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The Problem of Indirect Defamation: Omission of Material Facts, Implication, and Innuendo

David M. Cohn†

The *Washington Post* reports that Bob Hoffman, a weight-lifting coach, sold valueless protein supplements called "Hoffman's High Protein Tablets."[1] The article also reports that Hoffman drives a Rolls Royce and that many of his athletes were later discovered to be using anabolic steroids.[2] Hoffman sues the *Washington Post*, claiming that the article falsely implied that he enriched himself by selling the protein substitutes.[3] The newspaper defends by claiming that the statements taken individually are true and thus not defamatory.[4] Should Hoffman recover damages?

Traditionally, the law of defamation has recognized truth as a complete defense. Indirect defamation[5] cases, however, blur the line between truth and falsehood. A factually correct article may omit or falsely imply a material fact that makes the article just as harmful as a blatantly false report. Courts have continually struggled with this problem without reaching a consensus. This Comment examines the current law of indirect defamation and suggests a model standard to govern these cases.

The model standard proposed in this Comment attempts to address the concerns that make indirect defamation cases difficult. The press cannot guard as easily against false implications[6] and

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[1] *Hoffman v Washington Post Co.*, 433 F Supp 600, 602 (D DC 1977), aff'd, 578 F2d 442 (DC Cir 1978).

[2] Id.

[3] Id.

[4] Id at 602-03.

[5] In this Comment, indirect defamation is defined as those statements whose defamatory nature arises from omissions, implications, or innuendo. In contrast, direct defamation consists of those statements whose defamatory nature arises solely from the plain meaning of the words.

[6] In this Comment, implication is defined as "intendment or inference, as distinguished from the actual expression of a thing in words." *Black's Law Dictionary* 754 (West Publishing Co., 6th ed 1990). Similarly, innuendo consists of "indirect or subtle implication in words or expression, usually derogatory." Id at 789.

material omissions[7] as it can against false statements of fact. Thus, the model standard requires that plaintiffs both negate the substantial truth of the publication in implication cases and prove that an omitted fact caused an actual defamatory implication in omission cases. Furthermore, the model standard, in order to afford the media adequate protection, provides for enhanced scienter requirements; the standard recognizes that because the media cannot easily guard against omissions or implications, the plaintiff should be required to show a heightened level of press irresponsibility. Thus, the model standard requires an intent to deceive or omit facts in public figure suits and reckless implication or omission in suits by private plaintiffs.

Part I of this Comment explores the similarities between indirect defamation and the common law tort of libel per quod. Part II investigates the courts' common law response to indirect defamation claims by examining both British cases and pre-*New York Times Co. v Sullivan*[8] American cases. Part II also discusses the current state of indirect defamation law; in particular, it addresses *New York Times* and the constitutionalization of defamation law, as well as specific state and lower federal court treatments of indirect defamation cases. Part III evaluates the more recent cases and suggests a model standard under which courts should address indirect defamation cases.[9]

I. INDIRECT DEFAMATION AND LIBEL PER QUOD

The distinction between direct and indirect defamation is similar to that between libel per se and libel per quod. Because the damaging effect of libel per quod is likely to be less severe than the harm caused by libel per se, many states have held that libel per quod is actionable only with proof of damage. If a plaintiff fails to plead special or actual damages, an action for libel per quod cannot be maintained.[10]

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[7] In this Comment, the term "omission" means the omission of material fact(s) causing an otherwise non-defamatory statement to become defamatory.

[8] 376 US 254 (1964).

[9] This Comment devotes itself to a discussion of indirect defamation law in cases involving media defendants, defined as news reporting organizations, such as newspapers or television stations, that are defendants in defamation actions. Neither the discussion nor the model standard is intended to apply to defamation cases brought against non-media defendants.

[10] William L. Prosser, *Libel Per Quod*, 46 Va L Rev 839, 841 (1960). However, proof of damage was not required for libel per quod when the publication fell into one of four cate-

Ellsworth v Martindale-Hubbell Law Directory[11] illustrates the courts' treatment of libel per quod claims. In *Ellsworth*, the plaintiff brought a defamation claim based on an attorney rating published in the Martindale-Hubbell directory. The defamation could not be established, however, without reference to a confidential key interpreting the rating.[12] Thus, the alleged libel was not apparent based on the publication alone.[13] Because the plaintiff did not plead special damages, the case was dismissed.[14]

For many years, American common law followed the British approach and did not distinguish between libel per se and libel per quod.[15] In the late nineteenth century, however, American courts modified that approach and began to distinguish between the two actions.[16] Libel per se includes statements whose defamatory nature is "apparent upon the face of the publication itself, so that it is conveyed to any reader entirely ignorant of the facts, without resort to any other source."[17] Such libel is actionable without proof of special or actual damages. Libel per quod, in contrast, depends on the existence of extrinsic facts that are known to the reader but not mentioned in the publication.[18] Because libel per quod depends on the audience's knowledge of extrinsic facts, its damaging effect is likely to be smaller than that of libel per se because only a select number of readers will understand the defamatory nature of the libelous statement.

This two-tiered special damages system of libel per se and libel per quod has recently fallen into disfavor.[19] Indeed, the Restatement (Second) of Torts has endorsed the British common law position that all libel is actionable without proof of special or actual damages.[20] Thus, the critical underlying distinction between libel per se and libel per quod has been eliminated. Although *New*

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gories: imputation of crime, loathsome disease, defamation affecting business, or unchastity on the part of a woman. Id.

[11] 66 ND 578, 268 NW 400 (1936).

[12] 268 NW at 401.

[13] See William L. Prosser, *More Libel Per Quod*, 79 Harv L Rev 1629, 1643 (1966). See also *Macri v Mayer*, 22 Misc 2d 429, 201 NYS2d 525 (Sup Ct 1964) (article stated that someone other than the plaintiff had authored the advertising slogan, although plaintiff had stated to others that she authored the slogan).

[14] 268 NW at 407.

[15] Prosser, 46 Va L Rev at 843 (cited in note 10).

