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CONSTITUTIONAL LAW—FIRST AMENDMENT — A "RATIONAL INTERPRETATION" OF MASSON v. NEW YORKER MAGAZINE, INC.

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CONSTITUTIONAL LAW—FIRST AMENDMENT—A "RATIONAL INTERPRETATION" OF *Masson v. New Yorker Magazine, Inc.*

INTRODUCTION

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] While freedom of speech and of the press are guaranteed to all persons under the first amendment, these rights are not absolute.[2] Although an active press is "an indispensable component of a free and democratic society,"[3] this value must be balanced against an individual's interest in maintaining his or her privacy or reputation.[4] In a libel action, these competing interests come into conflict.[5]

While the majority of libel actions result from untrue statements of fact, this conflict also arises in the context of quotations. When quotation marks are used by a journalist, most readers understand that they represent the speaker's actual words. Therefore, the use of quotation marks has not presented many problems for courts to resolve. However, quotations present a special problem in the determination of

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

2. In fact, at one time libelous speech was among "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). Conversely, Justice Black proposed the idea, which has never commanded the support of a majority of the Court, that the literal language of the first amendment should be given effect. By taking the words "Congress shall make no law . . . abridging the freedom of speech or of the press" and interpreting "no law" strictly to require absolute protection of speech, Justice Black's view completely eliminates the law of libel. L. ELDREDGE, THE LAW OF DEFAMATION §§ 48-49, at 244-47 (1978); R. LABUNSKI, LIBEL AND THE FIRST AMENDMENT 38 (1963); *see also* Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 4 (1965).

3. Schermerhorn v. Rosenberg, 73 A.D.2d 276, 282-83, 426 N.Y.S.2d 274, 280 (1980).

4. This interest "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

5. Upon analysis of the conflict between the law of libel and the first amendment, the Court has stated that "[s]ome tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury." Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974).

liability in a libel action where a plaintiff claims that his or her own words were deliberately altered.

"The author's job is not simply to copy statements verbatim;"[6] inherent in the nature of reporting is the responsibility to interpret and rework the statements into an article.[7] When the author paraphrases a speaker's remarks, readers understand that they are reading the author's interpretation of what was spoken. The question that remains for the courts is whether a reporter should be given protection under the first amendment to change a speaker's verbatim words, and then to place that altered version within quotations.[8]

Recently, in *Masson v. New Yorker Magazine, Inc.*,[9] the Court of Appeals for the Ninth Circuit addressed a unique question involving the appropriate approach to the actual malice standard in the context of a misquotation. In a 2-1 decision, the court held that actual malice could not be inferred from altered statements placed within quotations as long as the purported quotes approximated what was said, or could be seen as a rational interpretation of ambiguous remarks.[10]

This Note examines the rationale and impact of the *Masson* decision, and addresses whether a court can infer that a reporter acted with actual malice when evidence shows that statements placed in quotation marks were altered or fabricated deliberately. Section I briefly discusses the history and purposes of libel law, and examines the policies behind placing constitutional limitations on libel law through *New York Times v. Sullivan*[11] and its progeny. Section II describes the *Masson* decision. Section III contains a critical analysis of the *Masson* decision, and suggests that the rational interpretation standard the court imposed was improper and inconsistent with the principles of both libel and first amendment law.

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6. Strada v. Connecticut Newspapers, 193 Conn. 313, 320, 477 A.2d 1005, 1009 (1984).

7. Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980).

8. "The misquotation problem is a particularly important one when the story involves the assembling and editing of a substantial amount of quoted material." R. SMOLLA, LAW OF DEFAMATION § 4.07[5], at 4-31 (1986); *see* Ben-Oliel v. Press Publishing Co., 251 N.Y. 250, 255, 167 N.E. 432, 433-34 (1929) ("In order to constitute a libel, it is not necessary for the defendant . . . to directly attack the plaintiff . . . . The same result is accomplished by putting in her mouth or attaching to her pen words which make self-revelation of such a fact.").

9. 895 F.2d 1535 (9th Cir. 1989), *cert. granted*, 111 S. Ct. 39 (1990).

10. *Id.* at 1539.

11. 376 U.S. 254 (1964).

I. BACKGROUND

A. *History and Purposes of Libel Law*

According to Dean Prosser, defamation consists of two torts, libel and slander.[12] The distinction between the two is that libel refers to defamatory words that are written or printed while slander refers to the oral communication of defamatory statements.[13] A defamatory statement is one which harms the reputation of another.[14]

The tort of libel has undergone significant changes since its origin. This is due in part to the fact that the law of libel reflects an attempt to accommodate two important yet conflicting interests: the integrity of an individual's reputation, and the responsibility of the press to inform citizens on matters of public concern.[15] In order to understand fully the significance of the *Masson* decision to the press and public, it is necessary to look briefly at the history of libel which reflects the tension between these two values.[16]

In his treatise on tort law, Dean Prosser characterized defamation as an "oddity of tort law" that developed according to no particular plan.[17] At common law, libel was a strict liability tort.[18] A defendant could be found liable for publishing a false and defamatory statement

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12. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984) [hereinafter PROSSER ON TORTS].

13. *Id.*

14. A defamatory statement can be defined as a communication which tends "to harm the reputation of another as to lower him [or her] in the estimate of the community or to deter third persons from associating with him [or her]." RESTATEMENT (SECOND) OF TORTS § 559 (1965).

15. Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-making*, 61 MINN. L. REV. 645, 645-46 (1977); *see also* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). In *Curtis*, Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Id.* at 152.

16. For a discussion of the history of libel, see Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Veeder, *The History and Theory of the Law of Defamation*, 4 COLUM. L. REV. 33 (1904).

17. PROSSER ON TORTS, *supra* note 12, § 111, at 772. Dean Prosser stated:

> It must be confessed . . . that there is a great deal of the law of defamation which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants . . . with a blind and almost perverse refusal to compensate the plaintiff for real and very serious harm.

Id. at 771-72 (footnote omitted); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974) ("The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss.").

18. 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 5.0, at 3 (1986). Dean Prosser, while discussing the common law of defamation stated:

without any showing that the defendant acted unreasonably, or knew or suspected that the statement was false.[19]

The focus of the common law of libel was the protection of one's good name and reputation in the community. The tradition of affording a person the opportunity to vindicate his or her good name is evident in modern defamation law, which has as its primary purpose the protection of the plaintiff's reputation.[20]

A second purpose of defamation law is compensation for harm actually caused by the false statement.[21] A plaintiff often brings an action for defamation for two purposes: to obtain both compensation for the injury and public vindication of his or her reputation.[22] Additionally, a successful defamation action serves a deterrent function, namely, to punish a defendant who has acted outrageously, and thereby deters others from publishing false statements.[23] Although each jurisdiction has its own rules governing the law of libel, each approach reflects the public policy of protecting individual reputations from false and defamatory speech.[24]

> The effect of . . . strict liability is to place the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals. If a defamatory meaning, which is false, is reasonably understood, the defendant publishes at his peril, and there is no possible defense except the . . . narrow one of privilege.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 113, at 773 (4th ed. 1971).

19. Lord Mansfield's statement that "whenever a man publishes he publishes at his peril" reflects the general attitude of the common law regarding defamatory remarks. *See* The King v. Woodfall, 98 Eng. Rep. 914, 916 (K.B. 1774).

20. L. ELDREDGE, *supra* note 2, § 3, at 4. Modern defamation law is concerned with protecting people from a wrongful disruption of the " 'relational interest' that an individual has in maintaining personal esteem in the eyes of others." R. SMOLLA, *supra* note 8, § 1.06[1], at 1-15. Defamation law assumes that a person is entitled to have his or her standing in the community unimpaired by defamatory statements. One scholar noted that there are three separate concepts of reputation that the common law of libel sought to protect: "reputation as property, as honor, and as dignity." Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693 (1986).

