

St. John's Law Review

Volume 64

Number 1 *Volume 64, Fall 1989, Number 1*

Article 5

April 2012

When is a Quote Not a Quote?: The Subjectivity of Truth in Masson v. New Yorker Magazine, Inc.

John J. McGreevy

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

McGreevy, John J. (1989) "When is a Quote Not a Quote?: The Subjectivity of Truth in Masson v. New Yorker Magazine, Inc." *St. John's Law Review*: Vol. 64 : No. 1 , Article 5.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol64/iss1/5>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

WHEN IS A QUOTE NOT A QUOTE?: THE SUBJECTIVITY OF TRUTH IN MASSON V. NEW YORKER MAGAZINE, INC.

In the 1964 landmark decision of *New York Times Co. v. Sullivan*,¹ the United States Supreme Court rendered the first of a series of decisions which ultimately dismantled much of the common law of defamation.² By requiring that the protection of an in-

¹ 376 U.S. 254 (1964). *New York Times* concerned a suit brought by one of three elected Commissioners of the City of Montgomery, Alabama over an allegedly libelous full-page advertisement published in the *New York Times*. *Id.* at 256. Although the plaintiff was not mentioned by name in the ad, testimony was offered at trial tending to prove that, based on his position and responsibilities within the city government, plaintiff could have been, and was, understood to have been responsible for the acts described in the ad. *Id.* at 258.

In reversing a \$500,000 jury award for the plaintiff, the Supreme Court held that the first amendment guarantees of free press and free speech require a rule which "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

² See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS §111 (5th ed. 1984)[hereinafter PROSSER & KEETON]. "Defamation is made up of the twin torts of libel and slander—the one being, in general, written [libel] while the other in general is oral [slander]. . . . In either form, defamation is an invasion of the interest in reputation and good name." *Id.* at 771.

The English common law of defamation traces its roots from the seigniorial courts of the early Middle Ages, through the ecclesiastical courts of the long epoch of unchallenged Church authority, to the Kings' courts and the Court of Star Chamber—which began to punish the crime of political libel—and eventually on to the common law courts. See Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1350 (1975). One commentator notes that the "common law of defamation slowly grew into a forest of complexities, overgrown with anomalies, inconsistencies, and perverse rigidities. It became thicketed with brambled traps for innocent defendants, crisscrossed with circuitous paths and dead ends for seriously wronged plaintiffs, and enshrouded in a 'fog of fictions, inferences, and presumptions.'" *Id.* (quoting Coleman v. MacLennan, 78 Kan. 711, 740, 98 P. 281, 291 (1908)).

Another commentator has described the common law of defamation as:

[A] mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.

Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546, 546

dividual's reputation be weighed against the strong fundamental values which shield the American press,³ *New York Times* and its progeny⁴ have injected a first amendment analysis into the law of defamation.⁵ As a result, the fulcrum upon which defamation claims brought by "public figures"⁶ now rest is the plaintiff's ability to prove "actual malice."⁷ Actual malice is defined as the publi-

(1903).

As a result of the evolution of the common law of defamation "there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word." PROSSER & KEETON, *supra*, at 771.

However, the "*New York Times* line of cases . . . has filled a void and added a constitutional norm to the list of situations in which one person may accuse another of wrongdoing." Tiersma, *The Language of Defamation*, 66 Tex. L. Rev. 303, 330 (1987). Yet, "[w]hether the competing social interests represented by the law of defamation and the first amendment have been appropriately compromised by the Court's forays is a question that will engage courts and commentators for years." Eaton, *supra*, at 1351.

³ See Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 200 (1976). "[A]ll of the *New York Times* series of decisions, attempt[] to reconcile mutually irreconcilable values: the polity's interest in free and full interchange of potentially useful information and ideas, and the citizen's interest in freedom from destructive invasions of his reputation, relationships, and personality." *Id.*; see also Rosenberg, *Taking a Look at "The Distorted Shape of an Ugly Tree": Efforts at Policy-Surgery on the Law of Libel During the Decade of the 1940s*, 15 N. Ky. L. Rev. 11, 55 (1988) (*New York Times* "adopted a legal rule that attempted to weigh competing interests and strike a 'balance' between reputation and free speech"); cf. Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 835 n.33 (1984) ("The sum of these cases, then, is that *New York Times* is not simply about the protection of the democratic process but about the protection of speech per se").

⁴ See, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (public plaintiff required to show actual malice for intentional infliction of emotional distress under *New York Times*); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59, 763 (1985) (when private plaintiff sues on statement not of public concern, recovery of presumed and punitive damages without showing actual malice will be allowed); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-47 (1974) (no constitutional requirement for showing actual malice where plaintiff is neither public official nor public figure).

⁵ See U.S. CONST. amend. I. The amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.* Although the first amendment specifically restricts only Congress, it has been held to apply to all branches of the federal government, and, through the fourteenth amendment, it has been further extended to all branches of state governments as well, including state courts. See *Palko v. Connecticut*, 302 U.S. 319, 324 (1937).

