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Fabricated Quotations--Facts Or Falsehoods - Masson v. New Yorker Magazine, Inc.

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Fabricated Quotations—Facts or Falsehoods? *Masson v. New Yorker Magazine, Inc.*

I. INTRODUCTION

Libel suits tend to excite the passion of the litigants as well as to generate enthusiasm among observers. Perhaps no other area of law brings constitutional protection of institutions into such intimate conflict with deeply felt personal outrage. The first amendment stands as a sentinel against repression of freedom of speech and freedom of the press. However, it is also a barrier to vindication of honor by those who are maligned by the falsehoods and scurrilous imputations of others.

In less civil times, public lies and attacks on personal character frequently resulted in duels. The combatants attempted to defend their reputations or prove the validity of their accusations by force of arms. Such duels now occur in courtrooms with only slightly less solemnity and formality. The atmosphere is invariably acrimonious because of the deeply rooted sense of personal outrage felt by the plaintiff and the defense of freedom of speech asserted by the press.

Against such a background it would seem unlikely that a case could arise in which free press advocates believe that a court is too vigorous in its enforcement of this constitutional guarantee. However, in *Masson v. New Yorker Magazine, Inc.*[1] the Ninth Circuit Court of Appeals recently decided a case which some journalists believe condones distortion and alteration of quotations obtained in interviews.[2] The decision is caught in the cross fire between common law libel and constitutional principles.

1. 881 F.2d 1452 (9th Cir. 1989).
2. *See* Henry, *The Right to Fake Quotes*, TIME, Aug. 21, 1989, at 49.

II. LEGAL BACKGROUND

A. Constitutional Concerns

In *New York Times Co. v. Sullivan*[3] the Supreme Court held that the first and fourteenth amendment safeguards for freedom of speech and press apply to libel actions brought by public officials. To give " 'breathing space' "[4] for free expression, the Court declared that erroneous statements must be protected because they are "inevitable in free debate."[5] The rule enunciated by the Court prohibits recovery by public officials for defamatory falsehoods "unless [they] prove[] that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[6]

The rule also applies to persons who, because of their position or some activity by which they voluntarily inject themselves into public controversy, are subject to public interest or fame.[7] In *Masson v. New Yorker Magazine*, the plaintiff conceded he was a public figure required to prove the defendants were motivated by actual malice.[8] The standard for proving actual malice is one of clear and convincing evidence.[9]

B. Statutory Basis

The California Civil Code defines libel as "a false and unprivileged publication by writing . . . which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation."[10] The California Supreme Court has appended to this definition the declaration of the United States Supreme Court that " '[t]he *sine qua non* of recovery for defamation . . . is the existence of a falsehood.' "[11] The requirement of falsehood is based on the protection accorded by the first amendment.[12]

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3. 376 U.S. 254, 264 (1964).
4. *Id.* at 272 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
5. *Id.* at 271-72.
6. *Id.* at 279-80.
7. Curtis Publishing Co. v. Butts, 388 U.S. 130, 154-55 (1967) (Harlan, J.); Carson v. Allied News Co., 529 F.2d 206, 209 (7th Cir. 1976).
8. 881 F.2d 1452, 1453 (9th Cir. 1989).
9. *New York Times*, 376 U.S. at 285-86.
10. CAL. CIV. CODE § 45 (West 1982).
11. Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 259, 721 P.2d 87, 90, 228 Cal. Rptr. 206, 208 (1986), *cert. denied*, 479 U.S. 1032 (1987) (quoting Letter Carriers v. Austin, 418 U.S. 264, 283 (1974)).
12. *Id.*

C. Decisional Background

1. Supreme Court Decisions

Although no opinion directly on point was controlling, the *Masson* court was not without guidance. In *Harte-Hanks Communications, Inc. v. Connaughton* the Supreme Court held that "a public figure plaintiff must prove more than an extreme departure from professional standards."[13] The Court indicated that election campaign coverage presents the strongest kind of case for applying the actual malice standard.[14] However, even in such cases, the press does not have absolute immunity, and "[i]f a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail."[15]

In *Bose Corp. v. Consumers Union of United States, Inc.* the Court found "a significant difference between proof of actual malice and mere proof of falsity."[16] It construed the language adopted by

13. 109 S. Ct. 2678, 2684 (1989). The Court affirmed an opinion of the Sixth Circuit upholding a district court libel verdict against the *Journal News* of Hamilton, Ohio. An unsuccessful candidate for Municipal Judge claimed that a story which appeared in the *Journal News* during the course of an election campaign was false and was published with actual malice. The story accused the plaintiff of "dirty tricks" in connection with a bribery investigation of the incumbent judge's Director of Court Services. *Id.* at 2682.

The Court expressly rejected a professional standards test for libel of public figures. It had previously considered whether libel of public figures could be found if publication was shown to be "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967) (Harlan, J.) A majority of the Court in *Butts* disagreed with such a professional standards test and supported adherence to the *New York Times* actual malice test. In *Connaughton*, the Court left no doubt as to its disapproval of any such test. "Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court." *Connaughton*, 109 S. Ct. at 2685.

14. *Connaughton*, 109 S. Ct. at 2695. The Court underscored the rationale behind the *New York Times* actual malice rule by noting that the right to elect public officials is an essential element of democracy and its value is dependent on an informed electorate. The actual malice rule provides a protected zone in which the press may investigate the candidates and report its findings and its opinions. "Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty." *Id.* at 2696.

15. *Id.* at 2696. The Court did not suggest that application of the standard is any less demanding in the case of a public figure not engaged in a political contest, merely that the values constitutionally protected by the actual malice rule are at their zenith in such circumstances.

16. 466 U.S. 485, 511 (1984). The Court upheld a decision of the First Circuit reversing the district court's judgment for the plaintiff. Bose Corp. claimed that Consumers Union had published an article disparaging a Bose loudspeaker system. *Id.* at 486-87.

the defendant as a rational interpretation of an event which was ambiguous and difficult to describe.[17] The Court held that the evidence of error was not sufficient to show actual malice. Rather, it was "the sort of inaccuracy that is commonplace in the forum of robust debate."[18]

In *Time, Inc. v. Pape* the Court held that failure to indicate that quotations were allegations contained in a complaint did not constitute " 'falsification' sufficient in itself to sustain a jury finding of 'actual malice.' "[19] The article gave the impression that the quoted passages were conclusions of a federal commission. However, the Court stated that the writer's interpretation was arguably a misconception. It "amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities."[20]

2. *Appellate Court Decisions*

Three federal circuit courts of appeal have addressed the problem of inaccurate quotations. The Third Circuit, in *Dunn v. Gannett New York Newspapers, Inc.*,[21] determined that a Spanish to English translation may have mischaracterized the plaintiff's comments. However, the court held that the translation was a "rational interpretation of remarks that bristled with ambiguities."[22]

The company presented evidence that the article falsely stated that the Bose system caused musical instruments to seem enlarged in size, to move, and to wander around the room. *Id.* at 493. The Court explained how the question of falsity relates to the *New York Times* standard. "The burden of proving 'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Id.* at 511 n.30 (citation omitted).

17. *Id.* at 512.

18. *Id.* at 513.

19. 401 U.S. 279, 289 (1979). The Court upheld the Seventh Circuit Court of Appeals which had reversed a district court's directed verdict for Time. Pape had accused Time of libel because of a story in its weekly magazine which reported on a document issued by the United States Commission on Civil Rights. The article included a description of the apprehension of a black Chicagoan by the name of James Monroe. Monroe, according to the published description, was abused by Pape, a Chicago detective, who was involved in the apprehension. The description was taken directly from the Commission's report which the challenged magazine article quoted extensively. However, the article failed to indicate that the description of abuse suffered by Monroe was based on allegations in a complaint filed by Monroe rather than on the Commission's findings. *Id.* at 280-82.

20. *Id.* at 290.

21. 833 F.2d 446, 452 (3d Cir. 1987). The court sustained the district court's summary judgment for the defendant. The Mayor of Elizabeth City, New Jersey alleged that a Spanish language newspaper headline was libelous which, in translation, stated that the Mayor referred to Hispanics as "pigs." The Spanish word "cerdos," which the parties agreed translates as "pigs" in English, was enclosed by single quotation marks. *Id.* at 448 n.1, 450.

