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## Freedom of Unspoken Speech: Implied Defamation and Its Constitutional Limitations

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**FREEDOM OF UNSPOKEN SPEECH:  
IMPLIED DEFAMATION AND ITS CONSTITUTIONAL  
LIMITATIONS**

**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, FIRST DEPARTMENT**

Stepanov v. Dow Jones & Co., Inc.<sup>1</sup>  
(decided May 29, 2014)

**I. INTRODUCTION**

The battle between a plaintiff’s reputational interests and a defendant’s First Amendment right to free speech has been ongoing ever since 1964, when the United States Supreme Court declared that the First Amendment significantly limits a plaintiff’s right to recover for defamation.<sup>2</sup> On the one hand, the cause of action for defamation exists because the law recognizes that a person’s reputation and good name are some of his most prized possessions.<sup>3</sup> On the other hand, the United States Constitution guarantees its citizens certain inalienable rights, including the right to express oneself freely through speech and press. So fundamental are these rights that they were included in the very First Amendment to the Constitution in 1791: “Congress shall make no law . . . abridging the freedom of speech, or of the press[.]”<sup>4</sup> These two competing interests—reputation versus free speech—clash when a defendant oversteps the boundary of his First

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<sup>1</sup> 987 N.Y.S.2d 37 (App. Div. 1st Dep’t 2014).

<sup>2</sup> N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (finding that the First Amendment limits a public official’s defamation claims and requires him to prove the defendant’s actual malice); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14 (1990) (“In 1964, we decided in [*Sullivan*] that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation.”).

<sup>3</sup> *See Milkovich*, 497 U.S. at 12, 22.

<sup>4</sup> U.S. CONST. amend. I; *see also Milkovich*, 497 U.S. at 22 (“[The Court recognizes the First] Amendment’s vital guarantee of free and uninhibited discussion of public issues.”).

Amendment right to say what he wants and enters defamatory territory by expressing an untruth that harms the plaintiff's reputation.

But what happens when a defendant expresses a *truth* that harms the plaintiff's reputation, by implying an untruth? In actions known as implied defamation, a plaintiff may recover for a defendant's statement that, while literally true, insinuates a fact about the plaintiff that is false and defamatory.<sup>5</sup> Once again, the interests of reputation and free speech collide because actions for implied defamation permit recovery for that which the defendant does not say, rather than what the defendant does say. While defendants' unsaid implications may undeniably produce damaging consequences, these defendants are still accorded the constitutional freedom to say or write what they please, so long as their statements are truthful.<sup>6</sup> Complications arise, and courts have thus developed competing approaches, when the defendant's statement is itself literally truthful, but the underlying meaning is false.<sup>7</sup>

This Note will take an analytical look at *Stepanov v. Dow Jones & Co., Inc.*,<sup>8</sup> a recent decision by the First Department of the New York State Supreme Court's Appellate Division, which addressed the issue of implied defamation. The Note will be divided into eight Parts, including this Introduction and a Conclusion. Part II will outline the relevant facts and the court's discussion in *Stepanov*. Part III will provide a broad context for defamation both generally and in New York, while Part IV will explore Supreme Court precedent that has placed First Amendment limitations on state defamation claims. The First Amendment concerns raised specifically by implied defamation claims, along with the various approaches adopted by the federal circuit courts and New York State courts, will be discussed in Parts V and VI, respectively. Finally, Part VII will revisit

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<sup>5</sup> See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 566 (2d ed. 2000); see also *Toney v. WCCO Television, Midwest Cable & Satellite*, 85 F.3d 383, 386 (8th Cir. 1996) (observing that implied defamation occurs "when an otherwise innocent statement is interpreted to have defamatory meaning"); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (noting that defamatory implications arise from the falsity of implications/innuendos, rather than the facts as literally stated); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 116 (Supp. 1988) ("[A] defamatory implication [occurs when a 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.").

<sup>6</sup> See discussion *infra* Part IV.C.

<sup>7</sup> DOBBS ET AL., *supra* note 5.

<sup>8</sup> 987 N.Y.S.2d 37 (App. Div. 1st Dep't 2014).

*Stepanov* and argue that, in light of existing federal and state precedent, the First Department's approach and outcome were both correct.

## II. *STEPANOV V. DOW JONES & Co., INC.*

The plaintiffs in *Stepanov* sued the defendant for implied defamation—namely, for publishing an article whose statements, while facially true, falsely suggested that the plaintiffs were involved in a tax embezzlement conspiracy.<sup>9</sup> On appeal of the trial court's dismissal of the plaintiffs' claims, the First Department reasoned that since the plaintiffs did not challenge the statements as printed, but rather the statements' unsaid implications, a heightened standard of review was required in order to stay within the bounds of the First Amendment.<sup>10</sup> The court thus held that in actions for defamation by implication, a plaintiff must make a "rigorous showing" that the challenged language, when read in context with the entire communication, can be "reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference."<sup>11</sup>

### A. Factual Background

Maxim Stepanov ("Stepanov"), a Russian businessman, and his company, Midland Consult Ltd. ("Midland"), (collectively, the "Plaintiffs") sued Dow Jones & Company (the "Defendant") for defamation in an article entitled *Crime and Punishment in Putin's Russia*, which appeared in a newspaper published by the Defendant.<sup>12</sup> The article provided in relevant part that some of Midland's employees were also directors of a shell company that was "nested inside" of yet another company, Bristoll Export, which had allegedly made some suspicious financial transactions.<sup>13</sup> The article further noted that Maxim Stepanov was a "former Russian Diplomat" and that other persons with the same last name, Stepanov—Olga Stepanova and her husband Vladlen Stepanov—were involved in a tax embezzle-

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<sup>9</sup> *Id.* at 41.

<sup>10</sup> *See id.* at 44.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 39.

<sup>13</sup> *Stepanov*, 987 N.Y.S.2d at 40.

ment scheme, money laundering, and political corruption.<sup>14</sup>

### B. Procedural History

The Plaintiffs alleged that these statements from the Defendant's article were impliedly defamatory.<sup>15</sup> Specifically, the Plaintiffs took issue with the article for stating that (1) the Plaintiffs were connected to Bristoll Export, but failing to explain that there was no such connection at the time of the suspicious activities; (2) some Midland employees were also directors of Bristoll Export's shell company, but neglecting to note that the suspicious activities occurred before these employees had any management role with Bristoll Export or its shell company; (3) Stepanov was a former Russian diplomat, in the context of discussing corruption in Putin's Russia, without mentioning that Stepanov was never a Russian diplomat while Putin was in power; and (4) Olga Stepanova and Vladlen Stepanov were involved in fraudulent activities and political corruption, but failing to clarify that the plaintiff, Maxim Stepanov, was in no way related to Olga or Vladlen.<sup>16</sup> The Plaintiffs claimed that by omitting crucial clarifications and failing to include a timeline of events, the article's statements falsely suggested that the Plaintiffs were associated with the fraudulent schemes described.<sup>17</sup> Although the Plaintiffs did not argue that the statements as published were false or inaccurate, they asserted that when read in context, the statements created false and misleading implications.<sup>18</sup> The trial court granted the Defendant's motion to dismiss for failure to state a claim for defamation, and the Plaintiffs appealed to the First Department of the New York State Supreme Court's Appellate Division.<sup>19</sup>

### C. Court Discussion

On appeal, the First Department affirmed the trial court's decision.<sup>20</sup> The appellate court first explained that while express defa-

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 40-41.

<sup>16</sup> *Stepanov v. Dow Jones & Co., Inc.*, No. 150534/2012, 2013 WL 1727123 (Sup. Ct. N.Y. County Apr. 18, 2013).

<sup>17</sup> *See Stepanov*, 987 N.Y.S.2d at 42.

