).
\textsuperscript{28} See generally Arthur L. Beney, \textit{Libel and the First Amendment—A New Constitutional Privilege}, 51 Va. L. Rev. 1 (1965); U.S. v. Alvarez, 617 F.3d 1198, 1203 (“Gertz does not stand for the absolute proposition advocated by the government and the dissent”); Gertz v. Welch, 418 U.S. 323, 349 (1974) (“We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved.”).
B. Actual Malice: The Current Governing Standard for Libel

To weigh reputational harm against fundamental First Amendment concerns, “actual malice” has been the governing libel standard in many states’ common laws for years, though the Supreme Court did not codify it until the landmark case New York Times Co. v. Sullivan. Plaintiff Sullivan was a Police Commissioner who brought suit against the New York Times for printing an advertisement accusing the police of harassing people involved with the civil rights movement. Justice Brennan wrote for the Court that, though allegedly libelous statements were in an advertisement, not a traditional article, they remained protected under the First Amendment in that they “communicated information, expressed opinion, [and] recited grievances.” Thus, the Court ruled that, in order to recover damages for libel, plaintiffs must prove that the statement was made with actual malice, which is defined as “knowledge of falsity and reckless disregard for truth.” This standard has become settled law of defamation, and courts have extended the standard to require private individuals, not just public figures, to prove falsity against media defendants and on matters of public concern. However, courts have not yet uniformly applied the standard to libel by implication.

Because the actual malice standard has proven successful in the law of defamation, this note argues that the actual malice standard should be codified into a uniform statute applied to libel by implication. Further, considering the actual malice standard was affirmed by the Supreme Court in Sullivan, it is unlikely to raise any constitutional concerns as applied to libel by implication. Plaintiffs should be required to show with clear and convincing evidence that the defendant acted with actual malice in creating the implication. Intent can be shown by proving the omission of fact that would have changed the complexion of the implication, or by proving there was a false statement of facts.

29. See Sherwood v. Evening News Ass’n, 256 Mich. 318, 322, 239 N.W. 305, 307 (1931) (“If the alleged libelous article is qualifiedly privileged, it is incumbent upon plaintiff to allege and prove express or actual malice.”).
30. See Sullivan, 376 U.S. at 270.
31. Id. at 256–57.
32. Id. at 266.
33. Id. at 280.
34. Philadelphia Newspapers v. Hepps, 475 U.S. 767, 777 (1986). In libel cases involving speech about issues of public concern by media defendants, private figures also must prove that the defamatory statement is false.
II. THE PROBLEM: VARYING STANDARDS USED BY FEDERAL CIRCUIT COURTS
AND STATE COURTS

A. States have Varying Libel by Implication Interpretations that must be
   Replaced with One Clear Standard.

In *Gertz v. Robert Welch, Inc.*, the Supreme Court permitted states to
fashion their own rules of liability. This allowed states to require a less
stringent standard than actual malice in cases involving private plaintiffs:
“We hold that, so 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.”

For cases with public-figure plaintiffs, the *New York Times*
actual malice standard would remain controlling. The Court reasoned
that allowing states to set their own standards for liability in certain libel
cases “recognizes the strength of the legitimate state interest in
compensating private individuals for wrongful injury to reputation, yet
shields the press and broadcast media from the rigors of strict liability.”

*Gertz* protected media defendants from liability for defamation where the
publication was made about a public figure and in good faith. The Court,
however, suggested that in libel by implication cases a different standard
might apply: “Our inquiry would involve considerations somewhat
different . . . if a State purported to condition civil liability on a factual
misstatement whose content did not warn a reasonably prudent editor or
broadcaster of its defamatory potential.” While the Court did not
squarely address what subjective state of mind is required in libel by
implication cases, the language suggests two concepts: (1) that the media
should not be subject to strict liability, and (2) that a showing of falsity
may not be necessary to prove libel by implication.

Despite the Supreme Court’s endorsements of federalism in libel
doctrine, lower courts have struggled to create a uniform and sensible
approach to libel by implication, resulting in a patchwork of doctrine.
Further, there is no one common law standard for what constitutes

38. *Id.* at 342 (“The *New York Times* standard defines the level of constitutional protection
appropriate to the context of defamation of a public person. Those who, by reason of the notoriety
of their achievements or the vigor and success with which they seek the public’s attention, are
properly classed as public figures and those who hold governmental office may recover for injury to
reputation only on clear and convincing proof that the defamatory falsehood was made with
knowledge of its falsity or with reckless disregard for the truth.”).
39. *Id.* at 348.
40. *Id.*
41. See *Edwards v. Nat’l Audubon Soc’y*, 556 F.2d 113, 120 (2d Cir. 1977); *Saenz v. Playboy
Enterprises, Inc.*, 653 F. Supp. 552, 560 (N.D. Ill. 1987); *White v. Fraternal Order of Police*, 909 F.2d 512 (1990); *Dall.
“truth” under this claim, leaving journalists without due notice and possibly leading to a chilling effect on journalistic content. Although this Note ultimately argues that courts should adopt the “actual malice” standard used for libel, courts currently use different standards in libel by implication cases. This discrepancy is particularly worrisome in an age when so much publishing occurs online and across multiple jurisdictions, and each jurisdiction may have a different standard of responsibility for implications. This section outlines and discusses various approaches taken by different jurisdictions to highlight the vastly different outcomes that arise from the same judicial instruction.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Test (From most to least protective of journalists)</th>
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<tbody>
<tr>
<td>2nd and 8th Circuits, but expressly rejected in the 3rd Circuit</td>
<td>Libel by implication claims are not allowed against reporters reporting on official actions or statements made by public bodies.</td>
</tr>
<tr>
<td>New York</td>
<td>Private-figure plaintiffs can recover where the plaintiff makes a rigorous showing that the publication's plain language suggests that a false inference was intended or endorsed.</td>
</tr>
<tr>
<td>Louisiana and Connecticut</td>
<td>Public officials can only recover for libel if the statements are false, effectively barring recovery for implications arising from true statements.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Implications are treated not as fact, but as opinion. This means they are not considered defamatory.</td>
</tr>
<tr>
<td>7th and 9th Circuits; Michigan</td>
<td>Public figures must show the statements were published with “actual malice.” This standard requires that the author knew the implications were false or acted with reckless disregard to their truthfulness.</td>
</tr>
<tr>
<td>D.C. Circuit</td>
<td>A plaintiff has to allege facts showing a defamatory inference can reasonably be drawn, and the manner or language in which the facts are conveyed supplies additional affirmative evidence that the defendant intended the inference.</td>
</tr>
<tr>
<td>Tennessee; Texas</td>
<td>The defendant must rebut a presumption of falsity once the plaintiff alleges false and defamatory implications.</td>
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B. The Highest Bar: Neutral Reportage Privilege under the First Amendment.