22. *Id.* at 452.

In *Hotchner v. Castillo-Puche* the Second Circuit held that publication can constitute reckless disregard of truth if a passage can be independently verified and there is "convincing indicia of unreliability."[23] The court found the published quotation milder and less offensive than what was actually said. The modifications "did not increase the defamatory impact or alter the substantive content."[24] Since the reliability of the more offensive original language had been established, the court held that the publisher was not liable for having toned it down.[25]

The Seventh Circuit dealt with the question of fabricated quotations in *Carson v. Allied News Co.*[26] It held that the plaintiff was entitled to a jury determination on the actual malice question because of "wholly imagined but supposedly precisely quoted conversations."[27] The court stated, "In the catalogue of responsibilities of journalists . . . must be a canon that a journalist does not invent quotations and attribute them to actual persons."[28]

3. *California Court Decisions*

The California Supreme Court considered the question of whether fabricated quotations may be defamatory in *Baker v. Los Angeles Herald Examiner.*[29] The court noted that the defendant author had

23. 551 F.2d 910, 914 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977). The court reversed a district court judgment for the plaintiff. Hotchner alleged that he was libeled in a book published by Doubleday & Company, Inc. in which the author described the plaintiff in derogatory terms. Doubleday and the writer were accused of altering a quotation attributed to Ernest Hemingway in which a negative opinion of Hotchner was expressed. *Id.* at 912. The court found that Doubleday had no suspicion that the conversation described in the book was fabricated and confirmed with the author his account of it which appeared in the original Spanish language edition of the book. *Id.* at 914.

24. *Id.* at 914. The evidence showed that the quotation attributed to Hemingway was fictionalized in that it did not recite the original conversation precisely. The published version quoted Hemingway as saying about Hotchner, " 'I don't really trust him, though.' " *Id.* at 912. According to the original Spanish-language version of the book, Hemingway actually said, " '[Hotchner is] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him.' " *Id.* at 914.

25. *Id.*

26. 529 F.2d 206 (7th Cir. 1976). The court reversed the district court's summary judgment for the defendant. Carson alleged, inter alia, that the writer fabricated quotations contained in an article published in *National Insider.* The article claimed to depict conversations which had taken place between Carson and executives of the National Broadcasting Company. *Id.* at 212.

27. *Id.* at 213.

28. *Id.*

29. 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 749 U.S. 1032 (1987). Baker claimed he had been libeled by a column written for the *Herald*

clearly qualified the ostensible quotation by introducing it as "his 'impression.' "[30] A hypothetical conversation was considered a valid journalistic method of conveying the writer's message.[31] To determine whether a reader would reasonably understand the author's impression to be opinion rather than fact, the court found it necessary to examine both the "language of the statement and the context in which it was written and received."[32]

In *Selleck v. Globe International, Inc.* the Second District Court of Appeal stated that it is libel to ascribe falsely to a person a statement which has "the same damaging effect as a defamatory statement about him."[33] The court also noted that a false statement of fact is an essential element of libel and that whether it is present is a question of law.[34] The same court also addressed the matter of quotations in *Bindrim v. Mitchell.*[35] It found that an author was not necessarily insulated from liability merely because the challenged work was purportedly fiction.[36] The court held that it was a question

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Examiner by Peter Bunzel. In the article Bunzel related his "impression" of a conversation between Walter Baker and Phil Reeder. Baker was the executive producer and Reeder was the writer and producer of a television documentary which was the subject of Bunzel's critical review. The Court of Appeals found the passage defamatory but the California Supreme Court reversed. *Id.* at 258-59, 721 P.2d at 89-90, 228 Cal. Rptr. at 208.

30. *Id.* at 263, 721 P.2d at 92, 228 Cal. Rptr. at 211.

31. *Id.* at 264, 721 P.2d at 93, 228 Cal. Rptr. at 211. The court discounted the argument that quoted material is necessarily an accurate account regardless of context.

32. *Id.* at 269, 721 P.2d at 96, 228 Cal. Rptr. at 215.

33. 166 Cal. App. 3d 1123, 1132, 212 Cal. Rptr. 838, 844 (1985). The court reversed a trial court's dismissal of a libel action brought by Selleck. The plaintiff claimed that quotations in an article published in the defendant's magazine were falsely attributed to him. *Id.* at 1129, 212 Cal. Rptr. at 841; *see also* Cameron v. Wernick, 251 Cal. App. 2d 890, 894 n.2, 60 Cal. Rptr. 102, 105 n.2 (1967) (applying the rule to statements attributed to the plaintiff which suggested questionable ethics and dishonesty); Kerby v. Hal Roach Studios, 53 Cal. App. 2d 207, 213-14, 127 P.2d 577, 581 (1942) (applying the rule to a letter falsely seeming to have been written by the plaintiff and attributing to her statements indicating immoral character).

34. *Selleck*, 166 Cal. App. 3d at 1133, 212 Cal. Rptr. at 845. The court concluded from the context that in this case the article "assert[ed] as a fact that plaintiff made the statements." *Id.*; *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (contrasting the impossibility of false ideas to the constitutional worthlessness of false facts); Okun v. Superior Court, 29 Cal. 3d 422, 450, 629 P.2d 1369, 1374, 175 Cal. Rptr. 157, 162 (1981) (derogatory implications not libelous in a letter to the editor which merely expressed opinion); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 600-01, 552 P.2d 425, 427, 131 Cal. Rptr. 641, 643 (1976) (expressly holding false statement of fact to be an essential element of libel).

35. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-26 n.9 (1986), *cert. denied*, 481 U.S. 1041 (1987). A psychologist claimed he was libeled in a fictional work which depicted a psychologist resembling the plaintiff. Quotations attributed to the fictional psychologist were alleged to be a false portrayal of the plaintiff. *Id.* at 69-71, 155 Cal. Rptr. at 33-35.

36. *Id.* at 73 n.2, 155 Cal. Rptr. at 35 n.2. The trial court's finding of actual malice was determined to be supported by evidence that the writer knew what actually occurred at the encounter replicated in the book and the portrayal was inaccurate. *Id.* at

for the jury to decide whether a reader "would regard the passages . . . complained of as mere fictional embroidering or as reporting actual language and conduct."[37]

III. *Masson v. New Yorker Magazine, Inc.*

A. Facts and Procedural Background

Jeffrey Moussaieff Masson is a former professor of Sanskrit and a psychoanalyst.[38] Dr. Kurt Eissler, the Secretary of the Sigmund Freud Archives, had close dealings with Freud's daughter, Dr. Anna Freud, before her death in 1982. Masson was Projects Director of the Freud Archives, slated to become Eissler's successor as Secretary, and selected by Anna Freud to publish her father's complete letters.[39] He was removed from his position with the Archives as a result of controversy over a paper he presented at Yale University in 1981. Masson claimed that his dismissal was in retaliation for his public disclosure of his contention that Freud had abandoned the seduction theory merely to advance his career.[40]

Masson was interviewed by Janet Malcolm concerning his termination. Her two-part article, "Annals of Scholarship," was published in *The New Yorker* in December of 1983.[41] On November 29, 1984, Masson filed a diversity action in United States District Court for the Northern District of California. His complaint against Malcolm, the New Yorker Magazine, Inc., and Alfred A. Knopf, Inc. alleged that the article defamed him and invaded his privacy. He claimed

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72-73, 155 Cal. Rptr. at 35-36.

37. *Id.* at 78, 155 Cal. Rptr. at 39.

38. *See* Blumenthal, *Scholars Seek the Hidden Freud in Newly Emerging Letters*, N.Y. Times, Aug. 18, 1981, at C1, col. 1; Blumethal, *Did Freud's Isolation Lead Him to Reverse Theory on Neurosis?*, N.Y. Times, Aug. 25, 1981, at C1, col. 1. Masson taught at the University of Toronto and at the University of California at Berkeley. He presented a number of highly acclaimed papers at psycho-analytical association congresses in the mid-seventies and came to the attention of Dr. Kurt Eissler of the New York Psychoanalytic Institute who was also Secretary of the Freud Archives.