[16] Id at 843-44.

[17] Id at 839-40.

[18] Id at 840.

[19] See Richard A. Epstein, *Cases and Materials on Torts* ch 16 at 1098 (Little, Brown & Co., 5th ed 1990).

[20] Restatement (Second) of Torts § 569, comment b at 183 (1977).

York Times and *Gertz v Robert Welch, Inc.*[21] have transformed libel into a matter of federal constitutional law, the problem of indirect defamation may provide the states with the opportunity to reexamine the need for a bifurcated system of defamation law.

Indirect defamation and libel per quod are similar but not identical. In both types of cases, the defamation arises from the context in which the communication was made. Unlike indirect defamation, however, libel per quod may encompass blatantly false assertions.[22] For example, in *Solotaire v Cowles Magazines, Inc.*,[23] the defendant published an article stating that the plaintiff's husband was a bachelor. In fact, the plaintiff and her husband had been married for twenty-two years. The plaintiff alleged that this error constituted libel because it implied "unchaste and indecent cohabitation."[24] Although the article stated a falsehood, the article's defamatory implication depended upon the reader's knowledge that the plaintiff and her husband in fact lived together. In contrast, indirect defamation only involves cases in which the challenged communication relays the truth. Nevertheless, similarities between libel per quod and indirect defamation remain. Libel per quod depends on the reader's knowledge of extrinsic facts. Likewise, indirect defamation depends on the reader's assumption of facts that are not explicitly stated. In either case, the publication in and of itself is not defamatory; rather, the defamation arises from the context of the publication.

II. Analysis of Current Law

A. Indirect Defamation and the Common Law

Special standards for indirect defamation are relatively new and uniquely American. Before *New York Times*, American courts decided such cases similarly to British common law courts. Early American and current British defamation law suggest that the new, bifurcated American approach may be unnecessary.

Before *New York Times*, courts treated indirect and direct defamation cases similarly.[25] Most courts adopted some variant of

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[21] 418 US 323 (1974).

[22] Libel per quod arises from the defamatory nature of the implication or inference drawn from the false statement. A statement that is libelous per quod may conceivably be libelous per se as well.

[23] 107 NYS2d 798 (Sup Ct 1951).

[24] Id at 799.

[25] At common law, courts presumed that alleged defamation was false. See *Harrison v Winchell*, 207 Misc 275, 137 NYS 82 (Sup Ct 1955). Thus, a defendant had to plead truth as

the "reasonable interpretation" test still used by British common law courts.[26] The courts determined the meaning of ambiguous language, innuendo, and implications by objective tests based on reader perception. For example, in *Carwile v Richmond Newspapers, Inc.*,[27] the Virginia Supreme Court ruled that "the meaning of the alleged defamatory language cannot, by innuendo, be extended beyond its ordinary and common accept[ance]."[28] Likewise, in *Richwine v Pittsburgh Courier Publishing Co., Inc.*,[29] a Pennsylvania Superior Court stated that it would allow a defamation action if "[t]he meaning of a communication is that which the recipient correctly or mistakenly but reasonably understands that it was intended to express."[30] Thus, at common law, the defamatory nature of a statement depended on an objective test based on reasonableness and ordinary meaning.[31]

B. Libel and the Constitution

At common law, libel was a strict liability tort.[32] In *New York Times*, the Supreme Court eradicated this common law rule. The

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an affirmative defense. The defendant was required to prove the truth of the communication's "reasonable" or "natural and ordinary" meaning rather than the substantial truth of the individual statements.

[26] The British test is "whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense." *Lewis v Daily Telegraph, Ltd.*, 2 All ER 151, 154 (House of Lords 1963), quoting *Capital and Counties Bank v George Henty & Sons*, 7 App Cas 741, 745 (1882) (Lord Selborne).

[27] 196 Va 1, 82 SE2d 588 (1954).

[28] 82 SE2d at 592. See also *Longey v Slator*, 118 Vt 251, 108 A2d 396, 399 (1954); *Southeastern Newspapers, Inc. v Walker*, 76 Ga App 57, 44 SE2d 697, 700 (1947); *Thompson v Osawatomie Publishing Co.*, 159 Kan 562, 156 P2d 506, 508 (1945); *Gough v Tribune-Journal Co.*, 75 Idaho 502, 275 P2d 663, 666 (1954); *MacLeod v Tribune Publishing Co.*, 133 Cal App 2d 486, 343 P2d 36, 42 (1959).

[29] 186 Pa Super 644, 142 A2d 416 (1958).

[30] 142 A2d at 417, quoting Restatement (First) of Torts § 563 (1938).

[31] A minority of American courts departed from the ordinary meaning approach. Some pre-*New York Times* courts treated indirect defamation like libel per quod. In *Brodsky v Journal Publishing Co.*, 73 SD 343, 42 NW2d 855 (1950), the court required that a plaintiff plead additional facts to explain the defamatory nature of the statement in an action for libel by innuendo. 42 NW2d at 857. In addition, even prior to the emergence of libel per quod, some courts drew a distinction between innuendo and direct libel. For example, *McLaughlin v Russell*, 17 Ohio 475 (1848), allowed examination of witnesses with knowledge of the circumstances to clarify an ambiguous, allegedly defamatory statement. Id at 480-81. Similarly, the court in *Van Derveer v Sutphin*, 5 Ohio St 294 (1855), allowed the defendant to plead partial truth or honest belief as mitigating factors. Id at 302. *McLaughlin* and *Van Derveer* demonstrate that courts afforded defendants extra protection, including mitigation and explanatory testimony, when they were unsure of a statement's defamatory nature.

[32] See Epstein, *Cases and Materials on Torts* ch 16 at 1100 (cited in note 19).

