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Masson v. New Yorker Magazine, Inc.: "Sex, Women, Fun, and Altered Quotations"

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COMMENTS

Masson v. New Yorker Magazine, Inc.: "Sex, Women, Fun, and Altered Quotations"*

I. INTRODUCTION

To many, the use of quotation marks signifies that a writer "is representing that those are the speaker's own words or something

* The title of this Comment parallels the inherent dilemma of the *Masson* court's "rational interpretation" standard. Because of an occasional reference to a particular subject matter, the title conceivably could be a rational interpretation of this Comment's content. However, in fairness to the curious reader, the thrust of this Comment centers upon "actual malice" and the common law rules of defamation as applied to altered quotations.

very close to them."[1] According to the United States Court of Appeals for the Ninth Circuit in *Masson v. New Yorker Magazine, Inc.*,[2] however, a journalist has a first amendment right to "fabricate quotations,"[3] and attribute them to a "public figure"[4] if the quotations are a "rational interpretation" of the public figure's authentic statements.[5]

In 1983, Janet Malcolm[6] published a two-part article in the *New Yorker* magazine regarding psychoanalyst Jeffrey Masson and the conditions surrounding his dismissal from his position as Projects Director of the Sigmund Freud Archives.[7] Masson filed suit in 1984 against Malcolm and the *New Yorker* magazine in the United States District Court for the Northern District of California.[8] Masson asserted that the defendants libeled him[9] by fabricating quotations

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1. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1548 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990); *see infra* notes 189-97 and accompanying text.

The United States Court of Appeals for the Ninth Circuit originally decided and filed an opinion in *Masson* on August 4, 1989. *See* Masson v. New Yorker Magazine, Inc., 881 F.2d 1452 (9th Cir. 1989). On February 15, 1990, the court of appeals denied appellant's motion for rehearing and rehearing en banc and amended its original opinion. *See Masson*, 895 F.2d at 1535. On October 1, 1990, the United States Supreme Court granted certiorari. *See Masson*, 111 S. Ct. at 39.

2. *Masson*, 895 F.2d at 1535 (2-to-1 decision).

3. *Id.* at 1539. For the purpose of the summary judgment standard, the court assumed that "the quotations were deliberately altered." *Id.* at 1537.

4. The plaintiff, Masson, acknowledged that he was a "public figure." *See* Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1397 (N.D. Cal. 1987); Brief for Appellant at 11, Masson v. New Yorker Magazine, Inc., 881 F.2d 1452 (9th Cir. 1989) (No. 87-2665) [hereinafter Brief for Appellant]. A public figure is either an all purpose public figure, by achieving pervasive fame or notoriety, or a limited purpose public figure, by voluntarily injecting himself or by being been drawn into the vortex of a public controversy. Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). This Comment will not discuss the issue of fabricated quotations attributed to private individuals.

5. *Masson*, 895 F.2d at 1539; *see* Taylor, *Janet Malcolm's License to Lie*, Miami Rev., Aug. 16, 1989, at 8, col. 1.

6. Janet Malcolm had an extensive background in psychoanalysis prior to interviewing Masson. Her father was a psychiatrist. Taylor, *Holier Than Thou*, N.Y. MAG., Mar. 27, 1989, at 32-33. Her breakthrough article at the *New Yorker* was a 1980 profile of an anonymous psychoanalyst that was later published as a book. *See generally* J. MALCOLM, PSYCHOANALYSIS: THE IMPOSSIBLE PROFESSION (1981).

In a 1989 interview with *New York Magazine* writer John Taylor, Masson recalled his interviews with Malcolm and suggested that Malcolm had a hidden agenda that led her to write *In the Freud Archives*. *See* Taylor, *supra*, at 33. He contended that Malcolm had a great deal invested in psychoanalysis, and that she hoped to discredit him in order to preserve psychoanalysis from the threat posed by his discoveries. *Id.*

7. Malcolm, *Annals of Scholarship: Trouble in the Archives* (pts. I & II), NEW YORKER, Dec. 5, 1983, at 59, Dec. 12, 1983, at 60, *reprinted in* J. MALCOLM, IN THE FREUD ARCHIVES (1984).

8. *Masson*, 686 F. Supp. at 1396. Masson also filed suit against Knopf, the publisher of the book. *Id.*

9. *Id.* Under California law:

that made him appear "egotistical, vain, and lacking in personal honesty and moral integrity."[10]

Malcolm had tape-recorded her interviews with Masson.[11] Therefore, when the challenged quotations in the article did not appear on her tape transcripts, the district court on summary judgment, and subsequently the court of appeals, accepted as true the allegations that Malcolm altered the quotations and attributed them to Masson.[12] Accordingly, this Comment addresses the issue of a jour-

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> Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, 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.

CAL. CIV. CODE § 45 (West 1982).

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

11. Malcolm had also submitted handwritten and typed notes to support her defense, but because Masson challenged the accuracy and authenticity of the typed notes, the district court disregarded those notes in its analysis. *Id.* at 1398 n.4. Additionally, there was direct evidence that Malcolm fabricated some of her notes. Certain sentences of her typed drafts had been crossed out and replaced with the disputed quotations. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1566-67 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990). Furthermore, Malcolm had repeatedly represented to her publisher that "everything was on tape" and had told Masson not to worry about being misquoted because all quotations would be verbatim. *Id.* at 1567.

12. *Masson*, 895 F.2d at 1537.

It would not be surprising if Malcolm did in fact alter the quotations given her opinion of the journalistic profession. In 1989, Malcolm wrote a two-part article describing author Joe McGinniss' relationship with Jeffrey MacDonald, a doctor and ex-Green Beret who had been convicted of murdering his wife and two daughters. Malcolm, *Reflections: The Journalist and the Murderer* (pts. I & II), NEW YORKER, Mar. 13, 1989, at 38, Mar. 20, 1989, at 49. After MacDonald's conviction, McGinniss wrote a book, concluding that MacDonald was guilty. *See generally* J. MCGINNISS, FATAL VISION (1983). MacDonald sued, claiming McGinniss betrayed his trust; eventually, they reached a $325,000 settlement. *See* Taylor, *supra* note 6, at 32.

Malcolm's article portrayed McGinniss as a liar and a fraud who gained MacDonald's confidence, pretending to believe in his innocence to assure his continued cooperation. *See* Malcolm, *supra*; *see also* Taylor, *supra* note 6, at 32. Malcolm, however, not only indicted McGinniss, but the entire profession as well:

> Every journalist who is not too stupid or too full of himself to notice what is going on knows that what he does is morally indefensible. He is a kind of confidence man, preying on people's vanity, ignorance, or loneliness, gaining their trust and betraying them without remorse. Like the credulous widow who wakes up one day to find the charming young man and all her savings gone, so the consenting subject of a piece of nonfiction writing learns—when the article or book appears—*his* hard lesson.

Malcolm, *supra*, Mar. 13, 1989, at 38.

Both Masson and McGinniss suggest that Malcolm's article attacking McGinniss is an attempt to work through her own "seduction and betrayal" of Masson. Taylor, *supra* note 6, at 37. McGinniss states:

> Before the article came out, someone said to me, 'Don't you see the obvious transference?' She had betrayed a subject named Jeffrey M. [Masson]. But she had escaped punishment because of the judge's broad interpretation of the libel

nalist's liability for defamation of a misquoted public figure when the journalist alters a public figure's quotation while having direct resources to verify the quotation.[13]

Since its 1964 decision in *New York Times v. Sullivan*,[14] the United States Supreme Court has subjected defamation law to constitutional scrutiny under the first amendment.[15] The Court's analysis weighs the constitutional freedom of the press against the countervailing state interest in protecting the individual's reputation.[16] The Court has granted significant constitutional protection to the press when the individual is a "public official"[17] or a "public figure,"[18] requiring the plaintiff to prove that the defamatory statement was false and to establish "actual malice" on the part of the defendant.[19] Although common law malice is shown by "ill will, evil or corrupt motive, intention to injure, hatred, enmity, hostility, or spite,"[20] the actual malice standard announced in *New York Times* requires the public figure or public official plaintiff to show that the statement was made "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[21] Later cases define "reckless disregard" to require a showing that a false publication was made with a "high degree of awareness of [its] probable falsity,"[22] or that the defendant "entertained serious doubts as to the truth of [the] publication."[23]

New York Times and its progeny explain that to encourage the

> laws. She had unexpiated guilt. Her transference was to project the guilt off herself and onto me. I was unaware of my role in her psychodrama. She could expiate guilt toward her Jeffrey M. [Masson] by coming to the aid of another Jeffrey M. [MacDonald], who was betrayed by a writer [McGinniss]. Freud said nothing is coincidence.

Id.

13. Journalists who recreate interviews from notes or memory and make inadvertent or negligent misquotations would remain sufficiently protected from liability. *See infra* note 236 and accompanying text.

14. 376 U.S. 254 (1964).

15. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

16. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

17. *New York Times*, 376 U.S. at 268 (requiring a showing of "actual malice").

18. *Gertz*, 418 U.S. at 335-37 (extending the *New York Times* "actual malice" standard to public figures).

19. *See id.* at 342; *New York Times*, 376 U.S. at 279-80.

20. Carson v. Allied News Co., 529 F.2d 206, 209 (7th Cir. 1976).

21. *New York Times*, 376 U.S. at 279-80. Private figure plaintiffs, however, are not necessarily held to this higher standard. *See Gertz*, 418 U.S. at 343.

22. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

23. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

dissemination of the truth, it is necessary to protect some misstatements of fact[24] because a rule requiring the press to guarantee the truth of all factual assertions would result in "self-censorship."[25] The constitutional phrase actual malice, however, is frequently misunderstood,[26] and raises unique issues when applied to individual situations. In *Masson*, the United States Court of Appeals for the Ninth Circuit confronted unique issues in applying the actual malice standard to altered quotations: To what extent is an altered quotation a false statement of fact within the actual malice framework? And what level of knowledge, with respect to the altered quotation, is required to prove actual malice?

For the analysis of altered quotations of a public figure to necessitate constitutional scrutiny, one first must accept that "[w]hat someone says is a fact no less than what someone does."[27] If a quotation is a factual assertion, then one must determine whether an altered quotation is a false statement of fact. There are at least two possibilities in defining falsity: 1) An altered quotation automatically is false because it purports to be a verbatim quotation when in actuality it is not, or 2) An altered quotation is false only when the meaning of the altered quotation is substantially different from the meaning of the original statement. The first proposition violates the spirit of *New York Times* because it requires journalists to guarantee the truth of all factual assertions (i.e., the exact wording of the quotation). The *New York Times* Court recognized the difficulties of proving truth "in all

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24. *New York Times*, 376 U.S. at 271-75; *see* Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report*, 54 N.Y.U. L. REV. 469, 490 (1979).

25. *New York Times*, 376 U.S. at 279.

26. *See* Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2685 n.7 (1989) ("The phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will."); *see also* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 n.18 (1971) (Ill will or bad motives are not elements of the *New York Times* standard.). Some suggest that the confusion could be minimized by substituting a less confusing phrase, such as "state of mind," "deliberate or reckless falsity," or "constitutional limitation." *See* Westmoreland v. CBS, Inc., 596 F. Supp. 1170, 1172 n.1 (S.D.N.Y. 1984).

27. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1558 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990); *see* Ben-Oliel v. Press Pub. Co., 251 N.Y. 250, 167 N.E. 432 (1929). In *Ben-Oliel*, the New York Court of Appeals stated:

> In order to constitute libel, it is not necessary for the defendant in its paper to directly attack the plaintiff as an ignorant imposter. The same result is accomplished by putting in [the plaintiff's] mouth or attaching to [the plaintiff's pen] words which make the self-revelation of such a fact. One may say of a physician that he is an ignorant quack, or he may print a statement by the physician regarding some operation performed by him or some treatment of a disease which shows him to the profession to be an ignoramus and a bungler. Both of these publications would be libelous.

Id. at 255, 167 N.E. at 433-34; *see also* Taylor, *supra* note 6, at 35 ("Quotations are facts, too.").

its factual particulars"[28] and stated that such a rule would lead to "self-censorship" and would thereby violate the first amendment.[29]

The second proposition, however, is in accordance with the actual malice standard as well as the common law rules of defamation. Under the common law, "[i]t is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."[30] Consequently, literal truth of a publication is not necessary; the statement must only be substantially true.[31] The test is "whether the statement produce[s] a different effect upon the reader than that which would be produced by the literal truth of the matter."[32] Under the second proposition, the issue of actual malice would arise only if the altered quotation is substantially false. If so, it would be considered a false statement of fact.

Thus, the first issue presented by *Masson* is whether a court should look at actual or substantial falsity. An actual falsity inquiry only would ask whether falsity is established because the quotation purports to be a verbatim quotation when in actuality it is not. A substantial falsity[33] inquiry would ask whether falsity is established only when the altered quotation produces a different effect upon the reader than that which would be produced by the verbatim quotation. If substantial falsity is required, then an actual malice knowledge of falsity inquiry also must address: 1) Whether the altered quotation had a different and more damaging effect on the mind of the reader

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28. *New York Times*, 376 U.S. at 279.

29. *Id.*

30. RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977); *see* W. PROSSER & R. KEETON, THE LAW OF TORTS 842 (5th ed. 1984) (stating that "it is not necessary to prove the literal truth of the accusation in every detail").

31. *See, e.g.*, Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 75 (1988), 109 S. Ct. 1118 (1989); Guccione v. Hustler Magazine, Inc., 800 F.2d 298 (2d Cir. 1986), *cert. denied*, 479 U.S. 1091 (1987); Alioto v. Cowles Communications, Inc., 623 F.2d 616 (9th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981); Gomba v. McLaughlin, 180 Colo. 232, 504 P.2d 337 (1972); Bell Courier-Journal v. Louisville Times Co., 402 S.W.2d 84 (Ky. 1966); Drury v. Feeney, 505 So. 2d 111 (La. App.), *cert. denied*, 506 So. 2d 1225 (La. 1987); Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976); Weisburgh v. Mahady, 148 Vt. 70, 511 A.2d 304 (1986).

32. *Gomba*, 180 Colo. at 234, 504 P.2d at 339; *see* Wehling v. Columbia Broadcasting Sys., 721 F.2d 506 (5th Cir. 1983); Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 448 A.2d 1317 (1982); Baia v. Palm Beach Newspapers, Inc., 387 So. 2d 517 (Fla. Dist. Ct. App. 1980); *see also* Liberty Lobby, Inc. v. Anderson, 746 F.2d 1563 (D.C. Cir. 1984) (Scalia, J.), *rev'd on other grounds*, 477 U.S. 242 (1986).

33. *See* RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977). This comment states in pertinent part: "It is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Id.*; *see supra* notes 31-32 and accompanying text.

than the speaker's literal words,[34] and 2) Whether the journalist knew or acted in reckless disregard with respect to the quotation's different and more damaging effect.[35]

The standards of both the *Masson* majority and the dissent, however, transgress the common law rules of defamation and the *New York Times* actual malice standard. The district court had granted defendant's motion for summary judgment.[36] Masson contended that the fabrication of a quotation attributed to a public figure raised a genuine issue of fact as to actual malice and therefore precluded summary judgment.[37] On appeal, the United States Court of Appeals for the Ninth Circuit held that there is no genuine issue of fact as to actual malice if the "fabricated quotations are either 'rational interpretations' of ambiguous remarks,"[38] or "do not 'alter the substantive content' of unambiguous remarks actually made by the public figure."[39] Thus, when a public figure's statements to a journalist differ from the statements attributed in print, the discrepancy between the actual statements and those attributed would not necessarily permit a jury to infer actual malice.[40] The argument on behalf of the *Masson* court's standard is one of journalistic discretion: "If the exercise of literary style were always subject to the threat of a defamation action, not only would the content of the messages ultimately be altered, but the vigorous and vital public debate essential to the democratic process would be 'tempered to polite sparring.' "[41]

The *Masson* court's rational interpretation standard, however,

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34. *See* Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537 (1934); M. ELDRIDGE, LAW OF DEFAMATION 337 (1978).

35. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (requiring proof of actual malice); St. Amant v. Thompson, 390 U.S. 727 (1968) (same); Garrison v. Louisiana, 379 U.S. 64 (1964) (same); New York Times v. Sullivan, 376 U.S. 254 (1964) (same).

36. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1398-99 (N.D. Cal. 1987). Under the standards enunciated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), "the appropriate summary judgment question [is] whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence." *Id.* at 255-56.

37. Brief for Appellant, *supra* note 4, at 8.

38. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1539 (9th Cir.) (citing Dunn v. Gannett New York Newspapers, 833 F.2d 446, 452 (3rd Cir. 1987); and Bose Corp. v. Consumers Union, 466 U.S. 485, 512-13 (1984) (quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971))), *cert. granted*, 111 S. Ct. 39 (1990).

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

40. *See* Reuben, *9th Circuit Rules Close Enough for Media Quotes*, L.A. Daily J., Aug. 7, 1989, at 1, col. 4.

41. Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 264, 721 P.2d 87, 93, 228 Cal. Rptr. 206, 212 (1986) (citing Good Government of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 698, 586 P.2d 572, 588, 150 Cal. Rptr. 258, 273 (1978) (Bird, J., dissenting)).

grants unwarranted protection to journalists by disregarding the common law rules of defamation and constitutional guidelines. Although the court's "alter the substantive content" standard arguably addresses the issue of substantial falsity,[42] the rational interpretation standard makes no falsity inquiry. Under the rational interpretation standard, a journalist can take a public figure's statement, interpret the meaning of that statement, and attribute that interpretation to the public figure. The main requirement imposed on the journalist is that the journalist's interpretation is rational. This standard also is in discord with the United States Supreme Court's admonition in *Time, Inc. v. Firestone*,[43] that although meaning is unclear, it "does not license [the journalist] to choose from among several conceivable interpretations the one most damaging to [the individual]."[44]

The dissent contended that such a standard virtually grants a license to lie[45] so long as the journalist can argue "with a straight face that it is *a* rational interpretation of what the speaker said."[46] The dissent asserted that there was a jury issue of actual malice because Malcolm either knew that the quotations attributed to Masson were false or, if she contended that she thought she had faithfully quoted Masson, she acted in reckless disregard of whether they were false or not because she could have easily verified the quotations by checking the tape-recorded passages.[47] To resolve the issue, the dissent set forth a five-step inquiry that analyzes whether a quotation is a verbatim representation of what the speaker said.[48] If it is not, then the altered quotation is a fabrication and must be tested under a strict standard equating fabrication (i.e., a change in wording) with actual malice.[49]

The dissent's strict standard is troublesome, however, because it reduces actual malice to a question of verbatim accuracy rather than to a question of substantial falsity.[50] The dissent advanced the argument that "the selective editing of quotations so as to radically alter

42. If an altered quotation does not alter the substantive content of the public figure's actual statement, then one can argue that the altered quotation is substantially true because the meaning remains the same.

43. 424 U.S. 448 (1976).

44. *Id.* at 459 & n.4.

45. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1570 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990); *see* Taylor, *supra* note 5, at 8, col. 1.

46. *Masson*, 895 F.2d at 1548.

47. *Id.* at 1566-68.

48. *Id.* at 1562-66.

49. *Id.*

50. *Id.* at 1566.

their meaning is an anathema among respectable journalists."[51] Even so, the United States Supreme Court has stated that an "extreme departure from professional standards . . . cannot provide a sufficient basis for finding actual malice."[52] Furthermore, to reduce actual malice to the issue of the accuracy of a quotation (i.e., whether the words quoted were in fact spoken as attributed) creates an undesirable chilling effect by holding journalists to verbatim quotes. If quotations are statements of fact requiring constitutional scrutiny, then the issue of knowledge of falsity or reckless disregard of the truth must also include whether the altered quotation was substantially false,[53] whether the altered quotation would have a different and more damaging effect on the mind of the reader than the speaker's literal words,[54] and whether the journalist knew or was in reckless disregard of the different and more damaging effect.[55]

This Comment reviews the *Masson* case and examines the forces behind the decision. Although the first amendment safeguards the freedom of the press,[56] the right to alter quotations deliberately and to attribute defamatory statements is not a concomitant of a free press.[57] And while it is not necessary for the press' constitutional autonomy to allow a journalist to interpret a public figure's statement and then attribute its own interpretation directly to that public figure,[58] a strict standard regarding fabricated quotations is unwarranted in light of the likely chilling effect on the press' stylistic discretion. Section II outlines the first amendment considerations concerning the use of quotation marks and discusses prior court decisions interpreting these considerations. Section III reviews the facts of *Masson* and challenges the rational interpretation standard in light of common law rules of defamation, first amendment principles, prior court decisions, and journalism's canon of ethics. Section IV analyzes the dissent's suggested five-step inquiry, proposes an alternative inquiry, and applies

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51. *Id.* at 1554.

52. Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2684 (1989).

53. *See* RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977); *supra* notes 31-33 and accompanying text.

54. *See supra* note 34 and accompanying text.

55. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (requiring proof of actual malice); St. Amant v. Thompson, 390 U.S. 727 (1968) (same); Garrison v. Louisiana, 379 U.S. 64 (1964) (same); New York Times v. Sullivan, 376 U.S. 254 (1964) (same).

56. *See* U.S. CONST. amend. I; *supra* note 15 (text of first amendment).

57. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1548 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

58. *But see* Reuben, *supra* note 40, at 1, col. 4. Rex Heinke, a Los Angeles libel lawyer, asserts that the court's ruling is sensible given the interviewing process. He states: "Inevitably, there is a fair amount of interpretation that goes on when you interview someone." *Id.*

the alternative inquiry to *Masson*'s facts. Section V concludes that the court's rational interpretation standard which shields fabricated quotations is a dangerous and unwarranted extension of first amendment protection, that the adoption of the dissent's five-step inquiry results in an undesirable chilling effect, and that the alternative inquiry would result in proper adherence to common law rules of defamation and the principles of the first amendment.

II. THE FIRST AMENDMENT AND QUOTATIONS

A. New York Times *and Actual Malice*

Modern libel law began in 1964 with the *New York Times v. Sullivan*[59] decision in which the United States Supreme Court held that constitutional guarantees require public officials to prove that a false and defamatory statement was made with actual malice in order to recover damages.[60] At common law, malice is shown by "ill will, evil or corrupt motive, intention to injure, hatred, enmity, hostility, or spite."[61] The actual malice standard announced in *New York Times*, however, requires the public official plaintiff to show that a statement was made "with knowledge that [the statement] was false or with reckless disregard of whether it was false or not."[62] Later cases define "reckless disregard" to require a showing that a false publication was made with a "high degree of awareness of [its] probable falsity,"[63] or that the defendant "entertained serious doubts as to the truth of [the] publication."[64]

The *New York Times* Court was concerned that a rule requiring the press effectively to guarantee the truth of all factual assertions would result in "self-censorship."[65] Recognizing that erroneous statements are "inevitable in free debate,"[66] the Court concluded that erroneous statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[67] Thus, by invoking the actual malice standard, and thereby eliminating liabil-

59. 376 U.S. 254 (1964).