Some jurisdictions do not recognize a cause of action for libel by implication. Most of these courts do not do so expressly, and instead treat the claim as though the statement was directly libelous, rather than libel by implication.\textsuperscript{42} Some jurisdictions however, have rejected libel by implication.\textsuperscript{43} In the Second and Eighth Circuits, the courts have held that the First Amendment calls for a “neutral reporting privilege” that protects reporters when publishing accurate information from a public figure engaged in a newsworthy controversy.\textsuperscript{44} The exemption holds that “the recitation of official actions or statements by public bodies, if substantially accurate, is protected, \textit{even if the implications are harmful.}\textsuperscript{45} This standard focuses solely on whether the reporting was accurate: “Evidence of the author’s general disposition toward his topic does not establish whether he espoused each particular allegation.”\textsuperscript{46} Thus, to state a claim for libel by implication against neutral reporting, a plaintiff must show that precise factual statements contained in the reporting are false. This requirement in turn bars inquiry into implication.

The Second Circuit first articulated the neutral reportage principle in \textit{Edwards v. National Audubon Society}. In \textit{Edwards}, the plaintiffs filed suit against a writer for the National Audubon Society and The New York Times for insinuating that he was paid off by the pesticide industry for supporting the use of a certain insecticide.\textsuperscript{47} While the court agreed that the statements about Edwards were harmful, they granted the writer immunity because of the compelling public interest in “being fully informed about controversies that often rage around sensitive issues.”\textsuperscript{48} The Court stated that the law must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that their report accurately conveys the charges made—\textit{even if not completely accurate}. But the journalist who “in fact espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. In such instances he assumes responsibility for the

\textsuperscript{42} LaBarbera, supra note 3, at 683.
\textsuperscript{43} See, e.g., Price v. Viking Penguin, 881 F.2d 1426, 1433 (8th Cir. 1989).
\textsuperscript{45} Price, 881 F.2d 1426, 1434 (emphasis added).
\textsuperscript{46} Id.
\textsuperscript{48} Id. at 120.
underlying accusations." Since the Court found that the author fairly and accurately reported on the controversy, and since the subjects of the controversy were public figures, the Court held the reporting privileged.

In *Price v. Viking Penguin*, Price, a special FBI agent, brought multiple defamation claims against the author of a book about occupation of the Wounded Knee reservation. He alleged that the book implied that he mismanaged his investigation of the occupation, and harassed the tribe members. While the court agreed that the book was generally sympathetic to the Native Americans and skeptical of the FBI, it also found that Price failed to show by clear and convincing evidence that the author published the facts with knowledge of their probable falsity. The Eighth Circuit was aware of the high bar they were setting, noting that Price's inability to "surmount these [legal] obstacles implies no condemnation" and that the "the sentiments [the book expresses] are debatable." Nonetheless, the Court decided to let "the debate continue." Notably, for libel by implication suits brought by private figures, New York law allows libel by implication claims. In New York, "the plaintiff must make a rigorous showing" that the challenged publication "as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed the inference." This rule thus creates drastic differences in outcomes for libel by implication suits based on the public status of the plaintiff.

The Third Circuit has explicitly declined to adopt the neutral reportage privilege. In *Dickey v. CBS, Inc.*, the Third Circuit held that the privilege is inconsistent with the Supreme Court's ruling that publishing with doubts as to truthfulness demonstrates actual malice. Further, the Third Circuit ruled that *Edwards* allows for the press to publish defamatory statements so long as they are from sources that are "newsworthy." A resolution from the Supreme Court has yet to occur, and the Fourth, Seventh, Ninth, and Tenth Circuits have considered the privilege, but have not yet adopted it.

49. Id.
50. Price, 881 F.2d at 1429.
51. Id. at 1429.
52. Id. at 1447.
53. Id.
55. Id.
57. Id.
C. Complete Barriers to Libel by Implications Claims Outside of the Neutral Reportage Principle.

Outside of the neutral reportage privilege, other courts have completely barred public officials from bringing libel by implication claims against the media.\(^59\) The Minnesota Supreme Court held that where the statements in question are true, a public official cannot prove falsity by implication.\(^60\) The Court argued that this rule is in line with First Amendment policy justifications: Allowing public officials to sue for implications arising from true statements would inhibit the publication of fair comments and opinions, undermining necessary criticisms. In *Loeb v. New Times Communications Corporation*, the court found that the “authors’ clear intent was to portray an overwhelmingly negative picture of Loeb” but that the article was nevertheless constitutionally protected because the “defendants have reported the facts accurately and carefully, avoiding the defamatory conclusion which Loeb claims they intended the reader to draw.”\(^61\)

Other states, including Louisiana\(^62\) and Connecticut,\(^63\) have effectively barred libel by implication claims from public official plaintiffs by holding that a public official cannot recover damages motivated by actual malice unless the publication is also false. Because libel by implication, by definition, requires false implications arising from true statements, it follows that libel by implication cannot arise out of false statements—that would constitute libel on its face.