⁶ *Rosanova v. Playboy Enters.*, 411 F. Supp. 440, 443-44 (S.D. Ga. 1976), aff'd, 580 F.2d 859 (5th Cir. 1978). Trying to define what exactly makes a person a "public figure" has been described as "trying to nail a jellyfish to the wall." *Id.* at 443. Although the term does not lend itself to easy definition, it does appear clear that the nature of a particular individual's position or status, not his mere rank or title, will be determinative. See *New York Times*, 376 U.S. at 279; *Barr v. Matteo*, 360 U.S. 564, 573-75 (1959).

⁷ See *New York Times*, 376 U.S. at 279; accord *Time, Inc. v. Pape*, 401 U.S. 279, 284 (1971); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 270 (1970).

cation of defamatory material with knowledge of its falsity or a reckless disregard for its truth.⁸ The application and development of this standard has resulted, by design,⁹ in the protection of the

In the years following *New York Times*, the Supreme Court decided a series of cases which "clarified and expanded the new constitutional privilege" it had granted to the press. Robertson, *supra* note 3, at 202. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court sought a proper accommodation between the law of defamation and freedom of the press, and, noting that "compensating injury to the reputation of private individuals requires . . . a different rule" than compensating injury to a public official or a public person, held the actual malice standard inapplicable to the former. *Id.* at 343.

One commentator summarized the stratification of the law after *Gertz* as follows:

- (1) "Public officials" and "public figures" may recover for defamation only on a [showing of] *New York Times* malice
- (2) Respecting private plaintiffs, the state may define the appropriate standard of liability "so long as they do not impose liability without fault." *Caveat*: This standard applies at least where "the substance of the defamatory statement makes substantial danger to reputation apparent."
- (3) No plaintiff may recover presumed or punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." For defamation plaintiffs who do not prove [either of these], recovery is to be limited to "compensation for actual injury."

Robertson, *supra* note 3, at 213-14 (footnotes omitted).

⁸ *New York Times*, 376 U.S. at 279-80. The Supreme Court clarified the application of the recklessness strand of this standard in *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). The *St. Amant* Court noted that "'[r]eckless disregard' . . . cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked . . . case-by-case." *Id.* at 730. The Court then concluded that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. The Court further stated that a publisher "cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *Id.* at 732; see also *Sharon v. Time, Inc.*, 599 F. Supp. 538, 564 (S.D.N.Y. 1984) (circumstantial evidence, such as defendant's conduct, may be used to prove actual malice).

It has been suggested that the "actual malice" standard is too imprecise and confusing to be of value as a benchmark denoting constitutional immunity, especially in the context of a jury trial. See *Westmoreland v. CBS Inc.*, 596 F. Supp. 1170, 1172 n.1 (S.D.N.Y.), aff'd, 752 F.2d 16 (2d Cir. 1984). In *Westmoreland*, Judge Leval expressed concern over the possibility of prejudice, to either party, should a jury confuse the *New York Times* definition of malice with the more prevalent common law understanding of the term, i.e., spite or ill will. *Id.* He therefore substituted the term "constitutional malice" for "actual malice." *Id.* Judge Leval explained that, although a reporter should not be held liable "for accusations that are responsibly researched and sincerely believed, no matter the extent of his ill will towards [his] subject," a jury might still find "an unwarranted liability" if they are "repeatedly told . . . evidence is being received on the issue of 'malice.'" *Id.* Similarly, he explained, a "plaintiff's burden of proving a reporter's recklessness to the jury will unfairly increase if the element is disguised under the label 'malice.'" *Id.*

⁹ See *Ocala Star-Banner*, 401 U.S. at 301 (White, J., concurring). Justice White pointed out that "imposing on libel and slander plaintiffs the burden of showing knowing or reckless falsehood in specified situations will result in extending constitutional protection to lies and falsehoods which, though neither knowing nor reckless, do severe damage to per-

press from liability for publications short of the most blatant and intentional falsehoods.¹⁰ Recently, in *Masson v. New Yorker Magazine, Inc.*,¹¹ the Ninth Circuit held that actual malice could not be inferred from the attribution to a public figure of fabricated quotations which either rationally interpreted ambiguous remarks or faithfully conveyed the substantive content of unambiguous remarks.¹²

In *Masson*, plaintiff Jeffrey M. Masson sued author Janet Malcolm and her publishers, New Yorker Magazine and Alfred A. Knopf, Inc., for the allegedly libelous publication of a two-part magazine article, as well as a book based on that article (collectively, the "article").¹³ The article concerned Masson's firing as projects director of the Sigmund Freud Archives.¹⁴ Malcolm based the article on a series of conversations she had with Masson, all of which were tape-recorded.¹⁵ However, Malcolm did not limit herself to words taken directly from those conversations; rather, she altered, edited and added to Masson's words, while attributing them to Masson as direct quotes.¹⁶ She claimed that this was in-

sonal reputation." *Id.* (White, J., concurring). Thus, to protect the truth from being suppressed, "innocent falsehoods are sometimes protected [even though it will achieve] nothing but gratuitous injury." *Id.* (White, J., concurring).

