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NOTES

FABRICATED QUOTES AND THE ACTUAL MALICE STANDARD: *MASSON v. NEW YORKER MAGAZINE*

The First Amendment to the United States Constitution guarantees federal protection against laws abridging freedom of expression.¹ The Fourteenth Amendment protects freedom of expression against state action² as well as private action³ brought in state court subject to state laws.⁴ In interpreting the First and Fourteenth Amendments, the United States Supreme Court has classified freedom of speech and of the press as fundamental liberties.⁵ As a result, the Court has required close scrutiny of legislation which appears to restrict freedom of expression.⁶

Not all forms of expression, however, are protected under the Constitution.⁷ The Supreme Court has taken two approaches in outlining the scope

1. The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

2. *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964) (stating that the Fourteenth Amendment requires constitutional safeguards protecting freedom of speech and of the press).

3. In a lawsuit between private parties, state courts are prohibited by the Fourteenth Amendment from applying a state law, whether common law or statutory, which imposes invalid restrictions on constitutional freedoms of speech and press. *Id.* at 265.

4. *Id.*

5. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating First Amendment rights into the Fourteenth Amendment).

6. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). In *Carolene Products*, Justice Stone wrote: "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." *Id.* at 152 n.4. See also *Texas v. Johnson*, 491 U.S. 397 (1989) (reversing conviction for burning American flag in violation of Texas statute because state statute was inconsistent with the First Amendment); *Stromberg v. California*, 283 U.S. 359 (1931) (invalidating a state law which banned the flying of a red flag as a sign of opposition to organized government); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a ban on the teaching of a foreign language in any school).

7. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973) (holding that there are legitimate state interests in regulating commercial obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that advocacy which incites imminent lawless action may be proscribed by state law); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) (upholding New Hampshire statute which prohibited the direct address of offensive, derisive or annoying

of protection to be afforded free speech. Under the first approach, the Supreme Court balances the constitutional right to freedom of expression with the governmental interest in abridging free speech to determine whether the First Amendment protects speech.⁸ Under this approach, speech which creates a "clear and present danger"⁹ or, under the current test, speech which is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"¹⁰ may be regulated by a state or by the federal government.¹¹ The Court's second approach to free speech removes some forms of expression from the "speech" definition under the meaning of the First Amendment.¹² By removing some forms of expression from First Amendment protection, legislation can then be enacted to regulate these forms of expression.¹³ "Fighting words"¹⁴ and obscenity¹⁵

speech to another person in a public place); *Schenck v. United States*, 249 U.S. 47, 53 (1919) (upholding a criminal conviction for conspiracy to distribute a circular denouncing conscription and urging destruction of the selective draft).

8. See, e.g., *Schenck*, 249 U.S. at 52-53 (balancing freedom of speech with the Congressional interest in preventing obstruction of the military draft during time of war).

9. *Id.* at 52. The Court did not specifically define "clear and present danger." Justice Holmes' opinion did, however, provide an example of such a danger: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.*

10. *Brandenburg*, 395 U.S. at 447 (footnote omitted). The Court in *Brandenburg* reversed the conviction of a Ku Klux Klan leader under the Ohio Criminal Syndicalism statute. *Id.* at 444-45. The Ohio law criminalized the advocacy of violence. *Id.* The per curiam opinion of the Court stated that a statute which purported to punish mere advocacy "falls within the condemnation of the First and Fourteenth Amendments." *Id.* at 449.

11. According to Justice Holmes, who delivered the opinion of the Court in *Schenck*, Congress has not only an interest, but the right to prevent certain "substantive evils." *Schenck*, 249 U.S. at 52. Justice Holmes did not, however, provide specific guidelines defining what types of evils are substantial enough to be regulable.

12. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Brandenburg*, 395 U.S. at 444; *Schenck*, 249 U.S. at 47.

13. Under the categorization approach, the Court removes from free speech "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (footnote omitted). Obscenity and "fighting words" are the two most common categories of speech removed from First Amendment protection.

14. *Id.* at 572. The Court in *Chaplinsky* defined "fighting words" as "[words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* (footnote omitted).

15. See *Miller*, 413 U.S. at 23-24 (holding that obscene material is unprotected by the Constitution and is subject to state regulation). In *Miller*, the Court confined the permissible scope of state regulation to works which, "taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24.

are examples of forms of expression that do not warrant First Amendment protection.¹⁶

Another category of speech that is not protected under the First Amendment is defamation.¹⁷ Generally, defamation consists of the torts of libel and slander.¹⁸ At common law, First Amendment problems were never raised in defamation cases because free speech rights were not incorporated into the Due Process Clause of the Fourteenth Amendment until the early part of the twentieth century.¹⁹ Therefore, strict liability was imposed upon a defendant for the harm caused to a plaintiff through false statements.²⁰ With the growing influence of the mass media in American society, however, defamation law has become more complex. The Supreme Court first considered the constitutional implications of defamation law²¹ less than thirty years ago. Yet, the Court has returned frequently to the area of defamation law in order to clarify important definitions that proved ambiguous after their initial application.²² Thus, defamation law evolved into a leading constitutional issue.

The Court first addressed the issue of defamation in *New York Times Co. v. Sullivan*²³ in 1964. The Court balanced the interests of individuals against the interests of the media and refused to grant an absolute privilege or immunity to the press under the First Amendment. Instead, the Court

16. In *Chaplinsky*, Justice Murphy explained that certain classes of expression—such as obscene, libelous, or incendiary speech—are not protected because their social value is so slight compared with the social interest in upholding order and morality. *Chaplinsky*, 315 U.S. at 572.

17. See *infra* note 63.

18. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. See *infra* note 63.

19. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (declining to decide whether the Fourteenth Amendment contains freedom of expression protections); cf. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment into the Fourteenth Amendment).

20. Donald L. Magnetti, "In the End, Truth Will Out". . . Or Will It?, 52 MO. L. REV. 299, 313 (1987).

21. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

22. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-12, at 865 (2d ed. 1988).

23. 376 U.S. 254 (1964).

required public officials²⁴ to prove actual malice²⁵ in order to hold a media defendant liable for defamation.²⁶

Justice Brennan, writing for the majority, based the *New York Times* decision on the theory that the First Amendment reflects a profound national commitment to the idea that debate on public issues should be "uninhibited, robust, and wide open."²⁷ This theory led the Court to broaden the application of the *New York Times* rule in subsequent decisions.²⁸ Since *New York Times*, the Court has made more difficult the task of a public figure²⁹ plaintiff seeking to recover damages from a media defendant.³⁰ The definition of "actual malice" has become more difficult to meet,³¹ the evidentiary standard has become more burdensome,³² and a media defendant is protected from liability as long as his or her presentation is a "rational interpretation" of a document or an event.³³

To resolve these issues, the United States Supreme Court granted certiorari to decide *Masson v. New Yorker Magazine, Inc.*³⁴ In *Masson*, the Court addressed the issue of whether the knowing misquotation of a public figure amounts to actual malice as required by *New York Times* for defamation liability.³⁵ The majority of the Court held that the knowing misquotation of

24. The holding in *New York Times* was limited by its facts to "public official" plaintiffs. *Id.* at 279-80. However, the Court did not explicitly define the term. In fact, the Court stated that it had "no occasion here to determine how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of this rule." *Id.* at 283 n.23.

In cases subsequent to *New York Times*, the Court expanded the class of public officials. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Court held that the designation "public official" included at a minimum government employees who "have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* at 85 (footnote omitted).

According to Professor Tribe, the term now includes "virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen." TRIBE, *supra* note 22, § 12-12, at 866 (footnote omitted).

25. "Actual malice" is a term of art in defamation law, defined by the Court as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280.

26. *Id.* at 279-80.

27. *Id.* at 270.

28. TRIBE, *supra* note 22, § 12-13, at 873.

29. See *supra* note 24. As discussed later in this Note, the rule was later expanded to apply also to public figures. See *infra* notes 107-26 and accompanying text.

30. Magnetti, *supra* note 20, at 313.

31. See *infra* notes 132-51 and accompanying text.

32. See *infra* note 179 and accompanying text.

33. *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). See *infra* note 42 and accompanying text.

34. 111 S. Ct. 2419 (1991).

35. *Id.* at 2431.

a public figure gives rise to defamation liability only when the meaning of the plaintiff's statements is materially altered.³⁶

Jeffrey Masson, a renowned psychoanalyst and former Projects Director of the Sigmund Freud Archives, objected to a number of self-criticizing quotations attributed to him in an article appearing in *The New Yorker Magazine*.³⁷ Masson alleged that he never uttered the statements in the alleged quotes³⁸ and therefore brought a federal suit for libel under California law,³⁹ naming as defendants the magazine which originally published the article, the publisher of the subsequent book, and the author of the article and book. The defendants claimed that the quotations were accurate reflections of the author's notes from unrecorded sessions with Masson, and moved for summary judgment.⁴⁰

The United States District Court for the Northern District of California⁴¹ applied a rational interpretation test⁴² and concluded that the defendants' choice of words represented rational interpretations of the plaintiff's tape-recorded statements.⁴³ Accordingly, the court found the plaintiff's claim of defamation was unsupported under the actual malice standard of *New York Times*, and granted the defendants' motion for summary judgment.⁴⁴

The United States Court of Appeals for the Ninth Circuit, with one judge dissenting, affirmed the district court's grant of summary judgment for the defendants.⁴⁵ The court used a two-prong test for actual malice in situations where quoted language does not contain the exact words used by the plain-

36. *Id.* at 2433.

37. *Id.* at 2424-25.

38. *Id.*

39. The relevant statute provides: "Libel is a false and unprivileged publication . . . 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).

40. *Masson*, 111 S. Ct. at 2438.

41. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd* 111 S. Ct. 2419 (1991).

42. Under the "rational interpretation" doctrine, a statement which amounts to an author's adoption of one of a number of possible rational interpretations of a document or event which is ambiguous does not amount to malice. *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971). See *infra* notes 144-51 and accompanying text.

43. *Masson*, 686 F. Supp. at 1407. The court found that considering the many egotistical statements that Masson actually made in the tape-recorded interview, the plaintiff did not demonstrate clear and convincing evidence from which reasonable jurors could conclude that the defendant "entertained serious doubts about the accuracy of the passage[s]." *Id.* at 1406.

44. *Id.* at 1406-07.

45. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1548 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991).

tiff, but is not wholly fabricated either.⁴⁶ Under this test, actual malice could not be inferred where the fabricated quotations are either rational interpretations of ambiguous remarks,⁴⁷ or did not "alter the substantive content"⁴⁸ of unambiguous remarks actually made by the plaintiff.⁴⁹ As additional support for its decision, the court applied the "incremental harm" test⁵⁰ to one passage in dispute, and concluded that the incremental harm inflicted by the challenged statements was nominal or non-existent.⁵¹ Therefore, the court affirmed the lower court's judgment.⁵² The United States Supreme Court granted certiorari⁵³ to decide what standard is applicable for a finding of actual malice in cases involving fabricated quotations.⁵⁴

The Supreme Court reversed the Ninth Circuit's decision and remanded the case for further proceedings.⁵⁵ Justice Kennedy, writing for the majority,⁵⁶ held that a deliberate alteration of the words spoken by a plaintiff equates with actual malice⁵⁷ only when the alteration materially changes the meaning conveyed by a statement.⁵⁸ Applying this standard, the Court found that five of the six challenged passages were substantially different enough from the tape-recorded statements that a jury might find them defamatory.⁵⁹

46. *Id.* at 1539. The court applied *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976), which stated that where the language attributed to the plaintiff is wholly fabricated, plaintiffs are entitled to a finding by the jury on the malice issue. *Id.*

47. *Id.* The court cited *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512-13 (1984). See *supra* note 42, for an explanation of the rational interpretation doctrine.

48. *Masson*, 895 F.2d at 1539, 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).

49. Applying the two-prong test to each of the challenged quotations, the court did not find actual malice in any instance. *Masson*, 895 F.2d at 1539-46.

50. *Id.* at 1541. The incremental harm doctrine measures the additional reputational harm inflicted by the challenged statements beyond the harm inflicted by the nonactionable portion of the publication. If the incremental harm is nominal or non-existent, then the challenged statements are not actionable. *Herbert v. Lando*, 781 F.2d 298, 310-11 (2nd Cir.), *cert. denied*, 476 U.S. 1182 (1986).

51. *Masson*, 895 F.2d at 1541.

52. *Id.* at 1548.

53. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 39 (1990).

54. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2424 (1991).

55. *Id.* at 2437.

56. Justice Kennedy was joined in his majority opinion by Chief Justice Rehnquist and Justices Marshall, Blackmun, Stevens, O'Connor, and Souter.

57. See *supra* note 25.

58. *Masson*, 111 S. Ct. at 2433.

59. *Id.* at 2435-37.

In a partial dissent, Justice White agreed that the case should be reversed and remanded.⁶⁰ Justice White stated, however, that the materiality of the change is irrelevant and the test should instead focus on whether or not the misquotation was printed with knowledge of its falsity.⁶¹ If this knowledge is established, the dissent concluded, then the trial court must decide whether or not reasonable jurors could conclude that the misquotation is defamatory under the applicable state libel law.⁶²

This Note surveys the law of defamation, including its development at common law, the landmark decision of *New York Times Co. v. Sullivan*, and the Supreme Court's shaping of defamation law over the past thirty years. Next, this Note analyzes the Court's application of *New York Times* and its progeny to the issue of fabricated quotations in *Masson v. New Yorker Magazine, Inc.* This Note then analyzes *Masson* and its impact on journalists regarding editorial license in altering quotations. This Note argues that while the dissenting opinion would superficially provide more guidance to journalists, the majority opinion strikes a fair balance between the competing interests of the individual and the media. Finally, this Note concludes that the effect of *Masson* will depend largely on whether journalists interpret the decision as a warning or as a grant of leeway, and may result in a tightening of journalistic standards.

I. DEFAMATION: THE COMMON LAW AND MODERN JUDICIAL CRAFTING

A. Tort Law Origins of Defamation

Actions for defamation⁶³ were brought under tort theories at common law.⁶⁴ A party bringing a defamation claim had to prove three elements in order to establish a prima facie case of defamation. First, the plaintiff had to

60. *Id.* at 2439. Justice White, joined by Justice Scalia in his dissent, concurred only with the majority's discussion of the background of the case and assessment of five of the six passages. Justice White found all six passages potentially defamatory. *Id.*

61. *Id.* at 2437-38.

62. *Id.* at 2438.

63. There are two types of defamatory communications, libel and slander. According to Professors Prosser and Keeton, the distinction between libel and slander is difficult and uncertain. PROSSER AND KEETON, *supra* note 18, § 112, at 786. Libel generally "consists of the publication of defamatory matter by written or printed words." RESTATEMENT (SECOND) OF TORTS § 568(1) (1977). Slander, on the other hand, generally "consists of the publication of defamatory matter by spoken words, transitory gestures or by any form of communication other than those" contained in the definition of libel. *Id.* § 568(2).

64. Defamation was once regarded in England as a sin, punishable by penance. PROSSER AND KEETON, *supra* note 18, § 111, at 772. Later libel was punished as a crime by the Court of Star Chamber and eventually libel and slander both became tortious actions. *Id.*

prove that the defendant published to a third party⁶⁵ a defamatory statement⁶⁶ of or concerning the plaintiff.⁶⁷ Second, the plaintiff had to prove that the statement tended to alter his reputation.⁶⁸ Third, the plaintiff had to establish harm or injury.⁶⁹ Unlike most tort actions where the plaintiff is required to prove negligence or fault on the part of the defendant,⁷⁰ defamation was a strict liability offense.⁷¹

Because recovery depended strictly on falsity and not negligence, the burden of proof for a plaintiff in a defamation case was relatively easy to over-

65. See, e.g., *McGuire v. Adkins*, 226 So. 2d 659, 661 (Ala. 1969) (holding that a slander complaint must state when, where and to whom the slander was published in order to be sustained); *Almy v. Kvamme*, 387 P.2d 372, 374 (Wash. 1963) (holding that plaintiffs could not recover damages for slander where there was no evidence that statements were heard or communicated to any other person). "Since the interest protected is that of reputation, it is essential to tort liability . . . that the defamation be communicated to some one other than the person defamed." PROSSER AND KEETON, *supra* note 18, § 113, at 797.

66. Courts vary in defining defamation and often a particular definition or rule is peculiar only to a small number of jurisdictions. PROSSER AND KEETON, *supra* note 18, § 111, at 773. A common definition of a defamatory communication is a false statement which "tends to hold the plaintiff up to hatred, contempt or ridicule, or to cause him to be shunned or avoided." *Id.* (footnote omitted).

67. *Magnetti*, *supra* note 20, at 306. See, e.g., *Beresky v. Teschner*, 381 N.E.2d 979, 982 (Ill. App. Ct. 1978) (holding that where newspaper articles could not be understood as referring to plaintiffs, no issue remained for consideration by a jury); *E.W. Scripps Co. v. Cholmondelay*, 569 S.W.2d 700, 702 (Ky. Ct. App. 1978) (holding that where a "defamatory statement does not name the defamed person, that person must prove that the article refers to himself").

68. *Magnetti*, *supra* note 20, at 306. See, e.g., *Peck v. Tribune Co.*, 214 U.S. 185, 189-90 (1909) (holding that a statement is libellous when it hurts the person alluded to "in the estimation of an important and respectable part of the community"); *Machleder v. Diaz*, 538 F. Supp. 1364, 1370 (S.D.N.Y. 1982) (holding that a communication is defamatory under New Jersey law if it tends to harm the reputation of another).

69. *Magnetti*, *supra* note 20, at 306. Definitions of defamation usually include, expressly or implicitly, the element of harm. See PROSSER AND KEETON, *supra* note 18, § 111, at 773 (defining defamation as "that which tends to injure 'reputation' in the popular sense"); RESTATEMENT (SECOND) OF TORTS, § 559 (1977) (providing that a communication amounts to defamation "if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him").

A party brings an action for defamation under a tort theory. See *supra* notes 63-64 and accompanying text. As a tort, injury or damage is an essential element in a defamation suit. PROSSER AND KEETON, *supra* note 18, § 30, at 164-65. See *Cannon v. Sears, Roebuck & Co.*, 374 N.E.2d 582, 584 (Mass. 1978) (holding that injury or damage is required in order to maintain a negligence action); *Richards v. Lawton*, 629 P.2d 1260, 1263 (Okla. 1981) (holding that damage "is [a]n essential element in every common law negligence-based tort claim").

70. See, e.g., *Quillen v. Quillen*, 388 So. 2d 985, 988 (Ala. 1980) (providing that breach of duty is an essential element to a right of recovery in negligence action); *Anderson v. Green Bay & Western R.R.*, 299 N.W.2d 615, 617 (Wis. Ct. App. 1980) (holding that plaintiff must demonstrate existence of duty and breach of duty before an action for negligence can be successfully alleged). See also PROSSER & KEETON, *supra* note 18, § 30, at 164.

71. *Magnetti*, *supra* note 20, at 301.

come.⁷² According to Professors Prosser and Keeton, the essence of common law falsity is the "meaning" that is conveyed.⁷³ Furthermore, only a few defenses were available to the defendant: truth of the statements made,⁷⁴ the absolute privilege afforded to those engaged in judicial and official process,⁷⁵ and the qualified privilege to criticize and comment on true statements of fact.⁷⁶

The common law of defamation took two forms in the United States. The majority approach resembled the traditional English rule of strict liability and focused on falsity.⁷⁷ In an action for defamation, the defendant bore the burden of proving a statement true.⁷⁸ The only defense for a press defendant was to allege fair comment based on actual facts.⁷⁹ Misstatements of fact were not protected under the majority view.⁸⁰

72. "At common law the majority position has been that although the plaintiff must allege falsity" to establish a prima facie case of defamation, "the falsity of a defamatory communication is presumed," shifting the burden to the defendant to prove truth as an affirmative defense. RESTATEMENT (SECOND) OF TORTS § 581A, cmt. b (1977). See, e.g., *Age-Herald Pub. Co. v. Waterman*, 81 So. 621 (Ala. 1919); *Palmer v. Adams* 36 N.E. 695 (Ind. 1894); *Rhynas v. Adkisson*, 159 N.W. 877 (Iowa 1916).

73. "The form of the statement is not important, so long as the defamatory meaning is conveyed. . . ." PROSSER & KEETON, *supra* note 18, § 111, at 776. See, e.g., *Ruble v. Bunting*, 68 N.E. 1041, 1042 (Ind. Ct. App. 1903) (holding that a strict affirmative charge is not necessary in an slander action so long as the words are used to suggest the charge to the hearer).

74. The Restatement provides: "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." RESTATEMENT (SECOND) OF TORTS, § 581A (1977). See, e.g., *McCuddin v. Dickinson*, 300 N.W. 308, 309 (Iowa 1941) (holding "truth of defamatory words is a complete defense in absence of statute to the contrary"); *Herald Pub. Co. v. Feltner*, 164 S.W. 370, 372 (Ky. 1914) (holding that truth is always a complete defense to a charge of libel); *Craig v. Wright*, 76 P.2d 248, 249 (Okla. 1938) (holding "truth published with a justifiable motive is a complete defense to a libel action").