Court, reasoning that the First Amendment was designed to "assure [an] unfettered exchange of ideas,"[33] ruled that a public official may not recover for defamation relating to his official duties without showing "actual malice" on the part of the defendant.[34] The Court held that to recover, the plaintiff must show that the defendant made the statement with "knowledge that it was false or with reckless disregard of whether it was false or not."[35] The Supreme Court expanded *New York Times* in *Gertz v Robert Welch, Inc.*[36] by requiring that private persons[37] show fault in order to recover for defamation.[38] In cases involving matters of public concern, private plaintiffs must show fault to collect actual damages and actual malice to recover presumed and punitive damages.[39] Because private persons have not voluntarily subjected themselves to public scrutiny, they retain a greater interest in the sanctity of their reputations.[40] Speech of public concern, however, deserves broad First Amendment protection. Thus, the *Gertz* Court reasoned that defamation actions by private persons involving matters of public concern merit an intermediate standard.[41]

To further "ensure that true speech on matters of public concern is not deterred," the Supreme Court, in *Philadelphia Newspapers, Inc. v Hepps*,[42] placed the burden of proving falsity on private figure plaintiffs.[43] *Hepps* completed the transition of defamation law from common law to constitutional law. *Hepps* and *New York Times* reasoned that the First Amendment guarantees free discussion of matters of public concern. Under this standard, media defendants are immune from defamation suits unless they print reckless falsehoods (for public figure plaintiffs) or negligent non-truths (for private plaintiffs).

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[33] *New York Times*, 376 US at 269, quoting *Roth v United States*, 354 US 476, 484 (1957).

[34] Id at 279-80.

[35] Id at 280.

[36] 418 US at 323.

[37] A private figure is neither a public official (for example, a holder of public office) nor a public figure (for example, an entertainer who has placed himself in the public limelight). See id at 332.

[38] Id at 346. Private persons in cases not involving matters of public concern may collect presumed and punitive damages without showing actual malice. See *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 US 749, 761 (1985).

[39] *Gertz*, 418 US at 347-49.

[40] Id at 345.

[41] Id at 347.

[42] 475 US 767 (1986).

[43] Id at 776-77. The common law presumed all alleged libel to be false. The defendant bore the burden of pleading and proving the truth of the statement.

Indirect defamation exposes a possible flaw in the constitutional standard. *New York Times*, *Gertz*, and *Hepps* all fail to consider the scenario in which a media defendant prints only true statements but nonetheless defames the plaintiff by omitting material facts or implying unstated occurrences. Under a strict application of the *Times-Gertz-Hepps* analysis, such statements cannot be actionable. Indirect defamation claims arise out of true reports, making the *Hepps* falsity requirement seemingly impossible to meet. But omissions can, in some instances, pose concerns as serious as outright lies.

In *Milkovich v Lorain Journal*,[44] the Supreme Court modified the opinion privilege created by *Gertz*.[45] Chief Justice Rehnquist announced the new standard that only "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection."[46] The difference between *Gertz* and *Milkovich* is dramatic. For example, the statement, "I think the Congressman lied in his campaign speech," would receive protection under the *Gertz* opinion privilege. Under the *Milkovich* standard, however, the statement would be actionable because the assertion that the Congressman lied is provably false.

Milkovich directly affects indirect defamation analysis. Prior to *Milkovich*, courts could often avoid indirect defamation analysis by classifying statements, under *Gertz*, as constitutionally protected opinion. For example, in *Price v Viking Penguin, Inc.*,[47] the plaintiff charged that a book implied he was guilty of witness tampering,[48] obstructing justice,[49] and investigatory harassment.[50] The Eighth Circuit affirmed a grant of summary judgment for the defendants, ruling that the statements were constitutionally protected opinion.[51] *Milkovich* forecloses the Eighth Circuit's analysis;

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[44] 497 US 1 (1990).

[45] The *Gertz* Court held that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 US at 339-40.

[46] *Milkovich*, 497 US at 20.

[47] 881 F2d 1426 (8th Cir 1989).

[48] Id at 1438.

[49] Id at 1439.

[50] Id at 1445.

[51] 881 F2d at 1447. See also *Saenz v Playboy Enterprises, Inc.*, 653 F Supp 552, 568 (N D Ill 1987) (holding that the charge that the plaintiff knew or should have known of the torture going on around him was protected opinion).

under *Milkovich*, the statements would not have qualified as protected opinion because the charges were provably false.[52]

Milkovich complicates matters by mooting much of the *Gertz* analysis and throwing more cases into the arena of indirect defamation. After *Milkovich*, media defendants now face a more difficult task in asserting their First Amendment rights. In order to maintain the desired level of press protection in indirect defamation cases, the courts must use the falsity analysis of *Hepps* exclusively. The courts may gradually expand the *Hepps* falsity requirement by including part of what was formerly the *Gertz* opinion privilege. For example, in *Unelko Corp. v Rooney*,[53] the Ninth Circuit held that Andy Rooney's assertion that a product "didn't work" could not be protected as opinion under *Milkovich*.[54] The court reasoned, however, that Unelko failed to meet its burden of proving falsity.[55] Without explicitly saying so, the Ninth Circuit may have endorsed the view that *Hepps* now encompasses at least part of what was formerly the *Gertz* opinion privilege.

C. Indirect Defamation Cases

Several courts have addressed the question of whether plaintiffs[56] may recover against media defendants for indirect defamation.[57] The holdings are not consistent. Indirect defamation involves two types of cases: (1) innuendo and implication cases and (2) omission cases. Courts have proposed a variety of possible standards for both forms of indirect defamation. The holdings can be loosely grouped into four categories.

1. *No libel by innuendo.*

A few states hold that libel cannot arise from innuendo or implication. For example, in *Strada v Connecticut Newspapers, Inc.*,[58] the Connecticut Supreme Court ruled that "[w]hen any inference or innuendo does not arise from the omission of material

[52] Price either was or was not guilty of witness tampering, obstructing justice, and investigatory harassment. These are indictable offenses that are provable.

[53] 912 F2d 1049 (9th Cir 1990).

[54] Id at 1053.

[55] Id at 1057.

[56] In the analysis that follows, all but three cases involve public figure plaintiffs. *Nichols*, *Adams*, and *Locricchio* involve private plaintiffs and matters of public concern.