¹⁰ See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 81-82 (1966) (intent to injure or evil motive will not alone support inference of actual malice); *New York Times Co. v. Connor*, 365 F.2d 567, 575 (5th Cir. 1966) (failure to retract defamatory statement not indicative of actual malice); *Rosanova*, 411 F. Supp. at 447-48 (where reliable source utilized, failure to check police records reckless); *Gilberg v. Goffi*, 21 App. Div. 2d 517, 526, 251 N.Y.S.2d 823, 831 (2d Dep't 1964) (negligence in failing to discover misstatement of fact insufficient for inference of actual malice), *aff'd*, 15 N.Y.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965).

¹¹ 881 F.2d 1452 (9th Cir. 1989).

¹² *Id.* at 1455-56. The court also held that actual malice could not be inferred from misleadingly edited quotations, provided such editing amounts to one of a number of rational interpretations of an ambiguous statement. *Id.* at 1461-63.

¹³ *Id.* at 1453.

¹⁴ *Id.* The article "described the struggle between Masson and other board members . . . over Sigmund Freud's abandonment of the 'seduction theory'—a hypothesis that assumes that certain mental illnesses originate in sexual abuse during childhood." *Id.* Masson claimed he was fired "because he 'went public' with his views that Freud abandoned the seduction theory simply to further his career and placate his colleagues." *Id.*

¹⁵ *Id.* "According to Masson, Malcolm asked him whether she could tape-record the interviews and 'explained that this would be to [Masson's] advantage, since it would mean there would be no misquotations.'" *Id.* at 1483 (Kozinski, J., dissenting).

¹⁶ *Id.* at 1456-63. Masson cited nine instances in the article where Malcolm altered or fabricated quotations. *Id.* These included Masson referring to himself as an "intellectual gigolo," *id.* at 1456-58, as well as "the greatest analyst who ever lived," *id.* at 1459, and referring to Freud as a moral coward. *Id.* at 1458. Malcolm also quoted Masson as claiming he would turn Anna Freud's house into "a place of sex, women, [and] fun." *Id.* In addition,

tended to paint a picture which was, as she termed, "as lifelike and real as possible."¹⁷ Masson sued, contending that Malcolm made him appear "‘unscientific, irresponsible, vain [and] lacking [in personal] honesty and moral integrity.’"¹⁸ The district court granted the defendants' motion for summary judgment, concluding that actual malice was lacking.¹⁹ On appeal, the Ninth Circuit affirmed.²⁰

Writing for the court, Judge Alarcon first determined that the issue presented was novel both within the circuit and in the Supreme Court.²¹ The court then examined several federal and state

Masson also noted an instance where Malcolm misleadingly edited a quote by eliminating 33 of 45 words in a sentence without substituting ellipses, resulting in Masson appearing to have stated that he was the wrong man to look to do the honorable thing. *Id.* at 1462-63. The words Malcolm deleted tended to characterize Masson as the wrong man to choose to sit idly by so as to avoid negative personal and professional repercussions. *Id.*

In his dissent, Judge Kozinski noted that "at least one piece of direct evidence [established] that Malcolm engaged in deliberate fabrication." *Id.* at 1483 (Kozinski, J., dissenting). Judge Kozinski pointed to a typed draft of the article which contained an alteration of a quote crossed out and replaced by another alteration which departed even further from the substance of Masson's actual statement. *Id.* According to Judge Kozinski, from this evidence "the jury could easily infer that Malcolm made the change in a deliberate effort to distort what Masson said or with reckless disregard to whether it accurately reflected Masson's words." *Id.* See generally *infra* notes 28-31 and accompanying text (doctoring quotations may constitute actual malice and thus offend first amendment).

¹⁷ *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1398 (N.D. Cal. 1987), *aff'd*, 881 F.2d 1452 (9th Cir. 1989). Malcolm contended in an affidavit that she "quoted Mr. Masson accurately . . . [and] presented him as he presented himself," and that she "invented nothing." *Id.*

¹⁸ *Masson*, 881 F.2d at 1453. Masson claimed that the defendants violated California Civil Code § 45 by libeling him and placing him in a false light. *Id.* Under the California statute, "[l]ibel is a false and unprivileged publication by writing [or] printing . . . 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." *Id.* at 1481 (Kozinski, J., dissenting) (quoting CAL. CIV. CODE § 45 (West 1982)).

The damaging effect of Malcolm's article was evidenced by some disparaging pieces subsequently written about Masson, which were based on the article and, more specifically, the quotes it contained. *Id.* at 1465 (Kozinski, J. dissenting). For instance, one review of Malcolm's article in the *Boston Globe* found that Masson "‘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 . . . through the efforts of an observer and listener.’" *Id.* (quoting Coles, *Freudianism and its Malcontents*, *Boston Globe*, May 27, 1984, at 58) (emphasis added by court).

¹⁹ *Masson*, 686 F. Supp. at 1407. The trial court found that "[n]o clear and convincing evidence exists that would justify a finding that . . . [the defendants] entertained serious doubts about the truth of the disputed passages." *Id.*

²⁰ See *Masson*, 881 F.2d at 1464.