21. L. ELDREDGE, *supra* note 2, § 3, at 5; *see also* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1357-58 (1975); Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519 (1987).

22. L. ELDREDGE, *supra* note 2, § 3, at 6.

23. *Id.* The tort of libel has several purposes, including: (1) to compensate for economic injury such as lost employment or diminished business, (2) to deter the publication of false and injurious speech, and (3) to provide a check and balance on the media's actions by opening up the media's news-gathering and decision-making processes to public scrutiny and accountability. R. SMOLLA, *supra* note 8, § 1.06.

24. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 341-42 (1974) (recognizing the legitimate state interest of protecting reputation).

B. *Constitutional Limitations Imposed Upon Libel Law*

Competing against the value of protecting reputational interests is the value society places on free speech.[25] However, prior to 1964, the first amendment did not impose restrictions on the law of defamation. The Supreme Court had made it clear that the constitutional protection for freedom of speech did not include protection for libelous utterance.[26]

In 1964, in what has been hailed a "landmark decision," the United States Supreme Court first applied the limitations of the first amendment to the law of libel.[27] In *New York Times v. Sullivan*,[28] the Court defined a zone of constitutional protection within which a journalist can publish information without liability under state libel law. The Court recognized the need to strike a balance between reputational interests and the first amendment freedom of the press.[29] Although false statements of fact are not automatically protected by the first amendment, the Court was concerned that holding the press liable for a minor mistake of fact might deter reporting of truthful information due to the fear and expense of litigation.[30] The Supreme

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25. For a discussion of the first amendment, see M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.05(C)(1) (1984) (stating "[t]he evil of defamation is self-evident, and tort protection here requires no greater theoretical justification than does tort protection against assault and battery, and other attacks upon the person").

26. Roth v. United States, 354 U.S. 476, 482-83 (1957) ("[L]ibelous utterances are not within the area of constitutionally protected speech."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (Libelous speech is among the "limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

27. *See* New York Times v. Sullivan, 376 U.S. 254 (1964). This decision has been highly praised. In fact, one scholar noted that *New York Times* was "an occasion for dancing in the streets." Kalven, *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 221 n.125 (quoting Professor Meiklejohn). Kalven described the *New York Times* decision as one that "may prove to be the best and most important [the Court] has ever produced in the realm of freedom of speech." *Id.* at 193-94.

28. 376 U.S. 254.

29. *Id.* at 256. In *Sullivan*, the New York Times ran a full page advertisement supporting Dr. Martin Luther King's efforts in the struggle for racial equality. *Id.* The action stemmed from an allegedly libelous advertisement entitled "Heed Their Rising Voices," which praised the efforts of Southern Blacks in resisting racism. *Id.* The advertisement contained a number of inaccuracies. One of the inaccuracies included a claim that a large number of police officers "rang" the campus of the Alabama State College Campus in Montgomery, when in fact they were just present near the campus. *Id.* at 259. In addition, while the State Board of Education expelled nine students, they were not expelled for leading the demonstration, but for demanding service at the lunch counter in the Montgomery County Courthouse on another day. *Id.* Finally, Dr. King had been arrested on four previous occasions, not seven times as reported in the advertisement. *Id.*

30. *Id.* at 279. Additionally, courts have given reporters procedural protection in a

Court stated that erroneous statements are "inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' "[31]

The standard enunciated in *New York Times* precludes a public official from recovery for a defamatory statement criticizing his or her official conduct "unless he [or she] proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[32] A plaintiff may establish actual malice in one of two ways: by proving that the defendant had knowledge of the falsity of the statement, or by demonstrating that the defendant published the statement with reckless disregard for its truth. The actual malice standard focuses on the conduct and state of mind of the journalist at the time of the publication.

In a series of subsequent cases, the United States Supreme Court further defined and expanded the application of the actual malice standard. The Court extended the actual malice test to public figures as well as public officials in *Curtis Publishing Co. v. Butts*,[33] and the com-

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libel action through the use of summary judgment. A summary judgment proceeding has been viewed as particularly important in a libel action and considered "the best procedural protection" for first amendment rights. MacGuire v. Harriscope Broadcasting Co., 612 P.2d 830, 831 (Wyo. 1980). The courts are concerned that unfounded libel suits chill free speech. The threat of a lawsuit may be just as chilling to the exercise of the first amendment as the fear of the outcome itself. R. SMOLLA, *supra* note 8, § 12.07[1][b]. Proof problems in court and the expense of litigation could turn journalists into self-censors and deprive readers and viewers of access to vital information. Thus, granting the journalist the extra procedural protection of summary judgment avoids some of the difficulties that a journalist is faced with, such as self-censorship. *Id.*

For a discussion of the summary judgment proceeding in a libel case, see generally B. SANFORD, LIBEL AND PRIVACY, THE PREVENTION AND DEFENSE OF LITIGATION 520-30 (1985); Matheson, *Procedure in Public Person Defamation Cases: The Impact of the First Amendment*, 66 TEX. L. REV. 215, 285-99 (1987); Smolla, *supra* note 21.

31. *New York Times*, 376 U.S. at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)). For a discussion of the "chilling effect," see generally Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978); Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

32. *New York Times*, 376 U.S. at 279-80. The actual malice standard of *New York Times* has survived twenty-five years of exacting scrutiny, but there are many critics of this standard. *See generally* Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of* New York Times v. Sullivan, 25 ST. LOUIS U.L.J. 501 (1981); LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 788-89 (1984); Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment"*, 83 COLUM. L. REV. 603, 623-25 (1983); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 11-12 (1983); Yasser, *Defamation as a Constitutional Tort: With Actual Malice for All*, 12 TULSA L.J. 601 (1977).

33. 388 U.S. 130 (1967).

panion case of *Associated Press v. Walker*.[34] Later, in *Gertz v. Robert Welch, Inc.*,[35] the Court differentiated between the level of scienter necessary in libel actions brought by public figures as compared to private figures.[36] While a public figure can turn to the media to protect their reputation from false statements, private figures' access to the media is virtually non-existent. Therefore, as long as they do not impose strict liability, states may adopt a lower standard than actual malice for private plaintiffs.[37] Finally, in *Anderson v. Liberty Lobby, Inc.*,[38] the Supreme Court held that upon a motion for summary judgment, a trial judge must evaluate whether the public figure plaintiff can show by clear and convincing evidence that the defendant acted with actual malice.[39] Although the Supreme Court has not directly addressed the issue of actual malice in the context of quotations, several related cases have indirectly addressed the issue.

The Supreme Court, in *St. Amant v. Thompson*,[40] elaborated on the actual malice standard of *New York Times*.[41] Reckless disregard for the truth is not measured by whether a reasonably prudent person would have published the statement, or investigated it before publishing.[42] Instead, there must be sufficient evidence to permit the conclusion that the defendant actually doubted the truth of the publication. "Publishing with such doubts shows reckless disregard for truth or

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34. *Id.*

35. 418 U.S. 323 (1974). In *Gertz*, the plaintiff was a well known lawyer who represented a family bringing a wrongful death action against a Chicago police officer. The magazine "American Opinion" attacked the credibility of the plaintiff. The magazine described Gertz as a "Communist-fronter," and falsely implied that he had a criminal record. *Id.* at 325-26.

36. *Id.* at 342-45.

37. *Id.* at 347.

38. 477 U.S. 242 (1986).

39. *Id.* at 252.

40. 390 U.S. 727 (1968).