[57] The cases cited are not exhaustive of all indirect defamation decisions, but they do represent all significant viewpoints.

[58] 193 Conn 313, 477 A2d 1005 (1984).

facts . . . the plaintiff may not recover for libel by innuendo."[59] In *Strada*, a state senator alleged that an article describing the "close relationship" between an attorney he sought to appoint as local prosecutor and an "important organized crime figure" defamed him by implication.[60] The court, citing the high degree of First Amendment press protection, refused to recognize the claim. The story contained no false statements, the court reasoned, and the "media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory implication arising from the report of those true facts."[61]

De Falco v Anderson[62] echoed the sentiment of *Strada*. The challenged article contained a picture of the plaintiff, a former congressional aide, prominently displayed in a story about congressmen with mafia ties.[63] A New Jersey appellate court affirmed a directed verdict for the defendant. Because the article contained no falsehoods or omissions of material facts, the court determined that "no libel by innuendo of a public figure" could arise.[64] Furthermore, the court ruled that there could be no defamation by "the editorial choice of layout."[65] Finally, *De Falco* adopted *Strada*'s suggestion that omission of material facts could constitute defamation.[66]

Likewise, in *Mihalik v Duprey*,[67] a Massachusetts appellate court ruled that allowing recovery for defamation by implication was inconsistent with *New York Times*.[68] In *Mihalik*, the defendant published a "riddle" in a newsletter with five "clues," each of which was true. The plaintiff alleged, however, that the compilation, taken as a whole, was defamatory because it implied that the plaintiff engaged in unethical activity.[69] The court held that "[i]t

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[59] 477 A2d at 1012.

[60] Id.

[61] Id. See also *Schaefer v Lynch*, 406 S2d 185 (La 1981), in which the Louisiana Supreme Court held that *New York Times* precludes public figures from recovering for defamation by implication but stated in dicta that "truthful statements which carry a defamatory implication can be actionable [only] . . . in the case of private citizens and private affairs." Id at 188.

[62] 209 NJ Super 99, 506 A2d 1280 (1986).

[63] 506 A2d at 1281.

[64] Id at 1284, quoting *Strada*, 477 A2d at 1012.

[65] Id.

[66] See id; *Strada*, 477 A2d at 1012.

[67] 11 Mass App 602, 417 NE2d 1238 (1981).

[68] 417 NE2d at 1240-41.

[69] The riddle read: "[C]lue 1. Which elected city official does not live within . . . the ward from which he was elected? [C]lue 2. This person does not have children in the public

would be incongruous [with *New York Times*] to permit a public official to recover where statements (in some degree relevant to his official conduct) were true as far as they went."[70] Thus, similar to *Strada* and *De Falco*, *Mihalik* established a steadfast rule against defamation by implication.[71]

2. *Libel by omission of material facts.*

In recent decisions, courts have judged omissions by differing standards. In *Memphis Publishing Co. v Nichols*,[72] an article in the *Memphis Press-Scimitar* reported that Ruth Ann Nichols had been shot and treated for a bullet wound.[73] The paper reported that "the incident took place . . . after the suspect arrived at the Nichols home and found [the suspect's] husband there with Mrs. Nichols."[74] Nichols, a private figure plaintiff, claimed that by omitting the fact that several other people were present in the house as well, the article falsely implied that she and the suspect's husband were engaged in an adulterous relationship.[75] Although every fact in the article was true, the Tennessee Supreme Court ruled that the paper was not entitled to summary judgment.[76] The court assigned the media a duty of "reasonable care" in reporting the news[77] and ruled that the courts must determine "whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced."[78]

In *Diesen v Hessburg*,[79] a Minnesota appellate court adopted a modified version of the *Nichols* analysis. In *Diesen*, a factually correct article, taken as a whole, allegedly implied that Diesen, a county attorney and thus a public official, had committed misfea-

schools. [C]lue 3. He went from provisional city employee to foreman almost overnight. [C]lue 4. He is having the Trade School make him furniture for his home. [C]lue 5. It's not the fence watcher. Answer next newsletter, maybe." Id at 1239.

[70] Id at 1240.

[71] *Mihalik* may indeed go further and disallow all indirect defamation claims, including actions for omissions. Although the plaintiff made no claim that material facts were omitted, *Mihalik*, unlike *Strada* and *De Falco*, did not hold in dicta that material omissions may give rise to liability.

[72] 569 SW2d 412 (Tenn 1978).

[73] Id at 414.

[74] Id.

[75] Id.

[76] 569 SW2d at 420.

[77] Id at 418.

[78] Id at 420, quoting *Fleckenstein v Friedman*, 266 NY 19, 193 NE 537, 538 (1934).

[79] 437 NW2d 705 (Minn App 1989).

sance in his public duties.[80] The article charged that Diesen had failed to prosecute an assault case as a felony. The article omitted several facts, including that (1) the victim did not wish to go through with the trial, (2) the victim thought that drug treatment would be a more appropriate punishment for her assailant, and (3) Diesen requested a jail sentence for the perpetrator although he reduced the charges to a misdemeanor. The newspaper's editors were aware of the omissions prior to publication.[81] The court held that indirect defamation of a public figure may arise when "known facts are omitted, which could have changed the defamatory implication of the article."[82] *Diesen*'s adoption of a scienter requirement distinguishes it from *Nichols*.[83] While *Nichols* employs a standard based completely on the perceptions of a reasonable reader, *Diesen* also requires that the defendant knowingly omit facts. The *Diesen* scienter requirement severely limits the scope of libel by omission because the plaintiff must prove knowledge. Nonetheless, as *Diesen* itself illustrates, this burden is not impossible to meet.