²¹ *Id.* at 1454. The court phrased the issue as "whether a finding of malice may hinge upon evidence showing that a defamatory statement attributed to a person by using quotation marks does not contain his or her exact words." *Id.*

appellate decisions,²² and concluded that as long as the writer did not publish fictionalized quotes which were "wholly the product" of imagination,²³ i.e., quotes which altered the substantive content of unambiguous remarks,²⁴ and as long as the edited quotes were reasonable interpretations of ambiguous remarks,²⁵ no reasonable jury could conclude²⁶ that the writer published the quotes with actual malice.²⁷ Applying these standards to the instant case, the court concluded that Malcolm quoted Masson with sufficient accuracy to require the dismissal of Masson's claims.²⁸

In a vigorous dissent, Judge Kozinski argued that "[t]he press can legitimately claim the right to editorial judgment when it is selecting words itself [but] it cannot, and does not, claim the right to select words for others."²⁹ The dissent further maintained that the determination of the instant case should rest on the idea that "what somebody says is a fact, and that doctoring a quotation is no more protected by the first amendment than is any other falsification."³⁰ Employing this proposition, Judge Kozinski applied a five-step test³¹ from which he concluded that a reasonable jury could in

²² *Id.* at 1454-56.

²³ *Id.* at 1456; see also *infra* notes 67-73 and accompanying text (discussing when a quote is so fabricated as to support inference of actual malice).

²⁴ *Masson*, 881 F.2d at 1456.

²⁵ *Id.*

²⁶ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-57 (1985). Actual malice must be proved by clear and convincing evidence. *Id.* The *Anderson* Court held that a "ruling on a motion for summary judgment must [also] be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists." *Id.* at 257.

²⁷ *Masson*, 881 F.2d at 1455-56.

²⁸ *Id.* at 1456-63.

²⁹ *Id.* at 1478 (Kozinski, J., dissenting). Regarding what he categorized as Malcolm's extreme departure from the standards of ethical journalism, Judge Kozinski noted that "authorities are adamant and uniform in condemning the use of altered quotes that are not faithful to the meaning intended by the speaker." *Id.* at 1475 (Kozinski, J., dissenting); see also *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976) ("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").

It has been urged, regarding such journalistic malpractice, that "a complete departure from the standards of investigation and reporting ordinarily adhered to may . . . be some evidence of actual malice." *Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1351 (S.D.N.Y. 1977); see *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967); *Bose Corp. v. Consumers Union of United States, Inc.*, 692 F.2d 189, 196-97 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984).

³⁰ *Masson*, 881 F.2d at 1478.

³¹ *Id.* at 1478-79. Judge Kozinski outlined the following test:

(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

fact infer actual malice from Malcolm's actions.³²

The *Masson* court, it is suggested, interpreted the actual malice standard in a manner which expanded the limited immunity of the press beyond its intended scope, and thereby extended constitutional protection to deliberate distortions and fabrications. The first amendment is intended to promote the free and robust debate of any and all public issues, not the diffusion of fabrications and distortions.³³

This Comment will first examine the development of the actual malice standard and its basis in the first amendment. It will then analyze the cases relied upon by the *Masson* court and assert that they were misinterpreted by the court, resulting in a rule which fails to adequately balance the rights of the individual with the rights of the press. Finally, this Comment will suggest an alternative analysis which preserves the ideals and freedoms protected by the first amendment while still affording due protection to those individual rights which the actual malice standard was designed to protect.

I. THE FIRST FREEDOM

The rationale underlying the free press clause of the first amendment can be stated quite succinctly: "[w]ithout a free press, there can be no free society."³⁴ Freedom of thought and the unfettered discussion of any and all issues of public concern are essential to the survival and growth of a republican government.³⁵ Neg-

so, is the inaccuracy defamatory? (5) If so, is the inaccuracy a result of [actual] malice . . . ? If the answer to any of these questions is no as a matter of law, the inquiry stops and the defendant wins. If they could all be answered yes, I would send the matter to the jury.

Id.

³² See *id.* at 1479-86.

³³ See *New York Times Co. v. Sullivan* 376 U.S. 254, 270 (1964). The *New York Times* Court decided that a case with first amendment implications should be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.*; see also *infra* notes 33-38 and accompanying text (discussing underlying rationale of freedom of the press).

³⁴ *Pennekamp v. Florida*, 328 U.S. 331, 354 (1946) (Frankfurter, J., concurring).

³⁵ See *New York Times*, 376 U.S. at 270. The Court in *New York Times* quoted Justice Brandeis' "classic formulation" of this principle:

Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . [T]hey knew that order cannot be secured merely through fear of pun-

tive, even caustic opinions, no matter how unpopular, are necessary to encourage open public debate.³⁶ From this realization a toleration for error grew.³⁷ Thus, to avoid self-censorship and its resultant atrophying of public discussion,³⁸ the Supreme Court determined that truth could not be the standard by which to measure the constitutional protection of a person's words.³⁹

ishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id. at 270 (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)).

Similarly, the Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), stated that “[t]he guarantees of freedom of speech and press were not designed to prevent ‘the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential.’” *Id.* at 150 (quoting T. COOLEY, *CONSTITUTIONAL LIMITATIONS* 886 (8th ed. 1927)); *see also* A. MEIKLEJOHN, *POLITICAL FREEDOM* 27 (1960) (“It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage”); Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 739 (1986) (“The ultimate metaphor of our national political life is that of public debate leading to the informed and personal consent of the governed”).