<sup>18</sup> *Id.* at 41.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

mation is premised on “direct statements,” implied defamation is based on “false suggestions, impressions and implications arising from otherwise truthful statements.”<sup>21</sup> The court observed that New York courts have recognized actions for defamation by implication in the past, but they have not yet articulated the appropriate standard to be applied in light of the federal constitutional implications.<sup>22</sup> The court thus remarked that in order to formulate the proper standard, two competing interests needed to be balanced: the plaintiff’s right to recover in tort for defamatory statements and the defendant’s First Amendment freedom to express speech that is “substantially truthful.”<sup>23</sup>

Relying primarily on federal precedent, the First Department concluded that defamation by implication requires a higher standard of review than express defamation.<sup>24</sup> In *Biro v. Condé Nast*, the Southern District of New York applied a standard derived from a line of federal circuit courts of appeals cases, which were also cited by “at least one” New York State trial court in an implied defamation action.<sup>25</sup> The D.C. Circuit, relying on Eighth Circuit precedent, had determined that in actions for defamation where the challenged communication “conveys materially true facts from which a defamatory inference can reasonably be drawn,” the communication will be considered defamatory only if the context “supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference.”<sup>26</sup> Likewise, the Fourth Circuit established a standard by which the plaintiff must make an “especially rigorous showing” that the language not only implies a “false innuendo, but it must also affirmatively suggest that the author intends or endorses the inference.”<sup>27</sup> The New York County Supreme Court has quoted this Fourth Circuit standard in an implied defamation claim.<sup>28</sup>

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<sup>21</sup> See *id.* at 42 (citing *Armstrong v. Simon & Schuster*, 649 N.E.2d 825, 829 (N.Y. 1995)).

<sup>22</sup> *Stepanov*, 987 N.Y.S.2d at 42-43 (discussing *Armstrong*, 649 N.E.2d 825; *Rinaldi v. Holt*, 366 N.E.2d 1299 (N.Y. 1977); and *November v. Time, Inc.*, 194 N.E.2d 126 (N.Y. 1963)).

<sup>23</sup> *Id.* at 43.

<sup>24</sup> See *id.* at 44.

<sup>25</sup> *Id.* at 43 (citing *Biro v. Condé Nast*, 883 F. Supp. 2d 441 (S.D.N.Y. 2012)).

<sup>26</sup> *Id.* (citing *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990) (emphases in original)).

<sup>27</sup> *Stepanov*, 987 N.Y.S.2d at 43 (citing *Chapin*, 993 F.2d at 1093).

<sup>28</sup> *Id.* at 43-44 (citing *Rappaport v. VV Publ’g Corp.*, 618 N.Y.S.2d 746 (Sup. Ct. N.Y. County 1994), *aff’d*, *Rappaport v. VV Publ’g Corp.*, 637 N.Y.S.2d 109 (App. Div. 1st Dep’t

Ultimately, the *Stepanov* court articulated a standard that it believed “struck the appropriate balance” between a plaintiff’s right to recover for defamatory implications and a defendant’s First Amendment right to publish statements that are substantially true: “a plaintiff must make a rigorous showing that the language of the communication as a whole can be reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference.”<sup>29</sup> The court applied this standard and determined that each of the Defendant’s challenged statements were substantially true, that the statements did not create any false implications, and that in any event, the Plaintiffs failed to demonstrate that the Defendant intended any of the alleged implications.<sup>30</sup>

### III. DEFAMATION

Traditionally, defamation actions allow a plaintiff to recover for a defendant’s false statements that harm the plaintiff’s reputation. A plaintiff must show (1) a false and defamatory statement of and concerning him/her; (2) publication to a third party without privilege; (3) that the defendant was at least negligent; and (4) harm or defamation per se.<sup>31</sup> Defamation includes the torts of libel—defamation through writing and other similar means—and slander—defamation through oral communication.<sup>32</sup> Since the elements to prove both libel and slander are virtually identical,<sup>33</sup> this Note will refer to both under the umbrella term “defamation.”

#### A. Implied Defamation

In some instances, a communication will not be defamatory on its face (“express defamation”), but through context and other rhetorical devices, a defamatory implication may arise (“implied defamation”).<sup>34</sup> While some statements will lead to defamatory inferences that are logically unavoidable, others may result in two

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1996)).

<sup>29</sup> *Id.* at 44.

<sup>30</sup> *Id.* at 44-46.

<sup>31</sup> RESTATEMENT (SECOND) OF TORTS § 558 (1977).

<sup>32</sup> DOBBS ET AL., *supra* note 5, at § 519.

<sup>33</sup> The elements for both are nearly identical, with the exception of form (i.e., one is written while the other is spoken) and the type of damages to be proved. *Id.* at §§ 519, 534.

<sup>34</sup> *See id.* at §§ 566, 526.

possible inferences—one defamatory and one not.<sup>35</sup> For example, the statement, “I am the only one of my siblings who knows how to swim,” leads to the unavoidable conclusion that my sister (assuming that I have one) does not know how to swim. On the other hand, the statement, “Mary was swimming in an ocean,” could lead to two possibilities, depending on the context.<sup>36</sup> If the surrounding circumstances are that Mary was at a beach, then she was likely swimming in a literal ocean; yet, the context could likewise demonstrate that “ocean” was meant metaphorically, as in Mary was swimming in a “sea of troubles.”<sup>37</sup> Since the versatility of language allows for ideas to be expressed in infinitely various forms, both expressly and impliedly, there are several ways in which a communication can lead to a defamatory implication: (1) by omitting relevant facts that lead to a misleading impression;<sup>38</sup> (2) by juxtaposing facts that when read contextually lead to a misleading impression;<sup>39</sup> and (3) by hiding behind the façade of a constitutionally protected opinion, when in reality it suggests false and defamatory facts.<sup>40</sup>

### B. Defamation Claims in New York

The State of New York has long recognized defamation actions, which arise from a defendant’s false statements that “expose the plaintiff to public contempt, ridicule, aversion, or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and . . . deprive him of their friendly intercourse in society.”<sup>41</sup> A New York plaintiff must demonstrate that a false statement was published to a third party without privilege or authorization, that the defendant was at least negligent, and that some injury resulted or that it constitutes defamation per se.<sup>42</sup> When determining whether a state-

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<sup>35</sup> *Id.* at § 566.

<sup>36</sup> *Id.*

<sup>37</sup> DOBBS ET AL., *supra* note 5.

<sup>38</sup> KEETON ET AL., *supra* note 5.

<sup>39</sup> *Id.*

<sup>40</sup> *See Milkovich*, 497 U.S. at 18-19. Since the latter type of implied defamation (and the applicable standard) has been directly addressed by the Supreme Court in *Milkovich*, this Case Note focuses primarily on the former two types, which have been approached differently by various courts.

<sup>41</sup> *Foster v. Churchill*, 665 N.E.2d 153, 157 (N.Y. 1996) (citing *Rinaldi*, 366 N.E.2d at 1305).