Dixon v Ogden Newspapers, Inc.[84] created an even more stringent test for libel by omission. The plaintiffs were police officers[85] who alleged that the defendant's article implied they had illegally provided a tavern owner with information about a vice raid. The article omitted information concerning the timing of the events which would have shown that the plaintiffs had not committed any wrongdoing.[86] The court held that the article was not defamatory as a matter of law, stating that the *New York Times* malice requirement can only be satisfied if the plaintiff presents "[e]vidence that a media defendant intentionally 'avoided' the truth in its investigatory techniques or omitted facts in order to distort the truth."[87]

Dixon adopted three requirements that make its standard more stringent than the standard espoused in *Diesen*. *Dixon* re-

[80] Id at 708. The article was admittedly written by a biased newspaper reporter: "In reading Hessburg's [the reporter's] notes shortly after he left the paper, Dennis Buster, an editor for the Duluth paper [for which Hessburg wrote], found that Hessburg had lost his objectivity." Id at 707.

[81] Id at 708.

[82] 437 NW2d at 709.

[83] Additionally, the plaintiff in *Nichols* was a private person while the plaintiff in *Diesen* was a public figure. It is not clear whether this fact affected the courts' analyses.

[84] 187 W Va 120, 416 SE2d 237 (1992).

[85] Police officers qualify as public officials. See W. Page Keeton, ed, *Prosser and Keeton on the Law of Torts* § 113 at 806 (West Publishing Co., 5th ed 1984).

[86] *Dixon*, 416 SE2d at 240.

[87] Id at 244.

quires the plaintiff prove (1) the omission of material facts leading to a defamatory implication, (2) knowledge that the material facts existed, and (3) intentional omission of material facts in order to distort the truth. In contrast, under *Diesen*, plaintiffs need only satisfy the first two conditions. *Nichols*, meanwhile, requires that a private figure plaintiff meet only the first requirement.

3. *Substantial truth.*

A third category of cases allows plaintiffs to recover for indirect defamation by implication or omission only if they negate the substantial truth of the challenged communication.[88] In *Ramada Inns, Inc. v Dow Jones & Co.*,[89] a Delaware superior court held that a plaintiff has an indirect defamation action in both implication and omission cases only if "a reasonable juror could conclude that the alleged libel was more damaging in the mind of the average reader . . . than would have been a precisely truthful report."[90] This subjective standard echoes the omission test in *Nichols* but also includes implications.[91]

4. *Capable of defamatory meaning.*

Some courts, including the Court of Appeals for the District of Columbia in *White v Fraternal Order of Police*,[92] apply a test more favorable to plaintiffs. In this fourth category, a media defendant is insulated from liability for indirect defamation only when "the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory

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[88] See *Pietrafeso v D.P.I., Inc.*, 757 P2d 1113, 1116 (Colo App 1988) (plaintiff must show by clear and convincing evidence that challenged statements containing defamatory implications are not "true, or substantially true").

[89] 543 A2d 313 (Del Super 1987). *Ramada* involved newspaper articles reporting on the financial condition of Ramada's casino operations. The hotel chain claimed that the reports misrepresented Ramada's financial condition. Id at 316. The court agreed that a reasonable jury could find that some of the challenged statements were not substantially true.

[90] Id at 321.

[91] The substantial truth requirement creates an interesting result in cases of "no comment" statements. *Ramada* held that a newspaper report stating that Ramada failed to comment about an investigation concerning possible illegal activities was capable of defamatory interpretation, ruling that "the 'no comments' are . . . highly susceptible to the interpretation that Ramada was attempting to cover up its problems." Id at 324. Whether *Ramada* accurately applied the substantial truth standard it advocated in the "no comment" ruling is questionable. The fact that Ramada failed to comment is the complete truth of the matter; how the implication of the reported statement could differ from that of a "precisely truthful statement" is unclear.

[92] 909 F2d 512 (DC Cir 1990) (applying District of Columbia law).

sense."[93] This analysis pays no regard to the truth of specific assertions but asks whether the article, taken as a whole, could be understood as defamatory by a reasonable reader.[94]

This "capable of defamatory meaning" standard may be applied differently in omissions and implications cases. The Court of Appeals for the District of Columbia has suggested that omissions may be subject to a stricter review standard than implications.[95] The *White* court observed in dicta that broad liability for omissions would place a heavy burden on the media. The court stated that "[n]ewspaper reporters should not be required to report the results of investigative journalism with a precision establishing an exhaustive, literal picture of what transpired."[96]

Similarly, a South Carolina appellate court adopted a standard for indirect defamation cases that examines whether the defendant's statements are capable of defamatory meaning. In *Adams v Daily Telegraph Printing Co.*,[97] the court denied summary judgment to two television stations that broadcast a story stating that Adams had, among other things, refused to take truth tests and failed to cooperate with a police murder investigation. Adams claimed that the reports implied he was guilty of the crime.[98] The *Adams* Court ruled that indirect defamation cases will be sent to a jury unless "the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory."[99]

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[93] Id at 518, quoting *Levy v Am Liability Mutual Insurance Co.*, 196 A2d 475, 476 (DC App 1964).

[94] *White* broke with *Strada* and *De Falco* by recognizing the relevance of layout and visual effects, especially when evaluating allegedly defamatory television reports. "[T]he television medium offers the publisher the opportunity, through visual presentation, to emphasize certain segments in ways that cannot be ascertained from a mere reading of the transcript." *White*, 909 F2d at 526, quoting *Southern Air Transport, Inc. v Am Broadcasting Co.*, 877 F2d 1010, 1015 (DC Cir 1989) (ruling that television broadcast juxtaposing picture of Southern Air plane with the caption "South Africa Connection" could not reasonably be interpreted as implying that Southern Air was assisting the South African government in covert operations).

[95] *White* did not rule on the issue of omissions because there were no material facts omitted in the challenged publications. 909 F2d at 520-21 ("[B]ecause we need not decide whether omissions are relevant to establishing defamatory meaning in order to dispose of this case, we leave the delineation of that issue for another day.").

[96] Id at 525.

[97] 292 SC 273, 356 SE2d 118 (1986).

[98] 356 SE2d at 119-20.