³⁶ See *New York Times*, 376 U.S. at 270; *see also* A. MEIKLEJOHN, *supra* note 35, at 26 (“What is essential is not that everyone shall speak, but that everything worth saying shall be said”); S. WORTON, *FREEDOM OF SPEECH AND PRESS* iv (1975) (“Freedom of expression does not ensure anyone automatic acceptance of his idea; all it guarantees is the opportunity to present them to others”).

³⁷ See *New York Times*, 376 U.S. at 271-72. The Court declared “[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’” *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

³⁸ See *id.*; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974); *Curtis Publishing Co.*, 388 U.S. at 152; *New York Times*, 376 U.S. at 279.

³⁹ See *New York Times*, 376 U.S. at 271. The Supreme Court has refused to establish any test of truth in the context of a libel suit. *See id.* The Court has noted that “[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . especially one that puts the burden of proving truth on the speaker.” *Id.* Justice Brennan continued, “[t]he constitutional protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered.’” *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)). Moreover, in *Curtis Publishing*, the Court declared that “[w]hile the truth of the underlying facts might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm . . . we have rejected . . . the argument that a finding of falsity alone should strip protections from the publisher.” 388 U.S. at 152.

After a decade of injecting first amendment values into defamation law, the Court reiterated and clarified its position. *See Gertz*, 418 U.S. at 340. In *Gertz* the Court stated that “[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.” *Id.*

The Supreme Court, however, has rejected the concept that the press enjoys an absolute immunity from liability for defamation.⁴⁰ In order to balance the need for fair comment⁴¹ and public dissemination of ideas against a person's right to protection of his "good name" and reputation,⁴² the Court established the actual malice standard.⁴³ The Court's employment of this standard has served to put the press on notice: where a public figure is concerned, the press will be protected from all error in judgment, as well as from innocent or negligent mistakes of fact,⁴⁴ but there is no constitutionally protected value in the reckless or intentional misstatement of fact.⁴⁵

⁴⁰ See *New York Times*, 376 U.S. at 269; see also *Goldwater v. Ginzburg*, 414 F.2d 324, 335 (2d Cir. 1969) ("False statements are protected only if they are honestly made").

⁴¹ See Robertson, *supra* note 3, at 201. At common law, a publisher was strictly liable for defamatory statements, subject only to the defenses of truth or privilege. *Id.* "Of the plethora of privileges recognized at common law, the most important from a constitutional standpoint was the privilege of 'fair comment' on matters of public concern." *Id.* One of the conditions for this privilege was the truth of the facts underlying the statement. See Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1228 (1976). However, "[i]n light of the [*New York Times*] line of cases, it should be obvious that the privilege of fair comment can no longer be deemed lost by reason of the falsity of the underlying facts except upon a finding of the requisite degree of fault in relation to falsity." *Id.*

⁴² See *Gertz*, 418 U.S. at 341-42; see also *Rosenblum v. Metromedia, Inc.*, 403 U.S. 29, 70 (1971) (Harlan, J., dissenting) (there should be some duty of reasonable care in the exercise of freedoms guaranteed by first amendment) (overruled by *Gertz*); Robertson, *supra* note 3, at 208 (*Gertz* majority closely followed Justice Harlan's *Rosenblum* dissent).

The Court in *Gertz* carefully balanced reputational interests with the first amendment right to free speech. *Gertz*, 418 U.S. at 341-42. According to the Court, "[t]he need to avoid self-censorship by the news media is, however, not the only societal value at issue." *Id.* at 341.

[T]he individual's right to the protection of his own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty . . . [and which] is entitled to . . . recognition by this Court as a basic of our constitutional system. *Id.* at 341 (Stewart, J., concurring) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)).

⁴³ See *supra* notes 3-10 and accompanying text.

⁴⁴ See *Gertz*, 418 U.S. at 339-43. As the *Gertz* Court explained, all opinions are protected "[u]nder the First Amendment [because] there is no such thing as a false idea." *Id.* at 339.

Although the Court recognized that some innocent and negligent mistakes of fact may not deserve constitutional protection, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *Id.* at 340 (quoting James Madison from the REPORT ON THE VIRGINIA RESOLUTIONS OF 1798). Therefore, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341.

⁴⁵ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984); *Gertz*, 418 U.S. at 340, 342; *New York Times*, 376 U.S. at 280.

The right of the press to be free from governmental authority should be considered in light of a higher purpose: enabling the press to function as a body free from stricture and restraint in order to ensure that the people have the information vital and necessary to the proper functioning and control of their government. The *Masson* court, however, unreasonably broadened the scope of press immunity; "freedom of the press" does not suggest invalidation of all checks on press activity, nor does it connote abdication of responsibility.⁴⁶

II. THE NINTH CIRCUIT ANALYSIS

In *Masson*, the Ninth Circuit relied primarily on four cases to establish a rule permitting an author to fabricate quotes.⁴⁷ It is submitted that these cases do not support such a proposition.