60. The Court required that actual malice be demonstrated by convincing clarity. *Id.* at 285-86. Additionally, the Court required independent appellate review. *Id.* at 285. For further discussion of *New York Times* and the actual malice standard, see Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of* Bose Corp. v. Consumers Union of United States, Inc., 71 CORNELL L. REV. 477 (1986).

61. Carson v. Allied News Co., 529 F.2d 206, 209 (7th Cir. 1976).

62. *New York Times*, 376 U.S. at 279-80.

63. Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

64. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

65. *New York Times*, 376 U.S. at 279.

66. *Id.* at 271.

67. *Id.* at 271-72 (citing NAACP v. Button, 371 U.S. 415, 433 (1963)).

ity for the good faith publication of defamatory falsehoods, the Court identified "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[68]

In *Gertz v. Robert Welch, Inc.*,[69] confirming the extension of constitutional protection from "public officials" to "public figures,"[70] the Court noted that no idea is false under the first amendment,[71] and that the expression of opinion depends "not on the conscience of judges and juries but on the competition of other ideas."[72] The Court added, however, that false statements of fact possess no constitutional value and that neither the intentional lie nor the careless error materially advance *New York Times'* interest in "uninhibited, robust, and wide-open" debate on public issues.[73] Ultimately, false statements belong to a class of statements which "are no essential part of any expression of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[74]

B. Anderson v. Liberty Lobby *and Summary Judgment*

In *Anderson v. Liberty Lobby*,[75] the Court announced the standard governing summary judgment in libel actions brought by public figures.[76] The Court held that "where the factual dispute concerns actual malice . . ., the appropriate summary judgment question will be

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68. *Id.* at 270.

69. 418 U.S. 323 (1974).

70. After *New York Times*, the Court subsequently expanded the doctrine to include public figures. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); *see also Gertz*, 418 U.S. at 323.

In *Butts*, Justice Harlan's plurality opinion suggested that, instead of the actual malice standard, a public figure need only make "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Butts*, 388 U.S. at 155. *But see* Harte-Hanks Communications, Inc. v. Connaughton, 109 S. Ct. 2678, 2685 (1989) (rejecting this approach).

71. *Gertz*, 418 U.S. at 339.

72. *Id.* at 339-40. The Court cites Thomas Jefferson's first Inaugural Address: "If there be any among us who would wish to dissolve this Union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." *Id.* at 340 n.8.

73. *Id.* at 340 (citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964)).

74. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

75. 477 U.S. 242 (1986).

76. The Court proclaimed:

> When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*. For example, there is no genuine issue if the evidence presented in the

whether the evidence in the record could support a reasonable jury finding . . . that the plaintiff has shown actual malice by clear and convincing evidence. . . ."[77]

The Court's holding defines a "genuine issue" for summary judgment purposes when a plaintiff faces a clear and convincing evidentiary burden of proof.[78] Before *Anderson*, the lower courts were divided on whether the clear and convincing evidentiary burden pertained only to the trial stage or if it pertained to the determination of whether a plaintiff had presented a genuine issue of fact to survive a summary judgment motion.[79] *Anderson* applies the burden to summary judgment so that now, for a plaintiff to establish a genuine issue in a public figure libel action, the plaintiff must allege sufficient facts such that "a reasonable jury might find that actual malice [has] been shown with convincing clarity,"[80] with the trial judge making this determination.

Some have argued that the *Anderson* rule extends the role of the judge, directing the judge to evaluate the persuasive potential of the evidence presented in support of a summary judgment.[81] The decision, however, appears to be a logical extension of significant procedural protections in first amendment cases.[82] In *Bose Corp. v. Consumers Union of United States, Inc.*,[83] the Court stated:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of

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opposing affidavits is of insufficient caliber or quality to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in a ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden.

Id. at 254.

77. *Id.* at 255-56.

78. *See* Comment, Anderson v. Liberty Lobby, Inc.: *Federal Rules Decision or First Amendment Case?*, 59 U. COLO. L. REV. 933 (1988).

79. *Id.* (citing Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 468 (1982)).

80. *Anderson*, 477 U.S. at 257.

81. *See* Comment, *supra* note 78, at 937.

82. *But see Anderson*, 477 U.S. at 256 n.7 (acknowledging the Court's "general reluctance 'to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws' " (quoting Calder v. Jones, 465 U.S. 783, 790-91 (1984))).

83. 466 U.S. 485 (1984).

"actual malice."[84]

C. *The Judiciary's Interpretation of Quotations*

The United States Court of Appeals for the Ninth Circuit in *Masson* reviewed both federal and California cases regarding the issue of quotations within the guidelines of first amendment protections. The cases considered fictionalized as well as misleadingly edited quotations.

1. THE FEDERAL COURTS OF APPEALS

a. Fictionalized Quotations

i. *Carson*

Carson v. Allied News Co.[85] concerned a journalist who wrote an article describing with abundant detail the supposed struggle between Johnny Carson and NBC executives concerning the Tonight Show's move from New York to Hollywood.[86] The article contained "wholly imagined but supposedly precisely quoted conversations" of Carson and the NBC executives.[87] In reviewing the unsubstantiated "quoted conversations," the United States Court of Appeals for the Seventh Circuit opined:

> In the catalogue of responsibilities of journalists, right next to plagiarism . . ., must be a canon that a journalist does not invent quotations and attribute them to actual persons. If a writer can sit down in the quiet of his cubicle and create conversations as "a logical extension of what must have gone on" and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. In any event, *St. Amant* expressly gives as another example of reckless disregard for the truth any "product of [one's] imagination."[88]

The court reasoned that by fabricating the quoted conversations, the defendants necessarily entertained serious doubts as to the truth of the statements and had a high degree of awareness as to their probable falsity.[89] Thus, the plaintiffs were entitled to a jury's determination as to the existence of actual malice.[90]

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84. *Id.* at 511.
85. 529 F.2d 206 (7th Cir. 1976).
86. *Id.* at 212.
87. *Id.* at 212-13.
88. *Id.* at 213 (citing St. Amant v. Thompson, 390 U.S. 727, 732 (1968)).
89. *Id.* at 209 (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968); Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).
90. *Id.*

The *Carson* opinion clarifies that wholly-imagined fabricated quotations are not protected under the principles of the first amendment. A journalist who invents quotations and attributes them to actual persons would meet the requisite actual malice standard because the journalist knows that the statements are false.

ii. *Dunn*

In *Dunn v. Gannett New York Newspapers, Inc.*,[91] the Mayor of Elizabeth, New Jersey, discussing the city's litter problems, stated:

> You have a lot of new people moving into the City of Elizabeth, some coming from foreign lands where abject poverty was something they lived with everyday and they have not yet been assimilated into our type of society, and it will take a great deal of time for some of them to respect the rights and the properties of other people, and above all, to respect a city that offers them a home in what I consider to be a wholesome environment.[92]

In summarizing the Mayor's comments, a Spanish-language newspaper printed the following headline: Alcalde de Elizabeth al ataque: LLAMA 'CERDOS' A LOS HISPANOS. Translated into English, the headline read: Elizabeth Mayor on the attack: CALLS HISPANICS 'PIGS.'[93]

The Mayor argued that the newspaper, "by enclosing 'cerdos' in single quotation marks, purported to proclaim that the mayor had in fact used the word 'pigs' in discussing the litter problem."[94] He asserted that actual malice could be implied because the defendant knew the headline was an exaggeration of the truth.[95] The district court granted summary judgment to the newspaper, holding that "the plaintiff had failed to present clear and convincing evidence that the newspaper published the headline with actual malice."[96]

The United States Court of Appeals for the Third Circuit affirmed, stating that "the headline was a rational interpretation of remarks that bristled with ambiguities."[97] While some may conclude that the *Dunn* decision supports the proposition that actual malice

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91. 833 F.2d 446 (3d Cir. 1987).

92. *Id.* at 448.

93. *Id.* Neither the plaintiff nor the defendant contested the translations. *Id.* at 448 n.1.

94. *Id.* at 450.

95. *Id.* at 451.

96. *Id.* at 449.

97. *Id.* at 452. The court cited two propositions: (1) that language in an article reflecting a misconception by an author is not enough to prove actual malice because the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities," Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 512-13 (1984); and (2) that the "interpretation [of a document], though arguably reflecting a

cannot be inferred from evidence showing quoted language differs from actual statements made if the fabricated quotations are rational interpretations of ambiguous remarks,[98] this conclusion ignores the rationale behind the *Dunn* decision.

First, the court acknowledged that the word "cerdos" was an appropriate and linguistically correct Spanish term for someone who litters or dirties streets.[99] Second, the court recognized that the newspaper placed quotation marks around the word "cerdos" to signify that the word was being used figuratively.[100] Finally, the court considered that the use of quotation marks in Spanish does not necessarily indicate that a literal quotation is intended.[101]

Consequently, the *Dunn* court never reached the *Masson* issue of whether the quoted language differed from actual statements made. The court concluded that:

> [Because the Spanish "cerdos"] was a fair, albeit inadequate, translation . . . of the words "litter," "litterer," or "litterbug," it was critical to the plaintiff's case that he meet this reality with countervailing factual evidence of actual malice [entertaining serious doubts as to the truth of the statements or having a high degree of awareness as to their probable falsity]. This he failed to do. In failing, he created no genuine issue of material fact.[102]

Recognizing the inherent difficulties in translating between languages, the *Dunn* decision emphasizes that translations involve judgment; a translator must select the foreign-language term that best corresponds to the English word actually spoken.[103] Even greater discretion is necessary when no exact translation is possible.[104] The need for discretion, however, disappears in the context of quoted language when no translation is necessary. When everyone is speaking English, no judgment is required,[105] and there is no need for rational interpretation.[106]

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misconception, was not enough to create a jury issue of [actual] 'malice,' " Time, Inc. v. Pape, 401 U.S. 279, 290 (1971).

98. *See supra* note 38 and accompanying text.

99. *Dunn*, 833 F.2d at 451.

100. *Id.*

101. *Id.*

102. *Id.* at 452.

103. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1555 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

104. *See id.*

105. *See id.*

106. *See id.*

iii. *Hotchner*

In *Hotchner v. Castillo-Puche*,[107] the United States Court of Appeals for the Second Circuit considered Castillo-Puche's memoir of his encounters with Ernest Hemingway. The evidence indicated that Castillo-Puche, in a book published in Spanish, quoted Hemingway as describing Hotchner, a public figure plaintiff, as follows: "[He is] dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him."[108] The publisher, in the English-language edition of the book "toned down" the quotation,[109] quoting Hemingway as stating: "I don't really trust him."[110]

With regard to the statements in Spanish, the court concluded that there was no clear and convincing evidence that the publisher entertained serious doubts as to the truth of the statements or had a high degree of awareness as to their probable falsity because "[t]he incident itself is believable and, as all the witnesses at trial agreed, the language used and sentiments expressed were not uncharacteristic of Hemingway."[111] The editor had contacted Castillo-Puche, who stood by his account of the incident. The court's rationale is instructive, concluding that "[w]here a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for the truth."[112]

The United States Court of Appeals for the Second Circuit also addressed the "bowdlerized version" of Hemingway's alleged statement, "I don't trust him."[113] The court concluded that "[i]t [was] true that in transforming Hemingway's words to the much milder 'I don't trust him,' . . . [the publisher] was fictionalizing to some extent. However, the change did not increase the defamatory impact or alter the substantive content of Hemingway's statement."[114] Furthermore, because the publisher could not have been liable for publishing the uncut version, it could not be liable for deciding to make the passage less offensive.[115]

The *Hotchner* opinion clearly stands for the proposition that a plaintiff cannot base a claim on changes in another's quote if the

107. 551 F.2d 910 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977).
108. *Id.* at 914.
109. *Id.* at 912.
110. *Id.* at 914.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*

changes do not increase the defamatory impact or alter the substantive content of the quotation. If an altered quotation does not alter the substantive content of the public figure's actual statement, then it follows that the altered quotation is substantially true because the meaning is the same.[116]

b. Misleadingly Edited Quotations: *Time, Inc. v. Pape*

Time, Inc. v. Pape[117] involved a defendant magazine which published an article concerning a report of the United States Civil Rights Commission ("Commission"). The Commission's report enumerated "the alleged facts in 11 typical cases of police brutality" under the preface that while "[i]n no case has the Commission determined conclusively whether [the allegations are correct], . . . [t]he Commission is of the opinion . . . that the allegations appear[ ] substantial enough to justify discussion."[118]

The report included the description of an "alleged" racially-motivated beating of an arrestee by detective Pape.[119] Drawing upon the Commission's report, the *Time* article contained numerous accounts of police brutality, including a detailed description of the beating by detective Pape.[120] The article, however, omitted the Commission's preface that the report described mere allegations.[121] Pape sued the magazine, charging that actual malice could be inferred from the omission of the word "alleged" in the *Time* article.[122] The Supreme Court refused to infer actual malice from the omission of the word "alleged" because of the Commission's prefatory remarks about the "allegations."[123] Instead, the Court held that the preface "may fairly be characterized as extravagantly ambiguous."[124] "[I]n context it was impossible to know whether the Commission was seeking to encourage belief or skepticism regarding the incidents about to be described."[125] Regarding this ambiguity, the Court concluded:

> [The magazine's] omission of the word "alleged" amounted to the adoption of one of a number of possible rational interpretations of

116. Consequently, an altered quotation that does not alter the substantive content has no more damaging effect than a verbatim quotation and does not increase the defamatory impact of that verbatim quotation.

117. 401 U.S. 279 (1971).

118. *Id.* at 287.

119. *Id.* at 280-81.

120. *Id.* at 281.

121. *Id.* at 281-82.

122. *See id.* at 282.

123. *Id.* at 288-92.

124. *Id.* at 287.

125. *Id.* at 288.

> a document that bristled with ambiguities. The deliberate choice of such an interpretation, though arguably reflecting a misconception, was not enough to create a jury issue of "malice" under *New York Times*. To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on the errors of historic fact.[126]

The *Pape* opinion acknowledges that publishers who maintain a standard of care, such as "to avoid knowing falsehood or reckless disregard of the truth," are protected from good faith errors by the first amendment.[127] The Court recognized that press reports about news events can contain "an almost infinite variety of shadings."[128] In materials such as the Commission report, where "the source itself has engaged in qualifying the information released, complexities ramify."[129] Thus, *"[a]ny departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices."*[130]

The ambiguities in the preface of the Commission report entitled the magazine to adopt one of a number of possible rational interpretations of the document. The omission of the word "alleged" was a matter of interpretation or judgment, necessarily protected by the first amendment. Conversely, in the context of unqualified quotations attributed to a third party, such standards cannot apply.[131] When quoting a third party, there is little need for interpretation. Quotation marks signify that the journalist "is representing that those are the speaker's own words or something very close to them"[132] and that the journalist warrants that no editorial comment has been interposed, no ambiguities have been resolved, and nothing of substance has been added or detracted.[133]

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126. *Id.* at 290.
127. *Id.* at 291.
128. *Id.* at 286.
129. *Id.*
130. *Id.* (emphasis added).
131. *But see* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1539 & 1544-45 (9th Cir.), *cert. granted*, 111 S. Ct. 39 (1990).
132. *Id.* at 1548 (Kozinski, J., dissenting).
133. *Id.* at 1549.

2. THE CALIFORNIA COURTS

a. *Bindrim*

Bindrim v. Mitchell[134] concerned a defendant author who wrote a purported novel about a fictional psychiatrist who demanded in obscene and unprofessional language that a patient "drag" his wife to a "nude marathon."[135] The plaintiff, a public figure psychologist, sued for libel, claiming that he was the psychiatrist portrayed in the novel and that the defendant fictionalized the defamatory quotations and attributed them to him.[136] At trial, the evidence revealed that the defendant author attended the psychologist's "nude marathon" sessions, that she told the psychologist that she was attending for therapeutic purposes and had no intention of writing about a "nude marathon," and that she signed a written contract to that effect.[137] The psychologist produced a tape recording of a therapy session that the author had attended. The tape revealed that the psychologist merely suggested in a decent and understanding manner that the patient bring his wife to a "nude marathon."[138]

The jury concluded that the book was not fiction, that the quotations attributed to the psychologist were false and defamatory, and that the defendant published the quotations with actual malice.[139] The defendant appealed, claiming that clear and convincing evidence did not support the jury's finding of actual malice.[140] The California Court of Appeals affirmed the jury's findings, holding that:

> [The defendant author's] reckless disregard for the truth was apparent from her knowledge of the truth of what transpired at the encounter, and the literary portrayals of that encounter. Since she attended sessions, there can be no suggestion that she did not know the true facts. Since "actual malice" concentrates solely on defend-

134. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Ct. App.), *cert. denied*, 444 U.S. 984 (1979), *disapproved on other grounds*, McCoy v. Hearst Corp., 42 Cal. 3d 835, 727 P.2d 711, 231 Cal. Rptr. 518 (1986).

135. *Id.* at 71, 155 Cal. Rptr. at 34. The fictional psychiatrist told his patient to "drag his wife [to a "nude marathon"] . . . by the fucking cunt." *Id.* The term "nude marathon" is described as a form of group therapy used as a means of helping people to shed their psychological inhibitions with the removal of their clothes. *Id.* at 69, 155 Cal. Rptr. at 33.

136. *Id.* at 71, 155 Cal. Rptr. at 35.

137. *Id.* The contract read as follows:

> The participant agrees that he will not take photographs, write articles, or in any manner disclose who has attended the workshop or what has transpired. If he fails to do so he releases all parties from this contract, but remains legally liable for damages sustained by the leaders and participants.

Id.

138. *Id.* at 70-71, 155 Cal. Rptr. at 34.

139. *Id.* at 71-75, 155 Cal. Rptr. at 35-37.

140. *Id.* at 71-72, 155 Cal. Rptr. at 35.

> ants' attitude toward the truth or falsity of the material published, and not on malicious motives, certainly defendant . . . was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with actual knowledge of falsity.[141]

The *Bindrim* court's approach regarding quotations is significant. The author had attended the "nude marathon" sessions and therefore had direct knowledge of the psychologist's statements. Since she knew the true facts, there was no ambiguity as to what was said, and there was nothing to interpret. The fabricated quotations were substantially false and had a different and more damaging effect on the mind of the reader than the psychologist's actual statements.[142] Thus, as in similar situations (i.e., when a journalist tape-records an interview), actual malice potentially exists because the author is in a position to know of the truth or falsity of her own material and to know of the departure from the substantial truth. The author's altering the meaning of the actual statements entitles the defamed to a jury's determination of actual malice.[143]

b. *Selleck*

Selleck v. Globe International, Inc.[144] involved a defendant magazine that falsely attributed statements about Tom Selleck's love life to the actor's father. Selleck's father alleged that he never gave an interview to any of the defendant's reporters nor consented to any interview that could be used by or sold to the defendant.[145]

The California Court of Appeals concluded that because the magazine article "attributed to plaintiff statements he did not make," the magazine acted with actual malice by publishing the statements "with knowledge that they were falsely attributed to plaintiff or with a reckless disregard of the fact that plaintiff did not make the statements."[146] The court, considering the argument that the quoted

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141. *Id.* at 72-73, 155 Cal. Rptr. at 35-36 (citations omitted).

142. The court stated:

> It is clear from the transcript of the actual encounter weekend proceeding that some of the incidents portrayed by Mitchell are false: i.e., substantially inaccurate descriptions of what actually happened. It is also clear that some of these portrayals cast plaintiff in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional.

Id. at 77, 155 Cal. Rptr. at 38.

143. *Id.* at 71, 155 Cal. Rptr. at 34-35.

144. 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (Ct. App. 1985).

145. *Id.* at 1128, 212 Cal. Rptr. at 841.

146. *Id.* at 1129, 212 Cal. Rptr. at 841. *But see* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1538 n.1 (9th Cir.) (arguing that *Selleck* never discussed actual malice), *cert. granted*, 111 S. Ct. 39 (1990).

passages merely were an expression of opinion and therefore did not give rise to a cause of action, concluded: "[The article did] not merely express the defendant's opinion that plaintiff made statements about his son. Rather, [it] assert[ed] as a fact that plaintiff made the statements."[147] Once again, the California Court of Appeals offers an instructive opinion regarding quotations. If the article gives a clear impression that the subject has made the statements, such as a reporter's use of direct quotations from a personal interview, the complete fabrication of these statements necessarily constitutes actionable actual malice.

c. *Baker*

Baker v. Los Angeles Herald Examiner[148] addresses the distinction between expressions of opinion and statements of fact. In *Baker*, the defendant newspaper published a television critic's review of a documentary on sexual education produced by the plaintiff.[149] The critic's review of the documentary contained the following statement:

> "My impression is that the executive producer Walt Baker, who is also vice president in charge of programs for Channel 9, told his writer/producer, Phil Reeder, 'We've got a hot potato here—let's pour on titillating innuendo and as much bare flesh as we can get away with. Viewers will eat it up!' "[150]

The California Supreme Court held that the quotation was not a statement of fact and therefore was not actionable.[151] The critic had notified the reader that he was only giving his "impression." By using the term "impression," the critic had informed the reader that he was only expressing an opinion.[152] Consequently, *Baker* offers an illustration of how a journalist can defeat the inference that quoted material purports to be exactly what the speaker said. Nevertheless, a problem still exists when a journalist uses quotation marks to indicate a verbatim quotation.

III. *MASSON V. NEW YORKER MAGAZINE, INC.*: THE CASE

A. *The Dispute*

In 1983, Janet Malcolm interviewed psychoanalyst Jeffrey Mas-

147. *Selleck*, 166 Cal. App. 3d at 1133, 212 Cal. Rptr. at 845.

148. 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 479 U.S. 1032 (1987).

149. *Id.* at 256, 721 P.2d at 87-88, 228 Cal. Rptr. at 206.

150. *Id.* at 258, 721 P.2d at 89, 228 Cal. Rptr. at 208.