41. In a televised political speech, St. Amant, a candidate for public office, read both the questions he had asked a union member and the corresponding responses. One of the answers falsely charged Thompson, another union member, with criminal conduct. *Id.* at 728-29. The case was tried before *New York Times*, and the trial court awarded Thompson $5,000 in damages. The Louisiana Court of Appeals reversed, holding that the record did not show that St. Amant had acted with actual malice. The Supreme Court of Louisiana reversed the appellate court, and held there was sufficient evidence that St. Amant acted with reckless disregard when deciding whether the statements about Thompson were true. *Id.* The United States Supreme Court held that there was not enough evidence to prove actual malice. There was no evidence that indicated that St. Amant knew of the probable falsity of the statement about Thompson. *Id.* at 730. Furthermore, under the *New York Times* doctrine, a failure to investigate alone does not constitute bad faith. *Id.* at 733.

42. *Id.* at 731.

falsity and demonstrates actual malice."[43] However, the Court stated that liability cannot be avoided by a defendant by merely testifying that he or she published the article "with a belief that the statements were true."[44] For a defendant to avoid liability, a fact-finder must determine that the publication was made in good faith. Furthermore, the Court warned that it would not be inclined to find a good faith belief in the truth of the statements when a story is fabricated or when there are reasons to doubt its accuracy.[45]

Moreover, actual malice can be proven by either direct or circumstantial evidence. For instance, evidence that the defendant was aware of inconsistent information can support a finding of reckless disregard. In one case, a court held that there was sufficient evidence of reckless disregard when the defendant not only republished certain allegations in the face of strong contradictory information, but also added additional details to increase the credibility of the original statements.[46] Courts may also infer reckless disregard when there were obvious reasons for the reporter to doubt the source, or when the reporter had relied on an inherently ambiguous source.[47]

In *Bose Corp. v. Consumers Union of United States, Inc.*,[48] the Court differentiated between the necessary proof for actual malice and mere proof of falsity.[49] The Court held that "[t]he burden of proving

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43. *Id.*

44. *Id.* at 732.

45. *Id.* The Court stated that "[p]rofessions of good faith will be unlikely to prove persuasive . . . where a story is fabricated . . . [or] is the product of [a journalist's] imagination . . . ." *Id.*

46. Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049 (1970).

47. *See* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979). In *Bindrim*, the plaintiff claimed that he was libelled in a fictional book. In affirming the award to the plaintiff, the California Court of Appeals held that "[s]ince actual malice concentrates solely on defendants' attitude toward the truth or falsity of the material published, and not on malicious motives," the defendant was in the best position to have this knowledge of her own material. *Id.* at 73, 155 Cal. Rptr. at 35. The court found actual malice from the author's knowledge of the real events and the fictional accounts presented in her book. Since she attended the therapy sessions fictionalized in the novel, there could be no doubt that she knew the true facts.

48. 466 U.S. 485 (1984).

49. *Id.* at 511 n.30. In *Bose*, Consumer Reports published a seven page article which evaluated the quality of loudspeaker systems. In referring to the plaintiff's product, Consumer Reports reported that the sound tended to wander about the room. The plaintiff claimed that this was a false statement of fact. The defendant moved for summary judgment. Relying on the rationale set forth in *Time, Inc. v. Pape*, the Supreme Court held that the defendant's resolution was among a number of possible interpretations of an event that "bristled with ambiguities." *Id.* at 512-13 (quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971)). The statement in *Bose* represented the type of inaccuracy that is common in the forum of robust debate to which the *New York Times* rule applies. *Id.* at 513. The choice

'actual malice' requires the plaintiff to demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of the statement."[50] In *Bose*, the Court held that the defendant's description of the plaintiff's loudspeaker was a rational interpretation of an ambiguous event.[51]

The Supreme Court, in *Harte-Hanks Communications v. Connaughton*,[52] held that reckless disregard is a subjective standard and there must be sufficient evidence to conclude that the defendant acted with a "high degree of awareness of . . . probable falsity."[53] "[A] public figure plaintiff must prove more than an extreme departure from professional standards."[54] The Court maintained that judges have a duty to determine independently whether the evidence in the record is sufficient to support a judgment by clear and convincing proof of actual malice.[55]

In essence, the actual malice standard enunciated in *New York Times* and its progeny provides a reporter with wide latitude to publish without the threat of liability.[56] In *Masson v. New Yorker Magazine, Inc.*,[57] the Court of Appeals for the Ninth Circuit maintained that the actual malice standard had not been satisfied when the plaintiff produced evidence of deliberate falsifications of statements made within quotations.

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of this language, the Court stated, although inaccurate, "does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella." *Id.*

50. *Id.* at 511 n.30.

51. *Id.* at 512-13.

52. 109 S. Ct. 2678 (1989).

53. *Id.* at 2696 (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)). In *Harte-Hanks*, the plaintiff was an unsuccessful candidate for the position of Municipal Judge of Hamilton, Ohio. *Id.* at 2681. The defendant, the publisher of a local newspaper, supported the re-election of the incumbent. *Id.* About one month before the election, the incumbent's Director of Court Services resigned and was arrested on a bribery charge. *Id.* at 2681-82. A grand jury investigation ensued. *Id.* at 2682. The local newspaper, The Journal News, published a story quoting a jury witness as stating that the plaintiff, Connaughton, "had used 'dirty tricks' and offered her and her sister jobs and a trip to Florida 'in appreciation' for their help in the investigation." *Id.* Connaughton sued the newspaper for libel, claiming that the story was published with actual malice. *Id.*

54. *Id.* at 2684.

55. *Id.* at 2695 (citing Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 511 (1984)).

56. Statistics prove that the defendant in a libel action usually prevails. For actual statistics, see Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 491.

57. 895 F.2d 1535 (9th Cir. 1989), *cert. granted*, 111 S. Ct. 39 (1990).

II. *MASSON V. NEW YORKER MAGAZINE, INC.*[58]

In 1983, Janet Malcolm authored a two-part article in The New Yorker magazine about the termination of psychoanalyst Jeffrey M. Masson as Projects Director of the Sigmund Freud Archives.[59] Malcolm's article, primarily based upon tape-recorded interviews with Masson, described his rise to prominence in the field of psychoanalysis. Malcolm explained the struggle between Masson and other board members of the Freud Archives. According to Masson, he was fired because of his outspoken view that Dr. Freud had suppressed information concerning sexual abuse of children.[60]

In reviewing the prepublication draft of the article, Masson noticed that the proposed publication contained several inaccuracies concerning his quoted statements.[61] Masson notified the fact-checking department at The New Yorker magazine of the inaccuracies, claiming that his quotations had been altered. He requested that the statements attributed to him through quotations be verified.[62] After his requests were ignored and the article published, Masson filed a libel suit against the author of the article, Janet Malcolm, and its publishers, The New Yorker magazine and Alfred A. Knopf.[63]

Masson contended that fabricated quotations and misleadingly edited statements attributed to him made him appear "unscholarly, irresponsible, vain, [and] lacking impersonal [sic] honesty and moral integrity."[64] As proof of deliberate fabrication, Masson presented evidence showing that several quotations attributed to him were not contained in the tape-recorded sessions.[65] The district court granted the defendants' motion for summary judgment on the ground that Masson failed to present sufficient evidence that a reasonable jury would find

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58. *Id.*

59. *Id.* at 1536. The article, entitled "Annals of Scholarship: Trouble in the Archives," was published in a two-part series in The New Yorker magazine. Malcolm's article was also published in book form by defendant Alfred A. Knopf. For purposes of this discussion, the term "article" will be used to discuss the libel action brought against both The New Yorker magazine and Alfred A. Knopf.