The *Masson* court cited *Dunn v. Gannett New York Newspapers, Inc.*⁴⁸ to support its holding that actual malice should not be inferred where "fabricated quotations are . . . 'rational interpretations' of ambiguous remarks made by the public figure."⁴⁹ The *Dunn* court was faced with the task of applying the actual malice standard to a Spanish language newspaper's translation, from English to Spanish, of a word with no exact Spanish equivalent.⁵⁰ The

⁴⁶ See *supra* notes 39-44 and accompanying text; see also *New York Times*, 376 U.S. at 269 ("libel can claim no talismanic immunity from constitutional limitations"); Eaton, *supra* note 2, at 1369 (Supreme Court rejected absolute immunity for press and left some speech unprotected by the Constitution).

⁴⁷ See *Masson*, 881 F.2d at 1454-55. The four cases are *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 451-52 (3d Cir. 1987); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), cert. denied, 434 U.S. 834 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976); and *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 76, 155 Cal. Rptr. 29, 37-38, cert. denied, 444 U.S. 984 (1979).

⁴⁸ 833 F.2d 441 (3d Cir. 1987).

⁴⁹ *Masson*, 881 F.2d at 1456 (quoting *Dunn*, 833 F.2d at 452).

⁵⁰ See *Dunn*, 833 F.2d at 447-48. In *Dunn*, the Mayor of Elizabeth, New Jersey sued a Spanish language newspaper challenging its use, in a headline, of the word "cerdos" in translating remarks he had made characterizing the Hispanic population of Elizabeth as litterbugs. *See id.* at 448. Translated literally "cerdos" means "pigs," though it can also be understood as a reference to a "dirty person, or slovenly person." *Id.* at 451 n.2. The court concluded that it was "required to determine whether the actual Spanish word or its English translation should be considered in deciding whether actual malice was implicated in the publication." *Id.* at 447-48. The court unequivocally stated that it was unwilling to make a determination of actual malice based "solely on the translation to English from Spanish [by the plaintiff] of the language used by the defendant." *Id.* at 452 (emphasis added). The court continued, stating that "[i]f the language is Spanish, we must apply the [actual malice] standard to Spanish . . . because . . . a translation may not reflect the nuances and subtleties of the original language." *Id.* This was especially true in *Dunn* since "there is no

issue arose out of an attempt to "express the gist of [the plaintiff's] remarks" for the purpose of creating a headline.⁵¹ Thus, *Dunn* involved the "unique" problems of translation and summarization, neither of which was implicated in *Masson*.⁵²

In addition, although the *Masson* court read *Dunn* as involving a fabricated quote,⁵³ the *Dunn* court provided no indication that it was dealing with a direct quote.⁵⁴ While the plaintiff in *Dunn* claimed that the newspaper was quoting him directly,⁵⁵ the defendants claimed that no such direct quote was intended.⁵⁶ After discussing the defendant's evidence to the contrary, the court made no finding either way.⁵⁷ For these reasons, it is apparent that the holding in *Dunn* fails to support the *Masson* ruling.

The *Masson* court also relied upon *Hotchner v. Castillo-Puche*⁵⁸ to hold that an author may fictionalize quotations to the

exact Spanish word for litterer or litterbug." *Id.* After applying the actual malice standard to the Spanish words used by the defendants, the court held that "cerdos" was a "fair, albeit inadequate translation." *Id.*

⁵¹ See *id.* at 451.

⁵² See *Masson*, 881 F.2d at 1471 (Kozinski, J., dissenting). Judge Kozinski concluded that "[t]ranslation necessarily involves a judgment But no judgment is required in quoting an English-speaking person in English." *Id.* (Kozinski, J., dissenting). It is suggested that since the mayor's remarks were subject to a number of rational interpretations, and since an exact translation was impossible, an element of subjectivity was introduced into the editorial process, one which the court was unwilling to second guess.

⁵³ See *id.* at 1454. The *Masson* court quoted the plaintiff's claim in *Dunn* that "by enclosing 'cerdos' ['pigs'] in single quotation marks, [the defendant newspaper] purported to proclaim that the mayor had in fact used the word 'pigs' in discussing the litter problem." *Id.* The court then went on to summarize its understanding of the holding in *Dunn*, stating that actual malice can not be inferred merely because the "quoted language" did not contain the speakers exact words. *Id.* at 1456. The court concluded that "[t]he newspaper editors in *Dunn* were not attempting to translate a particular word for which there was no exact equivalent in Spanish; instead they sought to 'express the gist of the mayor's remarks' by means of a fabricated quotation." *Id.* at 1456 n.2 (quoting *Dunn*, 833 F.2d at 451).

⁵⁴ See *Dunn*, 833 F.2d at 450-52.

⁵⁵ *Id.* at 450.

⁵⁶ See *id.* at 451. The *Dunn* court noted that the "use of [single] quotation marks in Spanish does not necessarily signify that a literal quotation is intended." *Id.* The court made reference to the testimony of the newspaper's editor, who stated that the challenged headline "was not intended to convey, nor do I believe our Spanish-speaking readership interpreted it to convey that Dunn was being directly quoted." *Id.*

⁵⁷ See *id.* at 450-52.