Other courts have prevented libel by implication claims by treating possibly defamatory implications as opinion.\(^64\) In *Janklow v. Newsweek, Inc.*, the former governor of South Dakota sued Newsweek for implying that he prosecuted American Indian activist Dennis Banks in response to the tribal community charging him with assault.\(^65\) The Eighth Circuit granted summary judgment on a fact versus opinion distinction, deciding that the article’s implication constituted opinion: “[the article] does not say in so many words that Janklow’s motive [in prosecuting] was revenge.”\(^66\) Because the court reasoned that a statement short of an explicit charge is too imprecise to be fact, such reasoning in effect prevents libel by implication claims from being heard. However, other courts have criticized this tactic, arguing that implications cannot “presumptively [constitute] opinion by virtue of being implicit.”\(^67\)

\(^{61}\) Id. at 91–92.
\(^{64}\) See Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983).
\(^{66}\) Id. at 1303.
While all federal circuits and many states recognize the distinction between defamatory assertions and opinion, the Supreme Court rejected this distinction when it ruled that opinions can be defamatory. In *Milkovich v. Lorain Journal Co.*, the Supreme Court developed a two-part test to determine when statements of opinion are entitled to protection. Under that test, a court must first determine whether a reasonable fact finder could conclude that a statement implied a defamatory assertion; if so, the court must then determine whether the defamatory assertion is sufficiently factual to be susceptible to being proved true or false. Thus, the Court ruled that a statement can imply a defamatory assertion and be an opinion. Regardless, this test would likely not address the problem of libel by implication in journalism: even from a perspective that favors protecting journalists, it is hard to see how a court could characterize certain objective news coverage as opinion.

D. The Subjective Standard: Plaintiffs must Show by Clear and Convincing Evidence the Falsity of the Statements and Actual Malice of the Defendant.

When dealing with public-figure plaintiffs, some states have decided to apply the actual malice culpability standard developed from *New York Times v. Sullivan* to libel by implication accusations. This requires both that the implications in question are false, and that they were published with actual malice, meaning the author knew they were true or acted with reckless disregard for their truth. But, the *Sullivan* court did not set a standard of fault for private-figure plaintiffs. While many states retain the actual malice standard, still others require only negligence.

69. Id. at 17.
70. See *Gertz*, 418 U.S. at 342 (“Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public’s attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.”).
71. *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1318 (7th Cir. 1988) (“If a plaintiff official must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.”).
In *Saenz v. Playboy Enters.*, the plaintiff, Saenz, alleged that an article describing a riot at a Santa Fe penitentiary implied he was complicit in torturing dissidents while serving as an official of the U.S. Office of Public Safety. The District Court ruled that in order to make a claim that statements critical of the government are also defamatory, the plaintiff must show "an explicit charge‘ specifically directed‘ at him." The Seventh Circuit, however, held that this rule would act as a complete bar to libel by implication claims. The rule would prevent plaintiffs from making claims against inferences by requiring an explicit statement. The court thus upheld the ability to make libel by implication claims against the government.

Still, the court ruled that Saenz failed to state a proper libel by implication claim by failing to show evidence that Playboy intended to imply he was a torturer. Saenz argued that omissions of his denials of involvement in the torture show that Playboy intended a certain meaning. However, the court held that these omissions did not rise to the level of "recklessly disregarding the truth," even though the journalist did not demonstrate "the caliber of journalistic integrity worthy of praise." The court also criticized the lower court for requiring that the defamatory statements explicitly libel the plaintiff:

[The standard] denies [plaintiffs] the opportunity to demonstrate defamatory inferences that are as clear and perhaps more damaging because of their unlimited nature than even explicitly defamatory charges. . . . Such a rule goes too far; it invokes the specter of heinous abuse by crafty and mischievous authors whose subtle art of insinuation is honed for destruction.

The court argued that requiring an “explicit charge” promotes sensationalism in journalism and protects speech that does nothing to enhance public debate. Nonetheless, the absence of the standard would do the opposite, chilling public debate and promoting sensationalism in plaintiffs. Thus, this high bar provides ample protection even where libel by implication is recognized as a permitted claim and protects journalists from threat of litigation wherever their journalistic work is thought to be negligent.

75. *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 45, 81 (1966)).
76. *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1314 (7th Cir. 1988).
77. *Id.* at 1320.
78. *Id.*
79. *Id.* at 1314 (alteration in original).
80. *Id.*
The intent requirement of actual malice has been read to mean the author “actually intended to impart the defamatory implication . . . .”\textsuperscript{81} For example, a libel by implication plaintiff in Virginia must show by a preponderance of the evidence that the language is “reasonably read to impart the false innuendo” and “affirmatively suggest[s] that the author also intends or endorses the interference.”\textsuperscript{82}

In \textit{Newton v. National Broadcasting Co.}, entertainer Wayne Newton alleged that NBC “conveyed the false impression” that he had help from mob sources in purchasing the Aladdin Hotel in Las Vegas. While the trial court instructed the jury to consider whether NBC “should have foreseen” the impression alleged by Newton, the Ninth Circuit expressly declined to adopt “an objective negligence test” in favor of the subjective actual malice standard, noting that: “[an objective standard] would permit liability to be imposed not only for what was not said but also for what was not intended to be said.”\textsuperscript{83}