39. Blumethal, *Scholars Seek the Hidden Freud in Newly Emerging Letters*, N.Y. Times, Aug. 18, 1981, at C1, col. 1.

40. Masson v. New Yorker Magazine, Inc., 881 F.2d 1452, 1453 (9th Cir. 1989). The seduction theory was a hypothesis advanced by Sigmund Freud which posited that certain types of mental illness have their origin in childhood sexual abuse.

41. The article contained some 48,500 words and was based on over 1000 pages of notes and tape transcripts of interviews and conversations between Masson and Malcolm. It appeared in the December 5 and 12, 1983 issues of *The New Yorker*. It was later published in book form by Alfred A. Knopf, Inc. under the title *In the Freud Archives*. The article and book have no relevant differences with respect to the case and will hereinafter be referred to simply as the article.

that misquotations in the article "falsely portray[ed] him as egotistical, vain, and lacking in personal honesty and moral integrity."[42]

Masson's complaint identified twelve passages which he alleged were libelous.[43] The district court found four of the passages substantially true and granted a partial summary judgment in favor of the defendants on August 19, 1986.[44] The court subsequently determined that the remaining eight allegedly libelous passages were "either nondefamatory, substantially true, or a rational interpretation of ambiguous conversations.[45] On August 17, 1987, the court disposed of these allegations by granting the defendants' motion for summary judgment.[46] The court found that "[n]o clear and convincing evidence exists that would justify a finding that the writer or the publishers entertained serious doubts about the truth of the disputed passages."[47]

B. The Decision

In a decision authored by Judge Arthur L. Alarcon, the Court of Appeals for the Ninth Circuit affirmed the judgment of the district court.[48] The summary judgment was reviewed de novo by the court applying the standard enunciated in *Anderson v. Liberty Lobby*.[49] That standard requires a determination of whether a reasonable jury could find that the plaintiff had shown actual malice by clear and convincing evidence.[50] The court dealt with Masson's claims in two parts. First, it reviewed those quotations which Masson alleged Malcolm had deliberately fabricated.[51] Then the court addressed those quotations which Masson contended had been edited in a misleading manner.[52]

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42. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1397 (N.D. Cal. 1987), *aff'd*, 881 F.2d 1452 (9th Cir. 1989). Masson's suit alleged that Malcolm's article libeled him, that the New Yorker Magazine, Inc., her employer, was liable on a theory of vicarious liability, and that Alfred A. Knopf, Inc. knew that Masson contested the accuracy of the quotations and had published the interview with reckless disregard of the truth. *Id.* at 1406.

43. *Id.* at 1397.

44. *Id.* The four passages found to be true were not addressed further in the district court's published opinion and were not subjects of review on appeal.

45. *Id.* at 1407; *see infra* notes 61-80 and accompanying text. The appeals court analyzed each of these passages in its de novo review of the district court's summary judgment.

46. *Masson*, 686 F. Supp. at 1397.

47. *Id.* at 1407.

48. Masson v. New Yorker Magazine, Inc., 881 F.2d 1452, 1453 (9th Cir. 1989).

49. 477 U.S. 242 (1986).

50. *Masson*, 881 F.2d at 1453 (quoting *Liberty Lobby*, 477 U.S. at 255-56).

51. *Id.*; *see infra* notes 53-80 and accompanying text.

52. *Masson*, 881 F.2d at 1461; *see infra* notes 81-85 and accompanying text.

1. Deliberate Fabrication

Masson argued that a reasonable jury could find actual malice solely on the basis of evidence which showed that Malcolm deliberately fabricated quotations which she attributed to him.[53] He presented evidence showing that tape recordings of their interviews did not contain quotations attributed to him, that Malcolm made the alterations, and that the publisher was warned of these facts.[54] The court assumed, for purposes of the appeal, that Malcolm deliberately altered the quotations. However, the court decided that the intentional misquotation alone was insufficient to show actual malice.[55]

Acknowledging that neither the Supreme Court nor the Ninth Circuit had addressed the question, the court drew on several federal and California cases to summarize its view of the "state of the current law governing the defamatory nature of statements ostensibly ascribed to another person by the use of quotation marks."[56] According to the court, although actual malice is inferable where the quoted language is "wholly the product of the author's imagination,"[57] an author has a limited privilege to "fictionalize quotations."[58] The court determined that actual malice is not inferable from fabricated quotations which are (1) " 'rational interpretations' of ambiguous remarks made by the public figure"[59] or which (2) "do not 'alter the substantive content' of unambiguous remarks actually made by the public figure."[60]

The court reviewed the allegedly fabricated quotations individually and determined that most of them did not alter the substantive content of what Masson said. Malcolm quoted Masson as stating that he changed his middle name from Lloyd to Moussaieff because

53. *Masson*, 881 F.2d at 1453.
54. *Id.* at 1453-54.
55. *Id.* at 1454. Since the appeal was from summary judgment, the court assumed that the facts claimed by Masson were correct, *i.e.*, that the alterations were intentional. Summary judgment was affirmed on the grounds that even if those facts were true, they were insufficient as a matter of law to support a finding of actual malice.
56. *Id.* at 1455. The court reviewed Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 466 (3d Cir. 1987); Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-26 n.9 (1986), *cert. denied*, 481 U.S. 1041 (1987).
57. *Masson*, 881 F.2d at 1456.
58. *Id.*
59. *Id.* (quoting *Dunn*, 833 F.2d at 452).
60. *Id.* (quoting *Hotchner*, 551 F.2d at 914).

" 'it sounded better.' "[61] The court said it could not "perceive any substantive difference"[62] between those words and Masson's recorded statement that he made the name change because he " 'just liked it.' "[63] Masson was quoted as saying he was, after Freud, " 'the greatest analyst who ever lived.' "[64] The court found this quotation to "reflect[] the substance of Masson's self appraisal."[65]

The article quoted Masson discussing " 'my discovery about the Schreber case.' "[66] The court noted that the words, "my discovery about the Schreber case" do not appear on the tapes while the phrase, "I went a step beyond Niederland" does appear on the tapes. However, the court determined that such a quotation failed to "alter the substance of Masson's comments."[67] Masson was also quoted as saying, " 'Denise worries too much' "[68] about his (Masson's) lack of sensitivity concerning Eissler. Masson's actual comment was "that he was not personally 'close' to Eissler."[69] Noting that Masson's comment was nonresponsive, the court found that the quotation "did not constitute a substantive alteration."[70]

Malcolm's article related a conversation in which Masson described his perception of the attitudes held by Eissler and Anna Freud toward him. He was quoted as saying, " 'I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public.' "[71] Although this characterization was apparently a complete fabrication, the court determined that it neither substantively altered Masson's actual description nor defamed him because it did not constitute "incremental harm."[72]

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61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 1459.
65. *Id.* The court reached this conclusion by agreeing with the district court that a number of statements made by Masson were boastful and egotistical. The court referred to statements by Masson on the interview tapes such as, " 'for better or for worse, analysis stands or falls with me now.' " Another statement relied on was, " '[I]t's me and Freud against the rest of the analytic world. . . . Not so, it's me. It's me alone.' " *Id.*
66. *Id.* at 1460. Masson alleged that this quotation suggested that he was claiming credit for a discovery actually made by William Niederland. He contended that his conversation had made it clear to Malcolm that Niederland made the initial discovery and he (Masson) merely took Niederland's discovery one step further.
67. *Id.*
68. *Id.* at 1461. This statement was purportedly made in response to comments by Masson's girlfriend, Denise Cammell, who was present at one of Malcolm's meetings with Masson and made some remarks to the effect that Masson was insensitive to the pain he caused Eissler.
69. *Id.*
70. *Id.*
71. *Id.* at 1456-57.
72. *Id.* at 1457. The court explained that the incremental harm doctrine "measures the incremental reputational harm inflicted by the challenged statements beyond the harm imposed by the nonactionable remainder of the publication; if that 'incremental harm' is determined to be nominal or nonexistent, the statements are dismissed as not