60. *Id.* Masson claimed that Freud had abandoned the "seduction theory," which hypothesizes that certain medical illnesses originate in sexual abuse during childhood. *Id.* Masson claimed that he was fired from his position at the Freud Archives because he publicly announced his views that Freud had suppressed the seduction theory to further his career and appease his colleagues. *Id.*

61. *Id.* at 1537.

62. *Id.* at 1568.

63. *Id.* at 1536.

64. *Id.*

65. *Id.* at 1537.

actual malice by clear and convincing evidence.[66]

Masson subsequently appealed to the Court of Appeals for the Ninth Circuit. He argued that actual malice could be proven from evidence that Malcolm fabricated quotations attributed to him, and that prior to publication he had alerted the staff at The New Yorker magazine.[67] The Court of Appeals for the Ninth Circuit affirmed the decision of the district court. For purposes of summary judgment, the court assumed that all the quotations were deliberately altered, and held as a matter of law that actual malice could not be established based on the fabrication.[68]

In reaching its decision, the majority noted that neither the Supreme Court of the United States nor the Supreme Court of California had addressed the specific issue of whether actual malice can be established through evidence of fabricated quotations.[69] Relying on other state and federal court decisions, the Ninth Circuit established the current law governing fictionalized quotations. First, and perhaps most important, the court held that actual malice will not be inferred if the fabricated quotations are " 'rational interpretations' of ambiguous remarks."[70] Second, the court stated that fictionalization or dramatization of conversations are not actionable if the changes "do not 'alter the substantive content' of unambiguous remarks actually made" by the speaker.[71] Third, the court held that actual malice can be proved by fabricated quotations only when they are "wholly the product of the author's imagination."[72] The court reviewed the passages to determine whether actual malice could be inferred. The court found that the challenged quotations were either rational interpretations of ambiguous statements, or did not alter the substantive content of what Masson actually said. The majority, therefore, denied

66. 686 F. Supp. 1396 (N.D. Cal. 1987), *aff'd*, 895 F.2d 1535 (9th Cir. 1989), *cert. granted*, 111 S. Ct. 39 (1990).

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

68. *Id.*

69. *Id.*

70. *Id.* at 1539 (citing Dunn v. Gannett New York Newspapers, 833 F.2d 446 (3d. Cir. 1987)).

71. *Id.* (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)).

72. *Id.* (citing Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976)). Additionally, Masson claimed that Malcolm took statements out of context, and made it appear that Masson said the exact opposite of what he actually did. For example, Malcolm deleted 33 out of 40 words in a sentence, changing Masson's meaning to make him say the opposite of what he actually said. The majority of the court also held that these statements were non-actionable. *Masson*, 895 F.2d at 1545-46, 1553.

Masson relief.[73]

Judge Kozinski, in dissent, stated, "[t]he majority and I part company on a simple but fundamental point: the meaning of quotations."[74] Although he agreed that first amendment freedoms should be highly protected, Judge Kozinski argued that journalists should not be given the right to alter quotations deliberately. According to the dissent, quotations are understood as containing no interpretations by the writer and by using quotation marks the writer guarantees that he or she "has interposed no editorial comment, has resolved no ambiguities, [and] has added or detracted nothing of substance."[75] Further, Judge Kozinski stated that the rational interpretation doctrine is particularly troublesome in the context of quotations because statements could vary in content and wording from what was actually said "so long as the writer can argue with a straight face that it is a rational interpretation of what the speaker said."[76]

Finding the law cited by the majority inapplicable, the dissent analyzed the policy reasons behind *New York Times v. Sullivan* and subsequent cases.[77] The dissent maintained that the rational interpretation standard is appropriate only in circumstances when a reporter is attempting to describe or summarize statements or descriptions.[78] Judge Kozinski, dissatisfied with the majority's application of the rational interpretation standard in the context of quotations, advocated a five-step inquiry in order to determine whether liability should ensue from a misquotation.[79]

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73. *Id.* at 1548.

74. *Id.* (Kozinski, J., dissenting).

75. *Id.* at 1549. According to the dissent, readers give more weight and credibility to a quotation than to a paraphrase or description. *Id.*

76. *Id.* at 1548 (emphasis in original).

77. *Id.* at 1557.

78. *Id.*

79. *Id.* at 1562. The five-step inquiry is:

1. Does the quoted material purport to be a verbatim repetition of what the speaker said?
2. Is it inaccurate?
3. Is the inaccuracy material?
4. Is the inaccuracy defamatory?
5. Is the inaccuracy the result of malice?

The defendant would be entitled to a favorable judgment if any one of these questions were answered in the negative. Applying this standard to the defendants, Judge Kozinski would have reversed the summary judgment granted by the district court. *Id.*

III. ANALYSIS

> The public looks to the press not only as a forum for divergent ideas and opinions but, equally important, as a source of accurate accounts of newsworthy events. Permitting the press intentionally to disseminate false and defamatory reports with impunity would be to damage its credibility and ultimately to injure the press as an institution.[80]

The *Masson* decision did just that.

The majority in *Masson* led the reader to believe that it merely followed existing case law. In reality, however, by taking bits and pieces of prior opinions unrelated to the issues of this case, the majority was just as guilty as was Janet Malcolm of taking phrases out of context. The majority's analysis was flawed for the following reasons. First, the court interpreted existing case law incorrectly, and therefore, misapplied the rational interpretation standard enunciated by the Supreme Court in *Time, Inc. v. Pape.*[81] Second, journalistic standards do not support the *Masson* decision. This Note advocates the approach taken by the *Masson* dissent.

A. *Misinterpretation of the Rational Interpretation Standard*

Commentators have stated that the actual malice standard must be employed with caution when quotations are used.[82] Quotations are used frequently and provide the core of many news articles and editorials. Perhaps one of the most common reactions from a person who has been portrayed less than favorably in print is to allege that they have been misquoted.[83] However, in the world of journalism, editing the material is "the rule rather than the exception,"[84] especially when the journalist is dealing with a large number of quoted passages. Courts should not get involved in determinations of style or editorial judgments.

In order to protect journalists from liability under certain circumstances, the Supreme Court established the rational interpretation standard. In reaching its decision, however, the *Masson* court relied on two cases, *Time, Inc. v. Pape*[85] and *Dunn v. Gannett New York*

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80. Schermerhorn v. Rosenberg, 73 A.D.2d 276, 288, 426 N.Y.S.2d 274, 284 (1980).
81. 401 U.S. 279 (1971).
82. *See, e.g.*, R. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 67 (1986).
83. *Id.*; *see also* R. SMOLLA, *supra* note 8, at § 3.32.
84. R. SACK, *supra* note 82, at 67.
85. 401 U.S. 279 (1971).

Newspapers,[86] neither of which extended the rational interpretation doctrine to deliberately fabricated quotations. By applying this doctrine in *Masson*, the majority distorted the purpose of the rational interpretation standard.