Lower courts have cited \textit{Newton} as standing for the proposition that the Ninth Circuit requires subjective awareness of defamatory meaning “in order to impose liability under the First Amendment.”\textsuperscript{84} For example, in \textit{Masson v. New Yorker Magazine}, a California District Court cited \textit{Newton} in ruling that the awareness element must be applied “regardless of whether the defendant’s statement is directly or indirectly libelous.”\textsuperscript{85}

Michigan prevents liability where the article in question is “substantially true” and accurately reports on public affairs. Plaintiffs can bring defamation by implication claims and the state expressly recognizes libel by implication claims.\textsuperscript{86} A plaintiff, however, must prove the defamatory implications are materially false and that a cause of action could succeed even without a direct showing of any false statements.\textsuperscript{87} Michigan uses the “actual malice” definition set out in \textit{Saenz}, but added to it that actual malice can be established where a journalist deliberately decided to avoid learning the truth.\textsuperscript{88} Furthermore, the substantial truth defense (in which slight inaccuracies are considered immaterial) can apply to libel by implication claims, thus providing further protection.\textsuperscript{89}

\begin{flushright}
82. Id. at 44–45 (quoting Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993)).
85. Id.
87. Id. at 732.
\end{flushright}
While the actual malice standard has proven somewhat popular in the realm of libel by implication, other courts have expressed concern that subjective inquiries into whether a defendant knew or intended a certain meaning will “lead to exactly the kind of lengthy litigation and burdensome discovery that Sullivan and its progeny indicate ought to be avoided.”90

E. The D.C. Circuit Test: Plaintiffs must Point to “Additional, Affirmative Evidence” in Addition to the Publication.

The D.C. Circuit stated its own test in White v. Fraternal Order of Police.91 The plaintiff served as a lieutenant police officer and was promoted to Captain despite testing positive for marijuana use, which the police force barred.92 The Fraternal Order of Police then published a letter stating that the Metropolitan Police Department used faulty testing procedures and named White as the only person who was promoted after testing irregularities.93 White brought suit alleging that because the letter immediately mentioned bribery laws and possible connections to personal gain, the implication was that he used bribery to get his promotion.94 White conceded that much of the letter was true.95 The court ruled that a reader being able to reasonably draw a defamatory inference from true facts is not sufficient to state a libel by implication claim. But if “the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning.”96 This standard has evolved into a two-part test in which a plaintiff has to allege facts showing that a defamatory inference can reasonably be drawn, and the manner or language in which the true facts are conveyed supplies additional, affirmative evidence that the defendant intends the inference.

In White, the court determined that the letter merely contained facts from which a reader could infer that White used drugs and committed bribery.97 However, while unpleasant, “the articles are devoid of any

92. Id. at 513.
93. Id. at 514.
94. Id. at 516.
95. Id. at 518–19.
96. Id. at 520.
97. Id. at 526.
suggestive juxtapositions, turns of phrase, or incendiary headlines,” that might serve as sufficient accompanying evidence. 98

Other courts have adopted this test, favoring its objective approach. 99 While the Sullivan test considers whether the defendant intended to communicate a certain meaning, that approach is not relevant here. Instead, courts look to the plain meaning of the text along with extrinsic evidence to make their determinations. 100 What exactly counts as sufficient extrinsic evidence is vague. In Financial Fiduciaries v. Gannett, a trustee argued that a newspaper article falsely implied that he had committed elder abuse by financially exploiting elders. 101 The court, in denying the newspaper’s motion to dismiss, held that if the newspaper article had “allowed its readers to draw their own conclusions from these statements, dismissal would be appropriate.” 102 But the newspaper had also advertised to its readers that another article about “elder abuse” was “related” to the story about the trustee. 103 This advertisement was considered willful enough to suggest that the newspaper intended the implication of elder abuse, therefore satisfying the test in White. 104

F. Placing the Burden on the Defendant: “The Proper Question is Whether the Meaning Conveyed by the Published Words is Defamatory.” 105

Other states have an even lower standard for plaintiffs asserting libel by implication: while the burden of proof still rests upon the plaintiff to show defamation, there is a legal presumption of falsity that the defendant must then rebut. To do so, “reliance on the truth of the facts stated in the article in question is misplaced” — the proper question is whether the libel would “have a different effect on the mind of the reader from that which the pleaded truth would have produced.” 107

98. Id.
102. Id. at 18.
103. Id.
104. Id.
106. Id.
107. Fleckenstein v. Friedman, 193 N.E. 537, 538 (N.Y. 1934). See also Caldwell v. Crowell-Collier Pub. Co., 161 F.2d 333, 335 (5th Cir. 1947) (“It is not necessary that the false charge be made in a direct manner, if the words in their ordinary meaning convey it, and an insinuation is as actionable as a positive assertion if the meaning is plain.”).
In Texas, for example, plaintiffs can bring a claim for defamation by implication where true facts are published in such a way that “they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way” that a reasonable person would pick up on.\(^{108}\) This is known in the state as the “converse of the substantial truth doctrine,” in which “publication that gets the details right but fails to put them in proper context and thereby gets the story’s gist wrong” can still be liable.\(^{109}\) Notably, the court used the word “gist” to refer to libel by implication, and that term stuck in Texas, creating further dissonance with other jurisdictions.\(^{110}\) Plaintiffs can bring two types of libel by implication claims in Texas: when meaning arises implicitly from the whole article (known as “gist”), and when meaning arises implicitly from a distinct portion of the article rather than its entire gist (known as “implication”).\(^{111}\)

This distinction is important in that, when making the latter claim, plaintiffs can avoid the substantial truth doctrine. When claiming an entire story has a defamatory meaning, liability is precluded if the gist of the story is substantially true. However, Texas courts do not hold that a true portion of a story can save a defendant from liability.\(^{112}\)

The distinction between “gist” and “implication” is also important in applying the state’s standard. Again, the standard for finding defamatory meaning is whether the publication is “reasonably capable” of defamatory meaning and requires courts to determine whether the meaning a plaintiff alleges arises from an objectively reasonable reading.\(^{113}\) When dealing with cases of implication, not gist, this means that the objectively reasonable reader notices some, but not all, of the implications in a statement.\(^{114}\) Thus, the court’s role is now to determine whether the implication is among those an objectively reasonable reader could draw, rather than to determine every implication possible.\(^{115}\)


\(^{109}\) Turner v. KTRK TV, Inc., 38 S.W.3d 103, 115 (Tex. 2000).