[99] Id at 122, quoting *Flowers v Price*, 192 SC 373, 377, 6 SE2d 750, 751 (1940). *White* is a public figure case while *Adams* is a private figure-public interest case. The similarity of the two standards may demonstrate that the *White* and *Adams* courts did not consider the

In *Locricchio v Evening News Association*,[100] the Michigan Supreme Court upheld a directed verdict against the plaintiffs, owners, and developers of a resort, who claimed that a series of newspaper articles linked them to organized crime.[101] The court held that the plaintiffs did not meet their burden of "prov[ing] falsity and fault by, at minimum, a preponderance of evidence."[102] The court also stated, however, that an indirect defamation action may be brought by private plaintiffs in cases involving matters of public concern if the "statement or implication [is] capable of defamatory meaning."[103]

III. Toward a Uniform Standard for Indirect Defamation

A. Indirect Defamation Requires a Special Standard

Neither the British and pre-*New York Times* American approach nor current constitutional law adequately deals with indirect defamation cases. Indirect defamation is a unique problem demanding a unique solution. Holding the media responsible for "reasonable" implications and "material" omissions may make reporting more difficult. Editors must worry about more than the truth of specific statements. They must guard against numerous possible interpretations and assure that no material facts are omitted. Ultimately, editors may choose not to publish certain undeniably true facts for fear of possible defamation suits. Thus, a stricter standard will have a chilling effect on the free flow of information. Because of such effects, any new standard must be carefully considered.

Current constitutional law is inadequate for two principal reasons. First, it does not provide enough protection for critical reporting. Before *Milkovich*, most allegedly defamatory reporting could be characterized as protected opinion. British courts and pre-*New York Times* American courts reached similar outcomes. British courts recognize the privilege of fair comment that protects

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public/private figure distinction relevant in defining falsity, at least in cases involving matters of public concern.

[100] 438 Mich 84, 476 NW2d 112 (1991).

[101] 476 NW2d at 114.

[102] Id at 133.

[103] Id. The defamatory meaning analysis in *Locricchio*, however, begs the question of whether Michigan limits defamation to false statements of fact. A concurring opinion thus drew a distinction between false implications and true facts presented in a "straightforward manner": "True facts, whatever their 'implications,' cannot become actionable simply because they are collected and published together in a straightforward manner." Id at 138 (Cavanagh concurring).

any opinion expressed on a matter of public concern as long as "any man, however prejudiced and obstinate, could honestly hold the view expressed."[104] Pre-*New York Times* American courts recognized a similar privilege.[105] But because *Milkovich* makes any expression with a provably false factual connotation actionable,[106] the constitutionalization of libel law may now have the perverse effect of providing less protection than the fair comment privilege it replaced.[107] This conflicts with the goal of *New York Times* that the First Amendment should "secure 'the widest possible dissemination of information from diverse and antagonistic sources.' "[108]

Second, current constitutional law does not adequately explain the falsity requirement. While *Hepps* requires the plaintiff to prove falsity, the Supreme Court did not specify whether this means the falsity of the specific statements or the falsity of their reasonable interpretation. If the former, the *New York Times-Hepps-Milkovich* analysis is conspicuously silent on the question of indirect defamation, requiring an expanded explanation. If the latter, then a common law reasonableness standard applies.

If applicable, a common law reasonableness approach also fails to provide a desirable standard. First, because defamation is a common law tort, reasonableness would be determined by state and local juries. This subjects the national media to the whims of eccentric localities. *New York Times* sought to correct this problem. The malice requirement prevents the chilling effect on free speech that arises when localities independently determine the measure of fault required. The spirit of *New York Times* suggests that the common law reasonableness standard violates the First Amendment.

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[104] *Telnikoff v Matusevitch*, 4 All ER 817, 824 (House of Lords 1991) (Lord Keith).

[105] For example, New Jersey allowed fair comment if the communication met the following conditions: fair comment "(a) must be based on facts truly stated, and (b) must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticised, save in so far as such imputations are warranted by the facts, and (c) must be the honest expression of the writer's real opinion." *Leers v Green*, 24 NJ 239, 131 A2d 781, 789 (1957).

[106] *Milkovich*, 497 US at 20.

[107] For example, *Leers* involved a charge that a politician misused his office to profit from a real estate deal. *Leers*, 131 A2d at 783. Because this statement is provably false, a court, under the standard established in *Milkovich*, would find the statements actionable. Yet *Leers* held that the statement was protected by fair comment. Ironically, the British press, without the benefit of a First Amendment, may now receive greater protection against libel claims than the American media.

[108] *New York Times*, 376 US at 266, quoting *Associated Press v United States*, 326 US 1, 20 (1945). The goal is to assure wide dissemination of information while sufficiently protecting the reputational interests of plaintiffs.

Second, even if a national standard of reasonable interpretation is possible, problems still remain. Under such a regime, the media's liability hinges not merely on what it prints but on how the public is reasonably expected to react. The media thus must make an ex ante determination of the public's reaction. Plaintiffs need not prove the absolute falsity of the challenged statements; they must only demonstrate that a reasonable reader would perceive false implications. This sacrifices the ideals of truth and wide, antagonistic discussion to popular prejudices, as juries are at liberty to draw whatever inferences they deem reasonable.[109]

A third problem with the common law reasonableness approach is that the defense of fair comment does not solve all of the problems of indirect defamation. For example, in *Lewis v Daily Telegraph*,[110] two newspapers published a true statement that the London Fraud Squad was inquiring into a company's affairs.[111] The chairman of the company brought suit claiming that the articles implied that he was guilty of fraud.[112] The court did not discuss the fair comment defense.[113] Applying the reasonable interpretation test, the House of Lords found the articles actionable despite the truth of the facts expressed.[114] This result conflicts with the goal of wide and antagonistic expression established by *New York Times*. The inadequacy of reasonable interpretation demonstrates the need for a constitutional standard for indirect defamation.