<sup>42</sup> *Stepanov*, N.Y.S.2d at 41-42; *Epifani v. Johnson*, 882 N.Y.S.2d 234, 242 (App. Div. 2d Dep’t 2009); *Roche v. Claverack Coop. Ins. Co.*, 874 N.Y.S.2d 592, 595-96 (App. Div. 3d

ment is defamatory, the language must be read in context with the entire communication.<sup>43</sup> New York also recognizes claims for defamation by implication, which the Court of Appeals has defined as defamation “premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements.”<sup>44</sup>

#### IV. FIRST AMENDMENT FREE SPEECH AND PRESS CLAUSES: UNITED STATES SUPREME COURT PRECEDENT IN THE DEFAMATION CONTEXT

The First Amendment to the United States Constitution states in relevant part, “Congress shall make no law . . . abridging the freedom of speech, or of the press[.]”<sup>45</sup> This protection has been made applicable to the states through the Fourteenth Amendment; therefore, states are not permitted to create laws that intrude on a citizen’s rights to free speech and press.<sup>46</sup> There are a number of First Amendment concerns that arise from allowing actions for defamation by implication. First, if the challenged communication is of a public concern, then the problem of limiting free public debate arises.<sup>47</sup> Second, statements that suggest implicit assertions may be understood as an opinion or as “rhetorical hyperbole,” both of which are constitutionally protected and nonactionable.<sup>48</sup> Finally, defamatory implications lead to lawsuits not for what is said, but for what is unsaid, and this treads on the protected territory of a defendant’s right to make truthful statements.<sup>49</sup>

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Dep’t 2009); *Dillon v. City of New York*, 704 N.Y.S.2d 1, 5 (App. Div. 1st Dep’t 1999).

<sup>43</sup> *Steinhilber v. Alphonse*, 501 N.E.2d 550, 553 (N.Y. 1986); *Dillon*, 704 N.Y.S.2d at 38.

<sup>44</sup> *Armstrong*, 649 N.E.2d at 829; see also discussion *infra* Part VI (providing a more in-depth discussion of implied defamation in New York).

<sup>45</sup> U.S. CONST. amend. I.

<sup>46</sup> See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

<sup>47</sup> See discussion *infra* Part IV.A.

<sup>48</sup> See discussion *infra* Part IV.B.

<sup>49</sup> See discussion *infra* Part IV.C.

### A. Public-Private Distinction

The United States Supreme Court first considered the constitutional implications of state defamation claims in the 1964 landmark case, *New York Times Co. v. Sullivan*.<sup>50</sup> In *Sullivan*, the New York Times had published a newspaper advertisement entitled *Heed Their Rising Voices*, which criticized the “unprecedented wave of terror” and overall violent response to civil rights demonstrators, led by Dr. Martin Luther King, Jr., in the Southern United States.<sup>51</sup> In this context, the article discussed the Montgomery, Alabama police force, which showed up “armed with shotguns and tear-gas” in response to Alabama State College student protesters.<sup>52</sup> The Montgomery County Commissioner, who supervised the Montgomery Police Department, sued for defamation, contesting several inaccuracies in the advertisement and claiming that the advertisement’s criticism of the police force would be imputed to him.<sup>53</sup>

The *Sullivan* Court declared that a heightened standard of fault was required for this defamation action because it involved a plaintiff who was a “public official.”<sup>54</sup> The Court emphasized the importance of the First Amendment’s free speech and press clauses, which are meant to “assure unfettered interchange of ideas” with respect to political and social discussion.<sup>55</sup> This country recognizes the “fundamental principle” that public debate remain “uninhibited, robust, and wide-open, and [that] it may well include vehement, caustic, and unpleasantly sharp attacks on government and public officials.”<sup>56</sup> The Constitution necessarily places limitations on actions for defamation, particularly when a public official is involved.<sup>57</sup> Thus, a public official must show that the defendant acted with “actual malice,” defined as “knowledge that [the defamatory statement] was false or with reckless disregard of whether it was false or not.”<sup>58</sup>

Subsequent Supreme Court decisions have announced similar

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<sup>50</sup> 376 U.S. 254 (1964).

<sup>51</sup> *Id.* at 256-58.

<sup>52</sup> *Id.* at 257.

<sup>53</sup> *Id.* at 258.

<sup>54</sup> *Id.* at 279-80.

<sup>55</sup> *Sullivan*, 376 U.S. at 269.

<sup>56</sup> *Id.* at 269-70.

<sup>57</sup> *See id.* at 279-80.

<sup>58</sup> *Id.*

limitations on actions for defamation. In *Curtis Publishing Co. v. Butts*,<sup>59</sup> the Court extended the *Sullivan* actual malice standard to include criticism of “public figures,” defined as “persons involved in issues in which the public has a justified and important interest.”<sup>60</sup> Thereafter, the Court in *Gertz v. Robert Welch, Inc.*<sup>61</sup> considered the standard to be applied when a private person is defamed regarding a matter of “public concern.”<sup>62</sup> The Court reasoned that public officials and public figures have assumed the “increased risk of injury” from defamation by voluntarily placing themselves in the public eye.<sup>63</sup> Private individuals, however, have not voluntarily subjected themselves to such public criticism, so they are more “vulnerable to injury,” and the state has a greater interest in protecting them.<sup>64</sup> Consistent with *Sullivan*, the *Gertz* Court noted that the First Amendment interest in free public debate still requires a showing of some “fault” (i.e., negligence) when the communication is of a public concern, but that the Constitution does not require a standard as high as actual malice.<sup>65</sup> Still, states are free to heighten the standard if they see fit.<sup>66</sup> Finally, in *Dun & Bradstreet, Inc. v. Greenmoss Builders*,<sup>67</sup> the Court considered the issue of defaming private individuals regarding a non-public concern.<sup>68</sup> The Court there found that common law rules for defamation are sufficient because there are no First Amendment interests at stake when private individuals are defamed on private matters.<sup>69</sup>

Supreme Court precedent discussing the distinctions between public and private individuals and public and private matters demonstrates the importance placed on open public discussion by the First Amendment. There is a direct correlation between the level of public concern and the respective standard of fault to be used. When a defamation plaintiff is a public official or public figure, First Amendment protections are at their apex and require a showing of actual

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<sup>59</sup> 388 U.S. 130 (1967).

<sup>60</sup> *Id.* at 134.

<sup>61</sup> 418 U.S. 323 (1974).

<sup>62</sup> *Id.* at 327.

<sup>63</sup> *Id.* at 345.

<sup>64</sup> *Id.* at 344.

<sup>65</sup> *Id.* at 347.

<sup>66</sup> *Gertz*, 418 U.S. at 347.

<sup>67</sup> 472 U.S. 749 (1985).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

malice.<sup>70</sup> If the plaintiff is a private individual defamed on matters of public concern, he must still show some fault on the part of the defendant, but is held to a much lower standard.<sup>71</sup> Finally, when both the plaintiff and the matter are private, the First Amendment is not implicated, and ordinary common law standards apply.<sup>72</sup>

## B. Opinions

The First Amendment also protects expressions of “pure opinion,”<sup>73</sup> defined as statements that cannot be objectively verified.<sup>74</sup> The Supreme Court noted in *Gertz* that “[u]nder the First Amendment there is no such thing as a false idea.<sup>75</sup> However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”<sup>76</sup> Subsequent circuit court decisions initially interpreted this to mean that while factually false statements are actionable, expressions of opinion are absolutely protected because they are unable to be proven false.<sup>77</sup>

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<sup>70</sup> See *Sullivan*, 376 U.S. 254; *Curtis*, 388 U.S. 130.

<sup>71</sup> See *Gertz*, 418 U.S. 323.

<sup>72</sup> See *Dun & Bradstreet, Inc.*, 472 U.S. 749.

<sup>73</sup> Although the Supreme Court has rejected a definitive distinction between actionable fact and protected opinion, *Milkovich*, 497 U.S. 1, many circuit courts have since adopted the term “pure opinion” to refer to the sort of opinion that the *Milkovich* Court would agree is constitutionally protected, as opposed to the sort of “mixed fact and opinion” that the *Milkovich* Court would consider actionable. See *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 496 (2d Cir. 2013); *Bennett v. Hendrix*, 325 F. App’x 727, 742 n.8 (11th Cir. 2009); *Jolliff v. N.L.R.B.*, 513 F.3d 600, 610 (6th Cir. 2008); *Gibson v. Boy Scouts of Am.*, 163 F. App’x 206, 212 (4th Cir. 2006); *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); see also *DOBBS ET AL.*, *supra* note 5, at § 568 nn.7 & 10; Kathryn Dix Sowle, *A Matter of Opinion, Milkovich Four Years Later*, 3 WM. & MARY BILL RTS. J. 467, 472-74 (1994) (“[The *Milkovich*] Court immunized only pure, *evaluative* opinion.”).