Addressing specific issues pertaining to errors of interpretation, the Supreme Court in *Time, Inc. v. Pape*[87] established guidelines for determining whether actual malice may be inferred from evidence showing misleading editing. In *Pape*, the United States Commission on Civil Rights issued a study on police brutality. One week later, Time magazine published an article about the Commission's study. The Time article described cases of police brutality and contained several direct quotations from the Commission's report.[88] Specifically, the article described an alleged racially motivated beating by Officer Pape, a Chicago police officer.[89] Time magazine failed to indicate that the charges of police brutality were only allegations in a complaint, and not independent findings by the Civil Rights Commission.[90] The Time article made it appear that the Commission report stated that the beatings had actually occurred.[91] Both the author of the article and his research assistant admitted that they were aware at the time the article was published "that the wording of the Commission Report had been significantly altered, but insisted that its real meaning had not been changed."[92] Pape sued, claiming that actual malice could be inferred from the omission of the word "alleged" in the article.[93]

The Supreme Court held that the wording of the Commission report was ambiguous, and that the magazine's resolution of ambiguities did not establish actual malice.[94] The Court recognized that a press report can contain "an almost infinite variety of shadings,"[95] and that the omission of the word "alleged" was valid since it was "one of a number of possible rational interpretations of a document that bristled with ambiguities."[96] The Supreme Court, therefore, held that there was not enough evidence to create a jury issue of actual malice under

86. 833 F.2d 446 (3d. Cir. 1987).
87. 401 U.S. 279 (1971).
88. *Id.* at 282.
89. *Id.* at 281.
90. *Id.* at 282. In fact, during the trial Pape called the police officers who had participated in the raid to testify. All of the police officers testified that nothing resembling the events described in the Time magazine article had actually occurred. *Id.* at 282-83.
91. *Id.* at 284-85.
92. *Id.* at 285.
93. *See id.* at 282-83.
94. *Id.* at 292.
95. *Id.* at 286.
96. *Id.* at 290.

the *New York Times* standard of reckless disregard for the truth.[97] Mistakes of this kind, the Court concluded, must be protected under the first amendment.[98] The Court reasoned that a directed verdict was appropriate in this circumstance because freedom of speech would be chilled if a jury determined whether actual malice existed, particularly where the alleged libel consists of a misinterpretation of a lengthy government document.[99] Additionally, journalists would be deterred from voicing their criticism of official conduct because of the fear and cost of litigation.

The rational interpretation doctrine established in *Pape* is based on a reporter's need to rely on a source which is descriptive.[100] When a description is unclear, "a reporter runs the risk of inaccuracy if he [or she] misunderstands or deliberately chooses one of several possible interpretations."[101] In such cases, the rational interpretation standard is a necessary safeguard. Consequently, due to the time constraints placed upon most journalists, granting a reporter the latitude to choose from a variety of interpretations appears to be justified. Courts are not willing, nor should they be willing, to intrude on the choice of language employed by reporters in such circumstances.

The question that remains, however, is whether reporters should be given the liberty to choose from a variety of interpretations when dealing with direct quotations. *Pape* did not address this issue. *Pape* allowed a journalist to select and publish portions of quoted excerpts from a Civil Rights Commission Report; it did not sanction the use of invented or altered quotations.[102] Under *Pape*, a reporter may select particular passages to quote from, shaping the article by omissions and inclusions, but he or she is not allowed to alter quoted passages. Furthermore, the Supreme Court warned lower courts that the decision in *Pape* was limited to the specific facts of the case, and that "[n]either lies nor false communication serves the ends of the First Amendment,

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97. *Id.*

98. *Id.* at 292. A few years later the Supreme Court extended its approval of the rational interpretation doctrine in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984). For a discussion of *Bose*, see *supra* notes 48-51 and accompanying text. For a further discussion of *Bose*, see Note, *The Future of Libel Law and Independent Appellate Review: Making Sense of* Bose Corp. v. Consumers Union of United States, Inc., 71 CORNELL L. REV. 477 (1986).

99. *Pape*, 401 U.S. at 291.

100. Bloom, *Proof of Fault in Media Defamation Litigation*, 38 VAND. L. REV. 247, 290 (1985).

101. *Id.*

102. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1557 (9th Cir. 1989) (Kozinski, J., dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

and no one suggests their desirability or further proliferation."[103] By extending the rational interpretation standard to quotations, the *Masson* court has indirectly furthered the proliferation of lies.

In fact, insofar as the facts in *Masson* and *Pape* are similar, the analysis in *Pape* supports the proposition that journalists should not be protected by the first amendment for deliberate alterations of quotations. In *Pape*, the court of appeals concluded that the omission of the word "allegation" was a falsification of the report.[104] The malice requirement might be reasonably inferred, the court stated, from the deliberate and conscious omission of the word "alleged."[105] Therefore, the issue of malice was for the jury.[106] Referring to the decision of the court of appeals, the Supreme Court in *Pape* stated that "[a]nalysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves."[107]

In contrast to the Commission report in *Pape*, although Masson's meaning might have been ambiguous, his tape-recorded statements were not. The article in *Masson* purported to be a direct account of events that speak for themselves—Masson's own words. Thus, *Pape* seems to indicate that Masson should be entitled to a jury determination on the issue of actual malice.

The *Masson* court also relied heavily on the Third Circuit's approach to libel in the context of quotations in *Dunn v. Gannett New York Newspapers*.[108] *Dunn* involved a libel action brought by the mayor of Elizabeth, New Jersey as a result of statements published in a Spanish language daily newspaper.[109] During a campaign debate, the mayor commented on the city's litter problem.[110] A Spanish newspaper headline, translated into English, read "Elizabeth Mayor on the

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103. *Pape*, 401 U.S. at 292 (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968)).

104. *Id.* at 285.

105. *Id.*

106. *Id.*

107. *Id.*

108. 833 F.2d 446 (3d Cir. 1987).

109. *Id.* at 446.

110. *Id.* at 448. The mayor stated:

> But litter, of course, is an ever growing problem because we are a very busy, a growing city. . . . You have a lot of new people moving into the City of Elizabeth, some coming from foreign lands where abject poverty was something they lived with everyday . . . and it will take a great deal of time for some of them to respect the rights and properties of other people, and above all, to respect a city that offers them a home in what I consider to be a wholesome environment.

Id.

attack: CALLS HISPANICS 'PIGS.' "[111] The mayor argued that by enclosing the Spanish word, "cerdos" in single quotation marks, the newspaper made it appear that the mayor had used the word "pigs" when discussing the litter problem. The mayor contended that actual malice could be inferred since the "pigs" quote was fabricated, and the defendant newspaper knew that the headline was an exaggeration. Claiming that the quotation marks were used to indicate that the word was used in a figurative sense, the defendant introduced evidence that the "use of quotation marks in Spanish does not necessarily signify that a literal quotation is intended."[112] Consequently, the court of appeals affirmed the summary judgment for the defendants granted by the district court.[113]

The *Masson* court inaccurately interpreted *Dunn* to support the conclusion that a deliberately altered statement made within quotation marks is not evidence of actual malice. *Dunn* does not stand for this proposition. Rather, the Third Circuit in *Dunn* addressed the narrow issue of actual malice as applied to a translation from Spanish to English. Additionally, because quotation marks in Spanish are not equivalent to those in English, the *Masson* analysis is not supported by *Dunn*. The Court of Appeals for the Third Circuit reasoned that, at most, Dunn's evidence showed that the defendant mischaracterized the mayor's remarks. The court was unwilling to find actual malice based solely on the Spanish-to-English translation of the language used by the newspaper, and was convinced that the word "cerdos" was a "fair, albeit inadequate, *translation*" of the mayor's remarks.[114] The defendant was granted summary judgment in *Dunn* because Dunn failed to present any countervailing evidence of actual malice. Again, the *Masson* facts are different. The plaintiff presented evidence of tape-recorded interviews that clearly proved that Janet Malcolm deliberately altered statements placed within quotations. Thus, *Dunn* is inapposite, and does not support the majority's approach in *Masson*.

The rational interpretation standard is appropriate when a reporter is summarizing a report, as in *Pape*, or translating a speech, as in *Dunn*. The rational interpretation standard is appropriate under these circumstances because the original statements themselves were ambiguous. The journalist in *Dunn* chose an interpretation, and the reader was not left with the impression that these exact words were

111. *Id.*
112. *Id.* at 451.
113. *Id.* at 455.
114. *Id.* at 452 (emphasis added).

spoken. The result is different when direct quotations are utilized. When the journalist is directly quoting from tape-recorded interviews, it is inappropriate to apply the rational interpretation standard to quotations because the issues of ambiguity, summarization, or translation do not apply.