B. Uniformity of the Proposed Model Standard for Omissions and Implications

In the interest of consistency, an indirect defamation standard should be as uniform as possible. While omissions and implications are different forms of indirect defamation, no separate standard is required. First, the "substantial truth" and "reasonable interpretation" theories, as evidenced in *Ramada*, *Adams*, and *Locricchio*,

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[109] *Lewis v Daily Telegraph*, 2 All ER 151 (House of Lords 1963), demonstrates this possibility. Nothing in the reasonable interpretation doctrine prevents a jury from determining that a report of a criminal investigation implies guilt. Thus, the press is not always free to report the fact of ongoing investigations.

[110] Id at 151 (Lord Reid).

[111] Id at 154.

[112] Id.

[113] The allegedly illegal activities of a corporation and its chairman appear to constitute a matter of public concern. It is therefore logical that the newspapers would have raised a fair comment defense.

[114] 2 All ER at 157.

can be adapted to both omissions and implications. For example, an article would be substantially true if it contained no false statements and no material omissions. Likewise, reasonable interpretation turns on a statement's effect on a reasonable reader. Whether the defamation is accomplished by omission or implication is irrelevant.

Second, omissions are a category of implications. Omissions are not actionable unless the article creates a defamatory implication. In both implications and omissions cases, the plaintiff alleges that the media twisted the truth in such a way as to make it defamatory. Third, because the line between omissions and implications tends to blur, courts may find it difficult to determine whether the defamatory nature of an article arises from its overall tone or the omission of a particular fact. In such cases, a dual standard would create confusion.

Despite the similarities between omissions and implications, some courts recommend separate treatment. First, *Nichols*, *Diesen*, and *Dixon* presented standards solely applicable to omissions, suggesting that implications merit a distinct analysis.[115] Second, *Strada*, *De Falco*, and *White* explicitly argued that omissions and implications are materially different. *Strada* and *De Falco* held that public figures may not recover for libel by innuendo but that omissions of material facts may be actionable.[116] Omissions are the only types of implications easily remedied by the press. By thorough investigation, good reporters can assure that they possess all material facts. Implications, on the other hand, are inherently subjective. To impose press liability for failing to guard against potential interpretations, *Strada* and *De Falco* reasoned, imposes an "undue burden" on the press.[117]

In contrast, dicta in *White* implied that guarding against defamatory omissions is actually more difficult than protecting against defamatory implications. *White* found that investigative reporting is imperfect; requiring the press to know and print all material facts and to know which omissions would send a defamatory message would have a chilling effect on reporting. The press

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[115] In addition, while *Ramada*'s substantial truth formulation does not distinguish between omissions and implications, see *Ramada*, 543 A2d at 317, the court's ruling on statements of "no comment" may indicate special treatment for omissions. Id at 324.

[116] *Strada*, 477 A2d at 1012; *De Falco*, 506 A2d at 1284.

[117] See *Strada*, 477 A2d at 1012; *De Falco*, 506 A2d at 1284.

might avoid printing controversial stories if the failure to uncover a single material fact could lead to a libel judgment.[118]

C. The Model Standard

This Comment proposes a model standard that is a synthesis of several of the cases discussed above. The model standard has two parts: a test for implications and a test for omissions. In the interest of uniformity, however, the standard attempts to maintain substantial consistency between the tests.[119]

1. *Implications.*

A good compromise solution for defamation by implication involves a combination of the *New York Times* and *Strada/De Falco* analyses. *New York Times* requires public figures to prove actual malice in defamation actions. *New York Times* defines actual malice as publication with "knowledge that [the challenged communication] was false or with reckless disregard of whether it was false or not."[120] Indirect defamation law should take this analysis one

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[118] See *White*, 909 F2d at 525. One possible resolution to the problem enunciated in *White* is a "hot news" privilege that would protect the press in the case of late breaking stories. Often, the press has only a short time to prepare for publication of an important news story, rendering thorough research impossible. A "hot news" privilege would protect the press from libel actions in these cases. Still, a "hot news" privilege would not solve the problem acknowledged in *White*. News organizations do not have the time or resources to explore every possible angle of every story. Moreover, space considerations will prohibit publishing every fact uncovered. Because judgments as to which facts are "material" will constantly be made by reporters and editors, omissions are bound to occur.

[119] A national standard should also address the question of standard of review. *New York Times* requires proof of actual malice by "convincing clarity." 376 US at 285-86. Several courts have extended this requirement to the question of falsity. *Viking Penguin* rejected a defamation suit because the plaintiff failed to "show by clear and convincing evidence that [the defendant] published particular false facts with knowledge of their probable falsity." 881 F2d at 1445. Likewise, *Ramada* held that the plaintiff "must present clear and convincing evidence" to prove falsity or negate substantial truth. 543 A2d at 319. The court did note that "[t]he quantum of proof with respect to falsity, however, has never been directly addressed by the Supreme Court." Id. *Locricchio* differs from *Viking Penguin* and *Ramada* on this point, asserting that a plaintiff must "prove falsity and fault by, at minimum, a preponderance of evidence." 476 NW2d at 133. But the clear and convincing standard merits more support. Citing the importance of the First Amendment, *Ramada* interprets *New York Times* to mean that "an erroneous verdict for the plaintiff would be much more serious than one for the defendant" in defamation cases. 543 A2d at 319. "The possibility of such error, the [Supreme] Court noted, would 'create a strong impetus toward self-censorship . . . ,' producing the result that legitimate utterances would be deterred." Id, quoting *Rosenbloom v Metromedia, Inc.*, 403 US 29, 50 (1971). If the Court errs on the side of the defendant with respect to actual malice, the same should be true of falsity. Thus, indirect defamation plaintiffs should have to prove falsity by clear and convincing evidence.

[120] *New York Times*, 376 US at 280.

step further and require that public figure plaintiffs prove that the defendant knew that the alleged defamation carried a false implication. In addition, private persons, who now must only prove fault (negligence) under *Gertz*, should have to demonstrate *New York Times* malice to recover for indirect defamation. Finally, the model standard establishes an intermediate requirement for private plaintiffs in cases involving matters of public concern, balancing the plaintiff's reputational interest with the need for free flow of information. Such plaintiffs should demonstrate malice to collect actual damages and knowledge to collect presumed and punitive damages.