<sup>74</sup> *DOBBS ET AL.*, *supra* note 5, at § 568, n.10; see also *Milkovich*, 497 U.S. at 21 (finding that statements will enjoy First Amendment protection if they contain “loose, figurative” language that is not “sufficiently factual to be susceptible of being proved true or false”).

<sup>75</sup> *Gertz*, 418 U.S. at 339.

<sup>76</sup> *Id.* at 339-40; see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he theory of our Constitution [is that] the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

<sup>77</sup> See, e.g., *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1431-32 (8th Cir. 1989) (observing that opinions are “absolutely protected” and applying the four factor test from *Ollman*); *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (creating a four-factor test for distinguishing actionable fact from protected opinion); *Lewis v. Time, Inc.*, 710 F.2d 549, 552-53 (9th Cir. 1983) (discussing the “constitutional privilege for opinion,” as contrasted with statements of fact, which may be actionable).

In turn, the courts developed tests to distinguish between actionable factual assertions and protected opinion.<sup>78</sup>

The Supreme Court rejected this bright line approach in *Milkovich v. Lorain*.<sup>79</sup> The Court ruled that it never intended to create a “wholesale” First Amendment protection for statements of opinion.<sup>80</sup> The protection applies only to statements that are incapable of being proven false, such as subjective ideas, value judgments, and evaluative opinions.<sup>81</sup> While the *Milkovich* Court purported to do away with the fact-opinion distinction, this decision was not fatal to the concept of protected opinions. The Court did not take issue with the protection of opinions that constitute subjective personal views; the Court instead took issue with the “artificial” labeling of fact versus opinion, which can lead to misleading results.<sup>82</sup> For example, “I think that John is a liar” is merely a factual assertion disguised as an opinion through the inclusion of the words, “I think.”<sup>83</sup> The Court wanted to make clear that statements in this vein should not be protected.<sup>84</sup> Expressions of “pure opinion,” such as “Mary is trashy,” are absolutely protected because there is no objective way to prove this statement true or false; it is merely a subjective personal belief.<sup>85</sup>

The Supreme Court has recognized other First Amendment protections that are closely related to, if not the same as, opinions. First, it has safeguarded loose, figurative language and rhetorical hyperbole.<sup>86</sup> Similarly, the Court has expressed that a sarcastic parody

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<sup>78</sup> See, e.g., *Ollman*, 750 F.2d at 979-83 (applying a four-factor test to determine whether a statement is fact or opinion: (1) “the specific language used”; (2) “the degree to which the statement [is] verifiable”; (3) “the immediate context of the . . . statement”; and (4) “the broader social context into which the statement fits.”).

<sup>79</sup> 497 U.S. 1 (1990).

<sup>80</sup> *Id.* at 18.

<sup>81</sup> See *id.* at 22 (construing the published statement about the plaintiff, “Anyone who attended the meet . . . knows in his heart that [the plaintiff] . . . lied at the hearing after each having given his solemn oath to tell the truth,” as a sufficiently objective, verifiable assertion that the plaintiff had committed perjury); DOBBS ET AL., *supra* note 5, at § 568; Sowle, *supra* note 73, at 474 (“[The *Milkovich*] Court immunized only pure, *evaluative* opinion. Thus, a pure, *deductive* opinion, which is provable as true or false on the basis of objective evidence, carries no immunity.”).

<sup>82</sup> *Milkovich*, 497 U.S. at 19.

<sup>83</sup> See *id.* at 18-19.

<sup>84</sup> *Id.*

<sup>85</sup> See *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 130 (1st Cir. 1997) (observing that the word “trashy” is an “elusive . . . chameleon” whose definition is too loose/imprecise to constitute an objectively verifiable statement).

<sup>86</sup> *Milkovich*, 497 U.S. at 21 (citing *Greenbelt Coop. Publ’g Ass’n, Inc. v. Bresler*, 398 U.S. 6 (1970)). In *Greenbelt*, a local newspaper characterized a prominent politician as hav-

with no real assertion of fact cannot be actionable under the First Amendment.<sup>87</sup>

### C. Truth

The First Amendment additionally protects a defendant's statements that are true or substantially true. Although truth will nonetheless protect a defendant since falsity is an element of the plaintiff's defamation claim, truth likewise implicates a defendant's First Amendment protections.<sup>88</sup> The doctrine of "substantial truth" was established because the Supreme Court recognized that political debate will naturally lead to "minor inaccuracies," but these inaccuracies cannot destroy a defendant's protection where the overall "gist" of the statement is substantially true.<sup>89</sup>

## V. FIRST AMENDMENT LIMITATIONS ON IMPLIED DEFAMATION ACTIONS

With the foregoing constitutional principles in mind, the following section will discuss the ways in which the First Amendment complicates courts' treatment of implied defamation claims. Because so much of defamation law and its constitutional boundaries are unclear, there is a general lack of uniformity among the federal circuit courts of appeals in dealing with actions for implied defamation in light of First Amendment free speech protections.

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ing made negotiations for zoning variances as "blackmail." 398 U.S. at 7-8. The Court determined that it was "simply impossible" that a reader would have believed that the plaintiff was involved in criminal activities. *Id.* at 14. The plaintiff was merely being criticized, and the word choice of "blackmail" was "no more than rhetorical hyperbole," a literary device that a publisher is free to use under the First Amendment. *Id.*

<sup>87</sup> *Hustler Magazine v. Falwell*, 485 U.S. 46, 48, 57 (1988) (holding that the First Amendment, which protects free public debate, does not permit a public figure's recovery for what was clearly a parody and did not purport to convey any true facts, where defendant magazine published a fabricated interview in which a well-known pastor and televangelist was depicted as having had an incestuous relationship with his mother).

<sup>88</sup> *Chapin*, 993 F.2d at 1092-93 ("The constitution provides a sanctuary for truth."); *Masson v. New Yorker Magazine*, 501 U.S. 496, 516-17 (1991) ("The common law of libel . . . overlooks minor inaccuracies and concentrates upon substantial truth. . . . Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge can be justified."); *Gertz*, 418 U.S. at 340 ("[T]he erroneous statement of fact is not worthy of constitutional protection."); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.").

<sup>89</sup> *Masson*, 501 U.S. at 517.

### A. Heightened Standard

A majority of the circuit courts that have considered actions for implied defamation have held that the First Amendment demands a higher standard of fault.<sup>90</sup> The Second and Eighth Circuits are in the minority that treat implied defamation actions no differently than claims for express defamation.<sup>91</sup> Further complications arise in cases that address the standard of fault required in implied defamation claims brought by public officials or public figures. The applicable standard in implied defamation actions, and the applicable standard in express defamation actions involving public officials/figures, are two distinct standards that derive from separate First Amendment concerns, yet many courts have addressed the issues simultaneously and created one hybrid standard of fault. This makes it difficult to extract the reasons behind the courts' application of a heightened standard since defamation claims by public officials/figures are already evaluated under the stringent "actual malice" standard. In turn, these cases create ambiguity as to which standard should be applied in cases of implied defamation of private persons since private individuals suing for defamation are not generally held to a higher standard.

#### 1. Heightened Standard—Generally

The D.C. and Fourth Circuits have explicitly recognized actions for implied defamation, and both have applied similar standards of fault.<sup>92</sup> In *White v. Fraternal Order of Police*,<sup>93</sup> the D.C. Circuit noted the difficulty of determining the appropriate standard in implied defamation cases where the stated facts are literally true.<sup>94</sup> In its discussion, the D.C. Circuit explained that if a communication,

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<sup>90</sup> See discussion *infra* Part V.A.1-2.