\(^{110}\) D Magazine Partners, L.P. v. Rosenthal, 529 S.W.3d 429, 434 (Tex. 2017) (“In making the initial determination of whether a publication is capable of a defamatory meaning, we examine its ‘gist.’”).

\(^{111}\) Dall. Morning News, Inc., 554 S.W.3d at 628–29 (“‘Gist’ refers to a publication or broadcast’s main theme, central idea, thesis, or essence . . . In this usage, publications and broadcasts typically have a single gist. ‘Implication,’ on the other hand, refers to the inferential, illative, suggestive or deductive meanings that may emerge from a publication or broadcast’s discrete parts. Implication includes necessary logical entailments as well as meanings that are merely suggested.”).

\(^{112}\) Id. at 629.

\(^{113}\) Id. at 624 (internal citations omitted).

\(^{114}\) Id. at 629–30.

\(^{115}\) See id. at 630.
For example, in *D Magazine Partners v. Rosenthal*, D Magazine published an article titled “The Park Cities Welfare Queen,” in which it painted plaintiff Janay Rosenthal as having fraudulently obtained SNAP benefits in order to fund a life of luxury.\(^{116}\) After publication, the commission responsible for administering SNAP contacted D Magazine, writing that the information in the article was obtained by deception and that Rosenthal had not abused state benefits.\(^{117}\) Because Rosenthal was a private-figure plaintiff, a prima facie case for defamation by implication required a showing of the defendant’s negligence. A defendant is negligent if it “knew or should have known [a] defamatory statement was false,” or if a statement would “warn a reasonably prudent editor or broadcaster of its defamatory potential.”\(^{118}\) The Texas Supreme Court found that Rosenthal had supplied enough evidence to survive summary judgment by showing that information provided by the Commission is confidential and that D Magazine never actually contacted them.\(^{119}\)

III. THE PROBLEM’S PERTINENCE: LIBEL BY IMPLICATION IS BECOMING THE FAVORED LEGAL MECHANISM FOR POLITICIANS TARGETING THE MEDIA.

“We’re going to open up libel laws, and we’re going to have people sue you like you’ve never got sued before,” said then–Presidential candidate Donald Trump regarding suits against news outlets.\(^{120}\) Many other politicians have taken up his crusade—a recent wave of libel by implication cases have been brought by politicians, making the need for a uniform, actual malice-affirming standard even clearer.\(^{121}\) In Florida, the state introduced (but failed to pass) bills that would lower the burden of proof for defamation claims and abrogate the reporter privilege.\(^{122}\) As touted by Governor DeSantis, “These companies are probably the leading...
pursuers of disinformation in our entire society. There needs to be an ability for people to defend themselves.”

Post-Sullivan courts once showed an aversion towards defamation by implication.124 Following the ruling, many libel cases were disposed of in pre-trial motions or, if they made it past a jury,125 judges significantly reduced damage awards. But recently, cases have shown a readiness by plaintiffs to initiate these suits against the media, and courts have been more likely to let jury findings of actual malice stand.126 Some of the Supreme Court’s most recent libel cases have discussed claims of implied libel, though none have addressed the issue squarely.127

For example, while the recent case Jacoby v. CNN affirmed the application of all defamation defenses to libel by implication claims, it highlighted the eagerness of political figures to bring claims against the media. The case deals with a CNN article about Mark Jacoby, a political figure hired onto Kanye West’s 2020 presidential bid, and his previous felony charges for voter fraud.128 To establish defamation by implication under Florida law, “the actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person.”129 However, the Supreme Court recognizes a third category, in which a person can be considered a “limited public figure” when they have “thrust themselves forward in a particular public controversy and are therefore required to prove actual malice only in regard to certain issues.”130 While the Eleventh Circuit considered Jacoby a limited public figure and held that he could not show CNN acted with actual malice, the case demonstrated the difficulty of predicting when courts will consider someone a public, limited public, or private figure.

In 2021, the Eighth Circuit held that then-Congressman Devin Nunes stated a sufficient claim against Esquire magazine.131 He alleged that Esquire implied the Nunes family had concealed the move of their

125. Id.
126. Id. at 241.
129. Id. at ”7.
130. Id. at ”8.
131. See Nunes v. Lizza, 12 F.4th 890 (8th Cir. 2021).
family farm from California to Iowa in order to hide the farm’s use of undocumented labor.\textsuperscript{132} The court held that plaintiffs must show the defendant “(1) juxtapose[d] a series of facts so as to imply a defamatory connection between them, or (2) create[d] a defamatory implication by omitting facts.”\textsuperscript{133} The district court held that no reasonable reader of the article, titled “Devin Nunes’s Family Farm Is Hiding a Politically Explosive Secret,” could draw the implication that Nunes conspired to hide the farm’s use of undocumented labor.\textsuperscript{134} But in reversing, the Eighth Circuit held that such a determination needs to be made after considering the article as a whole and in context, and that a reasonable reader could draw a defamatory implication from the article as a whole.\textsuperscript{135} Had the Eighth Circuit employed an actual malice standard, it seems unlikely that Nunes would have been able to supply the requisite evidence, saving the courts, and the magazine, from lengthy litigation. Also relevant is Nunes position as a repeat plaintiff in libel—since the Eighth Circuit opinion, he has initiated another case against CNN, showing that cases against the press may not always be in good faith.\textsuperscript{136}