Applying the rational interpretation standard to quotations conflicts with the purposes of the actual malice standard. For example, a contested passage in Malcolm's article referred to Masson's relationship with two other members of the Freud Archives, Anna Freud and Dr. Eissler. In the article, Malcolm quoted Masson as stating that "[Anna Freud and Dr. Eissler] loved to hear from me what creeps and dolts analysts are. I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public."[115] This passage was not found in the tape recordings. Rather, the transcripts show that Masson's actual words were:

> [I]n a sense, I . . . was a private asset but a public liability. They like [sic] me when I was alone in their living room, and I could talk and chat and tell them the truth about things. . . . But that I was, in a sense, much too junior within the hierarchy of analysis, for these important training analysts to be caught dead with me.[116]

Applying the rational interpretation standard to this passage, the majority held that actual malice could not be inferred because the use of the descriptive term "intellectual gigolo" was a rational interpretation of Masson's comments.[117]

Masson's actual statements are different from the quotation Malcolm reported in both tone and content. Masson's statements were sufficiently clear that they did not need any further interpretation. There is a difference between the principle that a defendant may select from various interpretations of the "truth" and a principle that allows conscious manipulation of the "truth" by a journalist. One commentator noted that at some point the journalist distorts the meaning to such an extent as to create a jury issue of actual malice.[118]

The meaning of a statement placed within quotations stands for itself and requires no additional interpretation. According to the dis-

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115. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1540 (9th Cir. 1989), *cert. granted*, 111 S. Ct. 39 (1990).

116. *Id.*

117. *Id.* at 1541. Judge Kozinski explains, "[b]eing too junior to be taken seriously is quite different from being a public embarrassment; one suggests that Masson is a young man with potential, the other makes him out to be a clown." *Id.* at 1552 (Kozinski, J., dissenting).

118. R. SMOLLA, *supra* note 8, § 3.20[3], at 3-54.

sent in *Masson*, readers give more weight to direct quotations than to descriptive passages. Judge Kozinski explained this phenomenon, stating that experienced writers use direct quotations "as if to say: '[s]ee here, don't just take *my* word for it, he said it himself.' "[119] In the present case, Malcolm invented words and then ascribed them to Masson. Masson's tape-recorded statements did not need any rational interpretation because Malcolm had available to her a completely accurate source of what was actually said. It was for the reader, not Janet Malcolm, to draw his or her own conclusions and interpret Masson's actual remarks.[120] If Malcolm felt compelled to publish her interpretation of her conversations with Masson, she could have published that interpretation without deceiving the reader into believing that the statements were Masson's actual words. Malcolm had the option of paraphrasing the conversations, thus signalling to the reader that Malcolm's article was her own "rational interpretation" of her conversations with Masson.

There is a need to grant a reporter some degree of literary license. A journalist is often faced with pressures such as time constraints when a story has an immediate deadline. A reporter's interviews are frequently unscheduled, and invariably reporters do not have enough time or resources to investigate and check the accuracy of the story. Because of the nature of the newsgathering process, a reporter is protected from inadvertent or negligent mistakes under *New York Times*, and is given the necessary latitude under *Pape* to interpret an ambiguous statement. None of these difficulties are present when the reporter has a verbatim tape of the statements to be used in the article. In this situation, fabricating statements placed in quotation marks is unwarranted.

B. *Masson's Misinterpretation of Existing Case Law Concerning Fabricated Quotations—Carson v. Allied News Co.*[121]

In addition to misinterpreting the rational interpretation standard, the *Masson* majority also misapplied other existing case law. The majority ignored the reasoning which governed the Seventh Circuit's decision in *Carson v. Allied News Co.*,[122] a case factually more similar to *Masson* than either *Pape* or *Dunn*. *Carson* involved an ac-

119. *Masson*, 895 F.2d at 1549 (Kozinski, J. dissenting).

120. According to the dissent, minor changes in a quotation can have major effects, and the skilled writer can alter the reader's perception far more effectively than if she had disclosed her editorial role. *Id.*

121. 529 F.2d 206 (7th Cir. 1976).

122. *Id.*

tion by Johnny Carson of "The Tonight Show" television program against the defendant's tabloid. The defendant published an article stating that "The Tonight Show" was moving from the East Coast to the West Coast, in order for Carson to "be closer to the woman who broke up his marriage."[123] Part of the article concerned an alleged struggle between Carson and National Broadcasting Co. executives, and contained statements by Carson to the executives and the executives' responses and reactions.[124] The defendant never interviewed or spoke with Carson. Rather, the defendant-writer claimed that while he had fabricated the conversations, these fabrications were justified because the quoted conversations were logical extensions of the facts of a previous story.[125]

The Court of Appeals for the Seventh Circuit reversed the grant of summary judgment and maintained that by imagining the "facts," the defendant "entertained serious doubts as to the truth of the statements."[126] The court stated:

> In the catalogue of responsibilities of journalists, right next to plagiarism, . . . must be a canon that a journalist does not invent quotations and attribute them to actual persons. If a writer can sit down in the quiet of his cubicle and create conversations as "a logical extension of what must have gone on" and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim.[127]

The *Masson* court improperly limited the *Carson* holding to stand for the proposition that a fact finder may infer malice from a fabricated quotation only when the language is *wholly* the product of the author's imagination. The Ninth Circuit decision would have enabled Malcolm to "sit down in the quiet of [her] cubicle, and create conversations as 'a logical extension of what must have gone on.' "[128] Under the unwarranted extension of the rational interpretation standard, Malcolm was able to accomplish what was prohibited by the Seventh Circuit in *Carson*.

The underlying rationale for not protecting deliberately altered quotations is that they are not worthy of first amendment protection. If the invented quotations at issue in *Carson* were not worthy of first amendment protection, then the invented quotations in *Masson* cer-

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123. *Id.* at 212. The source of the quote was Joanna Holland, Carson's second wife.
124. *Id.*
125. *Id.*
126. *Id.* at 213.
127. *Id.* (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968)).
128. *See id.* (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968)).

tainly should not be. The Supreme Court recognized the difference between honest error and fabrication and stated in *Garrison v. Louisiana*:[129]

> The use of calculated falsehood . . . would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity.[130]

The *Masson* majority departed from the Supreme Court's rationale in *Garrison*. The purpose of the actual malice standard enunciated in *New York Times* is to encourage speech on issues of public concern, not to protect the media from deliberate and conscious manipulation of speech, whether that speech is placed within quotations or not. The actual malice standard was established to protect the media from self-censorship and from errors that are inevitable in free debate.[131] False statements are only protected if honestly made.[132] A contrary rule in *Masson* would not result in self-censorship; rather, it would promote accurate, precise, and honest journalism. The type of intentional manipulation that Malcolm engaged in is closer to the "calculated falsehood" of *Garrison*[133] than to the type of inevitable error examined in *New York Times*.[134] Because Malcolm's fabrications were deliberate, she should not have been given protection under the standard stated in *New York Times*.

Furthermore, the *Masson* court's distinction between fabricated quotations which are wholly the product of the writer's imagination, and those which depart significantly from the speaker's remarks is nonsensical given the purpose of the actual malice standard. Under the *Masson* court's analysis, a deceptive journalist can avoid liability by fabricating ninety-nine percent of a conversation placed in quotations, and adding one sentence from what the speaker actually said. Because the conversation is not wholly the product of the author's imagination, the fact finder would never be allowed to determine whether the journalist acted with actual malice. If a jury issue of actual malice existed in *Carson*, then there should be one in *Masson* as well. Additionally, Masson contends that insofar as Malcolm did

129. 379 U.S. 64 (1964).
130. *Id.* at 75.
131. New York Times v. Sullivan, 376 U.S. 254, 271, 280 (1964).
132. *Id.* at 278.
133. 379 U.S. 64.
134. 376 U.S. 254.

fabricate the language attributed to him, it was wholly the product of Malcolm's imagination. Because Masson presented significant evidence of alteration of his statements and fabrication of quotations, summary judgment was inappropriate even under the majority's view of *Carson*.