<sup>91</sup> See discussion *infra* Part V.B.

<sup>92</sup> The Eleventh Circuit also considered an implied defamation claim in *Rubin v. U.S. News & World Report, Inc.*, but since it found that "no reasonable reading of the text support[ed] the [alleged] implication," the court did not reach the issue of an applicable standard. 271 F.3d 1305, 1308 (11th Cir. 2001). However, the court mentioned in a footnote that such claims raise a "First Amendment problem," citing *Chapin, White, and Dodds*. *Id.* at 1309 n.11.

<sup>93</sup> 909 F.2d 512 (D.C. Cir. 1990). The defendant in *White* had published articles that stated the true facts that the plaintiff, a police captain, tested positive for marijuana, and that a second drug test, which was "transported under irregular circumstances," produced negative results. *Id.* at 514. The plaintiff asserted that these statements falsely suggested that he used drugs. *Id.* at 516.

<sup>94</sup> *Id.* at 518.

read in context, is “materially true,” but a defamatory inference is possible, it is insufficient to prove defamation.<sup>95</sup> On the other hand, if the communication, read in context, “supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference,” then it will rise to the level of actionable defamation.<sup>96</sup> The Fourth Circuit adopted the same standard in *Chapin v. Knight-Ridder, Inc.*<sup>97</sup> Citing the D.C. Circuit’s *White* decision, the Fourth Circuit reasoned that since the plaintiff did not contest the literal facts as published, a more “rigorous” standard was required.<sup>98</sup> The First Amendment’s “sanctuary for truth” requires that the language “affirmatively suggest that the defendant intends or endorses” the alleged inference.<sup>99</sup>

## 2. Heightened Standard—In the Public Official/Figure Context

The Third, Seventh, and Ninth Circuits<sup>100</sup> have only considered claims of implied defamation brought by public officials or figures, and all have applied a hybrid standard of fault that fails to dis-

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<sup>95</sup> *Id.* at 520.

<sup>96</sup> *White*, 909 F.2d at 520. Although the court did not explicitly voice First Amendment concerns, it based its standard partly upon an Eighth Circuit case, *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986), in which the court found significant First Amendment limitations in actions for implied defamation.

<sup>97</sup> 993 F.2d 1087 (4th Cir. 1993). The plaintiff in *Chapin* operated a charity that sent care packages to American soldiers in Saudi Arabia. *Id.* at 1091. The defendant published an article that discussed the “hefty mark-up” between the cost of the items and the price paid by the public, wondered “where the rest of the money goes,” and made some other similar statements. *Id.* According to the plaintiff, the article suggested that he was pocketing the charity’s money. *Id.* at 1093.

<sup>98</sup> *Id.* at 1092-93.

<sup>99</sup> *Chapin*, 993 F.2d at 1092-93.

<sup>100</sup> In *Compuware Corp. v. Moody’s Investors Services*, the Sixth Circuit applied a standard for implied defamation that appeared to be distinct from the actual malice standard, but blurred the lines in its synthesis of the rule. 499 F.3d 520 (6th Cir. 2007). After a lengthy discussion of whether the public figure plaintiff had proven actual malice, the court briefly addressed the plaintiff’s defamation claims that were based on implications. *Id.* at 528-29. Citing *Saenz* and *Newton* (discussed below), both of which failed to draw the line between the standards for actual malice and implied defamation, the Sixth Circuit adopted a standard that requires the defendant “intended or knew of the [alleged] implication.” *Id.* The court also cited a standard from *Milkovich* that was specifically meant to apply only to public figures in the actual malice context, but applied it more generally to all implied defamation claims. *Id.* Ultimately, the court determined that the alleged implications could not reasonably be drawn, and it chose not to engage in a factual analysis. *Id.* at 529. This left unclear whether the standard was intended only for implied defamation against public figures or all implied defamation claims.

tinguish between the public figure actual malice standard and the implied defamation standard. Still, it is noteworthy that all have agreed that the traditional actual malice standard articulated in *Sullivan* is insufficient when faced with the additional obstacle of defamation by implication. Adopting similar standards of fault, these three circuits have required that the plaintiff demonstrate actual malice plus intent or endorsement of the defamatory inference.

The Third Circuit recently held in *Kendall v. Daily News Publishing Co.*<sup>101</sup> that in cases of implied defamation against a public official, a higher standard of intent is required to show actual malice.<sup>102</sup> The *Kendall* court defined defamation by implication as defamation based on a statement with “two possible meanings”—one defamatory and one innocent, as contrasted with “ordinary defamation,” where the only possible meaning is defamatory.<sup>103</sup> Because there are two possible meanings of impliedly defamatory statements, it is logically impossible in public figure cases to demonstrate actual malice merely by showing “knowledge of falsity” or “reckless disregard to it”; in other words, it cannot be proved that a person “knew” a statement was false if that statement could be interpreted both as innocent/true and as defamatory/false.<sup>104</sup> Thus, a higher standard is required.<sup>105</sup> Citing to fellow circuits that also require heightened standards for implied defamation, the Third Circuit concluded that to prove actual malice for defamatory implications, a plaintiff must show that (1) the

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<sup>101</sup> 716 F.3d 82 (3d Cir. 2013). The defendant in *Kendall* published an article discussing specific events in the plaintiff judge’s career, in which the judge had been lenient with some criminal defendants. *Id.* at 84-85. The judge, claiming that the article falsely suggested that his treatment of these defendants was unjustified, sued for implied defamation. *See id.*

<sup>102</sup> *Id.* at 90. Prior to *Kendall*, the Third Circuit first considered implied defamation in *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir. 1978). There, the former chairman of the Port Authority sued a television station for several statements it made implying that he misused his political connections for personal financial gain. *Id.* at 497-99. Since the plaintiff conceded that “no specific statement” was incorrect, the court concluded that the defendant’s First Amendment free speech protections rendered the challenged innuendos nonactionable. *Id.* at 509-10. The plaintiff, a public figure, was required to show actual malice pursuant to *Sullivan*. *See id.* at 507-08. However, the court declared that impliedly defamatory statements are incapable of proving actual malice because unstated innuendos cannot be used to show knowledge or reckless disregard of falsity where the facts as published are “literally correct.” *Id.* at 509. Oddly, nowhere in the *Kendall* decision does the court cite to its previous and related ruling in *Pierce*. While the court’s analysis in *Kendall* differs from *Pierce*, the *Kendall* decision is not inconsistent with the First Amendment concerns articulated in *Pierce*.

<sup>103</sup> *Kendall*, 716 F.3d at 89.

<sup>104</sup> *Id.* at 90.

<sup>105</sup> *See id.*

defendant intended or knew that the statement's meaning was defamatory and recklessly disregarded the defamatory meaning, and (2) the defendant knew that the statement was false or recklessly disregarded its falsity.<sup>106</sup>

In *Saenz v. Playboy Enterprises, Inc.*,<sup>107</sup> the Seventh Circuit made two important evaluations regarding defamation by implication: first, that it is possible for a statement to be defamatory even if it does not explicitly refer to the plaintiff;<sup>108</sup> and second, that proving actual malice in defamation cases against public officials/figures requires a showing of intent in addition to knowledge or reckless disregard of falsity.<sup>109</sup> The Seventh Circuit rejected the District Court's theory that a plaintiff can only recover for defamatory statements in which the plaintiff is explicitly mentioned.<sup>110</sup> The Seventh Circuit explained that such a rule would unfairly reward "crafty[,] mischievous" defendants who seek to defame a plaintiff through the "subtle art of insinuation."<sup>111</sup> As a separate matter, the court also determined that "simply because a statement reasonably can be read to contain a defamatory inference does not mean . . . that this inference is the only reasonable one that can be drawn from the article."<sup>112</sup> Thus, the possibility of two different meanings—one defamatory and one not—compels an additional finding of intent when demonstrating actual malice against a public official/figure.<sup>113</sup> Mere "knowledge" or "reckless disregard of falsity," the ordinary definition of actual malice, does not rise to the level of defamation when a defamatory implication has more than one possible meaning.<sup>114</sup>

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<sup>106</sup> *Id.* at 92-93.