The model standard's heightened scienter requirement compensates for the difficulty faced by the media in protecting against defamatory implications. While reporters can verify with relative ease whether specific statements of fact are true or false, determining what implications readers will draw from an article is a far more difficult task. In order to protect the free flow of ideas, the model standard provides the media more latitude for defamatory implications than for false statements of fact. Such a requirement best aligns the model standard with the goals of *New York Times*, which declared that the First Amendment mandates "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[121] If the media must constantly fear lawsuits even when it has reported true statements, the quality of reporting will suffer.[122]

Once the plaintiff satisfies the enhanced scienter requirement, the model standard requires the plaintiff to prove that a reasonable reader would interpret the challenged communication as having a defamatory implication. As such, the standard rejects the *Adams* approach that any language capable of defamatory inter-

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[121] Id at 270.

[122] Innuendo that arises from ambiguous language may not merit a heightened scienter requirement. Implication generally refers to cases in which the media reports a set of facts (call them X) and the reader infers additional facts (Y). Holding the media responsible for the falsity of Y when X is true could chill reporting where the press lacks knowledge of false implications. But innuendo often arises from ambiguous statements where the media claims to have reported X but even an objective reader may not be sure whether the media reported X or X + Y. In such cases, holding the press responsible for the truthfulness of Y may be necessary to encourage responsible reporting.

In addition, ambiguous statements do not always deserve to be treated as indirect defamation. If a reasonable person would determine that the media reported X + Y, then the media should be held responsible for the truthfulness of X + Y. Indirect defamation analysis only applies when the implications exceed the plain meaning of the language. These are the most difficult types of implications for the media to prevent, and thus reporters deserve a higher level of protection. Ambiguous statements, however, deserve no extra protection.

pretation may be actionable. *Strada* and *De Falco* correctly observed that the *Adams* approach holds the press to an exceedingly high standard—perhaps one inconsistent with the First Amendment as interpreted in *New York Times*. Courts cannot reasonably conclude that the press has acted with malice every time it fails to foreclose a possible defamatory interpretation to a news report. Thus, the plaintiff should have to demonstrate not merely that the communication was capable of defamatory interpretation but that a reasonable person would perceive it as such.

Finally, the model standard reads *Hepps* to require that an indirect defamation plaintiff negate the substantial truth of the publication. This requirement parallels falsity analysis in direct defamation cases and adopts the definition of substantial truth offered by *Nichols*.[123] Thus, the plaintiff must demonstrate how the communication should have been worded. This compromise, while recognizing the burden indirect defamation places on the press, would allow recovery in cases in which the media is clearly at fault. This standard will preserve the free flow of information while guarding against malicious reputational injury.

2. *Omissions.*

Omissions require a slightly more precise standard than implications. The model standard represents a compromise between the *Strada* and *De Falco* position that omissions are more harmful than implications and the *White* analysis that omissions are more difficult for the press to guard against. For public figure plaintiffs, the model standard adopts the *Dixon* requirement that such plaintiffs must prove that (1) the defendant had knowledge that the material facts existed, (2) the defendant intentionally omitted material facts in order to distort the truth, and (3) the publication contained an actual defamatory implication.[124] In suits by private plaintiffs, plaintiffs, under the model standard, should demonstrate recklessness as to the existence of material facts and reckless rather than intentional omission. When the case involves a private plaintiff and a matter of public concern, the model standard requires that the plaintiff prove (1) recklessness as to existence of material facts and reckless omission for actual damages, and (2) knowledge of the existence of material facts and intentional omis-

[123] *Memphis Publishing Co. v Nichols*, 569 SW2d 412 (Tenn 1978). For a discussion of *Nichols*, see notes 72-78 and accompanying text.

[124] *Dixon*, 416 SE2d at 244.

sion for presumed and punitive damages.[125] The *Nichols* test can be used to determine whether an omission creates an actual defamatory implication.

The proposed model standard creates the best environment to protect the free flow of information while permitting recovery against irresponsible reporting. Adopting the *Nichols* test alone would be inconsistent with *New York Times* and *Gertz* because it requires no fault by the defendant. Similarly, the *Diesen* test, although arguably a good compromise, fails to address the problem of space and time limitations. A newspaper article or television broadcast cannot report every material fact because time and space are limited. *Diesen* would hold editors culpable for every concession made because of space limitations. Only *Dixon* acknowledges the realities of reporting by requiring defamatory intent by the media. Thus, only a version of the *Dixon* test is consistent with the model standard for defamation by implication.

Conclusion

Indirect defamation presents a complex problem unresolved by the courts. The competing interests of freedom of the press, media responsibility, and the protection of reputations make it difficult to strike an appropriate balance.

This Comment proposes a model standard that provides a three-pronged test for implications and a two-pronged test for omissions. In cases of implications, which include innuendo, public figure plaintiffs must prove intent to deceive, private plaintiffs must show actual malice (recklessness), and private plaintiffs in cases involving matters of public concern must show *New York Times* malice to collect actual damages and show intent to deceive to recover presumed and punitive damages. In addition, the plaintiff must prove that a reasonable person would understand the communication as defamatory. Finally, the plaintiff must negate the substantial truth of the publication at issue.

For cases involving omissions, public figure plaintiffs must prove that the defendant had knowledge that material facts existed and intentionally omitted those facts; private plaintiffs must show recklessness as to the existence of material facts and reckless omission; and private plaintiffs in cases involving matters of public concern must show recklessness as to knowledge, reckless omission

[125] This is consistent with the reasoning of *Gertz* and the model standard for defamation by implication.

to collect actual damages, and knowledge and intentional omission to collect presumed and punitive damages. Additionally, the plaintiff must prove that the publication had an actual defamatory implication.

In all, this model standard balances the difficulty faced by the media in avoiding defamatory implications and omissions with reputational concerns. If applied, the proposed standard should encourage the free flow of information while promoting responsible reporting.