C. *Journalistic Ethics*

The Supreme Court has steadily expanded an author's protection regarding articles about public officials, public figures, and matters of public concern.[135] In fact, statistics prove that in the vast majority of cases, the defendant is ultimately successful in a libel action.[136] Ethical journalists do not need the additional protection of the rational interpretation standard in the context of quotations. The *Masson* court improperly decided that the press should not have to bear the burden of making sure that what they put in quotation marks is accurate. This is not a heavy burden to place on journalists, who are in the best position to verify the accuracy of the quoted passages. In Masson's case, all Malcolm (or The New Yorker, for that matter) had to do was replay the tape of Malcolm's conversations with Masson to verify the statements attributed to him. No doubt this job is cumbersome, but it is not excessively burdensome if it will protect a reporter from liability. Failing to verify the statements attributed to Masson following notification that the statements may have been fabricated should have been evidence of actual malice.

Journalists are confronted with ethical decisions in almost every aspect of the editing process.[137] In order to have some criteria of professionalism in the field of journalism, reporters rely heavily on a code of ethics. The foundation of one typical code of ethics is accuracy, objectivity, and good faith.[138] Such a code of ethics establishes some

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135. G. GUNTHER, CONSTITUTIONAL LAW 1058-62 (11th ed. 1985).

136. Most jury verdicts for plaintiffs in a defamation action are overturned on appeal. Federal courts have reversed approximately seventy percent of the libel judgments won by plaintiffs which involved actual malice. Note, *First Amendment:* Tavoulareas v. Piro: *An Extensive Exercise of Independent Judgment*, 56 GEO. WASH. L. REV. 854, 854 n.1 (1988); *see also* Bezanson, *The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get*, 74 CAL. L. REV. 789 (1986) (overall success rate for plaintiffs through a judgment was ten percent); Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455; Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 3-5 (1983) (At the summary judgment stage, media defendants are successful in almost 75% of their efforts to have their cases dismissed before trial. Plaintiffs who sue the media are awarded judgments in approximately five to ten percent of all libel cases.).

137. *See* M. CULLEN, MASS MEDIA & THE FIRST AMENDMENT 335 (1981).

138. *Id.* at 336.

guidelines for the journalist. These guidelines include:

1. Truth is our ultimate goal.
2. Objectivity in reporting the news is another goal which serves as the mark of an experienced professional.
3. There is no excuse for inaccuracies or lack of thoroughness.

. . . .

6. Partisanship in editorial comment which knowingly departs from the truth violates the spirit of American journalism.[139]

Malcolm violated the spirit of journalistic ethics by fabricating quotations, and the Ninth Circuit condoned this breach by providing Malcolm with the benefit of the rational interpretation standard.

According to The Associated Press Stylebook and Libel Manual, another source heavily relied upon by journalists, quotation marks are used "[t]o surround the *exact* words of a speaker or writer when reported in a story."[140] In determining when to use full quotes as compared to partial quotes, the Stylebook states, "[i]f a speaker's words are clear and concise, favor the full quote. If cumbersome language can be paraphrased fairly, use an indirect construction, reserving quotation marks for sensitive or controversial passages that must be identified specifically as coming from the speaker."[141] Thus, even journalistic standards do not adhere to the *Masson* standard that allows a journalist to consciously manipulate quotations.

A court is not required to base its decisions on journalistic standards. However, the standards that journalists impose upon themselves can be valuable to a court in evaluating any given journalist's actions. As Judge Kozinski explained: "[t]ruth is a journalist's stock in trade. To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print. . . . Masson has lost his case, but the defendants, and the profession to which they belong, have lost far more."[142] The court is in effect allowing Malcolm to change not only the meaning of the statements made by Masson, but also the concept behind quotations. No warning was given to the reader that these were not Masson's exact words. The reasonable reader of Malcolm's article would likely have drawn the conclusion that Masson used the exact words ascribed to him since that is the

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139. *Id.*

140. THE ASSOCIATED PRESS STYLEBOOK AND LIBEL MANUAL 183 (1980) (emphasis added).

141. *Id.* at 184.

142. Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1570 (9th Cir. 1989) (Kozinski, J. dissenting), *cert. granted*, 111 S. Ct. 39 (1990).

meaning of a quotation in a non-fiction piece.[143] In other words, the reader of Malcolm's article was not informed that, in effect, he or she was reading fiction.

D. *The Dissent's Approach—The Central Meaning Standard*

Perhaps one of the most troubling aspects of the *Masson* approach is that it fails to provide journalists, lawyers, and judges with a clear standard to determine liability. *Masson* does not provide any predictability or stability in the context of deliberately altered quotations because the writer could differ dramatically in what he or she considers a rational interpretation.

However, there are several reasons why a court should not adopt a rule that deliberate fabrications of quotations are, as a matter of law, evidence of actual malice. There are situations in which a journalist may change grammar and diction, yet remain true to the meaning of the quote.[144] In reality, it is not always possible to be literally accurate.[145] Many journalists adhere to the practice that a quote can be considered acceptable if it honestly reflects what the speaker said.[146] Additionally, verbatim transcripts can prove to be embarrassing to the speaker because many people make poor word choices, and use rambling and incomplete sentences.[147] In this situation, minor alteration of a quotation is acceptable. Conversely, there are circumstances in which the alteration of a quotation is viewed as questionable.

The dissent's five-part analysis strikes a balance between the majority's approach in *Masson*, and a per se rule of liability. Judge Kozinski's approach can be viewed as the traditional approach to the determination of liability in a libel claim. The dissent began its analysis with the proposition that "what somebody says is a fact, and that doctoring a quotation is no more protected by the first amendment than is any other falsification."[148] Judge Kozinski's five-step inquiry then asked:

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143. *See* Zimmerman, *Real People in Fiction: Cautionary Words About Troublesome Old Torts Poured Into New Jugs*, 51 BROOKLYN L. REV. 355, 361 (1985).

144. *Masson*, 895 F.2d at 1558-59 (Kozinski, J., dissenting) (citing M. CHARNLEY & B. CHARNLEY, REPORTING 248 (4th ed. 1979); J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA 70 (1976) ("[m]ost of the newspaper codes or canons tend to stress literal accuracy when quoting news sources")).

145. *Masson*, 895 F.2d at 1558.

146. *Id.* (citing J. HULTENG, THE MESSENGER'S MOTIVES: ETHICAL PROBLEMS OF THE NEWS MEDIA 70-71 (1976)).

147. *Id.* at 1559 (citing J. OLEN, ETHICS IN JOURNALISM 100 (1988)).

148. *Id.* at 1562.