<sup>107</sup> 841 F.2d 1309 (7th Cir. 1988). The plaintiff, who served as an official of the United States Office of Public Safety ("OPS"), was allegedly defamed in an article that accused the OPS of involvement in a violent riot that left many prisoners badly injured or dead. *Id.* at 1311. The plaintiff claimed the article falsely implied that he was an "accomplice to torture and political terror." *Id.* at 1313. The District Court dismissed the plaintiff's claim on the grounds that the plaintiff was never explicitly mentioned; rather, it was his employer that was accused of these acts. *Id.* at 1313-14.

<sup>108</sup> *Id.* at 1314.

<sup>109</sup> *Saenz*, 841 F.2d at 1318.

<sup>110</sup> *Id.* at 1314.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 1318 (citing *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 487 (7th Cir. 1986)). In *Woods*, the Seventh Circuit likewise found that in order to prove actual malice in the context of implied defamation, a higher standard is required than with express defamation since implied statements can support more than one meaning. *See* 791 F.2d at 487.

<sup>113</sup> *Saenz*, 841 F.2d at 1318.

<sup>114</sup> *Id.*

The Ninth Circuit adopted a heightened standard for proving actual malice by making logical arguments similar to those of the Third and Seventh Circuits.<sup>115</sup> The Ninth Circuit first held in *Newton v. NBC*<sup>116</sup> that defamatory implications cannot possibly lead to a finding of actual malice, or it would “eviscerate the First Amendment protections established by [*Sullivan v.*] *New York Times*” by allowing recovery not only for “what was not said but also for what was not intended to be said.”<sup>117</sup> Later, the Ninth Circuit softened these sentiments in *Dodds v. ABC*,<sup>118</sup> determining that defamatory implications may lead to a finding of actual malice, as long as there is proof that the defamatory statements were *intended*.<sup>119</sup>

### B. Ordinary Standard

The Second and Eighth Circuits appear to be the only circuit courts that have allowed claims for defamation by implication without applying a heightened standard. In *Cianci v. New Times Publishing Co.*,<sup>120</sup> the Second Circuit considered the plaintiff’s claim that the defendant’s article implied he was a rapist.<sup>121</sup> The article discussed how the plaintiff, the Mayor of Providence, Rhode Island at the time, had been accused of raping a woman, and that the charges were dropped and “nearly forgotten” about when she received a \$3,000 settlement.<sup>122</sup> Overall, the article detailed the facts of the case with a suspicious undertone.<sup>123</sup> The court noted that the plaintiff’s claims were based on both explicit statements and implicit suggestions and

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<sup>115</sup> Although the Ninth Circuit’s decision in *Partington v. Bugliosi* primarily discussed statements of *opinion* that imply false facts, it acknowledged in a footnote that the Fourth and D.C. Circuits have applied a heightened standard to statements of *fact* that imply false facts. 56 F.3d 1147, 1152 n.9 (9th Cir. 1995).

<sup>116</sup> 930 F.2d 662 (9th Cir. 1990).

<sup>117</sup> *Id.* at 681.

<sup>118</sup> 145 F.3d 1053 (9th Cir. 1998).

<sup>119</sup> *See id.* at 1064.

<sup>120</sup> 639 F.2d 54 (2d Cir. 1980).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 56-58.

<sup>123</sup> *See id.* at 55-58. For example, the headline of the article was, “BUDDY WE HARDLY KNEW YA”; the article repeatedly noted that “[the victim] took the lie detector test and passed; [the defendant] took it three times and failed each time”; and the article quoted the victim as having accepted the settlement as advice from her attorney, who found that she was “not . . . well enough to go on with the case,” despite the crime lab expert’s opinion that this was “one of the most clear cut cases of rape he had ever processed.” *Id.* at 56-57.

ultimately concluded that the alleged implications were “strong,” “clear,” and “fair.”<sup>124</sup> The court came to its conclusions without applying any special standard.<sup>125</sup>

Subsequent Second Circuit cases have left claims of implied defamation unchanged.<sup>126</sup> In *Herbert v. Lando*,<sup>127</sup> the court acknowledged in dicta that claims based on defamatory implications or inferences may be actionable, but it did not establish a standard to be applied to such claims.<sup>128</sup> Likewise, the court in *Levin v. McPhee*<sup>129</sup> determined, in the context of a motion to dismiss, that the defendant’s statements were capable of a defamatory meaning, even though the alleged defamation was based on “implications” and “connotations.”<sup>130</sup> In a footnote, the court noted that it would “neither consider nor decide . . . the proper standard to be applied to a motion to dismiss a claim of ‘defamation by implication’ ” under New York law.<sup>131</sup> Although the court was applying New York State law in this diversity case, it is notable that the Second Circuit, a federal court, did not find any First Amendment or other constitutional issues with the implied defamation claim.

The Eighth Circuit likewise does not apply a heightened standard to implied defamation claims, although it has expressed First Amendment concerns with such actions. In older, pre-*Milkovich* opinions, the Eighth Circuit had only considered implied defamation claims in the context of evaluating whether the statements constituted protected opinion.<sup>132</sup> The court first declared in *Janklow v. Newsweek*, after conducting a four-factor analysis to decipher fact versus opinion, that the First Amendment does not allow a plaintiff to recover on the basis of unsaid implications because they are too “im-

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<sup>124</sup> *Id.* at 60.

<sup>125</sup> *See Cianci*, 639 F.2d at 60.

<sup>126</sup> In *Biro v. Condé Nast*, the Southern District of New York adopted the standard that the Fourth Circuit, D.C. Circuit, and numerous New York State courts have articulated—namely, that the plaintiff must be able to prove that the defendant intended or endorsed the defamatory inference. 883 F. Supp. 2d 441, 464-66 (S.D.N.Y. 2012). In its discussion, the court commented that “neither the New York Court of Appeals nor the Second Circuit has established the standard to be applied on a motion to dismiss a defamatory implication claim.” *Id.* at 464.

<sup>127</sup> 781 F.2d 298 (2d Cir. 1986).

<sup>128</sup> *Id.* at 307.

<sup>129</sup> 119 F.3d 189 (2d Cir. 1997).

<sup>130</sup> *Id.* at 195.

<sup>131</sup> *Id.* at 196 n.5.