75. See, e.g., *Wright v. Lathrop*, 21 N.E. 963, 965-66 (Mass. 1889) (holding witness in legislative hearing enjoys absolute immunity for statements made during proceeding); *Irwin v. Ashurst*, 74 P.2d 1127, 1130 (Or. 1938) (extending to judges, on the grounds of public policy, "absolute immunity from liability . . . for defamatory words published in the course of judicial proceedings").

76. *Magnetti*, *supra* note 20, at 306. At common law there existed a privilege of "fair comment" for public discussion of matters of public concern. PROSSER & KEETON, *supra* note 18, § 115, at 831. See, e.g., *Kennedy v. Item Co.*, 3 So. 2d 175, 177 (La. 1941) (holding that newspaper article relating admission to the bar of an attorney who was a friend of state administrators was privileged); *O'Connor v. Sill*, 27 N.W. 13, 16 (Mich. 1886) (holding that school superintendent's remarks about plaintiff's teaching ability were privileged and therefore not libelous).

77. See, e.g., *Post Pub. Co. v. Hallam*, 59 F. 530, 541 (6th Cir. 1893) (holding the defendant liable for publishing false statements he believed to be true).

78. See, e.g., *Parsons v. Age-Herald Pub. Co.*, 61 So. 345, 348 (Ala. 1913) (holding that the publisher accused of publishing a libelous news article could only "justify his publication only by proving that it is true").

79. *Magnetti*, *supra* note 20, at 302. See *Post Pub.*, 59 F. at 540-41.

80. See *Post Pub.*, 59 F. at 541.

The minority approach focused on intent rather than falsity.⁸¹ Under this approach, the court determined whether the qualified privilege of the media extended beyond statements based on actual facts to misstatements of fact.⁸² If published without malice and with probable cause to believe the statements were true, liability would not attach.⁸³ It would seem that requiring a plaintiff to not only prove falsity but also intent on the part of the defendant made it more difficult for a plaintiff to establish a prima facie case of defamation. The courts often justified requiring intent by emphasizing the public's right of access to a forum of ideas,⁸⁴ an interest thought to be more important than an individual's reputation.⁸⁵

These two common law approaches to defamation developed in the states during the late nineteenth and early twentieth centuries without intervention from the United States Supreme Court because First Amendment guarantees were not extended to state actions.⁸⁶ When the First Amendment freedoms

81. See, e.g., *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908) (holding a publication made in good faith, although false and injurious to the character of others, is not defamatory).

82. See, e.g., *Children v. Shinn*, 150 N.W. 864, 869 (Iowa 1915) (holding that charges of unfitness for office against a candidate for re-election to county board of supervisors were privileged when made with belief that the charges were true and published without malice and in good faith); *Poleski v. Polish American Pub. Co.*, 235 N.W. 841, 843 (Mich. 1931) (holding proper a charge to the jury that honest criticism of a candidate is qualifiedly privileged unless made in bad faith with actual malice).

83. *Magnetti*, *supra* note 20, at 306. See, e.g., *Estelle v. Daily News Pub. Co.*, 156 N.W. 645, 646 (Neb. 1916) (holding defendant not liable for publishing privileged communications in the absence of defendant's actual malice on his part); *Egan v. Dotson*, 155 N.W. 783, 788 (S.D. 1915) (holding statement is privileged if person making it believes in the truth of the charges and has reasonable cause for his belief).

84. *Magnetti*, *supra* note 20, at 303. See, e.g., *Friedell v. Blakely Printing Co.*, 203 N.W. 974, 975 (Minn. 1925) (holding that in order to expose dishonest public officers the public good necessitates a qualified privilege for good faith and absence of malice).

85. See, e.g., *Coleman*, 98 P. at 285 (explaining that "[w]here the public welfare is concerned, the individual must frequently endure injury to his reputation without remedy"). The plaintiff in *Coleman* was the Attorney General of Kansas and a candidate for re-election. *Id.* at 281. The Topeka State Journal, a newspaper owned and published by the defendant, printed an article alleging facts relating to the plaintiff's official conduct involving a school fund transaction. *Id.* The plaintiff objected to the alleged facts and the inferences drawn from them in the article, and brought a defamation action charging that the article was false and malicious. *Id.* The Supreme Court of Kansas held that since the article was published in good faith and with the intention of enabling voters to cast their ballots more intelligently, the publication was privileged, even though the matters contained in the article might have been untrue. *Id.* at 287.

86. See *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (leaving undecided the question of whether the Fourteenth Amendment encompasses First Amendment protection). See also *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (1922) (holding that the Fourteenth Amendment does not impose upon the States free speech restrictions).

of expression were finally applied to the states in 1925,⁸⁷ state laws regulating expression became subject to constitutional scrutiny.⁸⁸

B. The New York Times Decision and the "Actual Malice" Standard

Defamation law in the states continued relatively unchanged after the incorporation of First Amendment guarantees. The states remained divided regarding the proper approach to resolving issues in defamation law.⁸⁹ Constitutional issues were rarely raised.⁹⁰ The tension between the majority and minority approaches to defamation cases remained unresolved until 1964, when the United States Supreme Court decided *New York Times Co. v. Sullivan*⁹¹ in which the Court announced a landmark approach—the actual malice standard—for the nation. The libel action in *New York Times* was brought by a city commissioner in Montgomery, Alabama against The New York Times for publication of a paid, full-page advertisement which contained misstatements of fact describing the maltreatment of black students protesting segregation.⁹² The trial court sent the issue of libel to the jury,

87. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that freedom of speech and the press are fundamental personal rights protected from impairment by the states by the Due Process Clause of the Fourteenth Amendment).

88. See *supra* note 6 and accompanying text.

89. For cases illustrating the majority approach, see, e.g., *Lindsey v. Evening Journal Ass'n*, 163 A. 245, 248-49 (N.J. 1932) (holding that newspapers have no privilege of criticism and comment for alleging facts that were not true even if made with a belief they were true and published without malicious intent); *Cohalan v. New York Tribune, Inc.*, 15 N.Y.S.2d 58, 60 (Sup. Ct. 1939) (holding that in order to establish a defense of fair comment, defendant must base a publication on facts referred to or truly stated); *Peck v. Coos Bay Times Pub. Co.*, 259 P. 307, 312 (Or. 1927) (holding that relative to a charge of commission of a crime, truth is the only defense). For cases illustrating the minority approach, see, e.g., *Poleski v. Polish American Pub. Co.*, 235 N.W. 841, 843 (Mich. 1931) (holding charge to jury that criticism which was just and proper and made in good faith, without malice and for the public good, is prima facie privileged was sufficient); *Williams v. Standard-Examiner Pub. Co.*, 27 P.2d 1, 13-14 (Utah 1933) (extending qualified privilege to communications made in good faith); *Bailey v. Charleston Mail Ass'n*, 27 S.E.2d 837, 844 (W. Va. 1943) (holding that misstatement made in good faith and with a reasonable and honest belief that the statement is true is qualified as privileged).

90. Where courts did consider the effect of constitutional guarantees on state defamation law, broad statements were generally made. In *Knapp v. Post Printing & Pub. Co.*, 144 P.2d 981 (Colo. 1943), the Supreme Court of Colorado stated:

[Liberty of the press] implies a right to freely publish whatever the citizen may please, and to be protected against responsibility therefor, unless such publication is a public offense because of blasphemy, obscenity or scandalous character, or, because of falsehood and malice, it injuriously affects the standing, reputation or pecuniary interests of individuals.

Id. at 985 (citation omitted).

91. 376 U.S. 254, 279-280 (1964).

92. *Id.* at 256-57. The suit also named four individuals whose names appeared in the advertisement. The plaintiff, L.B. Sullivan, was one of three elected commissioners in Mont-

which awarded the plaintiff \$500,000 in damages.⁹³ The Supreme Court of Alabama affirmed the award of damages.⁹⁴ The court followed the existing common law majority approach and focused on the falsity of the statements.⁹⁵ The court found that the advertisement falsely recounted the activities of the city police and therefore, was libelous per se.⁹⁶ The court rejected the defendant's constitutional objections on grounds that the First Amendment does not protect libelous publications⁹⁷ and that the Fourteenth Amendment is inapplicable against private action.⁹⁸

On a writ of certiorari, the United States Supreme Court unanimously reversed the judgment below and remanded the case.⁹⁹ The Court focused on the intent of the writer rather than the falsity of the publication.¹⁰⁰ Rejecting the common law majority approach reflected in Alabama's libel law, the Court for the first time constitutionalized defamation law and announced a new standard: "[C]onstitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was

gomery, Alabama. *Id.* at 256. One of his duties was the supervision of the Montgomery Police Department. *Id.* Although the text of the advertisement never mentioned Sullivan by name, he contended that the word "police" referred to him in his official capacity as commissioner. *Id.* at 258. Specifically, Sullivan objected to two paragraphs of the text. The first paragraph stated that "police armed with shotguns and tear-gas ringed the Alabama State College Campus" after leaders of black student groups were expelled from school for singing "My Country, 'Tis of Thee" on the State Capitol steps. *Id.* at 257. The students were in fact expelled from school, but for demanding service at a lunch counter at the County Courthouse on a different day, not for the demonstration at the Capitol. *Id.* at 258-59. Police were deployed in large numbers near the campus. *Id.* at 259. However, they did not at any time "ring" the campus and their deployment was unconnected with the demonstration. *Id.*

The second paragraph charged that the police had bombed the home of Dr. Martin Luther King, Jr., and arrested King seven times. *Id.* at 257-58. Sullivan objected to these charges because, although King's home had been bombed twice, both occasions predated Sullivan's tenure as Commissioner. *Id.* at 259. Not only were the police never implicated in the bombings, but the police made every effort to identify and apprehend the perpetrators. *Id.* Furthermore, Dr. King had been arrested four times, not seven as the article alleged. *Id.*

93. *Id.* at 256.

94. *New York Times Co. v. Sullivan*, 144 So. 2d 25 (Ala. 1962), *rev'd*, 376 U.S. 254 (1964).

95. The court stated that where words published are false and tend to injure a person's reputation, they are libelous per se. *Id.* at 37.

96. *Id.* at 39.

97. *Id.* at 40. In support of this interpretation, the court cited a string of cases, including *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (holding that certain classes of speech, including libel, are outside the scope of constitutional protection), discussed *supra* in note 16.

98. *New York Times*, 144 So. 2d at 40.

99. *New York Times Co. v. Sullivan*, 376 U.S. 254, 264, 292 (1964).