The court determined that two of the alleged misquotations were rational interpretations of ambiguous language. Masson had discussed his view that despite a brilliant mind, Freud lacked the " 'courage to stick with things that he knew were true.' "[73] The court found that Malcolm's phrase, "moral cowardice," was a rational interpretation of this view.[74] The court also found that Malcom rationally interpreted an ambiguous conversation when she quoted Masson as saying, " 'Eissler would have admitted I was right.' "[75]

When asked about a paper he presented in which he blamed Freud for what he called the " 'sterility of psychoanalysis,' "[76] Masson was quoted as having said, " 'I don't know why I put it in.' "[77] The court found that this phrase was a rational interpretation and that it did not substantively alter Masson's actual comments.[78] Malcolm also quoted Masson as saying that if he had been permitted to move into Anna Freud's house, it would have been not only " 'a place of scholarship, but it would also have been a place of sex, women, fun.' "[79] The court considered that this quotation was acceptable because it was "consistent with Masson's description of his life style and conception of 'fun.' "[80]

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actionable." *Id.* at 1458. *See also* Herbert v. Lando, 781 F.2d 298, 310-311 (2d Cir. 1986) (discussing background and logic of the doctrine); Simmons Ford, Inc v. Consumers Union of United States, Inc., 516 F. Supp. 742 (S.D.N.Y. 1981) (first application of the incremental harm doctrine).

73. *Masson*, 881 F.2d at 1458.

74. *Id.*

75. *Id.* at 1461. This statement was purportedly made by Masson as an assertion that Eissler agreed with Masson's theory that one of Freud's landmark case studies involving castration delusion was tainted because Freud knew the subject was in an asylum where his attending psychiatrist performed experimental castration experiments. In the taped conversation reviewed by the court it was unclear whether Masson claimed that Eissler agreed with this theory or agreed with another statement made by Masson in the same conversation. The court's view was that since the conversation was ambiguous, Malcolm's rendition of what Masson said was a rational interpretation.

76. *Id.*

77. *Id.* at 1459.

78. *Id.*

79. *Id.* at 1458.

80. *Id.* Unlike its assessments of the other quotations at issue the court did not characterize this statement as a rational interpretation of ambiguous remarks nor did it find that the quotation failed to substantially alter an unambiguous statement. Instead, it agreed with the district court that it was "substantially true" even though Masson apparently never said it. *Id.*

2. *Misleading Editing*

The court next reviewed Masson's allegations that Malcolm had edited quotations in a misleading manner. The court relied on the Supreme Court decision in *Time, Inc. v. Pape*[81] for the test to determine whether actual malice is inferable from misleading editing. The test is whether the quotation amounts " 'to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities.' "[82]

Masson claimed that in two separate passages his remarks were taken out of context. Malcolm misapplied Masson's comment, " '[t]here aren't too many interpretations possible,' "[83] associating it with Masson's Schreber discovery. Malcolm also edited out interviewing qualifiers in Masson's description of Eissler's pressure on him to keep silent. She juxtaposed " '[b]ecause it is the honorable thing to do' " with the quotation, " 'Well, he had the wrong man.' "[84] The court found that both of these passages were rational interpretations of conversations that were ambiguous.[85]

Having found that actual malice was not inferable from either the fabricated quotations or those edited in a misleading fashion, the court concluded that Masson had "failed to present evidence sufficient to support a reasonable jury finding that Malcolm acted maliciously."[86] Accordingly, the court affirmed the summary judgment in favor of defendant Malcolm. The court also found in favor of The New Yorker Magazine, Inc. and Alfred A. Knopf, Inc. on the vicarious liability claim.[87] Finally, the court ruled out frivolous claim sanctions under both federal and state rules,[88] holding that, given the unclear state of the law in California, "Masson made a plausible, good faith argument that actual malice could be inferred from the evidence he presented demonstrating that quotations were fictionalized in the article."[89]

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81. 401 U.S. 279 (1971).

82. *Masson*, 881 F.2d at 1461 (quoting *Time, Inc.*, 401 U.S. at 290).

83. *Id.* at 1462. Masson claimed that this remark was in reference to his discoveries about Freud's abandonment of the seduction theory. *See supra* notes 40, 66-67, 75 and accompanying text.

84. *Masson*, 881 F.2d at 1462. Masson's complaint was that deleted material would have shown that he said he was the wrong man to keep silent for selfish reasons, but as quoted he appears to be saying that he is the wrong man to expect to do the honorable thing.

85. *Id.* at 1462-63.

86. *Id.* at 1463. Presumably by sufficient evidence the court meant evidence sufficient to meet the clear and convincing standard. *See supra* notes 49-50 and accompanying text.

87. *Masson*, 881 F.2d at 1463; *see supra* note 42 and accompanying text.

88. FED. R. CIV. P. 11; CAL. CIV. PROC. CODE § 1021.7 (West Supp. 1988).

89. *Masson*, 881 F.2d at 1464. The court considered the state of the law unclear in California because neither state courts nor the Ninth Circuit had determined whether a finding of actual malice could be based solely on attribution in quotation marks of words

C. The Dissent[90]

Judge Alex Kozinski approached the fabrication of quotations from a completely different perspective. He stated, "Truth is a journalist's stock in trade. To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print."[91] The dissent was based on a fundamental disagreement with the majority concerning the meaning of quotations.[92] The underlying premise for Judge Kozinski's view was that "the right to deliberately alter quotations is not . . . a concomitant of a free press."[93] He was particularly concerned about application of the rational interpretation standard to quotations. He asserted, "An unqualified quotation attributed to a third party is commonly understood to contain *no* interpretation; by using quotation marks the writer warrants that she has interposed no editorial comment, has resolved no ambiguities, has added or detracted nothing of substance."[94]

Quotations are subject to subtle abuse if alteration is permitted. They may be artfully shaded to influence the perceptions of readers.[95] They are given greater weight by readers than are paraphrases because quotations may be used to draw personal conclusions about the speaker.[96] Injurious words placed in the speaker's own mouth conceal the writer's interpretative role and thereby deceive the reader.[97] Ultimately, "[b]ecause quotations purport to come directly from the speaker—free of editorial comment by the writer—they can have a devastating rhetorical impact and thus carry a serious potential for harm."[98]

The dissent illustrated the flaw in the majority's test by analyzing several of the quotations. The rational interpretation standard was

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not actually spoken by the plaintiff. For its ruling on the Rule 11 sanctions, the court relied on its statement of the appropriate legal standard in a prior Ninth Circuit case: "[W]e are concerned only with whether the complaint asserts a good faith argument . . . even if that legal argument may ultimately fail." Zaldivar v. City of Los Angeles, 780 F.2d 823, 832 (9th Cir. 1986). To avoid sanctions, Masson needed only to raise a claim in good faith that the fabricated quotations were evidence of actual malice. To get to the jury he had the more difficult task of producing evidence from which a reasonable jury, applying the clear and convincing standard, could find actual malice.

90. *Masson*, 881 F.2d at 1464 (Kozinski, J., dissenting).
91. *Id.* at 1486.
92. *Id.* at 1464.
93. *Id.* (footnote omitted).
94. *Id.* at 1465.
95. *Id.* at 1466.
96. *Id.* at 1465-66.
97. *Id.* at 1466.
98. *Id.* at 1465.

considered enormously broad as applied to the "greatest analyst who ever lived" quotation.[99] It would allow a statement reasonably construed as reflecting a particular character trait to operate as a license to fabricate quotations. A writer could use it as a basis for attributing to a speaker any other statement as long as it reflected that same trait.[100] This standard wrongly allowed the majority to put the most benign interpretation on the "intellectual gigolo" quotation, which the dissent concluded was neither a rational interpretation of anything said by Masson nor innocuous.[101]

The majority's acquiescence in the "sex, women, fun" quotation was viewed by the dissent as a "license to invent quotations on the basis of what [authors] perceive to be a speaker's character."[102] The dissent also argued that Malcolm radically altered the meaning of her conversation with Masson when she edited it by juxtaposing phrases indicating that Masson had said he was "the wrong man" to do the honorable thing.[103] Such selective editing was viewed as inconsistent with respectable journalism, and its acceptability to the majority indicated an absence of functional boundaries for the rational interpretation test.[104]