<sup>132</sup> *See Janklow*, 788 F.2d 1300; *Price*, 881 F.2d 1426.

precise” to be actionable.<sup>133</sup> To conclude otherwise would “intrud[e] too closely into questions of editorial judgment.”<sup>134</sup> Furthermore, it would be too difficult to prove the defamatory or false nature of an unstated implication.<sup>135</sup> Three years later, while applying the same four-factor test, the Eighth Circuit boldly declared in *Price v. Viking Penguin* that it does “not recognize defamation by implication.”<sup>136</sup> In neither *Janklow* nor *Price* did the Eighth Circuit use a heightened standard by requiring the plaintiff to demonstrate the defendant’s intent, as has become customary in other circuits.<sup>137</sup> Instead, the court engaged in an analysis of whether the impliedly defamatory statement was actionable fact or protected opinion.<sup>138</sup> The court in both cases concluded that the imprecise nature of the defamatory implications supported a finding of constitutionally protected opinion.<sup>139</sup>

In *Toney v. WCCO Television*,<sup>140</sup> the Eighth Circuit expounded upon its previous findings in *Janklow* and *Price*, and it also reconsidered them in light of the Supreme Court decision in *Milkovich*.<sup>141</sup> The district court in *Toney* had interpreted the *Janklow* and *Price* decisions as having rejected any and all actions for implied defamation.<sup>142</sup> On appeal, the Eighth Circuit disagreed with the district court’s interpretation of these decisions for two reasons. First, it noted that its previous decisions in *Janklow* and *Price* merely established that a defamatory implication cannot satisfy the “precision” factor in its four-factor fact/opinion test, not that defamatory implications are never actionable.<sup>143</sup> Second, the court held that in the wake of *Milkovich*, a four-factor test that distinguishes between fact and opinion is no longer appropriate, and that “*Milkovich* made clear that implications, like plain statements, may give rise to a defamation claim.”<sup>144</sup>

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<sup>133</sup> *Janklow*, 788 F.2d at 1302. The court in *Janklow* applied the same four-factor test first articulated in *Ollman v. Evans*: (1) “the specific language used”; (2) “the degree to which the statement [is] verifiable”; (3) “the immediate context of the . . . statement”; and (4) “the broader social context into which the statement fits.” 750 F.2d at 979-84.

<sup>134</sup> *Janklow*, 788 F.2d at 1304.

<sup>135</sup> *Id.*

<sup>136</sup> *Price*, 881 F.2d at 1432.

<sup>137</sup> See discussion *supra* Part V.A.

<sup>138</sup> *Price*, 881 F.2d at 1431-33; *Janklow*, 788 F.2d at 1302-05.

<sup>139</sup> *Price*, 881 F.2d at 1432; *Janklow*, 788 F.2d at 1302-04.

<sup>140</sup> 85 F.3d 383 (8th Cir. 1996).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 390.

<sup>143</sup> *Id.* at 393; see also *supra* note 133 and accompanying text.

<sup>144</sup> *Toney*, 85 F.3d at 394.

The court stressed that it is not only possible but *necessary* that claims for implied defamation be allowed, lest the law allow defamers to “accomplish indirectly what they could not do directly.”<sup>145</sup> Nonetheless, the Eighth Circuit has yet to apply a standard to defamatory implications that differs from the standard for express defamation.

## VI. IMPLIED DEFAMATION IN NEW YORK

It is not surprising that the inconsistent standards for implied defamation occur not only at the federal level, but also at the state level. Few New York courts have directly addressed defamation by implication, but those that have addressed it have used differing approaches. Many of the older decisions did not acknowledge separate actions or standards for what has come to be known today as “implied defamation,” and they instead addressed allegations of defamatory implications in less direct ways. Over time, however, the New York courts have begun to adopt the more stringent standard seen in many of the federal circuit courts of appeals.

### A. New York Court of Appeals

The New York Court of Appeals first considered a claim analogous to implied defamation in *November v. Time*.<sup>146</sup> An attorney sued a magazine publisher and author of an article that allegedly defamed him.<sup>147</sup> While he did not contest the literal statements as published, he argued that when read in context, the statements suggested that he was “incompeten[t]” and “unethical.”<sup>148</sup> The court found no directly defamatory statements, but held that the jury should be instructed to decide whether the context would render them defamatory—specifically, “whether a libelous intentment would naturally be given to it by the reading public acquainted with the parties and the subject matter.”<sup>149</sup> This decision occurred before *New York Times Co. v. Sullivan* and before courts had ever given much consideration to First Amendment concerns in defamation cases.

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<sup>145</sup> *Id.* at 395.

<sup>146</sup> 194 N.E.2d 126 (N.Y. 1963).

<sup>147</sup> *Id.* at 127.

<sup>148</sup> *See id.*

<sup>149</sup> *Id.* at 129 (internal quotations omitted).

Over a decade later, the Court of Appeals considered the “substantial truth” doctrine in *Rinaldi v. Holt*.<sup>150</sup> There, a judge sued the publisher and author of a book that described the judge as “incompetent,” “probably corrupt,” and “suspiciously lenient.”<sup>151</sup> The plaintiff alleged that the defendants’ statements were defamatory by omitting important details that would have negated the defamatory inferences.<sup>152</sup> The court concluded that the defendant’s omission of minor details when everything else was substantially true did not result in an actionable defamation claim.<sup>153</sup> In this post-*Sullivan* decision, the Court of Appeals emphasized the complex struggle between the constitutional interests of free speech and press versus an individual’s right to be compensated for defamation.<sup>154</sup> Yet the court expressed that “in areas of doubt and conflicting considerations, it is thought better to err on the side of free speech.”<sup>155</sup>

The closely related issue of an opinion that implies knowledge of facts was addressed in *Steinhilber v. Alphonse*.<sup>156</sup> The plaintiff was a union member who violated a strike order by continuing to work.<sup>157</sup> Thereafter, the defendant, vice president of the union, recorded a telephone message discussing the plaintiff’s actions and sent it to all the union members.<sup>158</sup> Among other things, the message described the plaintiff as a “scab,” a “failure,” and as lacking “talent, ambition, and initiative.”<sup>159</sup> The plaintiff argued that all of the defendant’s statements were suggestive of untrue facts, while the defendant claimed that these were protected expressions of opinion.<sup>160</sup> The court ultimately found that in context, the defendant’s statements did not suggest any factual assertions and were merely subjective expressions meant to be taken figuratively.<sup>161</sup>

In *Armstrong v. Simon & Schuster*,<sup>162</sup> the Court of Appeals

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<sup>150</sup> 366 N.E.2d 1299 (N.Y. 1977).

<sup>151</sup> *Id.* at 1303.

<sup>152</sup> *See id.* at 1307.

<sup>153</sup> *Id.* at 1308.

<sup>154</sup> *Id.* at 1308-09.

<sup>155</sup> *Rinaldi*, 366 N.E.2d at 1309 (citing *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977)).

<sup>156</sup> 501 N.E.2d 550 (N.Y. 1986).

<sup>157</sup> *Id.* at 551.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See id.* at 551, 554-55.

<sup>161</sup> *Steinhilber*, 501 N.E.2d at 554-56.

<sup>162</sup> 649 N.E.2d 825 (N.Y. 1995).

explicitly recognized defamation by implication as a valid cause of action, but declined to decide the applicable standard.<sup>163</sup> The plaintiff was a criminal defense attorney who was allegedly defamed in the defendant's book that depicted—through implications—the plaintiff as having encouraged his client to commit perjury.<sup>164</sup> The court determined that the claims should survive the defendant's motion to dismiss since they were “reasonably susceptible of a defamatory connotation.”<sup>165</sup> Since it had determined this threshold issue, the court did not reach the issue of the standard of proof in what it acknowledged to be a claim of “defamation by implication.”<sup>166</sup> Yet it correctly noted that courts throughout the country have adopted differing standards in light of the concern that “substantially truthful speech be adequately protected.”<sup>167</sup>

### B. New York Appellate and Trial Courts

The First Department in *Cole Fischer Rogow, Inc. v. Carl Ally, Inc.*<sup>168</sup> considered what it called defamation “by innuendo.”<sup>169</sup> The plaintiff advertisement agency alleged that the defendant's advertisement referred to the plaintiff by innuendo when it criticized the plaintiff's “type of advertising” and described it as “deceptive,” “inflammatory,” and “exploit[ative],” among other things.<sup>170</sup> In its discussion, the court noted that libel falls into two categories: libel per se, which is defamatory on its face, and libel by innuendo, which requires a showing of extrinsic facts or an alternate meaning not seen on its face.<sup>171</sup> The court here merely determined whether the statements were “capable” of a defamatory meaning without applying any particular standard of fault.<sup>172</sup> Ultimately, the First Department concluded that the defendant's statements were not capable of a defamatory meaning since “only a strained, unreasonable and unjustified in-

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 826-28.