100. *Id.* at 271-72, 279-80.

made with 'actual malice.'"¹⁰¹ The Court defined "actual malice" as "knowledge that [a statement] was false or [made] with reckless disregard of whether it was false or not."¹⁰² To ensure procedural protection, the Court declared that state libel laws must presume no malice on the part of a defendant,¹⁰³ and that the plaintiff must carry the burden of proving actual malice with "convincing clarity."¹⁰⁴

By focusing on the speaker's intent rather than the falsity of the defamatory statement, the Court implicitly rejected the common law majority approach.¹⁰⁵ In defamation cases brought by public officials, the Court granted defendants a qualified privilege to make an honest mistake and embraced the principle that First Amendment guarantees are not based on "the truth, popularity, or social utility of the ideas and beliefs which are offered."¹⁰⁶

The *New York Times*'s uniform standard in public official defamation cases focused on intent and shifted the burden of proof to the plaintiff. The Court, however, left several important questions unanswered. The Court failed to address whether the actual malice standard would apply equally to public figures who are not "public officials" but who are nevertheless prominent in the public eye,¹⁰⁷ or to private figures. Moreover, the Court failed to provide guidelines for determining whether or not a speaker made a statement with reckless disregard of its falsity.¹⁰⁸ In the years following the *New York Times* decision, the Supreme Court quickly filled in many of the gaps.¹⁰⁹

101. *Id.* at 278-79. See *supra* note 24 (discussing the term "public official" and its use in the decision).

102. *Id.* at 280.

103. *Id.* at 283-84. Prior to the Supreme Court decision in *New York Times*, Alabama law required proof of actual malice where punitive damages were sought, but presumed actual malice for an award of general damages. *Id.* at 283. The Court declared that such a presumption was inconsistent with the federal rule announced in the case. *Id.* at 283-84.

104. *Id.* at 285-86.

105. The Court did not expressly discuss the competing approaches to defamation law, but implicitly adopted the minority view by focusing on intent. See *id.* at 279-80. The Court pointed to the Kansas case of *Coleman v. MacLennan*, 98 P. 281 (Kan. 1908), discussed *supra* in note 85, and a string of other state cases as statements of rules similar to the *New York Times* holding. *New York Times*, 376 U.S. at 280-82.

106. *New York Times*, 376 U.S. at 271 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)).

107. See *supra* note 24.

108. In applying the actual malice standard to the facts in *New York Times*, the Court concluded that the evidence supported, at most, a finding of negligence by the Times, but was "constitutionally insufficient" to show the recklessness required by the standard. *New York Times*, 376 U.S. at 287-88. The Court did not, however, provide specific guidelines for determining what constitutes reckless disregard for the truth.

109. See *infra* Part I.C.

C. *Developments in Defamation Law After New York Times*

1. *Application of the "Actual Malice" Standard to Public Figures*

The application of the "actual malice" standard in the *New York Times* decision was limited on its facts to "public officials." Three years after the decision, the Supreme Court applied the actual malice standard to a public figure claiming defamation by media defendants in *Curtis Pub. Co. v. Butts*.¹¹⁰

Curtis involved a well-known and respected football coach charged in a Saturday Evening Post article of having conspired to "fix" a college football game.¹¹¹ At the time the article was published, the plaintiff was the athletic director of the University of Georgia, but was actually employed by a private corporation, not the state of Georgia itself.¹¹² The plaintiff claimed that the magazine had departed greatly from the standards of responsible journalism, and that the conduct of the magazine was reckless and wanton.¹¹³

Although the Court ultimately affirmed a lower court decision for the plaintiff,¹¹⁴ five members of the Court agreed that the *New York Times* "ac-

110. 388 U.S. 130 (1967). In conjunction with *Curtis*, the Supreme Court decided *Associated Press v. Walker*, 388 U.S. 130 (1967). In *Associated Press*, the plaintiff, Walker, a private citizen of some political prominence, objected to an Associated Press news dispatch alleging that he personally led protesters on a charge against federal marshals. *Id.* at 140. Walker claimed that the story was false and that the dispatch was improperly prepared. *Id.* at 140-41. Walker admitted that he had spoken to a group of students at the University of Mississippi, but claimed that he had urged restraint and peaceful protest, and that he exercised absolutely no control over the crowd. *Id.* at 141. Walker offered little evidence regarding the preparation of the dispatch other than showing a minor discrepancy between an oral account given by the author to his office and the dispatch as later written. *Id.* No other evidence was presented. *Id.*

111. *Curtis*, 388 U.S. at 135.

112. *Id.* Had Butts been an employee of the state of Georgia, he may have been characterized as a "public official" and the case would have fallen squarely under the *New York Times* rule. See *surpa* note 24. The Court held, however, that Butts was not a "public official," but rather a "public figure." *Id.* at 154-55.

113. *Id.* at 137-38.

114. *Id.* at 161. The *Curtis* case posed a difficult problem for the Supreme Court because the Fifth Circuit decision affirming a judgment on a jury verdict for the plaintiff was reached before the Supreme Court handed down its *New York Times* decision. See *Curtis Publishing Co. v. Butts*, 351 F.2d 702 (5th Cir. 1965), *aff'g* 225 F. Supp. 916 (N.D. Ga. 1964). The District Court opinion in *Curtis* was rendered in January, 1964; the Supreme Court decision in *New York Times* came down in March, 1964.

A majority of the Supreme Court in *Curtis* held that the failure of the defendant to raise constitutional defenses in the trial court did not constitute a knowing waiver of such defenses since the *New York Times* decision was not yet handed down (although certiorari had been granted in *New York Times*). *Curtis*, 388 U.S. at 143-44. Given that the defendant was not a public official under state law, the Court found it reasonable that at trial, he looked solely to defenses provided by state libel law. *Id.* at 144.

tual malice" standard should apply to public figures.¹¹⁵ The term "public figure" was vaguely defined in *Curtis* as one who has a position of public interest or who "by his purposeful activity . . . [thrusts] . . . his personality into the 'vortex' of an important public controversy."¹¹⁶

The Court more precisely defined "public figure" in *Gertz v. Robert Welch, Inc.*¹¹⁷ The plaintiff in *Gertz* was an attorney who represented a murder victim's family in a civil suit against a police officer.¹¹⁸ The attorney brought suit against the publisher of a magazine, alleging that it inaccurately portrayed the plaintiff as the architect of a "frame-up," implied that the plaintiff had a criminal record, and connected the plaintiff with Marxism and Communism.¹¹⁹

In *Gertz*, the Court classified public figures in two ways. First, an all-purpose public figure is an individual who "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."¹²⁰ Second, a limited purpose public figure is an individual who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues."¹²¹ The Court indicated that a limited purpose public figure has a stronger claim for defamatory statements which are unrelated to the controversy which gave rise to his or her status as a public figure.¹²² Applying the two bases for declaring an individual a public figure, the Court concluded that the plaintiff was not a public figure: "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome."¹²³

115. *Curtis*, 388 U.S. at 163, 170, 172. In his concurring opinion, Chief Justice Warren reasoned that to differentiate between "public figures" and "public officials" and to adopt separate standards for each would be illogical. *Id.* at 163 (Warren, C.J., concurring). Chief Justice Warren stated that the distinction between governmental and private sectors had become increasingly blurred. *Id.* He also explained that the public has a legitimate and substantial interest in the conduct of "public figures" because they, like "public officials," play an influential role in ordering society. *Id.* at 163-64. The Chief Justice concluded that for these reasons, it was crucial that the press be allowed to engage in unrestrained debate regarding the involvement of public figures in public issues and events. *Id.*

116. *Id.* at 155.

117. 418 U.S. 323 (1974).

118. *Id.* at 325.

119. *Id.* at 325-26.

120. *Id.* at 351.

121. *Id.*

122. Presumably, all-purpose public figures have greater access to the media, thus providing them with a forum in which to reply to defamatory attacks. The limited-purpose public figure enjoys less general fame and notoriety, and has less ability to respond to defamatory remarks. See TRIBE, *supra* note 22, § 12-13, at 877.

123. *Gertz*, 418 U.S. at 352.

The Court also addressed the question of whether the *New York Times* actual malice standard applied when private figures brought defamation suits against a media defendant.¹²⁴ By a 5-4 vote, the Court held that the actual malice standard is inapplicable to defamation cases involving private figures.¹²⁵ In the majority opinion, Justice Powell stated that private individuals are more vulnerable to injury than public figures and more deserving of recovery in defamation cases.¹²⁶

Having ruled that the *New York Times* standard was inapplicable to private figures, the majority held that the states could choose their own standard of liability for a media defendant in a suit brought by a private figure plaintiff injured by defamation.¹²⁷ However, the Court prohibited the imposition of a strict liability standard.¹²⁸ This prohibition was necessary to balance the legitimate state interests in compensating wrongful injury to a person's reputation and the burden placed on the media by a strict liability standard.¹²⁹ Under this rule, recovery for a private individual was limited to actual damages.¹³⁰ Presumed and punitive damages, however, were recoverable if a state law based liability on a showing of actual malice.¹³¹

Thus, the *Curtis* and *Gertz* decisions provided some guidance about the application of the actual malice standard. The definition of "actual malice" also became more clearly defined in cases following *New York Times*.

2. Further Definition of the Actual Malice Standard

In *New York Times*, the Court defined actual malice as actual knowledge of the falsity of a statement or reckless disregard for its truth.¹³² While "actual knowledge" is self-explanatory though difficult to establish, the meaning

124. *Id.* at 332.

125. *Id.* at 345-46.

126. Justice Powell wrote:

[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood No such assumption is justified with respect to a private individual He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.

Id. at 345.

127. *Id.* at 347.

128. *Id.*

129. *Id.* at 347-48.

130. This limitation was based on the state interest in *compensating* injured persons. *Id.* at 348-49.

131. *Id.* at 349.

132. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). See *supra* note 102 and accompanying text.

of reckless disregard for the truth is vague.¹³³ In cases subsequent to *New York Times*, the Court provided some guidance in defining the "reckless disregard" prong of the actual malice standard. In *Garrison v. Louisiana*,¹³⁴ the Court held that, where public issues¹³⁵ are being discussed, only "false statements made with the high degree of awareness of their probable falsity" were actionable under a defamation claim.¹³⁶

The *Garrison* holding explained *what* constituted "reckless disregard," but did not establish *how* "reckless disregard" could be proved.¹³⁷ Four years later, in *St. Amant v. Thompson*,¹³⁸ the Court provided additional guidelines to further define "reckless disregard." The plaintiff in *St. Amant*, a Louisiana parish deputy sheriff, brought a defamation action against a candidate for public office who charged the sheriff with criminal conduct relating to his labor union position.¹³⁹ The Court concluded that the sheriff fell short of

133. See *supra* note 108 and accompanying text.

134. 379 U.S. 64 (1964). Jim Garrison, a New Orleans district attorney, criticized the laziness and inefficiency of local judges and accused them of hampering him in the enforcement of vice laws by refusing to authorize sufficient expenses for investigations. *Id.* at 65-66.