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

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

son. She later published a two-part article in the *New Yorker* magazine regarding Masson and the conditions surrounding his dismissal as Projects Director of the Sigmund Freud Archives.[153] As Projects Director, Masson discovered material relating to Freud's abandonment of the "seduction theory."[154] Freud's theory posited that certain mental illnesses originated in sexual abuse in childhood and that children were molested more frequently than had been supposed.[155] Masson asserted that the psychoanalytical establishment suppressed his findings.[156] In discussing with Malcolm the ensuing struggle with the Archives' board members,[157] Masson claimed that the board terminated his contract because he went public with his view that Freud abandoned the "seduction theory" in order to further his own career and to appease his colleagues.[158] In Malcolm's article, she attributed several alleged quotations to Masson.[159]

Masson filed suit in 1984 against Malcolm and the *New Yorker* magazine.[160] Masson asserted that the defendants libeled him[161] by fabricating quotations that made him appear "egotistical, vain, and lacking in personal honesty and moral integrity."[162] Malcolm had tape-recorded her interviews with Masson.[163] Therefore, when the challenged quotations in the article did not appear on her tape transcripts, the district court, on summary judgment, and subsequently the court of appeals, accepted the allegations that Malcolm altered the quotations and attributed them to Masson.[164] The following passages are examples of the challenged quotations.[165]

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153. Malcolm, *supra* note 7.

154. *See* J. MASSON, THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY xv-xxiii (1984).

155. *See id.*; *see also* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1536 (9th Cir.), *cert. granted*, 111 S. Ct. 39 (1990); Brief for Appellant, *supra* note 4, at 4.

156. Brief for Appellant, *supra* note 4, at 4.

157. For a brief overview of the uproar surrounding Masson and his theory, see L. FORER, A CHILLING EFFECT 221-22 (1987); J. MALCOLM, *supra* note 7.

158. *See Masson*, 895 F.2d at 1536.

159. For examples of the alleged quotations, see text accompanying *infra* notes 166-88.

160. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1397 (N.D. Cal. 1987). Masson also filed suit against Alfred A. Knopf, Inc., the publisher of Malcolm's book.

161. *Id.*; *see* CAL. CIV. CODE § 45 (West 1982); *see also supra* note 9 (California's definition of libel).

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

163. *See supra* note 11.

164. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1548 (9th Cir.), *cert. granted*, 111 S. Ct. 39 (1990); *Masson*, 686 F. Supp. at 1407.

165. For the sake of brevity, this Section will include only a few of the challenged quotations. For a complete account of all challenged quotations, see *Masson*, 895 F.2d at 1539-46; Brief for Appellant, *supra* note 4, at 14-45; Appellees' and Cross-Appellants' Brief at 18-45, Masson v. New Yorker Magazine, Inc., 881 F.2d 1452 (9th Cir. 1989) (No. 87-2665).

1. THE FICTIONALIZED QUOTATIONS

a. "I Was Like an Intellectual Gigolo"

Malcolm wrote about a confession Masson gave regarding an affair he had with a graduate student while he was in college. Essentially, the woman had told Masson that outside of the bedroom he was a social embarrassment. Malcolm then attributed to Masson a statement comparing his affair to his relationship with members of the psychoanalitical establishment: that he was "an intellectual gigolo." Malcolm wrote:

> Then I met a rather attractive older graduate student, and I had an affair with her. One day, she took me to some art event, and she was sorry afterward. She said, "Well, it is very nice sleeping with you in your room, but you're the kind of person who should never leave the room—you're just a social embarrassment anywhere else, though you do fine in your own room." *And, you know, in their way, if not in so many words, Eissler and Anna Freud told me the same thing. They liked me well enough "in my own room." They loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public.*[166]

The italicized portion of the quotation did not appear in Malcolm's tape recordings.[167] The district court, however, noted that the tape of this conversation contained the following passage:

> [Eissler and Anna Freud] felt, in a sense, I was a private asset but a public liability. They like me when I was alone in their living room, and I could talk and chat and tell them the truth about things and they would tell me. But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.[168]

Concluding that "[t]he descriptive term 'intellectual gigolo,' as used in this context, simply means that Masson's views were privately entertaining, but publicly embarrassing to Freud and Eissler," the district court held that Malcolm's use of the "descriptive" term "intellectual gigolo" was a "rational interpretation of Masson's

166. Brief for Appellant, *supra* note 4, at 29-30; *see also Masson*, 895 F.2d at 1540-41.

167. *Masson*, 895 F.2d at 1540. It did appear, however, in Malcolm's interview notes. Nevertheless, the district court assumed for the purpose of disposing of the summary judgment motion that Masson did not refer to himself as an intellectual gigolo. *Id.*

168. *Id.* Other portions of the taped interviews demonstrated that Masson boasted about his ability to charm senior analysts. He told Malcolm, for example, that "I had managed to worm my way into the good graces of Eissler and Anna Freud . . . through charm and this had worked on them, and they had like fallen into a spell. I had mesmerized them." *Id.* at 1540 n.4.

comments."[169]

b. "Sex, Women, Fun"

Malcolm's article also quoted Masson as saying that if he had moved into Freud's house in London, the house would not only have been "a place of scholarship, but it would also have been a place of sex, women, fun."[170] This statement did not appear on Malcolm's tape recordings. The district court granted summary judgment to Malcolm finding the "disputed passage . . . substantially true because the sting of the passage is the same as that of undisputed tape-recorded passages."[171] In the taped interview, Masson stated "[t]hey're going to be calling the police on me every, every time I give a party or something," and that "I could have had some fun."[172] Masson commented that he envisioned the Freud house as a site for wild parties.[173] Masson also boasted of his sexual prowess, stating that before he became an analyst he had slept with over 1,000 women.[174] The United States Court of Appeals for the Ninth Circuit concluded that the "sex, women, fun" quotation was "consistent with

169. Masson v. New Yorker Magazine, Inc., 686 F. Supp. 1396, 1400-01 (N.D. Cal. 1987). The district court's holding begs the question of why a journalist needs to *describe* exactly what someone said and then represent that *description* as a direct quotation.

In reviewing the "I was an intellectual gigolo" quotation, the *Masson* court, although acknowledging that Masson never made that statement, nevertheless adopted the district court's conclusion. *Masson*, 895 F.2d at 1541. The *Masson* court concluded that Malcolm's interpretation did not alter the substantive content of Masson's description of himself as a "private asset but a public liability." *Id.*

In holding as a matter of law that a reasonable jury would find that the statement "I was an intellectual gigolo" does not alter the substantive content of the statement "I was a 'private asset but a public liability,' " the *Masson* court exposes an underlying tension within the *Masson* case. Malcolm herself had confessed that the term "gigolo" denoted a form of prostitution and "selling your sexual favors," and that she intended to represent this to the readers. Brief for Appellant, *supra* note 4, at 32. The district court, however, ignored her admission and concluded that the term "simply means that Masson's views were privately entertaining, but publicly embarrassing to Freud and Eissler." *Masson*, 895 F.2d at 1541. The district court's conclusion, however, is invalid under MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959), which held that although an innocent meaning can be derived from a statement, the court may not treat it as non-defamatory where a reasonable interpretation could also be defamatory. *Id.* at 547-48, 343 P.2d at 42. In addition to Malcolm's own admission of defamatory intent, the dissent read the "intellectual gigolo" quotation as defamatory: "For an academic to refer to himself as an intellectual gigolo is such a devastating admission of professional dishonesty that a jury could well conclude that it is libelous." *Masson*, 895 F.2d at 1551 (Kozinski, J., dissenting). Nevertheless, the *Masson* court read the altered quotation as non-defamatory.

170. *Masson*, 895 F.2d at 1542; *Masson*, 686 F. Supp. at 1404.

171. *Masson*, 686 F. Supp. at 1404-05.

172. *Masson*, 895 F.2d at 1542.

173. *Id.*

174. *Id.*

Masson's description of his lifestyle and conception of 'fun' " and therefore did not establish malice by clear and convincing evidence.[175]

c. "Greatest Analyst Who Ever Lived"

The district court found that the following passage in Malcolm's article was the "most problematic":[176]

> A few days after my return to New York, Masson, in a state of elation, telephoned me to say that Farrar, Straus & Giroux had taken *The Assault on Truth*. "Wait till it reaches the best-seller list, and watch how the analysts will crawl. They move whichever way the wind blows. They will want me back, they will say that Masson is a great scholar, a major analyst—after Freud, he's the greatest analyst who ever lived. Suddenly they'll be calling, begging, cajoling: 'Please take back what you've said about our profession; our patients are quitting.' They'll try a short smear campaign, then they'll try to buy me, and ultimately they'll have to shut up. Judgment will be passed by history. There is no possible refutation of this book. It's going to cause a revolution in psychoanalysis. Analysis stands or falls with me now."[177]

Masson claimed the conversation never took place and alleged that the " 'sting' of the passage is that it portrays Masson as a grandiose egotist and full of braggadocio."[178]

The district court noted that many tape recorded passages contained similar egotistical statements: "for better or for worse, analysis stands or falls with me now"; "it's me and Freud against the rest of the analytic world. . . . Not so, it's me. It's me alone"; and "[I] could single-handedly bring down the whole business [of Freudian psychology]."[179] Although Masson explicitly stated that it was his discoveries regarding the material that the psychoanalytic establishment suppressed and not his ability as an analyst that would shake the analytic world,[180] the district court nonetheless concluded that "[i]n light of the many egotistical and boastful statements that Masson made in tape-recorded comments . . . [Masson] has not demonstrated clear and convincing evidence from which a reasonable jury could conclude that Malcolm entertained serious doubts about the accuracy of the passage."[181] The United States Court of Appeals for the Ninth Cir-

175. *Id.*
176. *Masson*, 686 F. Supp. at 1405.
177. *Id.*
178. *Id.*
179. *Id.* at 1405-06; *see Masson*, 895 F.2d at 1542.
180. When told that his statements were grandiose, Masson replied "it's got nothing to do with me. It's got to do with the things I discovered." *Masson*, 686 F. Supp. at 1405.
181. *Id.* at 1406.

cuit agreed, holding that "the purportedly fictionalized quotation actually reflects the substance of Masson's self-appraisal."[182]

2. THE MISLEADINGLY EDITED QUOTATIONS[183]

In the article, Malcolm quoted Masson as stating:

> [Eissler] was always putting moral pressure on me [to keep silent about my discoveries about Freud]. "Do you want to poison Anna Freud's last days? Have you no heart? You're going to kill the poor old woman." I said to him, "What have I done? You're doing it. You're firing me. What am I supposed to do, be grateful to you?" "You could be silent about it. You could swallow it. I know it is painful for you. But you could just live with it in silence." "Why should I do that?" "Because it is the honorable thing to do." Well, he had the wrong man.[184]

Masson's unedited remarks on tape were as follows:

> [Eissler] was constantly putting various kinds of moral pressure on me, and, "Do you want to poison Anna Freud's last days" "Have you no heart?" He called me up, "Have you no heart? Think of what she's done for you and you are now willing to do this to her." I said, "What am I, What have I done? You're doing it, you're firing me. What am I supposed to do, thank you? Be grateful to you?" He said, "Well you could never talk about it, you could be silent about it, you could swallow it. I know it's painful to you, but just live with it in silence." "Fuck you," I said, "Why should I do that Why? You know, why should one do that?" "Because it's the honorable thing to do, *and you will save face, and who knows, if you never speak about it and quietly and humbly accept our judgment, who knows in a few years if we don't bring you back?*" Well, he had the wrong man.[185]

Masson asserted that Malcolm deleted the emphasized portion above to make it appear that he was "the wrong man" to ask to do something honorable when, in fact, the unedited passage discloses that he "was the wrong man" to ask to remain silent in the hope of regaining his position.[186] The United States Court of Appeals for the Ninth Circuit declared that Masson's "he was the wrong man" statement was ambiguous.[187] The court proclaimed that because it was unclear whether Masson meant he was the "wrong man" to ask to do

182. *Masson*, 895 F.2d at 1542.