A case involving former Alaska governor Sarah Palin against the New York Times illustrates the importance of an actual malice standard through the newspaper’s win on a judgment as a matter of law.\textsuperscript{137} The case involved an editorial in which a mass shooting was linked to a graphic by Palin’s political action committee which showed crosshairs over congressional districts she sought to flip Republican.\textsuperscript{138} Palin was unable to show any evidence of actual malice, and the court pointed to the several rounds of pre-publication review that the article underwent as evidence to the contrary.\textsuperscript{139}

Taken together, these cases show the disparate outcomes that arise from inadequately protective standards, highlighting the importance of embracing a uniform standard.

\textsuperscript{132} Id. at 894.
\textsuperscript{133} Id. at 896.
\textsuperscript{134} See Nunes v. Lizza, 486 F. Supp. 3d 1267, 1283 (N.D. Iowa 2020).
\textsuperscript{135} Nunes v. Lizza, 12 F.4th at 897.
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 408.
IV. The Solution: A Uniform State Statute Applying the “Actual Malice” Standard to Libel by Implication Law.

A. States Should Codify a Uniform Statute, as they have done in Multiple other Areas of Law.

Although the “actual malice” standard has limited the success of libel by implication actions by public figures and has established a deference to free expression over reputational interest, journalists are still facing the effects of costly libel litigation. Libel has been weaponized against journalists for statements that plaintiffs deem misleading, leaving journalists unsure how to balance their commitment to truth-telling while avoiding litigation.

Seeing as the Restatement of Torts already forms the basis for much of state defamation law, the states should be able to uniformly adopt a law that would adequately address the libel by implication problem. To balance reputational concerns of plaintiffs against weighty First Amendment requirements, states should adopt laws that require plaintiffs to show by clear and convincing evidence that the defendant had actual malice in creating a false implication from true facts, or that the statements themselves are false. While this is currently the standard used for public figure plaintiffs, the manipulability of the public/private figure distinction demonstrates the need for even more uniformity. The elements for libel by implication should be standardized for both public and private figure plaintiffs, and should require:

1. that the defendants made the statements alleged in the complaint,
2. that the statements, even if facially true, were designed and intended by the defendants to have defamatory meaning,
3. that in the light of the circumstances prevailing at the time they were made, the statements plainly conveyed that defamatory implication to a reasonable reader, and
4. that the plaintiff suffered harm as a result.

140. Nicole Alexandra LaBarbera, The Art of Insinuation: Defamation by Implication, 58 FORDHAM L. REV. 677, 678 (1990). However, the actual malice standard does not apply where private persons are attempting to prove they were defamed on a matter of public interest. In Gertz, the Supreme Court reasoned that “Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy” and “public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual.” Gertz v. Robert Welch, Inc., 418 U.S. 232, 344–45 (1974).


As Justice Harlan wrote for a plurality in *Curtis Publishing Co. v. Butts*, “Some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.” As proven in libel cases against public figures, the actual malice standard helped bridge the gap between freedom of speech and libel actions by ensuring that actionable claims are heard while giving the press the “breathing space” required for them to do their jobs.

A standard that requires both false implication and actual malice will provide better protection for journalists through proper due notice and will protect them from being liable for a statement they did not intend to make. Journalists will find it difficult to accidentally break such a standard through so-called “surprise” defamation cases.

After years of common law explanation and adoption by the Supreme Court, the actual malice standard is familiar terrain for journalists. While the actual malice standard faced a recent siege arguing for its reversal, those calls concern whether the actual malice standard should apply to private-figure plaintiffs—not whether the standard should apply to libel by implication.

Absent an actual malice standard, plaintiffs would be able to bring a claim on the assertion that the statements have a false implication alone. Not only would this open the floodgates to prohibitively expensive lawsuits, but liability would rest on the malleable implication being claimed. This increased threat of liability would undoubtedly result in a chilling effect on speech. Supporters of the standard articulate that the Supreme Court, in adopting the *Sullivan* standard, “reasoned that, if strict liability [was] imposed, critics of the government might refrain

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143. *Nat’l Ass’n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”).
145. Though the Supreme Court denied hearing argument for overruling of *New York Times v. Sullivan*, its denial was accompanied by a lengthy dissent from Justice Thomas, which argued that the actual malice standard lacks a clear constitutional backing and that since the media has seen a rise in publicized falsehoods, the law should evolve in response. *See Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (mem); *Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, 597 U.S. 3396, 142 S. Ct. 2453, 2455 (2022) (mem); *Tah v. Glob. Witness Publ’g, Inc.*, 991 F.3d 231, 251 (2021).
from comment out of fear of liability for a completely innocent error.”\textsuperscript{146}

The Court also held that surrounding any defamation, libel law is a gray area or “unlawful zone” in which authors unsure about their potential liability will steer on the side of caution and choose not to publish certain lawful speech.\textsuperscript{147} Thus, the law must affirmatively ensure that the law does not “create the danger that the legitimate utterance will be penalized” which in turn should require the most protective defenses for journalists.\textsuperscript{148}

The actual malice standard is not a grant of absolute immunity: the kind of reporting policy should strive to dispel—that motivated by animus and fiction—would face liability. While opponents of the standard argue that the actual malice standard is “fatal in fact,”\textsuperscript{149} plaintiffs frequently clear the hurdle to win cases against media defendants.\textsuperscript{150} For example, in \textit{Celle v. Filipino Reporter Enters.}, a plaintiff radio announcer won his suit against the defendant newspaper for publishing the following:

Alarmed by dwindling listeners, advertisers and an ongoing lawsuit, a controversial New Jersey based radio announcer last week took a last-ditch desperate act by scaring outlets with lawsuits if they distributed copies of The Filipino Reporter containing a factual report of a court decision rejecting his motion to dismiss a $5 million defamation suit slapped against him.\textsuperscript{151}

The radio host was deemed to be a public figure, and since he was suing a media defendant, he was required to establish that the newspaper had acted with actual malice.\textsuperscript{152} Plaintiff established that he and the defendant were personal rivals, each seeking to capture the Filipino-American news market.\textsuperscript{153} Depositions from the defendant also

\begin{itemize}
\item \textsuperscript{147} Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).
\item \textsuperscript{148} Speiser v. Randall, 357 U.S. 513, 526 (1958).
\item \textsuperscript{149} See Justice Gorsuch’s dissent in \textit{Berisha}, 141 S. Ct. at 2428 (“But over time the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability.”).
\item \textsuperscript{150} Michael Norwick, \textit{The Empirical Reality of Contemporary Libel Litigation}, in \textit{NEW YORK TIMES V. SULLIVAN THE CASE FOR PRESERVING AN ESSENTIAL PRECEDENT} 97, 98 (Media L. Res. Ctr. 2022) [https://perma.cc/MS52-VLWN].
\item \textsuperscript{151} Celle v. Filipino Rep. Enters., 209 F.3d 163, 173 (2d Cir. 2000).
\item \textsuperscript{152} Id. at 176.
\item \textsuperscript{153} Id. at 186.
\end{itemize}
showed that the defendant had doubts about the truthfulness of the publication.\textsuperscript{154} Thus, the plaintiff met his burden of proof, and was able to recover damages from the defendant.\textsuperscript{155}

C. A Uniform Defamation Statute would Provide Better Protection for Journalists Through due Notice and a Uniform Standard.

A uniform statute prevents disparate results state to state, giving journalists equal protection regardless of where they are reporting. While potential plaintiffs might argue that large media outlets have the legal capabilities to require journalists to be on notice of every state’s libel by implication law, requiring journalists to know a patchwork of state laws would disadvantage smaller local news outlets and would still likely create a chilling effect. The presence of asymmetrical results in various states may disincentivize journalists from reporting in certain areas for fear of litigation, in turn barring certain communities from necessary reporting.

Just as journalists would be incentivized to shop for the safest jurisdictions, so too would plaintiffs be incentivized to shop for the ripest jurisdictions. This makes the cost of doing journalism in certain jurisdictions much higher. We have seen this played out on a global scale: England’s libel law regime is notoriously favorable to plaintiffs, so much so that “libel tourism,” or jurisdiction shopping for libel-friendly courts, has become a growing phenomenon in the country.\textsuperscript{156} Unlike under the “actual malice” standard, defendants in England can be held liable even if they were unaware the statement was false.\textsuperscript{157} The chilling effects of England’s standard are clear: newspapers are now editing out crucial reporting solely on the basis of increased legal risk.”\textsuperscript{158} A clear standard may avoid similar chilling effects in the U.S. Finally, the “placelessness” of internet speech opens jurisdictional doors and encourages forum shopping—a problem this uniform statute would address.

\textsuperscript{154} Id.
\textsuperscript{155} Id. at 189.
D. The Objective Actual Malice Standard is more Protective than other Approaches to Libel by Implication.

Approaches like the one used in Texas, where a private-figure plaintiff only needs to show the defendant was negligent regarding a statement’s defamatory implications, are far too under-protective of journalists. In Texas, a defendant is negligent if they “knew or should have known a defamatory statement was false.” Courts, as non-experts, should not have the power to determine what a journalist “should” have known to be defamatory, and deference should be given to the pre-publication review of news outlets. The Supreme Court recognized this in its rejection of a negligence standard for libel per quod against public plaintiffs: “[S]anctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us.”

Other measures, like those used in the D.C. Circuit that require plaintiffs to point to additional, affirmative evidence in support of a defamation claim, are also under-protective. In this test, the manner or language the author chooses to convey facts can be used as evidence that the author intended a certain meaning. This is hardly a clear standard and seems more like a stand-in for complete judicial discretion that would allow courts to make results-driven decisions. Whether certain language seems like evidence against the defendant is highly subjective, as readers approach text with a myriad of perspectives. An actual malice standard, however, would require evidence in addition to the text itself, thus preventing baseless inferences being drawn from the text alone.

E. A Higher Standard, such as Absolute Privilege for Journalists, would Bar Meritorious Claims Against False Reporting.

In impassioned concurrences in Sullivan, Justice Black, Justice Douglas, and Justice Goldberg argued that the actual malice standard might actually be under-protective of the press, and that like government officials, they should have absolute immunity when writing about public officials. Goldberg argued that protections for government officials and the press should be parallel:

161. See supra text accompanying notes 89–102.
162. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring) (“I vote to reverse exclusively on the ground that the Times and the individual defendants had an absolute,
If the government official should be immune from libel actions so that his ardor to serve the public will not be dampened and “fearless, vigorous, and effective administration of policies of government” not be inhibited, then the citizen and the press should likewise be immune from libel actions for their criticism of official conduct.\(^{163}\)

He reasoned that if government action is so important as to be immune from liability, so too must be the action that holds them accountable. Black added that “actual malice” is too flimsy to properly protect the “sturdy safeguard embodied in the First Amendment.”\(^{164}\)