The dissent distinguished the cases relied upon by the majority. It asserted that the decision was "in conflict with that of every other circuit that has addressed the issue."[105] The dissent found *Dunn* inapposite because the problems inherent in translation from a foreign language were not present in this case.[106] The dissent also distinguished *Hotchner*, noting substantial dissimilarities in the facts. These included efforts of the editor to verify the offensive statement, absence of evidence indicating that the statement was unreliable, and editing which toned down and made less offensive the remarks about which the plaintiff complained.[107] *Carson* was construed as

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99. *Id.* at 1466; *see supra* notes 64-65 and accompanying text.
100. *Masson*, 881 F.2d at 1466
101. *Id.* at 1467-68; *see supra* notes 71-72 and accompanying text.
102. *Masson*, 881 F.2d at 1469; *see supra* notes 79-80 and accompanying text.
103. *Masson*, 881 F.2d at 1470; *see supra* notes 84-85 and accompanying text.
104. *Masson*, 881 F.2d.
105. *Id.* at 1472.
106. *Id.* at 1471. *Dunn* was concerned with whether the use of the Spanish word for "pigs" was a rational translation of a public figure's remarks about litterbugs. The dissent here notes that the plaintiff in *Dunn* failed because the Spanish word could be construed as a fair translation and the plaintiff did not produce other evidence of actual malice. In contrast, Malcolm was not translating from a foreign language and, in addition, even if the misquoted words alone were insufficient to infer malice, Masson presented other evidence from which a jury could find that the alterations were not inadvertent and from which malice could be inferred. Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446 (3d Cir. 1987); *see also supra* note 21 and accompanying text.
107. *Masson*, 881 F.2d at 1471-72. The dissent argued that *Hotchner* does not support the proposition that writers may alter quotations of third persons to make their comments more offensive or defamatory. In this case, unlike in *Hotchner*, the defendants had adequate means at their disposal in the form of tapes to ensure the accuracy of the

solidly supporting the plaintiff's argument that actual malice may be inferred from fabricated quotations.[108] *Bose Corp.* and *Pape* were not considered on point because "[w]hile Masson's *meaning* might have been ambiguous, there was no ambiguity as to what words he uttered."[109]

The dissent argued that an analysis of the basic first amendment principles of *New York Times Co. v. Sullivan* and its progeny is required to formulate an appropriate basis for determining whether altered quotations constitute libel.[110] These principles include protection of both errors of fact and errors of judgment.[111] Based on the premise that what is said is as much a fact as what is done, a journalist who negligently quotes inaccurately is protected because it is an error of fact. However, a journalist who intentionally fabricates quotations errs in judgment.[112] Accordingly, the dissent questioned whether the policy of protecting errors of judgment is supported by extending it to fabrication of quotations.[113]

The dissent turned to the journalism profession for its answer. Review of the relevant literature failed to reveal that "the right to distort quotes of real, identified people . . . is important to the proper functioning of the press in a free society."[114] Acknowledging that the

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quotations and they failed to use those means to quote their subject accurately. *See* Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977); *see also supra* note 22 and accompanying text.

108. *Masson*, 881 F.2d at 1472; *see* Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); *see also supra* note 26 and accompanying text.

109. *Masson*, 881 F.2d at 1473; *see* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); Time, Inc. v. Pape, 401 U.S. 279 (1971); *see also supra* notes 16-20 and accompanying text.

110. *Masson*, 881 F.2d at 1473; *see also supra* notes 3-9 and accompanying text.

111. *Masson*, 881 F.2d at 1473. Errors of fact are those mistakes in accuracy arising from incomplete information, insufficient verification, incorrect conclusions, and other similar causes. Errors of judgment are unfortunate choices of how to report events which are susceptible to varying interpretations depending on one's perspective or understanding.

112. *Id.* at 1473-74.

113. *Id.* at 1474. The implication appears to be that while the underlying first amendment policy concern extends absolute protection to errors of fact, the protection of errors of judgment may not be so broad. The analysis draws a distinction between an author's judgment in choosing how to describe something and an author's judgment to alter how someone else described something. The former is clearly protected in this view; the latter may not be unless it has the same kind of importance to a "free and robust press." *Id.*

114. *Id.* at 1478. The dissent made an extensive, if less than exhaustive, survey of the literature. Sources cited included: M. V. CHARNLEY & B. CHARNLEY, REPORTING (4th ed. 1979); J. L. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA (1976); J. L. HULTENG, PLAYING IT STRAIGHT: A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS

law is not determined by the standards of the profession, the dissent nonetheless refused "to construe the first amendment as granting journalists a privilege to engage in practices they themselves frown upon, practices one of our defendants has flatly disowned as journalistic heresy."[115]

A five-step inquiry was proposed by the dissent for resolving cases involving fabricated quotations. The court should determine whether: (1) the quotation purports to be verbatim; (2) the quotation is inaccurate; (3) the inaccuracy is material; (4) the inaccuracy is defamatory; and (5) the inaccuracy is malicious.[116] A positive answer to each of these questions would defeat a defendant's motion for summary judgment; a negative answer to any one would require a summary judgment in favor of the defendant.[117] Applying the inquiry to this case, the dissent concluded that the district court erred in granting summary judgment for the defendants. Malcolm used quotation marks to indicate verbatim reporting.[118] Accuracy of the quotations was subject to factual determination.[119] The alleged alterations could be material.[120] The quotations could not be found nondefamatory as a matter of law.[121] And a jury reasonably could conclude that the defendants were deliberate or reckless.[122]

D. Analysis

1. Majority Opinion

The majority opinion assumed that the quotations at issue were deliberately altered,[123] but then argued that such deliberate alteration failed to constitute actual malice.[124] The *New York Times* rule allows recovery for defamatory falsehoods which are published either

(1981); S. KLAIDMAN & T. L. BEAKUCHAMP, THE VIRTUOUS JOURNALIST (1987); THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL (1982); J. OLEN, ETHICS IN JOURNALISM (1988). The dissent also discussed a 1984 incident involving another writer for *The New Yorker*, Alistair Road, who was widely criticized in journalistic circles after he disclosed that he used composite characters in articles which were supposedly nonfiction. Editor-in-chief of *The New Yorker*, William Shawn, who initially defended Reid, subsequently advised his staff by memorandum that the editors of the magazine did not condone Reid's actions. The memorandum stated that " 'truth begins, journalistically, with the facts.' " *Masson*, 881 F.2d at 1477.

115. *Masson*, 881 F.2d at 1478.

116. *Id.*

117. *Id.* at 1478-79. "If the answer to any of these questions is no as a matter of law, the inquiry stops and the defendant wins. If they could all be answered yes, I would send the matter to the jury." *Id.*

118. *Id.* at 1479.

119. *Id.* at 1480.

120. *Id.* at 1481.

121. *Id.* at 1482.

122. *Id.* at 1484-86.

123. *Masson*, 881 F.2d at 1454.

124. *Id.* at 1456.

with knowledge of their falsity or with reckless disregard of their falsity.[125] The *Masson* court avoided the falsity issue by casting the actual malice test in terms of whether the plaintiff's actual remarks were substantively altered by the quotations or whether the quotations were rational interpretations of his comments.[126]

Falsity has remained central to the constitutional issue in libel suits since *New York Times v. Sullivan*.[127] The majority's tests in *Masson* have been used by other courts to determine whether defendants published falsehoods knowingly or with reckless disregard for truth.[128] However, tests for determining knowledge or reckless disregard may not be dispositive, or even appropriate, when a court begins by assuming deliberate alteration. In such a case, knowledge of falsity is already established by the assumption of deliberate alteration.

Accordingly, although actual malice may not turn on knowledge of falsity in this case, it is an underlying premise which the court acknowledged but then largely ignored. By focusing on whether an inference of actual malice may require more than deliberate alteration, the court appears to give a constitutional blessing to intentional misquotation. Since the court began by assuming that the quotations were untrue, its tests were really concerned with how much untruth

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125. New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); *see supra* notes 3-6 and accompanying text.