<sup>165</sup> *Id.* at 829.

<sup>166</sup> *Id.*

<sup>167</sup> *Armstrong*, 649 N.E.2d at 829.

<sup>168</sup> 288 N.Y.S.2d 556 (App. Div. 1st Dep't 1968).

<sup>169</sup> *Id.* at 562.

<sup>170</sup> *Id.* at 560.

<sup>171</sup> *See id.* at 562.

<sup>172</sup> *Id.*

nuendo” would have supported the plaintiff’s contention.<sup>173</sup>

The first New York court to apply the heightened “intent/endorsement” standard was the New York County Supreme Court in *Rappaport v. VV Publishing Corp.*<sup>174</sup> The plaintiff, a judge, sued the author and publisher of an article that stated that the plaintiff was assigned a “disproportionate number of police felony cases” and questioned the “fishy” numbers since he had previously represented police officers as a criminal defense lawyer.<sup>175</sup> The plaintiff claimed that the article defamed him with “false implications,” “misimpressions,” and “misleading omissions,” all of which suggested that he was engaged in judicial misconduct.<sup>176</sup> The court here cited to the Fourth Circuit’s *Chapin* standard for implied defamation before analyzing the plaintiff’s claims.<sup>177</sup> Specifically, the court noted the *Chapin* standard for defamation by implication: a plaintiff must make an “especially rigorous showing” where stated facts are literally true since the Constitution protects truthful statements.<sup>178</sup> The plaintiff must be able to show that the defendant “intends or endorses the inference.”<sup>179</sup> Relying on these principles, the court concluded that the defendant’s statements lacked evidence of intent or endorsement of a defamatory meaning.<sup>180</sup>

Interestingly, a more recent Third Department decision did not cite the *Chapin* standard or any similar standard in its analysis of the plaintiff’s implied defamation claim. In *Proskin v. Hearst Corp.*,<sup>181</sup> the defendants published an article that discussed how the plaintiff, an attorney, had made changes to a client’s will. According to the plaintiff, the article was impliedly defamatory for suggesting that the plaintiff had committed a felony by “alter[ing the] client’s will to leave \$49,000 of the elderly woman’s money to [the plaintiff’s] own children,” when the plaintiff had in fact made these changes at the client’s request.<sup>182</sup> The court’s discussion acknowl-

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<sup>173</sup> *Cole Fischer*, 288 N.Y.S.2d at 563.

<sup>174</sup> 618 N.Y.S.2d 746 (Sup. Ct. N.Y. County 1994), *aff’d*, *Rappaport v. VV Publ’g Corp.*, 637 N.Y.S.2d 109 (App. Div. 1st Dep’t 1996).

<sup>175</sup> *Id.* at 747.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 748 (citing *Chapin*, 933 F.2d at 1092-93).

<sup>178</sup> *Id.* (quoting *Chapin*, 933 F.2d at 1092-93).

<sup>179</sup> *Rappaport*, 618 N.Y.S.2d at 748 (quoting *Chapin*, 933 F.2d at 1092-93).

<sup>180</sup> *Id.* at 748-49.

<sup>181</sup> 787 N.Y.S.2d 506, 507 (App. Div. 3d Dep’t 2005).

<sup>182</sup> *Id.*

edged that the doctrine of substantial truth can protect a defendant's statements.<sup>183</sup> Since the defendant's statements in *Proskin* were not facially false, and "innuendo or adverse inferences are not enough to establish that the statement was false," substantial truth was a complete defense here.<sup>184</sup> This observation is not inconsistent with other New York courts' implied defamation standards, but unlike *Rappaport* and *Stepanov*, it does not allow the plaintiff to demonstrate falsity by additionally showing the defendant's intent.

In *Levy v. Johnson*,<sup>185</sup> one of the most recent New York decisions aside from *Stepanov*, the Nassau County Supreme Court cited language from both *Chapin* and *Rappaport* in deciding whether a defendant's statements were impliedly defamatory. In *Levy*, the defendants aired a news story that, according to the plaintiff (a landlord), "deliberately omitted" important details and made the plaintiff out to be a landlord who discriminated against prospective tenants infected with HIV/AIDS.<sup>186</sup> The court commented that implications and impressions may lead to defamation, but only with the additional proof that the defendant "intended or endorsed the inference."<sup>187</sup> Since that was not the case in *Levy*, there was no implied defamation.<sup>188</sup>

## VII. STEPANOV REVISITED

The First Department in *Stepanov* accurately addressed the complex issues it faced when a private individual sued for implied defamation regarding a matter of public concern. While its discussion lacked detail that would have proved helpful to its analysis—such as a broader and more elaborate survey of this nebulous area of law—its ultimate conclusions were nevertheless justified.

The First Department recognized that it needed to weigh the interest of the plaintiffs' defamation claim against the defendant's First Amendment interest in publishing "substantially truthful" statements.<sup>189</sup> In so doing, the court cited decisions by the Fourth and

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 508.

<sup>185</sup> No. 2851/09, 2012 N.Y. Misc. LEXIS 1198 (Sup. Ct. Nassau County Feb. 22, 2012).

<sup>186</sup> *Id.* at \*5-6.

<sup>187</sup> *Id.* at \*14 (citing *Chapin*, 993 F.2d at 1092-93).

<sup>188</sup> *Id.*

<sup>189</sup> *Stepanov*, 987 N.Y.S.2d at 43.

D.C. Circuits, both of which have adopted a standard for implied defamation that requires a showing that the defendant “intended or endorsed” the defamatory inference.<sup>190</sup> This appears to be the approach taken by the majority of the federal circuit courts that have encountered claims of defamation by implication. These circuits recognize that defamation claims based on unstated implications raise serious First Amendment concerns, and the standard of fault must therefore be heightened accordingly. The *Stepanov* court took these issues into consideration and followed federal precedent appropriately. The *Stepanov* court likewise followed recent New York precedent, which has also embraced the intent/endorsement standard, as seen in *Rappaport* and *Levy*.

Moreover, the *Stepanov* court properly addressed the implied defamation standard as distinct and independent of the public figure actual malice standard. Several circuit courts have “conflated” these two issues, as the plaintiffs in *Stepanov* attempted to do when they challenged the stringent implied defamation standard on the basis that they were “not public figures.”<sup>191</sup> The *Stepanov* court remarked that while the public figure actual malice standard is a subjective inquiry that contemplates the publisher’s state of mind when it created the statements, the implied defamation intent/endorsement standard tests whether the statement is objectively capable of a defamatory implication, and it is not a test of fault.<sup>192</sup> Courts that conflate these issues make it difficult to distinguish the appropriate standard when the plaintiff is not a public figure because they only address implied defamation in the context of actual malice, which is already a heightened standard. The court in *Stepanov* separated the two concepts and addressed them individually, which made the distinction perfectly clear.

### VIII. CONCLUSION

The law governing defamation by implication is one that lacks consistency among American courts, state and federal alike, particularly in light of the unclear laws regarding defamation generally and its constitutional limitations. Nevertheless, there is a majority consensus that the First Amendment free speech and press clauses limit defamation claims when an allegedly defamatory statement has

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<sup>190</sup> *Id.* (quoting *Chapin*, 993 F.2d at 1093; *White*, 909 F.2d at 520).

<sup>191</sup> *Id.* at 44.

<sup>192</sup> *Id.*

more than one possible meaning. Most of the federal circuit courts of appeals agree that a heightened standard is required to prove a defamatory implication, regardless of whether it is in the public or private context. In recent years, the State of New York has joined these circuits in applying similar restrictions: when a statement only implicitly defames a plaintiff, the plaintiff must be able to demonstrate that the defendant intended the defamatory implication. This standard properly balances the two important competing interests of a plaintiff's reputation and a defendant's right to free speech.

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