While the Justices’ remarks on the importance of the press are undoubtedly relevant, absolute immunity would do more harm than good in today’s media environment. \(Sullivan\) was decided decades before the invention of the internet. The Court likely did not foresee “fake news,” social media, or other forces chipping away at the press as a bulwark for truth. In reality, today some news outlets have abused their platforms to such an extent that many consumers don’t even consider what they publish “news.”\(^{165}\)

For example, when Fox News host Tucker Carlson was sued for libel, the court dismissed the case saying that no “reasonable viewer” takes what Carlson has to say seriously: “Fox persuasively argues, that given Mr. Carlson’s reputation, any reasonable viewer arrives with an appropriate amount of skepticism about the statements he makes.”\(^{166}\)

Thus, to give absolute immunity to all “news” entities (without some kind of extremely narrowly tailored definition of what entities are included) would be to give absolute immunity to non-credible information. This immunity would then incentivize news outlets to push the boundaries of what harmful information they can publish, since they know they would not face legal repercussions. The idea that reasonable viewers must be skeptical towards today’s journalism shows there is a vastly different media landscape today from the one in \(Sullivan\) and illustrates that not all news consumers would desire blanket immunity.

While dealing with libel per se, not libel by implication, a blockbuster suit by Dominion Voting Systems against Fox News highlighted the importance of allowing claims against the media. In \(Dominion Voting\)...

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\(^{163}\) Id. at 304 (Goldberg, J., concurring).

\(^{164}\) Id. at 293.


\(^{166}\) Id.
Systems v. Fox News, the voting machine company sought $1.6 billion in damages after alleging that Fox News journalists made false claims that Dominion’s voting machines were rigged against then-President candidate Trump. In a press statement, the Dominion CEO highlighted the democracy-harming reputational harm that lies by the media can cause: “Fox has admitted to telling lies about Dominion that caused enormous damage to my company, our employees and the customers that we serve. Nothing can ever make up for that.” Fox News argued the statements were merely opinion, allowing them to be protected by New York Times v. Sullivan. But pre-trial discovery uncovered that prominent Fox News hosts and executives were aware that the network was reporting lies and decided to continue doing so because of the financial benefit. Although the case ultimately settled, in a pretrial ruling the Delaware Superior Court held that all twenty statements made by Fox were false: “The evidence developed in this civil proceeding demonstrates that is CRYSTAL clear that none of the Statements relating to Dominion about the 2020 election are true.”

This case makes clear the enormous consequences media dishonesty can have. Though the media was intended to safeguard democracy, some of today’s most prominent media instead targets the literal machines democracy requires. And while many defamation cases balance individual reputational harms against the importance of the free press, it is important to note that in cases like Dominion, the plaintiffs are arguing on behalf of a reputation much more consequential—that of the democracy. Some reputational harms are more consequential to democracy than stifling the media would be, and much of the media does not seek to uphold the First Amendment concerns Justice Douglas described. As such, blanket immunity would do more harm to the goals of the First Amendment than good.

169. See U.S. Dominion, Inc., 293 A.3d at *1032.
170. See id. at *1025–29 (detailing several items turned over in pre-trial discovery wherein Fox hosts and executives discuss the credibility of the Dominion fraud allegations).
171. Id. at *1039.
172. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.").
F. Weighing Reputational Harms above the First Amendment would Likely be Unconstitutional.

States like Illinois that have declined to adopt the actual malice standard have argued that a “standard of liability less rigorous than that of actual malice will not impermissibly abridge freedom.”\textsuperscript{173} They argue that it can’t be that freedom of press is such an overriding policy concern because before \textit{Sullivan}, liability for defamation did not require any showing of fault at all.\textsuperscript{174} However, while less rigorous standards were not deemed unconstitutional, that does not make them good policy. The Supreme Court’s endorsement of a federalist approach should not be read to mean the approach it adopted for libel is wrong. Historically inadequate protection for the press does not mean the press do not deserve ample protection today. Legal standards need to evolve proportionately to our changing media environment.

Some argue that reputational interests should not be subordinate to First Amendment concerns, and that the fear of baseless defamation by implication claims is unfounded.\textsuperscript{175} But as noted, the First Amendment has long been heralded as taking precedence over many state-created rights.\textsuperscript{176} Further, unlike the benign reputational harm on one plaintiff, the chilling effects caused by fear of litigation are societal harms, making the need for protection more widespread.

Some critics argue that “[d]isallowing defamation by implication ignores the reality of human discourse” by approving of any speech that is not explicit, and rewarding crafty journalists who seek to further their agenda through insinuation.\textsuperscript{177} This mischaracterizes the nature of journalistic work. The cases against media defendants above mostly involved articles that went through a series of edits and pre-publication reviews—to characterize journalism as a manipulative mechanism for “high-profile defamatory stories” is to bolster the narrative that the press is a monolithic foe.\textsuperscript{178} To imagine that journalists are researching state libel by implication law in order to push their article to the limit of what their jurisdiction will allow is to assume the goal of journalism

\textsuperscript{174} Id. at 297.
\textsuperscript{175} Nicole Alexandra LaBarbera, The Art of Insinuation: Defamation by Implication, 58 FORDHAM L. REV. 677, 698 (1990).
\textsuperscript{177} LaBarbera, supra note 174, at 701.
\textsuperscript{178} Id.
is to advance an agenda. While this may be true of some outwardly partisan news outlets, this concern cannot characterize the entire industry, especially to the detriment of good-faith journalists. In balancing the possibility of reputational injury against First Amendment concerns, a desire for unbridled public speech has always taken precedent and should continue to do so. As the Eighth Circuit expressed in Price, “there is a larger injury to consider, the damage done to every American when a book is pulled from a shelf, as in this case, or when an idea is not circulated.”\footnote{Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989).} This injury cannot be outweighed by hard truths.