⁵⁸ 551 F.2d 910, 914 (2d Cir.), cert. denied, 434 U.S. 834 (1977). *Hotchner* involved a book about Ernest Hemingway in which Hemingway was quoted as referring to A. E. Hotchner as a "dirty and a terrible ass-licker. There's something phony about him. I wouldn't sleep in the same room with him." *Id.* at 914. Hemingway's statement was originally published in Spanish. *Id.* at 911. However, in translating from Spanish to English, Doubleday's editors softened the statement to "I don't trust him." *Id.* Hotchner contended that the defendant should be held liable because it knew for a fact Hemingway never made that state-

extent that they "do not 'alter the substantive content' of unambiguous remarks actually made by the public figure."⁵⁹ In *Hotchner*, the quote in issue had been altered in an effort to decrease its potential for defamatory impact.⁶⁰ While the court dismissed the plaintiff's claim because "the change did not increase the defamatory impact or alter the substantive content of [the] statement about Hotchner,"⁶¹ the underlying rationale was that a publisher should not be held liable for toning down an offensive statement where it could not have been held liable for publishing the "uncut version."⁶² Thus the court in *Hotchner* was not granting a license to fictionalize "to some extent," but rather was excusing such "fictionalizing" so as to avoid holding the defendants liable for making the passage less offensive than it was originally.⁶³ This rationale is inapplicable to *Masson*, wherein Malcolm's interpretations consistently suggested more pejorative versions of Masson's actual statements.⁶⁴

Having established this limited right to fabricate quotes, the *Masson* court next cited two other cases to set the bounds of this right.⁶⁵ The *Masson* court interpreted *Bindrim v. Mitchell*⁶⁶ as standing for the proposition that "an author's privilege to alter quotations is not unlimited."⁶⁷ However, the *Bindrim* court never mentioned, discussed, or alluded to any such "privilege."⁶⁸

In addition, the *Masson* court relied upon *Carson v. Allied*

ment. *Id.* The court did not agree and found no evidence of actual malice. *Id.*

⁵⁹ *Masson*, 881 F.2d at 1456 (quoting *Hotchner*, 551 F.2d at 914).

⁶⁰ *Hotchner*, 551 F.2d at 914.

⁶¹ *Id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *Masson*, 881 F.2d at 1456-63, 1467-70; see also *supra* note 16 (examples of Malcolm's inflammatory alterations).

⁶⁵ See *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976); *Bindrim v. Mitchell*, 92 Cal. App. 3d 61, 76, 155 Cal. Rptr. 29, 37-38, *cert. denied*, 444 U.S. 984 (1979).

⁶⁶ 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979).

⁶⁷ See *Masson*, 881 F.2d at 1456.

⁶⁸ See *Bindrim*, 92 Cal. App. 3d at 76-78, 155 Cal. Rptr. at 37-39. In *Bindrim*, the California District Court of Appeal found that actual malice could be inferred from the attribution of statements and actions to an ostensibly fictional character in a novel when, based upon the story line, that character could readily be recognized as the plaintiff. *Id.* The court began by directing its inquiry into whether or not such statements and actions could be considered statements of fact reflecting the actual words and deeds of the plaintiff. *Id.* The court then explored the standards for differentiating between fact and opinion, and, having determined that the statements in the novel were statements of fact, treated the fabricated quotations in the novel as it would any other misstatement of fact. *Id.* at 76-79, 155 Cal. Rptr. at 37-40.

*News Co.*⁶⁹ to help set the parameters of permissible press activity.⁷⁰ The *Masson* court concluded that a “factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author’s imagination.”⁷¹ However, the *Carson* court referred to “any ‘product of [one’s] imagination’” as “another example of reckless disregard for the truth.”⁷² The Ninth Circuit interpreted this to mean that only a fabrication which is “wholly imagined” could support an inference of actual malice.⁷³ The *Masson* court distinguished between situations where the author simply made up quotations without interviewing the subject—as was the case in *Carson*—and where the author fabricated quotes only after speaking with the subject—as in *Masson*.⁷⁴ However, the mere fact that an author has a base of knowledge from which to work does not change the reality that statements were falsely and publicly attributed to an individual who never actually made them. It is apparent from *Carson* that actual malice can be inferred from the fabrication of quotations.⁷⁵

It is submitted that by expansively interpreting these cases without due regard for their specific factual underpinnings, the

⁶⁹ 529 F.2d 206, 213 (7th Cir. 1976). *Carson* concerned the publication of an article in *The National Insider* claiming that NBC moved *The Tonight Show* to California so that Johnny Carson could be closer to the woman who caused the breakup of his first marriage. *Id.* at 208. The article’s discussion of Carson’s desire to move “contain[ed] supposed quotations by Carson to the executives and their responses and reactions [to him].” *Id.* at 212. In justifying the fabrications, the author concluded that such a conversation “seemed to be simply a logical extension of what must have gone on.” *Id.*

⁷⁰ *Masson*, 881 F.2d at 1454-56.

⁷¹ *Id.* at 1455-56 (citing *Carson*, 529 F.2d at 213).

⁷² See *Carson*, 529 F.2d at 213 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968)) (emphasis added).

⁷³ See *Masson*, 881 F.2d at 1455-56.

⁷⁴ See *id.* at 1454-56.