(1) Does the quoted material purport to be a verbatim repetition of what the speaker said?
(2) If so, is it inaccurate?
(3) If so, is the inaccuracy material?
(4) If so, is the inaccuracy defamatory?
(5) If so, is the inaccuracy the result of malice, *i.e.*, is it a fabrication or was it committed in reckless disregard of the truth?[149]

Accordingly, if any of these questions are answered in the negative, the inquiry terminates and the defendant prevails as a matter of law.[150] If all of these questions could be answered affirmatively, then the issue would be one for the jury to determine. Under such a standard, Masson's case would be sent to the jury.[151]

The approach taken by the dissent in *Masson* is preferable to the one chosen by the majority. The first question resolves the problem of when an author is using quotes not to represent a speaker's actual words, but for a literary purpose.[152] An example of this is a hypothetical conversation, where quotations are used explicitly to convey the journalist's thoughts, not the speaker's verbatim words. Some journalists forewarn the reader in the beginning of the article that the quotation marks do not represent the speaker's actual words.[153] Under these circumstances, it is reasonable not to hold the journalist liable because the reader is expected to understand that the passage is not verbatim, but rather that the author is using a rhetorical device.[154]

The second inquiry asks whether the quotes are inaccurate. At

149. *Id.*
150. *Id.*
151. *Id.*
152. The dissent discusses the school of thought known as "New Journalism" which advocates the view that a journalist is entitled to vary or rearrange the facts of a story in order to advance a literary purpose. However, this type of journalism is very controversial, and has been attacked by many journalists. Writer John Hersey stated:

> [T]here is one sacred rule of journalism. The writer must not invent. The legend on the license must read: *NONE* OF THIS WAS MADE UP. The ethics of journalism . . . must be based on the simple truth that every journalist knows the difference between the distortion that comes from subtracting observed data and the distortion that comes from adding invented data.

Id. at 1559-60 n.14. (citing Hersey, *The Legend on the License*, THE YALE REV., Autumn 1980, at 1, 2).

153. *Id.* at 1563. In *Baker v. Los Angeles Herald Examiner*, the issue was whether it was reasonable for a reader to understand that the quoted passage was not verbatim. 42 Cal. 3d 254, 721 P.2d 87, 228 Cal. Rptr. 206 (1986), *cert. denied*, 479 U.S. 1032 (1987). The court held that although the defendant used quotation marks, he was not purporting to quote the plaintiff. "Instead, . . . [the defendant] explicitly qualified the disputed statement by warning the reader that he was not reporting a fact but only giving his 'impression.'" *Id.* at 263, 721 P.2d at 92, 228 Cal. Rptr. at 211.

154. *Masson*, 895 F.2d at 1563 (Kozinski, J., dissenting).

this stage, the court should compare what the speaker said with what he or she is reported as having said.[155] If the situation involves a translation, or a partially inaudible statement, then the journalist may have to make an editorial judgment as to what was actually said.[156] Absent reckless or deliberate fabrication, deference must be given to the writer's choice of words.[157] Accordingly, in Masson's case, the quotes can be considered inaccurate because Malcolm did not claim that the statements were inaudible, and they certainly were not being translated from another language.[158]

The third question to be answered is whether the inaccuracies are material. Cosmetic changes that attempt to keep the speaker from looking foolish are not material as they do not substantively change what the speaker said.[159] However, if the inaccuracies are more than a cosmetic change, the alteration should be found to be material.[160]

The fourth question is whether the alterations were defamatory.[161] This is a basic requirement in a libel case. The evidence of the misquotations that "paint Masson as a vain, shallow, disingenuous, intellectually dishonest, cold, heartless, self-absorbed individual"[162] is sufficient for the jury to find the quotes defamatory.

Finally, the fifth inquiry is whether the alterations were the result of malice.[163] Thus, in the present case, the question that must be answered is whether the defendants knew that Masson's statements were different from those attributed to him, or whether the defendants acted with reckless disregard of the truth.[164] In Malcolm's case, there was strong circumstantial evidence of actual malice. Malcolm was not on a deadline to get the story published.[165] Therefore, she could have easily verified the statements placed within quotations. Furthermore, many passages that she attributed to Masson were nearly identical to the taped passages, except that key words were added, deleted, or changed.[166] Additionally, there was at least one instance that contained direct evidence that Malcolm had engaged in deliberate

155. *Id.* at 1564.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 1565.
161. *Id.*
162. *Id.*
163. *Id.* at 1566.
164. *Id.*
165. *Id.* at 1567.
166. *Id.* at 1566.

fabrication.[167]

Under the dissent's approach, The New Yorker magazine could also be found to have acted with actual malice. A jury could infer recklessness when Masson notified The New Yorker of the inaccuracies in the quoted passages, and The New Yorker failed to respond.[168] Further, a jury could consider The New Yorker's reputation for "scrupulous accuracy" in order to determine whether it had acted recklessly.[169] Because of this status, readers of The New Yorker reasonably expect accuracy in reporting, and "are more likely to accept at face value the quotes they read in *New Yorker* articles."[170] Under this analysis, the *Masson* case would have been heard by the jury.[171]

The dissent's approach and reasoning is more closely related to the principles of *New York Times* and its progeny. However, one danger exists. It is important for other courts to avoid incorporating the rational interpretation standard into quotes within this five-part test. In order to avoid this dilemma, courts should be careful to limit the third inquiry, whether the fabrication is material.[172] Immaterial alterations should apply only to changes in diction and grammar. Anything else should be considered a material alteration, and the determination of liability should be a jury question.

While the majority in *Masson* improperly advocates a rational interpretation standard, the dissent accurately recommends a "central meaning" standard.[173] The altered quote must honestly reflect what the speaker said; if not, the jury should determine whether the journalist acted with actual malice. In the context of an altered quotation, under the central meaning standard, if the speaker's words are ambiguous, the statements cannot "be altered to remove the ambiguity be-

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167. *Id.* at 1567. This fabrication involved Masson's discussion of renovating Anna Freud's house. Masson said: "it's dark and somber and nothing went on in there. Boy, I was going to renovate it and open it up, and the sun would come in and there would be people and—Well, that's what it needs, but it is an incredible storehouse. I mean the library. . . ." *Id.*

Malcolm's typed draft stated, "Sun would have come pouring in, people would have come, there would have been parties and laughter and fun." This sentence is crossed out, and handwriting above it reads, "Maresfield Gardens would have been a center of scholarship, but it would also have been a place of sex, women, fun." *Id.* This evidence would be enough for the jury to infer that the deliberate effort to distort what Masson said was made in reckless disregard of the truth. *Id.*

168. *Id.* at 1568-69.

169. *Id.* at 1569.

170. *Id.*

171. *Id.* at 1562.

172. *Id.* at 1564.

173. *Id.* at 1559 n.12.

cause that would change the spirit of what the speaker said."[174] In contrast, under the rational interpretation standard, the writer is given the discretion to choose a rational interpretation of what was actually said.[175] Because the vast majority of journalists and readers believe that a quotation stands for the speaker's verbatim words, the journalist should not be given the wide discretion to choose a "rational" interpretation. To prevent this abuse, courts should adopt the dissent's approach, with the caveat that most substantial changes should be viewed as material alterations. Furthermore, unless the altered quotation reflects the central meaning of the speaker's words, the decision of liability should rest with the jury.

CONCLUSION

The underlying rationale of *New York Times* and its progeny do not support the conclusion that first amendment protection should be given to deliberately calculated falsehoods. Neither journalists nor proponents of the first amendment can view the decision in *Masson* as a victory, for it casts a shadow of doubt upon the journalist's profession. The court moved beyond the rationale of *New York Times* when it applied the rational interpretation standard to deliberate misquotations. If *Masson* becomes the rule, whenever "the reasonable reader" encounters a passage containing a quote, there will be some doubt as to its accuracy. No reader will ever know when the actual speaker is speaking, or when the author, using "rhetorical license," is changing the meaning of the speaker's statement.

The majority's holding is inconsistent with both existing case law and, more importantly, with the policies of the first amendment as applied to libel law. There is no rational reason why the court should have extended first amendment protection to deliberately altered quotes. As one journalist noted, the *Masson* decision "is a case of bad journalism making bad law."[176]

Maureen E. Walsh

174. *Id.*

175. *Id.*

176. Taylor, *How Janet Malcolm Won a License to Lie*, 15 Conn. L. Tribune, Aug. 21, 1989, at 22, col. 2.