126. *Masson*, 881 F.2d at 1456. If the majority had really assumed deliberate alteration of the facts of what was said, it would have had to acknowledge that the quotations were falsehoods. The actual malice test would then be easy because it would be concerned only with whether the alteration was, in fact, deliberate or reckless rather than inadvertent.

127. R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 183 (1987).

128. In *Dunn* the court was concerned with whether the Spanish word used in an article was a rational interpretation of English language remarks. Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 452 (3d Cir. 1987). In *Bose* the court's concern was whether the writer made a rational interpretation of the way sound was produced by an electronic speaker. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984). In *Time* the court attempted to determine whether the writer adopted a rational interpretation of whether a report was merely allegations of a complainant or had been adopted as factual by a government commission. Time, Inc. v. Pape, 401 U.S. 279, 289 (1971). Only in *Hotchner* was the court concerned with defamatory effect, but it found no reckless disregard of truth in an alteration which served to lessen the defamatory impact of a speaker's actual comments. Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977). Although *Hotchner* applied the alteration of substantive content test in the context of defamatory effect, its purpose was to measure whether there was reckless disregard for truth. The majority in *Masson* failed to draw this distinction and thereby gave the impression that the absence of substantive alteration was the equivalent of absence of falsity. *See supra* notes 16-25 and accompanying text.

is constitutionally permissible. The unresolved question is defamatory effect. The authority marshaled to support the court's opinion[129] was less than convincing because most of those cases dealt with the question of knowing or reckless falsehood rather than defamatory effect. As a result, they are distinguishable on their facts or, as the dissent pointed out, they are contrary to the court's position.[130]

The court's opinion failed to consider the salience of defamatory effect in each of the quotations at issue. As a result, the court's message was distorted when it said, "We cannot perceive any substantive difference between the phrases 'it sounded better' and '[I] [sic] just liked it.' "[131] Its analysis conveys the impression that either the court was unable to distinguish between accuracy in quotation and similarity in quotation, or the court deemed misquotation relatively unimportant. The court's prior acknowledgement of the deliberate alteration is meaningless since it proceeded to equate similar language with accurate quotation.

The court may not have intended to suggest that misquotation is anything other than false representation of what was said. Nonetheless, the opinion is misleading at best because it confuses the test for deliberate or reckless disregard for truth with the test for defamatory effect. The court indicates that, in its view, the test for libel is no different when a writer uses quotation marks than when a writer merely gives an impression of what was said. However, as the dissent pointed out, the presence of editorial interpretation constitutes a substantive difference between direct quotation of a speaker's words and narrative which merely purports to give the writer's impression of what a speaker said.[132]

Nowhere is the confusing effect of the court's analysis more apparent than in applying the rational interpretation test to the phrase "intellectual gigolo." First, the court said Masson may not have used the phrase, but its attribution to him "did not alter the substantive content of Masson's description of himself."[133] Then, the court asserted that even if the quotation was inaccurate, it was not defamatory, and even if defamatory, it was not actionable under the incremental harm theory.[134]

If Masson never called himself an "intellectual gigolo" and Mal-

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129. *Masson*, 881 F.2d at 1456; *see* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984); Time, Inc. v. Pape, 401 U.S. 279, 289 (1979); Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 452 (3d Cir. 1987); Hotchner v. Castillo-Puche, 551 F.2d 910, 914 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977); *see also infra* note 165 and accompanying text.

130. *Masson*, 881 F.2d at 1471-73 (Kozinski, J., dissenting).

131. *Id.* at 1456.

132. *Id.* at 1465 (Kozinski, J., dissenting).

133. *Masson*, 881 F.2d at 1457; *see supra* notes 71-72 and accompanying text.

134. *Masson*, 881 F.2d at 1457-58.

colm knew he never did (as the court had already assumed),[135] then it is unquestionable that Malcolm deliberately or recklessly disregarded the truth. Assuming Malcolm knew that Masson never used this expression and she deliberately misrepresented that he had used it, her disregard of truth could fail to be libelous only if this falsehood was not defamatory or not actionable under the incremental harm theory. The court's argument that Malcolm's use of the phrase was not a substantive alteration was irrelevant if the remark was nondefamatory, or else it was just another way of describing incremental harm. Deliberate or reckless use already had been conceded. The only unresolved issue was whether it was defamatory. If it was not defamatory, there was no libel regardless of how deliberate or reckless Malcolm may have been in communicating the falsehood. The court merely confused the issue by agreeing with the district court that this phrase was a rational interpretation of Masson's conversation.[136]

2. *Dissenting Opinion*

The dissent pointed out the problem inherent in the majority's failure to recognize the substantive difference between purporting to quote Masson's conversations and relating the author's impressions, opinions, or even paraphrases of what he said.[137] Nonetheless, the dissent similarly failed to acknowledge the distinction between defamatory quotations and false quotations. Its discussion of the literary differences between quotations and paraphrases focused on the unique character of quotations.[138] The difference in what the reader

135. *See supra* note 55 and accompanying text.

136. *Id.* at 1457. The court's application of the incremental harm theory is misplaced as well. If the phrase is nondefamatory, the question of actual malice is moot. To get to incremental harm, the court must find it defamatory and must also find the actual malice factors of deliberate or reckless disregard of truth. Incremental harm applies only if, in the contest, the untruth is less defamatory or, at least, no more defamatory than the truth. Incremental harm is a bootstrap opposing argument when the plaintiff has alleged many false and defamatory statements. Only if the others were unproven might this one quotation be construed as not actionable because not constituting incremental harm. *See supra* note 72.

137. *Masson*, 881 F.2d at 1465 (Kozinski, Jr., dissenting); *see supra* notes 91-93 and accompanying text.

138. *Masson*, 881 F.2d at 1465. The analysis pointed out, in particular, how words reported to come from one's own mouth may be much more damaging to one's reputation than words said by others or even the impressions of others. Because the reader believes that the words reported are precisely those of the individual quoted, the reader's opinion is formed in that belief. The reader may make a different kind of judgment if it is understood that the words are the writer's interpretation of the substance or meaning of what

understands, depending on whether or not a statement is in quotation marks, is critical in a case such as this. However, the reader's understanding is important for determining defamatory effect rather than for determining the truth or accuracy of what was written.

The dissent relied on the theory that freedom of the press does not require a right to fabricate quotations.[139] The theory is unpersuasive, however, because the first amendment should not be understood by the limits it imposes on speech and press but rather by its liberation of speech and press. The question posed by this case is not whether the first amendment requires a right to fabricate quotations, but whether it protects such a right. The views and standards of the journalism profession are no doubt important to the credibility of the press. The understandings and conventions of the profession may provide invaluable guidance for the courts on the question of what quotation marks may reasonably signify to a reader. However, the application of standards and ethics of the profession to the question of legal liability for libel is a different matter.

Professional standards establish boundaries and constraints on conduct which those who engage in the profession deem important for the credibility, viability, and reputation of the profession. Those constraints may be much narrower than the allowable limits of free expression under the constitution. Quality professional journalism may not require a right to fabricate quotations. Even so, it does not necessarily follow, as the dissent urged, that the first amendment does not extend protection to such behavior.[140] As the prior cases show, libel is not established on the basis of either adherence to or extreme departure from professional standards.[141] Accordingly, the dissent's reliance on the ethics of professional journalists and educators was misplaced in determining the applicable legal standard.

If the standards of the journalism profession are not reliable guides to legal precepts for determining liability for libel, the dissent's five-step test for libel may be biased in favor of a more conservative standard than the first amendment would allow.[142] The test

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was said rather than what the individual actually said. *See supra* notes 94-98 and accompanying text.

139. *Masson*, 881 F.2d at 1464, 1478; *see supra* notes 115-16 and accompanying text.

140. *Masson*, 881 F.2d at 1478; *see supra* note 116 and accompanying text.

141. *See supra* note 13.