183. Although the United States Court of Appeals for the Ninth Circuit discussed two challenged quotations, for brevity's sake this Section will only discuss one. *See id.* at 1545-46.

184. *Id.* at 1546.

185. *Id.* (emphasis added).

186. *Id.*; *Masson*, 686 F. Supp. at 1400.

187. *Masson*, 895 F.2d at 1546.

something honorable or the "wrong man" to ask to remain silent in the hope of regaining his position, Malcolm was warranted to edit Masson's statement and that the edited statement attributed to Masson was a rational interpretation of Masson's ambiguous remarks.[188]

B. *Journalism's Canon of Ethics*

The dissent asserted that although the practice of correcting quotations to avoid grammatical errors and improper word usage is widely accepted within the journalistic profession,[189] "the selective editing of quotations so as to radically alter their meaning is an anathema among respectable journalists."[190] Citing several leading authorities who are consistent in condemning selective editing,[191] the dissent stated:

> No reporter has the right to manipulate the words of others so as to convey impressions that are distortions of the spirit of those

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188. *Id.*

189. *Id.* at 1558 (Kozinski, J., dissenting) (quoting from THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 184 (1982)).

190. *Id.* at 1554.

191. *See id.* at 1558 ("[q]uotation marks mean literally that the words they enclose are exactly as the source gave them—verbatim," quoting M.V. CHARNLEY & B. CHARNLEY, REPORTING 238 (4th ed. 1979)); *id.* (direct quotations are used "[t]o surround the exact words of a speaker or writer reported in a story," citing THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 183 (1982)); *id.* ("[m]ost of the newspaper codes or canons tend to stress literal accuracy when quoting news sources," quoting J.L. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA 70 (1976)); *see also* J.L. HULTENG, PLAYING IT STRAIGHT: A PRACTICAL DISCUSSION OF THE ETHICAL PRINCIPLES OF THE AMERICAN SOCIETY OF NEWSPAPER EDITORS 64 (1981) (stating that "[i]t is never justifiable for a journalist to make up quotations, however plausible or characteristic, or to edit a source's comments so that their thrust or meaning is altered any way").

A school of thought known as New Journalism proposes that journalists have the right to vary or rearrange the facts of a story in order to advance a literary purpose. *Masson*, 895 F.2d at 1559. Tom Goldstein describes New Journalism as follows:

> In an advertisement, *Harper's Magazine* tried defining New Journalism metaphorically as "somewhere west of journalism and this side of history," the "place where reporting becomes literature." In this unchartered territory, writers embellished quotes, burrowed into characters' interior thoughts, created scenes that may have happened but did not, and made up characters who were collages of real people.

Id. at 1559 n.13 (quoting T. GOLDSTEIN, THE NEWS AT ANY COST: HOW JOURNALISTS COMPROMISE THEIR ETHICS TO SHAPE THE NEWS 211 (1985)).

In 1980, John Hersey attacked New Journalism on the following premise:

> I will assert that there is one sacred rule of journalism. The writer must not invent. The legend on the license must read: NONE OF THIS WAS MADE UP. The ethics of journalism, if we can be allowed such a boon, must be based on the truth that every journalist knows the difference between the distortion that comes from subtracting observed data and the distortion that comes from adding invented data.

Id. at 1559 n.14 (quoting Hersey, *The Legend of the License*, YALE REV. 1, 2 (Autumn 1980).

> words. You may misplace a comma or substitute one adjective for another and still not alter the thrust of a quote or paraphrase. But you have no license to violate the source's intent by changing the meaning of what he said, no matter what the motivation or temptation.
>
> . . . .
>
> . . . The manipulation—or fabrication—of a quote in order to condition the reader's perception of a news figure or a news situation is a breach of journalistic ethics. . . .
>
> Absolute, literal accuracy can rarely be achieved, as we have noted earlier, but it is a firmly-rooted journalistic convention that the central meaning, the spirit, of a speaker's words must be truly conveyed.[192]

The dissent noted that the *New Yorker* itself professes the identical belief.[193] According to William Shawn, editor-in-chief when Malcolm's article was published, "the *New Yorker* 'ideal is a verbatim quote[;] . . . the most important thing is not to violate the truth . . . of what somebody has said.' "[194] Although the Court in *Harte-Hanks Communications, Inc. v. Connaughton*[195] declared that a departure from the standards and ambitions of the profession cannot alone provide a sufficient basis for finding actual malice,[196] the *Masson* dissent argued that it is difficult to interpret the first amendment as granting journalists a privilege to employ standards that they themselves disown.[197]

C. *The Majority Opinion*

The United States Court of Appeals for the Ninth Circuit was bound to apply California libel law in *Masson*.[198] Under California libel law,[199] the statements Malcolm attributed to Masson could constitute libel if they exposed Masson to "hatred, contempt, ridicule, or obloquy, or . . . cause[d] him to be shunned or avoided, or . . . ha[d] a tendency to injure him in his occupation."[200] There is little doubt that the four quotations, "I was an intellectual gigolo," "sex, women,

192. *Masson*, 895 F.2d at 1559 (quoting J.L. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA 71 (1976)).

193. *Id.* at 1561.

194. Lipman, *At the New Yorker, Editor and a Writer Differ on the 'Facts,'* Wall St. J., June 18, 1984, at 1, col. 4.

195. 109 S. Ct. 2678 (1989).

196. *Id.* at 2684.

197. *See supra* notes 190-94 and accompanying text.

198. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (holding that federal courts sitting in diversity must apply state substantive law).

199. CAL. CIV. CODE § 45 (West 1982); *see supra* note 9 (California's definition of libel).

200. *See* CAL. CIV. CODE § 45 (West 1982).

fun," "greatest analyst who ever lived," and "he had the wrong man," would constitute libel under California standards. For example, a critical review of Malcolm's article yielded the following comments:

> Masson the promising psychoanalytic scholar emerges gradually, as a grandiose egotist—mean-spirited, self-serving, full of braggadocio, impossibly arrogant and, in the end, a self-destructive fool. *But it is not Janet Malcolm who calls him such: his own words reveal this psychological profile*—a self-portrait offered to us through the efforts of an observer and listener who is, surely, as wise as any in the psychoanalytic profession.[201]

Another review added that "Malcolm's portrait of Masson is devastating: *largely through his own words* he emerges as a feverish jumble of vanity, self-destruction, childishness, and ruthlessness."[202] These reviews demonstrate that Malcolm's altered quotations exposed Masson to hatred, contempt, ridicule, and obloquy, and tended to injure him in his occupation. Additionally, they indicate that readers give greater weight to a direct quotation of one's remarks than to a writer's descriptive statements because the direct quotation permits readers to draw their own conclusions about the speaker's character, motive, candor, and lucidity.[203]

Despite the impact of the defamatory statements, the *Masson* court revisited the *Dunn*, *Hotchner*, and *Pape* opinions[204] and crafted its own standard for altered quotations that permitted Malcolm to attribute the defamatory statements to Masson with impunity. The United States Court of Appeals for the Ninth Circuit held:

> Malice will not be inferred from evidence showing that the quoted language does not contain the exact words used by the plaintiffs provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by the public figure, or do not "alter the substantive content" of unambiguous remarks actually made by the public figure.[205]

Although the alter the substantive content standard arguably concerns the issue of substantial truth,[206] the *Masson* court's rational

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201. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1549 (9th Cir.) (Kozinski, J., dissenting) (quoting Coles, *Freudianism and Its Malcontents*, Boston Globe, May 27, 1984, at 58, 60 (emphasis added)), *cert. granted*, 111 S. Ct. 39 (1990).

202. *Id.* (quoting KIRKUS REV., Apr. 1, 1984, at 345 (emphasis added)).

203. *See id.* & n.2.

204. *See supra* notes 91-133 and accompanying text.

205. *Masson*, 895 F.2d at 1539 (citations omitted).

206. If an altered quotation does not alter the substantive content of the public figure's actual statement, then one can argue that the altered quotation is substantially true because the meaning is the same.

interpretation standard bypasses actual malice and grants an unwarranted constitutional protection to journalists who alter quotations.

There is a problem with the *Masson* standard. Under the rational interpretation standard, a journalist can take a public figure's statement, interpret the meaning of that statement, and attribute that interpretation to the public figure. The *Masson* court's approach is indifferent to the public figure's actual meaning, asking only whether the journalist's interpretation is rational. The danger of such a standard is obvious: if journalists are given the license to invent quotations based on interpretations of ambiguities or content, there are no words that a journalist could not put into a subject's mouth.[207]

There is a fundamental difference between remaining faithful to "the central meaning . . . [and] the spirit of the speaker's words," which would permit correcting quotations to avoid grammatical errors and improper word usage,[208] and altering quotations to correspond to the journalist's interpretation of what the speaker said.[209] Under a central meaning standard, if the words spoken are ambiguous, the journalist cannot alter them to remove the ambiguity because that would change the spirit of what the speaker said.[210] Under the *Masson* court's rational interpretation standard, the journalist is given precisely that privilege.[211] Instead of granting journalists the privilege of rational interpretation, a constitutionally consistent approach should ask whether the jury could find substantial falsity with respect to the altered quotation (i.e., that the altered quotation is not substantially true and that it has a different and more damaging effect on the reader than the actual statements) and whether the jury could find actual malice as to the substantial falsity.[212] This would permit journalists to alter the language within the quotation but would still require them to remain faithful to the meaning of the speaker's authentic statements.

The *Masson* court's conclusion that the "sex, women, fun" quotation was "consistent with Masson's description of his lifestyle and conception of 'fun' "[213] illustrates the dangers of the *Masson* standard. Because Masson, in unrelated conversations, had commented that he envisioned the Freud house as a site for wild parties, had boasted of his sexual prowess, and had mentioned that he had slept with over

207. *Masson*, 895 F.2d at 1553 (Kozinski, J., dissenting).
208. *See supra* note 189 and accompanying text.
209. *See Masson*, 895 F.2d at 1559 n.12 (Kozinski, J., dissenting).
210. *See supra* text accompanying note 208.
211. *See id.*
212. *See supra* notes 27-35 and accompanying text.
213. *See supra* note 175 and accompanying text.

1,000 women *before* becoming an analyst, the *Masson* court granted Malcolm the license to describe her impression and perception of Masson's lifestyle purportedly in his own words.

Under *Baker v. Los Angeles Herald Examiner*,[214] Malcolm is protected by the first amendment to give her impressions and perceptions of Masson if she characterizes them as such. Under the *Masson* standard, however, Malcolm was given much more. The standard allowed her to perceive Masson's character and to invent quotations based on those perceptions. The dissent's outrage over this result is justified:

> The court's reliance on this remote and inapposite remark [that Masson had slept with over 1,000 women before he became an analyst], made by Masson during the course of an entirely unrelated conversation, demonstrates just how far afield a journalist may roam under the "rational interpretation" approach. To be sure, if one digs through the over one thousand pages of interview transcript, one occasionally finds the word sex; specifically, Masson did discuss his exploits as a young man, albeit with some remorse. But what does that prove? In effect, the court is saying that, because of his wayward youth, Masson is the kind of guy who probably *would* use the Freud house for "sex, women, fun," and therefore Malcolm was entitled to say so to the world.[215]

The *Masson* court concluded that the "sex, women, fun" quotation did not establish actual malice by clear and convincing evidence.[216] Implicit in this conclusion is the court's misconception of actual malice and the common law rules of defamation. There was no actual malice inquiry as to knowledge of falsity or reckless disregard for the truth. The court merely asked whether the altered quotation was a rational interpretation of Masson's actual remarks. Under the appropriate common law rules of defamation and an actual malice inquiry, the court should have asked whether the "sex, women, fun" quotation was substantially false and if so, whether a jury could find that Malcolm knew or acted in reckless disregard that the quotation had been altered and that the altered quotation would have a different and more damaging effect on the reader than the verbatim quotation.[217]

The court's treatment of the "greatest analyst who ever lived" quotation further illustrates the *Masson* court's misconception. The

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214. *See supra* notes 148-52 and accompanying text.

215. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1553 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

216. *Id.* at 1542.

217. *See supra* notes 27-35 and accompanying text.

quotation did not appear on the tape transcripts. Masson never asserted that people would say "after Freud, he's the greatest analyst who ever lived." Masson proffered evidence that the passage portrayed him as "a grandiose egotist and full of braggadocio."[218] Despite Masson's explicit taped statement that his discoveries of material suppressed by the psychoanalytic establishment would shake the analytic world, Malcolm altered Masson's words to imply that Masson meant his abilities as an analyst would do so.[219] Again, the *Masson* court's standard allowed Malcolm to perceive Masson's character and to invent quotations based on those perceptions solely because Masson had made other unrelated egotistical and boastful statements. In other words, under the *Masson* court's standard, if one makes statements that reasonably can be construed as egotistical or boastful (or any other trait of character or intellect), the journalist can attribute any other statements reflecting that same trait in an unrelated matter and remain protected by the first amendment.[220]

The flaw in the court's standard is that it does not employ the proper test of substantial truth. To establish substantial truth, "[i]t is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."[221] It is not enough, however, that the defamed person "is found to have engaged in some other substantially different kind of misconduct even though it is equally or more reprehensible."[222] "Specific charges cannot be justified by showing the plaintiff's general bad character."[223] "[I]f the accusation is one of particular misconduct, . . . it is not enough to show a different offense, even though it be a more serious one."[224] In *Masson*, the specific charge is that Masson said that after Freud, he was the greatest analyst who ever lived. This specific charge cannot be dismissed as being substantially true solely because Masson made unrelated egotistical and boastful statements. Under the *Masson* court's rational interpretation standard, however, the court avoids this issue.

The misleadingly edited quotation, "he had the wrong man,"[225]

218. *See supra* notes 201-02 and accompanying text.

219. *See supra* note 180 and accompanying text.

220. *See Masson*, 895 F.2d at 1550 (Kozinski, J., dissenting).

221. RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977); *see* W. PROSSER & R. KEETON, *supra* note 30, at 842 (stating that "it is not necessary to prove the literal truth of the accusation in every detail"); *supra* notes 31-35 and accompanying text.

222. RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977).

223. W. PROSSER & R. KEETON, *supra* note 30, at 841.

224. *Id.*

225. *See supra* notes 184-88 and accompanying text.

reveals the inherent problems in applying the rational interpretation standard to quotations. The *Masson* court noted that the statement "he had the wrong man" was ambiguous as to whether Masson meant he was the "wrong man" to ask to do something honorable or to ask to remain silent in hopes of regaining his position.[226] The court concluded that "[t]he statement Malcolm ascribed to Masson was a rational interpretation of his ambiguous remarks."[227] The court relied on *Time, Inc. v. Pape*[228] to support its proposition. The issue in *Pape* concerned an article's interpretation of a government document filled with "extravagantly ambiguous" language and the omission of the single word "alleged."[229] The Court concluded:

> To permit the malice issue to go to the jury because of the omission of a word like "alleged," despite the context of that word in the Commission Report and the external evidence of the Report's overall meaning, would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact.[230]

Masson, however, did not concern the interpretation of a report; it concerned quotations where words spoken were not ambiguous. The rational interpretation standard permitted Malcolm to attribute her interpretation of Masson's statement directly to Masson without questioning its different and more damaging effect on the reader. The court should have decided whether the edited quotation was substantially false, and whether Malcolm knew or acted in reckless disregard that the altered quotation would have a different and more damaging effect on the reader than the verbatim quotation.

When quoting a third party, a journalist strongly implies that "this is a statement of fact, this is what the subject said," not that "the subject's statement was ambiguous and this is what I perceive him to be saying." While a journalist is entitled under the first amendment to communicate those perceptions, the journalist must alert the reader that they are perceptions, not statements of fact. The journalist may also alter quotations as long as the journalist is faithful to the speaker's original meaning. Allowing journalists to report rational interpretations of ambiguous remarks as accurate quotations permits journalists to make potentially devastating statements of purported

226. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1546 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

227. *Id.*

228. 401 U.S. 279 (1971); *see supra* notes 117-33 and accompanying text.

229. *Pape*, 401 U.S. at 287.

230. *Id.* at 290.

fact with impunity.[231] The rational interpretation standard grants unwarranted constitutional protection and is inappropriate.

IV. *MASSON V. NEW YORKER MAGAZINE, INC.*: THE DISSENT

A. *The Dissent's Inquiry*

The *Masson* dissent recognized the dangers of the majority's standard, arguing that the holding gives a journalist the license to lie[232] if the journalist can "argue with a straight face that it is *a* rational interpretation of what the speaker said."[233] The dissent asserted that when balanced against the Court's concerns in *New York Times*, the majority's standard is unjustified and that requiring journalists to quote their subjects correctly when they have the resources to do so is neither oppressive nor analogous to self-censorship, especially in light of journalism's self-imposed canon of ethics.[234] The dissent contended that journalists are sufficiently protected from liability for inadvertent or negligent misquotations by the requirement that the public figure plaintiff prove actual malice.[235] For example, if a journalist only takes notes and is unable to record every word, the journalist is protected from liability even though it may be negligent not to use a tape recorder or to fail to double-check the source.[236]

The actual issue, according to the dissent, was whether journalists must be free to alter quotations to perform their duties properly.[237] Thus, if "[a]n unqualified quotation attributed to a third party is commonly understood to contain *no* interpretation [and] by using quotation marks the writer warrants that she has interposed no editorial comment, has resolved no ambiguities, [and] has added or detracted nothing of substance,"[238] then it follows that no alteration was justified. Malcolm's alteration of Masson's quotations, whether deliberate or not, amounted to an intentional lie or to a careless error, neither of which materially advanced *New York Times'* interest in "uninhibited, robust, and wide-open" debate on public issues.[239] Therefore, the fabricated quotations belonged to that class of state-

231. For a discussion of why quotations are potentially more devastating that mere statements of fact, see *supra* notes 201-03 and accompanying text.

232. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1570 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990); Taylor, *supra* note 5, at 8, col. 1.

233. *Masson*, 895 F.2d at 1548.

234. *See supra* notes 189-97 and accompanying text.

235. *See Masson*, 895 F.2d at 1558 (Kozinski, J., dissenting).

236. *Id.*

237. *Id.*

238. *Id.* at 1549.

239. *See supra* note 68 and accompanying text.

ments which "are no essential part of any expression of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"[240] and necessarily raised a jury issue as to actual malice.

Proposing that a person's statement is fact, and that altering quotations merits no more first amendment protection than any other falsification,[241] the dissent presented an alternative standard, a "five-step inquiry," to resolve the issue:[242]

1. Does the quoted material purport to be a verbatim repetition of what the speaker said?
2. If so, is it inaccurate?
3. If so, is the inaccuracy material?
4. If so, is the inaccuracy defamatory?
5. If so, is the inaccuracy a result of malice, *i.e.*, is it a fabrication or was it committed in reckless disregard of the truth?[243]

Under this inquiry, if the answer to any of the questions is no, then as a matter of law the defendant prevails. If the answer to all of the question could be yes, then the matter is to be sent to the jury for determination.[244]

The dissent's inquiry is troublesome because it omits an essential question regarding the falsity issue. Under the dissent's inquiry, falsity pertains only to whether the journalist knew that the subject's actual statements differed from those attributed to him or that the journalist acted in reckless disregard with respect thereto.[245] Thus, actual malice, with respect to quotations, is simply an issue of whether the journalist deliberately or recklessly altered the quotation. To reduce actual malice to this issue alone, however, creates an undesirable chilling effect by holding journalists to verbatim quotations. If quotations are considered to be statements of fact, then the common law rules of defamation and the actual malice requirements of knowledge of falsity or reckless disregard of the truth require addressing additional issues. These issues include whether the altered quotation

240. *See supra* note 74 and accompanying text.

241. *Masson*, 895 F.2d at 1562 (Kozinski, J., dissenting).

242. *Id.* at 1562-66.

243. *Id.*

244. *Id.* Two recent commentaries agree with the dissent's approach; neither, however, contemplates the common law concept of substantial falsity and its relationship to an actual malice standard as applied to altered quotations. *See* Case Comment, Masson v. New Yorker Magazine: *Actual Malice and Direct Quotations—The Constitutional Right to Lie*, 65 NOTRE DAME L. REV. 564 (1990); Comment, *When Is a Quote Not a Quote?: The Subjectivity of Truth in* Masson v. New Yorker Magazine, Inc., 64 ST. JOHN'S L. REV. 150 (1989).

245. *See id.* at 1562.

was substantially false under the common law rules of defamation,[246] whether the altered quotation would have a different and more damaging effect on the mind of the reader than the speaker's actual words,[247] and whether the journalist knew or acted in reckless disregard of the different and more damaging effect.[248]

The first question of the dissent's inquiry, "Does the quoted material purport to be a verbatim repetition of what the speaker said?," touches on the issue raised in *Baker v. Los Angeles Herald Examiner*[249] and in *Selleck v. Globe International, Inc.*.[250] In *Baker*, the California Supreme Court held that a quotation was not a statement of fact and therefore was not actionable because the critic, by using the term "impression," had informed the reader that he was only expressing an opinion.[251] In *Selleck*, the California Court of Appeals rejected the argument that certain quoted passages were expressions of opinion and therefore did not give rise to a cause of action, concluding that the article did "not merely express defendant's opinion that plaintiff made statements about his son. Rather, [it] assert[ed] as a fact that plaintiff made the statements."[252] Consequently, the dissent's use of *Baker* and *Selleck* illustrates that a journalist can defeat the inference that the quoted material purports to be exactly what the speaker said by emphasizing that the quotation is merely an opinion or an interpretation of words actually spoken.

The second question, "[I]s [the quote] inaccurate?," requires a direct comparison between what the speaker said and what the journalist quoted him as saying.[253] Although this question appears straightforward, difficulties do arise. As in *Dunn v. Gannett New York Newspapers, Inc.*,[254] where translations are involved, or in instances where the speaker's statements are partially inaudible, it becomes necessary for journalists to make judgments as to what the speaker actually said. Where journalistic judgments are required, the

246. *See supra* notes 31-33 & 221 and accompanying text.

247. *See* Fleckenstein v. Friedman, 266 N.Y. 19, 193 N.E. 537 (1934); M. ELDRIDGE, *supra* note 34, at 337; *supra* notes 32 & 34 and accompanying text.

248. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (requiring proof of actual malice); St. Amant v. Thompson, 390 U.S. 727 (1968) (same); Garrison v. Louisiana, 379 U.S. 64 (1964) (same); New York Times v. Sullivan, 376 U.S. 254 (1964) (same).