135. In *Garrison*, the Court explained that the *New York Times* rule is still applicable when an official's private reputation is harmed, as long as the statements were directed at public performance of the official's duties. *Id.* at 77. Justice Brennan, writing for the majority, stated: "The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch an official's fitness for office is relevant." *Id.*

136. *Id.* at 74. Garrison had been convicted under a Louisiana statute which provided criminal sanctions for defamation. The Court held that the standards for defamation of a public official were equally applicable in criminal as in civil proceedings. *Id.* Applying the "high degree of awareness" standard, the Court concluded that Garrison's statements were within the purview of criticism of the official conduct of public officials and were therefore protected by the *New York Times* rule. *Id.* at 76-77.

137. Magnetti, *supra* note 20, at 309.

138. 390 U.S. 727 (1968).

139. *Id.* at 728-29. The defendant, St. Amant, made a televised speech in which he read a series of questions he had asked J.D. Albin, a member of the Teamsters Union local, and the answers Albin allegedly provided. *Id.* at 728. According to St. Amant, Albin told him that E.G. Partin, St. Amant's political opponent and the president of the union, had unethical dealings with the defendant, Herman Thompson, an East Baton Rouge Parish deputy sheriff. *Id.* In his speech, St. Amant claimed that he had information that money had passed hands between Partin and Thompson. *Id.* at 728-29. These charges against Thompson ultimately proved to be false. *Id.* at 730.

Thompson brought suit against St. Amant for defamation, charging that "the publication had 'impute[d] . . . gross misconduct' and 'infer[red] conduct of the most nefarious nature.'" *Id.* at 729. The trial was held prior to the decision in *New York Times*. See *supra* notes 91-108 and accompanying text. The trial judge ruled in Thompson's favor and awarded \$5,000 in damages. See *Thompson v. St. Amant*, 184 So. 2d 314, 320 (La. Ct. App. 1966), *rev'd*, 196 So. 2d 255 (La. 1967), *rev'd* 390 U.S. 727 (1968). The Louisiana Court of Appeals reversed, holding that the record failed to show that St. Amant acted without malice. *Id.* at 323. The Supreme Court of Louisiana reversed the appellate court decision, finding sufficient evidence that St. Amant acted with reckless disregard for the truth. *Thompson v. St. Amant*, 196 So.

proving the candidate's reckless disregard for the accuracy of his statements and reversed the Louisiana Supreme Court's ruling in favor of the plaintiff.¹⁴⁰

Justice White, writing for the majority, stated that reckless disregard for the truth could be shown by proof that the speaker or publisher "entertained serious doubts as to the truth of his publication."¹⁴¹ The Court also held that reckless conduct is not measured by an objective, reasonably prudent man test, but rather by the presence or absence of good faith involved in the publication.¹⁴² Justice White also conceded that a rule measured by a subjective standard may permit recovery in fewer instances than a reasonable man standard, but stated that such an effect is necessary to insure the gathering and publication of the truth about public affairs.¹⁴³

In *Time, Inc. v. Pape*,¹⁴⁴ the Court reiterated the principle that reckless disregard for the truth is measured under a subjective standard.¹⁴⁵ A Chicago police officer, objecting to Time magazine's discussion of a United States Commission on Civil Rights report on police brutality, brought an action for libel against the magazine. The article discussed the report's "charge" or "finding" of brutality when, in fact, the report only described allegations of brutality by the defendant.¹⁴⁶ At trial, the author and the researcher of the article testified that the wording of the Commissioner's

2d 255, 262 (La. 1967), *rev'd*, 390 U.S. 727 (1968). The United States Supreme Court granted certiorari to decide the case. *St. Amant v. Thompson*, 389 U.S. 1033 (1968).

140. *St. Amant*, 390 U.S. at 732-33.

141. *Id.* at 731. According to the Court, nothing in the record indicated an awareness by St. Amant of the probable falsity of the information he received regarding Thompson. *Id.* at 732-33. Although St. Amant neglected to verify the charges against Thompson before broadcasting them, the Court found that he did not act in bad faith. *Id.* at 733.

142. *Id.* at 731-32. The Court did not provide specific guidelines for determining whether a publication was made in good faith, and left the issue to the finder of fact. *Id.* at 732. The Court did, however, explain that a defendant in a defamation case could not automatically escape liability merely by testifying that he or she published the statements with a belief that they were true. *Id.* Professions of good faith would unlikely be persuasive where a story is fabricated or imagined, is based wholly on an unverified anonymous telephone call, or is so inherently improbable that only a reckless person would publish it. *Id.*

143. *Id.* at 732.

144. 401 U.S. 279 (1971).

145. *Id.* at 291-92.

146. *Id.* at 280-82. In November 1961, the United States Commission on Civil Rights issued the fifth volume of its report discussing police brutality. *Id.* at 280. The report mentioned a case in which a black family filed a complaint against Deputy Chief of Detectives, Frank Pape, for breaking into their apartment, forcing them out of bed at gunpoint, beating the husband with a flashlight, ransacking their apartment, and neglecting to follow proper arrest and post-arrest procedures. *Id.* at 280-81. One week later, Time magazine reported on the Commission's publication. *Id.* at 281. The Time article portrayed the charges as independent findings of the Commission by neglecting to use the words "complaint" and "alleged." *Id.* at 281-82.

report had been altered by omitting the words "alleged" and "complaint,"¹⁴⁷ but concluded that the Commission had accepted the charges as true.¹⁴⁸

Justice Stewart, writing for the majority, announced the "rational interpretation" doctrine to define actual malice in a defamation case.¹⁴⁹ The Court found that the magazine's omission of the word "alleged" amounted to "the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguit[y]."¹⁵⁰ The writer's deliberate choice of such an interpretation, the Court stated, may have reflected a misconception, but did not amount to "actual malice" under the *New York Times* rule.¹⁵¹

Therefore, the *Time* decision, like other Supreme Court decisions following *New York Times*, attempted to clarify how "actual malice" should be defined¹⁵² and to whom the standard should be applied.¹⁵³ Yet confusion over the doctrine continued, and every answer the Court provided, prompted still more questions.¹⁵⁴

147. *Id.* at 283.

148. *Id.* at 282-83. The author of the article testified that based on the full context of the Commission's report, a Commission press release accompanying the report, and a New York Times story describing the report, he believed the Time article to have been true as written. *Id.* at 283. The researcher testified that she had consulted several newspaper articles describing the alleged victims' claims about the raid and several articles describing the police officer's previous career. *Id.* She also testified that she believed the Time article was based on truth. *Id.*

Time moved to dismiss the suit on the ground that the article was a fair comment on a government report. *Id.* at 282. The United States District Court of Illinois granted the magazine's motion for a directed verdict because the statements set forth in the article were published with a good faith intention that the facts be taken as substantially true. *Pape v. Time, Inc.*, 294 F. Supp. 1087, 1080-91 (N.D. Ill.), *rev'd*, 419 F.2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279 (1971). The Court of Appeals for the Seventh Circuit reversed, reasoning that the deliberate act of omission by the author and researcher evidenced the requisite actual malice. *Pape v. Time, Inc.*, 419 F.2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279 (1971). The United States Supreme Court reversed and remanded. *Time*, 401 U.S. at 292

149. *See supra* note 42. For an application of the doctrine, see *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (holding that adoption of language chosen in a critical review of a loudspeaker system reflected a rational interpretation of an ambiguous event for the writer and therefore did not amount to actual malice).

150. *Time*, 401 U.S. at 290.

151. *Id.*

152. *See supra* notes 134-51 and accompanying text.

153. *See supra* notes 110-31 and accompanying text.

154. According to Professor Tribe, the *New York Times* doctrine "has become a frustrating tangle for all concerned - a mysterious labyrinth for those seeking to clear their names and a costly and unpredictable burden for the speakers the first amendment is designed to protect." TRIBE, *supra* note 22, § 12-12, at 865.

II. *MASSON v. NEW YORKER MAGAZINE*: APPLYING THE ACTUAL MALICE STANDARD TO FABRICATED QUOTATIONS

The line of decisions from *New York Times* in 1964 to *Gertz* in 1974 significantly expanded the burden on the plaintiff in defamation litigation. By definition, in order to prove actual malice—knowledge of falsity or reckless disregard for the truth—a plaintiff faced the difficult task of establishing the defendant's subjective state of mind.¹⁵⁵ In cases involving a media defendant,¹⁵⁶ it became necessary for a plaintiff to investigate the state of mind of editors, publishers and producers in order to establish the degree of a publisher's culpability.¹⁵⁷

In defamation suits by public figures against the media, plaintiffs were required to explore the state of mind of a writer who knowingly attributes false or altered quotations to a speaker. A question arose as to whether a

155. See *supra* notes 101-02, 108 and accompanying text.

156. The position of the press is unique in defamation law because the First Amendment specifically guarantees a free press. U.S. CONST. amend. I. Because of this explicit constitutional protection, a media defendant in a defamation case may view itself as entitled to certain privileges not enjoyed by a private defendant. See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979).

157. In *Herbert*, the Supreme Court recognized this necessity and partially lightened the burden on a plaintiff by holding that the editorial process is discoverable. *Id.* at 169-70.