142. *See supra* notes 117-18 and accompanying text. Analysis of the standards of professional journalists led the dissent to its five-step inquiry to test for libel in cases involving fabricated quotations. Determination of whether a quotation purports to be verbatim and whether it is accurate quotation is simply the basic falsity inquiry that must be made when truth is urged as a defense to allegations of libel or any time actual malice must be proved. The actual facts must be ascertained in any case before the question of deliberate or reckless disregard of such facts can be raised. Materiality of the inaccuracy of quotations is relevant for determining whether a statement is defamatory, but it may

gives the appearance of a logically structured approach to answering the summary judgment question. However, it may only give heightened importance to the question of accuracy at the expense of more fundamental concerns. It may be more appropriate to consider the accuracy question by inquiring into the basic issues of defamatory effect and the constitutional safeguard of speech and press. The "breathing space"[143] needed for free expression may be unnecessarily restricted by focusing too heavily on accuracy. The analysis is more appropriately balanced if the court weighs the gravity of individual injury against the threat to free expression.

IV. INTERPRETIVE ISSUES

A. Quotations as Facts

Although the court never precisely identified its view of quotations, its analysis indicates that the court did not consider them assertions of fact.[144] Even the dissent was uncomfortable with such a construction, viewing quotations as representations of the "speaker's own words or something very close to them."[145] This discomfort led the dissent to argue that the degree of accuracy required in quotations is a question of journalistic judgment rather than journalistic fact.[146] The majority chose its accuracy standard by following court decisions which measured the truthfulness of translations and interpretations.[147]

Neither of these concepts is particularly useful in formulating a legal standard. Journalistic judgment may be helpful, but it repre-

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not be the only relevant factor.

143. New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)); *see supra* notes 4-5 and accompanying text.

144. *See supra* notes 124-27 and accompanying text. One of the basic issues the court faced was whether to treat quotations as assertions of fact. If quotations are understood as assertions that an individual literally said the quoted words, then anything other than verbatim reporting is falsehood. Had the court construed quotations in this manner, the actual malice inquiry would have been complete when it made the assumption, for purposes of the appeal, that the quotations were deliberately altered. The *New York Times* test, knowledge of falsity, would have been satisfied by the assumption of deliberate alteration.

145. *Masson*, 881 F.2d at 1464 (Kozinski, J., dissenting).

146. *Id.* at 1474; *see supra* notes 112-16 and accompanying text.

147. *Masson*, 881 F.2d at 1456; *see* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984); Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446, 452 (3d Cir. 1987); *see also supra* notes 16-18, 21-22, 129 and accompanying text.

sents only one side of the libel equation.[148] Translations pose problems of interpretation, usage, and context which are nonexistent in quotations. Similarly, quotations do not present the problem of interpretation of ambiguous events or remarks because they are, by definition, reproductions or repetitions of the exact language of the statements made.[149] Moreover, the Supreme Court has unequivocally rejected the professional standards test.[150]

A more constructive approach for such cases is to apply an objective standard to determine how quotations are understood. Although the standards of professional journalists shape the views of a reasonable person, the two are not wholly aligned. An objective standard is particularly appropriate in the case of libel because a fundamental element of the claim is damage to reputation.[151] Had the court applied this standard, it is unlikely that the court would have based its decision on whether the quotations were rational interpretations of what Masson actually said. A reasonable person is more likely to have an understanding closer to the fundamental rule cited by the dissent. Quotation marks are commonly understood to enclose words " 'exactly as the source gave them—verbatim.' "[152] The average person is unlikely to condone editing that goes beyond the most minor corrections of grammar or syntax as suggested by the *Associated Press Stylebook*.[153] Thus, the more controversial views of some journalists would not affect the standard.[154]

B. Standards of Materiality

The dissent included the question of materiality in its proposed five-step inquiry.[155] This element addresses the effect of the writer's

148. *See supra* notes 140-41 and accompanying text.

149. BLACK'S LAW DICTIONARY 1130 (5th ed. 1979); WEBSTER'S NEW WORLD DICTIONARY 1168 (2d ed. 1972); THE MLA STYLE SHEET 5-7 (W. Parker comp. 1968).

150. *See* Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2685 (1989); *see also supra* note 13 and accompanying text.

151. L. ELDREDGE, THE LAW OF DEFAMATION 2 (1978). The baseline objective standard for determining whether quotations are factually deficient would be what a reasonable person understands quotation marks to mean. In a particular case, the test would be how a reasonable person would interpret the use of quotations marks in the context.

152. *Masson*, 881 F.2d at 1474 (Kozinski, J., dissenting) (quoting M. V. CHARNLEY & B. CHARNLEY, REPORTING 248 (4th ed. 1979)).

153. *Id.* at 1475. "[T]he AP style manual advises that '[q]uotations normally should be corrected to avoid the errors in grammar and word usage that often occur unnoticed when someone is speaking but are embarrassing in print.' " *Id.* (quoting THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 184 (1982)).

154. *Id.* The dissent discusses views of some journalists who advocate "deliberate improvements." The views of writers such as Malcolm and Reid (*see supra* note 115) would also have to be considered in trying to settle on a standard accepted by the journalism profession.

155. *Masson*, 881 F.2d at 1478. The dissent conceptualized application of the materiality question in the context of sorting out whether an author's alteration of exact words spoken by the subject was the correction of speech fragmentation and other com-

changes on the accuracy of the quotation and asks whether the author misrepresented what the subject said. Applying this inquiry to the defamation issue is more logically the starting point because if the alterations are immaterial they can have no defamatory effect.[156] In such circumstances, there is no reason to raise the question of actual malice. Instead, the dispute is resolved at the defamation stage.

Defamation, which developed as a common law tort claim, is now codified in most states.[157] The common law tort standard of materiality for misrepresentation[158] is applicable in the defamation inquiry. The court asks whether a reasonable person, in framing a judgment of the speaker, would attach importance to the words misrepresented or omitted. If so, the misrepresented or omitted words are material. The inquiry then shifts to whether such misrepresentation or omission harmed the reputation or lowered the community estimation of the speaker.[159]

The test for actual malice follows the defamation inquiry because its purpose is to protect freedom of the press when liability for defamation would otherwise be imposed.[160] If the author's alterations are material in the defamation inquiry, the question of materiality is raised again in determining whether there was actual malice. However, the question of materiality in this context involves a different standard. Defamation is no longer involved because its essential elements are already established. Care must be taken not to confuse the analysis by making another facial comparison of what was said as opposed to what was quoted. Actual malice is an inquiry into the

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mon verbal abuses. The correction of such characteristic errors of speech was considered a commonly accepted and desirable practice. It did not embrace changing of words for artistic effect or other reasons unrelated to the process of transcribing spoken conversation into readable conversation. *See id.* at 1475; *see also supra* notes 117 and 142 and accompanying text.

156. If the difference between what was said and the way the author quoted it is materially the same, the quotation cannot be defamatory because the author has not interjected anything into it.

157. *See* L. ELDREDGE, THE LAW OF DEFAMATION 2 (1978); *see also* CAL. CIV. CODE § 45 (West 1982); L. FORER, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT 72 (1987).

158. *See* RESTATEMENT (SECOND) OF TORTS § 538 (1977).

159. *See* J. ELDREDGE, THE LAW OF DEFAMATION 32 (1978); *see also* RESTATEMENT (SECOND) OF TORTS § 559 (1977).

160. *See* L. FORER, *supra* note 157, at 74-78. Libel still requires the plaintiff to prove the elements of the defamation claim: publication of a defamatory statement, the statement concerned the plaintiff, and the plaintiff suffered injury to reputation as a result. However, when the defendant is a public figure, the constitutional concern for freedom of the press leads to the actual malice inquiry.

writer's subjective knowledge.[161] Thus, actual malice is established if the writer knew or was reckless as to whether his quotations were materially different from what the subject actually said.

The question is how to judge whether the writer had such knowledge. The standard of materiality in actual malice may be derived from judicial application of the *New York Times* rule.[162] The standard that runs through all the cases is that when the writer represents the work as factual, the writer is strictly liable for reporting which is intentionally or recklessly inaccurate about facts known to the writer. A different rule applies when the writer is expressing an opinion or giving an interpretation. Quotation marks are not determinative; liability depends on how the writer represents the quotations. When they are represented as factual and accurate, a subjective standard of materiality applies.[163]

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161. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 191 (1987). The writer's subjective knowledge is determinative of fault. Essentially, defamation of a public figure is excusable as long as the defamation was not false *and* the writer was not at fault for failing to ensure it was not false.