⁷⁵ See *Carson*, 529 F.2d at 213. *Carson* relied in part upon *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970), a case not cited by the *Masson* court, in which the Second Circuit expressly disapproved of “melding,” “distillation,” “misplaced emphasis,” “exaggeration” and “distortion” in relaying another’s words through the press. *Carson*, 529 F.2d at 337.

In *Goldwater*, the defendant published an unscientific survey of psychiatrists concerning the mental state of then presidential candidate Barry Goldwater. *Id.* at 328-30. In publishing the survey, the defendant altered the responses in various ways. *Id.* at 337. The court noted that the words quoted from one survey response “were changed and rewritten.” *Id.* The court stated that “[o]ne cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter’s statements or observations are altered or taken out of context.” *Id.*

Ninth Circuit formulated a rule which fails to adequately balance the rights of the press and the rights of the individual, as required by the actual malice standard. By injecting the highly speculative and subjective element of "rational interpretation" into the actual malice equation, it is asserted the *Masson* court has developed a rule which will functionally immunize the press from liability for all but the most obviously ill-willed misquotes.

A Fact Is A Fact

The Supreme Court has repeatedly and unequivocally stated that there is no constitutional value in a false statement of fact recklessly or intentionally made.⁷⁶ It is suggested that any deliberately fabricated defamatory statement purporting to be a direct quotation should, as a matter of law, be considered a false statement of fact sufficient to support an inference of actual malice. Therefore, although the issue in *Masson* was a novel one,⁷⁷ the Ninth Circuit took an approach contrary to the law of defamation as developed by the Supreme Court over the past three decades.⁷⁸

Quotation marks serve a highly specific function in the written English language.⁷⁹ They indicate that what one has written is in fact the words of another, taken "verbatim."⁸⁰ Yet, the Ninth Circuit simply focused on whether the words chosen relayed the mere denotative equivalent of the words actually spoken.⁸¹ In countering this argument and concluding that a quote should be considered a statement of fact, Judge Kozinski stressed the reader's perspective, that is, how a reader might be misled if a quote is not relayed exactly as spoken.⁸² However, the rationale for considering a quote a

⁷⁶ See *supra* note 45 and accompanying text.

⁷⁷ See *Masson*, 881 F.2d at 1454.

⁷⁸ See *supra* notes 39-45 and accompanying text. "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." *Carson*, 529 F.2d at 213.

⁷⁹ See *Masson*, 881 F.2d at 1465 (Kozinski, J., dissenting).

⁸⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1868 (1963); see SHAW & SHAFFER, McGRAW HILL HANDBOOK OF ENGLISH 179-82 (1952).

⁸¹ See *supra* notes 12, 21-28 and accompanying text (summarizing *Masson* court analysis).

⁸² See *Masson*, 881 F.2d at 1465-66 (Kozinski, J., dissenting). Judge Kozinski's dissent argued as follows:

[Q]uotations allow readers to draw their own conclusions about the speaker's character, motive, candor and lucidity By putting the phrase into Masson's own mouth and concealing her role as interpreter and editor, Malcolm has caused Mas-

statement of fact goes even further. It is suggested that the actual purpose behind the words—why the *speaker* chose them and what the *speaker* wanted to say—must be the paramount consideration. Although the *Masson* holding protects the cognitive function of a quotation, its emotive, relational function must be protected as well.⁸³ In allowing others to substitute their words for the speaker's, it is submitted that the *Masson* court has also allowed them to substitute their *perceptions* of what the speaker was feeling and thinking at the moment the words were uttered. Thus, the ultimate fallacy in the *Masson* decision lies in its consideration of a direct quote not as a statement of fact, but merely as a statement analogous to an opinion, open to interpretation and translation by the press.

CONCLUSION

This Comment has suggested that a direct quote should be considered a statement of fact and, therefore, any intentional or reckless alteration which makes the statement defamatory is per se unprotected by the free press clause of the first amendment. To the contrary, the Ninth Circuit overlooked the parameters of the first amendment established by the Supreme Court for the protection of the press and the people, thus providing unwarranted pro-

son a serious injury and made it look like a self-inflicted wound. It is this concealment—the use of quotation marks to deceive the reader about the author's editorial role—that libel law prohibits and the Constitution does not, in my opinion, protect.

Id. at 1466 (Kozinski, J., dissenting).

⁸³ See *Cohen v. California*, 403 U.S. 15, 26 (1971). Justice Harlan, in defending a person's right to choose his own words, stated that:

[L]inguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive intent of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id.

"Ignoring the inherent subjectivity and imprecision of language may lead to a constitutionally impermissible evaluation of the truth of normative or judgmental statements in the guise of examining factual truth." Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 281 (1978); see *Baker v. Los Angeles Herald Examiner*, 42 Cal. 3d 254, 261, 721 P.2d 87, 91, 228 Cal. Rptr. 206, 210 (1986) (reader may understand quote not to be statement of fact when viewed in context), cert. denied, 479 U.S. 1032 (1987).

tection of distortions and fabrications. Perhaps the Ninth Circuit should have looked beyond the impact of the *Masson* rule on the immediate litigants, and explored its ramifications on the basic political processes of this country. In an age dominated by the mass media, the press should not be free to present to the people whatever "truth" it sees fit.

John J. McGreevy