The plaintiff in *Herbert*, a retired Army officer, brought a defamation suit in a federal district court against the producer/editor and the narrator of a television report which, the plaintiff alleged, portrayed him falsely and maliciously. *Id.* at 155-56. In preparing his case, the plaintiff, Herbert, deposed the producer/editor, Lando, and sought to compel answers regarding the production of the television show. *Id.* at 157. Lando refused to answer Herbert's questions on the ground that the First Amendment protects against inquiry into the state of mind of editors, publishers and producers, and into the editorial process itself. *Id.* Herbert argued that his questions were discoverable under Federal Rule of Civil Procedure 26(b)(1), which provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

The district court granted the plaintiff's discovery motion and the defendant filed an interlocutory appeal. *Herbert v. Lando*, 73 F.R.D. 387 (S.D.N.Y. 1977), *remanded*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979). The Second Circuit Court of Appeals remanded, holding that there is an absolute privilege as to the editorial process. *Herbert v. Lando*, 568 F.2d 974 (2d Cir. 1977), *rev'd*, 441 U.S. 153 (1979). The United States Supreme Court reversed the appellate decision. Justice White, writing for the majority, rejected the claim of evidentiary privilege for the editorial process, pointing out that historically, evidentiary privileges in litigation are not favored, *Herbert*, 441 U.S. at 175, and that the suggested privilege would constitute a substantial interference with the ability of a defamation plaintiff to establish actual malice under *New York Times*. *Id.* at 170. The majority acknowledged the additional burdens and costs which would result in terms of increased discovery, but held that such costs are not peculiar to defamation cases and that the remedy perhaps lies in amendments to the Rules of Civil Procedure. *Id.* at 176-77.

knowing attribution rises to the level of "actual malice." The United States Supreme Court addressed this issue in *Masson v. New Yorker Magazine, Inc.*¹⁵⁸

In *Masson*, Jeffrey Masson, a prominent psychoanalyst, brought a libel suit against the author of a magazine article and subsequent book about Masson, the magazine which carried the article, and the book's publisher.¹⁵⁹ In 1980, Masson was hired as Projects Director of the Sigmund Freud Archives, outside of London.¹⁶⁰ While serving as Projects Director, Masson became disillusioned with Freudian theory and, at a 1981 academic lecture, advanced his own theories of Freud.¹⁶¹ Shortly afterwards, Masson was terminated from his position at the Archives.¹⁶²

In 1982, Janet Malcolm, an author and contributor to The New Yorker Magazine, approached Masson with an offer to write an article about his employment experience at the Archives.¹⁶³ Masson agreed, and he and Malcolm met in person as well as spoke on the telephone for a series of interviews.¹⁶⁴ When the article was being prepared for publication, a fact finder from The New Yorker contacted Masson to verify certain aspects of the article.¹⁶⁵ Masson allegedly expressed concern with certain quotations and information attributed to him.¹⁶⁶ He was reportedly "brushed off," however, and the article was published in December, 1983.¹⁶⁷ In 1984, with knowledge of Masson's objections to some passages in the article, Alfred A. Knopf, Inc., published the entire work of Malcolm as a book.¹⁶⁸

Masson brought an action for libel in the United States District Court for the Northern District of California,¹⁶⁹ presenting several published passages which he alleged to be defamatory.¹⁷⁰ These passages included statements

158. 111 S. Ct. 2419 (1991)

159. *Id.* at 2425.

160. *Id.* at 2424.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 2425-28. See *infra* notes 171-76 and accompanying text.

167. *Id.* at 2424-25. See Janet Malcolm, *Annals of Scholarship: Trouble in the Archives* (pts. 1 & 2), THE NEW YORKER, Dec. 5, 1983, at 59, THE NEW YORKER, Dec. 12, 1983, at 60.

168. *Masson*, 111 S. Ct. at 2425. See JANET MALCOLM, IN THE FREUD ARCHIVES (1984).

169. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991). See *supra* notes 41-44 and accompanying text.

170. *Masson*, 111 S. Ct. at 2425-28. See *infra* notes 171-76.

by Masson that he was an "intellectual gigolo;"¹⁷¹ that he had planned to transform the Archives into "a place of sex, women, fun;"¹⁷² that he had altered his name once because it "sounded better;"¹⁷³ that he had made a controversial remark during a lecture for gratuitous shock value;¹⁷⁴ that after Freud, he would be hailed as "the greatest analyst who ever lived;"¹⁷⁵ and that he was the wrong man for undertaking a certain noble task.¹⁷⁶ The defendants moved for summary judgment,¹⁷⁷ arguing that no genuine issue

171. *Id.* at 2425. The published passage quoted Masson as stating that two well-respected senior colleagues considered him an "intellectual gigolo." *Id.* at 2425. By contrast, the taped interview reveals that Masson believed that the two colleagues perceived him as personally likeable, but "too junior within the hierarchy of analysis, for [them] to be caught dead with [him]." *Id.* at 2425-26.

172. *Id.* at 2426. Masson is quoted in the passage as saying that he had planned to transform Maresfield Gardens (location of the Sigmund Freud Archives) into a center of scholarship and also "a place of sex, women, fun." *Id.* The article further quotes Masson as likening the transformation to "the change in *the Wizard of Oz*, from black-and-white into color." *Id.* The taped interview reveals that Masson referred to Maresfield Gardens as "an incredible storehouse" containing priceless items in Freud's Library. *Id.* He did, however, refer during the tape-recorded interview to a London analyst with whom he hoped to "pass women on to each other" and throw great parties in the Freud house. *Id.*

173. *Id.* The taped interview reveals that Masson made the name change because he "just liked it." *Id.* The Court concluded that these passages were not materially different. *Id.* at 2436.

174. *Id.* at 2426-27. In his closing remarks at a 1981 lecture in New Haven, Connecticut, Masson remarked to the audience about the "sterility of psychoanalysis." *Id.* at 2427. In Malcolm's piece, Masson is quoted as explaining that the remark was "tacked on at the last minute, and it was totally gratuitous." *Id.* at 2426-27. In comparison, the taped interview reveals that while Masson viewed the remarks as perhaps a "gratuitously offensive way to end a paper to a group of analysts," he nevertheless made the remark because he believed it to be true. *Id.*

175. *Id.* The published passage quoted Masson as predicting that, after the publication of his own book, "[other analysts] 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." *Id.* The closest remark on audio tape to the written version was the statement made by Masson that "analysis stands or falls with me now." *Id.* However, the plaintiff qualified this remark by adding, "it's got nothing to do with me. It's got to do with the things I've discovered." *Id.* at 2428.

176. *Id.* When asked by the head of the Freud Archives for a promise of confidentiality upon departing from the Archives because silence would be the honorable thing to do, the written passage quoted the plaintiff as responding that, "[the director] had the wrong man." *Id.* The taped version, however, reveals that Masson's self-description as "the wrong man" referred to his unwillingness to remain silent in order to preserve the chance to be rehired by the Archives in a few years. *Id.*

177. *Masson v. New Yorker Magazine, Inc.*, 686 F. Supp. 1396, 1397 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991). Rule 56(c) of the Federal Rules of Civil Procedure provides that a grant of summary judgment is proper only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Court held that "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.* at 255.

of material fact existed regarding whether the questioned passages were published with actual malice.¹⁷⁸ The parties agreed that Masson was a public figure and therefore summary judgment was proper unless there was sufficient evidence to permit reasonable jurors to conclude that defendants had published defamatory statements with actual malice.¹⁷⁹

The district court, applying the actual malice standard,¹⁸⁰ examined every disputed quote. In light of the many egotistical statements that Masson made in the tape-recorded interview, the court concluded that the plaintiff did not demonstrate clear and convincing evidence from which reasonable jurors could conclude that the defendant "entertained serious doubts" about the accuracy of the passages.¹⁸¹ The court, therefore, granted defendants' motion for summary judgment.

The Ninth Circuit Court of Appeals affirmed the district court's grant of summary judgment.¹⁸² The court applied a two-prong approach to the actual malice issue.¹⁸³ First, the court noted that actual malice could not be inferred when fabricated quotations are rational interpretations of ambiguous remarks.¹⁸⁴ Alternatively, the court examined whether the fabricated

In a summary judgment motion involving the issue of actual malice, the proper inquiry for the trial court judge is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 255-56. The Court warned that while the quantum and quality of the evidence should be considered by the trial judge, issues of weight and credibility and the drawing of inferences are more properly left to the jury. *Id.* at 254-55.

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

179. *Id.* at 1397-98. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court held that the burden of proving actual malice in a public official defamation case fell on the plaintiff, and that reviewing courts were under a duty to examine the record and determine if actual malice was proven with "convincing clarity." *Id.* at 271, 285-86. Federal Rules of Civil Procedure 52(a), on the other hand, provides that "[f]indings of fact . . . shall not be set aside unless *clearly erroneous*." FED. R. CIV. P. 52(a) (emphasis added). The Court resolved these apparently conflicting standards in *Bose Corp. v. Consumer's Union of United States, Inc.*, 466 U.S. 485 (1984), by holding that "the clearly erroneous standard of Rule 52(a) . . . does not prescribe the standard of review to be applied in reviewing a determination of actual malice" under *New York Times*. *Id.* at 514. Justice Powell's majority opinion explained that Rule 52(a) does not forbid an independent examination of the entire record. *Id.* at 499. By reviewing the entire record, and not just the factual findings, the *New York Times* standard of appellate review does not appear to fall under Rule 52(a). When reviewing the entire record, the Court is not deciding whether or not to overturn factual findings, but instead deciding "whether the evidence in the record is sufficient to cross the constitutional threshold." *Id.* at 511.

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

181. *Id.* at 1406.

182. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991). See *supra* notes 45-52 and accompanying text.

183. *Id.* at 1539.

184. *Id.* The court cited *Time, Inc. v. Pape*, 401 U.S. 279 (1971). For a discussion of *Time*, see *supra* notes 144-51 and accompanying text.

quotations “ ‘alter[ed] the substantive content’ of unambiguous remarks actually made by the [plaintiff].”¹⁸⁵ The court concluded that because none of the disputed passages substantially altered the content of Masson’s actual remarks, the plaintiff failed to raise a jury question.¹⁸⁶

On a writ of certiorari, the United States Supreme Court reversed.¹⁸⁷ The Supreme Court, like the lower courts, considered whether or not the alterations resulted in a material change in meaning.¹⁸⁸ However, in reaching a different result than the lower courts, the Supreme Court concluded that reasonable jurors could find five of the six passages defamatory under the *New York Times* standard.¹⁸⁹

A. *The Majority: A Question of Materiality*

Justice Kennedy, writing for the majority, first examined the actual malice standard which guides the Court in deciding public figure defamation cases.¹⁹⁰ He then considered the nature of quotations.¹⁹¹ The Court noted that a passage set off in quotation marks generally indicates to the reader that the passage is a verbatim reproduction of the speaker’s words.¹⁹² As such, the quotation is a valuable tool because it lends authority to the statement printed and adds credibility to the author’s work.¹⁹³ Conversely, according to the Court, the effect of a misquotation can also be very powerful.¹⁹⁴ Since the reader generally understands quoted material to be free of taint by the author’s interpretation,¹⁹⁵ a fabricated quotation may injure reputation either by attributing an untrue factual assertion to the

185. *Masson*, 895 F.2d at 1539 (quoting *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), cert. denied sub nom., *Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977)).

186. *Id.* at 1539-46.

187. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2429 (1991).

188. *Id.* at 2433.

189. *Id.* at 2435-37. The dissent refused to require a “material change” in meaning. *Id.* at 2437-38 (White, J., dissenting). Instead, the dissent considered whether or not the author knew that the subject did not utter the attributed statements. *Id.* If the author did have such knowledge, the dissent would ask whether reasonable jurors could conclude that such false attributions amounted to libel under the applicable state law. *Id.* at 2438.