249. 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 479 U.S. 1032 (1987); *see supra* notes 148-52 and accompanying text.

250. 166 Cal. App. 3d 1123, 212 Cal. Rptr. 838 (Ct. App. 1985); *see supra* notes 144-47 and accompanying text.

251. *Baker*, 42 Cal. 3d at 263, 721 P.2d at 92, 228 Cal. Rptr. at 211.

252. *Selleck*, 166 Cal. App. 3d at 1133, 212 Cal. Rptr. at 845.

253. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1564 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

254. 833 F.2d 446 (3d Cir. 1987); *see supra* notes 91-106 and accompanying text.

dissent suggests that the journalist's choice must be respected, absent a showing of deliberate or reckless fabrication.[255]

The next inquiry, "[I]s the inaccuracy material?," merely acknowledges that journalists often correct quotations to avoid grammatical errors and improper word usage.[256] Under the dissent's standard, such cosmetic changes would not be actionable because they are not considered material. Conversely, rephrasing a speaker's statement automatically represents a material change. Under the common law rules of defamation, however, the question should be whether the inaccuracy is substantially false. Implicit in the dissent's "material" standard is an elevated standard of falsity. For example, if a speaker says, "I killed him," and the journalist quotes the speaker as saying, "I murdered him," the dissent's material inquiry might yield a different result than the common law substantial falsity analysis. Under the dissent's inquiry, the issue is only whether the alteration is material, and a change in wording under the dissent's standard is material.

Under the common law rules of defamation, however, "[i]t is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance."[257] Therefore, the substantial falsity analysis must be content specific. For example, one can kill accidentally whereas calling one a murderer connotes a premeditated act of violence. Thus, if the speaker had accidentally killed the deceased, then changing the word killer to murderer within the quotation would not convey the substantial truth and would be actionable. On the other hand, if the speaker deliberately murdered the deceased, then changing the statement "I killed him" to "I murdered him" would be substantially true and would not be actionable.

The fourth question, "[I]s the inaccuracy defamatory?," addresses the individual state's definition of libel. Under California libel law, misquotations constitute libel if the misquote exposed the subject 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."[258] For example, in *Bindrim v. Mitchell*,[259] mis-

255. *See Masson*, 895 F.2d at 1564 (Kozinski, J., dissenting).

256. *Id.* at 1558 (quoting from THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 184 (1982)).

257. RESTATEMENT (SECOND) OF TORTS § 581A comment f (1977); *see* W. PROSSER & R. KEETON, *supra* note 30, at 842 (stating that "it is not necessary to prove the literal truth of the accusation in every detail"); *see also supra* notes 31-33 and accompanying text.

258. CAL. CIV. CODE § 45 (West 1982); *see also supra* note 9 (California's definition of libel).

259. 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (Ct. App.), *cert. denied*, 444 U.S. 984 (1979); *see supra* notes 134-43 and accompanying text.

quotations "cast [the subject] in a disparaging light since they portray his language and conduct as crude, aggressive, and unprofessional."[260] Thus, California courts recognize the actionability of misquotations.[261]

The final question, "[I]s the inaccuracy a result of malice, *i.e.*, is it a fabrication or was it committed in reckless disregard of the truth?," only explores whether the journalist knew that the subject's actual statements differed from those attributed to him or whether the journalist acted in reckless disregard with respect thereto.[262] Under the dissent's approach, *Masson* necessarily reached this final question: the quoted material purported to be a verbatim repetition of what Masson had said because Malcolm did not qualify the quotation as an opinion;[263] the attributed quotations could be found to be inaccurate because Masson alleged that they differed from his actual statements and because there were no circumstances which required Malcolm to use her judgment to determine what Masson actually said;[264] the inaccuracies were material because Malcolm did more than correct Masson's language, she completely rephrased his statements;[265] and arguably, the inaccuracies were defamatory.[266] Therefore, the final question asked only if Malcolm knew that Masson's actual statements differed from those attributed to him or acted in reckless disregard with respect thereto.

The dissent considered the contention that Malcolm fabricated some of her notes because certain sentences of her typed drafts had been crossed out and replaced with the disputed quotations.[267] Furthermore, the dissent considered the testimony that Malcolm had repeatedly represented to her publisher that "everything was on tape" and had told Masson not to worry about being misquoted because all quotations would be verbatim.[268] The dissent concluded:

> Should the jury believe Masson, they could view this as a significant indication of malice. First, they could consider it as proof that Malcolm intended to deceive Masson about her intentions

260. *Bindrim*, 92 Cal. App. 3d at 77, 155 Cal. Rptr. at 38.

261. *See* Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1565 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990); *see also* Baker v. Los Angeles Herald Examiner, 42 Cal. 3d 254, 261, 721 P.2d 87, 91, 228 Cal. Rptr. 206, 210 (1986); Selleck v. Globe Int'l, Inc., 166 Cal. App. 1123, 1132, 212 Cal. Rptr. 838, 844 (Ct. App. 1985).

262. *See Masson*, 895 F.2d at 1566.

263. *See supra* notes 249-52 and accompanying text.

264. *See supra* notes 253-55 and accompanying text.

265. *Masson*, 895 F.2d at 1566; *see supra* notes 166-88 and accompanying text.

266. *See supra* notes 199-203 and accompanying text.

267. *See supra* note 11.

268. *See supra* note 11.

> with respect to the quotes. Also, if Malcolm warranted to Masson that she would take all quotes verbatim off the tapes, I should think it would be at least reckless of her not to use the tapes to verify the accuracy of the quotes she used.
>
> The jury may, of course, disbelieve Masson's account of many of these disputed facts. Or, it may decide that, under all the circumstances, Malcolm was merely careless, not deliberate or reckless. But a jury might well come to a more sinister conclusion. I respectfully suggest that were a jury to do so on this record, we would exceed our authority in saying that they were wrong.[269]

The dissent's standard equates misquotation to falsity without examining the common law definition of truth. Under the common law rules of defamation, the truth requirement does not require absolute precision,[270] and if a statement is not substantially false, it is not actionable.[271] Because "literal truth"[272] is not required, it follows that the exact words are not as important as their meaning. Thus, in the spirit of the common law rules of defamation, the dissent's final question requires a two-part analysis addressing whether the substantial falsity was a result of actual malice: first, asking whether the journalist knew or acted in reckless disregard that the quotation had been altered; and second, asking whether the journalist knew or acted in reckless disregard of the different and more damaging effect of the altered quotation. The second part of this analysis would protect journalists who alter quotations but still convey the same meaning as the original statements and journalists who are negligent with respect to the different and more damaging effect of altered quotations. Otherwise, the dissent's final question would require journalists to guarantee the literal truth of all quotations, a requirement that violates the spirit of *New York Times*.[273]

B. *An Alternative Inquiry*

For the dissent's approach to conform both to common law rules of defamation and to the actual malice standard, the "five-step inquiry" must be revised as follows:

1. Does the quoted material purport to be a verbatim repetition of what the speaker said?
2. If so, is it inaccurate?
3. If so, is the inaccuracy substantially false?

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269. *Masson*, 895 F.2d at 1567-68 (Kozinski, J., dissenting).
270. *See supra* note 30 and accompanying text.
271. *See supra* notes 31-32 and accompanying text.
272. *See supra* note 30 and accompanying text.
273. *See supra* notes 59-68 and accompanying text.

4. If so, is the substantial falsity defamatory?

5. If so, is the substantial falsity a result of actual malice, *i.e.*, did the journalist know or act with reckless disregard of whether the quotation had been altered, and also did the journalist know or act with reckless disregard of the different and more damaging effect of the altered quotation?

In response to the first two questions of the revised inquiry and as the dissent asserted,[274] the quoted material purported to be a verbatim repetition of Masson's statements and was inaccurate. In reply to the third question regarding substantial falsity, arguably a jury could find that there was substantial falsity based on the considerable disparity in meaning between the original and the published statements.[275] Substantial falsity alone, however, is not enough to prove actual malice.[276] Because a jury could find that the altered quotations were sufficiently defamatory to satisfy the fourth question,[277] the additional determination necessary in this instance would be in response to the final question of whether a jury could find that the substantial falsity was a result of actual malice, i.e., did the journalist know or act with reckless disregard of whether the quotation had been altered, and also did the journalist know or act with reckless disregard of the different and more damaging effect of the altered quotation?

As the dissent contended, Malcolm fabricated some of her notes because certain sentences of her typed drafts had been crossed out and replaced with the disputed quotations.[278] Furthermore, the dissent considered the testimony that Malcolm had repeatedly represented to her publisher that "everything was on tape" and had told Masson not to worry about being misquoted because all quotations would be verbatim.[279] If a jury could find that Malcolm altered the quotations, as the typed drafts indicated, and that she knew of the potentially different and more damaging effect of the alterations on the reader, as she indicated in employing the phrase "intellectual gigolo,"[280] then there exists a jury issue as to actual malice, making summary judgment improper.

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274. *See supra* notes 249-55 and accompanying text.

275. *See supra* notes 166-88 and accompanying text. Consequently, a jury issue would exist regarding whether the altered quotations were substantially true in meaning when compared to Masson's actual statements on tape.

276. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984).

277. *See supra* notes 199-203 and accompanying text.

278. *See supra* note 11.

279. *See supra* note 11.

280. *See supra* note 169 and accompanying text.

V. CONCLUSION

The majority and dissent differ both in framing and in resolving the issues in *Masson*. The majority's rational interpretation standard extends beyond the *New York Times* actual malice standard[281] allows journalists to quote a public figure based upon the journalist's rational interpretation of the public figure's actual statement. If, under the guise of literary license, journalists are allowed to invent quotations based on interpretations of ambiguities or content without remaining faithful to the meaning of verbatim statements, there are few words that a journalist cannot put into a subject's mouth.[282] Granting such discretion to journalists by shielding fabricated quotations is a dangerous and unwarranted extension of first amendment protection.

The dissent's five-step inquiry is insufficient under both the common law rules of defamation and the actual malice standard. The dissent's resolution of the issue is deficient because it equates falsity with whether the journalist knew or acted in reckless disregard of the fact that the subject's actual statements differ from those attributed to him.[283] Thus, actual malice, with respect to quotations, is simply an inquiry into whether the journalist deliberately or recklessly altered the quotation. To reduce actual malice to this inquiry alone creates an undesirable chilling effect by holding journalists to verbatim quotations.

If quotations are considered to be statements of fact, then knowledge of falsity or reckless disregard of the truth must also address additional issues. These issues include whether the altered quotation was substantially false under common law rules of defamation,[284] whether the altered quotation would have a different and more damaging effect on the mind of the reader than the speaker's literal quotation,[285] and whether the journalist knew or acted in reckless disregard of the different and more damaging effect.[286] Only then will the examination of altered quotations coincide with the common law con-

281. *See supra* notes 59-68 and accompanying text.

282. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1553 (9th Cir.) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

283. *Id.* at 1566.

284. *See* RESTATEMENT (SECOND) OF TORTS § 581A (1977). This section states: "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." *Id.*; *see supra* notes 30-32 and accompanying text.

285. *See supra* note 34.

286. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (requiring proof of actual malice); St. Amant v. Thompson, 390 U.S. 727 (1968) (same); Garrison v. Louisiana, 379 U.S. 64 (1964) (same); New York Times v. Sullivan, 376 U.S. 254 (1964) (same).

cept of substantial falsity and with the impetus behind the *New York Times* actual malice standard.

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