162. Where circumstances are unclear or what was said is unclear, an interpretation which is rational is acceptable. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); Time, Inc. v. Pape, 401 U.S. 279 (1971). If an author must translate from one language to another, a rational interpretation is also acceptable. Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446 (3d Cir. 1987). Where an author gives an impression of what the subject can be imagined to have said, it is necessary only to convey clearly that the writer is expressing an opinion. Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 749 U.S. 1032 (1987).

The cases have applied a more demanding standard where an author represents that a quotation is an accurate report of what the subject said. The quotation may be a complete fiction if it is not defamatory. Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834 (1977). However, if it is defamatory fiction, the writer may not inaccurately replicate what the writer knows was actually said with impunity. Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-526 n.9 (1986), *cert. denied*, 481 U.S. 1041 (1987) (It is noteworthy that the court found that the question of whether the work was fictional or not was a jury issue, but the question of actual malice could be resolved strictly on the basis of whether the writer knew what actually was said and inaccurately replicated it.). Falsely attributing statements amounts to false statement of facts, and whether such falsity is present is a question of law. Selleck v. Globe International, Inc., 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985). When quotations are wholly invented, actual malice is a jury question. Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976). However, actual malice is more than failure to comply with professional standards. The asserted facts (quotations in this case) must be known to be false and must be published with reckless disregard of their falsity. Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678 (1989).

163. The court asks whether the writer knew or should have known that the quotations were not an accurate replication of what the subject actually said.

C. Measuring Ambiguity and Substantial Alteration

The court noted that other courts have found alteration of quotations acceptable under some circumstances.[164] However, the court failed to distinguish those circumstances where alteration was permissible from those where it was not. None of the cited cases upheld a privilege to fabricate quotations if the subject's actual words were unambiguous. In *Hotchner-Puche* the court refused to impose liability because it found that the fabricated quotation lessened the defamatory content of a statement that was not defamatory in any event.[165] The case is significant because it reaffirmed that falsity is presumed but not dispositive of libel.[166]

Defamatory effect is the central issue in libel. Falsity becomes an issue only when truth is raised as an affirmative defense or when the constitutional protection of freedom of the press is at issue.[167] A statement of fact, if true, cannot be defamatory, no matter how injurious to reputation.[168] Liability is not imposed for libel of a public figure, regardless of falsity, unless published with knowledge or reckless disregard of the falsity—that is, actual malice.[169]

The cases relied on by the court apply the rational interpretation standard when a writer expresses opinions about what someone did or said. Some of the cases address whether the writer adequately alerted the readers that they were reading opinion or fiction rather than fact.[170] Others were concerned with how much leeway a writer

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164. *Masson*, 881 F.2d at 1455-56; *see also supra* notes 56-60 and accompanying text.

165. Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir.), *cert. denied sub nom.* Hotchner v. Doubleday & Co., 434 U.S. 834, 914 (1977).

166. *See* R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH AND REALITY 183-84 (1987).

167. *See id.* Proof of falsity has been interpreted as an essential requirement to show knowledge or reckless disregard of truth.

168. *See* R. PHELPS & E. D. HAMILTON, LIBEL: RIGHTS, RISKS AND RESPONSIBILITIES 106-08 (1978).

> Truth is the greatest of all defenses. There is no finer hour for a newsman than, when hauled before a court on a libel charge, he replies, in effect, to the plaintiff, "Yes, I libeled you, and I'm glad. I would do it all over again, exactly as I did before, because what I said was true and the public ought to know what a scoundrel you are."

Id. at 106.

169. The *New York Times* requirement. *See supra* notes 3-6 and accompanying text.

170. Time, Inc. v. Pape, 401 U.S. 279 (1971); Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 479 U.S. 1032 (1987); Selleck v. Globe International, Inc., 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*,

has in interpretation of language or events.[171] In each of these contexts, the other courts agreed that interpretive freedom extends to what is rational as an opinion of another's meaning. The cases do not grant a writer wide latitude to make alterations when conveying facts. Rather, they uniformly suggest, and some specifically indicate,[172] that there is no margin for interpretation when a writer presents factual material.

V. Good Law and Ethics in Journalism

A. Applying Standards—Professional or Legal

It is unnecessary to make the choice between standards acceptable to journalists and the court's rational interpretation standard. No baseline is imaginable for understanding a quotation's meaning unless reference is made to the conventions of professional writers. The understanding of readers is shaped by their familiarity with the common practices of journalists, as well as by their own education. However, standards of journalists are unreliable guides to legal standards for libel because of the inherent conflict between injury to reputation and freedom of the press. This particular conflict is what the actual malice rule addresses. The press is protected by requiring clear and convincing evidence of knowledge of falsity or reckless disregard of truth. The public cannot rely on the press to restrain itself from abuses any more than any other institution can be relied upon to police itself.

B. Substance versus Accuracy

The balance between the conflicting interests of individuals and the press remains best determined by placing the decision of whether fabricated quotations are defamatory in the hands of the jury. The court erred in this case in finding no actual malice as a matter of law. The court's error resulted from its failure to allow the jury to determine the question of defamatory effect. The court also erred by applying a broad materiality standard to judge the accuracy of the quotations. Summary judgment was inappropriate because a material question of fact existed as to whether a reasonable person would

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444 U.S. 984 (1979), *disapproved on other grounds*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719, n.9, 231 Cal. Rptr. 518, 525-526 n.9 (1986), *cert. denied*, 481 U.S. 1041 (1987).

171. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446 (3d Cir. 1987).

172. Selleck v. Globe International, Inc., 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (1985); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 846 n.9, 727 P.2d 711, 719 n.9, 231 Cal. Rptr. 518, 525-526 n.9 (1986), *cert. denied*, 481 U.S. 1041 (1987); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).

attach importance to the alterations in the quotations. If it found the differences material, the jury could have decided whether the difference were damaging to Masson's reputation.

The court was entitled to find no actual malice, as a matter of law, only if a reasonable jury could not have found that the quotations were materially altered to the detriment of Masson's reputation. It may well have done so if clear and convincing evidence was not produced to show that Malcolm knew the quotations were materially altered. However, by simply finding that the quotations were rational interpretations of what was said, the court did not proceed in this manner. Such a finding avoided the writer's representation of the quotations as factual replications of conversations rather than as interpretations. The court also misapplied the actual malice test to the facts rather than to the issue of knowledge of the facts.

C. The Right to Fictionalize the Facts

The court's opinion does not endorse or grant a right to fictionalize facts. Neither does it necessarily endorse fabrication of quotations. Rather, it is best understood as an attempt to reinforce the principle that falsehoods, even libelous ones, are nonetheless entitled to some protection under the first amendment. *New York Times* and its progeny certainly indicate that a free press is unable to operate effectively (and to criticize public figures) if it is held liable for errors of fact. However, this court's application of the rational interpretation test to quotations seems to suggest that journalists are free to change facts either to suit their literary taste or for dramatic effect. The only constraint apparently is whether a judge could believe that their version of the facts is one of a number of rational interpretations.

VI. CONCLUSION

The court's decision to resolve the case on an actual malice basis was flawed. It should have decided the defamation issue first. If the case could have been disposed of on the grounds that the quotations were not defamatory, then it was unnecessary to reach the constitutional issue of actual malice. On the other hand, if the quotations were materially different from Masson's statements and the effect was defamatory, then the actual malice test was required. However, the inquiry should then have focused on the writer's subjective knowledge of the material alteration.

By deciding the actual malice question, the court reached a con-

clusion that lies are constitutionally protected as long as they are little lies. The test for actual malice does not provide such a range of truthfulness. It is concerned only with knowledge of truthfulness. Liberty to intentionally misrepresent facts and damage reputations was surely not intended by the Supreme Court when it fashioned the actual malice test. When a writer knows that reported facts are false, or the purported quotations are not accurate, the constitution is no shield if the result is defamatory. The press has neither a constitutional nor a moral right to inflict harm by intentional untruth. That question was settled, if it was ever in doubt, by the Supreme Court's definition of such actions as actual malice. When the courts protect conscious lies which cause injury, the press ceases to have freedom and begins to have license.

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