190. *Id.* at 2429-30. Justice Kennedy explained briefly that “actual malice” is a shorthand term describing First Amendment protection for speech which injures a person’s reputation. *Id.* at 2430. Justice Kennedy explained that it is better practice to refer to actual malice as “publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.” *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. The Court recognized that there are some uses of quotation marks which would not be understood by a reasonable reader as true — for example, hypothetical conversations or dramatized documentaries. *Id.* at 2430-31.

speaker or by suggesting a negative personal trait or attitude that the speaker does not hold.¹⁹⁶ The Court emphasized that this is particularly true of self-condemnatory quotations. Realizing that it is against self-interest to criticize oneself, the reader naturally assumes that a speaker never makes self-condemnatory remarks unless those remarks are true.¹⁹⁷

Against this backdrop, Justice Kennedy approached the issue of applying the actual malice test to fabricated quotes.¹⁹⁸ To develop a standard, the Court noted, it is necessary to consider the concept of "falsity."¹⁹⁹ The Court recognized that in a technical sense, any alteration of a verbatim quotation is "false."²⁰⁰ However, the meaning of "falsity," for the purposes of the First Amendment, does not depend solely on technical accuracy.²⁰¹ Justice Kennedy pointed out that journalists by necessity alter what people say, especially for grammatical and syntactical corrections.²⁰² If every alteration amounted to falsity under the *New York Times* standard, Justice Kennedy reasoned, journalistic practices would change drastically, in a manner inconsistent with the central purpose of First Amendment protection.²⁰³

Masson argued that changes knowingly made to a quotation, other than minor changes to correct for grammar and syntax, demonstrate knowledge of falsity and thus constitute actual malice under the *New York Times* definition, and that no more need be shown.²⁰⁴ The Court, however, rejected this rigid standard and cited several situations where a journalist should be allowed to alter quotes yet retain First Amendment protection.²⁰⁵ Justice

196. *Id.* at 2430.

197. *Id.* The Court's reasoning is similar to the philosophy behind Rule 804(b)(3) of the Federal Rules of Evidence, which creates an exception to the hearsay rule for statements against an unavailable declarant's interest. FED. R. EVID. 804(b)(3). The Advisory Committee's Notes accompanying the rule explain that "[t]he circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." FED. R. EVID 804 advisory committee's note (citation omitted).

198. *Masson*, 111 S. Ct. at 2431.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 2431-32.

203. *Id.* at 2431. The majority also recognized that the legitimate state interest in compensating individuals for the harm inflicted on them by a defamatory falsehood is not served unless the individual's reputation is actually harmed. *Id.* at 2432; see also *supra* notes 129-30 and accompanying text.

204. *Id.* at 2432.

205. For example, the Court recognized that alterations are necessary where an interviewer writes from notes and reconstructs a speaker's statements, or where the translation from speech to the printed word requires practical editing, in order to preserve the speaker's meaning. *Id.*

Kennedy also noted that injury to reputation does not necessarily result whenever a quotation is altered.²⁰⁶

The majority instead focused its attention on the meaning conveyed in a passage.²⁰⁷ Justice Kennedy reasoned that “[m]eaning is the life of language.”²⁰⁸ Because readers draw conclusions from meaning,²⁰⁹ whether or not a speaker has suffered compensable injury will depend on whether the meaning, not simply the words, of his actual statements has been changed.²¹⁰ Justice Kennedy examined the common law of libel and found that the approach to the issue of falsity traditionally centered on substantial truth rather than minor inaccuracies.²¹¹ Having concluded that meaning and substance are at the heart of defamation law, the majority held that “deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.”²¹²

The Court rejected the lower courts’ application of the “rational interpretation”²¹³ and “incremental harm”²¹⁴ approaches to claims involving fabricated quotations. The Court explained that the “rational interpretation” doctrine gives interpretative license to a writer relying on an ambiguous source.²¹⁵ Therefore, the Court found that the doctrine is not applicable in this case involving fabricated quotations.²¹⁶ The Court also found that

206. *Id.*

207. *Id.* at 2432-33.

208. *Id.* at 2433.

209. *Id.*

210. *Id.*

211. *Id.* at 2432-33. The Court indicated that California, like other jurisdictions, permits the defense of substantial truth, and would not hold a defendant liable even if she could not justify every word of the alleged defamatory publication. *Id.* at 2433. Justice Kennedy explained that “[m]inor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’” *Id.* (quoting *Heuer v. Kee*, 59 P.2d 1063, 1064 (Cal. Ct. App. 1936)).

212. *Id.*

213. *See supra* note 42 and accompanying text.

214. *See supra* note 50 and accompanying text.

215. *Masson*, 111 S. Ct. at 2434.

216. *Id.* at 2432. Justice Kennedy reasoned that the rational interpretation doctrine is applicable where a writer is faced with an ambiguous source and must supply an interpretation. *Id.* at 2424. However, where a writer uses a quotation, and where a reasonable reader would conclude that the quotation represents a verbatim repetition of the speaker’s remarks, the quotation indicates that the author is not supplying an interpretation to a writer’s ambiguous remarks. *Id.* Instead, the quotation indicates that the author is conveying what the speaker actually said. *Id.* Justice Kennedy concluded that the rational interpretation doctrine is therefore not applicable to determining actual malice in a fabricated quotations case. *Id.* Justice Kennedy added that if the Court were to assess quotations under the rational interpretation test, it would diminish the trustworthiness of the printed word and discourage newsworthy figures from making public comments. *Id.*

while many states may employ the "incremental harm" doctrine to determine whether challenged statements are actionable, it is not required under the First Amendment, and there is no evidence that California libel law recognizes the doctrine.²¹⁷ The Court reasoned that the incremental weight of the harm does not relate to a determination of intentional or reckless falsification.²¹⁸

After announcing the test for finding falsity under the actual malice standard in the case of fabricated or altered quotations—a material change in meaning—the Court examined the challenged passages.²¹⁹ The Court endeavored to determine whether the published passages in the case before it differed materially in meaning from the tape-recorded statements so as to create an issue for the jury.²²⁰ Because the defendants had moved for summary judgment, the Court was obliged to draw all reasonable inferences in favor of Masson.²²¹ Applying the material change in meaning analysis, the majority examined its six disputed passages and concluded that five contained a material difference which jurors could find defamatory under California libel law.²²² Accordingly, the Court reversed the judgment of the court of appeals and remanded the case for further proceedings.²²³

B. *The Dissent: A Question of Knowledge*

In his dissent, Justice White²²⁴ rejected the majority's "material change" analysis and instead focused on whether a falsehood is "knowing."²²⁵ Justice White reasoned that, under the *New York Times* definition of actual malice, knowingly attributing words that a speaker did not actually say is sufficient proof of malice.²²⁶ Justice White interpreted this standard as only requiring knowledge of falsity for a finding of actual malice and did not see

217. *Id.* at 2436.

218. *Id.*

219. *Id.* at 2434-35.

220. *Id.* at 2435.

221. *Id.* See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding that all justifiable inferences are to be drawn in favor of the non-moving party in summary judgment actions).

222. *Masson*, 111 S. Ct. at 2435-37. See *supra* notes 171-72 and notes 174-76 (describing the passages the Court determined to be materially altered).

223. *Id.* at 2437.

224. Justice White was joined in his partial dissent by Justice Scalia. It is worth noting that at the time *Masson* was decided, Justice White was the only member of the Court who had also taken part in the seminal 1964 decision, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Justice Marshall, the second most senior justice, joined the Court in 1967, after *New York Times, Garrison v. Louisiana*, 379 U.S. 64 (1964), and *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967) had already been decided.

225. *Masson*, 111 S. Ct. at 2437-39 (White, J., dissenting).

226. *Id.*

any reason for introducing the extraneous element of material change in meaning.²²⁷

According to the dissent, the question of knowledge is only the threshold inquiry. Finding a "knowing falsehood" does not necessarily mean that a plaintiff is able to defeat a defendant's motion for summary judgment.²²⁸ As a secondary issue, the trial court must determine whether, as a matter of law, reasonable jurors could conclude that the false attribution amounted to libel as it is defined under the pertinent state law.²²⁹ If reasonable jurors could conclude that the attribution is libelous under state law, the case should go to trial on the merits.²³⁰

Justice White rejected the majority's "material change" analysis for three additional reasons. First, Justice White noted that the majority's standard is less manageable and that it assigns to the trial court issues that are properly to be decided by a jury.²³¹ Second, Justice White rejected the majority's view that there are several situations in which a journalist may justifiably alter quotations beyond grammatical and syntactical corrections.²³² Justice White asserted that if an interviewer must reconstruct what a speaker said, either because the author is writing from notes or because the translation from audiotape to the printed word is awkward, he or she should merely paraphrase the remarks and not purport to quote the speaker.²³³ Finally, Justice White reasoned that the issues of materiality and compensable injury do not relate to the threshold question of whether the author knew the speaker did not use the published words.²³⁴

Applying its two-step analysis, the dissent concluded that because Malcolm wrote that Masson said certain things that she in fact knew Masson did not say, there was "knowing falsehood."²³⁵ Therefore, the defendants were

227. *Id.* at 2438. Justice White took a formalistic approach to interpreting the *New York Times* holding that, in a defamation case, reporting a known falsehood amounts to actual malice. See notes 100-01 and accompanying text. According to Justice White, a deliberate alteration of a quote is per se a knowing falsehood and therefore sufficient proof of actual malice. *Id.* at 2438.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* According to Justice White, the majority's approach, that is, asking whether a misquotation substantially alters the meaning of the speaker's actual words, measures the difference between the actual and the printed quote from the Court's point of view. *Id.* Asking whether reasonable jurors could find that a misquotation was different enough to be libelous, as Justice White recommends, assesses how a jury would or could view the misquotation. *Id.*

232. *Id.*

233. *Id.* at 2438-39.

234. *Id.* at 2439. Presumably, materiality and harm instead pertain to the dissent's secondary question of whether the false attribution is libelous under relevant state law. *Id.* at 2438.

235. *Id.* at 2437-38.

not entitled to summary judgment on the issue of actual malice with respect to any of the six misquoted passages.²³⁶ The dissent, therefore, agreed with the Court's judgment on five of the six passages,²³⁷ but disagreed with the analysis used in reaching that judgment.

III. SENDING MIXED SIGNALS TO THE PRESS

The United States Supreme Court's decision in *Masson* strikes a fair balance between media and individual interests. On one hand, the decision affords journalists the flexibility assured by the First Amendment.²³⁸ On the other hand, the decision denies the journalist carte blanche to place his or her words in the speaker's mouth.²³⁹ The only drawback to the decision is the mixed signals it sends to the media. While the decision reflects the Court's sensitivity to the practical necessities of journalism, it may ironically result in a tightening of journalistic standards.

In *Masson*, the Court revealed that it is willing to remove deliberately altered quotations from the umbrella of First Amendment protection only if the quotation substantially alters the meaning of the speaker's actual words.²⁴⁰ Following the *Masson* decision, the immediate media reaction was mixed. Some critics interpreted the decision as a Supreme Court restriction

236. *Id.* at 2439.

237. *Id.*

238. When the Supreme Court decided *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), it attempted to balance the First Amendment guarantees of free speech and of free press against the individual's right to be free from the harm inflicted by a defamatory falsehood. The Court focused on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Id.* at 270. In creating the actual malice test for defamation cases, the Court recognized that sometimes the greater public interests outweigh individual private interest. *Id.* at 279-80.

239. Although the Supreme Court asserted that First Amendment protection does not depend on the truth, popularity, or usefulness of ideas, *Id.* at 271, it has also recognized that there is no constitutional value in the dispersement of false information. *Herbert v. Lando*, 441 U.S. 153, 171 (1979). Rather than expressing an idea personally held by the author, a deliberately falsified quotation is an attribution to the speaker of words which he did not speak. The use of quotation marks generally adds credibility to the author's work. *Masson*, 111 S. Ct. at 2434. An intentional misquotation does not play a role in the genuine exchange and forum of ideas. It would not chill free speech or hinder First Amendment values to deny constitutional protection to a deliberately altered, defamatory quotation. Therefore, it should be removed from the protection of free speech.

240. *Masson*, 111 S. Ct. at 2433.

on free speech.²⁴¹ Others believed that the decision was sensitive to the practical difficulties faced by journalists.²⁴²

It does appear that the Court in *Masson* loosened the protective reins of the *New York Times* standard.²⁴³ The decision in *Masson* allows an inference of actual malice without much proof as to the defendant's actual subjective state of mind.²⁴⁴ This inference of actual malice intensifies the risk of liability to a journalist who uses quotation marks around a good faith paraphrase of a speaker's remarks.²⁴⁵ *Masson* does not, however, necessarily sound doom for journalism. Although the result in the case ultimately was decided against the media defendants, the Court did explicitly grant journalists some constitutional leeway not only to correct grammar and syntax, but also to reconstruct and edit obvious "misstatements," and make intelligible a speaker's incoherent remarks.²⁴⁶ For the press, whether the *Masson* decision is a triumph or a defeat is a matter of interpretation.

The majority's decision in *Masson* is somewhat problematic because it does not establish clear guidelines for journalists to follow.²⁴⁷ The Court's test for knowledge of falsity—whether the alteration results in a material change in the meaning conveyed by the statement—is ambiguous because the Court failed to explain the meaning of "material change."²⁴⁸ As Justice White remarked in his dissent, the majority's standard tells journalists that "the reporter may lie a little, but not too much."²⁴⁹ Because *Masson* provides only loose guidelines, the question of how the decision will affect journalistic practices remains open.

The confusion in the majority's standard might stem from the practical difficulties connected with defining "materiality" and "meaning."²⁵⁰ The

241. See, e.g., Martin Garbus, *The Big Chill on Free Speech*, NEWSDAY, July 4, 1991, at 63; Dawn Ceol, *Made-Up Quotes Not Protected*, WASHINGTON TIMES, June 21, 1991, at A3.

242. See, e.g., Ethan Bronner, *Justices Give Writers Some Leeway on Quotes*, BOSTON GLOBE, June 21, 1991, at 1; Linda Greenhouse, *Justices Refuse to Open a Gate for Libel Cases*, NEW YORK TIMES, June 21, 1991, at A1.

243. *Masson*, 111 S. Ct. at 2433.

244. *Id.*

245. The Court's holding simply equates a material alteration with actual malice. *Id.* The holding does not mention the element of good faith. See *supra* notes 141-42 and accompanying text. Presumably, a journalist who, in good faith, edits a quotation for clarity or readability but inadvertently alters the substance of the statement, could potentially face liability under the *Masson* decision.

246. *Id.* at 2431-32.

247. *Id.* at 2433.

248. *Id.*

249. *Id.* at 2438 (White, J., dissenting).

250. Whether altering a quotation materially changes its meaning is a subjective inquiry. The essential meaning of a quote is in the eye of the beholder. The procedural history of the *Masson* case illustrates this. The Ninth Circuit Court of Appeals granted the defendants' mo-

Court did not want to draw the line, as urged by the plaintiff Masson and by Justice White, at only allowing alterations for syntax and grammar; however, it seems that the dissent's standard may be the only place a bright line could feasibly be drawn.²⁵¹ The absence of narrow guidelines may cause the journalism industry to tighten its own standards and use exact quotations or resort to paraphrasing.

Although the majority takes a more liberal approach than the dissent, the holding in *Masson* will probably elicit a tightening of journalistic standards. Reporters and publishers, for fear of crossing over the fuzzy line into the area of "material change," will probably limit their alterations of quotes to minor editorial changes. After *Masson*, if a journalist cannot accurately capture a speaker's exact words, he or she may hesitate to use quotation marks.

However, diminished use of quotation marks may actually benefit the media. By paraphrasing, a journalist can still convey the remarks of a speaker. Paraphrasing enables a writer to avoid liability since it informs the reader that the passage may be tainted by the writer's interpretation.²⁵² Furthermore, allowing journalists to liberally attribute their own statements to a speaker through the use of quotation marks without fear of liability, could discourage newsworthy figures from speaking with the press.²⁵³

tion for summary judgment after concluding that none of the six disputed passages substantially altered the content of Masson's actual remarks. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1539-46 (9th Cir. 1989), *rev'd*, 111 S. Ct. 2419 (1991). See *supra* text accompanying note 186. Seven Justices of the Supreme Court, however, concluded that five of the six disputed passages did substantially alter the content of Masson's remarks. See *supra* notes 219-22 and accompanying text. The issue of material change in meaning is ultimately determined by the trier of fact. For journalists, the standard is problematic because it is difficult, if not impossible, to know in advance whether a change will be deemed "material." As lower courts begin to apply the Supreme Court's holding in *Masson*, clearer guidelines may emerge.

251. Identifying alterations made for syntax and grammar is a relatively easy and objective task. Such changes are readily apparent since they usually involve modifying the tense of a word or substituting one form of a word for another.

252. *Masson*, 111 S. Ct. at 2433.

253. *Id.* at 2434. In the portion of his opinion rejecting the rational interpretation approach to cases involving fabricated quotations, Justice Kennedy wrote:

By eliminating any method of distinguishing between the statements of the subject and the interpretation of the author, we would diminish to a great degree the trustworthiness of the printed word, and eliminate the real meaning of quotations. Not only public figures but the press doubtless would suffer under such a rule. News-worthy figures might become more wary of journalists, knowing that any comment could be transmuted and attributed to the subject, so long as some bounds of rational interpretation were not exceeded. We would ill serve the values of the First Amendment if we were to grant near absolute, constitutional protection for such a practice.

Id.

Although the dissent rejects the "material change in meaning" test,²⁵⁴ Justice White's opinion does seem to indirectly recognize a requirement of materiality for a finding of actual malice. This recognition appears in the second step of Justice White's test.²⁵⁵ Under the dissent's approach, actual malice is found when a reporter knowingly attributes words to a speaker which the speaker did not actually say.²⁵⁶ Before this issue can go to a jury, however, the trial court must determine whether reasonable jurors could conclude that the false attribution is libelous.²⁵⁷ To make this determination, materiality must be considered.²⁵⁸

The dissent's approach, appears more rigid on its face than the majority's approach. By equating any substantive changes in a quotation with actual malice, the dissent's approach would make it easier for a plaintiff to bring a defamation suit. More cases—many of which may ultimately be dismissed if a jury finds the action falls short of the statutory definition of libel—would reach the trial stage.²⁵⁹ From the standpoint of judicial economy, such increased litigation would be very costly. The problem of frivolity would be screened at the threshold by the trial judge. The invitation to initiate an action, however, would remain open under the dissent's approach.

On the whole, the majority opinion strikes a fair balance by affording journalists some room for error while protecting an individual's interest in not being misquoted. The opinion, however, sends mixed signals to journalists. The majority's requirement that a plaintiff prove a material change in meaning could result in stricter journalistic standards and less reliance on the use of the quotation by journalists who will interpret the test as a warning not to

254. *Id.* at 2437.

255. *Id.* at 2438.

256. *Id.*

257. *Id.*

258. For example, under California's law, libel is a false publication which exposes a 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). Justice White's approach requires the trial judge to assess whether reasonable jurors could determine that a plaintiff was defamed by a falsely attributed quote. How would California jurors make the assessment of whether or not a speaker was harmed in any of the ways delineated in the statute? One factor which jurors would probably consider is how substantially different the speaker's actual words appeared in print, and whether or not the meaning of the speaker's actual words was materially changed. If an attributed statement is technically inaccurate, yet substantially similar to the speaker's actual words, it is unlikely that a jury would conclude that the printed statement harmed the speaker and was therefore libelous. Although the dissent's approach did not directly require a contemplation of materiality, materiality may indirectly factor into the analysis.

259. One commentator suggested that the majority's approach "provides a better bulwark against unwarranted suits by disgruntled quotees with trivial grievances or selective memories." Stuart Taylor Jr., *1st Amendment Peril: Bad Issues Making Worse Law*, N.J.L.J., August 29, 1991, at 75.

alter quotes. The decision could, however, result in increased tampering by writers with the actual words spoken by a subject since the Court explicitly permits editing beyond grammatical and syntactical changes. Most likely, the decision will limit journalists' alterations of quotes to minor editorial changes. The limited alteration of quotes will protect journalists from liability and help foster public perception of the media as a trustworthy and credible social resource.

IV. CONCLUSION

The First Amendment guarantees freedom of speech and freedom of the press. Free expression is not, however, absolute. The Supreme Court has historically balanced these freedoms against the interest of the general public and categorized certain forms of speech out of First Amendment protection. One such unprotected class of speech is defamation. In *New York Times Co. v. Sullivan*, the Court held that a public official could only recover in a defamation suit if the plaintiff could prove that the media defendant made false statements with "actual malice." This holding was later extended to include public figure plaintiffs. In *Masson v. New Yorker Magazine, Inc.*, the Court applied the actual malice standard to deliberately altered quotations and held that a public figure plaintiff could recover for libel only if the quote as published materially alters the meaning of the speaker's actual words.

The *Masson* decision retrenches slightly on broad First Amendment protection afforded the media since the *New York Times* decision. The long term effects of the *Masson* decision will ultimately depend on how lower courts apply the material change in meaning test. The immediate result of the decision will most likely be a general tightening of journalistic standards and a trend toward use of paraphrase rather than quotation. Regardless of the ultimate result, First Amendment protection of journalistic practices may have been weakened.

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